

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

Number 34141

**GIANOLA, BARNUM, WIGAL & LONDON, L.C.,
AND PATRICK C. MCGINLEY, ESQ., PETITIONERS-BELOW**

APPELLANTS,

v.

HOWARD J. TRICKETT, et al., PLAINTIFFS AND RESPONDENTS-BELOW,

APPELLEES.

From the Monongalia County Circuit Court
Civil Actions Nos. 91-C-615 and 90-C-205
(Honorable Robert B. Stone, Judge)

THE APPELLANTS' BRIEF

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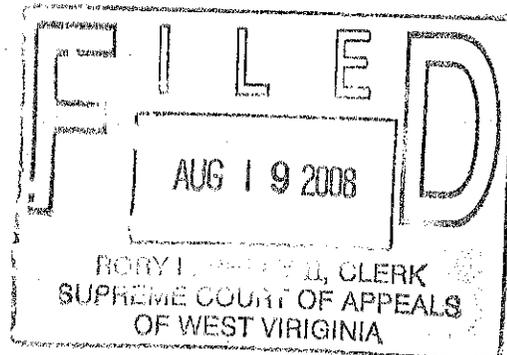


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KIND OF PROCEEDING AND NATURE OF RULING BELOW

The original Trickett case involved a tort, property damage, and breach of contract action related to coal leases, and coal mining on the Appellees' property. The Appellants represented the Plaintiffs for several years in the very difficult litigation before the Plaintiffs replaced them as counsel. The Defendants ultimately paid \$545,000 to settle the case.

The focus of this appeal is the attorneys' charging lien filed by Gianola, Barnum, & Wigal, L.C., and Patrick C. McGinley (collectively, Prior Counsel) to recover legal fees, costs, and expenses from the Appellees incurred prior to the time they were discharged without cause.¹

The circuit court ruled that the Appellees had a valid contract with their Prior Counsel that required them to pay for their time, and for the litigation expenses that were expended for the Appellees' benefit. Inexplicably, the circuit court denied Prior Counsel's request for allocation of a portion of the settlement amount pursuant to the attorneys' charging lien. The court's order implicitly required Prior Counsel to file a separate independent action against the Appellees below based on the legal services contract.

¹The Plaintiffs' Prior Counsel, the Appellants, also asserted in the alternative that it was entitled to its attorneys' fees and costs from the plaintiffs, and/or plaintiffs' counsel at the time of settlement on a *quantum meruit* theory. The circuit court ruled that Prior Counsel could only recover from the Plaintiffs by filing a separate lawsuit for breach of contract, and that because such a remedy was available, the Plaintiffs' Prior Counsel at the time of settlement had no obligation to share its fees with Prior Counsel under *quantum meruit*. This appeal does not seek review of the circuit court's ruling on the *quantum meruit* claim.

STATEMENT OF THE FACTS

On December 26, 1994, the Appellees (Trickett) retained the Appellants (Prior Counsel) to prosecute the underlying action pursuant to a written representation contract.² See Exhibit A and Record at Vol. II A. In the legal contract, Trickett agreed that, in consideration for Gary Wigal's representation, (and co-counsel with whom he would associate to assist in the claim), the attorneys would be compensated by "a lump sum payment of Thirty-three and One Third percent (33 1/3%) of all monies and things of value recovered in the claim by compromise, settlement or verdict after suit."³ See Exhibit A and Record at Vol. II A. Significantly, the Contract further provided that: "If the Client terminates the attorney, the Client agrees to pay the attorney his accrued fees to date, as well as costs and expenses which have been Incurred up to the time." See Exhibit A and Record at Vol. II A.

Gary Wigal represented the Appellees for a period of time, and then associated with Patrick McGinley, and Robert J. Shostak because of the case's complexity. After being retained, Prior Counsel began extensive discovery. Prior Counsel represented the Appellees for four years in a coal fraud, breach of contract, and property damage matter. Prior Counsel developed the underlying case through discovery and expert

² Prior to being represented by the Appellants in this matter, Trickett was represented by a Pittsburgh, Pennsylvania law firm, and by Attorney Robert Dinsmore of Morgantown, West Virginia. Trickett discharged these lawyers before entering into the written representation agreement with the Appellants. Subsequently, Trickett discharged the Appellants and retained, and then discharged, Farmer, Cline and Arnold of Charleston, West Virginia; retained, and discharged Allen, Guthrie, McHugh, & Thomas ("AGMT"), and retained Attorney James M. Poole, of Clarksburg, West Virginia, whom Trickett alleged abandoned his representation without notice to Trickett in February, 2004. Also, at various times Howard J. Trickett represented the Appellees *pro se*, see Record at 273.

³ After meeting with Howard J. Trickett and Gary Wigal in December, 1994, and on the basis of the terms set forth in the "Contract for Legal Services," Patrick McGinley and Robert J. Shostak agreed to associate with Gary Wigal in the prosecution of the claims of Trickett in the underlying action.

witnesses, and prepared extensively for the trial, which was scheduled for July, 1998. At that point in time, Prior Counsel had invested \$12,000 in costs for experts and depositions, and had more than \$60,000 in actual time expended in litigating the case on the Tricketts' behalf.

Two weeks before trial, the Defendants in the underlying case produced extremely damaging documents in response to a motion to compel. The Defendants' counsel moved for a continuance, allegedly based on a conflict of interest disclosed by the newly produced documents. The real reason for the continuance was that the Defendants could not deal with the documents' revealing content, and were stonewalling.

After the circuit court granted the Defendants' motion for a continuance of the trial to permit the Defendants to obtain separate counsel, Trickett, dissatisfied with litigation delays, discharged their Prior Counsel on November 5, 1999. Record at 274. Trickett did not dispute that they owed costs and fees to their Prior Counsel. In fact, they offered to pay Prior Counsel. See Jack Trickett letters, Record at Vol. I B(1) and B(2). As a courtesy, Prior Counsel deferred collecting its fees and costs pending resolution of the underlying action when settlement funds would be available.

After Prior Counsel's termination, Trickett engaged the services of the firm of Farmer, Cline and Arnold in 2000, but also discharged that firm. In 2001, Trickett retained the firm of Allen, Guthrie, McHugh, & Thomas (AGMT) to represent them in the underlying case.

During AGMT's representation, the parties in the underlying case entered into a

\$545,000 settlement agreement on May 20, 2002.⁴ Record at 152. Unfortunately, after the settlement was reached, Trickett refused to honor their agreement to settle, maintaining that they did not consent to the settlement. Record at 151-152. The circuit court heard the parties' arguments, and reviewed their submissions relating to the legitimacy of the settlement agreement.

On July 17, 2002, Prior Counsel filed a "Petition for *Quantum Meruit* Attorney Fees," and also filed a Notice of Attorneys' Fees Lien on September 18, 2003, which was based on the valid written contract they had with Trickett. *See, generally*, Record at 139-144 and 145-147. The Petition for *Quantum Meruit* Attorney Fees and the notice of lien put the circuit court and parties in the underlying action on notice that Prior Counsel was making a claim for attorneys' fees and costs, and that it was seeking payment for its out-of-pocket costs, expenses, and attorneys' fees from the proceeds of the \$545,000 settlement.

On February 18, 2004, nineteen months after Prior Counsel filed its notice of claim, the circuit court entered an Order enforcing the parties' settlement agreement. Record at 148, *et seq.* The February 18, 2004 Order resulted in AGMT disbursing its attorney fees and costs. Record at 274. The circuit court's order also permitted the remaining funds, less a contested twenty percent potential interest of David Trickett, to be disbursed to Trickett. Record at 274. The remaining twenty percent of the settlement was held in escrow pending resolution of David Trickett's claim, which the

⁴ Sometime after the settlement agreement was reached, AGMT ceased its representation of Trickett.

circuit court later denied.⁵ The Supreme Court later refused to accept David Trickett's Petition for Appeal.

Noting that the circuit court had not addressed the attorneys' charging lien, Prior Counsel filed a "Motion for Reconsideration and to Amend the Court's February 18, 2004 Order Enforcing Settlement, Releasing Defendants, and Dismissing Civil Actions." See Exhibit B (this February 27, 2004 document was contained in the Appellants' designation of record, but may not have been produced). In its motion, Prior Counsel asked the circuit court to rule on the Petition for Quantum Meruit Attorneys' Fees and Attorneys' Lien filed on July 17, 2002 and on September 18, 2003, respectively. In April, 2004, a hearing was held on the motion and, subsequently, memoranda of law were submitted by AGMT and Prior Counsel.

On June 12, 2007, more than three years after the April, 2004 hearing on the Motion for Reconsideration, the circuit court entered an order and an opinion recognizing that:

In the case at hand, GBW [Prior Counsel] had a contract with the plaintiffs and the contract explicitly provides for recovery from the Client. Furthermore, the statutory language of W.Va. Code § 30-2-15 allows GBW to recover the reasonable value of its services from the party with whom he contracted.⁶

Record at 276.

of attorneys' fees following the dissolution of the attorney-client relationship

⁵It is important to note that AGMT was fully paid for its attorneys' fees and costs, and that those fees and costs would not be affected by payment to Prior Counsel from the settlement proceeds.

⁶The circuit court expressly recognized that Prior Counsel's attorneys' charging lien sought payment from Trickett pursuant to W.Va. Code § 30-2-15:

"The underlying claim of GBW for attorneys' fees represented by the Attorneys' Lien is properly before this court for adjudication. GBW's request for fees is based both on its claim against the Plaintiffs pursuant to the December 20, 1994 "Contract For Legal Services" [Exhibit A] and against the Plaintiffs and AGMT upon a *quantum meruit* theory. (Emphasis added).

Moreover, the circuit court found that:

A valid contract existed between the plaintiffs and GBW, setting forth the remedies available to the parties in the event of a dispute. Specifically, the contract called for any payment to be paid by the client

Record at 278.

However, the circuit court held notwithstanding the requirements of W.Va. Code §30-2-15, that Prior Counsel was not entitled to recover its costs and fees from the proceeds of the underlying settlement.⁷ Record at 276 and 278. The circuit court's determination that the "written contract entered into by GBW and the plaintiffs sets forth GBW's legal remedy" requires that a second lawsuit be filed. Record at 178.

This appeal followed.

ASSIGNMENTS OF ERROR

- I. THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN REJECTING THE ATTORNEYS' CHARGING LIEN IN THE UNDERLYING CASE IN WHICH THE REPRESENTATION OCCURRED, AND IN HOLDING THAT LAWYERS MUST FILE AN INDEPENDENT BREACH OF CONTRACT ACTION RATHER THAN RECOVER FEES AND COSTS FROM SETTLEMENT PROCEEDS GENERATED IN THE ORIGINAL LAWSUIT.

⁷The circuit court also held that: "The "Contract for Legal Services" was between [Prior Counsel] and the plaintiffs and [Prior Counsel] cannot recover from AGMT, a non-party to the contract." *Id.* Appellants (Prior Counsel) do not challenge that holding in this appeal. The circuit court stated:

[Prior Counsel] attempted to assert a right to a share of attorneys' fees and costs in this matter by filing its Petition for Quantum Meruit Attorneys' Fees and Notice of Attorneys' Fees Lien prior to the Court entering its February 18, 2004 Order Enforcing Settlement, Releasing Defendants, and Dismissing Civil Actions. However, the written contract entered into by GBW and the plaintiffs sets forth GBW's legal remedy. (Emphasis added).

- II. THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN IGNORING THE REQUIREMENTS OF W.VA. CODE § 30-2-15, WHICH PERMITS AN ATTORNEY'S CHARGING LIEN TO BE FILED DURING THE UNDERLYING CIVIL ACTION AGAINST A CLIENT, OR A PRIOR CLIENT.

STANDARD OF REVIEW

The issues before the West Virginia Supreme Court of Appeals (Supreme Court) are matters of law, and therefore, are reviewed *de novo*. "Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, *Chrystal R. M. v. Charlie A. L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).§

ARGUMENT

The circuit court incorrectly rejected Prior Counsel's W.Va. Code § 30-2-15 attorneys' charging lien, which sought to recover the fees and costs incurred during the representation of their clients the underlying civil action. Instead, the circuit court held that the only available remedy was for the Appellants was to file an independent breach of contract action.

A. WEST VIRGINIA CODE § 30-2-15 PERMITS A DISCHARGED LAWYER TO RECOVER FEES AND COSTS FROM PRIOR CLIENTS BY FILING THE ATTORNEYS' CHARGING LIEN IN THE UNDERLYING ACTION.

The issue related to West Virginia Code § 30-2-15 is simplified because of the clarity of the Code language. West Virginia Code § 30-2-15 provides:

An attorney shall be entitled for his services to such sums as he may contract for with the party for whom the service is rendered; and, in the absence of such contract, he may recover of such party what his services were reasonably worth.

In filing an attorneys' charging lien in the lower court, Prior Counsel simply sought payment for the services it provided pursuant to its legal representation contract with the Trickett Plaintiffs. West Virginia Code § 30-2-15, as applied by the West Virginia Supreme Court of Appeals, confirms that an attorney's lien can be adjudicated precisely as Appellants requested.

In *Shaffer v. Charleston Area Medical Ctr.*, 485 S.E. 2d. 12, 199 W. Va. 428 (1997), the Supreme Court acknowledged that an attorney charging lien is specifically provided for under *W. Va. Code*, 30-2-15. Syllabus Point 4 of *Shaffer* states that: "A charging lien is the equitable right of an attorney to have fees and costs due the attorney for services in a particular action **secured by the judgment or recovery in such action.**" Prior Counsel complied with the clear language of *Shaffer* and of § 30-2-

15, when they brought “an attorney’s charging lien . . . during the underlying civil action . . . against the Prior client.” *Id.*

Thus, the *Shaffer* Court found that the proper forum for litigating an attorney’s charging lien against a prior client is in the underlying civil action. *Shaffer* at 432. Inexplicably, and without specifically addressing why the Appellants could not recover from Trickett in the underlying case, the circuit court held that the Appellants’ charging lien could not be resolved in the underlying case, and that their only recourse was to file an independent breach of contract action against Trickett.

Instead, the circuit court focused on the Appellants’ entitlement to share the legal fees awarded to AGMT, the law firm that ultimately settled the case. The lower court held that “. . . there is no basis for a recovery or sharing of such fees from funds received by plaintiffs’ [Appellees] subsequent counsel [AGMT]. Record at 178. The circuit court did not give a reason for its refusal to adjudicate the attorneys’ charging lien seeking payment of fees from Trickett settlement proceeds. *See, generally* Record at 172-178.

Nevertheless, the Appellants specifically requested that the lower court “award them their attorneys fees, expenses and costs **based upon the legal services contract between the Plaintiffs and GBW** or in the alternative, based on Quantum Meruit.” Record at 187 (May 13, 2004 Memorandum of Law in Support of Attorneys’ Lien and Petition for Allocation of Settlement Proceeds Pursuant to Contract or in the Alternative, Quantum Meruit); and February 27, 2004 Appellants’ Motion for Reconsideration and to Amend the Court’s February 18, 2004 Order. Both of these record documents discuss fee recovery from the Plaintiffs based on the legal services

contract. The lower court did recognize that the "ultimate issue" was "whether GBW is entitled to an attorneys' lien for attorneys' fees to be allotted from the proceeds of the settlement under either a contractual or *quantum meruit* theory. Record at 274. Further clarification reveals that the lower court recognized that GBW's request for fees is based both on its claim "against the Plaintiffs" pursuant to the December 20, 1994 "Contract for Legal Services." See Notice of Attorneys' Lien, Record at 145

As Syllabus Point 4 of *Shaffer* mandates, Prior Counsel has an equitable right to have the fees and costs due them for services secured by the funds generated by the settlement of the case. Resolving a fee dispute between an attorney and client (or prior client) is simply "a step in the main cause." See *Levine v. Levine*, 381 N.J. Super. 1, 9, 884 A.2d 222, 227 (App. Div. 2005) (citations omitted) (holding that the trial court improperly dismissed a petition for an attorneys lien).

Likewise, permitting counsel to resolve a fee dispute in the underlying action is consistent with Rule 1.8 of the West Virginia Rules of Professional Conduct. Rule 1.8 permits an attorney to "acquire a proprietary interest" in a client's "cause of action" by acquiring an attorney's lien to "secure the lawyers' fee or expenses." W. Va. R. Prof. Conduct Rule 1.8(j)(1). Acquiring a proprietary interest in a client's "cause of action" is a clear confirmation that an attorney has a proprietary interest in the client's litigation, and is not required to file a separate lawsuit, which is not the client's "cause of action," but the attorney's.

In summary, the circuit court erred as a matter of law when it did not enforce the Appellants' statutory and common law right to have their attorneys' lien litigated during the Tricketts' cause of action.

B. THE CIRCUIT COURT ERRED IN FAILING TO RECOGNIZE THAT CONSIDERATIONS OF JUDICIAL EFFICIENCY AND FAIRNESS REQUIRE THAT ATTORNEYS' LIENS BE ADJUDICATED IN THE UNDERLYING CASE.

If upheld, the circuit's court's decision will force Prior Counsel to file and litigate an independent breach of contract action against the Trickett Plaintiffs. Record at 178. The circuit court's decision misapprehends the rationale underlying West Virginia Code § 30-2-15, and the equitable considerations that led virtually every Anglo-American court to permit attorneys' charging liens to be litigated as part of the case in which the legal services were rendered.

In *State ex rel. Showen v. O'Brien*, the Supreme Court observed:

The law which recognizes an attorney's right to a **lien upon a judgment** to secure his fees for services rendered in its procurement rests upon the equitable rule that the party who has reaped the benefit of his services should not be allowed to run away with the fruits of such services without satisfying the legal demands of his attorney, by whose industry, sagacity and learning, and, in many cases, at whose expense those fruits are obtained." *Rooney v. Second Avenue R. Co.*, 18 N.Y. 368 (1858), says: "The judgment being under the control of the court and the parties within its jurisdiction, it will see that no injustice is done to its own officers."

* * *

... although some authorities question the existence of a common law rule upon the subject of such liens, they have been allowed and enforced as if authorized in England from a remote date.

State ex rel. Showen v. O'Brien, 89 W.Va. 634, 646-647, 109 S.E. 830, 831 (1921).

Fundamental considerations of judicial efficiency, and fairness to litigating parties, and to their counsel, reveal that the circuit court's ruling was erroneous and contrary to law. Without question, a court that tries a case is in the best position to determine the legitimacy of claims for fees and costs provided by attorneys in that case. Of course, *State ex rel. Showen* confirms the Appellants had a right to a lien "upon the judgment," which, in Trickett, was the settlement.

In contrast, forcing claims for attorneys' fees and costs to be litigated in a separate action after the underlying case is closed is inefficient and costly.

The court presiding over the underlying action is already familiar with the litigants, the attorneys, the facts, and the procedural history of the case. For example, in this matter, the trial court is already familiar with the work of the original counsel, the fact that Trickett had "revolving" lawyers, as well as the fact that the case was ultimately settled through the testimony of the Appellants' expert witnesses. In fact, the lower court approved of Prior Counsel's work in the case in an April 8, 2003 hearing.

During the hearing, the lower court discussed the fruits of Prior Counsel's motion to compel: "the Plaintiffs being able to form the basis for cause of action against the new defendants and even Laurita and Verno. Folks, there are documents that I have seen that makes it look like the corporations were illegitimate. You know that. There are documents that look like the corporations were a shell and they are absolutely nothing." Record at 178. Furthermore, the Court noted the "admissions" that "might be conceded" in the documents. Record at 181.

Importantly, a new judge in a subsequent breach of legal services contract action, would have to expend considerable time and energy to become familiar with the facts, the rulings, and the legal services provided in the original underlying case. Even the most industrious judge would not have as good a perspective on the legal services provided in the underlying litigation as the original court. Additionally, forcing claims into subsequent independent actions would waste judicial resources, and would significantly delay the resolution of the dispute. Clearly, both the attorneys seeking fees and their clients or prior clients would be unfairly disadvantaged by long delays.

Further, if a judgment or recovery is surrendered to the client, it will be more difficult to secure a recovery. In this case, where some of the Trickett clients reside outside the jurisdiction of West Virginia courts, the lower court's distribution of the settlement proceeds without addressing the attorneys' lien is problematic to payment. Reflecting this concern is the long-recognized rule allowing attorneys' liens to be pursued in the underlying action where funds from a judgment or settlement can be secured until the lien is resolved. Unfortunately, there are now no funds for the Appellants to recover for their years of work, as they were released to Trickett. Record at 288.

As the *State ex rel. Showen* Court emphasized, clients should not be allowed to enjoy the fruits of attorneys' services by collecting a judgment or settlement proceeds, and then run away "with the fruits of such services without satisfying the legal demands of his attorney." *Showen*, 89 W.Va. 634, 646-647, 109 S.E. 830, 831 at 638. That is why the trial court is given jurisdiction to hold funds pending resolution of attorneys' charging liens. The *State ex rel. Showen* Court cautioned: "The judgment being under the control of the court and the parties within its jurisdiction, it will see that no injustice is done to its own officers." (*quoting Rooney v. Second Avenue R. Co.*, 18 N.Y. 368). *Id.* This exact injustice is what happened to the appellants.

The Supreme Court should not overlook *Shaffer* and require the Appellants to file a new cause of action of action against the Appellees, because that would require counsel to sue their prior client, which they are hesitant to do. Most attorneys would

likely forego the fees, costs, and expenses, in order to avoid suing a delinquent client.⁸ A fee issue should be determined simultaneously with distribution of the judgment or recovery in those rare cases when a client fails to pay their fees and costs.⁹

Other states have recognized these important practical considerations. In discussing the attorney lien process in New Jersey, the Superior Court of New Jersey, Appellate Division, noted "that the disposition of a fee dispute between attorney and client under *N.J.S.A. 2A:13-5* may serve the interests of judicial economy and efficiency by placing the dispute before the same judge who presided over the underlying action, rather than requiring another judge to review a trial record with which that judge has no prior familiarity. See *Salch v. Salch*, 240 N.J. Super. 441, 444-45, 573 A.2d 520 (App. Div. 1990). This mode of disposition also enables the attorney and client to "resolve their fee dispute more expeditiously than by a separate action in the Law Division." *Levine v. Levine*, 381 N.J. Super. 1, 10-11, 884 A.2d 2222, 228 (App. Div. 2005) (holding that the trial court erred in requiring the attorney to file a separate cause of action to recover attorney fees).

In a similar case, an Oklahoma appellate court held that "the trial court erred as

⁸While the statute does not limit the ability of an attorney to file a separate action, it also does not require the attorney to file a new action. Rather, the Code allows either option for recovery. This is practical, because a prior counsel may not be aware of the prior client's recovery until after the case has been dismissed and, thus, the counsel should have the ability to file a separate action if necessary.

⁹In *Gibbs v. Geico General Ins. Co.*, 143 P.3d 235 (Okla. Civ. App. Div. 4 2006), the original counsel had a fee agreement with the plaintiff, reviewed documents, filed the complaint and received a recovery, and then filed a UM case on the plaintiff's behalf. The plaintiff then hired new counsel, and the original counsel provided the file to the subsequent counsel. The Oklahoma appellate court noted that *the lien of the original counsel was prior to any claim of the plaintiff's subsequent and current counsel*. *Gibbs v. Geico General Ins. Co.*, 143 P.3d 235, 238 (Okla. Civ. App. Div. 4 2006) ("We also find that such lien, if not destroyed or released, is prior to any claim or lien of [plaintiff's] present attorney."). See also *Gaines v. Dixie Carriers, Inc.*, 434 F.2d 52, 54 (5th Cir. 1970) (per curiam) (stating that the contingent attorney award should be "allocated as law and justice require between [plaintiff's] Prior and present counsel").

a matter of law in denying the motion to intervene and in finding that [prior counsel] could not enforce his claimed attorney's lien as to these settlement proceeds"). *Gibbs v. Geico General Ins. Co.*, 143 P.3d 235, 238 (Okla. Civ. App. Div. 4 2006).

The Fifth Circuit Court of Appeals found error in a trial court's refusal to allow prior counsel to intervene in an attempt to recover an attorney fees and expenses. *Gaines v. Dixie Carriers, Inc.*, 434 F.2d 52, 54 (5th Cir.1970) (per curiam). The legal reasoning behind these decisions is the simple attempt to prohibit judicial inefficiency and duplicity.

The Supreme Court should reject the Monongalia County Circuit Court's holding, and thus protect the judicial system's limited resources, as well as the attorneys' and the clients' right to a timely adjudication of attorneys' fee disputes as contemplated by W.Va. Code § 30-2-15, and the long line of cases referenced in *Shaffer, supra*, and *State ex rel. Showen, supra*.

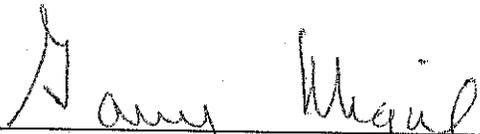
RELIEF REQUESTED

Because of the lower court's error in not resolving the Appellants' claim in the Tricketts' original cause of action, Gianola Barnum Wigal & London, L.C., and Patrick C. McGinley respectfully request that the Supreme Court reverse the Circuit Court of Monongalia County's final order that denied the attorneys' charging lien, vacate the judgment, and remand this case for resolution of the attorneys' charging lien in the

underlying *Trickett* case. The Appellants further request any other relief this Court deems appropriate.

**GIANOLA, BARNUM, WIGAL & LONDON, L.C.
AND PATRICK C. MCGINLEY, ESQ.**

**Appellants,
By Counsel**



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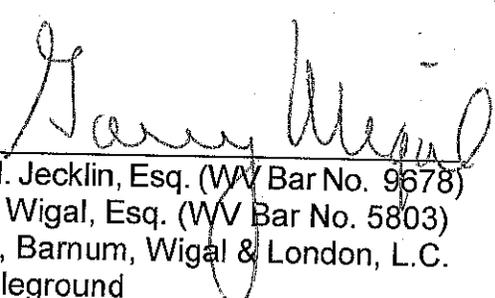
CERTIFICATE OF SERVICE

I, Gary S. Wigal, certify that a copy of APPELLANTS' BRIEF was served on all parties of record on August 18, 2008, by United States Mail, First Class postage prepaid, addressed to the following:

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File

DECEMBER 20, 1994

CONTRACT FOR LEGAL SERVICES

This contract is entered into on December 20, 1994, between Howard "Jack" Trickett (Client) and Gary Wigal, Attorney at Law (Attorney).

The Contract for legal services relates to Jack Trickett's involvement in Monongalia County Civil Action Nos. 91-C-615 and 90-P-205. The Client authorizes the Attorney to take any action which is necessary and incidental to the prosecution of the claim. As consideration for the legal services rendered by the Attorney, the Client agrees to the following compensation.

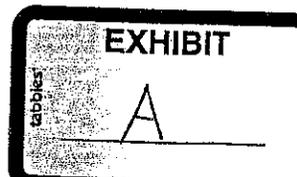
The Client agrees to pay the Attorney a lump sum of Thirty-three and One Third percent (33 1/3%) of all monies and things of any value recovered in the claim by compromise, settlement or verdict after suit. Should the case be appealed by any party after a verdict, the Client agrees to an additional legal fee of 10% of any recovery for legal representation in the appeal.

While the Attorney accepts the employment, the Attorney does not guarantee the successful prosecution in the case, and the Client is aware that not all litigation is brought to a successful conclusion on a litigant's behalf.

If the Attorney determines, in his sole discretion, before or after a claim is instituted, that continuing to defend the claim is not feasible for any reason, the Attorney may withdraw from the case and may rescind this contract. If the Client terminates the Attorney, the Client agrees to pay the Attorney his accrued fees to date, as well as costs and expenses which have been incurred up to the time.

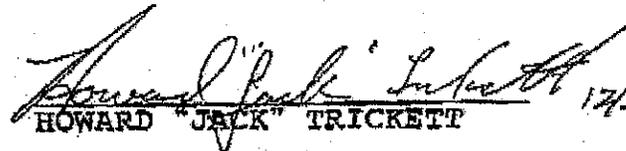
The Client authorizes the Attorney to withhold and pay from any recovery resulting from this legal action the following:

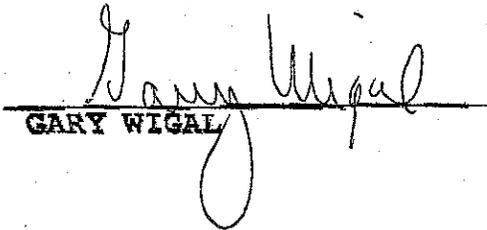
1. Attorney's fees in the amount contained in the contract;
2. All costs and expenses advanced by the Attorney;
3. Any other monetary obligations owed by the Client which arise out of the controversy for which the Attorney was employed.



It is further agreed that if the Attorney negotiates a fair and equitable settlement of the claim, and the Client refuses to accept the terms of the settlement, the Attorney can withdraw from further representation of the Client. If the Attorney withdraws under these circumstances, the Client agrees to pay the accrued attorney fees to date, as well as costs and expenses which have been incurred up to the time of the Attorney's withdrawal from the case.

The Client authorizes Gary Wigal to employ or associate with any attorney who is qualified to assist in the claim, provided there is no increase in the Attorney's fee as a result of the association.


HOWARD "JACK" TRICKETT 12/23/94


GARY WIGAL

GIANOLA, BARNUM & WIGAL, L.C.
Attorneys At Law

1714 Mileground
Morgantown, WV 26505

304-291-6300

JAMES A. GIANOLA
CHRISTOPHER A. BARNUM
GARY S. WIGAL
LARRY W. MAYFIELD
BRENT L. VAN DEYSEN
MICHELLE L. BECHTEL

Telecopier
(304) 291-6307

February 25, 2004

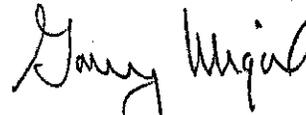
Jean Friend, Clerk
Monongalia County Courthouse
243 High Street
Morgantown, WV 26505-5427

Re: Howard Trickett et al., v. Joseph Laurita, et al., Civil Action No. 91-C-615
J. Anthony & Company, et al., v. Trickett et al., Civil Action No. 90-P-205

Dear Ms. Friend:

Enclosed please find for filing a Motion for Reconsideration and to Amend the Court's February 18, 2004 Order and a Certificate of Service in regard to the above styled case.

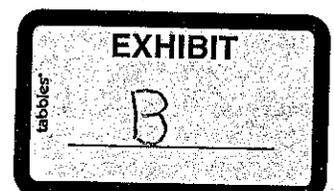
Sincerely,



Gary S. Wigal

GSW/cd

cc: w/enclosures
Judge Robert b. Stone
Robert B. Allen, Esq.
William Pennington, Esq.
Stephen R. Brooks, Esq.
Gordon Copland, Esq.
Raymond Yackel, Esq.
Gregg Rosen, Esq.
Timothy J. Padden, Esq.
Patrick C. McGinley, Esq.
Robert J. Shostak, Esq.



IN THE CIRCUIT COURT OF MONONGAIA COUNTY, WEST VIRGINIA

HOWARD J. TRICKETT, et al.,

Plaintiffs,

CIVIL ACTION NO. 91-C-615

v.

JOSEPH A. LAURITA, JR. et al.,

Defendants,

and,

J. ANTHONY & COMPANY, et al.,

Plaintiffs,

v.

CIVIL ACTION NO. 90-P-205

JAMES TRICKETT, et al.,

Defendants,

MOTION FOR RECONSIDERATION AND TO
AMEND THE COURT'S FEBRUARY 18, 2004 ORDER

Gianola, Barnum & Wigal, L.C., Patrick C. McGinley, and Robert J. Shostak respectfully request that this Court reconsider and amend its ORDER of February 18, 2004, captioned "Order Enforcing Settlement, Releasing Defendants and Dismissing Civil Actions," for the reasons set forth below.

1. Gianola, Barnum & Wigal, L.C., Patrick C. McGinley, and Robert J. Shostak were retained by the Plaintiffs, *inter alia*, pursuant to a "Contract for Legal Services" dated December 20, 1994, and have claims for attorneys fees and costs in the above styled matters based upon claims under their contract with the Plaintiffs and/or upon *quantum meruit*.

2. Representation of the Plaintiffs by Gianola, Barnum & Wigal, L.C., Patrick C.

McGinley, and Robert J. Shostak was terminated by the Plaintiffs in 1998, triggering the Plaintiffs' responsibility to pay Gianola, Barnum & Wigal, L.C., Patrick C. McGinley, and Robert J. Shostak all accrued significant attorneys fees, costs and expenses incurred up to the date of the termination.

3. The settlement reached in the instant case could not have been achieved and was based in substantial degree on the services rendered by Gianola, Barnum & Wigal, L.C., Patrick C. McGinley, and Robert J. Shostak during the time they represented the Plaintiffs.

4. The settlement reached in the instant case was based in substantial degree on the results achieved and services rendered by Gianola, Barnum & Wigal, L.C., Patrick C. McGinley, and Robert J. Shostak during the time they represented the Plaintiffs.

5. A settlement in this matter was reached by the parties in May, 2002.

6. Gianola, Barnum & Wigal, L.C., Patrick C. McGinley, and Robert J. Shostak are alternatively entitled, under their contract with the Plaintiffs and/or *quantum meruit* to a portion of the settlement proceeds in the instant matter.

7. On July 17, 2002, Gianola, Barnum & Wigal, L.C. filed a Petition for Quantum Meruit Attorney Fees.

8. On September 18, 2003, a Notice of Attorneys' Fees Lien was filed by Gianola, Barnum & Wigal, L.C., Patrick C. McGinley, and Robert J. Shostak which stated that:

"A settlement has been reached by the parties and disbursement of funds held in escrow may occur unless this court takes notice of the Attorneys Lien and stays the disbursement of the settlement proceeds to the Plaintiffs and their counsel until the Attorneys Lien is satisfied."

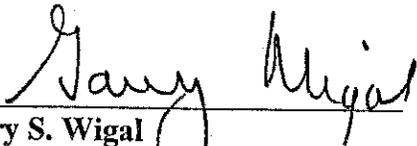
9. On February 18, 2004, the Court entered an "Order Enforcing Settlement, Releasing Defendants, and Dismissing Civil Actions.

10. The Courts' February 18, 2004 Order allows the Plaintiffs' current counsel Allen,

Guthrie and McHugh to immediately disburse to itself attorneys fees and costs to which it is entitled.

11. The disbursement of attorneys fees and costs in this matter should not occur unless and until the claims for attorneys fees and costs of Gianola, Barnum & Wigal, L.C., Patrick C. McGinley, and Robert J. Shostak are first determined either by agreement of the parties or, if an agreement cannot be reached, by order of the Court.

WHEREFORE, Gianola, Barnum & Wigal, L.C., Patrick C. McGinley, and Robert J. Shostak, respectfully request the Court reconsider its February 18, 2004 Order, to take notice of their Attorneys Lien and Petition for Quantum Meruit Attorney Fees as set forth above, and to amend the Order to require that the settlement proceeds be placed in an escrow account and further requiring that the disbursement of the settlement proceeds to the Plaintiffs' counsel be stayed until the claims of Gianola, Barnum & Wigal, L.C., Patrick C. McGinley, and Robert J. Shostak for attorneys and costs are resolved.



Gary S. Wigal
Gianola, Barnum & Wigal, L. C.
1714 Mileground
Morgantown, WV 26505
(304) 291-6300
W. V. Bar # 5803

CERTIFICATE OF SERVICE

I, Gary S. Wigal, certify that on February 25, 2004, I served a Motion for Reconsideration and to Amend the Court's February 18, 2004 Order by mailing a copy by United States First Class Mail, postage prepaid, to the following:

Howard J. Trickett
2699 Pontius Road
Hartsville, Ohio 44632
Pro Se Plaintiff

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Morgantown, WV 26507
Counsel for David H. Trickett

Robert B. Allen, Esq.
Allen, Guthrie & McHugh
P.O. Box 3394
Charleston, WV 25333-3394
*Previous Counsel for
Howard J. Trickett*

Raymond Yackel, Esq.
Attorney at Law
162 Chancery Row
Morgantown, WV 26505
*Counsel for Mike Lutman and
Lutmin Engineering, Inc.*

Gregg M. Rosen, Esq.
Tammy L. Ribar, Esq.
McGuire Woods, LLP
625 Liberty Avenue
Dominion Tower, 23rd Floor
Pittsburgh, PA 15222-3142
*Counsel for Concord Corporation,
James L. Laurita, and William Taylor*

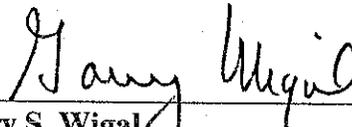
Timothy J. Padden, Esq.
Rose, Padden & Petty L.C.
P.O. Box 1307
Fairmont, WV 26555-1307
*Counsel for Concord Corporation and
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Bank One Center, Sixth Floor
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Counsel for John & Rebecca Verno & VMS, et al.

Peter T. DeMasters, Esq.
Stephen R. Brooks, Esq.
7000 Hampton Center, Suite 1
Morgantown, WV 26505
*Counsel for John Doe Defendants, J. Anthony & Company, Inc.,
Pinnacle Mining Company of Northern WV, Pinnacle Construction
Corporation, Joseph A. Laurita, Jr., Joseph A. Laurita d/b/a J. Anthony
& Company, Inc. and/or J. Anthony & Company, Mt. Morris Mine Repair
Company, William Taylor, and Eagle Management Service, Inc.*

Patrick C. McGinley, Esq.
737 South Hills Drive
Morgantown, WV 26505

Robert J. Shostak, Esq.
2 Wallace Drive
Athens, Ohio 45701



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