

On November 4, 2015, a motorcycle driven by Patrick Conklin and a pickup truck driven by Jason Gilbert collided in an intersection. Conklin died from the injuries he suffered in the collision. On July 20, 2016, Mary Malinowski filed this lawsuit against Gilbert and his employer, Selco Industries, Inc., for whom he had been driving. Malinowski's complaint consists of three counts. The first is brought against Gilbert and Selco under the Wrongful Death Act on behalf of Malinowski, her four siblings, and their father. Count two is also brought against both

defendants under the Survival Act on behalf of Conklin's estate. Count three is brought against both defendants for Conklin's medical, funeral, and burial expenses.

The issue before this court does not concern the substance of Malinowski's lawsuit. Rather, Malinowski petitioned this court to adjudicate the lien of Malinowski's first attorney, Randall Reinhardt, a Wisconsin licensed attorney. In response, Reinhardt filed a motion and then an amended motion to strike Malinowski's petition. Reinhardt argues that this court should apply Wisconsin law that, he claims, entitles him to one-third of "any judgment or settlement obtained for the *decedent's estate*." Amd. Mtn. Strike, at 2 (emphasis added). In contrast, Malinowski argues that Illinois law should apply, under which Reinhardt should receive only the value of his work product, which, she contends, is nothing.

The conflict began in December 2015, when Malinowski and her siblings, each a Wisconsin resident, executed an identical retainer agreement with Reinhardt. (Conklin's father did not execute such an agreement.) In each, Malinowski and her siblings agree to pay Reinhardt "one-third (1/3) of whatever total sum is collected for or on behalf of the client." Each signatory further agrees to give Reinhardt "a valid lien for said amount." The agreement provides that, "if there is no recovery, that is, nothing collected, then the client shall owe the attorney nothing for costs and disbursements or attorney fees."

The agreement provides specific circumstances under which Reinhardt may withdraw, such as if the clients rejected his settlement recommendations. If Reinhardt were to withdraw after the clients had received a settlement offer, the agreement gives him "a valid lien in the amount of his costs and disbursements to the date of withdrawal plus a fee of 33 1/3% of the amount of the settlement offer on the date of withdrawal or such lower amount as may be required by law." The agreement does not mention circumstances under which the clients could terminate Reinhardt's representation or the terms of such a

termination. The agreement also contains no choice-of-law provision.

According to Malinowski's response to Reinhardt's motion to strike, after only a few months she and her siblings were unsatisfied with his progress. She points out that she, not Reinhardt, filed the paperwork to petition the Cook County Circuit Court's probate division for letters of administration on behalf of Conklin's estate.¹ After approximately six months after she hired Reinhardt, Malinowski, then as administrator of her brother's estate, retained Salvi, Schostok, & Pritchard, P.C., an Illinois law firm that eventually filed the complaint and all subsequent pleadings in this case.

To obtain a more complete record of what transpired between Malinowski and Reinhardt, this court ordered that Reinhardt be deposed. On March 9, 2017, Reinhardt testified that he has been licensed exclusively in Wisconsin since 1973 and that he is unwilling to accede to the jurisdiction of Illinois courts. Reinhardt stated that he spoke mostly with Malinowski who said that she and her siblings' father did not wish to participate. Reinhardt said that he met with Malinowski shortly before December 22, 2015, the date on which he sent each sibling an identical retainer contract. Each sibling executed and returned the contract to him in or around late December 2015.

At some point, Reinhardt wrote a long letter to each family member explaining a settlement package that could be provided to the defendants' insurance company. The letter included a copy of jury instructions and "outlin[ed] the law of wrongful death in Illinois. . . ." Dep. at 29. Reinhardt recalled that in March 2016, State Farm had offered the limit of its \$100,000 policy as the

¹ To be clear, Malinowski did not file that paperwork. Instead, Raymond Lester, an Illinois licensed attorney, filed the petition for letters of administration on Malinowski's behalf in *In re Estate of Patrick Conklin*, 15 P 7970. On January 13, 2016, Malinowski received letters of office as the independent administrator.

underinsured carrier and that no other insurance company ever offered its policy or made a settlement offer. State Farm did not specifically identify the consideration for its \$100,000 offer, but Reinhardt believed that State Farm wished to obtain a release for Gilbert, its insured. Reinhardt forwarded State Farm's offer to the siblings to determine if they wished to substitute their funds and retain their rights against Gilbert individually. They wrote back indicating that they did not wish to accept State Farm's offer.

During Reinhardt's deposition, he identified various materials in this file that he had collected. They included correspondence, including e-mails, "a bunch of research done on Illinois wrongful death law settlements," *id.* at 20, Conklin's insurance information, and the Chicago Police Department's traffic crash report. He testified that he never opened a probate estate because "the anticipation was the case would get settled, as [the siblings] asked me to do, and we would distribute [the funds]. Since they agreed to share it evenly, I'm not certain we would need to have to run through probate." *Id.* at 20-21. Reinhardt remarked that Gilbert's ongoing traffic-violation case and Malinowski's and her siblings' tardiness in sending Reinhardt needed information hampered his ability to have meaningful settlement negotiations.

Reinhardt acknowledged that Conklin's accident occurred in Illinois but that he "didn't really undertake any investigation." *Id.* at 24. Reinhardt did not know if Conklin had been an Illinois resident at the time of his death since the only information Reinhardt had was the police report. He acknowledged that the defendants were Illinois residents, but he did not know if they were subject to Wisconsin jurisdiction. He said that the family had discharged him before he could visit conduct a site inspection. He did not attend Gilbert's criminal prosecution for the same reason. Reinhardt conceded that: "If a lawsuit were to be brought, I would assume it would have to be brought in Illinois." *Id.* at 24.

According to Reinhardt, from April to mid-May 2016, he sent correspondence and e-mails to the siblings but received little in

return. At one point he received e-mail communications, including one from Elizabeth Erenz, one of Conklin's other sisters. Based on the family's failures to respond and lack of cooperation in putting together a damages package for the insurance company, Reinhardt concluded that the family no longer wanted to settle the matter and were more open to the idea of a lawsuit. To that end, Reinhardt thought it was a good time to get a Chicago lawyer involved, so he spoke with Tom Demetrio at the Chicago law firm of Corby & Demetrio. Reinhardt testified that he felt it was likely a suit would be filed in Illinois.

Reinhardt testified that he received a discharge letter from Malinowski seven months after being retained. In the letter, Malinowski wrote that Reinhardt had made no progress on the matter in nearly six months. Reinhardt later provided the Salvi firm with Wisconsin law governing attorney's fees since Reinhardt believed the Salvi firm was trying to turn his discharge into one for cause. At one point, Reinhardt told Salvi attorney Paul Scoptur that there was no case for a discharge for cause.

Reinhardt testified that the family could not terminate him without having to compensate him one-third of whatever eventually the Salvi firm recovered, less whatever that firm did to resolve the claim. On that point, there was this colloquy:

Q. [I]s it your opinion that under those circumstances that I laid out where you are retained and you're terminated a week later and you secure the police report, the insurance information, the photographs of the scene, the medical records, and you get all of that done within one week and you're terminated, you're entitled to one-third of what's recovered even if the recovery take[s] place three years later through a trial?

A. That is my opinion.

Dep. at 43. Reinhardt agreed that the retainer contract does not inform a client that, if Reinhardt were fired, he would still be

entitled to one-third of any recovery. He also agreed that he never discussed that subject with any of the family members.

On March 24, 2017, Reinhardt filed an amended motion to strike Malinowski's petition. One exhibit to Reinhardt's motion is his affidavit averring that he had perfected his attorney's lien under Wisconsin law by serving a letter on the defendants' insurance companies. Malinowski's response brief attaches various exhibits, including a transcript of Reinhardt's deposition, Malinowski's December 27, 2015 petition to the probate division of this circuit court for letters of administration, and the letters of office issued the same day to Malinowski appointing her independent administrator of Conklin's estate. Reinhardt's reply brief attaches copies of portions of the Illinois and Wisconsin rules of professional conduct.

Analysis

Malinowski's petition to adjudicate and Reinhardt's amended motion to strike raise a variety of arguments as to this court's jurisdiction and the validity of Reinhardt's lien. This court has concluded that both parties' arguments are wrong – Reinhardt for believing that he has a lien in this case, and Malinowski for believing that this court can adjudicate that lien. The parties' mutual mistake is based on a misunderstanding of the Malinowski's role in this litigation.

Reinhardt does not have a lien in this case because his retention agreements are with each of Conklin's heirs. In other words, he was not retained by Conklin's estate, the plaintiff in this litigation. To that end, this court presumes that the estate executed a separate retention agreement with the Salvi firm. Given those facts, it is apparent that Malinowski overreaches by asking this court to adjudicate a lien that does not exist in this case. Even if this court were to rule as to the validity of Reinhardt's lien, such an order would likely be void as a matter of law.

Although Reinhardt has no lien in this case, his lien with Conklin's heirs raises other questions that this court cannot answer, but can at least ponder. For example, were Malinowski to obtain a judgment at the close of a trial or reach a settlement with the defendants in the meantime, the disbursement of any such sums – based on the current complaint – would have to be apportioned between the Survival and Wrongful Death Acts – the Survival Act on behalf of Conklin's estate and the Wrongful Death Act for each of Conklin's beneficiaries. One question is whether Reinhardt's one-third lien would be valid against the sums Conklin's siblings receive under the Wrongful Death Act. A second question is whether the lien might also attach to any sums received under the Survival Act. The reason is that any recovery received by the estate would ultimately be paid to Conklin's siblings and father.² Those sums might constitute a "total . . . collected for or on behalf of the client" as the retention agreement provides. The risk for Conklin's relatives is readily apparent. Conklin's heirs could potentially pay one-third of any settlement negotiated by or judgment attributed to the Salvi firm and another one-third to Reinhardt by virtue of the retainer agreement should Wisconsin law apply. That would leave each sibling with only a proportionate one-third share of a settlement or judgment, two-thirds having been paid to the attorneys.

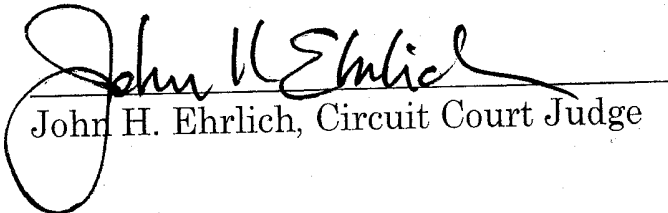
These heirs' future predicament does not solve the issues the parties wanted this court to resolve – this court's jurisdiction over Reinhardt's lien and the application of Illinois or Wisconsin law. The resolution of these issues remains for another day and would appear to be inevitable absent an agreement between Reinhardt and the Salvi firm. In the meantime, this case will continue through discovery.

² This court further assumes that Reinhardt's lien, if one exists, could not extend to Conklin's father since he did not execute a retainer agreement.

Conclusion

Based on the foregoing, it is ordered that:

1. Reinhardt's motion to strike Malinowski's petition to adjudicate is denied;
2. Malinowski's petition to adjudicate Reinhardt's lien is denied; and
3. The previously set case management date and time, October 26, 2017, at 10:00 a.m., will stand.


John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

SEP 06 2017

Circuit Court 2075