

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY

Doyet A. Early, III, Circuit Court Judge

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AUG 11 2014

SC Court of Appeals

Appellate Case No: 2014-000135

Moore Taylor & Thomas, P.A. Plaintiff/Appellant

v.

Marsha Banks and Mary Guynn..... Defendants

Of Whom Mary Guynn is the..... Respondent

REPLY BRIEF OF APPELLANT

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August 11, 2014

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INTRODUCTION

Respondent argues that she did not have any duty to Appellant and sets forth two spurious arguments in support of this position: (1) Rule 1.15 does not create any duty (initial brief at p. 9) and (2) even if there was a duty under Rule 1.15, none exists here because there was no written assignment, the client disputed Appellant's claim to funds, and there was no secured interest (initial brief at p. 7). Respondent misconstrues her obligations under Rule 1.15, entitled Safekeeping Property. Rule 1.15 clearly sets forth that Respondent's duties to Appellant were: (1) to hold the disputed funds separate and (2) not to arbitrate the dispute.

A. Rule 1.15 creates a duty when the lawyer has funds in escrow

Rule 1.15 clearly creates a duty for a lawyer holding funds in escrow that have more than one claimant. Rule 1.15 sets forth:

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property **shall be kept separate** by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Rule 1.15(e) (**emphasis added**). Respondent had a duty to hold the funds until the dispute was resolved. In an attempt to empty Rule 1.15(e) of any meaning, Respondent points to comment 4 which provides:

[4] Paragraph (e) **also** recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

(**emphasis** added). Comment 4 recognizes that there may be duties in addition to those set forth in Rule 1.15(e). (“Also” is defined as “in addition to.” See <http://www.merriam-webster.com/dictionary/also>).¹ This means there is a duty to be found in Rule 1.15 under appropriate circumstances. The Court of Appeals in Moore v. Weinberg found a Rule 1.15 duty: “The Rules of Professional Conduct specifically address this particular injury. Moore was a third party entitled to funds in an attorney’s possession.” Moore v. Weinberg, 373 S.C. 209, 225, 644 S.E.2d 740, 748 (Ct. App. 2007) aff’d, 383 S.C. 583, 681 S.E.2d 875 (2009). Here, Appellant is a third party entitled to funds in the possession of Respondent. Respectfully, Rule 1.15 applies.

B. Respondent’s attempt to distinguish Weinberg is misplaced

In her Brief, Respondent attempts to distinguish Weinberg by pointing out three factual differences between Weinberg and the instant case: (1) there is no written assignment, (2) the client disputed the amount, and (3) there is no secured interest. None of these facts are necessary to have a duty pursuant to Rule 1.15. Rule 1.15 simply requires an attorney to have possession of property in which multiple parties claim an interest and knowledge of the dispute. By virtue of the money being held in escrow, Respondent had legal title to the property (money). Respondent admits she

¹ In footnote 3 of its brief, Respondent cites to the unpublished decision of Byrd v. Wausau Underwriters Ins. Cos., 2011-MO-002, 2011 WL 11748258 (S.C. Jan. 7, 2011) and correctly notes that it has no precedential value. Byrd was decided at summary judgment after discovery. Here, the decision was on a motion to dismiss. In Byrd, the Court found “Under the circumstances of this case, we decline to find Respondents owed a duty to Byrd by operation of Rule 1.15.” The key fact in Byrd was no evidence was presented that the money at issue was ever part of an escrow account. Rather, the money went from the insurance company to the client. Here we have the opposite; the money flowed through Respondent’s escrow account giving Respondent legal title to the money, though not equitable title.

knew of Appellant's claim to funds. Respectfully, this matter should not have been dismissed as the duty is clear.²

CONCLUSION

Respondent has failed to point to any limitation on Rule 1.15's obligations supporting dismissal. Respectfully, the Circuit Court should not have dismissed this matter as a prima facie case of duty was set forth in the complaint and supported by the law.

Respectfully submitted,

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August 11, 2014
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² To the extent that additional facts may bear on the extent of the duty, the matter should have proceeded through discovery. Evans v. State, 344 S.C. 60, 68, 543 S.E.2d 547, 551 (2001) (As a general rule, important questions of novel impression should not be decided on a Rule 12(b)(6), SCRCP, motion to dismiss. Instead, a novel issue is best decided in light of the testimony to be adduced at trial).

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PROOF OF SERVICE

I, Jo-Elaine Boyd, a paralegal at Rikard & Protopapas, certify that I have served a true and correct copy of:

- **Reply Brief of Appellant**

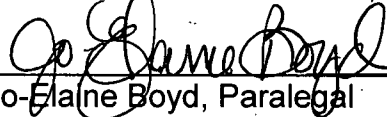
and upon all parties involved on the 11th day of August 2014, by mailing same by regular US Mail to:

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And to other counsel of record:

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Jenny Abbott Kitchings
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Re: Moore Taylor & Thomas, P.A., Appellant v. Marsha Banks and Mary Guynn, Defendants, of whom Mary Guynn is the Respondent.
Appellate Case No: 2014-000135

Dear Ms. Kitchings:

Enclosed please find the original and one copy of Appellant's Reply Brief. Please file the original and return a clocked copy to my courier. If you have any questions, please do not hesitate to contact me.

Sincerely,

Peter D. Protopapas

/jb
Encls.

cc: J. Calhoun Watson, Esq., Attorney for Mary Guynn
James D. Mosteller, III, Esq., Attorney for Marsha Banks

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