

IN THE CIRCUIT COURT OF HANCOCK COUNTY, WEST VIRGINIA

CYNTHIA MCCOY, ANNA
ECHELMEYER and WILLIAM
FOWLER,

Plaintiffs,

v.

Civil Action No.: 12-C-185

MARCY J. GRISHKEVICH, ESQ.,
STEVEN DRAGISICH, ESQ.,
MICHAEL T. CURTIS, ESQ., and
GRISHKEVICH & CURTIS LAW
OFFICE, PLLC,

Defendants.

CIRCUIT COURT
2015 DEC 29 PM 1:01
FILED
HANCOCK COUNTY
BRENDA L. JACKSON, CLERK

**MEMORANDUM ORDER GRANTING DEFENDANT DRAGISICH'S
MOTION FOR SUMMARY JUDGMENT**

Before the Court is Defendant Steven Dragisich's, Motion for Summary Judgment. The Defendant asserts that he is entitled to summary judgment under Rule 56 of the West Virginia Rules of Civil Procedure based upon the undisputed facts and law in this Legal Malpractice case that involves the wrongful death of the plaintiff's mother Hilda Bain. The plaintiffs contend that the defendant Steven Dragisich, an associate of the defendant law firm Grishkevich and Curtis, and the other attorneys at the Grishkevich and Curtis law office did not act with due diligence to investigate plaintiffs' claims and represent their interests, and allowed the statute of limitations to expire without taking any action.

Plaintiffs' mother, Hilda Bain, passed away on January 19, 2010, following treatment at Wheeling Hospital, Acuity Specialty Hospital, Trinity Medical Center and West Penn Hospital. On February 2, 2010, Richard Bain (Hilda Bain's husband and the Plaintiffs' step father) qualified as the executor of Mrs. Bain's estate.

Attorney Dragisich was employed as an associate by the law firm of Grishkevich and Curtis from August, 2010, until April 15, 2011. Before Mr.

Dragisich was employed by the law firm, on March 26, 2010, Cynthia McCoy met with Marcy Grishkevich about pursuing a wrongful death action and about removing Hilda Bain's husband as the personal representative of their mother's estate. Cynthia McCoy was concerned that Mr. Bain would not pursue the wrongful death action. She believed, at that time, that his son, Richard A. Bain Jr., a Respiratory Therapist at Acuity Specialty Hospital, was attending to Mrs. Bain prior to her death and during the timeframe that the alleged medical malpractice occurred.

At that meeting attorney Grishkevich and Ms. McCoy signed a retainer agreement in which attorney Grishkevich would "provide legal services concerning a wrongful death action/malpractice issue and removal of personal representative."

On April 29, 2010, before Mr. Dragisich was employed by Grishkevich law firm, Ms. Grishkevich wrote to Mr. Bain about pursuing the wrongful death suit. However Mr. Bain choose to contact the Frankovitch law firm to review the case. Thereafter, on or about December 3, 2010, the Frankovich firm declined the wrongful death case and informed Mr. Bain that if he was still interested in pursuing the claim that Ms. Grishkevich might provide representation. By letter dated December 27, 2010 attorney Grishkevich wrote to Mr. Bain to tell him that she would like to meet with him regarding his wife's estate, and in that letter she alerted Mr. Bain that there were statute of limitations issues that needed to be addressed.

However it was Ms. McCoy, not Mr. Bain, who went to the Grishkevich & Curtis law firm on January 3, 2011, to sign a second fee agreement for legal services regarding the "Estate of Hilda I/ Bain" (sic). Ms. McCoy testified that the reason she went to see attorney Grishkevich was because her sister Diane Swango called her and said that Ms. Grishkevich office had called, and Ms. McCoy needed to come in to sign a new fee contract because Mr. Dragisich was coming on board, and she needed to raise the retainer rate (from 30 to 40%). (This may help to understand the reason that attorney Grishkevich, who also was a young and

inexperienced attorney, felt that she needed to add attorney Dragisich's name to the new contract.)

This agreement was signed by attorneys Marcy Grishkevich and Steven Dragisich and Ms. McCoy. When Ms. McCoy signed the agreement she did not believe that the agreement was changing in any way other than to include Mr. Dragisich and raise the rate. However, the description of the legal services to be provided was changed to "provide legal services concerning an incident regarding the estate of Hilda I. Bain."

Then, on January 17, 2011, Ms. Grishkevich and Mr. Dragisich entered into a fee agreement with Mr. Bain. This agreement caused Mrs. Grishkevich to believe that the action to remove Mr. Bain as personal representative was now moot since Mr. Bain was now her client and cooperating in the pursuit of the wrongful death action. Thereafter, Mr. Dragisich, never gave any legal advice to either Ms. McCoy or Mr. Bain, before he left the Grishkevich firm on April 15, 2011.

At this point in the Courts analysis of the motion before it is important to address the issues that are not present in this Memorandum Order.

1. Dragisich is not asserting that his status as an associate somehow automatically absolves him from liability for his own conduct. That Mr. Dragisich should have known better than to sign an attorney client contracts as an associate of a law firm for a clients he was not directly involved with and for legal work on an issue that he was not handling is not contested. That call is not even a close one. And neither is the next one: Having signed the attorney-client contracts he should have, at the very least, informed the plaintiffs that he was leaving the firm and would not be handling their case-but that Ms. Grishkevich was still representing their interests. Nevertheless, it is well established West Virginia law that the existence of an attorney-client relationship is not determined by the rules of professional conduct. West Virginia common law governs the formation of the attorney-client

relationship. State ex rel. DeFrances v. Bedell, 191 W.Va. 513, 517, 446 S.E.2d 906, 910 (1994). In State ex rel. Bluestone Coal Corp. v. Mazzone, 226 W.Va. 148, 159–60, 697 S.E.2d 740, 751–52 (2010).

2. This case does not involve any issue of vicarious liability. The Court agrees with defense counsel that as a matter of law, Dragisich cannot, as an agent, be held liable for the acts of the principle. Dragisich, as an employed associate, cannot be held vicariously liable for the alleged misconduct of a principle attorney such as Grishkevich. See Ronald E. Mallen, Legal Malpractice § 5:41 (2015 ed.); Standage v. Jaburg & Wilk, P.C., 866 P.2d 889 (Ariz. Ct. App. 1993).
3. This case does not involve any fee-splitting agreements or agreements between the attorneys at Grishkevich & Curtis about who had the responsibility for the representation of the Plaintiffs or Mr. Bain.
4. This case does not involve any conflict of interest issues among the three attorneys at Grishkevich & Curtis and their representation of other clients.

ANALYSIS

Attorney-client relationship

The court has examined the undisputed relevant facts in this case with the written contract signed by Mr. Dragisich. This was necessary because West Virginia law is clear that contract law determines whether an attorney-client relationship has been established and such contract may be evidenced either by written agreement or by implication. See State ex rel. DeFrances v. Bedell, 191 W.Va. 513, 517, 446 S.E.2d 906, 910 (1994) (per curiam).

In this case Dragisich signed two express written contracts as an attorney. However West Virginia law also recognizes that “[t]he determination of the existence of an attorney-client relationship depends on each case's specific facts and circumstances.” State ex rel. DeFrances, 191 W.Va. at 517, 446 S.E.2d at 910.

The specific facts and circumstances most important to the Courts reasoning are as follows:

1. Dragisich was employed with Grishkevich & Curtis for a little more than three months after he signed the January 3, 2011, agreement.
2. Dragisich was an associate acting at the direction of Grishkevich.
3. Neither Ms. McCoy nor Mr. Bain knew Mr. Dragisich when they came to the office to sign the Retainer Agreement and they came with the specific intention of having Ms. Grishkevich represent them.
4. Dragisich, an associate, did not investigate or pursue the case in the three months before he left the firm.
5. In the three months that Dragisich remained employed at Grishkevich & Curtis after signing the agreement, Grishkevich was the supervising attorney and she never asked him to do any work on the case.
6. Grishkevich & Curtis retained "sole responsibility" for the Plaintiffs' case after Dragisich left the firm.
7. Both the January 3, 2011, "Retainer Agreement" with Ms. McCoy and the January 17, 2011 "Retainer Agreement" with Mr. Bain said the client was retaining and employing attorney to: Legal Services [to] "provide legal services concerning an incident regarding" the Estate of Hilda Bain. Neither agreement said anything about a wrongful death medical malpractice lawsuit.
8. Dragisich was never made aware of a potential wrongful death medical malpractice claim.
9. The Petition to remove Mr. Bain as the personal representative of the Bain estate is dated January 7, 2011 and although never filed, the Petition only refers to Ms. Grishkevich as counsel for Ms. McCoy and Mr. Dragisich's name is not mentioned anywhere in the Petition.
10. The statute of limitations had not run when Mr. Dragisich left the firm on April 15, 2011.

11. When, in August of 2011, Grishkevich & Curtis closed its offices, Marcy Grishkevich told Ms. McCoy she would continue to represent her in the medical malpractice case.

12. However on January 19, 2012 the Statute of Limitations ran for a West Virginia Wrongful Death Claim and a West Virginia Medical Malpractice Claim and no action was ever filed.

Keenan v. Scott, 64 W.Va. 137, 61 S.E. 806 (1908) is an old case but in the 2013 case of Lawyer Disciplinary Board v. Barry J. Nace, 232 W.Va. 661, 753 S.E.2d 618 (2013) our Supreme Court returned to the law of Keenan when it stated:

Furthermore, we have recognized that “[t]he determination of the existence of an attorney-client relationship depends on each case's specific facts and circumstances.” State ex rel. DeFrances, 191 W.Va. at 517, 446 S.E.2d at 910.

Ultimately, we again look to the long-held precedent set forth in syl. pt. 1, Keenan v. Scott, 64 W.Va. 137, 61 S.E. 806 (1908):

As soon as a client has expressed a desire to employ an attorney and there has been a corresponding consent on the part of the attorney to act for him in a professional capacity, the relation of attorney and client has been established; and all dealings thereafter between them relating to the subject of the employment will be governed by the rules applicable to such relation.

Keenan, the Court said, requires two actions for the formation of an attorney-client relationship: (1) that the client express a desire to employ the attorney and (2) that there be a corresponding consent on the part of the attorney to act for him in a professional matter.

The specific uncontested relevant facts of this case, when applied to each of these two elements, illustrate that there never was the formation of an attorney-client relationship between Mr. Dragisich and the Plaintiffs:

1. The Plaintiffs never knew Mr. Dragisich and never expressed a desire to employ him. They did want to hire Ms. Grishkevich and that is who they hired. The first element of Keenan is not satisfied.

2. Although Mr. Dragisich did sign the Retainer Agreement he signed it in his capacity as an associate who was expected to do what his employer asked. There is no evidence in this case that he ever consented to act for the Plaintiffs in a professional capacity in a wrongful death action accusing medical professionals of medical malpractice. The second element of Keenan is also not satisfied.

The question of the existence of a legal duty of care by Mr. Dragisich to the Plaintiffs that is presented to the court when it is considering this summary judgment issue based on the relevant undisputed facts presents a question of law to be determined by this Court. Absent the existence of a duty by Mr. Dragisich to the Plaintiffs, there can be no breach and no negligence.

Keenan is a 1908 opinion. The practice of law, the size of law firms, the employment of young lawyers in legal aid and public defender programs all are much different today than they were in 1908. Today young lawyers frequently move from one job to another. A significant number depend upon court appointments in criminal, juvenile and abuse and neglect cases for their main source of income. The overwhelming majority clients do not even know their lawyers when the court appointments are made. The attorney-client relationship in those cases are created by the Court. When the lawyer leaves the relationship to take another job the Court then appoints another attorney to represent the client.

In many cases the attorney-client relationship established with larger firms comes about because of the law firm's reputation or the reputation of a lawyer or lawyers in the firm. An unknown number of lawyer contacts come about as a result of advertising which was forbidden in 1908. So when the client goes to the law firm with an asbestos claim or a domestic relations problem he or she is handed off to an attorney in the firm who specializes in that law. Any one of several lawyers in a larger law firm could be the lawyer who signs the attorney-client fee agreement, but that lawyer will never actually serve as the lawyer for the client.

In this case there were only three lawyers in the firm. Would it make any difference if there had been 50 lawyers in the firm? If Mr. Dragisich was not the

attorney who caused the client to go to that firm, but he was the attorney who just happened to sign that attorney-client agreement without any intention of ever being the attorney who would handle the case, would he be the attorney bound by that agreement of representation?

Therein lies the problem. As a practical matter courts have to recognize that the employed attorney who signs an attorney – client agreement does not, simply by signing the agreement, establish an attorney-client relationship. That should be just the beginning of the court's analysis of whether an attorney-client relationship exists between the attorney who signs the agreement and the client of the firm.

In this case Dragisich is entitled to Summary Judgment because no attorney-client relationship was established after he signed the Retainer Agreement. No facts or even circumstances have been presented to the Court in the three month period he remained employed at Grishkevich & Curtis under which the Plaintiffs can establish that Dragisich, after signing the Retainer Agreement, breached a duty of care to the Plaintiffs. Thus, entry of summary judgment in favor of Mr. Dragisich in this professional negligence action is proper because the plaintiff is unable to show that the defendant owed any legal duty of care to the Plaintiffs.

Therefore, after due deliberation and consideration of the forgoing it is accordingly,

ORDERED that Defendants' Motion for Summary Judgment is GRANTED. Copies of this Order shall be transmitted by the Circuit Court Clerk to the following:

Larry W. Blalock, Esq.,
Ben Mcfarland, Esq.,
Jackson Kelly PLLC
1144 Market Street, Suite 400
Wheeling, West Virginia
26003

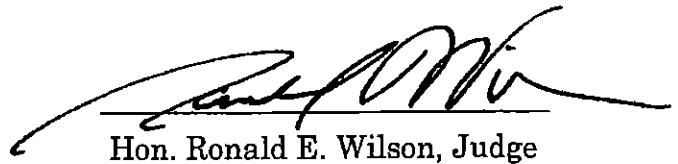
ROBERT P. FITZSIMMONS, Esq.,
FITZSIMMONS LAW FIRM, PLLC
1609 Warwood Avenue
Wheeling, West Virginia 26003

Frank X. Duff, Esquire
Sandra L. Law, Esquire
Schrader Byrd & Companion, PLLC.
32 - 20th Street, Suite 500
Wheeling, West Virginia 26003

Edward Lee Gillison, Jr., Esquire
Helen L. Jackson-Gillison, Esquire
Gillison & Gillison Law Offices
3139 West Street
Weirton, West Virginia 26062

Michael T. Curtis
130 Holden Terrace
Macomb, IL 61455-1020

ENTERED this 28 day of DECEMBER, 2015.



Hon. Ronald E. Wilson, Judge

A TRUE COPY

Attests

Brenda Jackson
Clerk, Circuit Court, Hancock County

Deputy