UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1710

DEBBIE GORE and DORIS LANCE SMITH, on behalf of themselves and all others similarly situated,

Appellants

v.

BRUCE H. NAGEL; ANDREW L. O'CONNOR; ROBERT H. SOLOMON; NAGEL RICE, LLP; DEREK POTTS; POTTS LAW FIRM, L.L.P.; BAILEY PEAVEY BAILEY COWAN HECKAMAN, PLLC; BAILEY PEAVEY BAILEY; BAILEY PERRIN BAILEY; MESH LITIGATION CENTER; ANNIE MCADAMS; STEELMAN MCADAMS; JUNELL & ASSOCIATES, PLLC; K. CAMP BAILEY PC; BURNETT LAW FIRM; JOHN DOES 1-100; ABC CORPS 1-100

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 2-19-cv-14287)
District Judge: Honorable Madeline C. Arleo

Submitted Under Third Circuit L.A.R. 34.1(a)
November 17, 2020

Before: AMBRO, BIBAS, and ROTH, Circuit Judges

(Dated December 17, 2020)

PETITION FOR CERTIFICATION OF QUESTION OF LAW

To the Honorable Justices of the New Jersey Supreme Court:

This matter came before our Court of Appeals on appeal from an order of the United States District Court for the District of New Jersey entered on March 24, 2020. The District Court granted a motion to dismiss in favor of the Defendants—Derek Potts; Potts Law Firm, L.L.P.; Bailey Peavey Bailey Cowan Heckaman, PLLC; Bailey Peavey Bailey; Bailey Perrin Bailey; Junell & Associates, PLLC; K. Camp Bailey, PC; Burnett Law Firm; and Mesh Litigation Center (collectively, the "Texas Defendants"), along with Steelman McAdams and Annie McAdams (collectively, the "Steelman Defendants"), as well as Bruce H. Nagel; Andrew L. O'Connor; Robert Solomon; and Nagel Rice, LLP (collectively, the "Nagel Defendants")—and against Debbie Gore ("Gore") and Doris Lance-Smith ("Lance-Smith") (collectively, the "Plaintiffs"). This appeal requires us to determine whether New Jersey public policy compels application of New Jersey's contingency-fee rules to all cases filed in its courts, even when the parties to the retainer agreement covering fees were domiciled out-of-state, the parties did not litigate in New Jersey other than by filing a complaint in a New Jersey court, and the case was ultimately settled out-of-state.

We believe our answer to this question depends on an important and unresolved question of New Jersey law that is appropriate for certification. Thus, we respectfully request that the Supreme Court of New Jersey grant this petition.

I. Reasons for Certification

Under New Jersey Court Rule 2:12A-1, the Supreme Court of New Jersey may answer a question certified to it by our Court "if the answer may be determinative of an issue in litigation pending in the Third Circuit and there is no controlling appellate decision, constitutional provision, or statute" in New Jersey. We have not found any binding legal authority that squarely addresses the question presented in this case. We believe the New Jersey Supreme Court is best suited to answer this question, as it involves interpreting state law and determining New Jersey public policy.

II. Background[1]

Plaintiffs-appellants Gore and Lance-Smith were victims of defective pelvic mesh products and participated in a large suit against Ethicon. The suit ended in a settlement, but Gore and Lance-Smith now sue their former attorneys for taking an allegedly unreasonable portion of the award.

In 2012, Lance-Smith, an Alabama resident, retained the Potts Law Firm to pursue her pelvic mesh claims. The Potts Firm is one of the parties known as the Texas Defendants—a consortium of firms and attorneys who filed pelvic mesh suits on behalf of thousands of plaintiffs. In her retainer agreement, Lance-Smith agreed to pay her attorneys 40% of any recovery plus all reasonable costs. The retainer did not include a choice-of-law provision.

In 2013, Gore, a Texas resident, retained the Steelman Defendants, also residents of Texas, to pursue her pelvic mesh claims. In her retainer agreement, Gore agreed to pay the

[1] Per New Jersey Court Rule 2:12A-4(b), this petition for certification sets forth "what [we] believe[] to be the relevant facts."

Steelman Defendants 40% of the total sum collected plus any applicable expenses, and she allowed them to associate with other law firms. The Steelman Defendants later entered co-counsel arrangements to bring in the Texas Defendants. The Gore retainer agreement included a choice-of-law provision stating that Texas law governs and that any claims "arising under [the retainer] must be filed only in a court of competent jurisdiction in Harris County, Houston, Texas." JA 181.

In July 2014, Gore and Lance-Smith filed Master Short Form Complaints in the Superior Court of New Jersey. These complaints were part of the broader pelvic mesh litigation that was taking place in New Jersey at the time.[2] Plaintiffs contend that filing in New Jersey was a strategic choice by the Texas Defendants, who were purportedly seeking a more favorable forum after losing a series of test cases filed in Texas.

Because the Texas Defendants were not licensed in New Jersey, however, they worked with the Nagel Defendants to file the cases as local counsel for a flat fee. The Nagel Defendants were listed as counsel for Gore and Lance-Smith, with Derek Potts and the Potts Law Firm (two of the Texas Defendants) listed as co-counsel. Plaintiffs contend that the Texas Defendants improperly acted as counsel in the New Jersey cases without being admitted *pro hac vice* before the New Jersey Superior Court. Notably, no litigation activity occurred in the Superior Court beyond the filing of the short-form complaints.

[2] Gore and Lance-Smith purport to represent a class of plaintiffs in approximately 1,450 suits filed in New Jersey courts as a multi-county litigation (MCL), though this case was dismissed prior to class certification.

In 2016, Ethicon entered into a Master Settlement Agreement, which was administered by a Texas special master. The Texas state court eventually approved the settlement, and both Gore and Lance-Smith accepted the settlement in 2018. They contend that this Agreement itself contains a choice-of-law provision that requires application of New Jersey law. The Texas state court has retained continuing jurisdiction to consider issues connected with the settlement.

In June 2019, Gore filed a class action complaint in the Superior Court of New Jersey against the Texas Defendants and the Steelman Defendants alleging that they contracted for and received fees in excess of New Jersey's rules.[3] The Nagel Defendants were also named as parties because they allegedly permitted this violation of New Jersey rules to occur as local counsel. Defendants removed the case to the U.S. District Court in New Jersey shortly thereafter, and Gore amended the complaint to add Lance-Smith as a named plaintiff. In its amended form, the complaint contains claims of legal malpractice, breach of fiduciary duty, and unjust enrichment against the various Defendants and seeks compensatory and punitive damages.

The District Court concluded that Texas law should apply to this dispute. Because the fee award would be permissible under Texas law, the Court dismissed the case for

[3] The parties do not dispute that the award is impermissible in New Jersey–it expressly violates New Jersey Court Rules 1:21-7(c) (establishing a capped fee structure that does not exceed 33 1/3% on the first $750,000 recovered) and 1:21-7(d) (requiring costs to be deducted from the gross award). Plaintiffs also contend that Rule 1:21-7(b) was violated because the retainer did not advise clients of an alternative to contingent fees and Rule of Professional Conduct 1.5(e) was violated by the fee-sharing arrangements among the firms.

failure to state a claim. Plaintiffs appealed to us and requested that we certify the choice-of-law question to the New Jersey Supreme Court. Defendants opposed certification.

III. Discussion

Whether this case survives a motion to dismiss depends on whether we apply New Jersey or Texas law to judge the fairness of the Defendants' fee structures. If New Jersey law applies, Defendants charged fees that were too high and Plaintiffs have stated a facially valid claim. If Texas law applies, Defendants' fees were permissible and Plaintiffs have failed to state a valid claim. Because the District Court exercised its diversity jurisdiction, we must answer this question by applying the substantive law that a New Jersey state court would have applied.[4]

At the outset, we recognize that the mechanics of the choice-of-law analysis may differ for Gore (whose retainer includes a Texas choice-of-law provision) and Lance-Smith

[4] Plaintiffs argue that we must apply New Jersey law because the rules governing attorneys' fees are inherently procedural, a claim that is facially supported by existing authority. *See, e.g.*, *Mitzel v. Westinghouse Elec. Corp.*, 72 F.3d 414, 416–18 (3d Cir. 1995) (holding that federal law, which there incorporates New Jersey state law, applies to all procedural matters in a federal court, including the award of contingency fees under the *Erie* doctrine); *North Bergen Rex Transp. Co. v. Trailer Leasing*, 730 A.2d 843, 848 (N.J. 1999) (holding that New Jersey courts will apply New Jersey law to all procedural matters, including attorneys' fees). However, we believe those cases appear not on point because the rules governing attorneys' fees there were merely raised incidentally after deciding other claims in the same cases. In this case, by contrast, the rules governing attorneys' fees are functionally substantive because they "determine[] the existence or parameters of a cause of action" in a separately filed case. *Mitzel*, 72 F.3d at 417 (quoting *Elder v. Metropolitan Freight Carriers, Inc.*, 543 F.2d 513, 519 (3d Cir.1976)); *see also Bernick v. Frost*, 510 A.2d 56, 59–60 (N.J. Super. Ct. App. Div. 1986), *cert. denied* 523 A.2d 158 (resolving a suit based on excessive fees by first applying substantive choice-of-law principles).

(whose retainer agreement contains no such provision). Still, we believe that in this case both analyses essentially devolve to a weighing of New Jersey's public policy.

As a general rule, New Jersey will apply the law chosen by the parties "if it does not violate New Jersey's public policy." *Instructional Sys. v. Computer Curriculum Corp.*, 614 A.2d 124, 133 (N.J. 1992). If the chosen law would violate the State's public policy, the analysis then hinges on which law would apply in the absence of a choice-of-law provision. *Id.* at 133 (holding that the choice-of-law provision will yield when it is "contrary to a fundamental policy of a state which has a materially greater interest . . . and which would be the state of the applicable law in the absence of [the parties' choice]." (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)) (alteration marks omitted)).

New Jersey follows the Second Restatement's "most-significant-relationship" test to choose which state's law to apply. *P.V. ex rel. T.V. v. Camp Jaycee*, 962 A.2d 453, 460 (N.J. 2008).[5] In applying that test, § 145 of the Restatement instructs us to look at the principles set out in § 6, taking into account contacts that include "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered."

[5] Plaintiffs argue that this inquiry is determined solely by *In re Accutane Litigation*, 194 A.3d 503, 524 (N.J. 2018), which applied New Jersey law in a set of MCL cases and was applied in the New Jersey pelvic mesh MCLs. We are not persuaded. Although the Plaintiffs in this case were also plaintiffs in pelvic mesh MCL cases, the claims at issue here are not raised in an MCL case and the factors that influence the choice-of-law analysis may be quite different.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2). Applying these principles, the District Court found that Texas law applies because the contracting lawyers were based in Texas, the plaintiffs were from Texas and Alabama, and the settlement agreement was approved in Texas. To be sure, the enumerated factors certainly swing in favor of Texas law. The only New Jersey "contact" is the filing of the lawsuits in New Jersey state court by the Nagel Defendants as local counsel, which were settled out-of-state after no further action.

Still, in addition to the factors enumerated in § 145, the Restatement points to § 6 as its overarching foundation. The latter emphasizes, among other factors, "the relevant policies of the forum." *Id.* at § 6(2)(b). It is conceivable that the strength of New Jersey's underlying public policy interest could trump the many Texas contacts in this case and that New Jersey courts would therefore choose to apply New Jersey law.

To be sure, New Jersey courts have held that the State has a "strong public interest . . . in regulating the economic relationship between New Jersey attorneys and their clients in tort cases." *Bernick v. Frost*, 510 A.2d 56, 60 (N.J. Super. Ct. App. Div. 1986), *cert. denied* 523 A.2d 158. The Appellate Division has gone a step further and applied New Jersey law to a case involving an out-of-state firm and New Jersey clients that was settled prior to the filing of any lawsuit. *Peteroy v. Trichon*, 694 A.2d 597, 598 (N.J. Super. Ct. App. Div. 1997). That Court has also applied, without explicitly considering the plaintiffs' residence, New Jersey fee rules to out-of-state counsel who had been admitted *pro hac vice* in New Jersey. *Glick v. Barclays De Zoete Wedd, Inc.*, 692 A.2d 1004, 1006 (N.J. Super. Ct. App. Div. 1997).

New Jersey's public policy interest in regulating attorneys' fees appears broad in those cases. They, however, do not address whether the public policy interest extends to cover all cases that are filed in New Jersey courts when the relevant retainer agreement is between out-of-state plaintiffs and out-of-state attorneys who used local counsel without themselves being admitted *pro hac vice*. New Jersey might reasonably take this further step, as applying another state's counsel fees rules would tend to "foreclose any litigant who properly seeks redress in [New Jersey] courts" from "the full scope of remedies affordable by [New Jersey] court rules." *Du-Wel Prods., Inc. v. U.S. Fire Ins. Co.*, 565 A.2d 1113, 1120 (N.J. Super. Ct. App. Div. 1989). But as this question necessarily determines the scope of New Jersey's public policy interest in the regulation of parties that use its court system, we believe it would be prudent for the New Jersey Supreme Court to perform the choice-of-law analysis in the first instance.

IV. Question for Consideration[6]

NOW THEREFORE, the following question of law is certified to the Supreme Court of New Jersey for disposition according to the rules of that Court:

> Whether New Jersey's public policy interest in regulating those who use its courts compels application of the State's contingency fee rules to a malpractice dispute between out-of-state plaintiffs and out-of-state lawyers?

We shall retain jurisdiction over the appeal pending resolution of this request for certification.

[6] Our framing of the question presented is, of course, subject to your reformulation and should not restrict your consideration of any related issues. *See* N.J. Court Rule 2:12A-4(c).

* * * * *

Thank you for considering our request.

United States Court of Appeals for the Third Circuit

By: s/ Thomas L. Ambro

Thomas L. Ambro, Circuit Judge
Stephanos Bibas, Circuit Judge
Jane R. Roth, Circuit Judge

A True Copy:

Patricia S. Dodszuweit, Clerk