No. 26658 -- Douglas Bass v. Laura Coltelli-Rose

Justice Scott, dissenting:

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I dissent from the majority's interpretation that the contractual language, "claim against . . . whoever is liable for . . . injuries or damages resulting from . . . [the] accident," includes medical payments coverage and, therefore, that coverage is properly subject to a contingent fee. The lower court correctly interpreted the contractual provisions to mean that "[t]he contingent fees charged by . . . [Ms. Coltelli-Rose] on the medical payment recoveries were not covered by the contingent fee contract entered into by either Mabel Bass or Douglass Bass . . . ," and ordered Ms. Coltelli-Rose to refund the $13,472.17 in contingent fees previously retained, less a quantum meruit fee for her services.[1] The insurance company which provide coverage to Mr. Bass was not an entity "liable for . . . injuries or damages resulting from . . . [the] accident." Rather, the insurance company was liable to Mr. Bass because of the terms of the insurance policy, a claim of contract, not tort. The terms of the contingent fee agreement did not otherwise make any reference to medical payments coverage or other first party benefits. It is well settled that "[w]here the terms of a contract are clear and unambiguous, they must be applied and not construed." Syl.

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[1]We have previously stated that even

> [b]efore a fee is awarded under the theory of quantum meruit, there must first be a determination of the reasonable value of the attorney's services rendered on behalf of the client. Identifying the reasonable value of an attorney's services requires an examination of various factors that concern such issues as the amount of time spent on the case, the difficulty of the case, and the outcome reached in the case.

Pritt v. Suzuki Motor Co., Ltd., 204 W.Va. 388, 396, 513 S.E.2d 161, 169 (1998).

Pt. 2, Bethlehem Mine Corp. v. Haden, 153 W. Va. 721, 172 S.E.2d 126 (1969). Thus, under the plain and unambiguous terms of the contingent fee agreement, the lower court correctly concluded that "whoever is liable" referred to the person responsible for causing Mr. Bass' injuries, i.e., the tortfeasor.

I also disagree with the majority's total failure to consider whether the contingent fee charged was reasonable and ethical. If the majority would have bothered to go beyond the question of whether the contingent fee agreement was ambiguous, a much different opinion would have been reached and much more important principles would have been discussed.

Even though the circuit court was not required to address whether the contingent fee imposed by Ms. Coltelli-Rose was reasonable or excessive, it is well established that "[c]ourts have inherent powers to supervise the collection of attorney fees and monitor contingent fee agreements." Jenkins v. McCoy, 882 F.Supp. 549, 553 (S.D.W.Va. 1995). "Determination of whether a contingent fee is reasonable is not limited to an interpretation of the agreement itself. The court must consider the circumstances surrounding both the negotiation and the performance of the contingency fee contract." Id., at 556 (emphasis added and citations omitted). In other words, the reasonableness of any attorney fee is determined by circumstances which appear after the fact, as well as the facts as they appeared to be or might become as seen before the event.

Generally, "courts in West Virginia will uphold contingency fee arrangements voluntarily entered into by the parties as long as they are not excessive, overreaching, and do not take inequitable

advantage of a client." Kopelman and Assocs., L.C. v. Collins, 196 W. Va. 489, 496, 473 S.E.2d 910, 917 n. 7 (1996). In determining whether a contingent fee contract is reasonable or excessive, we apply the following analysis:

> "The reasonableness of attorney's fees is generally based on broader factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases." Syllabus Point 4, Aetna Casualty & Surety Co. v. Pitrolo, 176 W.Va. 190, 342 S.E.2d 156 (1986).

Syl. Pt. 1, in part, Erwin v. Henson, 202 W.Va. 137, 502 S.E.2d 712 (1998); accord Daily Gazette Co. v. West Virginia Dev. Office, 206 W.Va. 51, 64, 521 S.E.2d 543, 556 (1999).

Unfortunately, the majority deemed it unnecessary to engage in discussion of the reasonableness or excessiveness of the fee charged by Ms. Coltelli-Rose. The facts, however, clearly indicate that the $25,000 payment for medical expenses incurred by Douglas Bass, which was received from the insurance company that insured the automobile in which Mr. Bass was a passenger at the time of the accident, was not questioned and was received routinely and without particular problems. As a matter of fact, the only service performed by Ms. Coltelli-Rose concerning this payment was the sending of letters to the insurance company which recited what services the bills were for and from which medical service providers they came. Regarding the second payment for medical expenses in the amount of $21,666.52,

which was received from the insurance company that insured the automobile owned by Mr Bass or his mother, Mabel Bass, the lower court noted that the receipt of this recovery "was apparently more difficult."[2] Thus, it is obvious that Ms. Coltelli-Rose charged $8,333, of which she latter refunded $2,083, to perform the service of writing several letters and $7,221 for basically the same service. It is clear to me that these fees should have been found to be excessive. Basically, Ms. Coltelli-Rose charged and received an exorbitant amount of attorney's fees for collecting medical payments coverage under a contract which was not in dispute and which was paid by the insurer without major controversy.

Not only is the contingent fee in this case unreasonable, it is potentially unethical as well. Rule 1.5 of the West Virginia Rules of Professional Conduct, which governs attorney's fees in general, dictates what elements comprise a reasonable fee for the provision of professional legal services:

> (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
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> (1) the time and labor required, the novelty and difficulty of the questions involved, and skill requisite to perform the legal service properly;
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> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) the fee customarily charged in the locality for similar legal services;
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> (4) the amount involved and results obtained;

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[2]The extent of just how difficult this was is not clear in the circuit court's final judgment order. While the circuit court noted that "there were apparently 'anti-stacking' provisions in the policies" which could have made the collection of the second medical payment amount more difficult, the Appellee, Mr. Bass, indicated that even the second amount was "obtained on an uncontested basis" from the Appellee's insurer. The Appellee states in footnote five of his brief that "Laura Rose attempts now to overstate the extent and necessity of her services in suggesting that a 'stacking' issue interfered with full payment of the med pay, but there is no evidence to support this assertion."

> (5) the time limitations imposed by the client or by the circumstances;
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> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

Id.

Further, this Court has previously held in syllabus points two and three of Committee on Legal Ethics v. Tatterson, 177 W.Va. 356, 352 S.E.2d 107 (1986), that:

> 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.
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> In the absence of any real risk, an attorney's purportedly contingent fee which is grossly disproportionate to the amount of work required is a "clearly excessive fee" within the meaning of Disciplinary Rule 2-106(A).

177 W. Va. at 357, 352 S.E.2d at 108, Syl. Pts. 2 and 3.

In reaching the above-mentioned holdings, we expressly discussed the fact that a contingent fee must be, in fact, contingent, stating:

> The requirement that the client be fully informed applies especially to a contingent-fee contract. The client needs to be fully informed as to the degree of risk justifying a contingent fee. Courts generally have insisted that a contingent fee be truly contingent. The typically elevated contingent fee reflecting the risk to the attorney of receiving no fee will

usually be permitted only if the representation indeed involves a significant degree of risk. The clearest case where there would be an absence of real risk would be a case in which an attorney attempts to collect from a client a supposedly contingent fee for obtaining insurance proceeds for a client when there is no indication that the insurer will resist the claim. In the absence of any real risk, an attorney's purportedly contingent fee which is grossly disproportionate to the amount of work required is a "clearly excessive fee" within the meaning of Disciplinary Rule 2-106(A). See Florida Bar v. Moriber, 314 So.2d 145, 146-49 (Fla.1975) (33 1/3% of moneys due to client upon mother's death; layman could have performed same services as attorney; major funds passed to client by operation of law); In re Teichner, 104 Ill.2d 150, 153-54, 160-63, 83 Ill.Dec. 552, 553-54, 557-58, 470 N.E.2d 972, 973-74, 977-78 (1984) (25% of group life insurance; insurer paid proceeds routinely without question; attorney's claimed services were "artificial" and "exaggerated"), cert. denied, 470 U.S. 1053, 105 S.Ct. 1757, 84 L.Ed.2d 820 (1985); In re St. John, 43 A.D.2d 218, 219-22, 350 N.Y.S.2d 737, 738-40 (1974) (33 1/3% of accidental death benefits; attorney spent 20 hours completing application and conferring with insurer; not a "collection matter"); In re Stafford, 36 Wash.2d 108, 113, 119, 216 P.2d 746, 748, 752 (1950) (en banc) (50% of life insurance; attorney spent 47 hours to locate beneficiary; attorney had beneficiary execute a contingent-fee contract for attorney to collect for client "an interest in a small estate").

Contracts for contingent fees, generally having a greater potential for overreaching of clients than a fixed-fee contract, are closely scrutinized by the courts where there is a question as to their reasonableness. This close scrutiny arises from the duty of the courts to guard against the collection of a clearly excessive fee, thereby fulfilling the primary purpose of attorney-disciplinary proceedings, specifically, protecting the public and maintaining the integrity of the legal profession. See In re Teichner, 104 Ill.2d 150, 160, 83 Ill.Dec. 552, 557, 470 N.E.2d 972, 977 (1984), cert. denied, 470 U.S. 1053, 105 S.Ct. 1757, 84 L.Ed.2d 820 (1985); F. MacKinnon, Contingent Fees for Legal Services 44-45 (1964).[3]

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[3]See Tatterson, 177 W. Va. at 363, 352 S.E.2d at 114 n.9 (citing In re Kennedy, 472 A.2d 1317, 1322-23, 1330-31 (Del.)(50% of temporary total disability workers' compensation to which there was clear entitlement), cert. denied, 467 U.S. 1205, 104 S.Ct. 2388, 81 L.Ed.2d 346 (1984); Horton v. Butler, 387 So.2d 1315, 1317 (La.Ct.App.)(25% of fire insurance proceeds; uncontested loss; attorney merely contacted insurer and accepted proceeds check), cert. denied, 394 So.2d 607 (La.1980); Hausen

Tatterson, 177 W.Va. at 362-63, 352 S.E.2d at 113-14 (footnote omitted and footnote added).

Under these rules of professional conduct, as well as the standards enunciated by this Court interpreting those rules, the contingent fee charged by Ms. Coltelli-Rose is excessive, unreasonable, and, at a minimum, raises the question that said fee might be unethical as well. Not only was the time, labor, legal skills and experience put forth by Ms. Coltelli-Rose to receive the medical payment proceeds de minimis, at best; but, the fee was simply not based upon any contingent event. For the majority to completely disregard any discussion of the ethical duty that a lawyer has to his/her client not to charge a fee that is clearly excessive demonstrates an abandonment of the duty of this Court to "guard against the collection of a clearly excessive fee," "protect[] the public and maintain[] the integrity of the legal profession." See id. at 363, 352 S.E.2d at 114. As we have held on many occasions, "[t]his Court is the final arbiter of legal ethics problems . . . ." Syl. Pt. 3, in part, Committee on Legal Ethics v. Blair, 174 W.Va. 494, 327 S.E.2d 671 (1984), cert. denied, 470 U.S. 1028 (1985). For the majority to completely fail to tackle at least an examination of the ethical considerations of the contingent fee charged in this case,

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v. Davis, 112 Misc.2d 992, 993, 448 N.Y.S.2d 87, 89 (Civ.Ct.1981)(40-50% of undisputed no-fault insurance; attorney entitled to no fee); In re Hausen, 108 A.D.2d 206, 206-08, 488 N.Y.S.2d 742, 742-43 (1985) (same matter as in Hausen v. Davis; clearly excessive fee under DR 2-106(A)); Harmon v. Pugh, 38 N.C.App. 438, 442-43, 445, 248 S.E.2d 421, 423-25 (1978) (20% of life insurance; attorney through correspondence obtained medical information and autopsy report; attorney entitled to compensation on quantum meruit basis for "menial tasks" in uncontested claim), petition for discretionary review denied, 296 N.C. 584, 254 S.E.2d 33 (1979); C. Wolfram, Modern Legal Ethics § 9.4.2 at 532-33 (1986). See generally American Bar Foundation, Annotated Code of Professional Responsibility 100-02 (1979); annotation, Attorney's Charging Excessive Fee as Ground for Disciplinary Action, 11 A.L.R. 4th 133 (1982)).

undermines this Court's responsibility to uphold the ethical principles of the legal profession and sends the wrong message to the members of our Bar.

For these reasons, I dissent.