

Wisconsin Appellate Court Enforces Limited Scope Retainer Agreement

Michael Freude v. Jeffrey M. Berzowski and Di Renzo & Bomier, LLC., No. 2023 AP 764 (Wis. App. August 7, 2024)

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Brief Summary

The plaintiff sued two defendants for legal malpractice related to an allegedly time-barred underlying personal injury case.

The trial court entered summary judgment in defendants' favor on all claims because the retainer agreement between plaintiff and defendants limited the scope of representation to plaintiff's workers' compensation claims, and specifically excluded third-party claims from the scope of representation.

On appeal, the plaintiff argued that defendants had a duty to inform clients of a potential third-party claim, even when the retainer agreement limited the scope of representation to workers' compensation claims.

The appellate court upheld the lower court's judgment, holding that "pursuant to the terms of the limited scope retention agreement, whereby the parties specifically and contractually disclaimed an attorney-client relationship as to third-party claims," summary judgment was properly entered in defendants' favor.

Complete Summary

Plaintiff alleged that on April 2, 2015, he was injured in a slip-and-fall accident while in the course and scope of his employment as a security guard for an independent contractor. The contractor retained to provide security guards at the facility owned by Nestle USA, Inc. ("Nestle"). Nestle retained an independent contractor to provide cleaning and maintenance services at the facility.

On December 30, 2016, plaintiff signed a two-page retention agreement titled “Worker’s Compensation Representation Agreement” (“Retainer Agreement”). The Retainer Agreement provided that plaintiff engaged the defendants “to represent [him] and to perform all services which [defendants] deem necessary to such representation with respect to my worker’s compensation claim.” Not only did the Retainer Agreement identify the scope of claims that the defendants agreed to pursue on plaintiff’s behalf, but it also disclaimed the claims not within the scope of retention:

I understand that the firm is being employed solely to prosecute a worker’s compensation claim on my behalf and that the firm has not been employed to bring actions against third parties as a result of my injury, the date of which is set forth above, nor is the firm being employed to prosecute any employment related claims arising under state or federal law. I acknowledge and understand that if the firm was to be employed to provide representation as to nonworker’s compensation claims that a separate fee arrangement shall need [to] be agreed upon to compensate the firm for prosecution of such other claims.

Defendants withdrew from representation with respect to the workers’ compensation claim in December 2017. On September 21, 2022, plaintiff filed a legal malpractice action against the defendants alleging that through the investigation of plaintiff’s worker’s compensation claim against his employer, defendants learned that a third-party claim could be asserted against Nestle and the independent contractor retained to provide cleaning and maintenance services.

The appellate court rejected plaintiff’s argument that the “limited-scope representation gave rise to a duty to advise [plaintiff] about potential third-party claims and the applicable statutes of limitations.” Rather, the court held that the Retainer Agreement expressly carved third-party claims out of the scope of defendants’ engagement, thus eliminating the basis for a duty to advise as to such claims.

According to the appellate court, “the agreement notified plaintiff of the possibility of such third-party claims, informed him that [defendants were] not representing him with respect to such claims, and instructed him what additional steps would be needed to have [defendants] undertake such representation.” On this basis, the court held that plaintiff did not establish an essential element of his claim—the existence of an attorney-client relationship—with respect to any purported third-party claims.

The court additionally declined to adopt plaintiff’s argument that, as a matter of public policy, attorneys have a duty to advise clients of potential third-party claims and the applicable statute of limitations in all cases. The Wisconsin Rules of Professional Conduct allows for reasonable limitations on the scope of representation. Accordingly, the court rejected any attempt to override the enforcement of a reasonable limitation as to the scope of representation contained in the Retainer Agreement.

Significance of Decision

In many cases, a well-drafted retainer agreement is the first defense to a legal malpractice claim. Effectively identifying what specific claims or subject matters are included within the scope of representation and expressly

carving out what claims are excluded from the scope can protect attorneys from legal malpractice claims arising from disputes or subject matters not contemplated at the time of retention and for which no fee was received.

Other states have ruled differently. See, e.g., *Keef v. Widuch*, 321 Ill.App.3d 571 (2001) (Illinois appellate court held that although defendants agreed in a written agreement to represent plaintiff only in his workers' compensation claims, they had a duty to advise plaintiff about the possibility of third-party actions and the applicable statutes of limitations).

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