IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 19-0018

CYNTHIA MCCOY, ANNA ESCHELMEYER, AND WILLIAM FOWLER,
Plaintiffs Below, Petitioners

v.

STEVEN DRAGISICH,
Defendant Below, Respondent

Hon. Ronald E. Wilson
Circuit Court of Hancock County
Civil Action No. 12-C-185

BRIEF OF RESPONDENT STEVEN DRAGISICH

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I. STATEMENT OF THE CASE[1]

A. FACTUAL AND PROCEDURAL HISTORY

The Petitioners are the biological children of Hilda Bain.[2] Mrs. Bain had a significant history of health problems, including carotid stenosis, cerebrovascular disease including mini-strokes, hypertension, hyperlipidemia, and other cardiopulmonary complications.[3]

In October of 2009, Mrs. Bain began experiencing a series of complications after being diagnosed with pneumonia.[4] Beginning in November of 2009, Mrs. Bain spent 70 days in four separate hospitals in West Virginia, Ohio, and Pennsylvania.[5] Mrs. Bain was treated at Wheeling Hospital in West Virginia, Acuity Specialty Hospital (Acuity) and Trinity Medical Center in Ohio, and at West Penn Hospital in Pennsylvania. During this time, Mrs. Bain underwent seven different surgeries, all of which appear to have been either heart or pulmonary related.[6] According to handwritten notes taken by the Petitioners during Mrs. Bain's prolonged 70-day

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[1] The "Statement of the Case" contained in the Petitioner's Brief completely ignores undisputed significant relevant evidence and testimony contained in the record upon which the Circuit Court relied to make its decision to grant summary judgment to the Respondent. Instead of refuting, filling in, and clarifying it point-by-point, the Respondent will present a thorough accurate Statement of the Case that is supported by the record. Without a line-by-line or paragraph-by-paragraph analysis, it also is the Respondent's position that nothing in the Petitioners' "Statement of the Case" should be accepted at face value without cross-referencing any assertion with the actual record.

[2] App. at 5.

[3] App. at 163.

[4] App. at 165-169.

[5] App. at 170-171.

[6] Id.

treatment, Mrs. Bain also needed a feeding tube, PICC-line, kidney dialysis, and was treated for multiple infections and other complications.[7]

Ultimately, Mrs. Bain did not recover and passed away as a result of sepsis at West Penn Hospital on January 19, 2010, at the age of 76.[8] In her will, Mrs. Bain named her husband, Richard Bain Sr., as the Executor of her Estate.[9] On February 2, 2010, Mr. Bain qualified as the Executor of Mrs. Bain's Estate.[10] Mr. Bain and Mrs. Bain were married for nineteen years.[11] Petitioner McCoy testified that Mr. Bain, her stepfather, and Mrs. Bain had a happy marriage, and that Mr. Bain was "very involved" with Mrs. Bain throughout all of her medical issues.[12]

Petitioners were unhappy with the treatment that Mrs. Bain received at Wheeling Hospital and Acuity, so they decided to seek legal consultation. After consulting with a lawyer in Pittsburg, Petitioner McCoy called Marcy Grishkevich after she saw an advertisement for Grishkevich & Curtis in the phone book.[13]

On March 26, 2010, the Petitioners met with Grishkevich at her law office in Weirton, West Virginia.[14] At this meeting, the Petitioners discussed all of their concerns with the treatment that Mrs. Bain received.[15] They also told Grishkevich that they believed that Mr. Bain

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[7] App. at 187-188.

[8] App. at 189.

[9] App. at 190.

[10] App. at 262.

[11] App. at 144.

[12] App. at 167-168. Bain Sr. is now deceased. He died prior to giving any testimony in the case.

[13] App. at 172-174. Petitioner McCoy recognized Grishkevich's name because her son had gone to school with Grishkevich. For that reason, Petitioner McCoy contacted Grishkevich. Id.

[14] Id.

[15] App. at 176-177.

would be reluctant to file a wrongful death action because his son, Richard Bain Jr., worked as a respiratory therapist at Acuity and provided care to Mrs. Bain.[16] Grishkevich, being aware that the Executor was vested with the sole ability to file a claim on behalf of the Estate, explained that Mr. Bain would have to be removed as Executor of Mrs. Bain's Estate before the Petitioners could move forward with suit.[17]

At the conclusion of the March 26, 2010, meeting, Petitioner McCoy and Grishkevich executed a "Retainer Agreement" wherein McCoy retained Grishkevich & Curtis to provide "legal services concerning a wrongful death action/malpractice issue and removal of personal representative."[18] The "wrongful death/malpractice issue" dealt with the potential wrongful death claim on behalf of Mrs. Bain's Estate, while the "removal of personal representative" dealt with the potential removal of Mr. Bain as the Executor of Mrs. Bain's Estate.[19]

The Respondent was not an employee of Grishkevich & Curtis when the March 26, 2010, Retainer Agreement was signed.[20] It was not until the instant litigation that the Respondent was made aware of the March 26, 2010, Retainer Agreement and a potential wrongful death claim.[21] Petitioner McCoy agreed that the Respondent was not in any way associated with the March 26, 2010, Retainer Agreement:

> Q: All right ... Do you agree with me that Steven Dragisich's name is not on [the March 26, 2010] Retainer Agreement?
>
> A: No, it is not.

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[16] Id.

[17] App. 175-176.

[18] App. at 175; App. at 196.

[19] App. at 175-176.

[20] App. at 199.

[21] App. at 209.

Q: Okay. You agree with me that Steven Dragisich was not a party to this Retainer Agreement?

A: No, he was not.

Q: And he was not your lawyer, with respect to this Retainer Agreement; correct?

A: Not that I knew of.[22]

Shortly after executing the March 26, 2010 Retainer Agreement, Grishkevich sent Mr. Bain a letter dated April 29, 2010, requesting that Mr. Bain voluntarily remove himself as the Executor of Mrs. Bain's Estate.[23] Grishkevich explained that if Mr. Bain's son provided negligent care to Mrs. Bain while she was at Acuity, Mr. Bain would have a conflict of interest pursuing a wrongful death claim on behalf of Mrs. Bain's Estate.[24] In response to that letter, Mr. Bain retained the law firm of Frankovitch, Anetakis, Colantonio & Simon in order to investigate the merits of a wrongful death claim on behalf of Mrs. Bain's Estate. On May 5, 2010, Eric Frankovitch sent Grishkevich a letter explaining that he had met with Mr. Bain and that "on behalf of Mr. Bain as Executor of the Estate of Hilda I. Bain," Frankovitch would "investigate the merits of the medical malpractice or wrongful death suit against" Mrs. Bain's medical providers.[25] Frankovitch also represented to Grishkevich that Mr. Bain's son did not provide any medical care to Mrs. Bain.[26]

Frankovitch's law firm obtained Mrs. Bain's medical records, consulted an expert, and ultimately declined to pursue any wrongful death/medical malpractice claim on behalf of Mrs.

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[22] App. at 178.

[23] App. at 212-213.

[24] Id.

[25] App. at 215.

[26] Id.

Bain's Estate. In a letter dated December 3, 2010, Frankovitch explained to Mr. Bain that Mrs. Bain's pre-existing medical conditions were too severe for a viable wrongful death claim based on medical negligence, but he also encouraged Mr. Bain to contact Grishkevich for a second opinion:

> Dear Mr. Bain ... Unfortunately, our expert advised us that due to the previous medical complications both before and after the surgery to replace the mitral valve, he does not think that we can successfully recover a claim for medical negligence. His concerns are the problems [that Hilda had] with chronic obstructive pulmonary disease, congestive heart failure, and then the subsequent need for dialyses due to kidney failure and pneumonia . . .
>
> I am sorry that we will not be able to represent you in this matter. However, I have been contacted [by] Marcy Grishkevich who may still be interested in pursuing this claim . . . As the executor of the Estate, you have the authority to bring a claim on behalf of Hilda [and] you may want to talk with Mrs. Grishkevich about pursuing a claim . . .[27]

Mr. Bain took Frankovitch's advice and sought to retain Grishkevich to investigate a potential wrongful death claim on behalf of Mrs. Bain's Estate. Grishkevich then discussed this situation with Petitioner McCoy, and she consented to Grishkevich's representation of Mr. Bain in connection with the potential wrongful death claim:

> Q: Okay. Okay. So did you or Diane [Swango][28] ever object to [Grishkevich] wanting to bring Bain [Sr.] on board as a client?
>
> A: No.
>
> Q: Okay. Okay. So, you consented to [Grishkevich's representation of Bain Sr.]?
>
> A: For him to come on board? Yes.[29]

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[27] App. at 216-217.

[28] Diane Swango is also a biological child of Hilda Bain. Petitioner McCoy testified that Grishkevich was authorized to communicate with either her or Diane Swango throughout the underlying matter. App. at 179-180.

[29] App. at 181-182.

With Mr. Bain's retention of Grishkevich & Curtis, the scope of representation with Petitioners obviously changed because there was no longer any need to remove Mr. Bain as the Executor of Mrs. Bain's Estate. To memorialize this change, Grishkevich drafted a second Retainer Agreement so that Petitioner McCoy would be fully aware that Mr. Bain was retaining Grishkevich and, thus, Grishkevich would not be seeking to remove Mr. Bain as the Executor of Mrs. Bain's Estate:

> Q: Why did you have Mrs. McCoy sign the [second] Retainer Agreement?
>
> A: ... She signed it so that she was fully aware of what was going on, and that [Bain Sr.] was corning in to retain my services for a possible medical malpractice claim. I was no longer going to be removing him, and that I wanted her to be aware of the same.[30]

Petitioner McCoy executed the second Retainer Agreement on January 3, 2011, wherein she retained Grishkevich & Curtis to "Provide legal services concerning an incident regarding the Estate of Hilda I. Bain."[31] Approximately two weeks later, on January 17, 2011, Mr. Bain executed a separate Retainer Agreement wherein he likewise retained Grishkevich & Curtis to "Provide legal services concerning an incident regarding the Estate of Hilda I. Bain."[32] Thereafter, on January 24, 2011, Grishkevich sent a letter to Petitioner McCoy advising her that Mr. Bain had formally retained Grishkevich & Curtis in connection with the potential wrongful death claim.[33]

As noted above, **the Respondent was not an employee of Grishkevich & Curtis when the Petitioner and Grishkevich executed the initial March 26, 2010, Retainer Agreement**.

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[30] App. 220-221.

[31] App. at 231.

[32] App. at 232.

[33] App. at 233-234.

The Respondent joined Grishkevich & Curtis as an associate attorney in August of 2010.[34] The Respondent's legal services at Grishkevich & Curtis were limited to bankruptcies, divorces, and occasionally, administrative estate work.[35]

The Respondent believes that sometime in January of 2011, his supervisor, Grishkevich, briefly introduced him to Petitioner McCoy and directed the Respondent to sign the second Retainer Agreement because Grishkevich "**may need**" the Respondent to work on the matter in the future:

> Q: Do you remember what was discussed about [the second Retainer Agreement at the time it was signed]?
>
> A: Well, I told you what was discussed. [Grishkevich] had come out of the meeting [with Petitioner McCoy]. We had a conference room, and I had an office that was about 15 yards away or whatever. [Grishkevich] had popped in [my office] and said, 'Hey, I want you to meet a client [McCoy] I have. I may need you to do some work on it, so I want you to meet her and sign off on an agreement we're entering into.' And I said, 'Okay.' That was the gist of it. And I believe [Grishkevich] and [Plaintiff] McCoy signed at the same time, as well.[36]

Thus, **at the direction of Grishkevich**, the Respondent signed the second Retainer Agreement.[37]

While the Respondent recalls one brief introduction to Petitioner McCoy as described above, **Petitioner McCoy testified that she never met or communicated with the Respondent** at any time and that when she [Petitioner McCoy] signed the second Retainer Agreement, the

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[34] App. at 199, 202.

[35] App. at 199-202.

[36] App. at 203-204.

[37] App. at 231. As Grishkevich had already been retained by the Petitioners, this second Retainer Agreement was redundant, but apparently Grishkevich believed that if the Respondent was going to work on the matter - which ultimately, he never did - he also needed to sign a retainer agreement.

Respondent was not present.[38] Regardless of whether the Respondent briefly met Petitioner McCoy in January of 2011, it is undisputed that **the Respondent never performed any work whatsoever on the McCoy file because his supervisor, Grishkevich, never directed him to do so**.[39]

It is also undisputed that at no time did anyone communicate to the Respondent that the McCoy retention involved a possible wrongful death claim on behalf of Mrs. Bain's Estate.[40] Unlike the March 26, 2010, Retainer Agreement, of which the Respondent was never aware, the second Retainer Agreement did not mention wrongful death or medical malpractice. The Respondent believed that the second Retainer Agreement was limited to administrative estate work on behalf of Mrs. Bain's Estate:

> Q: What was your understanding of what legal services were going to be provided [in the second Retainer Agreement]?
>
> A: Estate work.
>
> Q: What kind of estate work?
>
> A: Administrative estate work, preparing fee or appraisements, dealing with any will contest, notifying beneficiaries, doing final accountings, dealing with any claims by creditors, whether it be medical claims or credit cards or- I mean, I do a lot of those now, too, and Ideal with a lot. That was my understanding then, as well . . .[41]

Approximately three months after the Respondent signed the second Retainer Agreement on behalf of Grishkevich & Curtis, and without having done any work on the

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[38] App. at 183-186.

[39] App. at 208; App. at 222.

[40] App. at 208, 210-211.

[41] App. at 206.

matter, he resigned from Grishkevich & Curtis to form his own law firm, Dragisich Law Office, PLLC.

Shortly thereafter, on April 15, 2011, Marcy Grishkevich and Michael Curtis, as Members/Owners of Grishkevich & Curtis, and the Respondent, as the Member/Owner of Dragisich Law Office, PLLC, entered into an Agreement outlining which files the Respondent would take to his newly established law practice.[42] Pursuant to that Agreement, **both the Petitioners' file and Mr. Bain's file (e.g. the files relating to Mrs. Bain's Estate) remained the "sole property and responsibility of Grishkevich & Curtis."**[43] Indeed, on August 30, 2011, Grishkevich sent Petitioner McCoy a letter specifically advising her that the law firm of Grishkevich & Curtis had been dissolved and that Grishkevich and her paralegal, Melissa Miller, were still handling the potential claim in connection with Mrs. Bain's Estate.[44]

Grishkevich, without any knowledge on the part of the Respondent, took certain steps to investigate a potential wrongful death claim on behalf of Mrs. Bain's Estate. Among other things, Grishkevich obtained medical authorizations from Mr. Bain and began gathering such records.[45] She also consulted a nurse practitioner concerning Mrs. Bain's medical records.[46] For reasons that remain unknown because Mr. Bain is now deceased, Mr. Bain stopped

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[42] App. at 156.

[43] Id.

[44] App. at 157.

[45] App. at 222-226.

[46] App. at 227-229.

communicating with both Grishkevich and the Petitioners.[47] Grishkevich attempted to contact Mr. Bain on multiple occasions, all to no avail.[48]

Thereafter, on January 10, 2012, Grishkevich sent Mr. Bain a letter advising him that the anniversary of Mrs. Bain's death was approaching and urging him to contact her so the case could proceed.[49] Mr. Bain did not respond, which prompted Grishkevich to send Mr. Bain another letter, this one dated January 21, 2012, wherein Grishkevich advised Mr. Bain that she was interpreting his failure to respond to her to mean that he did not wish to file any lawsuit.[50] Grishkevich copied Petitioner McCoy's sister, Diane Swango, on both the January 10 and January 21 letters.[51] Mr. Bain did not respond, and the case did not go forward.

Despite all of this, the Petitioners filed suit against not only Grishkevich, but also against the Respondent with whom they never communicated and who never had anything whatsoever to do with the pursuit of a wrongful death/medical malpractice claim, alleging negligent failure to file such claim on behalf of Mrs. Bain's Estate within the applicable statute of limitations.

B. CIRCUIT COURT'S DECISION

After a period of discovery and briefing by the parties, the Circuit Court granted summary judgment to the Respondent by Memorandum Order dated December 29, 2015.[52] The Circuit Court concluded that the existence of an attorney-client relationship is not determined by the

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[47] App. at 222-226.

[48] Id.

[49] App. at 241.

[50] App. at 243-244.

[51] App. at 241, 243-244. Once again, Grishkevich communicated with either Diane Swango or Petitioner McCoy in the underlying matter. App. at 179-180.

[52] App. at 361-370. Eventually, the other defendants settled and no longer have any exposure in this case.

Rules of Professional Conduct under well-established West Virginia law.[53] Instead, West Virginia common law governs the formation of the attorney-client relationship.[54]

The Circuit Court found that the case did not involve vicarious liability because, as a matter of law, the Respondent cannot, as an agent, be held liable for the acts of the principal, and, thus, as an employed associate, cannot be held vicariously liable for the alleged misconduct of a principal attorney such as Grishkevich.[55] The Circuit Court further found that this case did not involve any fee-splitting agreement, any conflicts of interest, or any agreements concerning any continuing obligations on the part of the Respondent regarding a matter on which he had never worked.[56]

Ultimately, the Circuit Court held that the Respondent is entitled to summary judgment because no attorney-client relationship was established after he signed the second Retainer Agreement.[57] Based upon West Virginia law 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[58] but that "[t]he determination of the existence of an attorney-client

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[53] Id. at 3-4. See also W. Va. R. Prof. Cond., Scope (version prior to 2014/2015 amendments) (Alleged "[v]iolation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.")

[54] Id. (citing *State ex rel. DeFrances v. Bedell*, 191 W. Va. 513, 517, 446 S.E.2d 906, 910 (1994); *State ex rel. Bluestone Coal Corp. v. Mazzone*, 226 W. Va. 148, 159-60, 697 S.E.2d 740, 751-52 (2010)).

[55] Id. at 4 (citing Ronald E. Mallen, LEGAL MALPRACTICE § 5:41 (2015 ed.); *Standage v. Jaburg & Wilk, P.C.*, 866 P.2d 889 (Ariz. Ct. App. 1993)).

[56] Id. at 4.

[57] Id. at 4-8.

[58] Id. at 4 (citing *DeFrances*, supra at 517, 446 S.E.2d at 910).

relationship depends on each case's specific facts and circumstances,"[59] the Circuit Court examined the undisputed relevant facts in the case with the written contract signed by the Respondent. The specific undisputed facts and circumstances most important to the Circuit Court's reasoning were outlined in its Memorandum Order as follows:[60]

1. The Respondent was employed with Grishevich & Curtis for a little more than three months after he signed the second Retainer Agreement dated January 3, 2011.
2. The Respondent was an associate acting at the direction of Grishkevich.
3. Neither Petitioner McCoy nor Mr. Bain knew the Respondent when they came to the office to sign their retainer agreements and they came with the specific intention of having Grishkevich represent them.
4. The Respondent, an associate, did not investigate or pursue the case in the three months before he left the firm.
5. In the three months that the Respondent 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 Petitioners' case after the Respondent left the firm.
7. Both the January 3, 2011 Retainer Agreement with Petitioner McCoy and the January 17, 2011 Retainer Agreement with Mr. Bain said the clients were retaining and employing attorney to: "Legal Services [to] . . . provide legal services concerning the incident regarding" Mrs. Bain's Estate. Neither agreement said anything about a wrongful death medical malpractice lawsuit.
8. The Respondent was never made aware of a potential wrongful death medical malpractice claim.
9. There is a Petition that was drafted to remove Mr. Bain as the personal representative of Mrs. Bain's Estate dated January 7, 2011 and although never filed, the Petition only refers to Grishkevich as counsel for Petitioner McCoy and the Respondent's name is not mentioned anywhere in the Petition.
10. The statute of limitations had not run when the Respondent left the firm on April 15, 2011.

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[59] Id. (citing *DeFrances*, supra at 517, 446 S.E.2d at 910).

[60] Id at 5-6.

11. When, in August of 2011, Grishkevich & Curtis closed its offices, Grishkevich told Petitioner McCoy that 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.

In *Lawyer Disciplinary Board v. Barry J. Nace*,[61] this Court stated:

> [W]e 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. 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 and relating to the subjet of the employment will be governed by the rules applicable to such relation.

Thus, the Circuit Court correctly held that, "*Keenan* . . . 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."[62] Applying the specific uncontested relevant facts of the case to these two elements, the Circuit Court found that "there never was the formation of an attorney-client relationship between Mr. Dragisich and the Plaintiffs" because

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

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[61] 232 W. Va. 661, 753 S.E.2d 618 (2013).

[62] Memorandum Order at 6.

> 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.[63]

The Circuit Court concluded, "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 the 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."[64] The Circuit Court further noted that the practice of law, the size of law firms, and the employment of young lawyers are much different today than they were in 1908 when *Keenan* was decided:

> 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.[65]

Although the Circuit Court's decision is well-supported by the record evidence and the governing law, the Petitioners have nevertheless appealed seeking to impose malpractice liability on an attorney who never worked on their matter.

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[63] Id. at 6-7.

[64] Id. at 7.

[65] Id. at 7-8

II. SUMMARY OF ARGUMENT

The Circuit Court correctly held that the Petitioners' legal malpractice claim against the Respondent failed as a matter of law because the undisputed facts and circumstances did not establish any attorney-client relationship between the Petitioners and the Respondent. Absent the existence of any legal duty of care by the Respondent to the Petitioners, there can be no breach and no negligence.

The Respondent served only as an associate attorney at Grishkevich & Curtis for a mere eight months, and at no time did anyone communicate to him that he had any obligations whatsoever with respect to a wrongful death claim on behalf of Mrs. Bain's Estate. The Respondent's supervisor, Marcy Grishkevich, who was an owner of Grishkevich & Curtis, controlled every aspect of the Petitioners' file and never delegated any duties to the Respondent. In fact, the Respondent never had any communications with the Petitioners.

It is undisputed that the Respondent resigned from Grishkevich & Curtis before the two-year statute of limitations ran for any wrongful death claim in connection with Mrs. Bain's death, and Grishkevich & Curtis retained sole responsibility over the Petitioners' file.

Furthermore, it is undisputed that the Petitioners had no standing to pursue a wrongful death claim because they had no fiduciary rights or obligations in connection with Mrs. Bain's Estate. Instead, Mrs. Bain's long-time husband, Richard Bain Sr., as the Executor of Mrs. Bain's Estate, was the only individual who had standing to pursue a wrongful death claim, and Mr. Bain ultimately decided not to move forward with the claim. Thus, any claim that the Petitioners may have for failing to pursue a wrongful death claim lies against Mr. Bain, not the Respondent.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent submits that the resolution of the appeal without oral argument under R. App. P. 21(c) is appropriate where no substantial question of law is presented, no prejudicial error has been identified and, under the applicable standard of review and record presented, summary affirmance is warranted.

IV. ARGUMENT

A. STANDARD OF REVIEW

Upon appeal, "[a] circuit court's entry of summary judgment is reviewed *de novo*."[66] Because de novo review supports the award of summary judgment to the Respondent, this Court should affirm the judgment of the Circuit Court of Hancock County.

B. THE CIRCUIT COURT CORRECTLY HELD THAT THE PETITIONERS HAD NO ATTORNEY-CLIENT RELATIONSHIP WITH THE RESPONDENT.

The Petitioners' underlying case and Brief rely heavily upon alleged violations of the Rules of Professional Conduct[67] without any supporting evidence or authority and based upon an "expert report" that is filled with impermissible legal conclusions, credibility findings, speculation, and various other conclusions that are improper for expert testimony.[68]

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[66] Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

[67] The Petitioners' Brief references the "Rules of Professional Responsibility," see, e.g., Petitioner's Brief at 5. Effective on and after January 1, 1989, the Rules of Professional Conduct replaced the Code of Professional Responsibility. The Rules were then significantly amended by the Supreme Court of Appeals by an order dated September 29, 2014, effective January 1, 2015. Given the dates involved in this case, any specific Rule referenced or quoted in this brief will be the version prior to the 2014/2015 amendments.

[68] See *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 644, 600 S.E.2d 346, 356 (2004)("[A]s a general rule, an expert witness may not give his or her opinion on the interpretation of the law . . . ."); *In re Potts*, 158 P.3d 418, 429 (Mont. 2007)("Expert opinions that state a legal conclusion or apply the law to the facts are inadmissible."); *Reeves v. Kmart Corp.*, 582 N.W.2d 841, 845-46 (Mich. Ct. App. 1998) ("The duty to interpret and apply the law has been allocated to the courts, not to the parties' expert witnesses."); *Breezy Point Co-op., Inc. v. Cigna Property and Cas. Co.*, 868 F. Supp. 33, 36

For example, the Petitioners contend that the Respondent is liable as an employee of a professional limited liability company under Rule 5.8(b) of the Rules of Professional Conduct addressing "Limited Liability Legal Practice," which 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.

Similarly, the Petitioners rely on W. Va. Code § 31B-13-1305(d), which states:

> [N]otwithstanding 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.

The Petitioners' "expert" then opines that the Respondent's signature, alone, on the second Retainer Agreement "constituted personal participation in this legal matter."[69] The Petitioners ignore the very provisions upon which they rely that recognize that the Respondent can be held personally liable only for his own errors and/or negligent acts or omissions in which he personally participated.

The Petitioners further ignore unequivocal evidence that shows that the Respondent did not personally participate in the alleged negligent failure to file a wrongful death claim on behalf of Mrs. Bain's Estate within the applicable statute of limitations, such as (1) the Respondent was an associate employee at Grishkevich & Curtis who had no knowledge whatsoever of the March

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(E.D.N.Y.1994)("[A]n expert is prohibited from offering his opinion . . . drawing legal conclusions concerning whether a defendants behavior violates statutory provisions and offering 'conclusions as to the legal significance of various facts adduced at trial.'")(citation omitted); *In re Initial Pub. Offering Sec. Litig.*, 174 F. Supp.2d 61, 69 (S.D.N.Y. 2001) (author of leading textbook on legal ethics not qualified to testify in recusal motion of judge because issue was one of law). See also 4 WEINSTEIN'S FEDERAL EVIDENCE § 704.04[1] (expert testimony regarding the existence of a legal duty is generally inadmissible).

[69] Petitioners Brief at 5; App. at 295.

26, 2010, Retainer Agreement or any wrongful death claim on behalf of Mrs. Bain's Estate; (2) the Respondent had no knowledge or control over any aspect of the wrongful death claim; (3) the Respondent resigned his employment with Grishkevich & Curtis long before the statute of limitations ran in connection with the wrongful death claim; and (4) Grishkevich & Curtis retained "sole responsibility" for the Petitioners' case of which Petitioner McCoy was advised.

A second example is the Petitioners' contention that the Respondent did not provide "conflict free" representation because "potential" conflict could have arisen between Mr. Bain and the Petitioners is factually and legally flawed.[70]

Factually, the Petitioners completely ignore unequivocal evidence, such as Petitioner McCoy specifically testifying that she agreed that Grishkevich & Curtis could be retained by Mr. Bain to investigate the potential wrongful death claim,[71] and shortly after Mr. Bain retained Grishkevich & Curtis, Grishkevich sent Petitioner McCoy a letter dated January 24, 2011, specifically advising that Mr. Bain also had retained Grishkevich & Curtis.[72]

Legally, there is nothing inherently wrong with accepting representation where there is a "potential" that a conflict may arise. "Unlike an actual conflict of interest . . . a potential conflict of interest does not require disqualification of counsel."[73] There are a myriad of circumstances under which potential conflicts may or may not come to fruition during the course of a representation, and an attorney is not disqualified or otherwise required to refuse representation

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[70] See Petitioners' Brief at 13-14.

[71] App. at 181-182.

[72] App. at 232 and 233-234.

[73] *In re Universal Enteprises of W. Va., L.L.C.*, 09-2862, 2010 WL 2403354 (Bank. N.D. W. Va. June 9, 2010) (holding that the law firm was not disqualified from representing two bankruptcy debtors simply because there was a potential that a conflict could arise between the debtors).

based on the mere potential that a conflict may arise at some point in the future, particularly when, as in the instant case, both clients consented to the dual representation.

Likewise, it is undisputed that the Respondent had no knowledge whatsoever of a "potential conflict" between the Petitioners and Mr. Bain, and any knowledge that Grishkevich might have had about any such conflict cannot be imputed to the Respondent. By the time Mr. Bain allegedly stopped communicating with Grishkevich, which might have led to a "potential" conflict between the Petitioners and Mr. Bain, the Respondent was no longer employed as an associate at Grishkevich & Curtis.

A third example is the Petitioners' contention that the Respondent improperly failed to advise them when he left Grishkevich & Curtis.[74] Again, the Petitioners completely ignore unequivocal evidence that (1) on April 15, 2011, Grishkevich, Curtis, and the Respondent entered into an Agreement outlining which files the Respondent would take to his newly established law practice;[75] (2) pursuant to that Agreement, **both the Petitioners' file and Mr. Bain's file (e.g. the files relating to Mrs. Bain's Estate) remained the "sole property and responsibility of Grishkevich & Curtis;"**[76] and (3) on August 30, 2011, Grishkevich sent Petitioner McCoy a letter specifically advising her that the law firm of Grishkevich & Curtis had been dissolved and that Grishkevich and her paralegal, Melissa Miller, were still handling the potential claim in connection with Mrs. Bain's Estate.[77]

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[74] Petitioners' Brief at 14.

[75] App. at 235-238.

[76] Id.

[77] App. at 239-240.

Regardless, this is a legal malpractice case, and the Rules of Professional Conduct are not intended to establish the standard of care in civil proceedings. Indeed, the Scope of the West Virginia Rules of Professional Conduct specifically states that an alleged "[v]iolation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability."[78]

Accordingly, the Circuit Court correctly concluded that the existence of an attorney-client relationship is **not** determined by the Rules of Professional Conduct under well-established West Virginia law.[79] Rather, the formation of the attorney-client relationship is governed by West Virginia common law.[80]

The Petitioners complain that "[t]he Circuit Court gave no weight to the existence of the signed Retainer Agreement as a factor evidencing the creation of an attorney client relationship."[81] To the contrary, the Circuit Court explicitly stated in its Memorandum Order:

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[78] W. Va. R. Prof. Cond., Scope (version prior to 2014/2015 amendments); See also Ronald E. Mallen, LEGAL MALPRACTICE § 20:11 (2015 ed) ("With few exceptions, the courts agree that the violation of an ethics rule alone does not create a cause of action, a remedy, constitutes legal malpractice per se or necessarily creates a duty.")

[79] Memorandum Order at 3-4.

[80] Id. (citing *DeFrances*, supra at 517, 446 S.E.2d at 910; *Bluestone*, supra at 159-60, 697 S.E.2d at 751-52)).

[81] Petitioner's Brief at 10 (citing *May v. Seibert*, 164 W. Va. 673, 264 S.E.2d 643, 647 (1980) and *Lawyer Disciplinary Bd. v. Santa Barbara*, 229 W. Va. 344, 729 S.E.2d 179 (2012)). The instant case is a legal malpractice case, not a fee dispute between a lawyer and a client as in *May*, wherein the Court held that although an attorney had prepared a case for trial and the ultimate settlement was for the same figure originally obtained by him, he terminated the attorney-client relationship without good cause and, thus, the attorney fee awarded should be allocated and pro-rated between the withdrawing attorney and another lawyer engaged by the client to complete the work. In formulating its decision, the Court quoted rules of ethics articulated by a New York court that once an attorney-client relationship was established by a

> 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 the 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).
>
> 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.[82]

The Circuit Court then outlined numerous specific undisputed facts and circumstances in the record that were most important to the Circuit Court's reasoning, including those that pertained to the signed Retainer Agreement.[83]

The Circuit Court correctly held that, "*Keenan* . . . requires two actions for the formation of an attorney-client relationship: (1) that the client express a desire to employ the attorney and

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retainer agreement, whether oral or written, the attorney "cannot voluntarily withdraw without just cause. If he does so, then he must pay the penalty forfeiture of his compensation." The instant case also is not a disciplinary proceeding as in *Santa Barbara*, wherein the Court upheld an attorney's one-year suspension for violating the Rules of Professional Conduct that required him to act with reasonable diligence, communicate with clients, keep clients reasonably informed, and properly oversee and manage a client's trust account. Among other failures in other clients' cases, the attorney allowed the statute of limitations to expire on a client's case. The Hearing Panel Subcommittee of the Lawyer Disciplinary Board determined that an attorney-client relationship existed between the attorney and the client based not only upon a written retainer agreement in the attorney's file, but also based upon a signed authorization to obtain the client's medical files, a letter from the attorney to the client about the status of his claim, and testimony that the client attempted to contact the attorney numerous times and was advised on one such occasion by a secretary in the attorney's office that his medical bills were submitted to the insurance company involved. As already discussed, the Rules of Professional Conduct do not establish the standard of care in civil proceedings for legal malpractice. The evidence in this case also shows that Grishkevich was handling the wrongful death claim; the Respondent had no knowledge or control over any aspect of the wrongful death claim; Grishkevich never directed the Respondent to do any work on the wrongful death claim; there was absolutely no communications or attempt to communicate between the Respondent and the Petitioners; all communications occurred between Grishkevich and the Petitioners; and the Respondent was no longer employed by Grishkevich & Curtis when the applicable statute of limitations expired for any potential wrongful death claim on behalf of Mrs. Bain's Estate.

[82] Memorandum Order at 4.

[83] Id at 5-6.

(2) that there be a corresponding consent on the part of the attorney to act for him in a professional matter."[84]

Applying the specific uncontested relevant facts of the case to these two elements, the Circuit Court found that "there never was the formation of an attorney-client relationship between Mr. Dragisich and the Petitioners because:

> 3. 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.
>
> 4. 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."[85]

The Circuit Court concluded, "The question of the existence of a legal duty of care by Mr. Dragisich to the Petitioners that is presented to the court when it is considering the 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 Petitioners, there can be no breach and no negligence."[86]

Based on the law and facts of the case, the Circuit Court correctly determined that the Respondent is entitled to summary judgment because no attorney-client relationship was established and there could be no duties owed after he signed the second Retainer Agreement.[87]

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[84] Memorandum Order at 6.

[85] Id. at 6-7.

[86] Id. at 7.

[87] Id. at 4-8.

C. THE CIRCUIT COURT CORRECTLY HELD THAT THE RESPONDENT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW RELATIVE TO A MALPRACTICE CLAIM REGARDING A MATTER ON WHICH HE NEVER WORKED.

To prevail on their claim for legal malpractice against the Respondent, the Petitioners must establish: (1) that the Respondent was retained and therefore owed a duty to pursue a wrongful death claim on behalf of Mrs. Bain's Estate; (2) that the Respondent breached that duty of care by failing to file a wrongful death claim in connection with Mrs. Bain's Estate; and (3) that such breach resulted in and was the proximate cause of the Petitioners' alleged damages.[88] The Petitioners cannot meet this burden as a matter of law; therefore, the Circuit Court correctly awarded summary judgment to the Respondent.

1. The Petitioners Cannot Establish that the Respondent Breached Any Duty of Care to the Petitioners.

It is undisputed that the Respondent was an associate employee at Grishkevich & Curtis who had no knowledge whatsoever of the March 26, 2010, Retainer Agreement or any wrongful death claim on behalf of Mrs. Bain's Estate. The Respondent cannot be held liable for the breach of a duty that was never communicated to him, particularly when he had no knowledge or control over any aspect of the wrongful death claim. Furthermore, it is undisputed that the Respondent resigned from his employment with Grishkevich & Curtis long before the statute of limitations ran in connection with the wrongful death claim and that Grishkevich & Curtis retained "sole responsibility" for the Petitioners' case.

Because the alleged breach occurred when the Respondent was no longer associated with Grishkevich & Curtis, the Respondent cannot be held liable for such breach.

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[88] *Keister v. Talbott*, 182 W. Va. 745, 748-49, 391 S.E.2d 895, 898-99 (1990).

2. The Respondent Had No Knowledge or Control Over the Wrongful Death Claim; Therefore, He Cannot Be Held Liable for the Failure to Pursue Such Claim.

It is well-settled law that "an attorney cannot be liable for failing to do what there was no duty to undertake."[89] It is equally well-settled, as the Circuit Court correctly found, that, as a matter of law, the Respondent cannot, as an agent, be held liable for the acts of the principal, and, thus, as an employed associate, cannot be held vicariously liable for the alleged misconduct of a principal attorney such as Grishkevich.[90] Because Grishkevich's alleged conduct cannot be imputed to the Respondent and the Respondent was an associate employee of Grishkevich & Curtis who exercised no control over any wrongful death claim, he was entitled to summary judgment.[91]

The March 26, 2010, Retainer Agreement is the only document in this case that references a "wrongful death" or "medical malpractice" action in connection with Mrs. Bain's Estate, and the Petitioners do not dispute that the Respondent had absolutely nothing to do with that retention.[92] The only document that the Respondent was aware of was the second Retainer Agreement, which did not reference any wrongful death or medical malpractice action. The Respondent never communicated with the Petitioners, and he testified that he believed that Grishkevich directed him to sign the second Retainer Agreement to assist with any

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[89] Ronald Mallen, LEGAL MALPRACTICE § 8:3 (2015 Edition) (citations omitted). The Mallen treatise is a leading authority on legal malpractice that has been relied upon by this Court in adjudicating various legal malpractice cases. *See, e.g., Calvert v. Scharf*, 21 W. Va. 684, 619 S.E.2d 197 (2005); *VanSiclcle v. Kohout*, 215 W. Va. 433, 599 S.E.2d 856 (2004); *Smith v. Stacy*, 198 W. Va. 498, 482 S.E.2d 115 (1996).

[90] Id. at 4 (citing Ronald E. Mallen, LEGAL MALPRACTICE § 5:41 (2015 ed.); *Standage*, supra.

[91] See *Myers v. Muey*, 915 P.2d 940 (Okl. Ct. App. 1996).

[92] App. at 178.

administrative estate work that may have been necessary in connection with Mrs. Bain's Estate.[93] He simply was not aware of any wrongful death or medical malpractice action, and he cannot be held liable for breaching a duty that was never communicated to him.[94]

For example, in *Myers v. Maxey*,[95] the plaintiffs sued two attorneys, Eva Maxey and John Preston, alleging that they negligently failed to finalize the last will and testament of the plaintiffs' decedent, Escal Myers. After Escal suffered a stroke, his wife Betty was appointed as his legal guardian. hereafter, Betty met with attorneys Maxey and Preston and asked them to prepare an estate plan for both Escal and Betty, among other legal services. After meeting with Betty, Maxey and Preston sent an engagement letter to Betty summarizing the services that they agreed to perform, including the estate planning work. Although Preston signed the engagement letter and discussed certain aspects of Escal's Last Will and Testament with Maxey, it was Maxey who drafted Escal's Will and ultimately exercised control over that portion of the legal work.

After Escal died, the Probate Court refused to admit his Last Will and Testament because Escal did not acknowledge and execute it in front of a probate judge as required by Oklahoma law for individuals subject to a guardianship. As a result, the plaintiffs received a significantly smaller share of Escal's estate than they would have received under Escal's Will.

Plaintiffs sued both Maxey and Preston, claiming that they negligently failed to advise them of Oklahoma law and negligently failed to ensure that Escal's Will was properly executed. The lower court granted Preston's motion for a directed verdict, and the Oklahoma Court of

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[93] App. at 206.)

[94] See Ronald Mallen, LEGAL MALPRACTICE § 8:3 (2015 Edition).

[95] 915 P.2d 940, 942 (Okl. Ct. App. 1996)

Appeals upheld that ruling because Preston was an employee attorney at the firm and did not possess control over the preparation of the will:

> Appellants contend [that the lower court erred in granting Preston's motion] because Preston met with Betty Myers on two occasions, and [even] wrote a letter summarizing the firm's undertakings on Escal's behalf. He also discussed the applicability of [the relevant Oklahoma statute pertaining to the execution of wills by individuals subject to a guardianship] with Maxey on one occasion, and admitted that he did not caution her to have the will subscribed and acknowledged in front of a judge. We agree [] that this evidence was insufficient to render Preston either directly or vicariously Hable ••. [Preston] was not a principle in the law firm (i.e., not a shareholder, director, or officer), and he did not possess or exert any direction or control over the preparation of the will ...We therefore affirm the judgement in favor of Preston.[96]

The *Myers* case is analogous to the instant action. As in *Myers*, the Respondent was an associate employee who exercised no control whatsoever over any wrongful death claim in connection with Mrs. Bain's Estate. The Respondent was not an employee of Grishkevich & Curtis when the March 26, 2010, Retainer Agreement was executed and did not become aware of the document until the Petitioners filed their complaint in this case. Finally, the Petitioners never contacted the Respondent and there was never any correspondence or communications between the Petitioners and the Respondent regarding the matter.

While the Petitioners contend that the Respondent is somehow automatically liable because his employer, Grishkevich, directed him to sign the second Retainer Agreement, the trial court in *Myers* specifically rejected similar arguments. The plaintiffs in *Myers* argued for liability against attorney Preston because he attended two meetings with the plaintiffs and even sent them an engagement letter that summarized the scope of the representation, yet the trial court refused to impose such liability because Preston was not an owner/shareholder and did not exercise

[96] *Myers*, supra at 944.

control over the legal work at issue. The instant case is even more compelling because the Respondent was not an owner/shareholder, never met with the Petitioners, never had any knowledge of the wrongful death claim, and indisputably did not have any control over the claim. Thus, as in *Myers*, the Petitioners' claims against the Respondent fail as a matter of law, and he was entitled to summary judgment.

The Petitioners attempt to impose liability on the Respondent also runs contrary to the well-settled principle of agency law that an employee cannot be held liable for the acts of the employer. It is undisputed that the Respondent executed the second Retainer Agreement at the direction of his supervisor, Grishkevich, and on behalf of Grishkevich & Curtis. The Respondent's involvement with the Petitioners stems from the fact that Grishkevich walked into his office unexpectedly, explained that she "may need" some help on the case, and directed him to sign the agreement. The Respondent was acting within the scope of his employment and at the specific direction of his employer. Grishkevich never advised him of a wrongful death claim and never directed him to do any work whatsoever on the case. In fact, when Grishkevich was questioned as to why she directed her associate to sign the second Retainer Agreement, Grishkevich indicated that he was "in the wrong place at the wrong time."[97] The Respondent cannot be held liable under such circumstances.

In sum, it is unrefuted that the Respondent had no knowledge of or control over the wrongful death claim, and always acted at the direction of his employer, Grishkevich. Accordingly, the Respondent was entitled to summary judgment.

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[97] App. at 230.

3. The Respondent was not Associated with Grishkevich & Curtis when the Statute of Limitations for a Wrongful Death Claim Expired.

It is well-settled that a "claim for legal malpractice must be based on an attorney-client relationship that existed" at the time of the alleged breach.[98] In most circumstances, whether an attorney-client relationship is formed is a question of law, and not a question of fact.[99]

A wrongful death claim must be brought within two years from the date of death.[100] As discussed above, Mrs. Bain died on January 19, 2010. So, the statute of limitations for a wrongful death claim in connection with Mrs. Bain's Estate would have run on January 19, 2012. The Petitioners therefore must establish that they shared an attorney-client relationship with the Respondent in January of 2012, which they cannot meet.

It is unquestioned that the Respondent resigned from Grishkevich & Curtis in April of 2011, and pursuant to the April 15, 2011, Agreement, the Petitioners' file remained the "sole property and responsibility of Grishkevich & Curtis."[101] Thus, the Respondent had been totally disassociated with Grishkevich & Curtis for almost nine months when the statute of limitations ran. Moreover, on August 30, 2011, Grishkevich sent Petitioner McCoy a letter specifically advising her that the entire firm of Grishkevich & Curtis was dissolving and that Grishkevich and her paralegal, Melissa Miller, were keeping the Petitioners' file.[102]

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[98] See Ronald Mallen, LEGAL MALPRACTICE § 8:3 (2015 Edition).

[99] See Id. at § 8:4; *see also Jackson v. Putnam County Bd. of Education*, 221 W. Va. 170, 175, 653 S.E.2d 632, 637 (2007) (noting that the issue of whether a duty of care is owed is "a legal matter to be resolved by adjudication, rather than a factual question.").

[100] See W. Va. Code § 55-7-6(d); Ohio Rev. Code § 2125.02(D)(l).

[101] App. at 235-238.

[102] App. at 239-240.

The Respondent had nothing to do with the Petitioners' file when he was employed at Grishkevich & Curtis, and when he resigned from Grishkevich & Curtis, his supervisor Grishkevich maintained sole responsibility for the Petitioners' file. The Petitioners cannot establish that they shared an attorney-client relationship with the Respondent when the statute of limitations ran; therefore, the Respondent was entitled to summary judgment.[103]

In *Devereux v. Love*,[104] for example, clients brought a legal malpractice action against an attorney in conjunction with his representation of them with another attorney who was subsequently sentenced to prison for defrauding the clients. The clients alleged that the departing attorney breached the standard of care by failing to advise them about any suspicions he may have had regarding the fraudster's conduct when he terminated his employment with the firm. Rejecting this theory, the court held:

> The designated evidence reveals that by the time Devereux learned that Conour had mishandled active cases, Devereux had not served as the Loves' attorney for nearly two months. Importantly, Jim admitted that as of December 29, 2011, he knew that Devereux was no longer his attorney. Jim's admission undercuts his and Diana's claim on appeal that Devereux remained their attorney or retained some duty to them after he left the firm. As such, in this regard, we conclude that no issue of material fact remains that would preclude an award of summary judgment in favor of Devereux.[105]

Likewise, under circumstances like this case, clients brought a legal malpractice action arising from an alleged missed statute of limitations in *Estate of Mitchell v. Dougherty*,[106] against both the clients' current and former attorneys. As in this case, one of the attorneys employed by the law firm originally retained left and upon the attorney's departure, the case was retained by

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[103] See Ronald Mallen, LEGAL MALPRACTICE § 8:3 (2015 Edition).

[104] 30 N.E.3d 754 (Ind. Ct. App. 2015).

[105] *Devereux*, supra at 765-766.

[106] 249 Mich. App. 668, 644 N.W.2d 391 (2002).

the original firm. Also, as in this case, the departing attorney "did not provide any professional services for plaintiffs following" his "departure from the firm."[107] The clients in *Mitchell* relied on the fact that the departing attorney had signed a retainer agreement, but the court rejected that argument as follows:

> Specifically, plaintiffs argue that at the time they signed the contingency agreement with defendant attorneys, the attorneys were acting in a representative capacity for the firm, and the attorneys' disassociation with the firm did not terminate the relationship between plaintiffs and the firm . . .
>
> A client's employment of one member of a law firm is generally deemed to be employment of the firm itself. MCR 2.117(B)(3); *Plunkett & Cooney, PC v. Capitol Bancorp Ltd.*, 212 Mich. App. 325, 329, 536 N.W.2d 886 (1995). Defendant law firm does not dispute that an attorney-client relationship existed between it and plaintiffs at the time that plaintiffs entered into a contingency fee agreement with defendant attorneys. Instead the firm argues that its representation of plaintiffs ceased when defendant attorneys left the firm and assumed responsibility for plaintiffs' case.
>
> Defendant law firm further argues that where a firm ceases to represent a client and the client acquires new counsel before the applicable limitation period expires, the [former] firm is not liable for the failure to file an action before the expiration of the limitation period, citing *Boyle v. Odette*, 168 Mich. App. 737, 425 N.W.2d 472 (1988) . . .
>
> On the basis of our holding in *Boyle*, we would agree with defendant law firm that it could not be liable for the failure to pursue or timely file a claim where its representation of plaintiffs had ceased before the applicable period of limitation expired on the claim. . .
>
> In view of the precedent establishing that an attorney-client relationship can be terminated by implication, we conclude that the facts of this case show the intent of plaintiffs to terminate their relationship with defendant law firm. Defendant attorneys ceased their association with defendant law firm in January 1996, and plaintiffs were aware that defendant attorneys would be partners in a new law firm. After defendant attorneys left defendant law firm, the firm did not provide any further professional services for plaintiffs. There is no evidence that plaintiffs either objected to representation by defendant attorneys through their new law firm or sought to continue representation by defendant law firm. Although

[107] *Mitchell*, supra at 394.

> plaintiffs did not retain "new" counsel, plaintiffs' decision to continue their representation with defendant attorneys at a new firm rather than remain with defendant law firm was the functional equivalent of retaining a new attorney. On these facts, we find that plaintiffs relieved defendant law firm of its obligation to represent them when defendant attorneys ended their association with the law firm in January 1996 . . .
>
> The limitation period for plaintiffs' medical malpractice claim against Oakwood expired on February 25, 1997, more than a year after plaintiffs terminated their attorney-client relationship with defendant law firm in January 1996. Because defendant law firm cannot be liable for the failure to pursue or timely file plaintiffs' claim, the trial court did not err in concluding that defendant law firm was entitled to judgment as a matter of law.[108]

Here, although it is true that the Respondent in his role as an associate and at the direction of an owner of the law firm signed a second retainer agreement in the event his work was ever needed on the matter, he never performed any work on the matter either before or after his departure from the firm, and the statute of limitations expired well after his departure from the firm.[109]

Accordingly, the Circuit Court correctly determined that as in *Devereux* and *Mitchell*, a lawyer who leaves a firm which retains a matter is not liable to a client for malpractice which allegedly occurs after the lawyer has left the firm and which arose after his or her departure.

4. Alternatively, the Petitioners Lacked Standing to Pursue a Wrongful Death Claim on Behalf of Mrs. Bain's Estate.

In order to succeed on their claim against the Respondent, the Petitioners were required to establish not only that the Respondent breached a duty of care, but also that their alleged "damages are the direct and proximate result of such [breach]."[110] In a legal malpractice action,

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[108] *Mitchell*, supra at 398-401 (footnotes omitted).

[109] Additionally, it was eventually determined, after consultation with an expert, that there was no viable malpractice claim due to Mrs. Bain's medical history. App. at 216-217.

[110] *Keister v. Talbott*, supra at 748-49, 391 S.E.2d at 898-99.

proximate causation is viewed from the "case within a case" framework, meaning that the Petitioners were required to prove that but for the alleged negligence of the Respondent, they would have been successful on the wrongful death claim.[111] If the Petitioners lacked standing to institute a wrongful death claim, then they cannot prevail on a legal malpractice claim.

In re Alan Deatley Litigation,[112] for example, a law firm sued its former client for over $300,000 in unpaid legal fees in connection with underlying litigation involving the client's paving business.[113] In response to the law firm's complaint, the client filed a counterclaim for legal malpractice, claiming that the law firm negligently failed to pursue a breach of contract claim in the underlying litigation which ultimately forced the client to settle the underlying litigation under unfavorable terms.[114] The law firm responded by asserting that client had no right to pursue the breach of contract claim in the underlying litigation because any such right had been discharged in client's previous bankruptcy proceedings.[115] Thus, the law firm argued that even if it would have pursued the breach of contract claim, it would have been dismissed for lack of standing and the client could not establish that he would have succeeded on the breach of contract claim. The court agreed and granted the law firm's summary judgment motion:

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[111] See, e.g., *Calvert,* supra at 695, 619 S.E.2d at 208; *McGuire v. Fitzsimmons*, 197 W. Va. 132, 475 S.E.2d 132 (1996)(acknowledging that a legal malpractice action involves two suits and is this considered a case-within-a-case); *Fabricare Equipment Credit Corp. v. Bell, Boyd & Lloyd*, 767 N.E.2d 470, 474 (Ill. Ct. App. 2002) ("To satisfy the proximate cause aspect of a legal malpractice action, the plaintiff must essentially plead and prove a 'case within a case,' meaning that the malpractice complaint is dependent upon the underlying lawsuit. . . . Thus, no malpractice exists unless the plaintiff proves that, but for the attorney's negligence, plaintiff would have been successful in the underlying action.").

[112] 2008 WL 4153675 (D. Wash.).

[113] Id. at *1.

[114] Id.

[115] Id. at *14.

> [Holland and Knight] has met its prima facie burden of showing that [Deatley's] breach of contract claims would not have been viable ... because he lacked standing to assert the claim and because his attempt would have been judicially estopped ... There is no escape from the conclusion herein that [Deatley] is unable to establish the essential element of his malpractice claim which requires [that] he prove on a more probable than not basis that but for his attorneys' negligence, he would have fared better in the underlying action. Accordingly, [Deatley's] legal malpractice counterclaim is dismissed in its entirety.[116]

As in *Deatley*, the Petitioners cannot meet their "case-within-a-case" burden in the instant action because they lacked standing to pursue the wrongful death claim on behalf of Mrs. Bain's Estate. West Virginia's wrongful death statute unequivocally requires that any wrongful death claim be brought by the personal representative of the estate.[117] Because none of the Petitioners served as the personal representative of Mrs. Bain's Estate, they did not have the ability to pursue any wrongful death claim. Rather, Mr. Bain, as Executor of Mrs. Bain's Estate, was the only individual who had the right to pursue the wrongful death claim, and he ultimately decided not to pursue the claim.

V. CONCLUSION

WHEREFORE, the Respondent, Steven Dragisich, respectfully requests that this Court affirm the judgment of the Circuit Court of Hancock County.

STEVEN DRAGISIC

By Counsel

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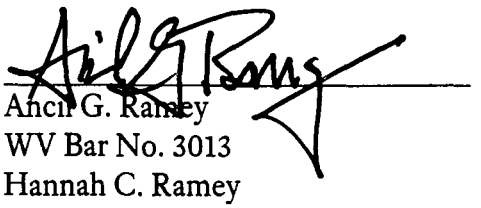
[116] Id. at *18.

[117] W.Va. Code § 55-7-6(a) ("[e]very such [wrongful death] action shall be brought by and in the name of the personal representative of such deceased person").



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