IN THE SUPREME COURT OF MISSISSIPPI

COPY

NO. 2007-CA-00232

PATRICIA JONES SPANN — APPELLANT

V.

GERALD J. DIAZ, JR., P.A. — APPELLEE

APPEAL FROM THE CIRUCIT COURT
OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT
THE HONORABLE BOBBY DELAUGHTER

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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I. TABLES

B. Table of Authorities

1. Cases

2. Other Authorities

II. INTRODUCTION

Diaz P.A.'s ("Diaz") response brief argues that the waiver of affirmative defenses principal in *MS Credit v. Horton* does not apply because Diaz's statute of limitations defense required factual development. In reality, Diaz stopped factually developing its case nine months before filing its summary judgment motion. Diaz's nine month delay waived its statute of limitations defense.

Diaz also argues that there was no fraudulent concealment despite the uncontestable facts that Diaz:

- failed to disclose its negligence to Patricia Spann ("Spann");
- failed to disclose all material facts regarding its negligence; and
- concealed evidence of its negligence in court pleadings.

These facts constitute multiple affirmative acts of concealment and defeat Diaz's argument.

Finally, Diaz argues that there was no attorney-client relationship when it was negligent, despite legal precedent that:

- filing a lawsuit for Spann created the relationship as a matter of law;
- the ratification doctrine imposed the relationship; and
- without the relationship Diaz's filing the lawsuit would have been illegal and unethical.

All Diaz's arguments are without merit and the Court should reverse the trial court's grant of summary judgment and remand this case for a trial on the merits.

III. SUMMARY OF THE ARGUMENT

Diaz suggests that lawyers have no duty to disclose their negligence or the underlying material facts related to the negligence to their clients. Other courts have disagreed and held that as fiduciaries, lawyers must disclose their negligence and all related material facts to their clients.

Spann's affidavit establishes that Diaz did not disclose its negligence or material facts related to its negligence. If this Court agrees that lawyers have a fiduciary duty to disclose their negligence and all material facts to their clients, then there are affirmative acts of concealment in this case independent of Diaz's alteration of a telephone transcript in the underlying case.

Diaz's response brief does not squarely address Spann's exercise of due diligence. But it would be unfair for the Court to find that Spann failed to act diligently where—unlike in the insurance policy cases—Spann did not have available to her the direct evidence of Diaz's negligence. Like this Court in *Rawson v. Jones*, Spann reasonably concluded based on the evidence disclosed to her that Diaz acted diligently and the statute ran because Diaz became involved in the case too late to identify the correct defendant.

Diaz's argument that no attorney-client relationship existed when it filed suit for Spann fails because the relationship existed as a matter of law and the ratification of the relationship by the parties. Finally, Diaz's argument that *MS Credit v. Horton* does not apply fails because there was no need to factually develop the statute of limitations defense in discovery and, even if there was, Diaz stopped factually developing its case nine months before filing its motion.

IV. ARGUMENT

A. Diaz's argument that no attorney-client relationship existed is wrong because the relationship existed as a matter of law and it would have been illegal to file suit without Spann's authority.

Throwing caution to the wind by urging a finding that would be tantamount to a finding that Diaz acted illegally, Diaz asserts that it cannot be held liable to Spann because no attorney-client relationship existed when it filed suit on Spann's behalf. Diaz's assertion that there was no attorney-client relationship when it filed Spann's lawsuit is incorrect.

1. An attorney-client relationship existed as a matter of law.

An attorney-client relationship can be implied from the conduct of the parties and does not depend upon an express contract or the payment of fees.[1] Normally the existence of an attorney-client relationship is a fact question.[2] But when an attorney enters an appearance in court on behalf of another, the law presumes that an attorney-client relationship exists.[3] This presumption arises because an attorney has no right to bring an action without the party's authorization.[4] When an attorney files an action, he "subjects the client to sanctions, counterclaims, discovery requests, and a judgment for costs if the suit is unsuccessful."[5] In addition, courts have held that it is **illegal** and **unethical** for an

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[1] *In re McKechnie*, 656 N.W. 2d 661, 667 (N.D. 2003).

[2] *See Lane v. Oustalet*, 850 So. 2d 1143 (Miss. App. 2002), *rev'd on other grounds*, 873 So. 2d 92 (Miss. 2004); *Winstead v. Berry*, 556 So. 2d 321, 322 (Miss. 1989).

[3] *In re Williamson*, 838 So. 2d 226, 235 (Miss. 2002)(signing pleading on behalf of client is affirmative representation that attorney represents client); *Brandon v. West Bend Mutual Ins. Co.*, 681 N.W. 2d 633, 640 (Iowa 2004)(finding attorney-client relationship existed even where client not aware that lawyer filed suit).

[4] Id.

[5] Id.

attorney to file an action if there is no attorney-client relationship.[6] Finally, the attorney-client relationship can be established through ratification by the parties' conduct.[7]

Spann asked Diaz to represent her family via the 1994 letter from Arnold Dyre (who was acting as Spann's agent) to Joey Diaz. The fact that Spann did not subjectively know that Dyre sent the letter is irrelevant. The law of agency imputes the agent's (Dyre's) knowledge to the principal (Spann).[8] Diaz accepted the case through its conduct by opening a file, assigning the case to attorney Kenny Womack, and filing suit. That Diaz did not try to contact Spann until filing suit is evidence of gross negligence, not a fact that clears Diaz from liability. Finally, the ratification of the attorney-client relationship by Diaz and Spann's conduct and Diaz collecting attorney's fees bars Diaz from denying the existence of the attorney-client relationship.[9]

Diaz supports its argument with a single case: the Fifth Circuit's opinion in *Hopper v. Frank.*[10] *Hopper* did not address the issue of whether there is an attorney-client relationship where a lawyer filed suit on the client's behalf. Instead, *Hopper* dealt with the issue of whether a law firm that represented a corporation also had an attorney-client

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[6] Id. (emphasis added) (*citing Foley v. Metro. Sanitary Dist.*, 572 N.E.2d 978, 984 (Ill. App. 1991)).

[7] *Foley*, 572 N.E.2d at 985.

[8] *Lane*, 873 So. 2d at 95-96; *Daniel v. Cantrell*, 375 F.3d 377, 385 (6th Cir. 2004) (attorney's knowledge automatically imputed to client).

[9] *Foley*, 572 N.E.2d at 985; *See also Dockins v. Allred*, 755 So. 2d 389, 384 (Miss. 1999)(conduct of accepting benefits of agreement ratifies its existence).

[10] 16 F.3d 92 (5th Cir. 1994).

relationship with the corporation's stockholders.[11] That question is not an issue in this case and *Hopper* is inapplicable.

The Iowa Supreme Court discussed the existence of an attorney-client relationship in *Brandon v. West Bend Mut. Ins. Co.*[12] *Brandon* was a subrogation case where an attorney filed suit in an individual's name, but the individual was unaware of it.[13] The court recognized that the law presumes an attorney-client relationship where—as here—an attorney enters a court appearance on a client's behalf.[14] The law makes this presumption because it would be illegal and unethical for an attorney to appear in court without the client's authority.[15] The Supreme Court of New Jersey made a similar finding in *In re Silverman,*[16] where the court found that the attorney's performance of legal tasks for the client triggered the obligations of an attorney-client relationship.[17]

In order to rebut the presumption of an attorney-client relationship, Diaz must prove that Spann did not assent to the filing of the action.[18] It is undisputed that Arnold Dyre asked Diaz to work on the case on Spann's behalf and that Diaz accepted the offer and filed the lawsuit eighteen months later. There is no evidence that at any time Spann

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[11] See id. at 95-96.

[12] 681 N.W. 2d 633 (Iowa 2004).

[13] Id. at 637.

[14] Id. at 640.

[15] Id.

[16] 549 A.2d 1225, 1241-42 (N.J. 1988).

[17] Id.

[18] See *Brandon*, 670 N.W. 2d at 504.

challenged Diaz's authority to file the lawsuit. As a result, Diaz cannot rebut the presumption of an attorney-client relationship.

2. Diaz and Spann's ratification of the relationship created an attorney-client relationship on the date that the Complaint was filed.

Courts apply the ratification doctrine to find an attorney-client relationship. For instance, in *In re Hoffman*[19], the North Dakota Supreme Court stated that "a lawyer gains the necessary authority to act on behalf of a client when the client expressly or by implication consents to the representation ... or if the client later ratifies the lawyer's action after the client has knowledge of all material facts."[20] Many other courts have applied the ratification doctrine to find the existence of an attorney-client relationship.[21] Further, Mississippi recognizes the ratification doctrine.[22]

It is undisputed that after Diaz filed Spann's lawsuit, Diaz contacted Spann and the two parties agreed to a contingency contract. Diaz continued to represent Spann until the conclusion of the appeal and for three years after the appeal in chancery matters. Spann paid Diaz for the representation with the proceeds from a settlement with Methodist Hospital and reimbursed Diaz for all case expenses. This conduct by the parties ratified the attorney-client relationship and created its existence no later than the date that Diaz filed suit on Spann's behalf.

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[19] 670 N.W. 2d 500 (N.D. 2003).

[20] Id. at 504 (citing Charles W. Wolfram, *Modern Legal Ethics* 149 (1986)).

[21] See, e.g., *In re W.R. Grace & Co.*, 366 B.R. 302, 305 (Brpcy. D. Del. 2007)(citing many similar cases); *Diaz v. Rio Grande Resources Corp.*, 2006 WL 3337520 (W.D. Tex. 2006); *Witzel v. 1969, Inc.*, 11 F. Supp. 2d 684, 686 n.2 (E.D. Va. 1998); *McCracken & McCracken, P.C. v. Haegele*, 618 N.E. 2d 577, 580 (Ill. App. 1993).

[22] See *Dockins*, 755 So. 2d at 389.

3. Diaz's own negligent conduct is no defense to a malpractice action.

Diaz recklessly asks this Court to find that no attorney-client relationship existed at the time it filed suit on Spann's behalf. Such a finding would compel the finding that the Diaz attorneys working on the case acted illegally and unethically and would subject the attorneys to disciplinary sanctions by the Mississippi Bar. Luckily for the attorneys involved, Diaz's argument is wrong because Diaz has not rebutted the presumption of an attorney-client relationship.

Diaz also improperly attempts to use its own malpractice as a defense to this lawsuit. The evidence before this Court is that Diaz attorneys breached the standard of care by performing no work on the case between November 1994 and April 1996.[23] It was this breach in the standard of care that caused Diaz attorneys to not talk to Spann until after suit was filed and this lack of communication that underpins Diaz's relationship defense. Diaz offers no support for its proposition that malpractice is a defense to malpractice. It would be a terrible precedent for this Court to create such a defense.

B. Diaz waived the statute of limitations defense and its attempt to distinguish *MS Credit v. Horton* fails.

Diaz's attempt to distinguish this case from *MS Credit v. Horton* is incorrect and inconsistent with its own arguments. Diaz contends that its eleven month delay in filing its motion for summary judgment did not waive the statute of limitations affirmative defense because the defense required factual development.[24] Simultaneously, Diaz takes

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[23] See Expert Designation of Mack Brabham at ¶ 10 (R. 388) (contained in Appellant's Record Excerpts).

[24] See Appellee's Brief at p. 41-42.

the inconsistent position that the statute of limitations expired because the *Rawson* decision was a public record. But no factual development was needed on the public record argument and the trial court based its grant of summary judgment on the fact that *Rawson* was a public record—not anything that Diaz factually developed in discovery.[25]

The record does not support Diaz's suggestion that its delay was due to it factually developing its defense. Diaz stopped factually developing its case after it deposed Patricia Spann on October 15, 2005.[26] Diaz waited another **nine months** to file its motion for summary judgment in July 2006. In the interim, Diaz performed no written discovery and did not take a single deposition. At the latest, Diaz's motion was ripe for a decision after it deposed Spann. Diaz cannot point to a single thing that it did to factually develop its case for nine months between the deposition and the filing of its motion. Diaz is asking this Court to find that it did not waive the defense because of hypothetical and non-existent factual development. The Court should reject Diaz's argument. Diaz is wrong on this issue and if the Court lets a law firm off the hook on the waiver issue when in the past it has applied the rule to non-lawyers, it will appear that the Court is favoring attorneys in the application of the law.

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[25] R. 459.

[26] See Appellant's Brief at p. 20 for a timeline.

C. Diaz fraudulently concealed the claim.

1. Diaz's failure to disclose material facts was concealment.

Due to its fiduciary relationship with Spann, Diaz had a duty to notify her of all material fact relevant to the firm's negligence.[27] Diaz withheld the following material facts:

1. Diaz obtained the case a year and a half before filing suit;
2. Diaz did nothing to investigate the case before filing suit;
3. Diaz did not consult any expert witnesses until months after filing suit;
4. Diaz did not consult and provide the medical records to a nenatologist until eight months after filing suit and over two years after accepting the case;
5. Diaz committed affirmative acts of concealment in the trial court by removing the portion of the telephone transcript with the neonatologist that revealed a delay caused by Diaz's failure to pay the expert her $400.00 fee;
6. Diaz's delays constituted a breach in the standard of care;[28]
7. Diaz crafted arguments in the trial court that were designed to conceal the firm's dilatory conduct; and
8. when the Supreme Court reversed the trial court Diaz knew that its negligence caused Plaintiff to suffer damages.

Contrary to number three above, Diaz represented to the trial court that it previously obtained expert reviews. But at most, these expert "reviews" were discussions with non-expert lawyers associated with the firm who also had medical degrees.[29] Contrary to number four above, Diaz did not seek a neonatology review until after filing

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[27] See Appellant's brief at pp. 23-24.

[28] R. 384-94 (R.E. tab 5)(Plaintiff's expert designation of Mack Brabham).

[29] R. 280 (Womack depo. at p. 8).

suit and that review was delayed for months waiting on management's approval to issue a $400.00 check.[30]

Diaz's failure to disclose these material facts were affirmative acts of concealment.[31] Diaz's brief argues that there was no fraudulent concealment because **some** facts were disclosed. The law with respect to attorneys and other fiduciaries requires the disclosure of **all** material facts—not Defendant's self-serving selection of facts.[32]

2. The altered telephone transcript is relevant because it concealed evidence of Diaz's negligent conduct.

The relevant specific portions redacted from the telephone transcript were:

KW: I'm sorry I didn't get back to you sooner and I'm sorry it took me so long to get around to getting you paid so you could, you know, undertake the case.

CW: Well, I was about to forget it. I thought you had given up.

KW: Well, no, I have not given up. I hope you will give me reason to continue not to give up, if you follow that.

CW: Yeah, I do.[33]

* * *

KW: Obviously, there's some records, I've got to exhaust the search for records before we—

Except for a section about a written report, everything redacted related to Diaz's delays. Diaz removed evidence of its delay in paying Dr. Walentik. The delay was so lengthy

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[30] R. 395-397 (Giddens affidavit at ¶¶ 3-20).

[31] See Appellant's brief at pp. 27-28.

[32] *Smith v. Sneed*, 638 So. 2d 1252, 1257 (Miss. 1994)(citation omitted).

[33] R. 362.

that Dr. Walentik thought that Diaz abandoned the case. Diaz also removed evidence of its delay in exhausting the search for medical records. Both redactions concealed negligent delays by Diaz attorneys. Both redactions were relevant in the underlying action, since Diaz was defending Dr. Rawson's challenge of his untimely joinder as a defendant.

The redacted language regarding Diaz's delay in paying Dr. Walentik was relevant to the delay in obtaining an expert in the case and Diaz concealed it from Spann. Indeed, why else was this language redacted? Why not redact clearly irrelevant portions such as the greetings on page one or the discussion regarding northern and southern dialects on page three? Any argument that Diaz's intent was something other than to deceive the court and defendants in the underlying case is spurious.

3. This Court's opinion in *Rawson v. Jones* did not suggest that Diaz was negligent.

Diaz and the trial court incorrectly state that this Court's opinion in *Rawson* "clearly identified Diaz as the party at fault."[34] In fact, *Rawson* does the opposite by suggesting that Diaz was not at fault because the Diaz attorneys were not the original lawyers on the case. *Rawson* states: "[s]he [Spann] claims she [Spann's lawyers] did consult with medical experts shortly after Timothy's death, **but was not able to obtain a medical opinion** imputing negligence to Dr. Rawson until January 1997. **(We add that Jones's trial counsel and counselor on appeal** [Diaz] **were not her original lawyer.)**"[35] Rather than identifying Diaz as the party at fault, this language suggests that Diaz was blameless because it was not Spann's original lawyer. It is inconceivable that

[34] R. 459.

[35] 816 So. 2d 367, 370 (Miss. 2001)(emphasis added).

the Court would have included this language clearing Diaz of blame if the truth had been disclosed.

In *Rawson*, Diaz argued that it diligently investigated the case, but through no fault of its own did not have reason to believe that Dr. Rawson was negligent until after the statute ran. Diaz never disclosed to the courts or Spann the real facts that it committed repeated acts of negligent delays over a two year period. [36] Diaz now takes the position that despite Diaz covering up the truth, Spann should have somehow known of Diaz's dilatory conduct when this Court was also misled by Diaz's suppression of the truth.

Diaz's acts of concealment in the underlying case count as affirmative acts of concealment in this case. While Diaz concealed its dilatory actions in the trial court it also concealed the same acts from Spann. And since the dilatory conduct is relevant to Diaz's negligent conduct, Diaz had an affirmative duty to disclose the conduct to Spann. It is undisputed that Diaz failed to do so.

D. Spann acted diligently.

Although Diaz argues that there were no affirmative acts of concealment, it cannot win the argument because of the altered transcript and Diaz's failure to disclose multiple material facts. Diaz's real argument is that it should win despite the concealment because Spann did not act with due diligence to discover her claim. The problem for Diaz with this argument is that there was a reasonable explanation for why the statute ran that did not suggest malpractice by Diaz: that Diaz received the case too late to identify Dr. Rawson's negligence.

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[36] See Plaintiff's Designation of Expert Witness (Tab 5 to Appellant's Record Excerpts).

Diaz did not disclose to Spann the documents or other facts that revealed that Diaz obtained the case 1 ½ years before filing suit and continued its dilatory delay after filing suit. If Diaz had disclosed these facts then, it would be correct that Spann did not act diligently. But it is undisputed that Diaz concealed these facts from Spann. Diaz's response does not explain Spann should have done to discover the claim and there were no documents or other information in Spann's possession that revealed the truth. Under these circumstances, Spann acted with due diligence as a matter of law or, at worst, Spann's exercise of due diligence is a fact question for the jury.

V. CONCLUSION

The trial court incorrectly granted summary judgment in this action. The Court should reverse the trial court and remand this action for a trial on the merits.

This the 4th day of February, 2008.

Respectfully Submitted,

PATRICIA JONES SPANN, Individually, and in her Representative Capacity on behalf of the wrongful death beneficiaries of Timothy Spann, Jr.

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VI. CERTIFICATE OF SERVICE

I certify that I have served via U. S. Postal Service a true and correct copy of the above and foregoing to the following:

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This the 4th day of February, 2008.

PHILIP W. THOMAS