

TO WHOM IT MAY CONCERN: REMINDER ON THE IMPORTANCE OF RETAINER LETTERSby [Samantha Green](#)

On April 7, 2021, in *Goldentuler v. Simmons Dasilva LLP*, 2021 ONCA 219 (CanLII) the Court of Appeal dismissed the Plaintiff lawyer's claim for negligence against the Defendant lawyers on the basis that the Defendants had not been retained by the Plaintiff, and therefore the Plaintiff had no legal capacity to sue the Defendant lawyers.

Background

The Plaintiff, as trustee of the Estate of his late brother (also a lawyer), had retained the Defendants to pursue a claim on the behalf of the Estate. The claim resulted in a judgment for the Estate. Thereafter, a dispute arose between the Plaintiff and the Defendant lawyers. The Plaintiff then sued them in his own name. The Motions Judge found that the Plaintiff did have the capacity to sue in his own name.

Appeal

The question on appeal was who had retained the lawyers? The Court of Appeal concluded that it was not the Plaintiff. The Court found that the Motions Judge made a palpable and overriding error when she based her ruling on the facts that (i) the account for legal fees was directed to the Plaintiff and (ii) the Plaintiff was the only party who could have been affected by the outcome of the proceeding in which the lawyers had been retained.

The Court of Appeal found that it was the Estate (i) that had retained the lawyers, (ii) on whose behalf the lawyers had commenced an action, and (iii) that was the beneficiary of the judgment the Defendants had procured.

Take Away:

Lawyers should take care to specify unambiguously, up front and in writing, who the client is, particularly when the client and individual instructing the lawyer are different parties (keeping in mind the Rules of Professional Conduct regarding fees and retainers).



[Samantha Green](#)
Partner

t: 416.860.6904
sgreen@foglers.com