

Supreme Court Case No. 063269

IN THE SUPREME COURT OF WEST VIRGINIA

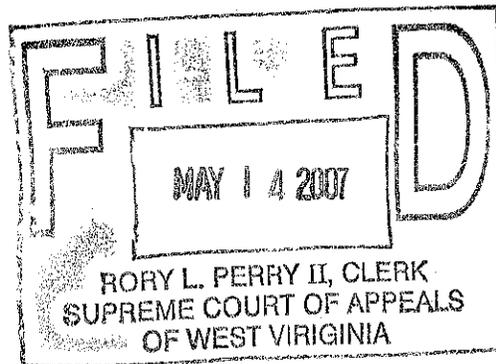
LANDIS V. LANDIS

A. E. LANDIS, M.D.,

Petitioner below,

Vs.

CASE NUMBER: 99-D-531
JUDGE ROBERT A. BURNSIDE, JR.
CIRCUIT COURT OF RALEIGH COUNTY



GEORGANNE BANNING LANDIS,

Respondent below.

FROM THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S
RESPONSE TO RESPONDENT'S PETITION FOR APPEAL

May 11, 2007

C. Elton Byron, Jr.
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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA:

NATURE OF PROCEEDINGS AND RULINGS IN TRIBUNAL BELOW

The statements contained in the Memorandum of Law in Support of Respondent's Petition for Appeal are substantially correct.

STATEMENT OF FACTS

The Statement of Facts contained in the Memorandum of Law in Support of Respondent's Petition for Appeal is substantially correct except as follows:

- A. Dr. Landis has partially paid to Ms. Landis her equitable share of the parties marital estate.
- B. Ms. Landis has been subject to a contempt petition for her failure to cooperate in the division of the parties' marital assets; and
- C. Ms. Landis did not terminate the services of Barry Bruce because he was unable to obtain certain requested financial information from Dr. Landis, but, she terminated Mr. Bruce because she was not willing to follow his advice and maintain her composure during the hearings in which she was involved with Mr. Bruce.

Further, the amounts enumerated as attorney fees due and owing the various attorneys for Ms. Landis had not been certified to counsel for the Petitioner and, therefore, no further comment can be made with regard thereto.

ASSIGNMENTS OF ERROR

- 1. The Circuit Court did not err by not remanding, nor reversing the Family Court Judge's decision to not award a full or partial reimbursement to Ms. Landis for attorney fees, expert

fees and costs incurred by her for the prosecution of this divorce matter, since this was a very complex case, Dr. Landis's misconduct led to the dissolution of the parties' marriage, there was a substantial disparity in income, he failed to provide documentation in a timely manner, and Ms. Landis did not have the financial ability to pay such fees.

2. The Circuit Court did not err by not remanding, nor reversing the Family Court's finding that Ms. Landis received an award of substantial assets when, in fact Dr. Landis failed to pay almost \$900,000 that was due and owing in December 2005 and Ms. Landis' other marital assets did not produce much income.

3. The Circuit Court did not err by not remanding, nor reversing the Family Court's decision that Ms. Landis had the ability to pay her own attorney fees when she was not currently employed and has not been for the last 15 plus years, her spousal support will terminate in approximately 2 ½ years and she suffers from health problems which preclude her from earning an income.

4. The Circuit Court did not err by not remanding, nor reversing the Family Court's ruling that Dr. Landis was making payment on a \$15,000 mortgage loan for Ms. Landis' benefit for her prior attorney fees when that is not the evidence contained in the record.

5. The Circuit Court did not err by not remanding, nor reversing the decision of the family court in finding that Dr. Landis had paid \$1,500.00 to Barry Bruce for attorney services rendered to Ms. Landis, when in fact the evidence did not support that he had paid that.

DISCUSSION AND AUTHORITIES

WV Code Section 51-2A-14 provides that the Circuit Court shall review the findings of fact made by the Family Court Judge under the clearly erroneous standard and shall review the

application of law to the facts under an abuse of discretion standard. However, in the absence of findings by the Circuit Court that the Family Court Judge was clearly erroneous or abused her judicial discretion after having heard all the facts and the evidence in the case, the Circuit Judge must affirm the ruling of the Family Court Judge.

DISCUSSION

A. The Respondent has sufficient funds from which to pay her own attorney fees.

First of all, the evidence in this case was that, although the Petitioner had a gross income of in excess of Six Hundred Thousand Dollars (\$600,000.00) per year, his net monthly income, after payment of all required, court-ordered obligations, left him with approximately Seven Thousand Dollars (\$7,000.00) in disposable income from which he must pay his own expenses and which amounts to less than 50% of the income which Ms. Landis is receiving from Dr. Landis. His obligation to Ms. Landis is Fifteen Thousand Dollars (\$15,000.00) per month in combined child support and alimony.

Secondly, in addition to the division of the marital assets which netted over One and one-half million dollars to Ms. Landis, within sixty (60) days of the date of the entry of the final order, Dr. Landis must pay to Ms. Landis, from some existing account, Eight Hundred Eighty Thousand Nine Hundred Sixty-Six Dollars (\$880,966.00) which certainly provides Ms. Landis sufficient income from which she can pay her attorney fees.

Third, although Ms. Landis had retained the services of several attorneys and expert witnesses in this case, it was her choice to terminate their services and no fault of Dr. Landis, and Dr. Landis should certainly not be responsible for her inability to sustain a compatible relationship with her attorneys and experts.

Fourth, although Dr. Landis timely provided all requested discovery to the prior attorneys and expert witness of Ms. Landis, he and his accountant were subsequently deposed on two occasions and the depositions disclosed nothing other than what Dr. Landis and his accountant,

John Stroud, had previously urged and asserted in the case. As a matter of fact, on several occasions documents were made available for inspection and reproduction by the attorneys and/or experts for Ms. Landis at the office of John Stroud and, although appointments for the same had been made, neither the attorneys nor the experts appeared as scheduled.

Fifth, although the motion for attorney fees refers in more than one instance to misconduct by Dr. Landis and even an “adulterous affair” no evidence was ever presented or corroborated to substantiate the allegations. As a matter of fact, the only testimony on this point was that there had been no relationship between Dr. Landis and his x-ray technician until subsequent to the separation of the parties. For counsel to urge that “it was devastating for Mrs. Landis to learn of Dr. Landis’ infidelity” is ridiculous. Had Ms. Landis and her counsel believed that such a shallow allegation could have been supported then certainly evidence with regard to the same would have been produced. The fact of the matter is that it simply did not exist.

B. Counsel has urged the Court to consider the application of the factors in Banker v. Banker, 474 S.E. 2d. 465 (W. Va. 1996) as being relevant to her motion. With regard to the same, the response of the Petitioner is as follows:

1. **Ability to Pay.**

First of all, this issue has been adequately covered in the preceding pages herein.

Secondly, the Respondent asserts that she will not enjoy the future benefit of **recurring income** from the medical practice of Dr. Landis. The fact of the matter is that Dr. Landis is fast approaching the age of sixty-five, is not in good health, and has had his income substantially depleted by court ordered obligations.

Further, there was no evidence at all to support the allegations by the Respondent that she is in ill health suffering from arthritis in her knees, degenerative disc and joint disease and collapsed discs. Ms. Landis states that she does not have the ability to be employed but the fact of the matter is she is highly educated, intelligent, has independent wealth and real estate holdings aside from

what she has received from Dr. Landis and has the ability to continue in gainful employment.

2. **The Amount Involved and the Results Obtained.**

It is interesting to note that the results contained in the Final Order in this case are basically those which were proposed as a settlement by Dr. Landis initially and at the outset of this case. The exercise in futility of Ms. Landis in prolonging this litigation led to nothing more than what was previously offered.

3. **The Skill Required to Perform Legal Services Properly.**

It is not argued that Ms. Landis was represented by a skilled attorney in this case. As a matter of fact, she had at least three experienced, skilled attorneys which she had retained. Two of which, James Cagle and Barry Bruce, she could not get along with and terminated and Dr. Landis should not be responsible for that. However, the skill alone of her attorney does not necessitate Dr. Landis being responsible for the attorney fees which were unnecessarily incurred in this case.

4. **The effect that payment of attorney fees would have on each parties' standard of living.**

It has already been pointed out that Ms. Landis will have twice as much spendable income in cash alone apart from her independent wealth and other investment holdings than that which Dr. Landis will have. If Dr. Landis can sustain his current earning capability, which is doubtful due to his age and health, he will still be financially disadvantaged when compared to the income and assets of Ms. Landis.

The Respondent states that her spousal support will expire at the end of approximately five years which will cause a depletion in her income. The Court will recall, however, that the term of her spousal support was by her agreement and had she believed she would be entitled to a longer period of support, she certainly could have placed this issue before the Court for determination.

5. **The "Degree of Fault" by either party in making the divorce action necessary.**

Once again, the Respondent urges that Dr. Landis was at fault by engaging in an

extramarital affair. However, counsel for Respondent does accurately state in the second sentence under this category that: "Dr. Landis has not admitted that he engaged in an adulterous relationship" which is absolutely true. Moreover, Ms. Landis could not come up with any evidence to support her allegations of fault on the part of Dr. Landis and by agreeing to the substantial settlement which Ms. Landis has received in this case, she has elected not to produce any evidence if it, in fact, even existed. Therefore, fault cannot be considered in this case because there was no fault shown.

6. **The Attorney Fees, Expert Fees and Costs in this case are Reasonable.**

Nothing could be further from the truth. All documents which were requested to be produced by the Petitioner were, in fact, produced on numerous occasions both in writing and by the physical exchange of documents. The records of Dr. Landis were kept in the office of John Stroud and Mr. Stroud made his office open and available to at least two experts which were retained by Ms. Landis. The problem in this case was that nothing would satisfy Ms. Landis and she insisted on continuing to dig for information that simply did not exist.

C. The Respondent urges the Court to consider **THE TWELVE AETNA FACTORS** in the Motion for Attorney fees as follows:

1. **The Time and Labor Required.**

There is no question that current counsel, Lyne Ranson, expended many hours at the urging of her client to pursue this case. However, this case was no more complex, protracted, or contentious than many other cases before the Court. What made this case complex, protracted and contentious was the personality of the Respondent who was hell-bent on attempting to destroy the reputation of Dr. Landis which she fell short of doing.

2. **The Novelty and Difficulty of the Questions.**

As indicated before, this case was not complex. It was only the irrational and unreasonable behavior of the Respondent that caused it to appear that way.

3. **The Skill Required to Perform Legal Services Properly.**

With respect to all the attorneys that represented the Respondent in this case, any one of the three could have taken it to completion without incurring the extreme costs which are now placed before the Court for consideration. All of the attorneys who have been retained by the Respondent were seasoned, experienced and well-versed in family law. However, simply because the Respondent could not get along with all of them is not reason enough to cause or expect Dr. Landis to be responsible for all the fees incurred.

4. **The Preclusion of Other Employment by the Attorney Due to the Acceptance of this Case.**

As indicated by counsel for the Respondent, she was not precluded from accepting other cases and, as a matter of fact, was involved in several other cases during the course of this litigation.

5. **The Customary Fee.**

Counsel for the Respondent urges that the customary fee for litigation such as this is Two Hundred Dollars (\$200.00) per hour by her counsel. However, this was not the customary fee in Raleigh County, West Virginia which is more in line with One Hundred and Fifty Dollars (\$150.00) per hour.

6. **Whether the Fee is Hourly or Contingent.**

As the Court knows, it is not ethical to charge a contingency in litigation of this nature and, therefore, as stated by counsel for the Respondent, this factor is not relevant.

7. **The Limitations Imposed by the Client or the Circumstances.**

The circumstances of this case did not impose any limitations on counsel for the Respondent. However, the Petitioner would urge the Court to consider the irrational and unreasonable behavior of the Respondent in determining whether her conduct caused limitations on her attorney.

8. **The Amount Involved and the Results Obtained.**

As previously disclosed this case settled on substantially the same terms which were urged by the Petitioner at the outset of this litigation.

9. **The Experience, Reputation and Ability of the Attorneys.**

As previously indicated, any of the attorneys who have been retained to represent the Respondent had the necessary experience, reputation and ability to have completed this case. It was only through the unreasonableness of the Respondent that two of the attorneys were discharged prematurely.

10. **The Undesirability of the Case.**

Nothing urged by counsel supports the assertion that this case was undesirable.

11. **The Nature and Length of the Professional Relationship With the Client.**

As stated by counsel for the Respondent, this fact, also, is not relevant.

12. **Attorney Awards in Similar Cases.**

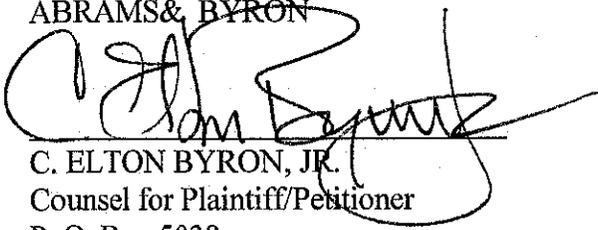
There are several cases in West Virginia where attorney fees have been argued and, in some of which, have been awarded. However, the lopsidedness of the settlement and the result in this case tending to favor the Respondent certainly would not support a finding that the Petitioner should be responsible for the attorney fees and costs incurred by the Respondent.

CONCLUSION

Wherefore, it is respectfully submitted that considering all of the above, neither the Circuit Court nor the Family Court clearly erred or abused its discretion and, therefore, the Respondent's Petition for Appeal should be denied.

A. E. LANDIS, M.D.
By Counsel

ABRAMS & BYRON

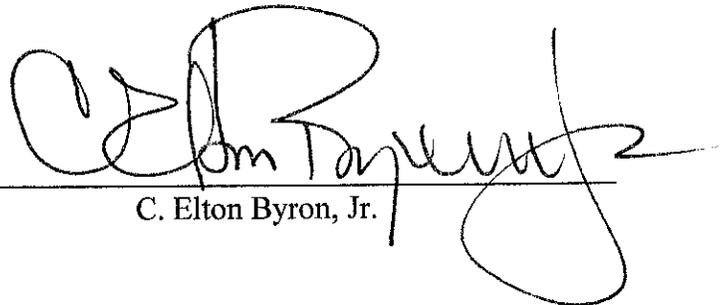


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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Memorandum of Law in Support of Plaintiff's Response to Respondent's Petition for Appeal has been served upon the following counsel of record by United States mail, first class, postage prepaid, this 10th day of May, 2007.

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C. Elton Byron, Jr.