

IN THE CIRCUIT COURT OF MADISON COUNTY, TENNESSEE

FILED
JUDY BARNHILL, CIRCUIT COURT CLERK

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P.M.

THE TRAVELERS INDEMNITY COMPANY)
OF CONNECTICUT and F.F.E.)
TRANSPORTATION SERVICES, INC.,)

Plaintiffs,)

vs.)

ROBERT A. COX, WARREN McWHIRTER,)
and GLASSMAN, EDWARDS, WADE &)
WYATT, P.C., a Tennessee professional)
corporation,)

Defendants.)

Case No. C-04-104
Div I

COMPLAINT

Come now the Plaintiffs, The Travelers Indemnity Company of Connecticut and F.F.E. Transportation Services, Inc., and for their cause of action against the Defendants, and each of them, state and allege as follows:

I. PARTIES AND JURISDICTION

1. Plaintiff, F.F.E. Transportation Services, Inc. ("FFE"), is a Delaware corporation qualified to do business in the state of Tennessee and was, at all times material herein, represented by Defendants with regard to the litigation entitled Steve Vinson and Barbara Vinson vs. FFE Transportation Services, Inc., Warren W. Harris, D.L. Peterson Trust, and Reece T. Williams, Madison County Court Docket No. C-99-409 (the "Vinson litigation"). The acts and omissions complained of herein arose out of Defendants' representation in said action. With regard to any potential liability of FFE for the automobile accident that was the subject of the Vinson litigation, FFE was self-insured for liability in the

amount of \$750,000.00.

2. Plaintiff, The Travelers Indemnity Company of Connecticut (“Travelers”), is a Connecticut insurance company licensed to do business in Tennessee. With regard to any potential liability of FFE for the motor vehicle accident that was the subject of the Vinson litigation, Travelers insured FFE, through an excess indemnity policy, for liability exceeding FFE’s self-insured retention. Under the provisions of the excess indemnity policy, Travelers is subrogated to any claim that FFE may have against any persons growing out of any occurrence resulting in payment of loss by Travelers.

3. Defendant Richard A. Cox (“Cox”) is, upon information and belief, a Tennessee resident who is duly licensed to practice law in the State of Tennessee, with a current office address of 26 North Second Street, Memphis, Tennessee 38103. At the time of the events alleged herein, Cox was employed at the professional corporation and law firm of Glassman, Edwards, Wade & Wyatt, P.C. Defendant Cox, at all times material herein, was one of the attorneys hired to represent and defend Warren Harris (“Harris”) and FFE with regard to the Vinson litigation.

4. Defendant Warren McWhirter (“McWhirter”) is, upon information and belief, a Tennessee resident who is duly licensed to practice law in the State of Tennessee, with a current office address of 26 North Second Street, Memphis, Tennessee 38103. At the time of the events alleged herein, McWhirter was employed at the professional corporation and law firm of Glassman, Edwards, Wade & Wyatt, P.C. Defendant McWhirter, at all times material herein, was one of the attorneys hired to represent and defend Harris and FFE in the Vinson litigation described above.

5. Defendant Glassman, Edwards, Wade & Wyatt, P.C. ("Glassman"), at all times material herein, was a professional corporation engaged in the practice of law, with its principal business address at 26 North Second Street, Memphis, Tennessee 38103. At all times material herein, Glassman employed Defendants Cox and McWhirter. Jurisdiction and venue are appropriate in this Court.

II. GENERAL ALLEGATIONS

6. In or around December, 1998, FFE retained Defendants, and each of them, to represent and render legal services and advice to Harris and FFE regarding a motor vehicle accident that was the subject of the Vinson litigation, as well as the subsequently filed litigation itself. Harris was alleged to be the driver of a vehicle owned by FFE, and was alleged to be an employee of FFE. Defendants agreed, as part of said contract, to provide competent and skilled legal services and to exercise that degree of care, skill and diligence commonly possessed and exercised by other practicing attorneys, in exchange for Plaintiffs' payment of Defendants' attorneys' fees and costs relating to Defendants' representation.

7. Between December, 1998, and December, 1999, when the Vinson litigation was finally commenced, Defendants failed to interview or secure the cooperation of Warren Harris. For substantial periods of time after commencement of the Vinson litigation, and throughout the years of 1998 - 2001, Defendants failed to interview, secure the cooperation of, or preserve the testimony of their client Warren Harris. Defendants consistently and repeatedly failed to exercise appropriate care, skill, and diligence in locating, interviewing, securing the cooperation of, and preserving the testimony of their client, Warren Harris.

8. Over a year after the Vinson litigation was commenced, in January of 2001, counsel for the Vinsons filed a Motion for Default Judgment as to Harris. Although the motion alleged that Harris had been served through the Secretary of State during the summer of 2000, Harris in fact had not been served.

9. In July of 2001, counsel for the Vinsons filed a Motion to Compel Discovery against Harris. In response to this motion the Defendants, as counsel for Harris, agreed to the terms and entry of a Consent Order, entered by the Court on August 20, 2001, which provided that Harris was to respond to the discovery within thirty (30) days. This order was entered without the knowledge, consent or authorization of Harris.

10. The Vinsons' Motion for Default Judgment was still pending in August, 2001. In response to this motion, and without the authority or consent of Harris or FFE, Defendants as counsel for Harris agreed to the terms and entry of another Consent Order which stated, in part:

Come the parties, upon Plaintiffs' Motion for Default Judgment as to Defendant Warren W. Harris, and agree, with the approval of this Honorable Court, that Defendant Warren W. Harris shall have 30 days from the entry of this Consent Order to file and serve an Answer to Plaintiffs' Complaint, and if no Answer is filed by the end of the thirtieth day, Plaintiffs may present an Order Granting Default Judgment which will be entered by the Court with no further motion from the Plaintiffs.

This Consent Order was signed by the Court on August 17, 2001. At the time the two (2) above referenced Consent Orders were agreed upon by Defendants and submitted to the Court for entry in August, 2001, the case file of the Circuit Court Clerk in Madison County, Tennessee contained documentation establishing that Warren Harris in fact had not been

properly served with process, and contained an alias summons for Harris issued in July, 2001 which was still outstanding at the time the Consent Orders were entered on August 17, 2001.

11. In order to avoid a default judgment against Harris under the Consent Order previously agreed to by Defendants and referred to in ¶ 10, above, Defendant Cox, without the knowledge, consent, or authority of Harris or FFE, filed with the Court on September 18, 2001 an Answer to the Complaint on Harris' behalf. Prior to filing the Answer, Defendant Cox did not confirm with his client Harris whether Harris had been served with process, and the Answer did not assert the affirmative defenses of insufficiency of process and insufficiency of service of process.

12. In October of 2001, counsel for the Vinsons brought a second Motion to Compel Harris to provide responses to discovery. On or about November 16, 2001 at a hearing on that motion, Defendant McWhirter, on behalf of and representing Harris, entered into a voluntary agreement with counsel for the Vinsons allowing Plaintiffs Vinson to present an Order Granting Default Judgment and Summary Judgment as to Harris if Harris did not serve responses to Vinsons' discovery requests by December 5, 2001. Said Consent Order was entered by the Court on or about November 28, 2001 and stated, in part, as follows:

1. That Plaintiffs' Second Motion to Compel Discovery from defendant Warren W. Harris is granted; and
2. That Defendant Warren W. Harris shall serve complete responses to Plaintiffs' First Set of Interrogatories and Request for Production by the close of business on December 5th, 2001, and if said responses are not received by Plaintiffs by the close of business on December 5th, 2001, Plaintiffs may present an Order Granting Default Judgment and Summary Judgment as to Defendant Harris, which will be entered by the Court with no further motion from the Plaintiffs; and

3. That, if this cause is not otherwise resolved by December 5th, 2001, Defendant Harris shall pay \$350.00 in attorneys' fees to the Plaintiffs for their reasonable expenses in seeking discovery following the Court's first Order compelling discovery."

This Order was filed without the knowledge, consent, or authority of Defendants' clients, Warren Harris and FFE.

13. Pursuant to the provisions of the foregoing Consent Order, the Court signed and entered an Order granting a default judgment and summary judgment against Harris on January 15, 2002 after Defendants failed to serve properly executed discovery responses.

14. The Vinsons thereafter filed a motion requesting an Order from the Court granting summary judgment in their favor against FFE. On or about March 12, 2002, the Court issued an Order finding there were no genuine issues of material fact as to the vicarious liability of FFE and granting summary judgment against FFE. This Order was based, in part, upon the default and summary judgment orders against Harris, which established Harris' fault and FFE's vicarious liability therefor. Subsequent motions to set aside the orders entered in the Madison County Circuit Court were denied, and Defendants' attempt to appeal was unsuccessful.

15. Following entry of the various above-referenced orders, liability was established in the Vinson litigation, and Plaintiffs FFE and Travelers had no ability to defend on the merits of the compensatory and punitive damage claims asserted against Harris and FFE. As a direct result of the Defendants' negligent and improper acts and omissions, Plaintiffs were required to obtain substitute counsel for FFE and Harris to replace the Defendants. A damages hearing was set to take place in April, 2003. Before the matter was heard, however, the parties to the

Vinson litigation eventually settled all claims in controversy. Defendants and their professional liability insurer were invited to participate and monetarily contribute to efforts to mediate the claims, but declined to make any payment. As a result, the entire settlement was borne by Plaintiffs FFE and Travelers, with no participation by the Defendants. By terms of the settlement agreement, the specific provisions and amount of the settlement are confidential and therefore cannot be recited publicly in this filing, but will be shown to the Court and parties pursuant to appropriate confidentiality protections as the Court may direct. However, as a direct and proximate result of Defendants' acts and omissions, both FFE and Travelers were required to incur additional costs and attorneys' fees, and were required to pay their respective portions of the total settlement, thereby incurring substantial expenses, fees and monetary damages well over the minimum jurisdictional limits of this Court, which would not have been incurred but for the wrongful acts and omissions of the Defendants.

**COUNT ONE
LEGAL MALPRACTICE/NEGLIGENCE
FFE VS. DEFENDANTS**

16. The Plaintiffs reallege all of the foregoing paragraphs as though fully restated herein.

17. The Plaintiffs retained Defendants as attorneys to competently represent, advise, and defend Harris and FFE and their interests with regard to the claims made against them in the Vinson litigation. During their representation of FFE, Defendants owed various legal duties to FFE, including the duty to exercise that degree of care, skill and diligence commonly possessed and exercised by other practicing attorneys, and the duty to comply with the appropriate standards of care governing their conduct as attorneys with regard to the subject

litigation. The Defendants represented to this Plaintiff that they were qualified to represent Harris and FFE, and specifically represented that they could defend Harris and FFE in the Vinson litigation, and agreed to represent Harris and FFE.

18. At all times material herein, there was an attorney/client relationship between FFE and the Defendants for the purpose of rendering legal advice and defending and protecting the interests of FFE and its employees.

19. At all times material herein, the Defendants owed a duty of care, competence and diligence to FFE.

20. At the time Defendants were retained, this Plaintiff did not possess expertise in legal matters and relied upon the Defendants to competently represent its legal interests in good faith and with undivided loyalty in their paid fiduciary capacity.

21. Plaintiff relied to their detriment upon the Defendants' expressed and implied representations, and innocently trusted their legal advice. This Plaintiff further relied upon the Defendants to thoroughly investigate the facts and the law, and to preserve FFE's rights in accordance with the law. Although Defendants represented that the defense was being handled appropriately, such was not the case and Defendants failed to properly advise and/or disclose material information to the Plaintiffs, who detrimentally relied on Defendants' representations and were damaged as a result.

22. By undertaking the role of attorneys, the Defendants had a duty to represent Plaintiff's legal interests thoroughly and competently, taking whatever steps necessary as competent lawyers to investigate, analyze and fully determine Plaintiff's legal rights and entitlement, and to represent this Plaintiff's legal interests thoroughly, competently, and zealously, taking whatever steps necessary as competent lawyers to protect this Plaintiff's legal rights and interests.

23. The Defendants, and each of them, breached their duties of care to their client, including but not limited to the following particulars:

- (a) Failing to adequately inform and advise Plaintiff of all pertinent matters relating to its representation, including but not limited to the effect of interposing an Answer on behalf of Warren Harris in the absence of proper service of the Summons and Complaint upon him;
- (b) Entering an appearance on behalf of Harris by signing various voluntary Consent Orders without first verifying that Harris had been properly served with the Summons and Complaint, and without preserving the defenses of insufficient process and insufficient service of process;
- (c) Failing to consult with, inform, obtain authority from, or advise plaintiff regarding the voluntary nature of, and alternatives to, the various Consent Orders that Defendants agreed to concerning service, pleading, discovery responses, default judgment, and other issues arising during the litigation;

- (d) Entering into Consent Orders without consultation with or authorization from Plaintiff FFE and/or Warren Harris;
- (e) Entering into Consent Orders allowing the Court, upon application by counsel for Defendants, to enter a default judgment and/or summary judgment against Harris on the issue of liability rather than defending against and disputing the merits of any said motions for default judgment or summary judgment against Harris;
- (f) Failing to competently draft an answer on behalf of Harris by drafting an answer that failed to include, and thus waived, the affirmative defenses relating to insufficient process and insufficient service of process;
- (g) Failing to advise or explain to Plaintiff that the Answer filed on behalf of Harris did not contain the defenses of insufficient process and insufficient service of process, and that said omission constituted a further waiver of said defenses by Harris;
- (h) Failing to advise or explain to Plaintiff the nature and legal effect of the Consent Orders to which Defendants agreed relating to entry of default judgment and/or summary judgment against Harris;

- (i) Failing to advise or explain to Plaintiff the nature and effect of the default judgment and/or summary judgment against Harris, and in particular, its effect on the claims against FFE and/or on the defenses available to FFE, and more specifically, failing to advise or explain that FFE could be found vicariously liable based on the default and summary judgments against Harris;
- (j) Failing to exercise appropriate care, prudence and diligence in locating, interviewing, securing the cooperation of, and/or preserving the testimony of Warren Harris;
- (k) Entering appearances, executing Consent Orders, and filing an Answer on behalf of Harris without first carefully examining the entire Court file which contained documentation clearly establishing that Harris had not been properly served with process.

24. The above-referenced breaches of the standard of care, and others, proximately caused damages to the Plaintiffs, including but not limited to:

(a) But for the advice and conduct of Defendants, and each of them, Plaintiff would have known about the effect of the Consent Orders entered into by Defendants and would not have agreed to the various Consent Orders that resulted in the unauthorized appearance, waiver of defenses, default judgment and summary judgment against Harris;

(b) But for the advice and conduct of Defendants, and each of them, Harris would have been able to defend against and avoid the entry of a default judgment and summary judgment against him on the issue of liability;

(c) But for the advice and conduct of Defendants, and each of them, Harris would have asserted the affirmative defenses of insufficient process, insufficient service of process, and the Court's lack of personal jurisdiction over him;

(d) But for the advice and conduct of Defendants, and each of them, FFE would have been able to avoid the entry of summary judgment against it on the issue of liability;

(e) But for the advice and conduct of Defendants, and each of them, FFE's self-insured retention and deductible would not have been placed at risk;

(f) But for the advice and conduct of Defendants, and each of them, Plaintiffs would have been able to successfully defend against and/or resolve the claims of the Vinsons for a reasonable sum substantially less than what they ultimately were required to pay as a result of its ability to depend on the merits being eliminated by the improper conduct of the Defendants;

(g) But for the advice and conduct of the Defendants, and each of them, FFE would not have been exposed to a potential punitive damages award, and/or increase in insurance premiums.

As a direct and proximate result of the various breaches of duty and applicable standards of care by the Defendants, as set forth heretofore and otherwise, FFE incurred substantial damages, including but not limited to its respective portion of the settlement of the Vinson litigation, attorneys' fees expended for Defendants' work, attorneys' fees expended in retaining substitute counsel and attempting to correct Defendants' negligence and deficient representation, as well as costs, expenses and attorneys' fees incurred in pursuing the present malpractice litigation against the Defendants, which would not have been incurred but for the wrongful acts and omissions of the Defendants.

**COUNT TWO
BREACH OF CONTRACT
FFE VS. DEFENDANTS**

25. The Plaintiffs reallege all of the foregoing paragraphs as though fully restated herein.

26. As part of the contract between FFE and Defendants, and in exchange for the payment of fees to Defendants by FFE, Defendants agreed to represent FFE in the Vinson litigation competently, diligently, and in accordance with the various duties and standards of care hereintofore set forth.

27. The Defendants, and each of them, breached their contract of representation of Plaintiff FFE in all of the particulars herintofore set forth, including but not limited to those matters referenced in ¶¶ 17-23, above. As a direct and proximate result thereof, Plaintiff FFE has been damaged, including but not limited to those damages set forth in ¶ 24 above and elsewhere in this Complaint.

**COUNT THREE
LEGAL MALPRACTICE
TRAVELERS VS. DEFENDANTS**

28. The Plaintiffs reallege all of the foregoing paragraphs as though fully restated herein.

29. Due to its indemnification of FFE for the amount paid in settlement of the Vinson litigation and in excess of FFE's self-insured retention, Travelers is equitably and legally subrogated to FFE's legal malpractice claim against Defendants to such an extent. Travelers is also so subrogated under the subrogation provision of its excess indemnity policy with FFE. By virtue of their representation of FFE, Defendants owed concomitant duties to FFE's insurance carrier Travelers, including but not limited to those various duties hereintofore set forth. Defendants owed a duty to Travelers to discharge their various duties and comply with the standards of care applicable to them in handling the defense of the Vinson matter, and to competently and diligently represent the interests of Travelers and its insureds as more particularly set forth above.

30. The Defendants, and each of them, were negligent and breached their duties of care in all of the particulars herintofore set forth, including but not limited to those matters referenced in ¶¶ 17-29, above. As a direct and proximate result thereof, Plaintiff Travelers has been damaged, including but not limited to those damages set forth in ¶ 24 above and elsewhere in this Complaint. Travelers is further entitled to recover said damages to the extent it has indemnified and or continues to incur any such losses, costs, attorneys' fees or expenses.

**COUNT FOUR
BREACH OF CONTRACT
TRAVELERS VS. DEFENDANTS**

31. The Plaintiffs reallege all of the foregoing paragraphs as though fully restated herein.

32. Due to its contractual obligation to indemnify FFE, Travelers is legally and equitably subrogated to FFE's breach of contract claim against Defendants. Travelers is also so subrogated under the subrogation provision of its excess indemnity policy with FFE.

33. As part of the contract between FFE and Defendants, and in exchange for the payment of fees to Defendants by FFE, Defendants agreed to represent FFE and Harris in the Vinson litigation competently, diligently, and in accordance with the various duties and standards of care hereintofore set forth. Travelers, as FFE's insurer, was a beneficiary of the contract between Defendants and FFE, in addition to the various duties owed by Defendants to FFE.

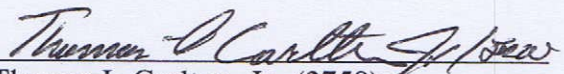
34. The Defendants, and each of them, breached their contractual duties of representation in all of the particulars hereintofore set forth, including but not limited to those matters referenced in ¶¶ 17-29, above. As a direct and proximate result thereof, Plaintiff Travelers has been and continues to be damaged, including but not limited to those damages set forth in ¶ 24 above and elsewhere in this Complaint.

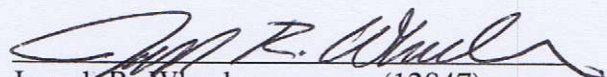
35. Plaintiffs hereby reserve their right to amend this Complaint should further investigation and/or discovery, both of which are ongoing and not yet complete, reveal information supporting other claims and/or causes of action against the defendants.

WHEREFORE, Plaintiffs pray for the following:

1. Judgment against Defendants for compensatory damages in an amount to be determined at trial, together with reimbursement of attorneys' fees paid;
2. Prejudgment and post-judgment interest;
3. Discretionary costs and court costs;
4. Such other relief as the Court deems just and equitable.

Respectfully submitted,


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