IN THE

Supreme Court of Virginia

RECORD NO. 091376

MICHAEL PATRICK WEATHERBEE,

Appellant,

v.

VIRGINIA STATE BAR, ex rel.
FOURTH DISTRICT - SECTION I COMMITTEE,

Appellee.

OPENING BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

The trial court erred in finding a violation of Rule of Professional Conduct ("Rule") 3.1 (Rules of Court, Part Six, § II: Rule 3.1) because:

1. As a matter of law, the trial court's ruling is inconsistent with its dismissal of Rules 1.1 and 1.3, and

2. The Virginia State Bar failed to produce evidence that the underlying lawsuit was frivolous.

NATURE OF THE CASE

The Virginia State Bar filed a Certification against Michael Patrick Weatherbee ("Weatherbee"), a Virginia licensed attorney in good standing, asserting that he engaged in conduct contrary to Virginia Rules of Professional Conduct ("RPC")[1] 1.1 (Competence), 1.3 (Diligence) and 3.1 (Meritorious Claims and Contentions). Weatherbee demanded a trial before a three-judge circuit court panel and the Honorable William H. Ledbetter, Jr.,

[1] Rules of Court, Part Six, § II, Rule ___.

Honorable Arthur M. Vieregg and Honorable Thomas D. Horne, Chief Judge, were appointed to hear the case.

Trial was held in the Arlington County Circuit Court on January 29, 2009. Following the hearing, the Court dismissed Rules 1.1 and 1.3, but found, by split decision, that Weatherbee's conduct violated Rule 3.1. On April 10, 2009, the Court entered its Memorandum Order, imposing a Public Reprimand.

Weatherbee filed a Notice of Appeal with the Arlington County Circuit Court on May, 8, 2009, resulting in an automatic stay of the Public Reprimand pending disposition of his appeal to this Court. The transcript of the trial was filed on June 12, 2009. Weatherbee appealed to this Court as a mater of right, pursuant to Va. Code § 54.1-3935.E., as amended.

QUESTIONS PRESENTED

1. Did the Court err as a matter of law in finding that Weatherbee violated Virginia Rule of Professional Conduct 3.1? (Assignment of Error No. 1)

2. Did the Court err in finding that the Virginia State Bar established by clear and convincing that Weatherbee's conduct violated Virginia Rule of Professional Conduct 3.1? (Assignment of Error No. 2)

STATEMENT OF FACTS

On December 16, 2002, Dianna D. Broyles ("Ms. Broyles") underwent surgery at the Warren Memorial Hospital for a hysterectomy. The Operative Report for the surgery noted Joel Evan Backer as the surgeon; Bob Vaughan as the Assistant. (Joint Appendix, hereinafter "JA," p. 279) Ms. Broyles experienced immediate post surgical problems and was transported to the University of Virginia Hospital for further medical care.

On January 14, 2004, Ms. Broyles consulted with Frederic N. Ornitz ("Ornitz"), a Virginia licensed attorney, about the surgery and its consequent harm to her. (JA, pp. 293, 323) Ornitz referred Ms. Broyles to Weatherbee on March 9, 2004. (JA, p. 77, ll. 4-6; p. 293)

On August 19, 2004, Weatherbee filed a Motion for Judgment in the Warren County Circuit Court styled *Dianna Broyles v. Joel E. Backer, M.D., et al.*, At Law No. L04000217. Ward P. Vaughan, M.D. ("Dr. Vaughan") was named as a defendant. When filing the Motion for Judgment, Weatherbee asked that the Motion for Judgment not be served on Dr. Vaughan at that time. (JA, pp. 262-272)

On Saturday, August 28, 2004, the *Northern Virginia Daily* published an article about the Motion for Judgment (hereinafter sometimes referred to as "lawsuit"). (JA, p.50, l. 19 – p. 51, l. 3; p. 273) Dr. Vaughan testified that he first learned of the lawsuit on Monday morning, August 30, 2004. (JA, p. 43, ll.15-17) The existence of the lawsuit was publicized by local radio station WINC both on air and in a scrolling news trailer on a local television channel. (JA, p. 43, l. 20 – p. 44, l. 17) Dr. Vaughan testified that the lawsuit embarrassed and humiliated him (JA, p. 54, l. 23 – p. 54, l. 2), affected his medical practice and ruined his reputation and good will in his community. (JA, p. 53, l. 15-p.

54, l. 5) He further testified that the lawsuit did not affect his medical privileges or his license to practice medicine. He also testified that he must disclose the filing of the lawsuit and its dismissal bi-annually in connection with his application to maintain his medical license and with his medical malpractice insurance provider. (JA, p. 60, ll. 4-15)

Within a day or so of learning of the Motion for Judgment, Dr. Vaughan contacted his medical malpractice carrier. Richard L. Nagle, Esquire ("Nagle") commenced representation of Dr. Vaughan. In communications with Weatherbee, Nagle satisfied Weatherbee that Dr. Vaughan was not a proper party to the lawsuit. On September 17, 2004, Weatherbee agreed to the entry of a Dismissal Order, dismissing Ms. Broyles' case as to Dr. Vaughan. (JA, p. 58, l. 16 – p. 59, l. 17; pp. 317-320) Dismissal of the lawsuit against Dr. Vaughan was reported by the *Northern Virginia Daily*. (JA, p. 274)

When Ornitz referred Ms. Broyles' case to Weatherbee, Ornitz shared his file notes with Weatherbee. Ornitz informed

Weatherbee that Ms. Broyles informed him that Backer could not operate without having an assisting physician present. (JA, p. 151, ll. 6-14, ll. 18-20; p. 323) On July 28 and 29, 2004, Ornitz made several telephone calls at Weatherbee's request in an effort to determine Dr. Vaughan's status at Warren Memorial Hospital. Ornitz testified that he spoke with Anthony Toth, M.D., who advised him (Ornitz) that

> . . . he knew Dr. Vaughan, he knew he was an OB/GYN surgeon in the Winchester, Virginia area and he believed he had privileges at Warren Memorial Hospital. Otherwise, the assistant in the surgery was most likely a Resident. (JA, p. 153, l. 10-p. 154, l. 2; p. 323)

Ornitz then called the Human Resources Department at Warren Memorial Hospital to ascertain the employment status of Dr. Vaughan, and was advised that the hospital's privacy rules prevented disclosure of the requested information. Ornitz confirmed the hospital's position in calls to several other hospitals. (JA, p. 154, l. 20 – p. 155, l. 22; p. 323)

Janet Weatherbee ("Mrs. Weatherbee"), Weatherbee's wife, testified to her professional credentials and work history as a

nurse for George Washington Hospital. She has worked for her husband since 1997. (JA, p. 116, ll. 15-23) Mrs. Weatherbee testified that her work involved reviewing medical bills and records, preparation of medical summaries, and assisting in the preparation of demand letters. She has been involved in the medical review of client cases for eleven (11) years, handling some five hundred (500) cases. (JA, p. 117, ll. 5-13, ll. 16-23)

With regard to Ms. Broyles case, Mrs. Weatherbee testified that she received Ms. Broyles' medical records from Ornitz. These consisted of records from Warren Memorial Hospital and the University of Virginia Hospital. She reviewed these records and prepared a synopsis of the records. (JA, p. 119, ll.3-12) She further testified that she has reviewed operative reports in the Washington, DC area for thirty one (31) years. (JA, p. 120, ll. 9-10)

Mrs. Weatherbee learned from interviewing Ms. Broyles that Ms. Broyles was the security supervisor for Warren Memorial Hospital (JA, p. 121, ll. 3-5) and had been an employee at the

hospital for some time. (JA, p. 121, ll. 12-14) Ms. Broyles informed Mrs. Weatherbee that Dr. Backer could not operate without another surgeon being present. (JA, p. 123, l. 19 – p. 124, l. 2) Based on the information presented to her, Mrs. Weatherbee concluded that Bob Vaughan was a physician. (JA, p. 126, l. 7-16)

Mrs. Weatherbee testified that she called Warren Memorial Hospital on two separate occasions to inquire about the status of Bob Vaughan. Each time, her call was forwarded to a voice answering machine; each time Mrs. Weatherbee left an inquiry; and on neither occasion did anyone from Warren Memorial Hospital return her call. (JA, p. 126, l. 19 – p. 127, l. 15)

In further investigation, Mrs. Weatherbee consulted the Virginia Board of Medicine website. From information posted on the website, Mrs. Weatherbee concluded that there was only one male OB/GYN practicing in the area of Warren Memorial Hospital – Dr. Ward P. Vaughan. (JA, p. 127, ll. 16-22; p. 129, ll. 3-16)

Mrs. Weatherbee was also aware of the conversation Ornitz had with Dr. Toth. (JA, p. 131, ll. 17-21) Mrs. Weatherbee assisted in the preparation of the Motion for Judgment and sent it to Ms. Broyles for review. (JA, p. 132, l. 16 - p. 133, l. 2) Based on the information thus gathered, Mrs. Weatherbee formed the belief that Dr. Ward Vaughan was the "Bob Vaughan" identified in Ms. Broyles' Operative Report. (JA, pp. 294-295)

Michael Weatherbee testified that Ms. Broyles told him that Dr. Backer was required to have an assisting physician with him in the operating room and directed Weatherbee to Drew McPeak ("Ms. McPeak") for confirmation. (JA, p. 187, ll. 1-14) Weatherbee spoke with Ms. McPeak, the former Human Resources Director for Warren Memorial Hospital, who confirmed that Backer was required to have an OB/GYN surgeon in surgery with him. (JA, p. 80, l. 22 – p. 81, l. 9; p. 191, ll. 9-13; pp. 308-316) Ms. McPeak related that the attending physician would likely be a Dr. Landis (JA, p. 82, ll. 6-10) and that she would not know if a Dr. Vaughan was in attendance. (JA, p. 82, ll. 7-9)

Weatherbee also testified that Mrs. Weatherbee had informed him of her search of the Virginia Board of Medicine website. (JA, p. 194, l. 15 – p. 195, l. 19) Weatherbee was also aware that Ms. Broyles had seen Dr. Vaughan briefly in 1999 or 2000. (JA, p. 195, l. 22-p.196, l.2) Weatherbee testified that he believed from the information known by him that Dr. Vaughan was a proper party to the Motion for Judgment. On receipt of verification that Dr. Vaughan was not a proper party, he immediately agreed to, and signed, a Non-Suit Order dismissing Dr. Vaughan from the lawsuit. (JA, p. 197, ll. 1-19; pp. 317-322)

Steven Frei, a Virginia licensed attorney, qualified as an expert witness on behalf of the Virginia State Bar. In his opinion, Weatherbee's pre-filing investigation of Ms. Broyles' complaint vis-à-vis Dr. Vaughan fell below the standard of care. (JA, p. 91, l. 19 – p. 92, l. 1; p. 93, ll. 10-20) Frei expressed no concern regarding the content of the Motion for Judgment prepared by Weatherbee or any of the work Weatherbee did on behalf of Ms. Broyles. (JA, p. 103, ll. 21-22; p. 105, ll. 7-8) He acknowledged

that he utilized the website maintained by the Virginia Board of Medicine to harvest information about doctors. (JA, p. 104, l. 11 – p. 106, l. 14) He further testified that he had never had success in obtaining information regarding a doctor's privileges from a hospital. (JA, p. 108, l. 9 – p. 109, l. 3)

Peter M. Baskin testified as an expert on behalf of Weatherbee. In his opinion, Weatherbee's investigation regarding Dr. Vaughan met the standard of care for proper identification of a party to a lawsuit. (JA, p. 170, l. 9 – p. 171, l. 13; pp. 296-297)

ARGUMENT

Introduction

Disciplinary proceedings are summary in nature and exist to protect the public. *Morrissey v. Virginia State Bar, ex rel. Third District Committee*, 260 Va. 472, 538 S.E.2d 677 (2000); *Seventh District Committee v. Gunter*, 212 Va. 278, 284, 183 S.E.2d 713, 717 (1971) All attorneys licensed to practice law in

Virginia are subject to the Rules of Professional Conduct adopted by the Supreme Court of Virginia. Virginia Code § 54.1 – 3909 (1950, as amended) Violation of these rules may result in the imposition of discipline. Rules of Court, Part Six, § IV, ¶ 13-18.M In order to suspend an attorney's license, however, the alleged violations of the Rules of Professional Conduct must be established by clear and convincing evidence. *Pilli v. Virginia State Bar,* 269 Va. 391, 611 S.E.2d 389 (2005); Rules, *id.*, ¶ 13-18.L On review of a three-judge court decision, the Supreme Court conducts an independent examination of the record, considering the evidence and all reasonable inferences there from in the light most favorable to the prevailing party below, and gives the factual findings of the three-judge court substantial weight, viewing them as prima facie correct. *Anthony v. Virginia State Bar,* 270 Va. 601, 608-609, 621 S.E.2d 121, 125 (2005)

1. Did the Court err as a matter of law in finding that Mr. Weatherbee violated Virginia Rule of Professional Conduct 3.1? (Assignment of Error No. 1)

The Virginia State Bar accused Weatherbee of violating three Rules of Professional Conduct regarding his representation of Dianna Broyles. The bar's position was that Weatherbee's investigation of Ms. Broyles' complaint against Dr. Vaughan was not adequately investigated, and that filing a Motion for Judgment against Dr. Vaughan based upon an inadequate investigation violated Rules 1.1 (Competence); Rule 1.3(a) (Diligence) and Rule 3.1 (Meritorious Claims and Contentions). (JA, pp. 1-4) Following the hearing and argument, the trial Court dismissed Rules 1.1 and 1.3(a) on the basis of insufficient evidence. A divided trial Court, however, found that the bar had proved a violation of Rule 3.1, writing that

> Conduct under the circumstances of this case in filing the lawsuit against Dr. Ward Vaughan was frivolous given facts known at the time of the filing of the suit. (JA, p. 8)

Rule 1.1 states that

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Significantly,

> Competent handling of a particular matter includes inquiry into, and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. . . . Rule 1.1, Comment [5]

Adequate investigation is a component of competent representation. ABA/BNA Lawyers' Manual on Professional Conduct, 31:206 (4-29-09) Cf. *Vinson v. Vinson*, 41 Va. App. 675, 687, 588 S.E.2d 392, 398 (2003); *Flippo v. CSC Assocs. III, L.L.C.*, 262 Va. 48, 65-66, 547 S.E.2d 216, 227 (2001)

As to Rule 1.1, the question presented to the trial Court was whether Weatherbee exercised the requisite legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation of his client. This inquiry, as presented by the bar, related solely to Weatherbee's investigation into the identity of "Bob Vaughan" and his decision to named Ward P. Vaughan as a defendant in Ms. Broyles' Motion for Judgment. The evidence presented at trial was that Weatherbee and others conducted an investigation that led Weatherbee to conclude that Dr. Vaughan

was a proper party defendant. Weatherbee met the standard of care in conducting the pre-filing investigation, in the opinion of his expert witness, Peter M. Baskin. The bar argued in its closing that

> The charges of Exhibit No. 2 have been proven by proven (sic) clear and convincing evidence, which is to say the evidence presented by the State Bar has demonstrated that prior to the filing of this suit of (sic) against Dr. Ward P. Vaughan, the Respondent in this case conducted a woefully inadequate investigation, if you want to call it that, to determine the identity of Bob Vaughan whose name appeared on an operative report. (JA, p. 224, ll. 7-14)

Clearly the trial court was asked to rule upon Weatherbee's competency as it related to Weatherbee's determination to name Dr. Vaughan in the Motion for Judgment.

Notwithstanding testimony from the bar's expert, Steven Frei, that Weatherbee's investigation into the presence of Dr. Vaughan in the operating room was inadequate, the trial Court concluded that the bar failed to present adequate evidence to establish that Weatherbee's legal knowledge, skill, thoroughness and preparation were less than that required by the Rule 1.1. The

trial Court's decision did not carve out any reference to Dr. Vaughan, as it did with regard to Rule 3.1. The reasonable inference to be drawn from the evidence before the trial Court, therefore, must be that Weatherbee's decision to include Dr. Vaughan in the Motion for Judgment was consistent with his obligation of thoroughness and adequate preparation. *Anthony v. Virginia State Bar*, *supra*, 270 Va. at 608-609, 621 S.E.2d at 125.

Similarly, Rule 1.3(a) instructs that a lawyer ". . . shall act with reasonable diligence and promptness in representing a client." Comment [3] to the Rule offers the guidance that " . . . [E]ven when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness."

In its presentation, the bar made much of the fact that the Motion for Judgment was filed well before the statute of limitation would preclude the lawsuit. Nevertheless, the trial Court made no separate finding of misconduct as to Dr. Vaughan, as it did with regard to Rule 3.1. (JA, p. 8) The reasonable inference to be

drawn from the evidence adduced on this point is that the timeliness of filing the Motion for Judgment was consistent with Weatherbee's duty of reasonable diligence and promptness.

Given the trial Court's ruling on the sufficiency of evidence concerning legal knowledge, skill, thoroughness, preparation, diligence and promptness, the question arises – how can the Motion for Judgment be frivolous?

Rule 3.1 states, as material to this appeal, that

> A lawyer shall not bring or defend a proceeding or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. . . .

Comment [2] expresses the circumstances under which an action may be deemed frivolous.

> The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person, or if the lawyer is unable wither to make

> a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

In *Byrd v. Byrd*, 232 Va. 115, 348 S.E.2d 262 (1986), the Court accepted the following definition of "Frivolous:" " Of little weight or importance, *having no basis in law or fact*: light, slight, sham, irrelevant, superficial." (Emphasis in original) 232 Va. at 120, 348 S.E.2d at 265 While a pleading may have no basis in law or fact at the conclusion of a legal journey, Rule 3.1 and Comment [2] clearly signal that a lawyer is granted a degree of latitude in determining the presence of a basis in law or fact at the commencement of the legal journey; the standards of professional conduct do not expect unfailing exactitude or precision of law or fact when filing a pleading.

Weatherbee submits that the trial Court's finding of misconduct under Rule 3.1 is in conflict with its dismissal of Rules 1.1 and 1.3. The Motion for Judgment naming Dr. Vaughan as a defendant cannot be frivolous in the absence of a finding by the trial Court that Weatherbee violated Rules 1.1 and 1.3(a).

In addition to the incongruity in the trial Court's decision, the Record reveals no allegation, suggestion or argument that Weatherbee filed the Motion for Judgment in response to Ms. Broyles' desire to embarrass or maliciously injure Dr. Vaughan. The evidence was that Ms. Broyles had been seriously injured during the course of a surgery performed at Warren Memorial hospital. Ms. Broyles employed Weatherbee, who conducted an investigation into the identity of "Bob Vaughan," an individual named in the Operative Report. Weatherbee, relying upon information gleaned from his interview with McPeak, and information provided by his client, his wife and the Ornitz, the referring attorney, believed Dr, Vaughan to be a proper party defendant.

2. Did the Court err in finding that the Virginia State Bar established by clear and convincing that Mr. Weatherbee's conduct violated Virginia Rule of Professional Conduct 3.1? (Assignment of Error No. 2)

The trial Court made no finding that the Motion for Judgment was frivolous, other than as to Dr. Vaughan. Indeed, it could not.

The bar's expert witness expressed no criticism with the content of the Motion for Judgment. Certainly Weatherbee was under a duty to investigate Ms. Broyles' claim as it related to Dr. Vaughan and there is no question but that he did so. The bar's contention, however, was that he did not investigate well enough and had he done more, then presumably at some point along the investigative continuum, Weatherbee would have concluded that Dr. Vaughan was not in the operating room.

Rule 3.1 does not require an attorney to exhaust all possibilities of fact or law before filing a lawsuit. Melding Rule 3.1 with Rule 1.1, however, an attorney must make a reasonable pre-filing investigation of the client's claim. Weatherbee did so and satisfied himself that Ms. Broyles' claim was meritorious. Weatherbee erred, however, in naming Dr. Vaughan as a defendant in that meritorious lawsuit.

This Court has said that an erroneous position is not necessarily a frivolous position. *Barrett v. Virginia State Bar,* 272 Va. 260, 272, 643 S.E.2d 341, 348 (2006) Reported cases

involving violations of Rule 3.1 present instances where the attorney pled recognizably spurious and unsupportable claims. *Barrett v. Virginia State Bar*, 277 Va. 412, 675 S.E.2d 827 (2009) (attorney asserted that he was not obligated to pay child support because the children's mother had been awarded sole legal and physical custody); *Barrett v. Virginia State Bar*, 272 Va. 260, 634 S.E.2d 341 (2006) (attorney called opposing counsel as witness in divorce case, asserting he had reason to believe opposing counsel had a romantic relationship with his estranged wife); *Barrett v. Virginia State Bar*, 269 Va. 583, 611 S.E. 2d 375 (2005) (attorney filed motion to strike pleadings asserting he did not know and was not married to plaintiff; contended motion proper because pleadings were not filed in wife's legal name)

It is significant that Weatherbee agreed to dismiss Dr. Vaughan from the lawsuit as soon as he had confirmation from Dr. Vaughan's counsel that Dr. Vaughan was not present at Ms. Broyles' surgery. Upon learning of the mistake, Weatherbee responded immediately and professionally. He did not hold to the

misbelief that Dr. Vaughan was a proper party defendant or take any action to importune Dr. Vaughan. Consequently, Dr. Vaughan was a named defendant in Ms. Broyles' lawsuit for approximately three weeks.

To establish misconduct, the bar must establish by clear and convincing evidence that Weatherbee violated Rule 3.1. Clear and convincing evidence is that quantum of evidence which produces in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal. *Turner v. Jackson,* 14 Va. App. 423, 417 S.E.2d 881 (1992); *Southeastern Tidewater Opportunity Project, Inc. v. Bade*, 246 Va. 273, 435 S.E.2d 131 (1993); *Com., Dep't of Social Servs., ex rel. Comptroller of Va. v. Flaneary*, 22 Va. App. 293, 469 S.E.2d 79 (1996) In the case at hand, the most that can be said is that

Weatherbee conducted an investigation and formed an erroneous conclusion based on the facts known to him.

CONCLUSION

The legal knowledge, skill, thoroughness and preparation that Weatherbee employed in the preparation of Ms. Broyles' Motion for Judgment against Dr. Ward Vaughan was challenged by the bar. These qualities involved Weatherbee's investigation of Ms. Broyles' possible claim against Bob Vaughan that led to naming Dr. Ward P. Vaughan as a defendant in the Motion for Judgment. The trial Court dismissed the bar's Complaint regarding Rule 1.1, on the basis of insufficient evidence. The reasonable inference is that Weatherbee did employ the requisite legal knowledge, skill, thoroughness and preparation necessary for the filing of the Motion for Judgment. The same argument is made with regard to Rule 1.3(a) concerning the requirement to act with reasonable diligence and promptness in representing a client.

The sole basis presented by the trial Court for finding a violation of Rule 3.1 is ". . . the facts known [by Weatherbee] at the time of the filing of the suit." (JA, p. 8) If the information was inadequate, as argued by the bar, the inadequacy called into question the legal knowledge, skill, thoroughness, preparation, diligence and promptness employed by Weatherbee to prepare a Motion for Judgment for his client, Ms. Broyles.

It must follow that if Weatherbee employed the legal knowledge, skill, thoroughness, preparation, diligence and promptness expected of a Virginia practitioner, the product of those qualities cannot be frivolous. In this appeal, Rules 1.1, 1.3(a) and 3.1 go hand in glove. Thus, Weatherbee argues that the trial Court erred as a matter of law in finding him in violation of Rule 3.1

Weatherbee further argues that the bar did not present clear and convincing evidence of a Rule 3.1 violation. The Motion for Judgment was predicated on substantial fact. There was no evidence that Weatherbee named Dr. Vaughan as a defendant to

harass or maliciously injure him. Indeed, when presented with satisfactory information, Weatherbee dismissed Dr. Vaughan and issued an apology to Dr. Vaughan's counsel for the error. Evidence between the experts conflicted, but there was opinion evidence offered on Weatherbee's behalf that his pre-filing investigation met the standard of care. Weatherbee submits that the evidence at trial showed that he erred in naming Dr. Vaughan as a defendant in Ms. Broyles' lawsuit; the evidence did not establish that he violated Rule 3.1. Accordingly, Weatherbee respectfully requests that the decision of the trial Court be reversed and that this matter be dismissed.

Respectfully submitted,

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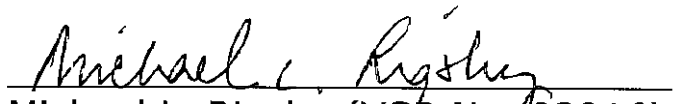
By Counsel



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CERTIFICATE OF SERVICE

I hereby certify that Rule 5:26(d) of the Rules of the Supreme Court of Virginia has been complied with and pursuant to the Rule, fifteen (15) copies of this opening Brief of Appellant and one (1) electronic copy in PDF format on CD have been filed with the Clerk of the Supreme Court and three (3) copies have been mailed postage prepaid and/or hand delivered this 28th day of August, 2009 to:

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