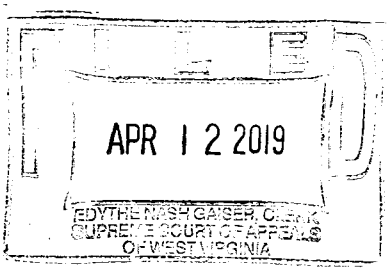
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 19-0018



CYNTHIA MCCOY, ANNA ESCHELMEYER, And WILLIAM FOWLER,

Plaintiffs Below, Petitioners,

v.

STEVEN DRAGISICH,

Defendant Below, Respondent.

PETITIONERS' BRIEF

COUNSEL FOR PETITIONERS

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ASSIGNMENTS OF ERROR

1. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR THE DEFENDANT WHEN IT HELD THE DEFENDANT OWED NO LEGAL DUTY OF CARE TO THE PLAINTIFFS, EVEN THOUGH THE DEFENDANT SIGNED A FEE CONTRACT WITH THE PLAINTIFFS AND TOOK ABSOLUTELY NO STEPS TO DILIGENTLY PROVIDE COMPENTENT REPRESENTATION.

2. THE CIRCUIT COURT ERRED IN FINDING THERE WERE NO ISSUES OF FACT, THAT AN ATTORNEY-CLIENT RELATIONSHIP HAD NOT BEEN FORMED BETWEEN THE DEFENDANT AND THE PLAINTIFFS, EVEN THOUGH THE DEFENDANT SIGNED A FEE CONTRACT WITH THE PLAINTIFFS AND THE PLAINITFFS BELIEVED THE DEFENDANT WAS WORKING ON THEIR CASE.

3. THE CIRCUIT COURT ERRED IN FINDING THE DEFENDANT, AS AN ASSOCIATE, WAS ONLY EXPECTED TO DO WHAT HIS EMPLOYER ASKED AND HE OWED NO INDIVDUAL DUTY AS AN ATTORNEY, TO THE PLAINTIFFS.

STATEMENT OF THE CASE

The 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. (A.R. 1-4, 165, 187-189). On February 2, 2010, Richard Bain (Hilda Bain's husband and the Plaintiffs' stepfather) qualified as the executor of Mrs. Bain's estate. (A.R. 423). On March 26, 2010, the Plaintiffs met with Attorney Grishkevich, about pursuing a wrongful death action and removing Mr. Bain as the personal representative of the estate. (A.R. 196, 311-312). A fee agreement "to provide legal services concerning a wrongful death action/malpractice issue and removal of personal representative," was signed to that effect on March 26, 2010. (A.R. 196).

The Plaintiffs believed that Mr. Bain would not pursue a wrongful death action since his son worked at Acuity and provided care to Mrs. Bain. (A.R. 312). Ms.

Grishkevich contacted Mr. Bain about pursuing a wrongful death suit on April 29, 2010. (A.R. 266-267). Mr. Bain then contacted the Frankovitch law firm, which advised Ms. Grishkevich they would look into the matter of a possible wrongful death claim. (A.R. 269). The Frankovitch firm ultimately declined to take the wrongful death case, but referred Mr. Bain to Ms. Grishkevich, who still wanted to pursue the matter. (A.R. 270-271). Ms. Grishkevich again wrote Mr. Bain about pursuing a claim on December 27, 2010. (A.R. 273).

Mrs. Bain's estate was closed by Mr. Bain on June 4, 2010, with no wrongful death action being filed. (A.R. 262). The Defendant joined Ms. Grishkevich's law firm in August of 2010. (A.R. 199, 321). Even though he was hired as an associate attorney, the Defendant had several years more experience as an attorney than Ms. Grishkevich. (A.R. 295-296).

On January 3, 2011, Plaintiff McCoy was advised that Ms. Grishkevich's office needed her to come in to sign a new fee contract for two reasons: One, because the Defendant was coming on board and Two, the rate was being raised from 30 to 40%. (A.R. 313). Ms. McCoy went in and signed the agreement, and had no belief that the agreement was changing in any way other than to include Mr. Dragisich and raise the rate. (A.R. 313-316). A letter sent by Ms. Grishkevich to Ms. McCoy on January 24, 2011, enclosed "a copy of the Retainer Agreement that you signed ..., wherein you have agreed to retain us as counsel for the wrongful death claim of Hilda I. Bain." (A.R. 283-284).

The Defendant was specifically referenced by name in the January 3, 2011 Retainer Agreement, and was identified as the "Attorney." (A.R. 275). The Retainer

Agreement states "Client hereby retains and employs Attorney to: Legal Services. Provide legal services concerning an incident regarding the estate of Hilda I. Bain." (A.R. 275). The January 3, 2011 Retainer Agreement stated the Attorney would charge a fee of 40% for his services, which will be collected upon settlement, and "In consideration for said payment, Attorney agrees to perform to the best of his/her abilities and to exhibit due diligence in the conduct of said services." (A.R. 275).

Plaintiff McCoy testified she was told the Defendant was coming on board to help with the case, and if Ms. Grishkevich was not available, she could always ask for Mr. Dragisich. (A.R. 313-316). Plaintiff McCoy also testified that on at least one occasion when she called the office and Ms. Grishkevich was not in, she specifically asked to speak to the Defendant. (A.R. 314). The Defendant testified that prior to signing the Retainer Agreement, he was introduced to Ms. McCoy, and that Ms. McCoy was told he would be working on her case. (A.R. 204, 324). The Defendant testified that he looked over the Retainer Agreement before he signed it. (A.R. 204). The Defendant also testified that he thought he would be performing estate work.[1] (A.R. 326).

Within days of the signing of the January 3, 2011 agreement, a petition to remove Mr. Bain as the executor was drafted, dated January 7, 2011. (A.R. 277-279). Plaintiff McCoy testified that Ms. Grishkevich told her the petition was filed with the Clerk, but there is no record of the petition ever being filed. (A.R.317).

On January 17, 2011, Ms. Grishkevich and the Defendant entered into a fee contract with Mr. Bain. (A.R. 281). The language of the Bain contract is identical to the

[1] Had the claims against the Defendant not been dismissed, the Plaintiff intended to challenge the assertion that a 40% contingency agreement, payable upon settlement, is consistent with a reasonable fee for estate work. It should also be noted that Mrs. Bain's estate was closed on June 4, 2010. (A.R. 262).

one signed by the Plaintiff. (A.R. 275, 281). Ms. Grishkevich drafted a letter to Plaintiff McCoy on January 24, 2011 advising that Mr. Bain had signed an agreement to proceed with the wrongful death claim. (A.R. 283-284). Ms. Grishkevich also stated she was sending her a copy of their January 3, 2011 fee contract "wherein you agreed to retain us as counsel for the wrongful death claim." (A.R. 283-284).

Mr. Dragisich testified that after signing the fee contracts with the Plaintiffs and Mr. Bain, he did absolutely nothing further. (A.R. 324, 329-330, 332-333). He never reviewed the file, never talked to Ms. Grishkevich about the case or what needed to be done, never talked to the clients, never looked into the possible conflict of interest between the Plaintiffs and Bain, never looked into the estate (which was already closed) and never investigated the case in any way. (A.R. 324, 329-330, 332-333).

The Defendant left the Grishkevich & Curtis law firm in April of 2011. (A.R. 321). He never contacted the Plaintiffs about his departure, or the status of their case. (A.R. 321-323). Mr. Bain was never removed as executor and a wrongful death suit was never fully investigated nor filed by the Defendant or Ms. Grishkevich. The statutes of limitations to file wrongful death claims in West Virginia or Ohio passed with no lawsuit being filed by the Defendant or Ms. Grishkevich. In September and October of 2012, respectively, the Plaintiffs filed a Complaint and an Amended Complaint against the Defendant, Ms. Grishkevich and the Grishkevich & Curtis law firm, alleging legal malpractice. (A.R. 1-9).

In support of the Plaintiffs claims, the Plaintiffs retained two experts, Christopher Polen, M.D. and Sherri Goodman-Reveal. (A.R. 494). Dr. Polen, who is board certified in internal medicine and critical care, provided opinions regarding deviations from the

standard of care that occurred at Wheeling Hospital and Acuity in their care and treatment of Ms. Bain. (A.R. 257-260). Ms. Goodman-Reveal is an expert in legal ethics, professional responsibility and legal malpractice. (A.R. 286, 301-307). Ms. Goodman-Reveal prepared a report dated October 28, 2015, which set forth her opinion that the Defendant and Ms. Grishkevich had deviated from reasonable legal standards which supported the Plaintiffs' claims of legal malpractice. (A.R. 287-300).

Specifically, with regard to the Defendant, Ms. Goodman-Reveal opined that he owed the Plaintiffs a duty of care because he personally signed the second Retainer Agreement with the Plaintiffs as their Attorney. (A.R. 294-296). Ms. Goodman-Reveal also referenced Rule 5.8 of the Rules of Professional Responsibility[2] and W.Va. Code 31B-13-1305[3] in support of this opinion. (A.R. 295). Ms. Goodman-Reveal further held that the Defendant neglected his duty of care to the Plaintiffs on several grounds. (A.R. 294-296). First, the Defendant failed to provide a conflict free representation, in that he also signed a Retainer Agreement with Mr. Bain, who did not follow through on filing a wrongful death case, and who the Plaintiffs wanted to remove as the personal representative for Mrs. Bain's estate. (A.R. 294-296). Second, the Defendant did not exercise any of his knowledge or skill on behalf of the Plaintiffs, even though the Defendant was the more experienced attorney signing the Retainer Agreement. (A.R. 294-296). The Defendant did not familiarize himself with the Plaintiffs' legal matter, did

[2] Rule 5.8(b) states "Nothing in this rule or the laws under which a lawyer or law firm is organized shall relieve a lawyer from personal liability for the acts, errors, and omissions of such lawyer arising out of the performance of professional legal services."

[3] W.Va. Code 31B-13-1305(d) provides "notwithstanding any provision of this article to the contrary, any individual who renders a professional service as a member, manager, agent **or employee** of a professional limited liability company is liable for a negligent or wrongful act or omission in which the individual personally participated to the same extent as if the individual rendered the professional service as a sole practitioner." [Emphasis added].

not assess or protect the Plaintiffs from the risk inherent in his simultaneous representation of Mr. Bain, and did not determine the statutes of limitation applicable to the Plaintiffs' potential claims. (A.R. 294-296). Third, the Defendant failed to advise the Plaintiffs when he left the Grishkevich & Curtis law firm. (A.R. 294-296).

The Defendant never obtained an expert in this case.

On September 11, 2015, the Defendant filed a Motion for Summary Judgment. (A.R. 139-244). On November 2, 2015, the Plaintiffs filed a Response to the Defendant's Motion for Summary Judgment. (A.R. 245-334). On November 20, 2015, the Defendant filed a Reply in Support of his Motion for Summary Judgment. (A.R. 335-360). On December 29, 2015, the Circuit Court granted the Defendant's Motion for Summary Judgment. (A.R. 361-370). The Circuit Court concluded signing an attorney client agreement, is not sufficient to establish an attorney client relationship, and the Defendant did not owe any legal duty of care to the Plaintiffs. (A.R. 361-370).

The Plaintiffs' case against the remaining Defendants was eventually resolved, and the Court entered a Final Dismissal Order on December 13, 2018. (A.R. 585). The Plaintiffs filed a Notice of Appeal on January 4, 2019. (A.R. 587-606).

SUMMARY OF ARGUMENT

The Circuit Court's December 29, 2015 Order incorrectly found that the signing of a Retainer Agreement by the Plaintiff and the Defendant did not create an attorney client relationship between the parties. The Court failed to consider the clear language of the Retainer Agreement as a factor in establishing the existence of an attorney client relationship. The Retainer Agreement is a contract, wherein the Defendant, by name,

agreed to provide legal services to the Plaintiff, to perform said work to the best of his ability and to exhibit due diligence in the conduct of his services, and to charge a fee for his services of 40% of any settlement collected. The Defendant also testified that he reviewed the Retainer Agreement before he signed it, and that he told the Plaintiff he would be working on the case. Plaintiff McCoy testified the reasons she was told she needed to sign, and did sign, a second Retainer Agreement were because the Defendant was being brought on board and the fee rate was increasing.

The Defendant admitted that after signing the Retainer Agreement, he took no actions to investigate or work on the Plaintiffs' case. The Court incorrectly held the Defendant owed the Plaintiffs no legal duty of care, because he was only an associate attorney, and his signing of the Retainer Agreement did not obligate him to perform any work for the Plaintiffs.

The Plaintiffs also contend there are issues of fact regarding the Defendant's representation, making summary judgment inappropriate.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The facts and legal arguments in this matter have been adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. Therefore, pursuant to R.A.P. 18(a)(4), oral argument is not requested, unless the Court determines oral argument is necessary.

ARGUMENT

I. Standard of Review

"A circuit court's entry of summary judgment is reviewed de novo." Syllabus Point 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963). Syllabus Point 1, *Andrick v. Town of Buckhannon*, 187 W. Va. 706, 421 S.E.2d 247 (1992). Syllabus Point 2, *Painter v. Peavy*. "The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syllabus Point 3, *Painter v. Peavy*. "Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syllabus Point 4, *Painter v. Peavy*.

II. An Attorney Client Relationship Existed

The Circuit Court's Order finds the Defendant owed no duty to the Plaintiffs because no attorney client relationship existed between the Plaintiffs and the Defendant. (A.R. 361-370). But the Court only reaches this conclusion by ignoring the largest piece of uncontested evidence in this case – the signed Retainer Agreement.

In *Keenan v. Scott*, 64 W.Va. 137, 61 S.E. 806 (1908) at Syl. Pt. 1, the Court held "As soon as the 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." See also *State ex rel. DeFrances v. Bedell*, 191 W.Va. 513, 446 S.E.2d 906 (1994). Plaintiff McCoy testified that one of the reasons she came in to the sign the new Retainer Agreement on January 3, 2011 was because the Defendant was being brought in to represent the Plaintiffs. (A.R. 313). While the Plaintiffs may have originally retained Ms. Grishkevich, before the Defendant joined her firm, a second Retainer Agreement was signed for the specific purpose of acknowledging and adding the Defendant as an attorney for the Plaintiffs. (A.R. 275). Plaintiff McCoy testified she was told she could always contact the Defendant if she had any questions about the case. (A.R. 313-316). Thus, there was a definite desire on the part of the Plaintiffs to employ the Defendant.

The Defendant testified that prior to signing the Retainer Agreement, he met the Plaintiff and Plaintiff McCoy was told he would be working on her case. (A.R. 204, 324). The Defendant also testified that prior to signing the Retainer Agreement, he did read and review the document. (A.R. 204). The clear and plain language of the Retainer Agreement states the Agreement is made and entered into "between Marcy J. Grishkevich, Esq., and Steven E. Dragisich, Esq." as Attorneys, with the Plaintiff. (A.R. 275). The Agreement is not between a law firm and the Plaintiffs, but the Plaintiffs, Ms. Grishkevich and the Defendant. In the Agreement, the Defendant, as the Attorney, is agreeing to provide legal services and to perform these services to the best of his ability and to exhibit due diligence in performing his services. (A.R. 275). The Agreement also provides for a 40% fee, and the recovery of reasonable attorney fees and costs in the

event legal action would be required to enforce any provision of the Agreement. (A.R. 275).

The Retainer Agreement clearly documents the creation of an attorney client relationship between the Plaintiffs and the Defendant. The actions of the parties are also consistent with the creation of a relationship. The Defendant admitted he thought he would at least be performing estate work for the Plaintiffs. (A.R. 326). If the Defendant had no intention of representing the Plaintiffs, why did he bother to review and sign a Retainer Agreement in which he promised to diligently perform legal services? What was the purpose of a Retainer Agreement if not to memorialize the contractual relationship being created between the Client and the Attorney?

The Circuit Court gave no weight to the existence of the signed Retainer Agreement as a factor evidencing the creation of an attorney client relationship. In *May v. Seibert*, 164 W.Va. 673, 264 S.E.2d 643, 647 (1980), the Court held the "law recognizes that these obligations to a client are difficult and severe. Therefore these obligations are only imposed once an attorney decides to acquiesce in the establishment of the attorney-client relationship **as evidenced by a retainer agreement**, whether oral or written." [Emphasis added]. See also *Lawyer Disciplinary Bd. v. Santa Barbara*, 229 W.Va. 344, 729 S.E.2d 179 (W. Va., 2012). In *Santa Barbara*, the attorney provided a sworn statement that it was not his intention to represent the plaintiff in a personal injury matter, and he did not recall giving the retainer agreement or an authorization to obtain medical records to the Plaintiff. Nonetheless, the investigating Hearing Panel of the Lawyer Disciplinary Board determined an attorney client relationship was created when it discovered a retainer agreement was signed by the attorney and the plaintiff. The

Supreme Court agreed with the Hearing Panel and found an attorney client relationship existed, resulting in attorney Santa Barbara violating a duty of care to the plaintiff when he missed a statute of limitations. *Id.* at 182.

The Circuit Court made three factual assumptions to absolve the Defendant of responsibility in this matter which are not supported by the evidence of record. First, the Court said the Plaintiffs never expressed a desire to hire the Defendant. (A.R. 366). This is incorrect as the January 3, 2011 Retainer Agreement was being signed to expressly add the Defendant as an Attorney for the Plaintiffs. (A.R. 275, 313-316).

Second, the Court said the Defendant signed the Retainer Agreement "in his capacity as an associate who was expected to do what his employer asked." (A.R. 367). There is absolutely no indication anywhere in the Retainer Agreement that the Defendant was signing in a limited role, or as an "associate." (A.R. 275). Additionally, an attorney is responsible for his own negligence, and is not exempted from liability as an attorney merely because he has the title of associate. W.Va. Prof. Resp. Rule 5.8(b) states "Nothing in this rule or the laws under which a lawyer or law firm is organized shall relieve a lawyer from personal liability for the acts, errors, and omissions of such lawyer arising out of the performance of professional legal services." See also W.Va. Code 31B-13-1305(d) which provides "any individual who renders a professional service as a member, manager, agent **or employee** of a professional limited liability company is liable for a negligent or wrongful act or omission in which the individual personally participated to the same extent as if the individual rendered the professional service as a sole practitioner." [Emphasis added]

Interestingly, the Court's Order acknowledges that the Defendant is not asserting "that his status as an associate somehow automatically absolves him from liability for his own conduct." (A.R. 363). The Court's Order stated that in more modern times (as opposed to the *Keenan* case, which is over 110 years old), in larger firms, it could be possible for an attorney to sign a fee contract, and then hand the case off to another lawyer to handle. (A.R. 367). The implication from that reference is that the signing attorney would not be liable for the negligence of the attorney who actually handled the matter. But, that certainly wasn't the case here, where there were only three lawyers at the firm, and two of them signed the Retainer Agreement. Per the Court's argument, an actual signatory to a contract could avoid all liability merely by handing off the case to someone else. However, the Court recognized the outrageousness of such a position by stating "That Mr. Dragisich should have known better than to sign an attorney client contracts (sic) as an associate of a law firm for a clients (sic) 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." (A.R. 363).

Third, the Court says there is no evidence the Defendant ever consented to act for the Plaintiffs in connection with a wrongful death action. This is clearly a factual dispute. Plaintiff McCoy testified that it was her understanding the only changes between the original Retainer Agreement and the January 3, 2011 Retainer Agreement were to add the Defendant and increase the fee. (A.R. 313). Plaintiff McCoy indicated she thought everything else was remaining the same. (A.R. 313-316). Also, when Ms. Grishkevich returned the signed Retainer Agreement to the Plaintiff, she referred to the Agreement as "wherein you have agreed to retain us as counsel for the wrongful death claim of Hilda I.

Bain." (A.R. 283-284). Also, as part of pursuing the wrongful death claim, Mr. Bain needed to be removed as the estate's personal representative. The Defendant admitted he was at least expecting to perform estate work. (A.R. 326).

III. Defendant Owed Duty of Care to the Plaintiffs

An "attorney's non-delegable duty of loyalty to his client and the level of trust a client places in his attorney are ... essential elements of the attorney-client relationship." *Delaware CWC Liquidation Corp. v. Martin*, 213 W.Va. 617, 622, 584 S.E.2d 473, 478 (2003). The Court "holds each and every attorney to the inflexible requirement that he "diligently, faithfully and legitimately perform every act necessary to protect, conserve and advance the interests of his client." *Id.* at 479. Once an attorney client relationship exists, as evidenced by a Retainer Agreement, "the attorney cannot turn back. He is duty bound to represent the client to the best of his ability." *May v. Seibert* at 647.

The Defendant has admitted that after he signed the Retainer Agreement, he took no action on behalf of the Plaintiffs. (A.R. 324, 329-330, 332-333). He never reviewed the file or talked to Ms. Grishkevich about the case or what needed to be done. (A.R. 324, 329-330, 332-333). However, just two weeks after signing the Retainer Agreement with the Plaintiffs, the Defendant signed an identical Retainer Agreement with Mr. Bain. (A.R 281). The Defendant admitted he never looked into the possible conflict of interest between the Plaintiffs and Bain, nor looked into the estate. (A.R. 324, 329-330-332-333).

Per the Plaintiffs' expert, Ms. Goodman-Reveal, the Defendant breached his duty of care to the Plaintiffs in several regards. (A.R. 294-296). The Defendant failed to provide a conflict free representation, in that he also signed a Retainer Agreement with Mr. Bain, who did not follow through on filing a wrongful death case, and who the

Plaintiffs wanted to remove as the personal representative for Mrs. Bain's estate. (A.R. 294-296). The Defendant did not exercise any of his knowledge or skill on behalf of the Plaintiffs. (A.R. 294-296). The Defendant did not familiarize himself with the Plaintiffs' legal matter, did not assess or protect the Plaintiffs from the risk inherent in his simultaneous representation of Mr. Bain, and did not determine the statutes of limitation applicable to the Plaintiffs' potential claims. (A.R. 294-296). Third, the Defendant failed to advise the Plaintiffs when he left the Grishkevich & Curtis law firm. (A.R. 294-296). Even the Court's Order noted "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..." (A.R. 363).

The Defendant did not have any evidence to counter the opinions of Ms. Goodman-Reveal.

IV. Issues of Fact

There are also numerous issues of fact which make the Court's granting of Summary Judgment inappropriate. For example, the Court stated it was undisputed the Defendant did not know the Plaintiffs wanted to pursue a wrongful death case. A minimal review of the file reveals this is not a reasonable position for the following reasons: The first Retainer Agreement says it is to "provide legal services concerning a wrongful death action/malpractice issue and removal of personal representative;" Plaintiff McCoy testified she thought the scope of the representation was remaining the same when she signed the second Retainer Agreement; the January 24, 2011 letter from Ms. Grishkevich to Plaintiff sending a copy of the Retainer Agreement that had been signed by the Defendant refers to the Agreement "wherein you have agreed to retain us as

counsel for the wrongful death claim of Hilda I. Bain;" the Retainer Agreement signed by the Defendant called for a 40% fee upon settlement which would be significantly higher than the law allows for estate work (see W.Va. Code 44-4-12a); the Defendant testified he reviewed the Retainer Agreement before he signed it, and as someone who did estate work, he should have been aware a 40% fee to handle the estate would be unconscionable; and the Hilda Bain estate was closed months before the Defendant signed the Retainer Agreement. (A.R. 196, 313-316, 283-284, 275, 204, 262).

CONCLUSION

The Circuit Court's Order granting summary judgment to the Defendant should be reversed, and this matter should be remanded for further proceedings.

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