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Case Name:

Morgan v. Steffanini

Between
Reuben Morgan, carrying on business as Reuben Morgan
Paralegal Services, applicant, and
Max Steffanini, respondent

[2005] O.J. No. 1606
Court No. 01-CV-218362SR

Ontario Superior Court of Justice
J.F. McGarry J.

Heard: November 9, 2004.
Judgment: January 12, 2005.
(16 paras.)

Legal profession — Regulation of profession — Champerty and maintenance — Barristers and solicitors — Compensation — Contingency agreements.

Application by the plaintiff, Morgan, for a judgment against the defendant, Steffanini, for balance of an account owed in the amount of $25,000. The plaintiff was a paralegal. The defendant was unsuccessful in his two attempts to pursue compensation from the Workmen's Safety and Insurance Board. The plaintiff claimed he was retained to pursue compensation on behalf of the defendant in exchange for 15 per cent of the amount recovered. The defendant denied that there was a written retainer regarding WSIB claims and submitted that the plaintiff was hired solely to perform accounting tasks. The plaintiff was successful in obtaining a payment and sought his fee. The defendant claimed that he signed a blank piece of paper that he believed was a consent form required to obtain WSIB documents, and that the agreement was champertous in nature as a contingency fee agreement.

HELD: Application allowed. The evidence established that the defendant executed the agreement and that it was binding on both parties. The agreement was not champertous in light of the conduct of the parties and the motivation of the plaintiff. The plaintiff obtained an extraordinary result for the defendant where others failed. The amount billed was not unreasonable. No regulations related to paralegals or their fees precluded enforcement of the agreement.

Statutes, Regulations and Rules Cited:

Courts of Justice Act.

Powers of Procedures Act, s. 10.

Counsel:

John F. Johnson, for the Plaintiff

Khalid L. Baksh, for the Defendant

¶ 1 **J.F. McGARRY J.**:— The plaintiff a paralegal is claiming the balance of an account owing in the amount of $25,000.00 pursuant to the Simplified Procedure Rules. This amount is derived from an alleged agreement dated the 29th day of June, 2000 for services rendered between 1998 and April 2001.

¶ 2 The basis for the agreement relates to the recovery for injuries suffered by the defendant in his workplace in November, 1977. The plaintiff claims that he was retained in 1999 to pursue compensation from the Workmen's Safety and Insurance Board ("WSIB"). The defendant states that he has known the plaintiff since 1998 and had hired him to perform accounting tasks. He denies that there was any written retainer with respect to the WSIB claims.

¶ 3 By way of background the defendant was employed as a plumber when he was injured while working on the job. He pursued compensation for this disability and became fully disabled in 1994, stopped working and attempted to obtain disability payments from the WSIB. His efforts were not successful and an appeal of the decision of the WSIB was denied. He thereafter attempted to pursue the matter through other legal channels. These were not successful either.

¶ 4 In 1999 the parties discussed pursuing matters further. The defendant is alleged to have said that he would sign a retainer as he did not expect to win. The retainer agreement is attached hereto as exhibit "A" which in effect states that the plaintiff is entitled to 15% of all monies received from the WSIB including any lump sum payment along with any further monthly pension payments and acknowledges that the plaintiff has been a legal representative of the defendant since 1998. [Editor's note: Exhibit "A" was not attached to the copy received from the Court and therefore is not included in the judgment.]

¶ 5 It is agreed that the plaintiff was successful in obtaining a payment of $134,000.00 and a further monthly pension which prorated over 10 years was in the amount of $96,480.00 being a total sum of $230,480.00 and thus the plaintiff claims to be entitled to the sum of $34,572.00 of which the sum of $9,400.00 has been paid for a balance owing of $25,172.00. The plaintiff is willing to forego the sum of $172.00.

¶ 6 The defendant denies an obligation to pay this amount on two basis. Firstly he denies having signed the agreement claiming that his signature was applied to a blank piece of paper which was presented to him by the plaintiff with the understanding that it would be completed in the form of a consent to obtain documents from the WSIB. The plaintiff states that the document was typed in entirety prior to signature. Having heard the evidence of the defendant I am satisfied that he did in fact sign the document applying his full signature in the same format as the typed version and that this was unlike his usual signature. His lack of explanation for signing his name and his general demeanour left me with the clear impression that he was attempting to mislead the court on this issue. Consequently, I find the agreement binding on both parties.

¶ 7 The defendant claims that a document should not be enforceable as it is clearly a contingency agreement and it is alleged that it is champertous in nature.

¶ 8 It is clear from the evidence that the plaintiff who charges $50.00 per hour did not provide services amounting to $34,000.00 worth of time. However, when one calculates the amount of time which he did spend on the file and taking a generous view it is clear that his services would approximate $10,000.00 worth of billable time thus he would be receiving a bonus of approximately $24,000.00 based upon the agreement. When this court considers the contingency agreement I must look to the guidance of the Ontario Court of Appeal in McIntyre Estate v. Ontario (Attorney General) 61 O.R. (3d) 257. In this case Associate Chief Justice O'Connor stated that contingency fees were not per se champertous and thus were not per se illegal. In the words of O'Connor, A.C.J.:

> To be clear, I am not suggesting that contingency fee agreement can never be champertous. Rather, I conclude only that contingency fee agreements should no longer be considered per se champertous. The issue of whether a particular agreement os champertous will depend on the application of the common law elements of champerty to the circumstances of each case. A court confronted with an issue of champerty must look at the conduct of the parties involved, together with the propriety of the motive of an alleged champertor in order to determine if the requirements for champerty are present.

¶ 9 Further when considering the principles of maintenance and champerty he stated,

> Although the type of conduct that might constitute champerty and maintenance has evolved over time, the essential thrust of the two concepts has remained the same for at least two centuries. Maintenance is directed against those who, for an improper motive, often described as wanton or officious intermeddling, become involved with disputes (litigation) of others in which the maintainer has no interest whatsoever and where the assistance he or she renders to one or the other parties is without justification or excuse. Champerty is an egregious form of maintenance in which there is the added element that the maintainer shares in the profits of the litigation. Importantly, without maintenance there can be no champerty ...
>
> The Courts have made clear that a person's motive is a proper consideration and, indeed, determinative of the question whether conduct or an arrangement constitutes maintenance or champerty. It is only when a person has an improper motive, which motive may include, but is not limited to, "officious intermeddling" or "stirring up strife", that a person will be found to be a maintainer.

In Buday v. Locator of Missing Heirs Inc. (1993), 16 O.R. (3d) 257 at p. 268, 108 D.L.R. (4th) 424 (C.A.), Griffiths J.A. quoted with approval the following extract from Monteith v. Calladine, 47 D.L.R. (2d) 332, supra at p. 342 D.L.R.:

> It would appear, therefore, that champerty is maintenance plus an agreement to share in the proceeds, and that while there can be without champerty, there can be no champerty without maintenance. There must be present in champerty as in maintenance an officious intermeddling, a stirring up of strife, or other improper motive.

Similarly, Forgarty D.C.J., in S. v. K., 55 O.R. (2d) 111, supra, at p. 117 O.R., summarized the need for an improper motive as follows:

> I must conclude that the motive of the party who interests himself in the suit of another is most relevant to determine whether maintenance is made out. If the motive is genuine and arises out of concern for the litigant's rights, it is not maintenance. Similarly if that interest of such party arises genuinely from an interest in the outcome, it is not maintenance and this is not restricted to blood relationships. ...

In the same vein, the courts have allowed exceptions to what constitutes champerty or maintenance when there has been the presence of a justifying motive or excuse. Galati v. Edwards (1998), 27 C.P.C. (4th) 123, 21 R.P.R. (3d) 151 (Ont. Gen. Div.); S. v. K, supra; Goodman, [1939] S.C.R. 446, supra; Stribbell v. Bhalla (1990), 73 O.R. (2d) 748, 42 C.P.C. (2d) 161 (H.C.J.); and Buday, supra. Lord Denning M.R. in Trepca Mines, supra, said the following at p. 219 (ch.):

> Maintenance may, I think, nowadays be defined as improperly stirring up litigation and strife by giving aid to one party to bring or defend a claim without just cause or excuse. At one time the limits of "just cause or excuse" were very narrowly defined. But the law has broadened them very much of late ... [a]nd I hope they will never again be places in a strait waistcoat.

The fundamental aim of the law of champerty and maintenance has always been to protect the administration of justice from abuse. However, over time, that which has been considered to be champerty and maintenance has evolved. As they have done with many other common law concepts, the courts have shaped the rules relating to champerty and maintenance to accommodate changing circumstances and the current requirements for the proper adminstration of justice. In Giles v. Thompson, [1993] 3 All E.R. 321, supra, at p. 360 All E.R., Lord Mustill described this process as follows:

> As Steyn L.J. has demonstrated, the law of maintenance and champerty has not stood still, but has accommodated itself to changing times: as indeed it must if it is to retain any useful purpose. ... I believe that the law on maintenance and champerty can best be kept in forward motion by looking to its origins as a principle of public policy designed to protect the purity of justice and the interests of vulnerable litigants. ...

In summary, I discern the following four general principles from a review of the common law of champerty and maintenance:

- champerty is a subspecies of maintenance. Without maintenance, there can be no champerty.
- For there to be maintenance, the person allegedly maintaining an action or proceeding must have an improper motive, which motive may include, but is not limited to, official intermeddling or stirring up strife. There can be no maintenance if the alleged maintainer has a justifying motive or excuse.
- The type of conduct that has been found to constitute champerty and maintenance has evolved over time so as to keep in step with the fundamental aim of protecting the administration of justice from abuse.
- When the courts have had regard to statutes such as the Champerty Act and the Statue Concerning Conspirators, they have not interpreted those statutes as

cutting down or restricting the elements that were otherwise considered necessary to establish champerty and maintenance at common law.

¶ 10 Thus with the guidance of McIntyre I must look upon the following:

1) the conduct of the parties involved and

2) the propriety of the motive of the alleged champertor.

¶ 11 It is clear when reviewing the evidence in this case that the plaintiff achieved an extraordinary result for the defendant and did so when others had failed to take action and looked upon the case as hopeless. Thus in my view his conduct was exemplary and not to be considered in any fashion an attempt to "stir up strife" but rather to ensure that the defendant obtained justice.

¶ 12 Thus the motives of the plaintiff were entirely proper. In addition the plaintiff is entitled to appear before the administrative tribunal by virtue of s. 10 of the Powers of Procedures Act and thus should be entitled to enter into a contingency agreement provided such fees are consistent with public policy aims of the regulations under the Solicitor's Act governing contingency fees by lawyers.

¶ 13 It is noted that the Task Force on paralegal regulations carried out by the Law Society of Upper Canada stated in its recommendations under paragraph 19 and the surrounding commentary at pages 41-42 as follows:

> FEES CHARGED BY PARALEGALS
>
> Participants at the consultation meetings frequently identified problems with the fees paralegals charge, especially unconscious contingency fees in the context of FSCO and The Workplace Safety and Insurance Board. Members of the public should have recourse to a mechanism to review unreasonable fees. The Task Force is of the view that the same process for disputing lawyers' fees should be applied to paralegal fees also.
>
> While some submissions suggested that paralegals should not be permitted to charge contingency fees, this would be inconsistent with the government's recently adopted regulations for lawyers.
>
> Licensed paralegals should be required to maintain trust accounts for retainers and any other funds received in trust. Some paralegals submitted that the use of a trust account is cumbersome in a practice involving many small cases and would not be necessary if a paralegal undertakes to submit all invoices in arrears. However, the Task Force does not regard exceptions to the requirements of a trust account to be in the public interest.
>
> RECOMMENDATION NINETEEN
>
> It is recommended that,
>
> a) the same process used for reviewing legal fees be applied to paralegal fees;
>
> b) contingency fees not be prohibited outright but that the rules governing contingency fees for lawyers should apply to paralegals also; and

c) licensed paralegals be required to maintain trust accounts for retainers and any other finds received in trust, and comply with requirements for record keeping and handling of money similar to those lawyers.

¶ 14 Despite this, however, the ministry of the Attorney General has not yet taken steps to impose any formal regulations on paralegals or their fees, although the Law Society of Upper Canada has submitted these recommendations to the Attorney General as of September, 2004.

¶ 15 Accordingly, for the above reasons, I find that the plaintiff is entitled to recover the sum of $25,000.00 plus interest in accordance with the Courts of Justice Act and costs.

¶ 16 I would ask counsel to make submissions with respect to costs within 14 days of the release of this judgment.

J.F. McGARRY J.

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