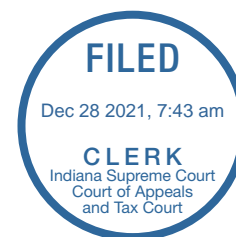


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Supervised Estate of Dr. John
Thomas Durnin (Deceased),
Robert Montgomery,
Appellant-Defendant,

v.

Law Office of David Gladish,
P.C., et al.,
Appellees-Plaintiffs.

December 28, 2021

Court of Appeals Case No.
21A-ES-1439

Appeal from the Lake Circuit
Court

The Honorable Marissa J.
McDermott, Judge

The Honorable Jewell Harris, Jr.,
Probate Commissioner

Trial Court Cause No.
45C01-1004-ES-49

Brown, Judge.

[1] Attorney Robert Montgomery appeals the trial court’s September 8, 2020 Order Authorizing the Compromise and Settlement of Wrongful Death Claim and the court’s June 15, 2021 order granting a motion for judgment on the pleadings filed by Dr. Timothy Durnin (“Timothy”), as personal representative of the Estate of Dr. John Durnin (the “Estate”), and the Law Office of David Gladish, P.C. (“Appellees”). We reverse and remand.

Facts and Procedural History

[2] On April 13, 2010, Attorney Montgomery and Judy Durnin (“Judy”) entered into an Attorney – Client Agreement, which provided that Judy retained Attorney Montgomery to prosecute or settle all claims of personal injuries against any who may have been responsible for the injuries and wrongful death of Dr. John Durnin (“John”). On April 20, 2010, Attorney Montgomery filed an appearance for the Estate, “by Special Administrator, Timothy Durnin” in the Lake Superior Court under cause number 45C01-1004-ES-49 (“Cause No. 49”). Appellees’ Appendix Volume II at 2.

[3] On July 12, 2019, Timothy, as Special Administrator for the Estate, by Attorney Montgomery, filed a Petition for Authority to Compromise Partial Settlement of Personal Injury and Wrongful Action alleging that a complaint was filed with the Indiana Department of Insurance (“IDOI”) on behalf of the Estate seeking damages against Munster Med Inn and Dr. Rajarajeswari Majety. The petition asserted that there was a proposed settlement of \$250,000 which included expenses of \$5,677.53 and attorney fees of \$83,333.33.

- [4] On July 15, 2019, the court entered an Order Approving Settlement of Wrongful Death Lawsuit and Accounting, which ordered Attorney Montgomery to coordinate with John's heirs to schedule a mutually convenient hearing date to decide the percentage of distribution of the net recovery.
- [5] On August 8, 2019, Timothy, Special Administrator for the Estate, by Attorney Montgomery, filed an Amended Petition for Authority to Compromise Settlement of Personal Injury and Wrongful Action, which again indicated that the proposed settlement was \$250,000 and included expenses of \$5,677.53 and attorney fees of \$83,333.33.
- [6] On September 4, 2019, the court entered an Order Approving Settlement of Wrongful Death Lawsuit and Accounting. That same day, Attorney Montgomery filed a Motion to Remove Timothy Durnin as Special Administrator for the Estate and Request for an Expedited Hearing. Attorney Montgomery asserted in part that Timothy refused to execute the release dismissing the defendants in the wrongful death lawsuit after learning Judy would receive a portion of the settlement funds.
- [7] On September 16, 2019, the court entered an Order Approving Settlement of Wrongful Death Lawsuit and Accounting, which again ordered Attorney Montgomery to coordinate with John's heirs to schedule a mutually convenient hearing date to decide the percentage of distribution of the net recovery.
- [8] On September 18, 2019, Dr. Majety filed a Motion to Intervene and Motion for Clarification of the Court's September 4th and 16th orders. Dr. Majety asserted

that the lawsuit was settled for a total amount of \$187,001. On October 4, 2019, Attorneys David Gladish and Douglas Walker of the Law Office of David Gladish, P.C., filed an appearance for Timothy as personal representative. On October 25, 2019, Timothy, as personal representative and by Attorneys Gladish and Walker, filed a Response to Motion to Intervene and Motion for Clarification.

[9] On October 29, 2019, the court held a hearing and entered an order substituting Attorneys Gladish and Walker for the personal representative and ordering that “Attorney Montgomery shall remain on the service list in this matter and shall file any request for attorney fees and/or reimbursement of expenses in this matter with this Court.” Appellant’s Appendix Volume II at 77. The court vacated the September 4th and 16th orders “rendering Dr. Majety’s Motion to Intervene [as] MOOT.” *Id.* It approved a proposed settlement agreement and authorized the personal representative to pursue a claim against the Patient’s Compensation Fund “with the counsel of his choosing.” *Id.* at 78.

[10] On May 6, 2020, Timothy, as personal representative and by Attorneys Gladish and Walker, filed a Petition for Authority to Compromise and Settle, which asserted that the court had previously approved a proposed settlement with the negligent health care providers for an amount of \$187,001 and that the IDOI, Judy, and the personal representative and his counsel had agreed to resolve the remaining claims for a payment from the IDOI of \$500,000. On May 14, 2020, the court granted the petition and ordered Timothy, as personal representative, to deposit all funds received into the trust account of the Law Office of David

Gladish, P.C., and to “file a petition requesting a hearing for apportionment of attorney fees among counsel for the Personal Representative, reimbursement of expenses advanced, and distribution of the remaining funds pursuant to Indiana law upon receipt of funds from the IDOI” *Id.* at 83.

[11] On July 17, 2020, Attorney Montgomery filed a Verified Complaint for Declaratory Judgment against the Law Offices of David Gladish in the Lake Superior Court under cause number 45D11-2007-MI-458 (“Cause No. 458”). He asserted that he provided legal services to the Estate, achieved a partial settlement of the medical malpractice claim with John’s health care providers, was discharged by the Special Administrator of the Estate, and had a claim for reimbursement of expenses and attorney fees. On July 29, 2020, the Law Office of David Gladish, P.C., filed a motion to dismiss pursuant to Ind. Trial Rule 12(B)(8) under Cause No. 458.

[12] Meanwhile, on July 28, 2020, Timothy, as personal representative and by Attorneys Gladish and Walker, filed a Petition for Fees and Allocation of Settlement Funds under Cause No. 49 alleging in part that Attorney Montgomery was disqualified from receiving any fees under the unclean hands doctrine. He asserted in part that lawyers with the Law Office of David Gladish, P.C., worked closely with Attorney Joseph Planera who was responsible for pursuing the claims on behalf of the personal representative under a split fee agreement. He also stated that, “if this Court determines Attorney Montgomery is entitled to any fees at all, he would only be entitled to attorney fees under an equitable theory of *quantum meruit*” and, “if this Court is

inclined, in spite of his ‘unclean hands’, to provide Attorney Montgomery with any fee, equitably, Montgomery should be apportioned 27% of the attorney fees, or \$66,776.50” *Id.* at 88-89. That same day, the Law Office of David Gladish, P.C., filed a Motion to Consolidate Cause No. 458 under Cause No. 49.

[13] On August 11, 2020, the court entered an order which scheduled a hearing for all pending matters for October 8, 2020. On August 18, 2020, Timothy filed a Motion for Summary Ruling on his petition. On August 25, 2020, the court scheduled a hearing for September 15, 2020.

[14] On September 8, 2020, the trial court entered an Order Authorizing the Compromise and Settlement of Wrongful Death Claim. The court approved attorney fees and expenses and ordered the personal representative to direct \$5,677.53 for expenses to Attorney Montgomery. On September 11, 2020, the Law Office of David Gladish, P.C., filed a Motion to Vacate the Hearings Scheduled for September 15, 2020, and October 8, 2020, as Moot and for Summary Ruling on the Motion to Consolidate. On September 15, 2020, the court entered an order granting Attorney Montgomery’s “Motion for (7) seven days up [to] and including September 21, 2020 to file a Trial Rule 60(B) Motion to Vacate the Court’s Order of September 8, 2020 and that the Defendant not disburse attorney fees until this Court has ruled on Plaintiff’s Motion to Vacate the Order of September 8[,] 2020.” Appellees’ Appendix Volume II at 44. On

September 21, 2020, Attorney Montgomery filed a Verified Motion Pursuant to Indiana Trial Rule 60 to Vacate the Court's September 8th Order.¹

[15] On October 6, 2020, Attorney Montgomery filed a notice of appeal of the court's September 8, 2020 order under appellate cause number 20A-ES-1843 ("Appellate Cause No. 1843").

[16] On October 7, 2020, the Lake Circuit Court granted a motion to consolidate Cause No. 458 with Cause No. 49. On November 12, 2020, Attorney Montgomery filed a Motion for Oral Argument on Previously Filed Trial Rule 60(B) Motion to Vacate the Court's Order of September 8, 2020, Denying Attorney Montgomery Attorney Fees under Cause No. 49. On December 9, 2020, Timothy, as the personal representative, filed a Final Accounting and

¹ In his December 17, 2020, Motion to Remand Pursuant to Ind. Appellate Rule 37 under appellate cause number 20A-ES-1843, Attorney Montgomery asserted that he filed a Motion to Vacate the Court's September 8, 2020 Order and referenced an attached Exhibit A, which contains a document titled: "Verified Motion Pursuant to Indiana Trial Rule 60 to Vacate the Court's September 8, 2020, Distribution Order that Denied Attorney Robert Montgomery Any Attorney's Fees." Appellant's Appendix Volume II at 167 (capitalization omitted). The document contains a stamp at the upper right corner, which states: "Filed: 9/21/2020 8:53 PM Clerk Lake County, Indiana." *Id.* On appeal, Appellees assert that "no T.R. 60 motion was ever filed on September 21, 2020." Appellees' Brief at 11. They also state:

Although Montgomery's T.R. 60(B) motion filed on February 11, 2021, is captioned "Amended", there has never been any other motion to vacate properly filed by Montgomery in the Trial Court action. The February 11, 2021 motion to vacate was Montgomery's first motion to vacate properly filed in the Trial Court. Appellant's App. Vol. II pp. 179-82. Montgomery attempts to "amend" his document that was merely served as a proposed order through IEFIS on September 21, 2020, but there is no NEF, nor does any e-filing appear for September 21, 2020 on the Chronological Case Summary. Appellant's App. Vol. II p. 10. Pursuant to Ind. Trial Rule 87 no document was ever filed on September 21, 2020, merely served. In spite of Appellant Montgomery's failure to properly file on September 21, 2020, he falsely stated to the Trial Court on November 12, 2020 and February 11, 2021, and to this Court on December 17, 2020, that he filed a T.R. 60(B) motion on September 21, 2020, when, in fact, he had not.

Id. at 5 n.1.

Petition for Discharge, which requested approval of the final accounting “as there is nothing properly filed before the Court challenging the validity of the Court’s Order of September 8, 2020.” Appellant’s Appendix Volume II at 159.

[17] Also on December 9, 2020, Attorney Montgomery filed a Second Motion Seeking a Hearing and Oral Argument on Previously Filed Trial Rule 60(B) Motion to Vacate the Court’s September 8th Order. On December 16, 2020, the trial court granted his motion to set the matter for hearing on his Rule 60(B) motion and scheduled the hearing for February 9, 2021.

[18] On December 11, 2020, Timothy, as personal representative, and the Law Office of David Gladish, P.C., filed a Motion to Dismiss Pursuant to Ind. Appellate Rule 10(F) under Appellate Cause No. 1843. On December 17, 2020, Attorney Montgomery filed a Motion to Remand Pursuant to Ind. Appellate Rule 37 under Appellate Cause No. 1843. He asserted that, “[f]or judicial economy, because oral argument has been scheduled by the Trial Court on Appellant’s 60([B]) Motion, Appellant requests that the appeal be dismissed without prejudice or temporarily stayed and the case remanded to the trial court for further proceedings.” *Id.* at 166.

[19] On December 30, 2020, the trial court entered an Order Approving Final Accounting, Discharging Personal Representative and Closing Estate, which stated that “no proper objections were filed” to the accounting and ordered “[t]hat the attorneys’ fees shall be disbursed by the Personal Representative in accordance with the Court’s Order of September 8, 2020.” *Id.* at 175.

[20] On January 8, 2021, this Court entered an order under Appellate Cause No. 1843, which denied the Appellees' motion to dismiss, granted Attorney Montgomery's motion to remand in part, and stated:

This Court dismisses this appeal, without prejudice, and remands the matter to the trial court for further proceedings. If any part of the trial court's forthcoming ruling on Appellant's Trial Rule 60(B) motion is adverse to Appellant, Appellant may, after filing a new notice of appeal, raise the issues he would have raised in this appeal along with the new issues created by the trial court's ruling on the Trial Rule 60(B) motion.

Id. at 177.

[21] On January 26, 2021, the trial court entered an order rescheduling the February 9, 2021 hearing for March 25, 2021. On February 5, 2021, Timothy, as personal representative, and the Law Office of David Gladish, P.C., filed a Motion to Vacate the Hearing Scheduled for March 25, 2021, and to Deny All Pending Motions as Moot.

[22] On February 11, 2021, Attorney Montgomery filed an "Amended Motion to Vacate Judgment Pursuant to Indiana Trial Rule 60(B)." *Id.* at 179. He asserted that he maintained his original basis for setting aside the judgment alleged in his initial motion and also cited Ind. Trial Rule 60(B)(3) and asserted fraud on the court "that arose after [he] filed his initial motion." *Id.* Specifically, he asserted:

Notwithstanding Gladish's express knowledge that this Court's September 8, 2020 Order was being appealed, Gladish filed a

December 9, 2020 verified motion for final accounting with this Court wherein [Timothy] averred under the penalties of perjury that “there is nothing properly filed before the Court challenging the validity of the Court’s Order of September 8, 2020.”

Id. at 180. He asserted that he had a meritorious claim and was entitled to a quantum meruit distribution. He asked the court to vacate its judgment pursuant to Ind. Trial Rule 60(B)(1), (3), and (8).

[23] On February 15, 2021, Attorney Montgomery filed a Motion for Treble Damages Arising from Attorney Deceit and Collusion. That same day, Timothy, as personal representative, and the Law Office of David Gladish, P.C., filed a Reply in Support of Motion to Vacate the Hearing Scheduled for March 25, 2021, and to Deny All Pending Motions as Moot and Request for Treble Damages.

[24] On March 16, 2021, the trial court held a hearing. Attorney Walker argued that Attorney Montgomery’s motion under Trial Rule 60(B) was never properly filed because he filed it “as an Order and it does not appear on the chronological case summary and there’s no NEF for it and the, the Personal Representative’s position is that under Trial Rule 87-C- that it’s not filed.” Appellant’s Appendix Volume III at 41. Attorney Montgomery’s counsel argued that “it was a technical violation” and was rendered moot by the fact he filed an amended motion. *Id.* Attorney Walker argued that Attorney Montgomery’s amended Rule 60(B) motion did not address the December 30, 2020 order. After some discussion, the court stated that “[i]t seems like we’ve

moved, we've moved beyond the excusable neglect and, and moved on to this allegation of fraud.” *Id.* at 48. Attorney Walker stated that if there was a hearing on the amended Rule 60(B) motion then “the discovery . . . should be narrowly tailored I believe for that initial hearing as to the issue of the fraud.” *Id.* at 49. The court stated it thought that was true “and I think that counsel agreed that that’s, that it would be limited for that purpose.” *Id.* Attorney Montgomery’s counsel stated: “I would agree.” *Id.* at 50. The parties discussed bifurcating the issue of fraud. Specifically, Attorney Walker stated in part: “[I]f the threshold issue of fraud isn’t met, there’s no reason to get in and waste the resources and all the discovery on the second half of what they have to prove, which is that they have a meritorious claim.” *Id.* at 51. Attorney Montgomery’s counsel stated that “the deep dive into the merits of who contributed what is unnecessary at this phase” and “I just need enough or, or either need a, some kind of stipulation or, or enough to show that, yeah, Mr. Montgomery has sufficient evidence out there to make that claim.” *Id.* at 52. He also stated:

The only thing I, I say I, absolutely cannot happen is I can get sandbagged and say, wait a minute, you had this showing. If we have a separate bifurcated proceeding and say, okay, now we’re going to proceed to the next phase. As long as I get the opportunity to make that showing I’m, I’m fine with what the Court’s saying there.

Id. at 53. The court stated he “would definitely get that opportunity.” *Id.* at 54. That same day the court entered a Hearing Journal Entry vacating the March

25, 2021 hearing and ordering Attorney Montgomery's counsel and Attorney Walker to submit a proposed order within fourteen days.

[25] On March 30, 2021, the court entered an order finding that the court's September 8th order "was supplanted by" its December 30, 2020 order and "[t]herefore, the various motions pending that relate[d] to the September 8, 2020 [o]rder" were denied as moot. Appellant's Appendix Volume II at 197. It found that Attorney Montgomery's claims under Ind. Trial Rule 60(B)(1) and (8) relating to the September 8, 2020 order were denied as moot. With respect to Attorney Montgomery's claim under Ind. Trial Rule 60(B)(3), the court scheduled a hearing for June 22, 2021, on his claim that the office of Attorney Gladish had committed fraud, misrepresentation, or other misconduct.

[26] On April 2, 2021, Timothy, as personal representative, and the Law Office of David Gladish, P.C., filed a Motion for Judgment on the Pleadings. They moved for a dismissal/denial of Attorney Montgomery's Ind. Trial Rule 60(B)(3) claim pursuant to Ind. Trial Rule 12(C).

[27] The chronological case summary indicates that a hearing was "[c]ommenced and concluded" on June 8, 2021, and that the hearing scheduled for June 22, 2021, was canceled. *Id.* at 18. At the June 8, 2021 hearing, the court indicated it was "set for hearing on all pending matters" and the parties discussed Attorney Montgomery's allegation of fraud. Transcript Volume II at 4. On June 15, 2021, the court granted the motion for judgment on the pleadings and found that it was a final and appealable order adjudicating all claims and the

rights and liabilities of all parties and that there was no just reason for delay pursuant to Ind. Trial Rule 54.

Discussion

[28] Attorney Montgomery argues that “this court should reverse the probate court’s September 8, 2020 and December 30, 2020 orders and remand the case for a hearing to determine a proper quantum meruit distribution.” Appellant’s Brief at 14-15. Timothy, as personal representative, and the Law Office of David Gladish, P.C., argue that the sole reviewable issue is whether the trial court properly entered its June 15, 2021 order granting their motion under Trial Rule 12(C). They also assert that any remaining issues were waived by Attorney Montgomery and state, without citation to the record or to any trial court order dated December 9, 2020, that “[t]he December 9, 2020 Order is a final order and no timely response, objection, notice of appeal or T.R. 59 motion were filed.”² Appellees’ Brief at 23. They argue that, waiver notwithstanding, Attorney Montgomery’s actions constitute unclean hands and preclude him from recovery of any equitable claim. They also contend that Attorney Montgomery’s claims for excusable neglect are strictly related to the September

² To the extent Appellees argue that Attorney Montgomery did not timely appeal the December 30, 2020 order, we note that Attorney Montgomery filed a notice of appeal on October 6, 2020, under Appellate Cause No. 1843 with respect to the September 8, 2020 order. Further, the chronological case summary for Cause No. 49 indicates multiple entries following the December 30, 2020 order including an entry dated January 26, 2021, scheduling a hearing.

8, 2020 order, which was supplanted by the trial court's December 30, 2020 order.

[29] While the trial court's March 30, 2021 order found that its September 8, 2020 order "was supplanted by" its December 30, 2020 order and "[t]herefore, the various motions pending that relate[d] to the September 8, 2020 [o]rder" were denied as moot, Appellant's Appendix Volume II at 197, this Court's January 8, 2021 order in Appellate Cause No. 1843, which related to Attorney Montgomery's appeal of the September 8, 2020 order, provided:

If any part of the trial court's forthcoming ruling on Appellant's Trial Rule 60(B) motion is adverse to Appellant, Appellant may, after filing a new notice of appeal, raise the issues he would have raised in this appeal along with the new issues created by the trial court's ruling on the Trial Rule 60(B) motion.

Appellant's Appendix Volume II at 177. Thus, we cannot say that Attorney Montgomery is precluded from raising claims related to the September 8, 2020 order and quantum meruit in this appeal.

[30] Despite the trial court's May 14, 2020 order that "Timothy Durnin, as Personal Representative . . . shall file a petition requesting a hearing for apportionment of attorney fees among counsel for the Personal Representative, reimbursement of expenses advanced, and distribution of the remaining funds pursuant to Indiana law upon receipt of funds from the [IDOI] as set forth in the Petition," *Id.* at 83, the record does not reveal that Timothy filed such a motion or that the trial court held a hearing for apportionment of attorney fees prior to its entry of the

September 8, 2020 order. Further, despite the court's December 16, 2020 order, which granted Attorney Montgomery's motion to set the matter for hearing on his Rule 60(B) motion and scheduled a hearing for February 9, 2021, the trial court entered the December 30, 2020 Order Approving Final Accounting, Discharging Personal Representative and Closing Estate before the scheduled February 9, 2021 hearing. We also note that the trial court consolidated Cause No. 458, which involved a complaint by Attorney Montgomery asserting that he was entitled to attorney fees based upon quantum meruit, into Cause No. 49. We cannot say that the trial court held a hearing on or specifically addressed the quantum meruit or unclean hands issues or that the record supports a review of these issues. We vacate the September 8, 2020, and December 30, 2020 orders to the extent the court failed to conduct a hearing for apportionment of attorney fees before those orders were entered. We reverse and remand for a determination of these issues and direct the trial court to detail the reasons for its ruling in its order, and we do not retain jurisdiction. *See Zimmer, Inc. v. Davis*, 922 N.E.2d 68, 75 (Ind. Ct. App. 2010) ("Since we remand for a trial on the merits, we vacate the trial court's findings and conclusions on the issues of the reasonableness of the Employment Agreement's restrictive covenants and the affirmative defense of unclean hands. Such issues are best determined by a trial on the merits of this dispute following an adequate time for discovery."); *Wallem v. CLS Indus., Inc.*, 725 N.E.2d 880, 890 (Ind. Ct. App. 2000) (holding, "because there is evidence in the Record that Wallem did in fact perform services for Defendants without payment, we

remand this case to the trial court for a hearing in order to determine Wallem's just compensation under the theory of quantum meruit").

[31] For the foregoing reasons, we reverse and remand for further proceedings not inconsistent with this opinion.

[32] Reversed and remanded.

Najam, J., and Riley, J., concur.