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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE
SUPREME COURT OF APPEALS
OF THE
STATE OF WEST VIRGINIA

SCHRADER BYRD & COMPANION, P.L.L.C., a West Virginia corporation,

Appellee

v.

No. 33184

FRANCIS G. MARKS,
JOHN L. MARKS, JR.,
PATRICIA J. MARKS,
ELIZABETH A. McCLURE,
M. CHESLEY MARKS,
ANTHONY MARKS,
CATHERINE D. MARKS,
EAST ENDERS, L.L.C., and
JOSEPHINE LUTHER,

Appellants

APPELLANTS' REPLY BRIEF

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Come now the Appellants and file this reply brief in response to the brief filed by the Appellee in this case.

Discussion of the Law

I. The Circuit Court's finding that, as a matter of law, there was no modification of the contingent fee agreement, was in error.

The Law Firm was retained to prosecute an action for "loss of income and other damages sustained by Client as a result of the wrongful and improper mining of mineral property." The contingent fee agreement further provided that the Law Firm would receive a percentage of the "**loss of income and other damages sustained by Client as a result of the wrongful and improper mining of mineral property**."

When that portion of the lawsuit was resolved and the amount of damages was settled upon, there remained the fact that the coal companies lacked a valid lease and other agreements with Ms. Marks and Ms. Luther, who owned a share of the property.

Accordingly, the companies negotiated a new lease and side letter agreement with Ms. Marks and Ms. Luther. The income generated from these new agreements was not "loss of income and other damages sustained by Client as a result of the wrongful and improper mining of mineral property," but rather new income going forward. As a result, the services provided by the Law Firm in negotiating and drafting these agreements was not within the contingent fee agreement and the firm should have been separately compensated on an hourly basis for these services.

The Law Firm has raised the argument, for the first time on appeal, that the new lease and side letter agreements were negotiated as part of the settlement "so that Cannelton and Laxare could pay its *(sic)* damages over time rather than in one lump sum."

Yet the Law Firm concedes that the new lease and side letter agreement are at a market rate and include no payment for past damages.[1]

Even if it were not so clear that these damages were not within the purview of the contingent fee agreement, any ambiguity must be resolved against the Law Firm. To the extent that the contingent fee agreement may be found to be ambiguous as to whether the negotiation of a lease constitutes damages for wrongful mining, the comment to Section 18 of the ***Restatement (Third) of the Law Governing Lawyers*** provides that contingent fee contracts are traditionally interpreted against the lawyers. *Accord*, ***Beatty v. NP Corp.***, 31 Mass.App. Ct. 606, 581 N.E.2d 1311 (Mass.App. 1991); ***Merrimack Valley Natl. Bank v. Baird***, 372 Mass. 721, 724, 363 N.E.2d 688 (1977); ***Restatement (Third) of the Law Governing Lawyers*** § 46, comment b (Tent. Draft No. 4, 1991).

Despite the fact that these services were not included under the contingent fee agreement and should have been billed separately on an hourly basis, the firm was apparently not satisfied with this arrangement and sought to receive a percentage of the future rents produced by the lease and side agreement. In a letter dated March 31, 1998, after the settlement agreement had been reached, Ray Byrd wrote to Ms. Marks and Ms. Luther and recounted an agreement from a telephone conference in which he states the parties agreed that the firm would get 30% of future payments. In fact, Ms. Luther and Ms. Marks were told that would be the arrangement and were given no option but to accede.[2]

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[1] The Law Firm argues that although the new lease was at market rate, the agreement that the existing lease did not include Marks and Luther is the basis for their insistence on taking a share of future payments. Suppose this case had gone to trial and the jury awarded only $100,000 for damages but found the lease to be invalid as to the plaintiffs. A year later, a separate coal company desired to lease the property. Could the Law Firm seriously claim an entitlement to a share of the lease payments?

[2] In its argument, the Law Firm relies heavily upon an entry made by Mr. Byrd in the Firm's time entries. Of course, this entry is entirely self-serving and would not have ever been seen by any of the Appellants.

The Law Firm strenuously argues that there was never any modification of the contingent fee agreement. In response, the income going forward is clearly not the "**loss of income and other damages sustained by Client as a result of the wrongful and improper mining of mineral property**." In addition, if there was no modification, why is the Law Firm relying so heavily upon the so-called Understanding? If the income going forward were part of the damages for improper mining, there would be no need for an Understanding.

This validity of this Understanding which grossly increased the fee payable to the Law Firm is addressed in Section 18 of the ***Restatement (Third) of the Law Governing Lawyers***, which provides as follows:

> § 18. Client-Lawyer Contracts
>
> (1) A contract between a lawyer and client concerning the client-lawyer relationship, including a contract modifying an existing contract, may be enforced by either party if the contract meets other applicable requirements, except that:
>
> > (a) if the contract or modification is made beyond a reasonable time after the lawyer has begun to represent the client in the matter [see § 38(1)], the client may avoid it unless the lawyer shows that the contract and the circumstances of its formation were fair and reasonable to the client; and
> >
> > (b) if the contract is made after the lawyer has finished providing services, the client may avoid it if the client was not informed of facts needed to evaluate the appropriateness of the lawyer's compensation or other benefits conferred on the lawyer by the contract.
>
> (2) A tribunal should construe a contract between client and lawyer as a reasonable person in the circumstances of the client would have construed it.

Comment e to Section 18 of the ***Restatement*** provides that "[c]lient-lawyer fee contracts entered into after the matter in question is under way are subject to special scrutiny. A client might accept such a contract because it is burdensome to change lawyers during a representation. A client might hesitate to resist or even to suggest changes in new terms proposed by the lawyer, fearing the lawyer's resentment or believing that the proposals are meant to promote the client's good. A lawyer, on the other hand, usually has no justification for failing to reach a contract at the inception of the relationship or pressing need to modify an existing contract during it. The lawyer often has both the opportunity and the sophistication to propose appropriate terms before accepting a matter. A lawyer is also required to give the client at least minimal information about the fee at the outset...."

"The client's option under this Section to avoid the contract may be exercised during or after the representation. In particular it may be exercised during litigation about the lawyer's fee, because that is when the former client is most likely to seek new counsel and learn the facts relating to the fairness of the contract." ***Id.***

In the instant case, the modification of the contingent fee agreement occurred after the settlement was reached and when there was no longer any risk in the litigation.[3]

In this case, there is absolutely no evidence that the law firm informed the client at the time of the modification that it intended to charge a fee for as long as coal was mined on the property, the possibility that the fee could be astronomical, or that it intended to charge the fee against the clients' children and grandchildren.

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[3] The Law Firm refers to risk arising from Laxare's bankruptcy. Of course, by the time that the settlement was reached, that risk was no longer present. It is also interesting to note that of the $3,500,000 settlement, only $583,335 was paid by Laxare, which was purchased by Massey Energy. The remainder of the settlement was paid by Cannelton, which was not in bankruptcy.

As is stated in the Affidavit from Josephine Luther, one of the signatories to the contingent fee agreement, which was submitted in opposition to the motion for summary judgment, in convincing her to acquiesce in the modification to include the future receipts within the purview of the agreement, the Law Firm failed to provide her with the necessary disclosures required for such a modification, including (1) the fact that it intended to charge a fee for as long as coal was mined on the property, (2) the possibility that the fee could be astronomical, (3) that it intended to charge the fee against the clients' children and grandchildren; and (4) the alternatives to including the work under the contingent fee agreement.

Feeling that they had no alternative at that stage of the proceedings, Ms. Marks and Ms. Luther acquiesced in the modification of the contingent fee agreement.

The law firm also contends that its clients waived any objection to the contingency fee agreement and to the modification of the agreement by complying with the same for 15 years. First, it has not been 15 years since the clients learned that the law firm insisted on taking a percentage of future payments under the lease. That did not occur until 1998, and in 2003, the defendants objected to the agreement, after learning that the Law Firm contended that such fees ran in perpetuity and sought the advice of separate counsel.

More importantly, the parties have a continuing right to object to an excessive fee. The cases cited by the plaintiff in their motion did not deal with the issue of attorneys fees. On the other hand, in ***Committee on Legal Ethics v. Tatterson***, 177 W.Va. 356, 352 S.E.2d 107 (1986), this Court held that if an attorney's fee is grossly disproportionate to the services rendered, the fee is "clearly excessive" within the meaning of Disciplinary Rule 2-106(A), even though the client has consented to such fee."

The rationale for this rule is explained in Section 18 of the ***Restatement (Third) of the Law Governing Lawyers***. In comment e, the authors note that "[t]he client's option under this Section to avoid the contract may be exercised during or after the representation. In particular it may be exercised during litigation about the lawyer's fee, because that is when the former client is most likely to seek new counsel and learn the facts relating to the fairness of the contract."

Accordingly, there is no waiver of the right to object to the unreasonable and exorbitant fee.

The modification was made without the appropriate disclosures and cannot be said to be valid. In essence, the modification grants the Law Firm a 30% interest in the property.

II. The fee sought by the Law Firm is unreasonable.

As noted previously, the Law Firm received a fee of $1,108,409.56 for its services in this case, representing a premium of 2.66 times its hourly rate. As of the date of the summary judgment, there had been only minimum royalty and wheelage payments on the lease. As coal mining commences on the property, the royalties could extend into millions of dollars, with the law firm claiming 30% of the royalties. This could end up in a fee of millions of dollars for negotiating and drafting a lease. The excessiveness of such a fee is obvious.

In ***Committee on Legal Ethics v. Tatterson***, 177 W.Va. 356, 352 S.E.2d 107 (1986), this Court stated:

> If an attorney's fee is grossly disproportionate to the services rendered and is charged to a client who lacks full information about all of the relevant circumstances, the fee is "clearly excessive" within the meaning of Disciplinary Rule 2-106(A), even though the client has consented to such fee. The

> burden of proof is upon the attorney to show the reasonableness and fairness of the contract for the attorney's fee. *See* ***In re Kennedy***, 472 A.2d 1317, 1322, 1330-31 (Del.), *cert. denied*, 467 U.S. 1205, 104 S.Ct. 2388, 81 L.Ed.2d 346 (1984); ***Florida Bar v. Moriber***, 314 So.2d 145, 149 (Fla.1975); ***Harmon v. Pugh***, 38 N.C.App. 438, 444, 248 S.E.2d 421, 424-25 (1978), *petition for discretionary review denied*, 296 N.C. 584, 254 S.E.2d 33 (1979); ***In re Stafford***, 36 Wash.2d 108, 113, 119, 216 P.2d 746, 748, 752 (1950) (en banc); C. Wolfram, ***Modern Legal Ethics*** § 9.3.1 at 520 (1986).

177 W.Va. at 362-63, 352 S.E.2d at 113-14.

The Law Firm insists that this Court look at only the payments received to date to determine the reasonableness of its fee. The Appellants are not challenging the fee that the Law Firm received for obtaining the $3,500,000 settlement. The Appellants rather challenge the Law Firm taking a 30% share for drafting the new lease on the property.

In opposition to the motion for summary judgment, the defendants submitted an affidavit prepared and executed by Teresa Tarr, an expert witness retained by the defendants in this case. Ms. Tarr is a former Assistant Disciplinary Counsel in West Virginia and has testified as an expert witness on ethics issues. As the affidavit states, Ms. Tarr has reviewed the record to date in this case, and it is her opinion that the fee collected so far on the lease is grossly disproportionate to the work performed and that the disproportionality will increase as time goes on and more fees are taken. She further opines that the fee violates Rule 1.5 of the ***West Virginia Rules of Professional Conduct***.

In the final paragraph of her affidavit, Ms. Tarr states:

> Based upon the foregoing, the fee as it relates to the lease and side letter agreement is clearly excessive. The present hourly fee for Plaintiff is approximately $515.96. That figure would only continue to increase as time

> went on and Plaintiff received more and more payments. The $515.96 an hour figure is grossly disproportionate to the work performed since 1998. The agreement is speculative and open-ended. It is evident from the facts of this case that Ms. Marks and Ms. Luther clearly lacked full information about the circumstances of such an agreement. Therefore, the fee is clearly excessive and violative of Rule 1.5 of the West Virginia Rules of Professional Conduct.

The Circuit Court totally ignored this affidavit in granting summary judgment for the Law Firm.

The Law Firm sought to prevent the Circuit Court from considering the Tarr affidavit. Previously, the Firm contested her qualifications as an expert witness. The Firm appears to have abandoned that argument.

The Law Firm argues that the expert opinions set forth by Ms. Tarr in her Affidavit are not admissible, citing ***Jackson v. State Farm Auto. Ins. Co.***, 215 W.Va. 634, 600 S.E.2d 346 (2004). This argument overlooks the fact that Ms. Tarr is not telling a jury what the law is, but is providing an opinion of the application of the law to the facts to assist the trier of fact. The ***Jackson*** opinion relies heavily on Professor Cleckley's ***Handbook on Evidence for West Virginia Lawyers***, quoting extensively from that work. In his treatise Professor Cleckley notes exceptions to the general rule, stating that "law experts are allowed to testify as to the reasonableness of another lawyer's conduct. In doing so, a lawyer may very well state her understanding of the legal standard on which she based her opinion." 2 Cleckley, ***Handbook on Evidence for West Virginia Lawyers***, (Cum. Supp.) § 7-4.

Before the Circuit Court, the Law Firm attempted to justify the fee as analogous to a structured settlement. A structured settlement, however, provides for a set payment over either a set number of years or over the life of the payee, which can be judged by reference to mortality tables. See comment e to Section 35 of the ***Restatement (Third) of the Law Governing Lawyers***. In such situations, the present value or cost of the structured settlement can be determined and all parties will be aware of the value prior to settlement. In this case, there is no such ability, and there is no evidence that the law firm disclosed the potential value of the fee before imposing the modification on its clients.

In the Circuit Court, the Law Firm further attempted to justify a huge fee of unknown proportions by stating that (1) the damages could have been as high as 59 million dollars, and (2) that courts have awarded fees of $1,000.00 per hour. First, the reliance on the 59 million dollars is fatuous, since the Law Firm pressured its clients to accept a settlement of $750,000.00, in which case the fee would have been only $225,000.00 – far less than what they ultimately received from the damages for past mining. While the Law Firm denies this, the Appellants refer to a meeting held in Wheeling at which Ms. Marks, her son Tony, Mr. and Mrs. Luther and their son Bill met with Mr. Byrd. In that meeting, Mr. Byrd went over the reasons not to pursue the case and to accept the money on the table. At that meeting, Mr. Byrd even brought in a former Supreme Court justice to give a "gloom and doom" assessment of the case. The plaintiffs refused the settlement, ultimately resulting in a much, much larger recovery.

Second, it is at this point impossible to determine the hourly rate which the Law Firm will receive. If there is enough mining going forward, their fee could be greatly in excess of $1,000.00 per hour. In addition, in ***Abramson v. Laneko Engineering Company***, Civil Action No. 3:04-0489 (S.D.W.Va. May 26, 2005), a case upon which the Law Firm relies, the damages were known, the fee was not being paid by the client, the Court found an exceptionally high risk and novel issues involved, and the Court found that the law firm was enforcing an important public policy. In addition, the Court reduced the attorneys fees to ten percent (10%).

As noted above, when the Law Firm convinced the defendants to acquiesce in the modification to the contingent fee agreement, there was absolutely no risk; the case had been settled.

This Court should not permit the Law Firm to exact a huge fee of unknown proportions from the Petitioners for the negotiation and drafting of coal mining agreements.

III. The modification of the contingent fee agreement violates the Statute of Frauds.

West Virginia Code § 55-1-1 provides that an agreement that is not to be performed within one year may not be enforced unless in writing and signed by the party against whom it is charged. The modification to the contingent fee agreement is not signed by either Josephine Luther or Mary Catherine Marks. Accordingly, it cannot be enforced against them or their successors.

<u>Relief Prayed For</u>

It is clear that Ms. Marks and Ms. Luther did not intend to make the Law Firm a 30% owner of the property, a partner in their business, or a member of the family.

The Circuit Court erred in granting the motion for summary judgment when there were and are genuine issues of material fact. These issues include (1) whether the services performed in negotiating and drafting the coal agreements falls within the ambit of the contingent fee agreement as "loss of income and other damages sustained by Client as a result of the wrongful and improper mining of mineral property;" (2) whether the inclusion of the coal agreement services constituted a modification of the contingent fee agreement; (3) whether the Law Firm provided sufficient disclosure to its clients in insisting that the drafting of the agreements be compensated under the contingent fee agreement; and (4) whether the fee sought is reasonable.

Accordingly, the Appellants respectfully pray that this Court reverse the decision of the Circuit Court of Ohio County.

FRANCIS G. MARKS, JOHN L. MARKS, JR., PATRICIA J. MARKS, ELIZABETH A. McCLURE, M. CHESLEY MARKS, ANTHONY MARKS, CATHERINE D. MARKS, EAST ENDERS, L.L.C., and **JOSEPHINE LUTHER**, Appellants,

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CERTIFICATE OF SERVICE

Service of the foregoing ***Appellants' Reply Brief*** was had upon the Appellee by mailing a true copy thereof via regular first class United States mail, postage prepaid, addressed as follows, this 6th day of December, 2006:

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