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' REPLY BRIEF

COUNSEL FOR PETITIONERS

Frank X. Duff, Esq. (WV Bar #1065)
Sandra K. Law, Esq. (WV Bar #6071)
Schrader, Companion, Duff & Law, PLLC
401 Main Street
Wheeling, WV 26003
(304) 233-3390
fxd@schraderlaw.com
skl@schraderlaw.com

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STATEMENT OF THE CASE

The Respondent's Statement of the Case failed to note numerous facts which are in dispute in this case. These factual disputes are critical because they raise issues appropriate for a jury to decide, rather than the Court via summary judgment.

The Respondent claims it is undisputed that at no time did anyone tell the Respondent the Retainer Agreement he signed with the Petitioner in January of 2011 was in any way related to a wrongful death claim. (Resp's Br. Pg. 8). The Respondent testified he was only going to perform administrative estate work, such as preparing appraisements, doing final accountings, and dealing with creditors. (Resp. Br. Pg. 8, and A.R. 206) However, numerous facts surrounding the January 2011 Retainer Agreement cast doubt on the Respondent's claim that he was being retained to perform simple estate work.

For example, the Plaintiffs were not the personal representatives of the Hilda Bain estate, so there would be no simple estate work to perform for them. (A.R. 423). Also, the Hilda Bain estate was closed by Mr. Bain seven months before the Respondent signed the Retainer Agreement. Plaintiff McCoy testified she had no belief that the January 2011 Fee Contract was in any way changing the representation and the intent was always to pursue a wrongful death case. (A.R. 313-316) Ms. McCoy testified she interpreted the description of services in the Retainer Agreement to be "...all involved with the medical malpractice suit," that the Respondent was "coming on board for the medical malpractice suit," and it was not reasonable to interpret the Retainer Agreement to mean administrative estate work. (A.R. 315-316). A letter sent by Ms. Grishkevish to Ms. McCoy on January 24, 2011, enclosed a copy of the signed Retainer Agreement and

described the representation as "wherein you have agreed to retain us as counsel for the wrongful death claim of Hilda I. Bain." (A.R. 283-284) Ms. Grishkevich's letter confirmed the Plaintiffs were hiring "us" for the wrongful death claim, and Ms. Grishkevich and the Respondent were the only two attorneys that signed the Agreement. (A.R. 283-284, 275). Ms. Grishkevich's letter also confirms Mr. Bain agreed to hire them for the wrongful death matter, and the Bain Retainer Agreement signed by the Defendant was identical to the Plaintiff's Retainer Agreement. (A.R. 283-284, 281).

Ms. McCoy also testified that there were two reasons she was told she had to sign the new Retainer Agreement on January 2, 2011. One reason was the Plaintiffs were specifically told the Respondent was coming on board to work on their case. (A.R. 313). The second reason was because the contingency fee was being raised to 40%. (A.R. 313). Ms. McCoy also testified she was told she could always ask for the Respondent if she had a question about her case, and on at least one occasion she did ask to speak with the Respondent. (A.R. 313-316).

The Respondent testified he was introduced to Ms. McCoy before he signed the Retainer Agreement, and Ms. McCoy was told he would be working on her case. (A.R. 204, 324). It is undisputed that the Respondent reviewed the Retainer Agreement before he signed it. (A.R. 204). The Retainer Agreement, which is only one page (including signature lines), states the attorney "shall charge for his/her services a fee of 40%, which will be collected upon settlement..." (A.R. 275). There is no indication in the Retainer Agreement that the representation was conditional or temporary. (A.R. 275). The Retainer Agreement with a 40% contingency fee to be collected upon settlement is

clearly an Agreement for a personal injury/wrongful death case, and not a Retainer Agreement for estate work.

The Respondent noted that after he left the Grishkevich & Curtis law firm, he entered into an April 15, 2011 Agreement with Grishkevich & Curtis dividing up files, and leaving the Plaintiffs' file with Grishkevich & Curtis. (Resp. Br. Pg. 9). However, the actual Agreement did not mention the Plaintiff's case by name, and the Agreement was never shared with the Plaintiff. (A.R. 235-238). Neither Mr. Grishkevich nor the Respondent sought any input from the Plaintiffs when they were divvying up their file. (A.R. 322). The Respondent admitted he did not have any discussions with the Plaintiffs advising them he was leaving the firm, or giving them a choice as to who would represent them. (A.R. 322-323). The Respondent never advised the Plaintiffs that he was ending his representation or terminating their contract. *Id.*

ARGUMENT

I. The Respondent has Personal Liability, not Vicarious Liability

The Respondent contends the Petitioners are trying to argue he should be vicariously liable for the negligence of Ms. Grishkevich. However, that is not the case. The Petitioners contend the Defendant should be personally liable for his own acts of negligence, even if he was not an owner of the firm where he worked.

Under W.Va. Prof. Resp. Rule 5.8(b), "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." The West Virginia statute regarding professional limited

liability companies, is consistent with Rule 5.8(b). W.Va. Code 31B-13-1305(d) states "any individual who renders a professional services 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 services as a sole practitioner." [Emphasis added].

Grishkevich & Curtis was a professional limited liability company (for example, see the Retainer Agreement signed by Respondent, A.R. 275). The Respondent was an employee of Grishkevich & Curtis (A.R. 202). Per W.Va. Code 31B-13-1305(d), the Respondent is liable for any negligent acts, errors or omissions he participates in. The Petitioners contend the Respondent agreed to represent them per the Retainer Agreement, "and to exhibit due diligence in the conduct of said services." (A.R. 275). The Defendant repeatedly admitted that after signing the Retainer Agreement, he did absolutely nothing for the Plaintiffs – he didn't bother to discuss the matter, familiarize himself with the file or make sure appropriate representation was being pursued. He didn't even let the Plaintiffs know when he left the firm, to explain their options for representation.

As the Petitioners noted in their Brief, Ms. Goodman-Reveal's report sets forth numerous deficiencies in the Defendant's representation – all of which arose from his own personal conduct.

II. An Attorney Client Relationship Existed

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." *Keenan* requires two actions – a

client's desire to hire an attorney, and an attorney's consent to be employed by the client. Both actions occurred here.

Ms. McCoy testified there were two reasons she signed a new Retainer Agreement on January 3, 2011, and the first reason was because the Respondent was being brought on board to work on the case. The Respondent was mentioned by name in the Retainer Agreement as an attorney, and the Respondent promised to exhibit due diligence in his representation. Ms. McCoy signed the new Retainer Agreement with the understanding the Respondent would be working on their case. There was also consent by the Respondent to represent the Plaintiffs, as he admitted he read and signed the Retainer Agreement. Thus, the two actions required under *Keenan* are met.

The Respondent tries to avoid his responsibilities under the Retainer Agreement, by claiming he thought he would only be performing simple administrative estate work. However, there is no such limiting language in the Retainer Agreement. And, as noted in the Statement of the Case, there are clear factual disputes about the scope of the representation. Ms. Grishkevich signed the same Retainer Agreement as the Respondent, and was crystal clear that she was representing the Petitioners in a wrongful death matter. (For example, see Ms. Grishkevich's letter of January 24, 2011 where she repeatedly states they were retained as counsel for the wrongful death claim of Hilda Bain – A.R. 283-284). It is difficult to understand how the same Retainer Agreement, signed by Ms. Grishkevich and the Respondent, can authorize representation in a wrongful death matter by Ms. Grishkevich, but somehow limit the Respondent's representation to handling simple estate matters for an estate that had already been closed.

The Respondent offered the Oklahoma case of *Myers v. Maxey*, 915 P.2d 940, 1995 OK Civ App 148 (Okla. Civ. App., 1995) to support the theory that the Respondent should not be liable in this matter because he was merely an associate doing what he was told by his boss. But *Myers* isn't on point, as it is not looking at the personal liability of an attorney who signed a fee contract. In *Myers*, there were two associate attorneys at a firm. One who worked directly on a Will that was subsequently found to be deficient, and another who had worked for the same client, but on another matter unrelated to the Will. The associate who did not work on the Will was dismissed from the malpractice case involving the Will because he had not worked directly on the matter, and there was no indication he had signed a fee contract or had control of the Will litigation.

The Respondent's testimony (that he was only supposed to perform administrative estate work) created issues of fact, as it was contrary to the plain language of the Retainer Agreement and the Plaintiff's testimony. As such, summary judgment was not appropriate.

III. **Departing Attorney Liability**

The Respondent contends that because he left the Grishkevich & Curtis law firm, he owed no duty the Plaintiffs after that point. However, the Respondent never notified the Plaintiffs that he was leaving, or that he would not continue to work on their case. The Respondent never told the Plaintiffs their contract was terminating, and there was no indication in the Retainer Agreement that the representation was temporary or conditional. The Respondent did not explain the status of the case to the Plaintiffs at the time he left, and did not give the Plaintiffs a chance to decide who would represent them.

The Respondent cites the Indiana case of *Devereux v Love*, 30 N.E.3d 754 (Ind. 2115) implying that a departing attorney no longer owed any duty to a client after he left the firm. However, the facts of *Devereux* are very different from the instant case. In *Devereux*, an attorney left a law firm, and it was subsequently discovered that a partner at his former firm had been stealing money from clients for years. The Plaintiffs wanted to sue the departing attorney because he had worked on their case before he left, and the former partner had stolen their settlement money. However, in *Devereux,* the original firm immediately sent a letter to the client with an election of representation form, explaining an attorney had left and they could choose who would represent them. The departing lawyer also sent the clients an explanatory letter explaining their representation options. The clients filled out the election form and chose the original firm instead of the departing attorney. The Court held that the departing attorney was not responsible for the subsequent theft by the former partner as the clients elected to be represented by the former partner.

In the instant case, the Respondent never advised the Plaintiffs about the status of their case when he left, never told them he was terminating his representation or their contract, nor gave them an option about representation. As Ms. Goodman-Reveal noted in her report, this was another negligent act by the Respondent. (A.R. 287-300)

IV. Standing

The Respondent contends the Plaintiffs lacked standing to pursue a wrongful death lawsuit since they were not the personal representatives of the estate. However, this is only because of the negligence of the Respondent and Ms. Grishkevich. The Plaintiffs wanted to remove Mr. Bain as the personal representative and voiced concerns

that Mr. Bain might not pursue the wrongful death case because his son had treated Mrs. Bain at Acuity, a fact Ms. McCoy personally observed. (A.R. 312). The Defendants ignored this potential conflict between Mr. Bain and the Plaintiffs, and decided to represent both parties in a wrongful death suit. A diligent review of the facts and Mr. Bain's lack of cooperation, should have warranted removing Mr. Bain as the personal representative. The Respondent should not be able to argue that his own negligence in failing to remove Mr. Bain, exonerates him.

CONCLUSION

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

Sandra K. Law
Counsel for Petitioners

Frank X. Duff, Esq. (WV ID #1065)
Sandra K. Law, Esq. (WV ID #6071)
Schrader Companion Duff & Law, PLLC
401 Main Street
Wheeling, WV 26003
(304) 233-3390
fxd@schraderlaw.com
skl@schraderlaw.com