

ARIZONA COURT OF APPEALS

DIVISION ONE

DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA

FILED

JUN 0 8 2008

PHILIP G. URRY, CLERK

By _____

STATE OF ARIZONA,

Petitioner,

v.

HONORABLE BETHANY G. HICKS,
Maricopa County Superior Court,

Respondent,

RAPHAEL DURMAN,

Real Party in Interest.

No.

Court of Appeals No.
1 CA-SA 08-0072

Maricopa County Superior Court No.
CV2007-001874

CV-08-0174-PR

FILED

JUN 0 4 2008

RACHELLE M. HESNICK
CLERK SUPREME COURT
BY

PETITION FOR REVIEW

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INTRODUCTION

This Court's intervention is needed to resolve a question of first impression in Arizona: when the State complies with its duty under *Gideon v. Wainwright* to provide a criminal defense attorney at no charge to an indigent defendant by appointing a private defense attorney to represent him, must the State answer in tort damages for that attorney's malpractice?

After Durnan's felony conviction was overturned because of ineffective assistance of counsel, he sued his attorney for malpractice. He joined the State as a Defendant, asserting that it was liable for the attorney's negligence,

Even though the attorney was not an employee or agent of the State, the superior court refused to dismiss the action against the State, holding that it owed a non-delegable duty to Durnan. Although it was presented with a pure question of law, a case of first impression, and information that the case is not an isolated incidence, the court of appeals refused to accept jurisdiction over the State's Petition for Special Action.

The Court should grant review to resolve this important question of first impression on a subject that is of statewide importance.

ISSUE PRESENTED FOR REVIEW

When the State prosecuted Durnan on felony charges, it complied with the constitutional duty that it owes to indigent criminal defendants by appointing, at its

own expense, a private attorney to defend him. Durnan was convicted, but the conviction was overturned for ineffective assistance of counsel. Can the State be held liable for Durnan's attorney's negligence in these circumstances?

MATERIAL FACTS

Durnan was indicted in Gila County on multiple felony counts. (Appendix 1, ¶ 6.) Because he was indigent, a superior court judge appointed attorney Kristi Riggins, a private attorney, to defend him. (*Id.*, ¶ 9; Appendix 2, ¶ 1.) Riggins was not the court's employee; the court contracted with her to provide legal counsel to Durnan at State expense. (Appendix 2, ¶ 2.) After Riggins was appointed, no one at the Gila County Superior Court attempted to interfere with or control her pretrial investigation or her preparation for and conduct of the trial. (*Id.*, ¶ 9.)

Durnan was convicted after trial and sentenced to a ten-year term of imprisonment. (Appendix 1, ¶¶ 11, 13.) After he had served approximately five years, the court overturned his conviction because it determined that Riggins's representation had been ineffective. (*Id.*, ¶¶ 14-15.) After the State dismissed the criminal charges (*id.*, ¶¶ 16-17), Durnan filed this action (Appendix 1).

The State moved for summary judgment on Durnan's claim for legal malpractice, arguing that Riggins was not an agent or employee of the State, and

that it had no control over her representation of Durnan. (Appendix 3 at 6-7.)¹ Durnan argued that under the non-delegable-duty rule, the State was vicariously liable for Riggins's performance regardless of its lack of control over her professional conduct. (Appendix 4 at 2-5.)

The superior court denied the State's Motion, ruling as follows:

With respect to the State's assertion that it cannot be vicariously or otherwise liable for the actions of plaintiff's court-appointed defense counsel, the State contends that defendant Riggins was not the "agent" or "employee" of the State and that the State had no duty to supervise her conduct of plaintiff's defense in the criminal proceeding. The plaintiff counters that the State had a "non-delegable" duty to appoint competent counsel to defend him and is therefore liable for any malpractice by defendant Riggins, citing *Wiggs v. City of Phoenix*, 198 Ariz. 367, 10 P.3d 625 (2000), *Simon v. Safeway, Inc.*, 519 Ariz. Adv. Rep. 18 (App. 12/20/07), and *Medley v. N. C. Dep't of Corr.*, 330 N.C. 837, 412 S.E.2d 654 (1992). Based on these authorities, the Court agrees that the State would be liable for any malpractice by defendant Riggins. However, the determination of whether . . . Riggins committed malpractice in her defense of the plaintiff require[s] factual determinations which make summary judgment inappropriate.

(Exhibit A, attached.) The State requested special-action relief from the court of appeals and Durnan agreed that jurisdiction was appropriate. On May 5, 2008, the court of appeals declined special-action jurisdiction. (Exhibit B, attached.)

¹ The parties stipulated to dismiss with prejudice the other count, which alleged negligent hiring and supervision. (Appendix 5.)

After Durnan filed this suit, another claimant filed a notice of claim with the State, claiming damages for the alleged malpractice of his court-appointed criminal-defense counsel. (Appendix 6.)

REASONS WHY THE COURT SHOULD GRANT REVIEW

I. The Court Should Grant Review to Resolve an Important Issue of First Impression.

Whether the State is vicariously liable for the legal malpractice of court-appointed indigent defense counsel is a novel legal issue in Arizona. Furthermore, legal research has disclosed only one other case from another jurisdiction that discusses the issue. Because no Arizona decision controls the point of law in question, this case is ripe for consideration by this Court. ARCAP (c)(3).

This Court should also grant review because an important issue of law has been incorrectly decided. *Id.* The superior court applied the non-delegable-duty rule to a situation where the State owes no duty to Durnan in the first place. The State's only duty was to assign counsel to represent Durnan. Assigned counsel was neither an employee nor an agent of the State. The duty to competently represent Durnan was hers alone.

There is yet another reason for granting this petition: what began as a single, novel lawsuit has expanded into something more problematic, not only for the State but for the judicial system as well: another tort claim has recently been filed

by an inmate claiming entitlement to money damages from the State for the alleged malpractice of his court-appointed criminal defense counsel. Unless this novel and important issue of law is promptly resolved, many more of these claims and suits can be expected from current prison and jail inmates and unincarcerated former criminal defendants. Prompt resolution of this issue will serve the interests of justice and judicial economy by terminating this litigation, thus dispensing with costly and time-consuming pretrial discovery and trial proceedings, and preventing other unnecessary lawsuits and the possibility of inconsistent judgments.

II. The Non-Delegable-Duty Rule Does Not Apply Here.

A. The State Could Appoint Riggins to Defend Durnan Without Incurring Vicarious Liability.

The essence of the non-delegable-duty rule is that, in certain circumstances, persons may not avoid liability by delegating the performance of *their own duty* to an independent contractor. *Wiggs v. City of Phoenix*, 197 Ariz. 358, 365 ¶ 32, 4 P.3d 413, 420 (App. 1999) *vacated on other grounds*, 198 Ariz. 367, 10 P.3d 625. It cannot apply here because the State did not owe Durnan any duty of competent representation.

Under *Gideon v. Wainwright*, 372 U.S. 335, 342-44, 83 S. Ct. 792, 795-96 (1963), the State had a constitutional duty to provide counsel to Durnan. It discharged that duty by appointing Riggins and paying for her services. (Appendix 2 at ¶ 2.) The duty to competently *represent* Durnan belonged exclusively to

Riggins. Because the State had no duty to competently represent Durnan, it could not possibly have a non-delegable duty to do so. The non-delegable-duty rule simply does not apply in these circumstances, and the superior court erred by concluding otherwise. *See Foster v. County of San Luis Obispo*, 14 Cal. App. 4th 668, 673, 17 Cal. Rptr. 2d 730, 733 (1993) (government discharged its duty under *Gideon v. Wainwright* by providing defense counsel at its own expense; it was not liable for the attorney's performance).

Gideon v. Wainwright required no more of the State than to provide Durnan a criminal-defense attorney at no cost to him. The State fulfilled its duty to Durnan by hiring an independent lawyer to represent him. The appointed attorney, not the State, owed a tort duty of competent representation. Because the State did not owe a duty in tort, the non-delegable-duty rule does not apply. The superior court erred by not granting the State's Motion for Summary Judgment. This Court should grant review to issue an opinion on this matter of statewide importance.

B. Riggins Was Not the State's Independent Contractor.

The non-delegable-duty rule is an exception to the common-law rule that an employer is exempt from liability for its independent contractor's negligence. *Ft. Lowell-NSS Ltd. P'ship v. Kelly*, 166 Ariz. 96, 100, 800 P.2d 962, 966 (1990). The rule does not apply here, however, because Riggins was not the State's independent contractor. An independent contractor is someone hired to act *on*

behalf of the person who hires him. See *Wiggs v. City of Phoenix*, 198 Ariz. 367, 370, ¶ 10, 10 P.3d 625, 628 (2000) (“[B]ecause APS contracted to act on the City’s behalf to maintain the streetlights, APS was the City’s agent for the performance of that non-delegable duty.”); *Simon v. Safeway, Inc.*, 217 Ariz. 330, 335 n.3, 173 P.3d 1031, 1036 n.3 (2007) (stating that an independent contractor does work for another under conditions that are not sufficient to make him a servant of the other); *Rand v. Porsche Fin. Servs.*, 216 Ariz. 424, 434, ¶ 36, 167 P.3d 111, 121 (App. 2007) (non-delegable-duty exception applied to company hired by automobile lessor to repossess a leased motor vehicle). Riggins was hired to be *Durnan’s* agent, not the State’s. A court-appointed indigent defense counsel acts solely on behalf of her client, not the governmental entity that appointed her. See *Polk County v. Dodson*, 454 U.S. 312, 323, 102 S. Ct. 445, 452 (1981) (“[A] public defender is not acting on behalf of the State; he is the State’s adversary.”). Therefore, Riggins was not the State’s independent contractor, and the non-delegable-duty rule cannot make the State vicariously liable for her professional conduct.

CONCLUSION

The Court should grant this Petition for Review and reverse the superior court's order, remanding with instructions to grant the State's Motion for Summary Judgment.

Respectfully submitted this 2 day of June, 2008.

Terry Goddard
Attorney General

A handwritten signature in black ink, appearing to read "Richard P. Broder", written over a horizontal line.

Richard P. Broder
Assistant Attorney General
Attorneys for Petitioner

EXHIBIT A

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2007-001874

02/11/2008

HONORABLE BETHANY G. HICKS

CLERK OF THE COURT
D. Whitford
Deputy

RAPHAEL DURMAN

WILLIAM G WALKER

v.

STATE OF ARIZONA, et al.

RICHARD P BRODER

ROGER W PERRY JR.
KRISTI A RIGGINS
STEVEN P SHERICK

RULING ON MATTER TAKEN UNDER ADVISEMENT

Oral argument with respect to defendant State of Arizona's Motion for Summary Judgment, filed August 21, 2007, and plaintiff's Cross-Motion for Partial Summary Judgment, filed September 6, 2007, was heard on January 28, 2008. The plaintiff contends, *inter alia*, that his court-appointed attorney committed malpractice, causing or contributing to his conviction for a criminal offense and his ensuing incarceration for five years. He is suing the State and his court-appointed counsel for the damages he allegedly incurred as a result.

The State has moved for summary judgment on the grounds (i) that the plaintiff's notice of claim failed to comply with the applicable Arizona statute and was, in any event, not filed within the time period specified by Arizona law, (ii) that the State cannot be vicariously or otherwise liable for the actions of his court-appointed attorney and (iii) that judicial immunity protects the State from liability. The plaintiff has moved for partial summary judgment, requesting the Court to find (i) that the State had a duty to provide effective assistance of counsel to the plaintiff in his criminal proceeding and (ii) that the State is vicariously liable for the actions of his court-appointed counsel in providing his defense.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2007-001874

02/11/2008

The Arizona notice of claim statute (A.R.S. §12-821.01(A)) requires a claimant to file a notice of claim within 180 days after the cause of action accrues and to include in the claim "facts sufficient to permit the public entity ...to understand the basis upon which liability is claimed" and "shall also contain a specific amount for which the claim can be settled and the facts supporting that amount".

In this instance, the defendant State of Arizona asserts that the 180-day time period "had long since expired" when the plaintiff filed his notice of claim on December 6, 2005, but has provided no further factual details or citations of authority in support of this contention. In the Court's view, if the plaintiff's cause of action accrued on June 13, 2005, the date on which the Gila County Superior Court granted the plaintiff's Rule 32 Petition for Post-conviction Relief and set aside his conviction on the ground of inadequate assistance of counsel, the notice of claim was clearly filed within the 180-day period. In the absence of an assertion and a cogent legal argument, together with citations of applicable authority, to the effect that the plaintiff's cause of action accrued at a prior date, the Court is unable to grant summary judgment to the State based on the timeliness issue.

Insofar as specifying both an amount and a basis upon which liability is claimed, the plaintiff's notice of claim "demands that the State and Gila County compensate him in the amount of 5 million dollars (\$5,000,000)" for his imprisonment, lost wages, "ruination of his reputation", emotional distress and "all accompanying compensatory damages (due) to the acts of (the individual defendants)" as a result of attorney malpractice, negligent hiring, negligent retention and negligent supervision (of his court-appointed attorney). The notice also recites that the plaintiff has additional (and presumably separate) claims against the individual defendants for malpractice and is entitled to punitive damages for their "wonton, reckless conduct". The Court is satisfied that this information sufficiently apprises the State of both the amount and basis of the claim as required by law.

With respect to the State's assertion that it cannot be vicariously or otherwise liable for the actions of the plaintiff's court-appointed defense counsel, the State contends that defendant Riggins was not the "agent" or "employee" of the State and that the State had no duty to supervise her conduct of plaintiff's defense in the criminal proceeding. The plaintiff counters that the State had a "non-delegable" duty to appoint competent counsel to defend him and is therefore liable for any malpractice by defendant Riggins, citing *Wiggs v. City of Phoenix*, 198 Ariz. 367, 10 P.3rd 625 (2000), *Simon v. Safeway, Inc.*, 519 Ariz. Adv. Rep. 18 (App. 12/20/07), and *Medley v. North Carolina Department of Corrections*, 330 N.C. 837, 412 SE.2d 654 (1992). Based on these authorities, the Court agrees that the State would be liable for any malpractice by defendant Riggins. However, the determinations of whether the State was negligent in entering into a contract with defendant Riggins and whether defendant Riggins committed malpractice in

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2007-001874

02/11/2008

her defense of the plaintiff require factual determinations which make summary judgment inappropriate.

Finally, the State's assertion that judicial immunity protects the State from liability for the appointment of defendant Riggins is also inapposite. The plaintiff has not asserted any claim against Judge Dawson. As noted above, the issue is whether the duty to appoint counsel, the manner in which defendant Riggins was appointed and the nature of her representation of the plaintiff make the State (not Judge Dawson) liable for any malpractice defendant Riggins may have committed.

Accordingly, for the reasons set forth above, it is ORDERED denying both the State's Motion for Summary Judgment and the plaintiff's Cross-Motion for Partial Summary Judgment, except to the extent of finding that the State would be liable for any malpractice committed by defendant Riggins.