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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 05/26/2011
RUTH A. WILLINGHAM,
CLERK
BY: GH

LAURA WINTERBOTTOM; CHRIS) 1 CA-SA 11-0101
WINTERBOTTOM; BARBARA) 1 CA-SA 11-0105
WINTERBOTTOM STAPP,) (consolidated)
)
Petitioners,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
THE HONORABLE EMMET RONAN, Judge) Rule 28, Arizona Rules
of the SUPERIOR COURT OF THE) of Civil Appellate
STATE OF ARIZONA, in and for the) Procedure)
County of MARICOPA,)
)
Respondent Judge,)
)
R. JOHN LEE and JANE DOE LEE, a)
married couple,)
)
Real Parties in Interest.)
_____)
)
R. KEITH PERKINS and S. KENT)
PHELPS, Attorneys for LAURA)
WINTERBOTTOM, CHRIS WINTERBOTTOM,)
and BARBARA WINTERBOTTOM STAPP,)
)
Petitioners,)
)
v.)
)
THE HONORABLE EMMET RONAN, Judge)
of the SUPERIOR COURT OF THE)
STATE OF ARIZONA, in and for the)
County of MARICOPA,)
)
Respondent Judge,)
)

R. JOHN LEE and JANE DOE LEE, a)
married couple,)
)
Real Parties in Interest.)
_____)

Petition for Special Action from the
Maricopa County Superior Court

Cause No. CV 2010-090526

The Honorable Emmet Ronan, Judge

JURISDICTION ACCEPTED, RELIEF GRANTED

Never Again Foundation for Legal Services Chandler
By R. Keith Perkins
Attorneys for Petitioners Winterbottom

Riggs Ellsworth & Porter, PLC Mesa
By Matthew L. Riggs
Attorneys for Petitioners Perkins/Phelps

Broening Oberg Woods & Wilson, PC Phoenix
By Donald Wilson, Jr.
And Brian W. Purcell
Attorneys for Respondent Lee

Jackson White, P.C. Mesa
By Bradley D. Weech
Attorneys for Plaintiff Jon R. Winterbottom

O R O Z C O, Judge

¶1 R. Keith Perkins (Perkins) and S. Kent Phelps (Phelps)
(collectively, Petitioner Attorneys), attorneys for Laura
Winterbottom (Laura), Chris Winterbottom (Chris), and Barbara
Winterbottom Stapp, (collectively, Crime Victims) petitioned this
Court for review of the trial court's order requiring Crime Victims

and Petitioner Attorneys to be deposed. This Court, Judge Patricia A. Orozco presiding and Judges Donn Kessler and Patrick Irvine participating, has considered the petition for special action, the responses and the reply. For the following reasons, we accept jurisdiction, grant relief and vacate the lower court's order requiring Petitioner Attorneys appear for a deposition.¹

FACTS AND PROCEDURAL HISTORY

¶2 In 2004, attorney R. John Lee (Lee) defended Jon Winterbottom (Winterbottom) in a civil lawsuit in which Crime Victims sought damages. Through Petitioner Attorneys, Crime Victims filed a civil suit against Winterbottom. Lee filed a motion to withdraw from representing Winterbottom at a point in which he was responsible for responding to matters of discovery that were overdue.

¶3 In June 2006, the court allowed Lee to withdraw as Winterbottom's attorney. Thereafter, the court ordered Crime Victims, Petitioner Attorneys, and Winterbottom to participate in a telephonic settlement conference. In June 2007, a year after Lee withdrew, the parties reached a settlement agreement where Chris and Laura were each awarded \$1,000,000 and attorney fees were granted in

1 Crime Victims brought a separate special action to reverse the denial of a motion for a protective order, which we consolidated with this action. For the reasons stated in a separately issued decision, we accept jurisdiction and deny relief on that special action. See ARCAP 28(g) (authorizing partial publication of opinions).

the amount of \$200,000. During the settlement conference Perkins stated that two of the Crime Victims would agree to be paid \$50,000 each and would not pursue the remaining part of the stipulated judgment with "the exception that in the event [Winterbottom] pursues a legal malpractice claim arising out of this matter that [Crime Victims] will agree to forego collection on the remaining part of the balance" in exchange for one-third of any amounts collected from that malpractice case. The civil matter was concluded without Crime Victims or Petitioner Attorneys being required to submit to depositions or examinations.

¶4 Perkins telephoned Winterbottom and discussed whether or not Winterbottom should² file a legal malpractice suit against Lee. Subsequently, in January 2010, Winterbottom through his attorney, Bradley D. Weech, filed this legal malpractice action against Lee alleging professional negligence and breach of fiduciary duty for claims arising from the concluded civil lawsuit. In defending the case, Lee scheduled the depositions of Petitioner Attorneys. Petitioner Attorneys sought a protective order from being required to submit to the depositions, alleging the depositions would violate their ethical obligations under Arizona Ethical Rule 1.6. Lee filed a response, and through counsel, Petitioner Attorneys filed a reply.

² In Winterbottom's deposition, he interchanges "would" and "should."

¶15 In February 2011 the court issued a minute entry denying Petitioner Attorneys' protective order stating: "The Court finds the attorney-client privilege has been waived because communications between [Petitioner Attorneys and Crime Victims] have been directly placed in issue through the bringing of this lawsuit." The court stated that their conversations had been placed in issue because a critical issue in the malpractice lawsuit is the circumstances under which Crime Victims agreed to receive one-third of a potential malpractice settlement. Petitioner Attorneys filed a request with the trial court to stay the proceedings pending a special action appeal to this Court, which was denied by the trial court. Petitioner Attorneys then filed this special action. We issued a stay of the court ordered depositions and indicated this decision would follow.

JURISDICTION

¶16 Special action jurisdiction is highly discretionary and is appropriate when there is no adequate remedy on appeal. *State ex rel. Thomas v. Duncan*, 216 Ariz. 260, 262, ¶ 4, 165 P.3d 238, 240 (App. 2007); see Ariz. R.P. Spec. Act. 1(a) (special action jurisdiction is appropriate where a petitioner would have no "plain, speedy, and adequate remedy by appeal"). Because Petitioner Attorneys cannot appeal the trial court's order requiring they be deposed, they do not have an adequate remedy by appeal. We therefore accept special action jurisdiction.

DISCUSSION

¶7 The court's minute entry distinguished this case from *State v. Lee*, 226 Ariz. 234, ___, ¶ 2, 245 P.3d 919, 920 (App. 2011) (holding "that victims retain their constitutional right to refuse to be deposed by the defense in a civil proceeding where the subject matter of the proposed deposition is the criminal offense committed against those victims") and applied the "fairness" approach from *Elia v. Pifer*, 194 Ariz. 74, 82, ¶ 40, 977 P.2d 796, 804 (App. 1998) ("Arizona courts take a 'fairness' approach to determining whether implied waiver of the attorney-client privilege should be found in a particular situation." The privilege is waived when the conduct of the parties claiming the privilege places them in such a position, with reference to the evidence, that it would be unfair and inconsistent to permit them to maintain the privilege.). In *Elia*, this Court followed *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975), which established that a party asserting a privilege has waived that privilege when: (1) the assertion of the privilege was the result of an affirmative act by the asserting party; (2) this affirmative act put the protected information at issue and thus makes it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information that is vital to his defense. 194 Ariz. at 82, ¶ 38, 977 P.2d at 804.

¶8 Arizona Ethical Rule 1.6 states:

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, [or] the disclosure is impliedly authorized in order to carry out the representation . . .

Petitioner Attorneys cannot be deposed without violating Arizona Ethical Rule 1.6 unless their clients have previously waived their privilege as articulated by *Elia*. See 194 Ariz. at 82, ¶ 38, 977 P.2d at 804.

¶19 Lee argues Petitioner Attorneys “put privileged information at issue through the ‘affirmative act’ of accepting the impermissible assignment [of the proceeds in this case], and then encouraging Mr. Winterbottom to file this lawsuit and steering him to a lawyer.” However, we fail to see how the acceptance of an impermissible assignment³ waives Crime Victims’ privilege with their attorney. Also from Winterbottom’s deposition we find that Petitioner Attorneys discussed the topic with him, but it was “from the intonation of Judge Wing both when I saw him and what my mother had written, I thought [filing the legal malpractice claim] was necessary.” Furthermore, Mr. Winterbottom indicated that he had not filed suit before because his Mother could not find an attorney to take the case. Thus, we find that there was no affirmative act by Crime Victims or Petitioner Attorneys. Without an affirmative act,

³ Lee argues that under Arizona law, legal malpractice claims are unassignable. *Botma v. Huser*, 202 Ariz. 14, 17, ¶ 11, 39 P.3d 538, 541 (App. 2002). While the assignment may be invalid, the action may still proceed if the plaintiff receives a direct benefit from the filing of the action. See *id.* at 18, ¶ 23, 39 P.3d at 542.

Petitioner Attorneys could not have put protected information at issue in this case.

¶10 Finding that attorney-client privilege was not waived or impliedly waived, we reverse the court's order requiring Petitioner Attorneys' deposition.

CONCLUSION

¶11 For the aforementioned reasons, we accept jurisdiction, grant relief and vacate the trial court's order that Petitioner Attorneys be deposed.

/S/

PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/

DONN KESSLER, Judge

/S/

PATRICK IRVINE, Judge