

35224

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

JOHN DAVID MOONEY, an individual

Plaintiff,

v.

Civil Action No. 08-C-1038

MICHAEL FRAZIER, an individual,
and FRAZIER & OXLEY, L.C.,
a West Virginia legal corporation,

Defendants.

CABELL CHANDLER
CIRCUIT CLERK
CABELL WV

2009 APR - 8 P 1:18

FILED

ORDER AND CERTIFICATION

On February 12, 2009, came the defendants, Michael Frazier and Frazier & Oxley, L.C., by counsel, and the plaintiff, John David Mooney, by counsel, for a hearing concerning "Defendants' Rule 12(b)(6) Motion to Dismiss" and the "Plaintiff's Response to Defendants' Rule 12(b)(6) Motion to Dismiss." Essentially, the defendants, who had been previously appointed by the United States District Court to represent the plaintiff in a criminal matter, argued that the plaintiffs' subsequent state law legal malpractice claims should be dismissed on statute of limitations and immunity grounds. The plaintiff opposed the motion by claiming that the plaintiff had timely filed his legal malpractice claims and that the defendants were not immune from such claims under West Virginia law. After full consideration of the written pleadings and the oral argument of the parties, the Court found that each of the legal issues raised were questions of first impression in West Virginia and that the following certified questions should be submitted to the Supreme Court of Appeals of West Virginia for consideration. Accordingly, the Court hereby certifies the following questions for the Supreme Court's consideration:

1. Whether the statute of limitations on a legal malpractice action stemming from the defense of a criminal defendant begins to run when the criminal defendant files a habeas corpus petition claiming that he suffered ineffective assistance of counsel in the underlying criminal proceedings?

Yes

No

2. Is a criminal defendant collaterally estopped from filing a civil legal malpractice claim against his attorney until the underlying criminal conviction is overturned?

Yes

No

3. Whether, under West Virginia law, an attorney who is court appointed to represent a criminal defendant in a federal criminal prosecution is immune from purely state law claims of legal malpractice stemming from the underlying criminal proceedings?

Yes

No

Pursuant to West Virginia Code Section 58-5-2, the Court also certifies that each of the above questions arise as purely questions of law relating to the challenge of the sufficiency of a pleading.

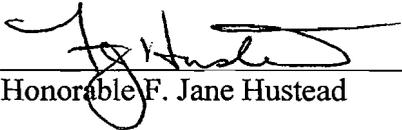
The Court orders that further proceedings in this matter be stayed until such questions shall have been decided by the Supreme Court and the decision thereof certified back to this Court.

The Circuit Clerk is directed to provide certified copies of this order and certification to the parties.

The defendants are directed to file with the Circuit Clerk an original and nine (9) copies of a petition within sixty (60) days of the date of the entry of this order and certification and the plaintiff is directed to file an original and nine (9) copies of a response within thirty (30) days of the filing of the petition, if plaintiff chooses to file a response.

Within thirty (30) days of the designations of the record by the parties, the Circuit Clerk is ordered to assemble, paginate, and index the designated portions of the record by the parties and, together with the original and copies of the petition and any opposing response, transmit the same to the Clerk of Supreme Court of Appeals of West Virginia.

Entered this 7th day of April, 2009.

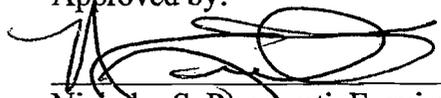

Honorable F. Jane Hustead

Prepared by:


Michael M. Fisher, Esquire (WVSB #4353)
JACKSON KELLY PLLC
500 Lee Street East, Suite 1600
P. O. Box 553
Charleston, West Virginia 25322
(304) 340-1000
Counsel for Defendants

ENTERED Circuit Court Civil Order Book
No. 217 Page 608 this
APR 08 2009

Approved by:


Nicholas S. Preservati, Esquire (WVSB #8050)
PRESERVATI LAW OFFICES PLLC
300 Capitol Street Suite 1018
P. O. Box 1431
Charleston, WV 25325
Counsel for Plaintiff

STATE OF WEST VIRGINIA
COUNTY OF GABELL
I, ADELL CHANDLER, CLERK OF THE CIRCUIT
COURT FOR THE COUNTY AND STATE AFORESAID
DO HEREBY CERTIFY THAT THE FOREGOING IS
A TRUE COPY FROM THE RECORDS OF SAID COURT
ENTERED ON 4-8-09
GIVEN UNDER MY HAND AND SEAL OF SAID COURT
THIS JUL 1 2009
 CLERK
CIRCUIT COURT OF GABELL COUNTY, WEST VIRGINIA