

14-1333

IN THE CIRCUIT COURT OF HANCOCK COUNTY, WEST VIRGINIA

CHRISTOPHER J. WALLACE, and  
THE WALLACE FIRM, PLLC,

PLAINTIFFS,

VS.

// CIVIL ACTION NO. 13-C-56

RAYMOND A. HINERMAN, and  
HINERMAN & ASSOCIATES, PLLC,

DEFENDANTS.

CIRCUIT COURT  
2014 DEC -5 AM 8:14  
FILED  
HANCOCK COUNTY CLERK  
BRENDA L. JACKSON

ORDER

Pending is "*Plaintiffs' Motion Requesting Findings of Fact and Conclusions of Law*" which was filed for the express purpose of providing Plaintiffs with a record upon which an extraordinary writ of prohibition could be filed because The West Virginia Supreme Court of Appeals declined to consider a previously filed appeal based upon its determination that the order appealed was interlocutory in nature. So that Plaintiffs may get to the heart of what they truly want, this Court has entered an *Amended Judgment Order - Partial* which expressly included a **W.Va. R.Civ.P. 54(b)** designation. Accordingly, the substantive issues complained of should be readily appealable.

Based upon the foregoing, Plaintiffs' instant motion is **DENIED** as moot.

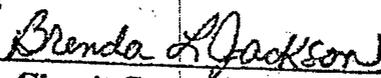
The Clerk of this Court shall, in accord with **W.Va. R.Civ.P. 77(d)**, transmit a copy of this Order to all counsel of record.

Entered: December 2, 2014.

  
DAVID W. HUMMEL, JR.  
Circuit Court Judge

A TRUE COPY

Attests

  
Brenda L. Jackson  
Clerk, Circuit Court, Hancock County

Deputy

IN THE CIRCUIT COURT OF HANCOCK COUNTY, WEST VIRGINIA

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DEFENDANTS.

AMENDED JUDGMENT ORDER – PARTIAL

- Original *Judgment Order – Partial* entered March 1, 2014. Amended order entered to expressly include W.Va. R.Civ.P. 54(b) designation.

On April 8, 2013, Plaintiffs herein filed *Complaint for Declaratory Judgment* expressly, “limited to the fees earned from workers’ compensation matters for which the clients originally signed a contract with Hinerman & Associates, but have subsequently elected to have Plaintiffs represent them in exchange for periodic fees... Thus, the subject of this litigation is limited to the allocation of fees for the 53 workers (sic) compensation matters.” *Complaint* @ ¶¶ 5 and 13.

By Administrative Order entered by the Chief Justice of The West Virginia Supreme Court of Appeals, the undersigned was appointed to preside over the instant litigation in the First Judicial Circuit; specifically, in the Circuit Court of Hancock County, West Virginia.

On July 25, 2013, the above-styled matter came on for hearing at which time came Plaintiffs Christopher J. Wallace, Esq., *pro se*, and on behalf of The Wallace Firm PLLC, and

CIRCUIT COURT  
2014 DEC -5 AM 8: L2  
HANCOCK COUNTY  
BRENDA L. JACKSON, CLERK

came Defendants Raymond A. Hinerman, Esq., *pro se*, and on behalf of Hinerman & Associates, PLLC. It was at this hearing that the parties unanimously agreed that Kopelman and Assoc., L.C. v. Collins, 196 W.Va. 489, 473 S.E.2d 910 (1996) shall be the law applied to the distribution of attorney fees in all disputed matters which are the subject of the instant civil action.

At the July hearing, Plaintiffs informed the Court that several files at issue had already generated fees and were closed, the specific number of which was not known at the time of the hearing. All of the closed files in Plaintiffs' possession were ordered to be delivered to the office of Hinerman & Associates, PLLC no later than August 12, 2013. Noting that Defendant Hinerman would be out of the country until September 3, 2013, he had thirty (30) days from the date of his return to review said files. Upon the expiration of same said time-frame, the files were to be returned to Plaintiffs, who were responsible for retrieving them. Hinerman was permitted to make true and accurate copies of any and all files as he deemed reasonable and necessary.

It was ordered that from the files delivered to Defendants, Plaintiffs were to select two files to be presented at an evidentiary hearing before the bench where the Court would apply Kopelman as set forth above. Defendants were then to select two files to be similarly presented at the aforementioned hearing. The parties were urged to agree on a fifth file to be presented for determination.

As memorialized in the order emanating from the July hearing, it was the Court's express intent that the determinations made by it relative to the five "sample" cases would serve as a template or framework for the parties to amicably resolve the balance of the disputed matters which are the subject of the instant civil action.

The Court held an evidentiary hearing on October 16, 2013, at which time the respective parties were permitted to, and did, present any and all evidence and argument they deemed necessary in support of their position as well as in opposition to their opponents' position. Furthermore, the Court granted the parties an opportunity to file post-hearing written arguments.

Under West Virginia law, whether and how to compensate a lawyer when a contingent fee contract is prematurely terminated depends on whether the lawyer was discharged, withdrew with the consent of the client, or withdrew voluntarily without consent. A lawyer discharged by the client without cause can recover on the contingent fee contract or in *quantum meruit*.

Clayton v. Martin, 108 W.Va. 571, 151 S.E. 855 (1930); Polsey & Son v. Anderson, 7 W.Va. 202, 23 Am.Rep. 613 (1874).

There is nothing in the law or our public policy to preclude a client from privately entering into a contingent fee agreement. See Venegas v. Mitchell, 495 U.S. 82, 90, 110 S.Ct. 1679, 1684, 109 L.Ed.2d 74, 84 (1990) (the "reasonable attorney's fee" policy does not interfere with the enforceability of a contingent-fee contract.") 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. However, recovery on a contract is permitted only when the contract explicitly provides for the type of termination involved in the particular case. Otherwise, West Virginia, like the majority of jurisdictions, limits the discharged attorney's recovery to *quantum meruit* (or the less of *quantum meruit* and the contract price), refusing to apply the normal contract rules to an attorney-client relationship because of the special trust and confidence that must exist between attorney and client. See Hardman v. Snyder, 183 W.Va. at 35-36, 393 S.E.2d at 673-74, quoting Covington v. Rhodes, 38 N.C.App. 61, 65, 247 S.E.2d 305, 308 (1978).

*Quantum meruit* "means 'as much as deserved,' and measures recovery under implied contract to pay compensation as reasonable value of services rendered." *Black's Law Dictionary* 1243 (6<sup>th</sup> ed. 1990), in part. (Citation omitted.)

The Court in Kopelman and Associates L.C. v. Collins 196 W.Va. 489, 473 S.E.2d 910 (1996), expressly held that, "a circuit court must look at more than hourly reimbursement in making a *quantum meruit* determination." (Emphasis added.)

If the contract between the attorney and client is specific as to the method and measure of fee payment, the contract itself is controlling. In cases where a relationship is terminated earlier than the completion of the job, unless the contract specifically provides otherwise, there is no occasion to consider payment under the contingency fee arrangement.

Each of the Hinerman & Associates, PLLC contracts in the five (5) "sample" cases before the Court contain the following provision:

"Should the client terminate this relationship without good cause, **HINERMAN & ASSOCIATES, PLLC**, is entitled to collect their fee as set forth herein. Otherwise, the law set forth in Kopelman v. Gallis, 473 S.E.2d 910 (W. Va. 1996), applies."

There is no evidence of record or suggestion made that any of the contracts entered into between Hinerman & Associates, PLLC and the clients in the five (5) "sample" cases were not entered into voluntarily. Furthermore, there is no evidence of record or suggestion that such contracts are excessive, overreaching, or in any way take inequitable advantage of the respective clients. Accordingly, the Court **FINDS** the Hinerman & Associates, PLLC's contingent fee contracts legally enforceable in each of the five (5) "sample" cases.

Although there is no evidence of record that any client in the five (5) "sample" cases actually discharged Hinerman & Associates, PLLC, the parties hereto appear to be operating with the understanding that each of the five clients did, in fact, discharge Hinerman & Associates, PLLC. Not a single "former client" testified at the October 16, 2013, evidentiary hearing. Not a single sworn statement or Affidavit from a "former client" was entered into evidence at any time regarding any issue whatsoever before the Court; including, but not limited to, the alleged "discharge" of Hinerman & Associates, PLLC or the circumstances and/or reason(s) therefor. At best, Plaintiffs rely upon the following sentence from a letter presented on Plaintiff, Christopher J. Wallace, Esq., letterhead to clients of Hinerman & Associates, PLLC:

"[ X] I wish to continue being represented by Christopher Wallace. Please transfer to him, at the above stated address all records, files and property in the possession of Hinerman & Associates, PLLC as quickly as possible."

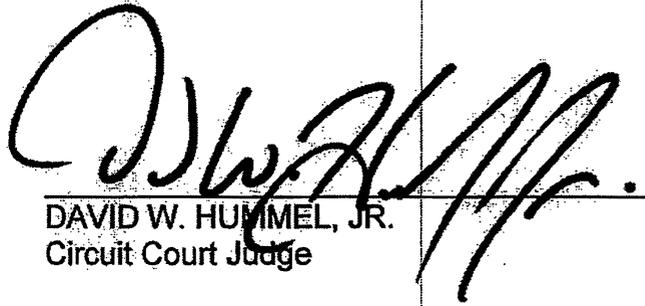
To the extent the parties hereto appear to agree that Hinerman & Associates, PLLC has, in fact, been "discharged" as counsel for the clients in the disputed matters which are the subject of the instant civil action, the Court will not disagree. Accordingly, the Court **FINDS** that each of the five (5) subject contingent fee contracts was prematurely terminated by the respective client thereto; resulting in the discharge of Hinerman & Associates, PLLC. Furthermore, the Court **FINDS** that each such discharge was without cause – as there was no evidence of any kind or character whatsoever to the contrary.

Based upon the foregoing **FINDINGS**, the parties' mutual position that the Court is to apply Kopelman in arriving at its' determination is without merit. Kopelman is only to be applied in the context of a *quantum meruit* determination. In as much as the Court has found Hinerman & Associates, PLLC's contingent fee contracts legally enforceable in each of the five (5) "sample" cases and that each such contract was prematurely terminated by the respective client without cause, Hinerman & Associates, PLLC's is entitled to recover on each contingent fee contract.

Furthermore, the Court expressly determines, in accord with **W.Va. R.Civ.P. 54(b)**, that there is no just reason to delay entry of final judgment as to the five (5) "sample" cases or claims out of the fifty-three (53) total cases or claims alleged in the instant civil action. Accordingly, the Court directs the Clerk of the Court to enter **FINAL JUDGMENT** as set forth above.

It is all so ORDERED.

Entered: December 2, 2014.



DAVID W. HUMMEL, JR.  
Circuit Court Judge

A TRUE COPY  
Attests Brenda Jackson  
Clerk, Circuit Court, Hancock County  
Deputy

IN THE CIRCUIT COURT OF HANCOCK COUNTY, WEST VIRGINIA

CHRISTOPHER J. WALLACE, and  
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DEFENDANTS.

ORDER

Pending in the above-styled civil action is "Plaintiffs' Motion to Reconsider or in the Alternative Motion to Re-Open Hearing" which has been fully briefed and orally argued by counsel herein.

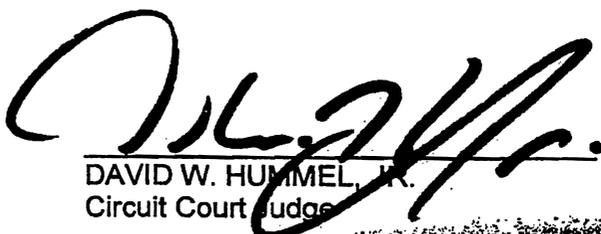
Having considered all filings of record as well as the arguments of counsel, the Court respectfully declines to reconsider its "Judgment Order – Partial" which is the subject of the aforementioned motion.

The parties' respective objections and exceptions are both noted and preserved.

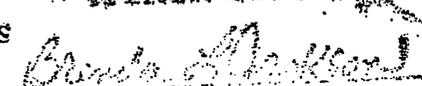
It is so ORDERED.

The Clerk of this Court shall, in accord with W.Va. R.Civ.P. 77(d), transmit a copy of this Order to all counsel of record.

Entered: July 29, 2014.

  
DAVID W. HUMMEL, JR.  
Circuit Court Judge

Attests

  
Clerk, Circuit Court, Hancock County

Deputy

**IN THE CIRCUIT COURT OF HANCOCK COUNTY, WEST VIRGINIA**

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**PLAINTIFFS,**

**VS.**

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**DEFENDANTS.**

**JUDGMENT ORDER – PARTIAL**

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On July 25, 2013, the above-styled matter came on for hearing at which time came Plaintiffs Christopher J. Wallace, Esq., *pro se*, and on behalf of The Wallace Firm PLLC, and came Defendants Raymond A. Hinerman, Esq., *pro se*, and on behalf of Hinerman & Associates,

PLLC. It was at this hearing that the parties unanimously agreed that Kopelman and Assoc., L.C. v. Collins, 196 W.Va. 489, 473 S.E.2d 910 (1996) shall be the law applied to the distribution of attorney fees in all disputed matters which are the subject of the instant civil action.

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As memorialized in the order emanating from the July hearing, it was the Court's express intent that the determinations made by it relative to the five "sample" cases would serve as a template or framework for the parties to amicably resolve the balance of the disputed matters which are the subject of the instant civil action.

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Under West Virginia law, whether and how to compensate a lawyer when a contingent fee contract is prematurely terminated depends on whether the lawyer was discharged, withdrew with the consent of the client, or withdrew voluntarily without consent. A lawyer discharged by the client without cause can recover on the contingent fee contract or in *quantum meruit*. Clayton v. Martin, 108 W.Va. 571, 151 S.E. 855 (1930); Poisey & Son v. Anderson, 7 W.Va. 202, 23 Am.Rep. 613 (1874).

There is nothing in the law or our public policy to preclude a client from privately entering into a contingent fee agreement. See Venegas v. Mitchell, 495 U.S. 82, 90, 110 S.Ct. 1679, 1684, 109 L.Ed.2d 74, 84 (1990) (the "reasonable attorney's fee" policy does not interfere with the enforceability of a contingent-fee contract.") Courts in West Virginia will uphold contingency fee arrangements voluntarily entered into by the parties as long as they are not excessive,

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There is no evidence of record or suggestion made that any of the contracts entered into between Hinerman & Associates, PLLC and the clients in the five (5) "sample" cases were not entered into voluntarily. Furthermore, there is no evidence of record or suggestion that such contracts are excessive, overreaching, or in any way take inequitable advantage of the respective clients. Accordingly, the Court **FINDS** the Hinerman & Associates, PLLC's contingent fee contracts legally enforceable in each of the five (5) "sample" cases.

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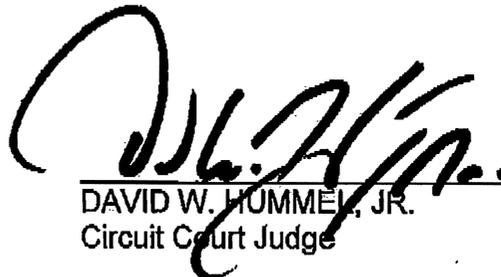
"[X] I wish to continue being represented by Christopher Wallace. Please transfer to him, at the above stated address all records, files and property in the possession of Hinerman & Associates, PLLC as quickly as possible."

To the extent the parties hereto appear to agree that Hinerman & Associates, PLLC has, in fact, been "discharged" as counsel for the clients in the disputed matters which are the subject of the instant civil action, the Court will not disagree. Accordingly, the Court **FINDS** that each of the five (5) subject contingent fee contracts was prematurely terminated by the respective client thereto; resulting in the discharge of Hinerman & Associates, PLLC. Furthermore, the Court **FINDS** that each such discharge was without cause – as there was no evidence of any kind or character whatsoever to the contrary.

Based upon the foregoing **FINDINGS**, the parties' mutual position that the Court is to apply Kopelman in arriving at its' determination is without merit. Kopelman is only to be applied in the context of a *quantum meruit* determination. In as much as the Court has found Hinerman & Associates, PLLC's contingent fee contracts legally enforceable in each of the five (5) "sample" cases and that each such contract was prematurely terminated by the respective client without cause, Hinerman & Associates, PLLC's is entitled to recover on each contingent fee contract.

It is all so **ORDERED**.

Entered: March 1, 2014.



DAVID W. HUMMEL, JR.  
Circuit Court Judge

### **CIRCUMSTANCES OF JUDICIAL SPECIAL ASSIGNMENT**

When the underlying Complaint was filed it was originally assigned to Judge David Sims of the First Circuit. Judge Sims, believing he had a conflict informed the presiding Judge of the First Circuit of this fact. The remaining three judges of the First Circuit also indicated that they had a conflict. The presiding judge then referred the matter to the Clerk of the Supreme Court. The Clerk appointed Judge David Hummel, Jr. of Marshall County to hear this matter.

**CONFIDENTIALITY**

At the October 16, 2013 hearing on the first five test cases, the trial court Ordered that the pleadings, testimony and other files in this matter be kept under seal. This Order of confidentiality was made *sua sponte* from the bench. No written Order was created.

## NATURE OF THE CASE, RELIEF SOUGHT AND OUTCOME BELOW

**Nature of the Case:** The case originated with a Complaint for Declaratory Judgment filed by attorney Christopher Wallace and The Wallace Firm, PLLC (“Wallace”) in order resolve a fee dispute between Wallace and his former employer Hinerman & Associates, owned by attorney Raymond Hinerman (“Hinerman”).

Wallace was an at-will employee for 14 years before he resigned from Hinerman & Associates in January of 2013 to begin his own practice. At the time of his resignation, Wallace provided Hinerman with a complete list of his clients, including approximately 52 individuals with workers compensation claims serviced exclusively by Wallace during his employment. After Wallace’s resignation, all clients, with the exception of one, opted to remain represented by Wallace, discharging Hinerman. Wallace proposed a division of fees based on the West Virginia Supreme Court’s framework for resolving attorney fee disputes in *Kopelman and Assoc., L.C. v Collins*, 196 W.Va. 489, 473 S.E.2d 910 (1996). Hinerman rejected the proposal.

Wallace filed the initial Complaint, asking the Court to apply *Kopelman* to the 52 cases in dispute. At the initial hearing on July 26, 2013, the parties and the Court agreed that *Kopelman* was the appropriate framework for dividing fees and thereafter ordered that a *Kopelman* hearing be conducted on five “test” cases.

Wallace argued on October 16, 2013 that the Court should consider the enumerated factors outlined in *Kopelman* and divide fees based on *quantum meruit*, with hours worked by each firm as the primary factor in allocating future fees. Hinerman argued that Wallace was entitled to no future fees of any kind for his future work on the cases primarily based on the “catch-all” *Kopelman* factor, because Wallace failed to provide Hinerman with advance notice of his departure and began preparations to start his own practice prior to his resignation, among other things. The substance of the *Kopelman* factors are not at issue in this appeal.

**Outcome below:** On March 1, 2014, the Court issued a “Judgment Order – Partial” constituting a final order on the five test cases. Instead of applying the *Kopelman* framework, the Court ordered that Hinerman was entitled to fully recover on each contingent fee contract because the clients discharged Hinerman & Associates without cause, specifically noting that there was “no evidence of any kind or character whatsoever to the contrary.” The Hinerman & Associates contract contains the following provision:

“Should the client terminate this relationship without good cause, Hinerman & Associates is entitled to collect their fee as set forth herein. Otherwise, the law set forth in *Kopelman* applies.”

The term “good cause” is not defined in the contract. Hinerman had never plead, raised, argued or even contemplated the contract defense applied by the Court. Consequently, Wallace proffered no evidence to rebut such a defense because Hinerman had already admitted, in the record, that “good cause” existed and West Virginia law protects a client’s absolute right to select his or her own counsel. It was a non-issue. Wallace immediately filed a Motion to Alter or Amend Judgment to the Court’s March 1, 2014 Order.<sup>1</sup>

On July 29<sup>th</sup>, 2014, the lower court issued a single-page Order denying Wallace’s Motion. The court did not address or respond to any of the legal or factual errors raised by Wallace, including the fact that Wallace specifically averred in his Complaint that good cause to discharge Hinerman existed and that Hinerman failed to respond to such an averment – an admission as a matter of West Virginia law. After this Court deemed the Order interlocutory, the lower court denied Wallace’s request for Findings of Fact and Conclusions of Law sufficient to file a Writ of Prohibition and instead modified the Order to make it clearly final and appealable.

**Relief Sought:** Reversal of the Court’s March 1<sup>st</sup> Order, finding that:

1. Record evidence of “good cause” for the clients to discharge Hinerman has been established including Hinerman’s admission in his Answer that good cause existed and Wallace’s undisputed testimony that the clients’ discharge of Hinerman was based on the clients’ desire to continue being represented by Wallace, the only attorney who had ever performed work on their case.
2. The alleged lack of “good cause” evidence does not permit Hinerman to lawfully recover against the clients on his contingent fee agreements because Hinerman, as the party attempting to enforce a non-defined, vague term in a contract *he drafted*, has the burden of proof to establish that the “good cause” term has not been met – particularly where Hinerman never plead, asserted, raised or argued such a contract defense.
3. The lower court’s interpretation of the Hinerman contract violates West Virginia law and public policy by impinging on a client’s absolute right to select his or her own counsel, is overreaching and takes inequitable advantage of the client by failing to acknowledge that a client’s right to remain represented by Wallace constitutes “good cause.”

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<sup>1</sup> This pleading was originally filed as a Motion to Reconsider. However, Wallace made clear in the reply brief and argument before the Court, that pursuant to the authority Syl. Pt. 2, Powderidge Unit Owner’s Ass’n v. Highland Properties, LTD., 196 W.V. 692, 474 S.E. 2d 872 (1996) the matter was being treated as a Motion to Alter or Amend Judgment as found in Rule 59(e) of the Rules of Civil Procedure.

## ASSIGNMENTS OF ERROR

**I. The Court erred in finding that no evidence was presented to establish that the clients discharged Hinerman & Associates for “good cause.”**

The Hinerman & Associates Contract contains a two-part termination provision that specifically spells out that Hinerman’s entitlement to fees is based, first and foremost, on whether or not the client terminated the agreement for “good cause”:

“Should the client terminate this relationship without good cause, Hinerman & Associates is entitled to collect their fee as set forth herein. Otherwise, the law set forth in Kopelman applies.”

The trial court has taken this language and turned a hearing about the distribution of fees between attorneys in to a finding that good cause was not proven below. This was the case even though each side and the Court specifically agreed that *Kopelman and Assoc., L.C. v Collins*, 196 W.Va. 489, 473 S.E.2d 910 (1996) would be the law applied to the case and that a hearing applying the *Kopelman* factors would take place. Most troubling is the fact that the trial court completely ignored an admission by Hinerman that good cause existed.

Specifically, the Court found that each discharge by the client under the Hinerman contract was without cause – as there was “*no evidence of any kind or character whatsoever to the contrary.*”

However, in Plaintiffs’ Complaint for Declaratory Judgment, Plaintiff averred, in Paragraph 26:

“...the clients, elected in good faith, to remain represented by Wallace, the only attorney who ever performed work on their matters. As such, **each such client had “good cause” to terminate their relationship with Defendants.**” (Emphasis added)

Hinerman failed to deny this averment, and thus the averment is deemed admitted by Hinerman as a matter of law in West Virginia. See W.Va. Rules of Civ. Procedure 8(d) (Effect of failure to deny – Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading).

Further, at no time did Hinerman ever advance, argue or even reference this argument. Finally, Hinerman's repeated admissions that *Kopelman* applied to the disputed cases clearly established his belief that good cause had been established, the first step of the above referenced provision that triggers the application of *Kopelman*. Otherwise, why would Hinerman, as drafter of the contract, agree that *Kopelman*, a framework for *distributing* settled fees (part two of the contract provision) applies at all in this matter?

Simply put, this was a non-issue between the parties until the trial court created it. The court's ruling took a simple fee dispute between attorneys and created a procedural and substantive mess for the five test cases and for every case following.

All of the arguments above were raised in Wallace's Motion to Alter or Amend Judgment. However, the trial court, without any explanation or examination of the issues, denied the Motion in a one page Order. The court failed to even address or even mention the issue that an admission regarding "good cause" was in the record before it. When Wallace asked the trial court to provide Findings of Fact and Conclusions of Law so that Wallace could proceed with a Writ of Prohibition, the trial court again declined to provide an explanation of its findings (including the fact that it disregarded the Hinerman admission) and simply modified the Order as "final" and therefore subject to the instant appeal.

The first issue before this Court is whether a lower tribunal is free to ignore, without explanation, an admission in the record on what that court evidently believes to be the key issue in the case. This is clear and reversible error.

The second issue is whether a trial court is free to ignore the record evidence establishing that good cause existed. The only evidence regarding good cause presented at hearing was Wallace's affirmative testimony that the clients desired to change law firms and work with the only attorney who had ever worked on their files – attorney Wallace. Under West Virginia law, the client's fundamental right to select his or her own counsel is good and sufficient cause for any client to leave one law firm for another. Such a right is implied into every representation contract and cannot be circumvented. To find otherwise would violate long-standing West Virginia law, as detailed below.

This Honorable Court should address this issue for several reasons. First, the error of ignoring an admission on what the trial court believes to be the seminal issue in a case cannot be permitted to stand. It is the clearest and plainest of error. Second, the trial court's opinion sets a dangerous precedent that interferes with a client's sacrosanct right to choose their own attorney. This will be further addressed below.

Finally, the trial court advanced an argument that no party raised or even contemplated. In doing so it presents a "Hinerman takes all" scenario based on an issue (good cause) that had been admitted and that was not the focus of the *Kopelman* hearing below. This has effectively deprived Wallace of his due process rights for a fair hearing and a full adjudication on the merits. Moreover, it sets a precedent clearly contrary to West Virginia law. This issue begs this Court's attention.

**II. The Court erred in finding that the alleged lack of "good cause" evidence permits Hinerman to lawfully recover against the clients on his contingent fee agreements because Hinerman, as the party attempting to enforce a non-defined, vague term in drafted, has the burden of proof to establish that the "good cause" contract term has not been met.**

The first issue is one of simple contract law. The term "good cause" is undefined in the Hinerman contract. Under basic contract law, a vague contract term is construed against the drafter. Hinerman, as the party attempting to enforce an undefined and vague contract term, has the burden of proof in establishing that the term has not been met. An absence of evidence regarding "good cause" does not, even if true, meet that burden. More importantly, there is no evidence of any kind to even suggest that the clients could have understood the Court's interpretation of the contract – that they were signing away the fundamental right under West Virginia law to choose their own counsel.

The trial court flipped the burden of proof against the parties. The court's order makes it clear that Wallace, who did not draft the agreement, has the burden of establishing good cause under the Hinerman contract. This violates basic tenants of contract law. Hinerman drafted the agreement and inserted the vague and undefined term "good cause". Any ambiguity or doubt in that term's meaning must be construed against the drafter. However, the Court has construed that term against Wallace, using

it as a club to defeat even consideration of an otherwise valid claim for fees under the appropriate West Virginia framework set forth in *Kopelman*.

The second issue involves the likely and undesirable outcome of the trial court's order; Hinerman suing former clients for duplicate fees. The court's order permits Hinerman to "recover on each contingent fee contract". Rather than divide the settled fees amongst the attorney litigants, the Court's order operates solely to allow Hinerman to proceed against these former clients to recover attorney fees. This is precisely the litigious quagmire that *Kopelman* was designed to avoid. By failing to apply *Kopelman*, this is precisely the situation the trial court has invited. Long-standing West Virginia law prohibits a discharged attorney from recovering on a contingent fee contract and instead compensates the attorney for the reasonable value of the services provided. Lawyers suing former clients for fees being held in escrow can do nothing but hurt the legal profession as a whole. The clients will be forced to pay double fees, which is strictly contrary to West Virginia law. The trial court's interpretation creates an over-reaching and excessive contract.

This Honorable Court must address these issues as they deal with something as simple as the interpretation of basic contract law and as gravely important as the attorney/client relationship itself, if not the integrity of the legal profession.

**III. The Court's finding that Hinerman can enforce his contract against the clients violates West Virginia law and public policy by impinging on a client's absolute right to select his or her own counsel and takes inequitable advantage of the client by failing to acknowledge that a client's right to remain represented by Wallace is "good cause."**

It is well-settled in West Virginia that a discharged attorney cannot recover on a contingency fee agreement, but can recover in *quantum meruit*:

*"Where an attorney has been discharged, without fault on his part, from further services in a suit just begun by him under a contract for payment contingent upon successful prosecution of the suit, his measure of damages is not the contingent fee agreed upon, but the value of his services rendered; and in the absence of evidence of the reasonable value of such services, no recovery can be had."*

*Kopelman*, citing *Clayton v. Martin*, 108 W.Va. 571, 151 S.E. 855 (1930).

The rationale for this principle was articulated in *Hardman v. Snyder*, 183 W.Va. 34, 393 S.E.2d 672 (1990), citing *Covington v. Rhodes*, 38 N.C.App. at 65, 247 S.E.2d at 308 and 7 C.J.S. Attorney and Client § 109:

*“It is a settled rule that because of the special relationship of trust and confidence between attorney and client the client may terminate the relationship at any time, with or without cause.” ... The courts which follow the modern trend also based their holdings on the view that a client’s discharge of his attorney is not a breach of contract. Such a discharge does not constitute a breach of contract for the reason that it is a basic term of the contract, implied by law into it by reason of the special relationship between the contracting parties, that the client may terminate the contract at will. (Emphasis added).*

The Court in *Kopelman* further clarified these principles:

*Recovery on a contract is permitted only when the contract explicitly provides for the type of termination involved in the particular case. Otherwise, West Virginia, like the majority of jurisdictions, limits the discharged attorney’s recovery to quantum meruit (or to the lesser of quantum meruit and the contract price), refusing to apply normal contract rules to an attorney-client relationship because of the special trust and confidence that must exist between attorney and client. See Hardman v. Snyder, 183 W.Va. at 35-36, 393 S.E.2d at 673-74, quoting Covington v. Rhodes, 38 N.C.App. 61, 65, 247 S.E.2d 305, 308 (1978). The majority of jurisdictions reason that allowing recovery on a contract impinges on a client’s absolute right to select the lawyer of his or her choice by forcing the client to pay double fees, one to the discharged lawyer and one to the new lawyer. These jurisdictions typically imply a term into the contingency contract allowing discharge of a lawyer at will so that the discharge is not considered a breach and does not give rise to contract damages. Kopelman at fn. 7.(Emphasis added).*

While the attorney is free to include a specific provision for a division of fees in the representation agreement, that provision cannot be excessive, overreaching and cannot take inequitable advantage of a client. This is precisely what the Hinerman provision does when it fails to acknowledge that a client’s right to change attorneys is “good cause.”

First, the Hinerman contract does not “explicitly provide for the type of termination” involved in this case. The contract fails to define or provide any example of “good cause” and is therefore so vague as to provide no notice whatsoever to the client that changing lawyers, a client’s fundamental right, would not be considered “good cause.”

Second, the effect of the Hinerman “take it all” provision allowing the firm to recover its entire contingency fee if the client chooses to follow his or her attorney to a new firm “impinges on a client’s

absolute right to select the lawyer of his or her choice by forcing the client to pay double fees, one to the discharged lawyer and one to the new lawyer.” *Id.* This provision ultimately results in the precise circumstance that was outlawed by *Clayton v. Martin*. Allowing Defendants to “contract around” the protections provided to the special relationship between attorneys and clients takes, by definition, inequitable advantage of the client. **Particularly where the drafter of the contract fails to inform the client that they are effectively waiving their “absolute right to select the lawyer of his or her choice”** by failing to define “good cause.” *Id.* Emphasis added.

In light of well-settled West Virginia law that forbids impingement of a client’s absolute right to select his or her own counsel and thus precludes the discharged attorney from recovering an entire contingent fee in a breach of contract claim, the Court’s finding that the Hinerman “take it all” contract provision is not excessive, overreaching or takes inequitable advantage of the client is an error of law. Enforcement of the Hinerman “take it all” provision on the basis that a client’s desire to select his or her own counsel is not “good cause” has the identical effect of a claim for the entire contingent fee under breach of contract – an action specifically precluded by West Virginia law.

Neither Hinerman nor the Court cited any case law which supports a “take it all” provision as lawful. Certainly, a law firm can contract with the client for a specific *division of fees* compensating the firm for the “reasonable value” of its services rendered in the event the client prematurely discharges the attorney under specifically identified circumstances. That is not the case here. The Hinerman provision is simply a circumvention of West Virginia law in the form of a disguised breach of contract claim for the entire contingency fee. The provision effectively destroys the client’s right to select counsel by forcing the client to pay double fees in order to follow his or her existing lawyer to a new firm.

This is an issue of paramount importance that needs this Court’s attention. It is also a matter that is capable of repetition that could affect far more than just the litigants in this fee dispute. The court’s holding has a drastic effect on the “absolute right” to select the lawyer of a client’s choice. It abandoned a long line of precedent by entering the Order in the manner it did. Access to the lawyer a client desires is a matter of grave importance that surely warrants this Court’s addressing of this issue.