No. 11-0813 – *Lawyer Disciplinary Board v. D. Michael Burke*

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Ketchum, Chief Justice, dissenting:

I dissent, because nothing lawyer Burke did came close to being an ethical violation. The majority skirted around our case law applicable to the facts of this case that has existed since 1976.[1]

Mr. Burke and Mr. Nace represented a client in a medical negligence case. After the client filed bankruptcy, the bankruptcy trustee hired them to continue to pursue the case. They filed the lawsuit and Mr. Burke discovered that his partner's neighbor was a defendant in the lawsuit. He did the ethical thing and withdrew as one of the lawyers. He told his *de facto* client, but he forgot to notify his *de jure* client, the bankruptcy trustee. Mr. Nace, the co-counsel, continued with the case and got a settlement and jury verdict in the malpractice action. Mr. Burke played no part in distributing the settlement

[1] In *Committee on Legal Ethics of West Virginia State Bar v. Mullins*, 159 W.Va. 647, 653, 226 S.E.2d 427, 430 (1976), we said:

> Misconduct or malpractice consisting of negligence or inattention, in order to justify suspension or annulment, must be such as to show the attorney to be unworthy of public confidence and an unfit or unsafe person to be entrusted with the duties of a member of the legal profession or to exercise its privileges. Charges of isolated errors of judgment or malpractice in the ordinary sense of negligence would normally not justify the intervention of the ethics committee.

or jury verdict money. He received no fee. It appears the money was not paid to the bankruptcy trustee as required by law.

There is a difference between negligence and ethical misconduct. For an attorney of lawyer Burke's quality, that distinction is not irrelevant. The only thing lawyer Burke did incorrectly was fail to notify the trustee of his withdrawal from the case. This was, at most, simple negligence.

The problem with the majority's opinion is that it fails to define disciplinable incompetence with any clarity so as to allow for predictability. Single lawyer slipups are generally not ethical violations. They may expose the lawyer to professional negligence liability, but it has nothing to do with the lawyer's ethics. Discipline should only be imposed when the lawyer's error is intentional, reckless, repeated, or accompanied by some other misconduct like concealment.

One commentator suggests that a "lawyer's isolated act of professional negligence, and even an isolated breach of fiduciary duty," generally should not "raise the issue of whether the lawyer is fit to practice law. However, professional incompetence that is intentional, reckless, or repeated does implicate the lawyer's fitness to practice, and therefore, is a proper subject of discipline[.]" Robert Kehr, "Lawyer Error: Malpractice, Fiduciary Breach, or Disciplinable Offense?," 29 W.St.U.L.Rev. 235, 260 (Spring, 2002).

Numerous cases and treatises support the position that an isolated act of negligence does not raise an issue of whether the lawyer is fit to practice law. *See, e.g.*,

In re Complaint as to Conduct of Gygi, 273 Or. 443, 541 P.2d 1392, 1396 (1975) (stating "we are not prepared to hold that isolated instances of ordinary negligence are alone sufficient to warrant disciplinary action"); *The Florida Bar v. Neale*, 384 So.2d 1264, 1265 (Fla.1980) (the "rights of clients should be zealously guarded by the bar, but care should be taken to avoid the use of disciplinary action . . . as a substitute for what is essentially a malpractice action"); *Attorney Grievance Comm'n of Maryland v. Kemp*, 335 Md. 1, 10-18, 641 A.2d 510, 514-18 (1994) ("Trivial errors, which, when viewed individually, would not sustain a finding of incompetent representation, when viewed collectively or cumulatively can have that effect. . . . While we do not condone, and certainly do not encourage, attorney negligence or carelessness in the handling of client affairs, neither do we routinely treat negligence or carelessness as a violation of the Rules of Professional Conduct."); *Matter of Curtis*, 184 Ariz. 256, 908 P.2d 472, 477-78 (1995) ("Neither failure to achieve a successful result nor mere negligence in the handling of a case will necessarily constitute an [ethical] violation. We recognize the important distinction between conduct by an attorney that is simply negligent and conduct that rises to the level of an ethical violation. Clearly, the Bar must be vigilant in guarding the rights of clients, but care should be taken to avoid the use of disciplinary action . . . as a substitute for what is essentially a malpractice action.); *Disciplinary Board v. McKechnie*, 656 N.W.2d 661, 666 (N.D., 2003) ("Disciplinary proceedings differ significantly, both procedurally and substantively, from civil legal malpractice actions." Because the evidence showed the lawyer committed "nothing more than an isolated instance of

ordinary negligence, or error of judgment, the court found "no clear and convincing evidence" of ethical violation); *In re Disciplinary Action Against Hoffman*, 703 N.W.2d 345 (N.D. 2005) (same). *See also*, 1 R. Mallen and J. Smith, *Legal Malpractice*, § 1.9, at p. 45 (5th ed. 2000) ("[o]rdinary negligence should not warrant discipline"); C. Wolfram, *Modern Legal Ethics*, § 5.1, at p. 190 (1986) ("[T]he enforcement of competence standards has been generally limited to relatively exotic, blatant, or repeated cases of lawyer bungling. . . . Most decisions and official ABA policy insist that a single instance of 'ordinary negligence' is usually not a disciplinary violation[.]")

In 1976, our Court plainly said that an isolated negligent act will not justify the intervention of the ethics committee. Failing to notify the bankruptcy trustee did not make lawyer Burke unworthy of public confidence or an unfit or unsafe lawyer, as the majority opinion seems to suggest. It was an inadvertent slip.

I dissent because the majority opinion makes no distinction between a mistake and ethical misconduct. As a result, lawyers had better be careful. Deed lawyers, for instance, had better be extra careful. If they now inadvertently leave a word out of a metes and bounds description, they are subject to the whims of the Office of Disciplinary Counsel.

I am authorized to state that Justice Workman joins in this dissent.