No. 31402 - Douglas Bass v. Laura Coltelli Rose

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Davis, J., dissenting:

The majority's opinion permits attorneys to collect fees from their clients for performing absolutely no services on behalf of those clients. I disagree with any scheme that allows an attorney to collect money when he or she has done nothing to earn that money. Let me be clear that my dissent is not a criticism of contingent fees. I find absolutely no fault with contingent fees in general. As I have said before, "my dispute with the majority opinion is that it permits attorneys in this state to collect fees from their clients when they have performed absolutely no services on behalf of those clients." *Lawyer Disciplinary Bd. v. Morton,* 212 W. Va. 165, 171, 569 S.E.2d 412, 418 (2002) (per curiam) (Davis, J., dissenting). Therefore, I respectfully dissent.

When this case was previously before this Court on the issue of the application of the contingency fee contract to recovery of medical pay benefits, I stated the following:

> The circuit court restricted the . . . language [of the contingency fee contract] to mean that Rose could recover only the fees from the person who struck the car in which Mr. Bass was riding when he was injured. The majority opinion correctly found that such an interpretation of the contract was wrong. In the context of the claim against Mr. Weakley's insurer, there is no ambiguity in the contract. It is a well settled principle of law that "[w]here the terms of a contract are clear and unambiguous,

> they must be applied and not construed." Syllabus point 2, *Bethlehem Mines Corp. v. Haden*, 153 W. Va. 721, 172 S.E.2d 126 (1969).
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> Weakley was the driver of the car in which Mr. Bass was a passenger when he sustained his injuries. Neither Mr. Bass nor his mother, Mrs. Bass, owned the vehicle driven by Weakley. While the record in this case does not disclose whether or not a separate action was initiated against Weakley, it is clear that a potential claim was present. In other words, Weakley was a potential adversary. In this posture, Rose's contract with the Bass family clearly entitled her to receive one-third of any recovery obtained from Weakley.

Bass v. Coltelli-Rose, 207 W. Va. 730, 734-35, 536 S.E.2d 494, 498-99 (2000) (per curiam) (Davis, J., concurring and dissenting). Based on the facts before the Court at that time, I believed Ms. Rose was entitled to a fee for obtaining medical pay benefits under the Weakley policy based upon the assumption that she had performed legal services to collect those medical payments.[1]

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[1]I also thought that Ms. Rose was not entitled to receive a fee for the collection of the medical pay benefits under Mr. Bass's own policy because I believed that no legal services were needed to gain those payments. The facts developed on remand reveal that I was wrong in condemning application of a contingency fee to the payments collected under the Bass policy. The circuit court found that "State Farm originally refused to pay this claim. Laura Rose's letter to State Farm . . . is four pages long and is a very well written brief as to why State Farm [cannot] enforce the 'anti-stacking' provisions of its insurance policies as they apply to medical payment provisions[.]" Moreover, the circuit court found that "[t]his was definitely a contingency fee matter. There was no assurance . . . that the 'anti-stacking' provisions of the policies would not be enforceable."

Thus, the now fully developed facts indicate that I initially was incorrect in my decision as to which policies would properly be the subject of a contingent fee. "In these circumstances the temptation is strong to embark upon a lengthy personal apologia." *Boy's Mkts. Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 255, 90 S. Ct. 1583, 1595, 26 (continued...)

On remand to the circuit court, the facts were more fully developed and it now is clear that Ms. Rose was not entitled to charge Mr. Bass a fee for collecting medical pay benefits under the Weakley policy. The circuit court found that "State Farm had originally contacted . . . [a] parent of Douglas Bass,[2] advising her of the fact that Douglas was entitled to have his medical bills paid by State Farm[.]" (Footnote added). Because of this fact and because the medical bills were promptly paid, the court opined that "[m]aking copies of these medical bills from the file and forwarding them under a cover letter to State Farm was a matter which could have been handled by Laura Rose's staff, and probably did not take much time." Moreover, the circuit court found that "the obtaining of the $25,000.00 medical payment due under the Weakley policy to Douglas Bass was a certainty, not an uncertainty, and was something which did not even require the skill of an attorney. The fee charged . . . was still excessive and is disapproved."

We have previously held "[i]n the absence of any real risk, an attorney's

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[1](...continued)
L.Ed.2d 199, 213 (1970) (Stewart, J., concurring). The words of Justice Frankfurter provide me some comfort and instruction: "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee v. Union Planters Nat'l Bank & Trust Co.*, 335 U.S. 595, 600, 69 S. Ct. 290, 293, 93 L.Ed. 259, 264 (1949) (per curiam) (Frankfurter, J., dissenting). Therefore, while my decision has changed as to whether the Weakley policy and Mr. Bass's policy were properly considered under the contingent fee contract, my reasoning remains the same that no attorney should receive compensation for performing no legal services.

[2]Douglas Bass was a minor when the accident occurred.

purportedly contingent fee which is grossly disproportionate to the amount of work required is a 'clearly excessive fee' within the meaning of . . . [the rules]." *Comm. on Legal Ethics of the West Virginia State Bar v. Tatterson*, 177 W. Va. 356, 363, 352 S.E.2d 107, 114 (1986).[3] Ms. Rose charged and received an unreasonable and excessive amount of attorney's fees for collecting medical payment benefits which were never disputed and which were paid by the insurer without controversy.

Ms. Rose was not hired to merely receive checks from State Farm on behalf of Mr. Bass. Thus, she should not be compensated for performing a service which required no skill and limited time. No legal services were necessary to obtain the medical pay benefits portion under the Weakley policy. The majority's opinion allows Ms. Rose to collect a fee of $6,250.00, for copying medical bills and submitting them with a cover letter to the insurance company, a task which was probably relegated to an office staff member. No member of the legal community should be allowed to accept fees when no work was performed justifying those fees, and there is no uncertainty with respect to the recovery of the medical pay benefits. Therefore, I cannot agree with the majority opinion in that it permits an attorney to take fees from clients when no legal services were performed.

[3]In *Tatterson*, the Court found that the lawyer improperly charged a contingent fee when the only service provided was assistance in filling out life insurance proceeds forms and the insurance company never disputed payment.

For the reasons stated, I dissent. I am authorized to state that Chief Justice Maynard joins me in this dissenting opinion.