

1996

Maxine Archuletta v. Donald Hughes : Brief of Appellee

Utah Court of Appeals

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Donald Hughes; Defendant/Appellee.

Mark Wilkey; Kimball, Parr, Waddoups, Brown and Gee; Attorney for Plaintiff/Appellant.

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IN THE COURT OF APPEALS

STATE OF UTAH

MAXINE ARCHULETA,
Plaintiff,
vs,
DONALD HUGHES,
Defendant

Appeals Court
No. 960276 - CA

Trial Court
No. 940700264

BRIEF OF APPELLEE

Plaintiff's appeal from the Second District Court for Davis County, State of Utah
The Honorable Glen Dawson

**UTAH COURT OF APPEALS
BRIEF**

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Donald Hughes
Defendant/ Appellee
PO Box 27611
St. Louis, MO 63146

Mark Wilkey
KIMBALL, PARR, WADDOUPS, BROWN and GEE
Attorneys for Plaintiff/ Appellant
185 South State Street, Suite 1300
Salt Lake City, UT 84111

FILED

Utah Court of Appeals

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Marilyn M. Branch
Clerk of the Court

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Donald Hughes
Defendant/ Appellee
PO Box 27611
St. Louis, MO 63146

Mark Wilkey
KIMBALL, PARR, WADDOUPS, BROWN and GEE
Attorneys for Plaintiff/ Appellant
185 South State Street, Suite 1300
Salt Lake City, UT 84111

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STATEMENT OF JURISDICTION

This is an appeal from a district court poured over to the Court of Appeals pursuant to UCA § 78-2a-3(2)(j).

STATEMENT OF ISSUES

The issues are those raised by plaintiff/appellant with the addition that the appeal is frivolous.

STATEMENT OF CASE

Various motions for summary judgment and other things were scheduled for hearing at the final pretrial conference. Argument and decision on the plaintiff/appellant's motion for partial summary judgment were delayed by stipulation until after the jury was out.

Statement of Facts

The facts alleged by the plaintiff were contested. For purposes of the summary judgment motion defendant/appellee filed an extensive affidavit controverting the allegations of plaintiff's attorneys. The affidavit is found at page 416 of the record. It is reproduced here from the memorandum in opposition which is found in the record at page 423 and 425. It in essential form restates the affidavit and reflects what the court was presented with by way of controverting the plaintiff's claims that there were material uncontested facts. The facts alleged in appellant's brief bear little resemblance to the case that was tried. The jury found the facts against the plaintiff and essentially as stated by the defendant.

1. Hughes was contacted by phone in St. Louis, Missouri by Maxine Archuleta on or about October 19, 1993 requesting that he represent her in a potential claim for injuries suffered in an automobile accident. Ron Bennett and the plaintiff were on the phone when defendant answered.

2. Before contacting Hughes, Maxine Archuleta claims to have been referred to Ron Bennett, a licensed public adjuster by her friend Vsana Skinner. She claims, “ ...Vsana skinner referred me--you know, she contacted Ron about the accident I was in. Irene knows Ron. Q. That’s Irene Roche? A. Yes, and --” Archuleta deposition at page 65. Plaintiff sought out Don Hughes to retain him.

3. Maxine Archuleta executed the retainer agreement attached hereto as Exhibit A on October 23, 1993 in the presence of Ron Bennett.

4. Maxine Archuleta’s initial medical bills totaling \$618 were submitted to Allstate Insurance as PIP carrier. Allstate paid these initial bills. See drafts attached to the deposition of Sandra McIntosh. Maxine Archuleta handled the routine submission of these bills herself. See application for PIP benefits attached to deposition of Sandra McIntosh. No attorney’s fee was taken by Hughes on any of the routinely submitted bills. See affidavit of Don Hughes and application for PIP benefits attached to the deposition of Sandra McIntosh.

5. On November 17, 1993 Maxine Archuleta had an MRI. The results were: “Discs appear essentially unremarkable at all levels. There may be a minuscule annular bulge at C3-4 but no evidence of herniation extruded fragment or foraminal compromise. Cord intrinsically normal without evidence of mass, syninx, etc. No evidence of congenital or acquired spinal stenosis. IMPRESSION: ESSENTIALLY NORMAL MAGNETIC RESONANCE SCAN, CERVICAL SPINE WITH ABOVE OBSERVATIONS.” (emphasis in original) See report attached to the deposition of Sandra McIntosh.

6. On January 7, 1994 Sandra McIntosh as claim representative of Allstate Insurance PIP benefits sent a letter to Maxine Archuleta's physician questioning why Allstate should pay the MRI bill when she could find "nothing in your records which identify clinical symptoms such as parathesias or radiculopathy suggesting nerve impingement." See letter of McIntosh attached to her deposition.

7. The response was that Maxine Archuleta had complained of severe back pain from her neck to her tail bone on October 21, 1993. By November 15, 1993 the symptoms had mostly resolved except pain going down into her shoulders and persistent neck pain. Even though the objective observations showed the pain to be localized her physician was unable to observe any signs of acute disease he did not want to miss something if there was radicular pain. The negative MRI gave him a basis for encouraging Maxine Archuleta to resume her regular work load and continue physical therapy. "I felt the results aided me in encouraging her to get back to work at an earlier time and to continue with physical therapy." See letter of January 12, 1994 attached to deposition of Sandra McIntosh.

8. Maxine Archuleta continued physical therapy only until the \$3,000 threshold was reached. Maxine Archuleta did not want to continue medical treatment. See Archuleta deposition pages 50 to 52. Maxine Archuleta has not been back to see any physician or therapist of any kind for her back problems since terminating physical therapy. See Archuleta deposition at page 55.

9. Other than possibly missing 3 or 4 days immediately after the accident and occasionally leaving work early to make physical therapy appointments Maxine Archuleta did not miss any work because of her accident. See Archuleta deposition page 53.

10. Maxine Archuleta refused to go to physical therapy or to receive any further treatment after her medical bills exceeded the \$3,000 threshold. See Archuleta deposition pages 48 to 55.

11. Maxine Archuleta does not claim to have any evidence that she was permanently injured in the car accident. Her physician told her she suffered a strain and that was all. Archuleta deposition at pages 40 and 41.

12. It was Hughes opinion that a fair settlement for the injury suffered by Maxine Archuleta would be in the \$5,000 range. See Hughes affidavit and Hughes deposition page 104.

13. Hughes engaged Ron Bennett, a licensed public adjuster to carry out the initial negotiations with Allstate Insurance. Hughes was aware of Bennett's skill as an accident investigator and his abilities in dealing with insurance personnel. Hughes was personally aware of the excellent job Bennett had done on other occasions for Hughes and for other attorneys including plaintiff's counsel, Dan Wilson. Hughes conveyed to Bennett his assessment of the case and instructions in how to proceed with the negotiations. The offer received from Allstate was higher than the value placed on the case by Hughes.

14. Hughes was of the opinion that the higher offer was due in part to Bennett's relationship with Allstate personnel and in part that Allstate did not know the lack of plaintiff's evidence demonstrating positive injury.

15. The use of a skilled public adjuster or paralegal is consistent with the standard of practice in Weber County. Hughes had previously used Bennett in this manner and is aware of other attorneys engaging Bennett in the same function, including plaintiff's counsel, Dan Wilson. Hughes maintained responsible control over all aspects of the case and delivered a fair and reasonable result for Maxine Archuleta See affidavit of Hughes.

16. The settlement received from Allstate as liability carrier consisted of \$9,286 in new money and payment to the PIP carrier (Allstate) of \$618 in subrogation rights. See draft attached to deposition of Maxine Archuleta and draft attached to deposition of Sandra McIntosh.

17. Maxine Archuleta was given a written accounting of the funds at the time she executed the release. See affidavit of Don Hughes.

18. Maxine Archuleta had medical bills that did not relate in any way to the accident, including medical bills for her children. Maxine Archuleta requested that she receive \$5,000 of the funds and that Hughes attempt to compromise the hospital bills for herself and her children with the balance of the funds. Maxine Archuleta was informed that she was responsible for her medical bills and would have to pay any that were not compromised or exceeded the amount retained in trust.

19. In July of 1994 Maxine Archuleta asked Hughes to no longer try to resolve her medical bills and asked for the return of the funds being held in trust. The funds were returned to her. See deposition of Hughes.

20. Don Hughes graduated from the charter class of the J. Rueben Clark Law School at Brigham Young University. He was admitted to the Utah Bar in April of 1976. In the course of following years Hughes has represented hundreds of clients including many personal injury cases. Hughes is familiar with the standard of practice in Weber and Davis Counties through his nearly two decades of practice.

21. A contingent fee agreement of 1/3 of any settlement, compromise or judgment is fair and comports with the standard of practice of attorneys in the second judicial district. The retainer agreement between Hughes and Archuleta is fair and reasonable and comports with the standards of conduct generally prevailing in the second judicial district. Defendant did not inflate his attorney's fee.

22. Hughes represented Maxine Archuleta in a manner consistent with the standards of practice current in Weber and Davis Counties. Don Hughes achieved a fair and reasonable settlement for Maxine Archuleta. Maxine Archuleta received positive gain from the representation of Don Hughes and suffered no damage. Maxine Archuleta was fairly and adequately compensated for her injuries. See affidavit of Don Hughes.

SUMMARY OF ARGUMENTS

The position of defendant/appellee is that he well represented Maxine Archuleta that that she recovered a fair and reasonable settlement for her real injuries related to the accident.

1. Three of appellant's claims are for the court's refusal to grant partial summary judgment. For purposes of summary judgment the facts are viewed in a light most favorable to the nonmoving party.

2. Three of appellant's points are essentially the same and seek a ruling that an attorney cannot take a fee on uncontested pip benefits. The flaw in the argument is that no fee was collected on any pip benefits in this case.

a. Appellant's first issue. This isn't a lien case. It is a case in which plaintiff's law suit was settled and plaintiff authorized the settlement. It was never disputed that she understood she was agreeing to a contingent fee of 1/3. Her foremost claim at trial was that her case was worth more. The jury disagreed and that issue is not on appeal. Plaintiff's claim is that the agreement did not authorize the payment of a fee for PIP benefits. The problem plaintiff/appellant has is no fee was ever taken on PIP benefits.

b. Appellant's second issue. Plaintiff/Appellant still argues that Hughes should not be allowed to receive \$800 for PIP benefits. Whether the law allows attorneys to collect fees for such services is irrelevant because none was collected by Hughes on any PIP benefits. The undisputed amount of benefits paid under PIP was \$618 and Maxine Archuleta received all of that.

c. Appellant's fifth issue. This point in appellant's brief is a recitation of the same misstatement of fact asserting that Hughes took a fee of \$800 on PIP benefits. I don't know how many times it needs to be said no such fee was collected. The medical necessity of the bills was questioned by the PIP and none after the \$618 were paid. The liability case settled at about the same time as Maxine Archuleta's physician was responding to the inquiry for justification of an MRI.

3. Plaintiff's third issue is the refusal to give an instruction on agency. Agency was not an issue at trial. There was nothing done in representation that Hughes did not claim to have either done or directly supervised.
4. The court properly refused to allow plaintiff/appellant to audit Hughes trust account. There was no issue in this trial that required Hughes to divulge the confidential information of his clients. Plaintiff admitted that she received all trust funds promptly on her terminating the attorney client relation.
5. This is a frivolous appeal that should not have been brought. The entire remaining claim of plaintiff subject to this appeal is \$800. It certainly points to other purposes as to why this case is still being pursued.

APPELLEE'S ARGUMENT

POINT ONE

THREE OF APPELLANT'S CLAIMS ARE FOR THE COURT'S REFUSAL TO GRANT PARTIAL SUMMARY JUDGMENT

The timing of the summary judgment hearing is somewhat unusual. The motions for summary judgment were not scheduled until the final pretrial conference days before the commencement of trial. The parties stipulated that arguments would take place after the jury was out. The jury returned a verdict of non suit against the plaintiff/appellant before the arguments could be heard. The actual arguments took place after conclusion of the trial and the return of the verdict. All of the issues presented in plaintiff's motion for partial summary judgment were litigated at trial and found wanting by the jury.

Hughes as defendant filed with the court a lengthy affidavit in support of his opposition to the motion for partial summary judgment. See affidavit at page 416 of the record. The affidavit contested virtually every fact claimed by the plaintiff/appellant. There were no uncontested facts in plaintiff's motion for partial summary judgment.

Summary judgment is only appropriate if there are no undisputed material issues of fact. On summary judgment the facts are interpreted in the light most favorable to the non-moving party. *Sandy City v Salt Lake City*, 827 P2d 212 (Utah 1992); *Rollins v Petersen*, 813 P2d 1156 (Utah 1991); *Rutherford v AT&T Communications of Mountain States*, 844 P2d 949 (Utah 1992). In the context of claims against attorneys the same rule applies and the facts are also viewed in favor of the non-moving party. "It is only necessary for the non-moving party to show 'facts' controverting the 'facts' asserted by the moving party." *Breuer-Harrison v Combe*, 799 P2d 727, 728 (Utah App 1990). In this case Hughes submitted a long and detailed statement of the case controverting virtually every fact claimed by the plaintiff/appellant. In the context of the motion for partial summary judgment there were no uncontested facts. **The strange twist in this case is that the jury as finder of fact had at the time the judge was ruling on the motion, had heard the fully litigated case and had found that plaintiff's evidence lacking and not credible. How could anyone say the plaintiff/appellant had presented uncontested facts.**

POINT TWO

THREE OF APPELLANT'S POINTS ARE ESSENTIALLY THE SAME AND SEEK A RULING THAT AN ATTORNEY CANNOT TAKE A FEE ON UNCONTESTED PIP BENEFITS. THE FLAW IN THE ARGUMENT IS THAT NO FEE WAS COLLECTED ON ANY PIP BENEFITS IN THIS CASE.

Three of plaintiff/appellant relate to the court's denial of partial summary judgment and all three relate directly to the assertion that an attorney should not take a fee on uncontested PIP benefits. These issues on plaintiff/appellant/s motion for partial summary judgment are dealt with together because of their similarity. The issues raised by appellant bear little resemblance to the case that was tried and less relation to the facts as testified to by the witnesses including Maxine Archuleta.

The first, second and fifth issues raised on appeal by appellant are each different ways of stating the same claim that an attorney is not entitled to a fee on undisputed PIP benefits. None of these issues apply to this case. Regardless of whether there are circumstances in which an attorney can charge a fee for collecting PIP benefits the issue doesn't apply in this case. **NO FEE WAS TAKEN ON ANY PIP BENEFITS, CONTESTED OR OTHERWISE.** See paragraph four of appellee's affidavit at Page 416 of the record.

The general rule is that negligence cases are not subject to summary judgment. *Preston v Lamb* 436 P2d 1021 (Utah 1968). This applies to attorney negligence as well. *Jackson v Dabney*, 645 P2d 615 (Utah 1982). The standard of care and question of breach are fact questions for the jury on receipt of proper expert opinion. *Jackson, supra*; *Brown v Small* 825 P2d 1209 (Mont 1992).

A. Appellant's first issue.

The first issue is the claim the retainer agreement did not retain Hughes to settle claims against her own insurance company. The appellant completely misconstrues the facts. Allstate Insurance was both the PIP carrier for Maxine Archuleta and the liability carrier for the woman that ran into her. See paragraph 16 of the affidavit of Appellee at page 416 of the record. There was no settlement with the PIP carrier. The settlement was with Allstate as the liability carrier. See previous citation to record.

The initial medical bills were submitted to Allstate as the PIP carrier by Maxine Archuleta on forms prepared in Hughes office without charge by Hughes. Allstate as the PIP carrier paid \$618 to Archuleta and settled her property damage claim, all without Hughes taking a fee.

Separate adjusters represented Allstate on the PIP claim and on the liability claim. The PIP adjuster questioned the medical necessity of an MRI and requested explanation why appellants physician had ordered the MRI. The bill was never paid by the PIP claim. The liability claim settled before the PIP adjuster resolved her concerns or paid any bills. See paragraph 6 of affidavit at

page 416 of the record. At trial of this issue Archuleta could not prove that she had \$3,000 in medical bills related to the accident to reach the threshold for filing a suit. She admitted that she had subsequently injured her knee and had additional problems not related to the accident.

Maxine Archuleta has never claimed that Hughes ever told her or represented to her the contingent fee to be anything other than 1/3 of the recovery. She has not claimed that her understanding was otherwise. In none of the documents supporting her motion for partial summary judgment on this issue is there reference to her understanding being otherwise. The settlement of this case was with the liability carrier of the woman that ran into her. Coincidentally that carrier also happened to be Allstate her own carrier. The attorneys for the plaintiff/appellant intentionally confuse the difference just as they tried to do at trial. Allstate was required to maintain a "China Wall" between the two adjusters. In this case they did this. The settlement was with the liability carrier for new money and the reimbursement of the PIP carrier for benefits paid.

For plaintiff/appellant to have prevailed on her motion for partial summary judgment she would have had to demonstrate that the standard of care for attorneys is that collection of PIP benefits is violated per se and constitutes malpractice. She would then have to demonstrate that she had medical bills that would have qualified for PIP benefits and that they were uncontested. The basic elements of attorney malpractice important to this case are 1) the standard of care of attorneys, 2) whether the standard was breached and 3) did the breach proximately result in damages. *Harline v Barker* 854 P2d 595, 598 (Utah App 1993).

In the supporting documents for the motion for partial summary judgment there is no expert opinion proffered. The only expert opinion offered is that of defendant/appellee to the effect that his actions in this case were within the standard of care required of attorneys in the Second Judicial District.

There was also no demonstration that she had incurred any additional medical bills related to the accident that would have qualified for PIP payments. At trial this issue was fully litigated and Maxine Archuleta admitted she could not show even sufficient medical bills related to the accident to meet the \$3,000 threshold. When she incurred a total of \$3,000 in medical bills for all reasons she quit going for treatment and has refused to go since. See affidavit at Page 416 of the record.

B. Appellant's second issue.

The second claim is virtually a restatement of the first, namely that Hughes would not be entitled to a fee on the routine collection of PIP benefits. The undisputed fact in the documents presented by appellant in support of her motion for summary judgment make no claim Hughes collected a fee on any PIP benefits. At trial plaintiff/appellant admitted that Hughes did not take a fee on any PIP benefits. At trial her claim changed to one of saying that Hughes should have submitted and pursued her PIP claims for her without fee even if they were contested.

Maxine Archuleta submitted her own PIP claim with supporting forms from Hughes office. Archuleta submitted and settled her own property damage claim. Hughes took no fee on any of those funds. Maxine Archuleta ran into a dead end on PIP payments. Her PIP benefits were not routine. They were not uncontested and they were not paid. Hughes did not collect them nor did he take a fee on any that were collected.

This is a legal malpractice case. It is a claim that the performance of the Appellee fell below the standard of practice of attorneys similarly situated. Even if Hughes had taken a fee on PIP benefits Appellant offered no expert opinion with her that collection of PIP benefits is malpractice.

The necessary elements of a claim against an attorney are well established in Utah law. The Court of Appeals in *Breuer-Harrison, Inc. v Combe* 799 P2d 716,

727 (Utah 1990) says, "Once this [attorney client] relationship is proven, the client has the burden of showing two additional elements: 1) negligence on the part of the attorney, and 2) that such negligence was the proximate cause of damage to the client." The court cites *Dunn v McKay Burton and Thurman*, 584 P2d 894, 896 (Utah 1978) as authority for this statement.

"The elements of legal malpractice include: (1) an attorney-client relationship; (2) a duty of the attorney to the client; (3) a breach of that duty; and (4) damages suffered by the client proximately caused by the attorney's breach of duty." *Harline v Barker* 854 P2d 595, 598 (Utah App 1993).

Whether an attorney breached the standard of care is an issue of fact. "A genuine issue of fact exists where, on the facts in the record, reasonable minds could differ on whether defendant's conduct measures up to the required standard." *Jackson v Dabney*, 645 P2d 615 (Utah 1982).

The standard of care is determined by expert testimony. Utah, as virtually every jurisdiction requires the standard of professional care be proven by expert testimony. The standard of care is a question of fact to be determined through expert testimony. *Kellas v Sawilosky*, 322 SE2d 897 (GA 1984); *Gruse v Belline* 486 NE2d 398 (1985); *Brown v Small* 825 P2d 1209 (Mont 1992); *Boigegrain v Gilbert*, 784 P2d 849 (Colo App 1989); *Somma v Gracey* 544 A2d 668 (1988).

After the standard of care is proven the plaintiff must prove the defendant breached the standard and that there are damages proximately caused by the breach of the standard. This is the trial within a trial referenced supra.

“Proximate cause is an issue of fact.” *Harline supra* at 600. See also *Swift Stop, Inc. v Wight*, 845 P2d 250, 253 (Utah App 1992).

These are the legal doctrines enunciated by the Utah appellate courts applying to claims against attorneys. None of this body of law is cited by the plaintiff. The requirements of proving a duty and the applicable standard of care is for expert opinion. In this particular case the reasons for expert testimony apply. The claimed breach is not simple such as a missed statute of limitations but relates to “constructive” duties asserted by plaintiff’s counsel. Evaluation of the standard of care requires the assistance of expert witnesses.

C. Plaintiff/Appellant’s fifth issue.

It is claimed that, “as a matter of law, Hughes constructively defrauded Archuleta when he charged her an illegal and unreasonable contingent fee for collecting undisputed PIP benefits.” (Point V of appellant’s brief) It should be noted that the plaintiff/appellant admitted that there was no evidence of actual fraud. It should also be noted that there is no claim that Hughes took a fee on any PIP benefit. No fee was collected on PIP benefits.

There was no evidence in any of the documents supporting the motion for partial summary judgment that Maxine Archuleta had any medical bills beyond the \$618 that were paid that qualified for payment by PIP benefits.

Plaintiff/ Appellant offered no evidence from any medical provider to even suggest that any of the medical bills either related to the accident or were medically necessary because of the accident. The affidavit of Hughes contesting

the partial summary judgment certainly controverts the claim and requires the trier of fact to determine the facts. See paragraphs 4, 5, and 6 of the affidavit at Page 416 of the record. At trial the issue was litigated. Plaintiff/Appellant failed to call any of the physicians to demonstrate relation to the accident or medical necessity. Maxine Archuleta admitted on the stand that at least some of the bills related to a subsequent injury to her knee and to other illness not related to the accident.

In this case nothing was done to discourage or suggest to plaintiff that she not submit bills for PIP benefits. In fact at trial it was demonstrated that the \$618 in bills she did submit were submitted on supporting forms from Hughes office. At trial the issue of should bills always be submitted to the PIP carrier was raised in the context of trying to settle the hospital bill for less than its face value. At trial the issue was litigated as to whether there were conditions under which PIP benefits harmed a claimant. The answer was a clear yes and the rationale applies here in the context of did Hughes have some duty to submit and collect PIP benefits for free.

The gist of the argument is straight forward. Medical providers such as hospitals have an established "usual and customary" charge for each service. No one pays that price except people without insurance and those that are paying their bills with PIP benefits. Maxine Archuleta had medical insurance coverage supervised by a managed care group. The testimony at trial was that her managed care paid for services at rates as little as 45% of the "usual and

customary” rate. The plaintiff/appellant would certainly be better off submitting her bills to her managed care group. She would have to reimburse them just as she would have reimburse the PIP carrier for any benefits paid out of the liability settlement but the reimbursement would be only at the rate of 45% of the “usual and customary” rate. The PIP carrier is also reimbursed by the liability carrier, but at the full “usual and customary” rate. A plaintiff is entitled to the benefit of the bargain they have negotiated through their managed care supervisor. It is understandable that hospitals would rather be paid at the higher rate but it is equally understandable that a plaintiff in a car accident case is better off reimbursing medical bills at the rate negotiated by their managed care company.

POINT THREE

PLAINTIFF’S THIRD ISSUE IS THE REFUSAL TO GIVE AN INSTRUCTION ON AGENCY

From the brief of appellant it is impossible to know what refused instruction is being referenced. The instruction is not set out by reference to the record nor is it attached. The issue of agency was not presented at trial. In the brief there is no act that the plaintiff/appellant points to in the record where a claim is made that Bennett did something that was inappropriate. The issue at trial was direct and straight forward. Hughes asserted that all of the acts involving the representation of this case were his. Anything Bennett did was under the direct supervision of Hughes. There was no issue of agency because the plaintiff/appellant did not at trial any more than she did in her brief demonstrate any failing in the representation by Hughes. The court gave all of the MUJI instructions relating to legal malpractice and constructive fraud. It is hard to know what instruction is being referenced.

Plaintiff/ Appellant resorts to ad homonym attack instead of dealing with the issue. The appellant's brief asserts that the theme of the defense was "I am not Bennett." **That could only be asserted by someone who didn't attend the trial.** The judge is quoted as saying "Bennett is not on trial here." These supposed quotes are made without citation or reference.

There was no defense that if something was done wrong it was Bennett. The theme of the defense was blunt, consistent and straight forward. Maxine Archuleta retained Don Hughes to represent her in a personal injury action. Hughes represented her well and achieved a very favorable result that was more than fair and constituted more than complete compensation for her injuries. Any assertions to the contrary are false. Hughes stated bluntly at trial and has maintained that he was responsible for every aspect of the case and every part of the representation. There was no issue of vicarious liability because Hughes claimed all of the acts.

To claim Bennett played a role in the trial is wrong. Neither party called Bennett as a witness. Perhaps that is because neither party thought he had much to add except in retrospect when plaintiff/ appellant's lawyers are searching for a reason for their loss at trial and hoping to create an issue on appeal. There wasn't evidence at trial that Bennett played any role except under the direct supervision of Hughes. There was no evidence that Bennett did anything but advance the cause of Maxine Archuleta under the direction of Hughes. Plaintiff/ Appellant presented no evidence at trial that Bennett did anything that was not under the direct supervision of Hughes and done at his insistence.

The instruction requested by the plaintiff is nowhere set out in her brief. It can only be presumed that the requested instruction being complained of is the agency instruction relating to the claim of constructive fraud. Archuleta and her lawyers admitted there was no evidence of actual fraud. They claimed a tortuously reasoned claim of constructive fraud based on the possible finding by the jury that Hughes had breached a fiduciary duty to Archuleta. The judge

properly ruled that any fiduciary duty was owed by the attorney to his client. There was nothing the plaintiff/appellant could point to that Bennett did that Hughes did not take credit for. There was no issue of agency because Hughes directed all of the representation.

Bennett was not a party nor a witness nor were any alleged out of court statements of his admitted for their purported truth. The court gave all of the MUJI instructions on legal malpractice and constructive fraud. These instructions more than adequately stated the law. There was no issue of agency because plaintiff/appellant never showed anything they claimed Bennett did that Hughes did not claim to have done or to have ordered.

POINT FOUR

THE COURT PROPERLY REFUSED TO ALLOW PLAINTIFF/APPELLANT TO AUDIT HUGHES TRUST ACCOUNT.

The uncontested facts were that Hughes settled the liability claim. There was a decision to attempt to have the hospital take payment at the rate they would receive from her managed care provider. The approximately \$1,100 was held for this purpose. See paragraph 18 of the affidavit at Page 416 of the record. When Maxine Archuleta terminated the attorney client relation the funds held in trust were promptly returned to her. There has never been a claim that the full funds were not returned nor that they were not returned promptly.

Plaintiff's attorney was not interested in any legitimate determination of the plaintiff's funds, but rather was determined to obtain access to the dates and amounts of checks and deposits in the defendant/appellee's trust account. Defendant claimed early on this was a frivolous case brought by plaintiff's counsel because the defendant/appellee had brought malpractice actions against him and for his cooperating with the Office of Attorney Discipline in bringing charges for discipline against him. It was the suspicion of defendant/appellee that the audit of the trust account was sought to have access to information relating to those other cases.

This discovery request was properly considered by the court and denied. There was no claim that Hughes did not hold the funds of plaintiff in trust. They were returned to her promptly when requested. She was given a full accounting at the time of the settlement. See paragraphs 17, 18 and 19 of the affidavit of Hughes at Page 416 of the record. Plaintiff made no claim that Hughes did not return her the full amount held in trust or that it was not timely paid or that she suffered any damage. Her attorney made the claim that there was a potential that Hughes did not have the money in trust during the few months (from March to July) he represented her after the settlement. Her attorney refused the suggestion the court examine the bank records to assure that the funds were there. Plaintiff's counsel would only be satisfied with his auditing the bank records and having them in his possession. The court properly denied the request as not leading to admissible evidence that related to any issue in this case.

The discovery request to essentially audit the trust account of defendant/appellee is outrageous. There was no serious request for anything that would be admissible at trial. Plaintiff/Appellant made no claim that Hughes failed to return the funds held in trust promptly when she terminated the attorney client relation. Her lawyer was not interested in the court determining that the funds were always present. His only interest was viewing the dates and amounts of checks and deposits.

An attorney's trust account is subject to the privilege of confidentiality an attorney owes his clients. Hughes would have no right to reveal the activity of his clients associated with his trust account without a waiver from those clients. The request was frivolous and not aimed at obtaining evidence relevant to this case.

POINT FIVE

THIS IS A FRIVOLOUS APPEAL THAT SHOULD NOT HAVE BEEN BROUGHT

Three of the issues raised on appeal are issues concerning summary judgment. Plaintiff/ Appellant seeks partial summary judgment on a liability issue where the establishment of a standard of care by expert opinion is a necessary element. No expert opinion as to a standard of care was offered. At the full trial of these issues plaintiff/appellant failed to prove the standard of care and failed to prove any breach.

The basic claim in the three issues relating to the plaintiff/appellant's motion for partial summary judgment is that an attorney should not take a fee on uncontested routine PIP benefits. That is an issue that was never in this case. Even Maxine Archuleta admitted on the stand and her trial attorney that no fee was taken on any PIP benefits. Plaintiff/appellant's continual return to this issue is frivolous.

The issue of a rejected jury instruction on agency is a frivolous appeal. From the brief of appellant/plaintiff it is impossible to even tell what the requested instruction was. The argument consists only of supposedly quoted characterizations without reference or citation. How can the court evaluate the appropriateness of the instruction without even being given what it was. There was no agency issue at trial. There is no agency issue on appeal.

Plaintiff/ Appellant failed to show any reason to view defendant's client trust account. No claim was ever made that the funds were not promptly returned to the plaintiff when the attorney client relation was terminated. This was a fishing expedition by plaintiff/appellant's counsel that had nothing to do with this case.

CONCLUSION

Plaintiff/ Appellant was properly denied her motion for partial summary judgment. All three of the issues associated with the motion assume that Hughes took a fee on uncontested PIP benefits. That is simply factually wrong. It was denied at the summary judgment level and proven false at trial. They make the unfounded leap that since plaintiff did collect \$618 in PIP benefits that there

where approximately \$2,400 of additional benefits to collect. The brief completely ignores the facts before the court at the time the summary judgment motion was heard. She submitted some of her bills to her PIP carrier. They paid \$618 and questioned the medical necessity of the remaining bills and did not pay any further. She made no showing in her motion for partial summary judgment to show medical necessity or relation to the accident. No further PIP benefits were paid and no fee was taken on any PIP benefits. Even at trial she failed to call any of the treating physicians to prove what services were rendered or that they were necessary or that they related to the accident.

The affidavit of defendant/appellee clearly and directly controverted the claims of Maxine Archuleta. The trier of fact found the facts against her after a full trial. How could Judge Dawson or this court find that the material facts were uncontested? Judge Dawson reached the proper decision and so did the jury. This appeal is frivolous.

From the brief of appellant it is impossible to know what jury instruction they are complaining about. What is worse for them is that if it has to do with agency, agency was not an issue in this trial. Hughes took credit for all acts done in the course of this representation. There was no claim if errors occurred they were someone else's. Every act done Hughes claimed as his own either because he did it or directed it.

The decision of the trial court should be affirmed and the appeal denied and declared frivolous.

Respectfully submitted,



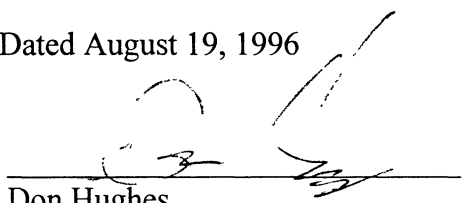
Don Hughes

Certificate of Mailing

I certify that I mailed four copies of the Brief of Appellee postage prepaid August 19, 1996 to:

Mark Wilkey
Kimball, Parr, Waddoups, Brown & Gee
185 South State Street, Suite 1300
Salt Lake City, UT 84111

Dated August 19, 1996



Don Hughes