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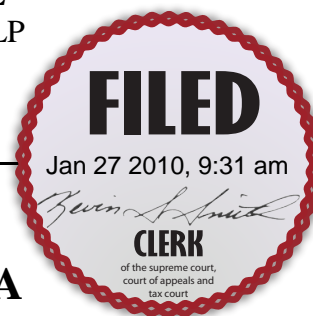
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**IN THE
COURT OF APPEALS OF INDIANA**

KERRY W. RIDGE,)

Appellant/Plaintiff,)

vs.)

No. 51A01-0906-CV-300

MATTHEW D. LARK,)

Appellee/Defendant.)

APPEAL FROM THE MARTIN CIRCUIT COURT
The Honorable William E. Weikert, Special Judge
Cause No. 51C01-0704-CT-120

January 27, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Plaintiff Kerry W. Ridge appeals the trial court's judgment in favor of Appellee/Defendant Matthew D. Lark following a four-day bench trial on Ridge's legal malpractice claim against Lark. On appeal, Ridge raises numerous issues which we restate as follows:

- I. Whether the trial court's judgment in favor of Lark is clearly erroneous; and
- II. Whether section 24 of the Restatement (Third) of the Law Governing Lawyers is applicable to the instant matter and should be adopted by this Court in lieu of Indiana Professional Rule 1.14.

Concluding, that the trial court's judgment in favor of Lark is not clearly erroneous and that section 24 of the Restatement (Third) of the Law Governing Lawyers is inapplicable to the instant matter, we affirm the judgment of the trial court.

FACTS AND PROCEDURAL HISTORY

In 1989, Ridge married Vicki L. Ridge. During their marriage, Ridge, who had received a limited education, worked as a laborer. For over fifteen years, Ridge worked for his friend Robert Melton's tree-trimming business, which was called Melton's Tree Service. Ridge's responsibilities at Melton's Tree Service included dragging brush, feeding branches into a chipper, running a bucket truck, and running a stump grinder. Ridge, Melton, and their wives were very close, and the couples frequently socialized.

On December 28, 2004, Vicki was killed when the automobile in which she was a passenger was struck by a truck. Following Vicki's death, Ridge asked Melton if he could recommend any attorneys to assist him in bringing a wrongful death suit on Vicki's behalf. Melton recommended two attorneys, including Lark. On December 30, 2004, Ridge hired

Lark to represent Vicki's estate in a wrongful death action against the trucking company involved in the accident that resulted in her death. Lark represented Vicki's estate in the wrongful death proceedings, and attorney Mark J. Jones represented her estate in all probate matters. Ridge was appointed to be the personal representative of Vicki's estate.

During the course of Lark's representation, Lark met with Ridge on numerous occasions to discuss issues relating to the wrongful death action. Melton was present during some but not all of these meetings. As the case progressed toward mediation, it became clear that Ridge was likely going to receive a substantial settlement. Lark warned Ridge that people may try to take advantage of him in order to benefit from the settlement funds. Lark recommended that Ridge invest the settlement funds and introduced Ridge to two different financial advisors. Ridge assured Lark that he planned to meet with a financial advisor to discuss the investment of the settlement funds. At no time during any meetings between Ridge and Lark did Ridge inform Lark of his plan to use a portion of the settlement funds to purchase certain items for the benefit of Melton and/or Melton's Tree Service.

Prior to mediation, Lark hired attorney Frank Safrin to assist him in receiving the best possible settlement for Ridge. As mediation approached, both Safrin and Lark discussed the concept of a structured settlement with Ridge, explaining how a structured settlement works and outlining both the "pros and cons" of such settlements. Appellant's App. II, p. 77-78. On April 19, 2005, the parties participated in mediation of the wrongful death action. The defendant trucking company provided a structured settlement specialist to participate in the negotiations. During mediation, Ridge decided, despite Lark's and Safrin's

recommendations to the contrary, that he was not interested in a structured settlement and that he wanted to receive all settlement funds in a single cash payment. At the conclusion of mediation, the parties agreed to settle the wrongful death action in exchange for a lump sum payment in the amount of \$650,000.00.

On April 29, 2005, Lark received the \$650,000.00 settlement check. Lark deposited the settlement check in his trust account pending the check's clearance through the bank. On May 4, 2005, Lark met with Jones and Ridge in Jones's office to distribute the proceeds of the settlement check to Vicki's estate. During this meeting, Lark, with Jones's approval, tendered a check in the amount of \$400,000 to Ridge. This check represented Ridge's share of the settlement proceeds. After Ridge received the settlement proceeds, Melton assisted Ridge in writing six checks dated May 4, 2005, totaling \$282,108.45 benefiting Melton or Melton's Tree Service.¹

On October 15, 2007, Ridge filed his second amended complaint against Lark claiming that he was an incapacitated person pursuant to Indiana Code section 29-3-1-7.5 (2004), and in light of his incapacitated state, Lark was negligent in his representation of Ridge relating to the distribution of the settlement proceeds. Following a four-day bench trial, the trial court ruled in Lark's favor. Ridge now appeals.

DISCUSSION AND DECISION

I. Whether the Trial Court's Judgment in Favor of Lark is Clearly Erroneous.

¹ Each of the six checks was written by Melton and signed by Ridge.

On appeal, Ridge challenges the trial court's judgment in favor of Lark claiming that the judgment is clearly erroneous. Specifically, Ridge challenges the trial court's determinations that Ridge is not an "incapacitated person" pursuant to Indiana Code section 29-3-1-7.5 and that Lark did not breach any duty owed to Ridge.

A. Standard of Review

In challenging the trial court's judgment, Ridge, as the party who carried the burden of proof at trial, is appealing from a negative judgment. *Krieg v. Hieber*, 802 N.E.2d 938, 943 (Ind. Ct. App. 2004). To prevail on an appeal from a negative judgment, Ridge must establish that the judgment is contrary to law. *Id.*; *Cutshall v. Barker*, 733 N.E.2d 973, 978 (Ind. Ct. App. 2000). A judgment is contrary to law when the evidence is without conflict and leads to but one conclusion and the trial court did not reach that conclusion. *Cutshall*, 733 N.E.2d at 978.

On appeal, we will affirm the trial court's judgment unless all evidence leads to the conclusion that the trial court's findings are clearly erroneous and against the logic and effect of the facts. In determining whether the findings of fact are clearly erroneous, we may neither reweigh the evidence nor judge the credibility of the witnesses. Instead, we will consider only the evidence most favorable to the judgment together with all reasonable inferences that may be drawn therefrom.

Krieg, 802 N.E.2d at 943 (citations omitted).

When, as here, the trial court has entered findings of facts and conclusions thereon, we apply a two-tiered standard of review. *Carroll v. J.J.B. Hillard, W.L. Lyons, Inc.*, 738 N.E.2d 1069, 1075 (Ind. Ct. App. 2000), *trans. denied*. We first determine whether the evidence supports the findings, and then whether the findings support the judgment. *Id.* We will set

aside the trial court's findings and conclusions only if they are clearly erroneous. *Id.* Findings are clearly erroneous if the record contains no facts or inferences supporting them. *Id.* A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. *Id.*

B. Trial Court's Findings of Fact and Conclusions Thereon

Following the conclusion of the four-day bench trial, the trial court entered written findings of fact and conclusions thereon. With respect to Lark's representation of Ridge through his position as the Personal Representative of Vicki's Estate, the trial court made the following factual findings:

4. On December 30, 2004, Ridge retained the services of Lark to pursue a claim against a trucking company for the wrongful death of Vicki L. Ridge.

* * * *

13. Lark introduced Ridge to Mark Jones, Esq., who agreed to act as probate counsel.

14. Upon a petition prepared by Jones, Ridge was appointed the Personal Representative of the Estate of Vicki L. Ridge ("Estate") on January 6, 2005, by this Court for the sole purpose of collecting damages for the wrongful death of Vicki L. Ridge.

15. Joint Exhibit 1, the contract between Ridge, as the Personal Representative of the Estate, and Lark, as modified on January 6, 2005, defines the scope of legal services to be provided by Lark.

* * * *

17. Lark, with the assistance of a more senior lawyer, Frank Safarin [sic] of Indianapolis ("Safarin") [sic], prepared the Estate's case for pre-suit mediation.

18. Lark encouraged Ridge to consider receiving monthly payments of the funds he would receive as the heir of the Estate.

19. Lark encouraged Ridge to meet with a financial advisor with regard to the funds he was likely to receive as sole heir to the Estate and introduced him to such advisors.

20. At the mediation, a presentation was made to Ridge to provide payments to him over time rather than a lump sum.

21. Ridge rejected the idea of receiving payments over time, but agreed to a

lump sum payment of Six Hundred Fifty Thousand Dollars (\$650,000.00) at the mediation.

* * * *

31. On April 19, 2005, mediation was held in Indianapolis, Indiana, between the Estate of Vicki L. Ridge and an anonymous trucking firm, the Defendant in the Vicki Ridge wrongful death claim.

32. At the mediation, a presentation was made to Ridge concerning the option of a structured settlement whereby the defendant would purchase for Ridge an annuity from a life insurance company so that Ridge would receive future cash payments for a guaranteed period of time.

33. At the mediation, Ridge said he was not interested in a structured settlement/annuity, and wanted all of the settlement in cash.

34. At the mediation on April 19, 2005, a settlement was reached between the Estate of Vicki L. Ridge and the anonymous trucking firm for the total amount of Six Hundred Fifty Thousand Dollars (\$650,000.00).

* * * *

36. On April 27, 2005, the Martin Circuit Court issued an Order authorizing Ridge to compromise and settle the wrongful death claim for Vicki L. Ridge for the total sum of Six Hundred Fifty Thousand Dollars (\$650,000.00), to pay Lark Two Hundred Thirty Six Thousand Seven Hundred Fifty Dollars (\$236,750.00), and to pay the funeral and burial expenses of Vicki L. Ridge.

37. On or about April 29, 2005, Lark received the Six Hundred Fifty Thousand Dollar (\$650,000.00) settlement check at his office in Indianapolis, Indiana.

38. Both Lark and Ridge endorsed the Six Hundred Fifty Thousand Dollar (\$650,000.00) settlement check which was deposited in Lark's trust account on April 29, 2005.

39. Ridge and Melton were told on April 29, 2005, at the National City Back in Indianapolis that Ridge would have to wait approximately seven (7) days until the Six Hundred Fifty Thousand Dollar (\$650,000.00) settlement check cleared before Lark could issue a check to Ridge for his portion of the settlement.

40. On May 4, 2005, Lark met Ridge and Melton at the office of Mark Jones, Attorney at Law, Loogootee, Indiana, and Lark gave Ridge a check from Lark's trust account for Four Hundred Thousand Dollars (\$400,000.00).

* * * *

44. Ridge never retained Lark to perform any legal services for him regarding any of his purchases.

Appellant's App. I, pp. 14-18. In addition, with respect to Ridge's competency, the trial court found as follows:

5. Ridge dropped out of high school in the 11th grade, he has not received his GED, and Ridge has not received any vocational or college education.

* * * *

7. Ridge was very knowledgeable in the use of a computer, including using it to:

- a. Play video games;
- b. email;
- c. get information for taking trips;
- d. “instant messaging” other individuals;
- e. design his own business card.

8. Ridge had used the internet to get forms for dissolutions, and had filed a pro se dissolution.

9. Ridge had represented himself in a criminal matter and negotiated with the Prosecutor directly to resolve the charges against him.

10. Ridge had learned on the job to work as a lumber grader and supervised other employees in doing so.

11. From observing Ridge in court and on the witness stand, he would aptly fit the description of being “street smart”.

12. Based on his testimony before this Court, Ridge appears competent to handle his own affairs.

* * * *

22. Many witnesses testified that in his/her dealings with Ridge, they found him to be able to understand and to communicate reasonably with respect to the wrongful death claim and Ridge’s expected recovery as the heir of the Estate (Testimony of Greg Guyer, Diane Spears, James Day, and April Diamond).

23. Jones had no concerns from his dealings with Ridge about his comprehension of the Estate process or as to Ridge serving as the Personal Representative of the Estate.

Appellant’s App. I, pp. 14-16.

In light of these factual findings, the trial court concluded that Ridge was not an “incapacitated person” as defined by Indiana Code section 29-3-1-7.5 and that Lark did not breach any duty owed to Ridge. Specifically, the trial court concluded as follows:

1. The evidence does not support the finding that Ridge is an incapacitated person as defined by I.C. 29-3-1-7.5.
2. The evidence does not support a finding that Ridge should be placed under the supervision of a guardianship.

3. Considering the relationship between Plaintiff and Defendant, and with Defendant observing Plaintiff in his day-to-day representation of the Plaintiff, similar to the Court's observation of Plaintiff in court, and with the Court's awareness of Plaintiff's abilities as described in testimony, it is the Court's conclusion that the Defendant did not breach any standard of care owed to the Plaintiff by the Defendant's representation of the Plaintiff.

4. There were no obvious "signs" that Plaintiff had any issues with "incapacitation". Plaintiff's presentation, behavior and relationship with Defendant would lead one to believe that he may have had some "issues", but nothing that would put any reasonably competent lawyer on notice that he was dealing with an incapacitated person.

* * * *

6. If the above mentioned "issues" as mentioned in paragraph 4 did identify Ridge as suffering from diminished capacity ... it is still the Court's conclusion that Lark's representation of Ridge met the applicable standard of care, that is that Lark satisfied the duty to use the same degree of knowledge, skill and judgment ordinarily possessed by other members of the legal profession and to perform any service undertaken in the same manner that a reasonably careful attorney would do under the same or similar circumstances.

7. The Court finds Lark's representation of Ridge as the Personal Representative of the Estate was appropriate for Ridge's capacity to understand and participate in that matter.

Appellant's App. I, pp. 18-19.

C. "Incapacitated Person"

Indiana Code section 29-3-1-7.5 provides that an "incapacitated person" means an individual who:

- (1) cannot be located upon reasonable inquiry;
- (2) is unable:
 - (A) to manage in whole or in part the individual's property;
 - (B) to provide self-care; or
 - (C) both;

because of insanity, mental illness, mental deficiency, physical illness, infirmity, habitual drunkenness, excessive use of drugs, incarceration, confinement, detention, duress, fraud, undue influence of others on the individual, or other incapacity; or

- (3) has a developmental disability.

Ridge claims that the trial court's determination that Ridge was not an "incapacitated person" is clearly erroneous because the determination is contrary to the objective evaluation performed by Ridge's expert, Dr. Linkenhoker, who testified that Ridge was incapacitated because of his limited cognitive and academic abilities, his alleged developmental disabilities, and the undue influence of others. Again, in considering Ridge's claim, we first consider whether the evidence supports the trial court's factual findings. *Carroll*, 738 N.E.2d at 1075.

Upon review, we conclude that the trial court's findings regarding Ridge's competency are supported by the evidence presented by the parties at trial. The evidence at trial establishes that Ridge is capable of understanding both legal proceedings and financial matters. Ridge negotiated a favorable outcome for a prior criminal conviction and filed a pro se petition for the dissolution of his marriage using forms that he obtained from the internet. Ridge is knowledgeable about technology and use of computers. Ridge displays "street smarts" and the ability to learn and master vocational skills despite his limited formal education. Multiple acquaintances testified that Ridge is able to communicate reasonably and that Ridge discussed the progress of the wrongful death action in a reasonable and rational manner. Lark and Safrin found Ridge competent to discuss the wrongful death action and capable of comprehending facts relevant to the legal proceedings. Furthermore, Ridge was found competent to serve as the personal representative of his deceased wife's estate, and Jones had no concerns about Ridge's ability to comprehend the estate process. In addition, although Dr. Linkenhoker testified that he believed that Ridge was an incapacitated

person, Dr. David Cerling, a clinical psychologist, testified to the contrary, stating that he found Ridge competent to understand financial matters, to make rational decisions, and to manage his personal affairs. The trial court was within its fact-finding discretion to credit Dr. Cerling's testimony over Dr. Linkenhoker's.

Having concluded that the trial court's findings regarding Ridge's competency are supported by the evidence presented by the parties at trial, we next consider whether the factual findings support the trial court's judgment. *Carroll*, 738 N.E.2d at 1075. The trial court's findings establish that Ridge can be described as "street smart" despite his limited formal education and that he exhibits the ability to competently handle his own affairs. At all times relevant to the instant appeal, Ridge exhibited the ability to make rational decisions and did not exhibit any obvious signs of incapacitation due to any mental deficiency or developmental disability. Here, our review of the record in conjunction with the trial court's findings and conclusions thereon does not leave us with a firm conviction that a mistake has been made, and therefore, we conclude that the trial court's determination that Ridge is not an "incapacitated person" pursuant to Indiana Code section 29-3-1-7.5 is not clearly erroneous.

D. Breach of Duty

"To prove a legal malpractice claim, the plaintiff-client must prove four elements: 1) employment of the attorney (the duty); 2) failure of the attorney to exercise ordinary skill and knowledge (the breach); 3) proximate cause (causation); and 4) loss to the plaintiff (damages)." *Gilman v. Hohman*, 725 N.E.2d 425, 428 (Ind. Ct. App. 2000), *trans. denied*.

To prove causation and damages in a legal malpractice case, the client must show that the outcome of the underlying litigation would have been more favorable but for the attorney's negligence. *Id.* at 428-29. A fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight. *See generally Dew v. State*, 843 N.E.2d 556, 563 (Ind. Ct. App. 2006) (providing that courts should attempt to refrain from considering hindsight when determining whether the representation provided by an attorney was deficient), *trans. denied*.

Ridge asserts that the trial court's determination that Lark did not breach any duty owed to Ridge is clearly erroneous.² Specifically, Ridge claims that Lark should have known that Ridge would not be able to manage the settlement funds because Ridge is an incapacitated person who exhibits a diminished mental capacity. Ridge also claims that Lark breached his duty to protect and preserve Ridge's right to the full use and benefit of the settlement funds and to protect Ridge from the undue influence of others.³

² To the extent that Ridge contends that the determination of the trial court is clearly erroneous because the trial court applied the wrong legal standard relating to the scope of Lark's representation, we observe that Ridge provides no relevant authority in support of this claim. Ridge relies on *Fraley v. Minger*, 829 N.E.2d 476, 482 (Ind. 2005) in support of this claim. *Fraley*, however, is unpersuasive because the *Fraley* court was not faced with a question relating to the scope of an attorney's representation.

³ To the extent that Ridge argues that Lark had the duty to protect Ridge's right to the full use and benefit of the settlement funds, our review of the record convinces us not only that Lark successfully protected Ridge's right to the full use and benefit of the settlement funds but also that Ridge did in fact enjoy the full use and benefit of said funds. Ridge decided to use a majority of the funds to make purchases for himself and his friends including Melton and Ridge's then-girlfriend. Ridge bought himself a new truck and bought new vehicles for his then-girlfriend and her son. Ridge bought Melton a more spacious home. In addition, Ridge purchased a bucket truck and a chipper for Melton's business. At the time Ridge made these purchases, he believed that he would also benefit from the purchases as he planned to move in with Melton and his wife and to continue working with Melton. Nothing in the records suggests that Ridge did not wish to make these purchases benefiting his friends or that either Melton or Ridge's then-girlfriend exerted any undue influence over Ridge with respect to these purchases.

Again, because the trial court issued written findings of fact and conclusions thereon, we will first consider whether the evidence supports the trial court's factual findings. *Carroll*, 738 N.E.2d at 1075. Upon review, we conclude that the trial court's findings relating to Lark's representation are supported by the evidence presented by the parties at trial. The evidence at trial establishes that Ridge hired Lark to prosecute a wrongful death action on behalf of Vicki's estate against the defendant trucking company. Lark determined in light of their interactions that Ridge was competent to handle his own affairs and to make decisions regarding the wrongful death action even though he had received a limited formal education. During mediation, Lark successfully obtained a favorable result which was accepted by Ridge. Lark discussed settlement options with Ridge and, when it became clear that Ridge preferred to collect a lump sum settlement payment, recommended that Ridge speak with a financial advisor about investing the settlement funds. Lark warned Ridge to be careful of people who may attempt to take advantage of him in order to benefit from the settlement funds. Lark subsequently transferred Ridge's portion of settlement funds to Ridge in a timely manner.

Having concluded that the trial court's factual findings relating to Ridge's representation are supported by the evidence presented at trial, we next consider whether the factual findings support the trial court's judgment. *Carroll*, 738 N.E.2d at 1075. The trial court's findings establish that Ridge was "street smart" and competent in handling his own affairs despite his limited formal education. Ridge exhibited an ability to understand legal proceedings and to use technology to expand his ability to negotiate legal matters. The

findings also establish that Lark kept Ridge informed about the progress of the wrongful death suit and discussed multiple settlement options with Ridge, made legal recommendations, and ultimately settled the matter pursuant to Ridge's wishes. Lark counseled Ridge about the dangers involved with receiving a large lump sum settlement and encouraged Ridge to meet with a financial advisor regarding the settlement funds. We believe these facts support the trial court's conclusion that Lark's representation of Vicki's Estate in the wrongful death proceeding was such that Lark did not breach any duty owed to Ridge in his capacity as the Personal Representative of Vicki's Estate. Therefore, the trial court's determination that Lark did not breach his duty to Ridge is not clearly erroneous.

II. Whether Section 24 of the Restatement (Third) of the Law Governing Lawyers is applicable to the instant matter and should be adopted by this Court in lieu of Indiana Professional Rule 1.14.

In addition, Ridge encourages this court to adopt section 24 of the Restatement (Third) of the Law Governing Lawyers as the duty of Indiana attorneys to clients who are incapacitated or of a diminished capacity. Ridge claims that public policy necessitates the adoption of this section because it would clarify an attorney's responsibility to clients who are incapacitated or exhibit a diminished capacity, promote the welfare of clients, and enhance the professionalism and public perception of the Indiana Bar. However, because we concluded above that the trial court's determination that Ridge did not exhibit a diminished capacity and thus was not incapacitated is not clearly erroneous, we need not address the question of whether Indiana courts should adopt section 24 of the Restatement (Third) of the Law Governing Lawyers as substantive law.

In sum, we conclude that the trial court's judgment in favor of Lark is not clearly erroneous and that section 24 of the Restatement (Third) of the Law Governing Lawyers provides no relief in the instant action.

The judgment of the trial court is affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.