

Petition for Rehearing

Plaintiff Michael Applebaum, respectfully petitions the Honorable Court for Rehearing of the above captioned matter, for the reason that the Court misapprehended or overlooked various matters of law and fact that would have changed its ruling in this matter, and states as follows:

I Introduction and Background

The Court's ruling of September 28, 2007, answered the certified question of the circuit court in the positive. The question of the court below was:

Whether the nullity rule should be applied in a wrongful death action where the plaintiff is an attorney who has passed the bar and was on inactive status at the time of the filing of the complaint, was the special administrator, sole beneficiary and son of the decedent and prior to the hearing on the motion whose license was reinstated.

Plaintiff and the court below relied primarily on *Ford Motor Credit Company v. Sperry*, 214 Ill. 2d 371 (2005), arguing the differential fee between an attorney on active status and one on inactive status was not a regulation for the protection of the public, and therefore, under *Sperry* should not invoke application of the nullity rule.

The Court rejected this reasoning, and distinguished *Sperry* on grounds never raised by the defendants and, it is respectfully submitted, based on a misapprehension of the rules governing active and inactive status.

Specifically:

- Contrary to the Court’s opinion, (slip op. at 9) an attorney placed on inactive status is not removed from the Master Roll of Attorneys, but is listed thereon as “inactive.” Ill. Sup. Ct., R 756(a)(5) (2007);
- Contrary to the Court’s opinion, (slip op. at 9) *no* “petition for reinstatement” is required or contemplated by the rules for attorneys registered on the Master Roll of Attorneys. Ill. R. Att’y Regis. & Disc. Comm’n, R 400 (2007) and *et seqq.*;
- Contrary to the Court’s opinion, (slip op. at 9) payment of the “difference between the inactive [and active] status registration fee” results in immediate return to active status. Ill. Sup. Ct., R 756(a)(5) (2007);
- Contrary to the Court’s opinion, (slip op. at 9) an attorney on inactive status necessarily remains subject to discipline, including disbarment and removal from the Master Roll for failure to pay fees. Ill. Sup. Ct., R 756(i) (2007);
- Contrary to the implication of the Court’s opinion, (slip op. at 9) compliance with the new continuing legal education requirements are not a prerequisite to returning to the active practice of law; that is, an inactive member may immediately return to active practice, but must

fulfill CLE requirements within 24 months thereafter.¹ Ill. Sup. Ct., R 791 (2007);

- Contrary to the Court’s opinion, (slip op. at 9) an attorney placed on inactive status is not removed from the Master Roll of Attorneys, and therefore not “reinstated.” Ill. Sup. Ct., R 767 (2007).

In short, the Court’s conclusion that “importantly” the return to active status “necessarily included more than simply forwarding funds” was a result of the Court’s apparent misapprehension. Slip op. at 9. It is respectfully submitted that had the court not misapprehended this important factor, it would have ruled in favor of the plaintiff and affirmed the circuit court’s ruling.

Further, respectfully, the Court overlooked factors it considered “crucial” to its decision:

Specifically:

- Contrary to the Court’s opinion, (slip op. at 9) the attorney in *Brigham* was not suspended nor are the conditions under which he failed to pay his dues known.

It is respectfully submitted that had the court not overlooked these points which it has described as “a crucial factor” (slip op. at 9) it would have ruled in favor of the plaintiff and affirmed the circuit court’s ruling.

¹ In any event, even active attorneys have until June of next year at earliest to complete the education requirements. Ill. Sup. Ct., R 794 (2007)

Further, and with due respect, the Court erroneously concluded that plaintiff was not a licensed attorney.

Specifically:

- Contrary to the Court's opinion, (slip op. at 10) an attorney listed on the Master Roll of Attorneys is licensed.

It is respectfully submitted that had the Court not misapprehended this point, it would have ruled in favor of the plaintiff and affirmed the circuit court's ruling.

II Argument

A. The Court’s Misapprehension Prevented It From Applying The Reasoning Of *Sperry*

1. *The Court Misapprehended the Nature of Inactive Status*

This Court rightly points out that good standing with the court is generally part of the regulatory scheme that protects the public. Slip op. at 9. The rules specifically provide that an attorney on inactive status remains subject to discipline, registration status notwithstanding. Ill. Sup. Ct., R. 756(i) (2007). Thus plaintiff remained subject to “oversight by the ARDC.” Additionally, even as of today, an attorney may return to active status without having first complied with continuing legal education. Ill. Sup. Ct., R 791 (2007). Indeed, the Court identified the most important issue: whether something more than the payment of a fee—including petition for reinstatement—was necessary to return to active status. It was not.

The reasoning of *Ford Motor Credit Company v. Sperry*, 214 Ill. 2d 371 (2005), was that “The goals of protecting the public and ensuring the integrity of the court system which underpin the invocation of the nullity rule were not implicated by the facts in the instant cause.” Id at 391. Given that the rules recognize no competency or fitness difference between active and inactive status, and therefore impose no requirements other than a fee make this case closer to *Sperry* than the Court believed. Ill. Sup. Ct., R 756(a)(5) (2007).

Indeed the *Sperry* opinion itself likens the failure to register under Rule 721 as causing no harm for lack of competency similar to the failure to pay a fee in *People v.*

Brigham, 151 Ill. 2d 58, 600 N.E.2d 1178, 175 Ill. Dec. 720 (1992). See *Sperry* at 388. See also *Joseph P. Storto, P.C. v. Becker*, 341 Ill. App. 3d 337 (Ill. App. Ct. 2003) where the court makes the analogy at greater length. It seems that neither court would have made such an analogy, absent a belief that the public is not harmed by an otherwise qualified attorney who has failed to pay the appropriate fee.

Finally, the Court's distinction between this case and *Sperry*, actually distinguishes it from the case the Court found more in point: *Fruin v. Northwestern Medical Faculty Foundation, Inc.*, 194 Ill. App. 3d 1061 (Ill. App. Ct. 1990). That is, an attorney licensed in a foreign jurisdiction, unlike an Illinois attorney on inactive status, must do much more than simply pay a fee to obtain the right to practice in Illinois. Ill. Sup. Ct., R 701 (2007) and *et seqq.* It is respectfully submitted that inasmuch as the Court's misapprehension led it to apply this distinction to *Sperry* rather than *Fruin*, the reverse application of this distinction should lead to a different result.

Unlike the Court, defendants never made an argument that the difference in status had any implications with respect to competency or oversight and argued for no more than the strict application of the nullity rule. Hence, plaintiff never had a reason to believe that the question whether more than the payment of a fee was involved. It is respectfully submitted that absent its misapprehension about the need to petition for reinstatement and the lack of ARDC oversight, it would have ruled in plaintiff's favor.

B. The Court Misapprehended Points Which It Deemed "Crucial"

In its analysis, the Court misapprehended "crucial factors" in its ruling. Slip op. at 9. When distinguishing the attorney in *Brigham* from the instant case, the Court

characterized him as “suspended” and implied that his failure to pay dues was not voluntary. The former is erroneous. (“We conclude that this fact [suspension] is irrelevant...since we are focusing upon the facts as they existed at the time of the defendant's trial.” *Brigham* at 63.) Why he failed to pay his fee was not stated, and apparently irrelevant to the decision. *Brigham* at 60 and see *People v. Brigham*, 208 Ill. App. 3d 982, 984 (Ill. App. Ct. 1991).

It is respectfully submitted that absent its misapprehension about them, it would have ruled in plaintiff’s favor.

C. The Court Misapprehended That ”Inactive” Is Not the Equivalent of “Unlicensed”

1. The Misapprehension Led The Court To Apply The Nullity Rule

Plaintiff “obtained a license” “to practice as an attorney or counselor at law within this State” “from the Supreme Court of this State.” 705 ILCS 205/1 (2007). “The license to practice law is a privilege granted only by the Supreme Court and can only be delimited, restricted or taken away by that court or by statutory enactment.” *Remole Soil Service, Inc. v. Benson*, 68 Ill. App. 2d 234, 236-237 (Ill. App. Ct. 1966). Plaintiff’s license was never “delimited, restricted or taken away.” He has never been disciplined. Slip op. at 3. Had plaintiff simply paid the higher fee earlier, without any additional act, this controversy would not exist.

This Court ruled that Ill. Rev. Stat. 1975, ch. 13, par. 1 (which subsequently became 705 ILCS 205/1) “is intended to prevent the practice of a profession by one who has not first complied with the licensing requirements.” *Rathke v. Lidisky*, 59 Ill. App. 3d 560, 562 (Ill. App. Ct. 1978). The requirements are set forth in Ill. Sup. Ct., R 701 (2007)

and *et seqq.* Attorneys licensed only in foreign jurisdictions or others who have never qualified to practice in Illinois are *de facto* unlicensed.

The Illinois Supreme Court provides the definitive explication of the nullity rule:

This rule is grounded in the fact that there are risks to individual clients and to the integrity of the legal system inherent in representation by an unlicensed person: The purpose of the nullity “rule is *** to protect litigants against the mistakes of the ignorant and the schemes of the unscrupulous and to protect the court itself in the administration of its proceedings from those lacking requisite skills.” *Ford Motor Credit Co. v. Sperry*, 214 Ill. 2d 371, 389-390 (2005) (citations omitted)

Courts considering the nullity rule are virtually unanimous in concluding that it applies only to an “unlicensed person”:

- “an unlicensed person” *Ford Motor Credit Co. v. Sperry*, 214 Ill. 2d 371, 389-390 (Ill. 2005);
- “a person not licensed to practice in Illinois” *Fruin v. Northwestern Medical Faculty Foundation, Inc.*, 194 Ill. App. 3d 1061, 1063 (Ill. App. Ct. 1990);
- “one not licensed to practice law,” “nonattorney agents,” “nonattorney,” “lay agent” *Janiczek v. Dover Management Co.*, 134 Ill. App. 3d 543, 545 (Ill. App. Ct. 1985);

- “persons [not] licensed by our supreme court” *McEvers v. Stout*, 218 Ill. App. 3d 469, 471-472 (Ill. App. Ct. 1991);
- “a person not licensed to practice in Illinois” *Pratt-Holdampf v. Trinity Med. Ctr.*, 338 Ill. App. 3d 1079, 1083 (Ill. App. Ct. 2003)

The fee differential between active and inactive status does not change the underlying competence and fitness recognized by admission to the Bar. Nothing in the structure of the rules can support the inference that differential fees paid by such persons are a judgment that preventing their practice is a regulation enacted to protect the public. Further, and with respect, there is nothing in the caselaw to suggest that for an attorney admitted to the Bar, in good standing and registered on the Master Roll of Attorneys, “unauthorized” under the rules has ever been equated with “unlicensed.” Cf. *Hill v. State* (Tex. Crim. App. 1965), 393 S.W.2d 901, 904 (“status of a delinquent attorney not being a member of the State Bar * * * does not place him in the position of being 'unlicensed to practice law...’”) cited with approval, *Brigham* at 67. As plaintiff pointed out in his brief, no court has ever held the nullity rule applicable where a licensed Illinois attorney in good standing is involved.

Given the Court’s misapprehension of the nature of “inactive status,” plaintiff respectfully submits that the Court should reconsider the policy implications of its decision with respect to Illinois lawyers and the finality of decisions (pl. brief at 14-15), with respect to active attorneys failing to pay their fees, and perhaps, the issue raised by the Court – a possible default in their continuing education responsibilities.

Finally, plaintiff does not seek to invoke the “innocent litigant” *exception* to the nullity rule. Pl. brief at 6. Rather, he invokes *Sperry’s* requirement that the nullity rule be only invoked where a regulation breached—such as admission to the Bar—is for the protection of the public and the courts. This is in harmony with the “innocent litigant” cases that refused to apply the nullity rule where its purpose would not be advanced.

It is respectfully submitted that absent the misapprehensions outlined above the Court would have ruled in plaintiff’s favor.

Conclusion

For the reasons stated above, plaintiff respectfully requests that the Court grant a rehearing of this matter, and, upon such rehearing, answer the certified question of the circuit court in the negative.

Respectfully Submitted,

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RULE 341 (c) CERTIFICATION

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the appendix is 10 pages.

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