THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

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SC Court of Appeals

Case No. 2013-CP-26-04551
Appellate Case No. 2014-000328

Atlantica Property Owners' Association, Inc.,

Respondent,

v.

Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers P.A.,

Appellant.

RETURN TO MOTION TO DISMISS APPEAL

Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers P.A. ("The Bellamy Law Firm" or "the law firm") hereby responds to the Motion to Dismiss the Appeal filed by Atlantica Property Owners' Association, Inc. ("Plaintiff" or "the plaintiff"). The motion to dismiss the appeal should be denied because the order being appealed involves the merits and affects a substantial right. The order permits the plaintiff to prosecute an action for legal malpractice against a law firm even though the plaintiff is not and never has been a client of the law firm. By denying the law firm's motion to dismiss on this threshold question of law, the trial court has put the law firm in the untenable position of having to defend a legal malpractice case brought by an entity that is not and never has been a client of the firm, and to do so without the ability to reveal the substance of

confidential attorney-client communications that are directly related to the allegations in the complaint. The law firm has sought permission from the client to reveal the content of such communications but the client has refused to waive the privilege. Ex. A.

Because the plaintiff has not stated a claim as a matter of law and because the law firm is unable to fully and adequately defend itself, the motion to dismiss the appeal should be denied. The trial court order should be reviewed and reversed.

BACKGROUND

This is a legal malpractice case. The plaintiff is a property owners' association that has sued The Bellamy Law Firm for legal malpractice and breach of fiduciary duty. Compl., Ex. B. The complaint alleges that the law firm failed to prepare and record a parking easement in connection with the establishment of a horizontal property regime in Myrtle Beach, South Carolina. Compl. ¶¶ 12, 13. The complaint does not allege the existence of an attorney-client relationship between the plaintiff and the law firm and does not allege that the plaintiff retained the law firm to perform the legal services that are the subject of the complaint. Instead, the complaint alleges that a different entity, Adrian Development, LLC, hired the law firm, and that the duty owed to Adrian Development passed to the plaintiff.

According to the complaint, "beginning in approximately 1998, [the law firm] *was employed by developer Adrian Development, LLC* ("Adrian Development") and its predecessor entities to prepare and, if required, record in Office of the Register of Deeds of Horry County all documents necessary to implement the horizontal property regime including the documents referenced below." Compl. ¶ 2 (emphasis added). The complaint does not allege that the plaintiff or any of its members employed the law firm,

or that the plaintiff or any of its members has an attorney-client relationship with the law firm.

The complaint further alleges that "[t]he duty of Defendant Bellamy Law Firm passed to the Plaintiff and it[s] members." *Id.* The complaint does not allege any facts to support this statement and no such facts exist. Indeed, at the same time that Plaintiff is suing the law firm for legal malpractice, Plaintiff is also suing the developer, Adrian Development, the entity from which the legal duty allegedly passed. The case is *Atlantica Property Owners' Association, Inc. v. Adrian Development, LLC*, Case No. 13-CP-26-2841, and is pending in Horry County. Ex. C. Both lawsuits concern the same set of facts and allege the same harm.

Given the lack of an attorney-client relationship between Plaintiff and the law firm, the law firm moved to dismiss the complaint. Ex. D. After a hearing, the trial court denied the motion, allowing the case for legal malpractice to proceed against the law firm even though the plaintiff is not and never has been a client of the firm. The law firm moved for reconsideration, Ex. E, and the motion was denied. This appeal follows.

ARGUMENT

Respondent's motion to dismiss the appeal should be denied because the order being appealed involves the merits and affects the substantial right of the law firm to fully and adequately defend itself.

"The right of appeal arises from and is controlled by statutory law." *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005). South Carolina statutory law provides that a party may immediately appeal an interlocutory order if the order (1) involves the merits or (2) affects a substantial right. S.C. Code Ann. § 14-3-330(1) and

(2) (1976). To involve the merits, an order must "finally determine some substantial matter forming the whole or a part of some cause of action or defense . . . ." *Peterkin v. Brigman*, 319 S.C. 367, 368, 461 S.E.2d 809, 809 (1995). An order affects a substantial right if it "(a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial, or (c) strikes out an answer or any part thereof or any pleading in any action[.]" S.C. Code Ann. § 14-3-330(2).

The order on appeal in this case involves the merits and affects a substantial right. The law firm's threshold defense in this case is that the plaintiff is not and never has been a client of the law firm and therefore cannot state a claim for legal malpractice against the law firm. The law firm fully briefed this issue in the motion to dismiss, citing cases stating "[b]efore a claim for malpractice may be asserted, there must exist an attorney-client relationship." *Rydde v. Morris*, 381 S.C. 643, 675 S.E.2d 431 (2009); *Am. Fed. Bank, FSB v. Number One Main Joint Venture*, 321 S.C. 169, 172, 467 S.E.2d 439, 442 (1996). The law firm also cited numerous cases for the proposition that the first element of a legal malpractice claim is the existence of an attorney-client relationship. *Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions*, 388 S.C. 394, 402, 697 S.E.2d 551, 555 (2010); *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009); *Smith v. Haynsworth, Marion, McKay & Geurard*, 322 S.C. 433, 472 S.E.2d 612 (1996); *Sims v. Hall*, 357 S.C. 288, 295, 592 S.E.2d 315, 318-19 (Ct. App. 2003); *Hall v. Fedor*, 349 S.C. 169, 174, 561 S.E.2d 654, 656 (Ct. App. 2002).

By denying the motion to dismiss, the trial court has determined that it is permissible for an entity that does not allege it is the client, and indeed is not the client, to

pursue a cause of action for legal malpractice. This is directly contrary to South Carolina law and has the effect of striking the law firm's defense that the plaintiff cannot state a claim for legal malpractice against the law firm.

In addition to involving the merits, the order affects a substantial right because it has the effect of striking part of the law firm's answer to the complaint. The law firm's threshold defense in this case is that the plaintiff does not have the right to sue the law firm for legal malpractice. By denying the motion to dismiss, the trial court made a determination regarding this defense that has severe consequences for the law firm and impairs the law firm's ability to defend itself.

Although orders denying motions to dismiss ordinarily are not immediately appealable, the order in this case should be reviewed. At least one court in another jurisdiction has agreed. In *Haney v. State*, the Supreme Court of Oklahoma granted certiorari to review a trial court decision denying a motion to dismiss in a legal malpractice case. 850 P.2d 1087 (Okla. 1993). The supreme court determined that the trial court erred in denying the motion to dismiss because the parties did not have an attorney-client relationship as a matter of law. Following review, the case was remanded to the trial court with directions to dismiss the case.

The Bellamy Law Firm seeks the same relief here. The plaintiff is not and never has been a client of the law firm and cannot state a claim against the law firm for legal malpractice as a matter of law. Not only does the complaint fail to allege the existence of an attorney-client relationship, but it alleges that an entirely different entity (Adrian Development) retained the law firm to perform the legal services complained of.

In an effort to get around the lack of an attorney-client relationship, the complaint summarily alleges that the duty owed to the client (Adrian Development) passed to the plaintiff. But the complaint does not allege any facts to support this allegation, nor do any such facts exist. In fact, the plaintiff is actually suing Adrian Development—the entity from which the legal duty allegedly passed—for the same harm alleged in this case.

Additionally, the notion of a legal duty automatically passing from the client to a third-party is incorrect as a matter of law. It is well established that lawyers are immune from liability to third parties absent the existence of some independent duty owed to the third party. *See Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions*, 388 S.C. 394, 400, 697 S.E.2d 551, 554 (2010) (stating that "an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client," and that "an attorney owes no duty to a non-client unless he 'breaches some independent duty to a third person or acts in his own personal interest, outside the scope of his representation of the client'"); *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 509 (2006) (same). Here, there are no allegations in the complaint that the law firm owed an independent duty to the plaintiff or that the lawyer handling the case acted in his own personal interest, outside the scope of his representation of the client.

Finally, because the plaintiff is not and never as been a client of the law firm, the law firm is not able to fully and adequately defend itself. The complaint alleges that the law firm failed to do something in connection with its representation of the client and yet the law firm cannot reveal whether the thing the law firm allegedly did not do is even

something that the client wanted the law firm to do, or whether the client told the law firm not to do it. Because there has not been a waiver of the privilege through the filing of this lawsuit, the law firm cannot simply turn over the client file or reveal confidential attorney-client communications to defend itself. The law firm has asked the client to waive the privilege and the client has refused to do so. Ex. A. The law firm is therefore trapped in a lawsuit for legal malpractice brought by an entity that is not and never has been the client, and lacks the ability to fully defend itself because it cannot reveal the communications concerning the allegations in the complaint. This limitation on the law firm's ability to defend itself constitutes a denial of due process under the South Carolina and United States Constitutions. Accordingly, the law firm seeks relief and guidance from this Court.

CONCLUSION

The plaintiff should not be permitted to continue prosecuting a case for legal malpractice against a law firm that has never represented the plaintiff. Allowing the litigation to continue puts the law firm in the untenable position of having to defend a legal malpractice case without the ability to reveal confidential attorney-client communications directly related to the allegations in the complaint. This limitation severely impairs the law firm's ability to fully and adequately defend itself.

Because the order on appeal involves the merits and affects a substantial right, the motion to dismiss the appeal should be denied. On review, the trial court's order should be reversed and this case should be dismissed.

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PROOF OF SERVICE

I certify that I have served a copy of the Return to Motion to Dismiss Appeal on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on **March 3, 2014**, addressed to its attorney of record, David Popowski, Esquire, Popowski Law Firm, LLC, Post Office Box 1064, Charleston, South Carolina 29402.

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