IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 14-1333

CHRISTOPHER J. WALLACE and THE WALLACE FIRM, PLLC

Plaintiffs-Below, Petitioners

v.

RAYMOND A. HINERMAN and HINERMAN & ASSOCIATES, PLLC

Defendants-Below, Respondents

Honorable David W. Hummel, Jr.
Sitting by Special Assignment
Hancock County Circuit Court
Civil Action No. 13-C-56

BRIEF OF THE PETITIONERS

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I. ASSIGNMENTS OF ERROR

1. The Court erred in holding that there was no evidence that clients discharged Hinerman & Associates for "good cause."

2. The Court's finding that Petitioner can enforce his contingent fee agreement against former 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."

3. The Court failed to establish that Respondent, as the party attempting to enforce a non-defined, vague term in an agreement he drafted, has the burden of proof to establish that the contract term has not been satisfied – not Petitioner nor the client.

II. STATEMENT OF THE CASE

A. Procedural History

The case originated with a Complaint for Declaratory Judgment filed by attorney Christopher Wallace and The Wallace Firm, PLLC ("Petitioner") in order resolve a fee dispute between Wallace and his former employer Hinerman & Associates, owned by attorney Raymond Hinerman ("Respondent"). App. 4.

Petitioner was an at-will employee for 14 years before he resigned from Hinerman & Associates in January of 2013 to begin his own practice. App. 314-315. At the time of his resignation, Petitioner provided Respondent with a complete list of his then current clients, including approximately 52 individuals with workers compensation claims serviced exclusively by Petitioner during his employment. App. 321. Each of these clients had a contingent fee agreement with Hinerman & Associates, Petitioner's at-will employer. None of these clients had any contact with other attorneys at Respondent's law firm, including Respondent. App. 351. Nor were the clients generated by Respondent or his law firm. App. 50-51. To the contrary, the clients were sent to Petitioner directly through referrals. *Id.*

After Petitioner's resignation, all clients, with the exception of one, opted to remain represented by Petitioner, discharging Respondent. App. 6. Petitioner proposed a division of future 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). App. 7. Respondent rejected the proposal, alleging that he was entitled to collect all future fees based on his contingent fee agreement with those clients, including those future fees generated after the clients discharged Respondent. App. 8-9.

Respondent filed a 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. App. 173. The Court issued an Order framing the scope of the argument as such. App. 185. The Order did not refer to any contract defenses, as none had been asserted at the initial hearing or in any pleading.

Petitioner 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. Respondent argued that Wallace was entitled to no fees of any kind for his future work on the cases largely based on the "catch-all" *Kopelman* factor instead of the enumerated factors. Respondent primarily argued that Petitioner was at some sort of fault when he failed to provide Respondent with advance notice of his departure from the firm and began preparations to start his own practice prior to his resignation, among other things. Petitioner argued that all of those actions were entirely appropriate and lawful as at at-will employee and in fact, necessary under the West Virginia Rules of Professional Conduct in order for him to effectively service his clients. Respondent <u>did not</u>

assert any contract defense regarding "good cause" at that time or any other in this litigation. **The substance of the *Kopelman* factors are not at issue in this appeal, as the lower court had not ruled on those facts.**

B. Outcome below

On March 1, 2014, the Court issued a "Judgment Order – Partial" constituting a final order on the five test cases. App. 768. Instead of applying the *Kopelman* factors, the Court ordered that Respondent 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 drafted by Respondent. Respondent had never plead, asserted, argued or even contemplated the contract defense applied by the Court. In fact, Respondent failed to deny Petitioner's specific averment that the contract term had been met in paragraph 26 of Petitioner's Complaint, and thus Respondent admitted under West Virginia law that the good cause contract term *had* been met:

> "...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). App. 10.

Consequently, Petitioner proffered no evidence to rebut such a defense because Respondent had already admitted in its Answer (as well as in other record evidence) that "good cause" existed. App. 28. Moreover, well-settled West Virginia law protects a client's absolute right to select his or her own counsel and terminate a contingent fee contract at-will. The

discharged attorney's recovery is limited to *quantum meruit* based on the reasonable services provided. It was a non-issue. Petitioner immediately filed a Motion to Alter or Amend Judgment to the Court's March 1, 2014 Order, citing Respondent's admission in the Answer as well as other record evidence on the above legal and factual issues.[1] App. 774.

On July 29th, 2014, the lower court issued a single-page Order denying Petitioner's Motion. App. 843. 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. The Court also was silent regarding the fact that the Order permitting Respondent to enforce a contingent fee agreement against a former client violates West Virginia law and public policy. 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. App. 902.

III. SUMMARY OF ARGUMENT

The underlying case is a simple fee dispute between two West Virginia attorneys that should be appropriately adjudicated in a lower court via *Kopelman*. **To be clear, this appeal does not involve the substantive, fact-based factors as to how fees should be distributed under Kopelman.** That issue has not been ruled upon by the lower Court. Instead, this appeal is more limited in nature, raising three general issues:

[1] This pleading was originally filed as a Motion to Reconsider. However, Petitioner 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.

- The lower court simply ignored an admission in Respondent's Answer regarding satisfaction of the contract term allegedly at issue and equally disregarded ample other record evidence that the contract term had been satisfied. Moreover, the lower court's holding on a contract defense never asserted by Respondent and outside the scope of the Court-defined argument has denied Petitioner his right to a fair hearing and full adjudication under the fee dispute framework established by this Court;
- The lower court's holding that Respondent is entitled to enforce his entire contingent fee agreement against his former clients directly violates settled West Virginia law and public policy;
- Respondent, as the party attempting to enforce his own vague contract term, must carry the burden of proof on satisfaction of that term. Not the Petitioner nor the client.

First, the lower court failed to rule on the simple fee dispute and instead issued an Order based on a contract defense that was never asserted or even contemplated by any party, including the Court, at any time prior to its Order. More troubling, in issuing the Order, the Court ignored Respondent's admission in its Answer that the contract term allegedly at issue had been satisfied. When Petitioner raised this obvious oversight to the Court in its Motion to Alter or Amend Judgment, pointing out ample additional record evidence that the contract term had been met, the Court simply denied the Motion, offering no explanation for its holding. Even then, at no time has Respondent sought leave to amend his Answer. When Petitioner formerly addressed the Court a second time, seeking Findings of Fact and Conclusions of Law sufficient for an interlocutory appeal, the Court again refused to offer any explanation for its holding and simply issued the Order as "final." Unfortunately, in doing so, the lower Court left Respondent with no

other option but to unnecessarily bring a very simple, black and white issue to this tribunal for resolution.

Second, as set forth below, it is well-settled in West Virginia that a discharged attorney cannot recover on a contingency fee agreement against a former client. Instead, the former attorney is compensated for the reasonable value of his services via *quantum meruit.* The rationale for this principle is founded in the public policy that a client may terminate a contract for legal fees at will. Otherwise, the client's absolute right to select the lawyer of his or her choice is impinged by forcing the client to pay double fees. The Court's holding that Respondent may enforce his contingent fee agreement against his former clients based on a vague contract term drafted by Respondent utterly disregards West Virginia law and denies Petitioner resolution of this matter.

Third, the Court issued an Order instructing the parties to present evidence in the fee dispute based on *Kopelman v. Collins*. The Court then ruled on an issue outside the scope of that Order, based on a contract defense never raised by the parties. Moreover, as discussed below, that contract defense had been waived repeatedly via record admissions, including by Respondent's on-point admission regarding the exact contract term in his Answer. App. 28. Petitioner never had the opportunity to address or present available evidence on the contract defense, as it was outside the scope of the court-directed Order regarding the argument. Even if Petitioner had been given the opportunity to introduce such evidence, the Court improperly placed the burden of proof on Petitioner to prove that a vague contract provision drafted by Respondent should be enforced upon the client. It is precisely this situation that West Virginia sought to avoid when it established the *Kopelman* framework – attorneys suing former clients in fee disputes between lawyers.

Although this honorable Court must rule on the effect of Respondent's admission that the good cause element had been met, it must also look to the apparent underlying basis for the lower Court's ruling – that an attorney can circumvent West Virginia law and recover against a former client on a contingent fee agreement by inserting the words "good cause" into the agreement without any definition of what those terms mean. And then rely on those terms to argue that a client's desire to select the attorney of their choice and discharge the former attorney is not good cause.

Contingent fee agreements in West Virginia are not intended to effectively chain a client to a lawyer for life. To the contrary, the lower Court's ruling forever deprives the client, unknowingly, of his or her fundamental right to select the lawyer of his or her choice by forcing the client to pay double fees. It is also entirely inconsistent with West Virginia law and ignores Respondent's proper method of resolving a fee dispute, purposefully set forth by this Court in *Kopelman*. If the Court fails to address this issue and simply permits Respondent to amend his Answer, we will find ourselves before this tribunal again.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This is an important case. It is important not only to Petitioners, but to all citizens of this state who hire attorneys. The Court has the opportunity to make it clear that a client has an absolute right to the attorney of their own choosing. The decision of this Court could conceivably affect every attorney client relationship in the state. That choice must be free from financial penalty or having to pay two attorney fees. Clearly this presents an issue of fundamental public importance. As such, oral argument is proper pursuant to Rule 20 and Petitioners would ask that it be scheduled for a full argument in that regard.

Further, argument is proper pursuant to Rule 19. The trial court's decision to disregard a key admission in the pleadings and then base its decision on that very issue presents error on a basic and well settled matter of law.

V. ARGUMENT

I. The Court erred in finding that there was no evidence that clients discharged Hinerman & Associates for "good cause."

The Hinerman & Associates contingent fee agreement 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." (Emphasis added)

As set forth above, Petitioner specifically averred in his Complaint that the "good cause" element of the Hinerman contract had been met because the clients in good faith elected to remain represented by Petitioner once he established his own law practice. App. 10. As discussed below, a client's right to select his or her own counsel without financial penalty is a right under West Virginia law. Respondent failed to deny that averment and never asserted it at any future date. Thus, under West Virginia law, the averment is admitted and the issue of "good cause" is settled.[2]

Sua sponte, the trial court has taken the contract language and turned a court-ordered hearing about the distribution of fees between attorneys in to a finding that an undisputed good

[2] 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).

cause contract provision was not proven below. This was the case even though each side and the Court specifically agreed that *Kopelman* would be the law applied to the case and that a hearing applying the *Kopelman* factors would take place.

The Court's Order August 14, 2013 Order states:

"The parties agree that *Kopelman and Assoc., L.C. v. Collins*...shall be the law applied to the distribution of attorney fees in all disputed matters which are the subject of the instant litigation." App. 185-186.

Regarding the scope of the hearing, the Order states:

"From the files delivered to Defendants, Plaintiffs will select two files to be presented at an evidentiary hearing before the bench where the Court shall apply *Kopelman* as set forth above." App. 187.

Per the Court's Order, a hearing was conducted and extensive evidence was adduced by both sides regarding the enumerated "factors" set forth in *Kopelman.*[3] The only evidence related to 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. App. 336-337, 342, 349,

Four months thereafter, the Court issued an Order holding that each client discharged the Respondent without cause – as there was "*no evidence of any kind or character whatsoever to the contrary.*" App. 773. The Court entirely ignored Petitioner's admission or the fact that such evidence was never within the scope of the argument. The Court further erred in assuming that

[3] The Kopelman factors include the time spent on the case at each law firm, relative risks assumed by each firm, frequency and complexity of difficulties faced by each firm, proportion of funds invested and other contributions, quality of representation, degree of skill needed to achieve success, result of each firm's efforts, the reason the client changed firms, viability of claim at transfer, amount of recovery realized and any other factors the Court wishes to consider.

Petitioner as a non-party to the contract had the burden of proof to establish good cause in an agreement drafted by Respondent, to be enforced against his former clients.

Most concerning, the Court admitted that the issue was never raised by either party:

> **MR. WALLACE**: Mr. Hinerman in (sic) now attempting, for the first time, to utilize good cause as defense to paying money. He's asserting it, in essence, as an affirmative defense, and, Your Honor, I would – I would bet my bottom dollar that this argument never crossed Mr. Hinerman's mind until your order landed on his desk, and –
>
> **THE COURT**: Didn't cross mine until on the Saturday or Sunday that I wrote it.
>
> **MR. WALLACE**: Well, and that is because nobody had ever mentioned it.
>
> **THE COURT**: Yeah, yeah. I mean, that's true. App. 857.

But it wasn't just the admission in the Answer that Petitioner relied upon with respect to "good cause." The record is replete with evidence that Respondent had waived any "good cause" contract defense by admitting repeatedly that Kopelman applied to the fee dispute. As Respondent drafted in his own agreement, either good cause was met or Kopelman applied – not both. And certainly, there would be no need to litigate Kopelman if Petitioner at any time believed that good cause had not been established. To suggest otherwise strains credulity.

For example, in Respondent's Response to Petitioner's Motion for Summary Judgment, Respondent states:

> "Defendants do not seek to deny Mr. Wallace payment for 'work' that is or was performed after his departure from Hinerman & Associates on January 17, 2013." App. 83.
>
> "So there is no misunderstanding, if Mr. Wallace can demonstrate in each of the , what work he did after he left Hinerman & Associates, and the date of said work is clearly established, this problem should be easily resolved based on Kopelman v. Collins." App. 84.

However, once the lower court issued its March 1, 2014 Order based on a contract defense never before raised by Respondent, Respondent changed his story:

"My position has always been he's not entitled to any attorney fees." App. 869.

Petitioner reasonably relied not only on Respondent's failure to deny (and effectively admit) the good cause averment in determining that good cause had been met, he also relied on the following events in is his assumption that no additional evidence regarding "good cause" was necessary beyond his own testimony:

- Respondent's absolute failure to raise "good cause" as a defense in the pleadings or at any time during the proceedings prior to and including the evidentiary hearing;

- Respondent's admission that part two of its contract termination provision regarding distribution of fees to other attorneys applied *in this matter* (meaning that good cause had been established under part one and Respondent was not entitled to all fees);

- Respondent's confirmation at the July 26, 2013 hearing that the issue in the case was the "division of fees," not entitlement to fees. App. 171, Trans., pg. 33, 4-14;

- Respondent's confirmation at the July 26, 2013 that "..on West Virginia civil action cases and worker's compensation cases, I agree that *Kopelman* presents an outline for a determination of as much as deserved." App. 173. (*see* discussion on pg. 41-42 and Trans. Pg. 42, 7-10);

- Respondent's participation in the drafting and approval of the Court's August 14, 2013 Order specifically directing the presentation of evidence on *Kopelman* factors regarding *distribution* of fees. App. 185-187.

- Respondent acknowledges that he did, in fact, pay fees on a *quantum meruit* basis to Petitioner "in one case where he demonstrated that there was additional work performed after [the] January 17, 2013..." App. 28-29. If there was no good cause termination of the contract, why would Hinerman have paid fees for Wallace's work, precisely as requested by Plaintiffs in the instant Declaratory Judgment action?

- Respondent's Motion for "Directed Verdict" at the conclusion of Petitioners' case wherein he does not mention, argue, or reference any contract issue or entitlement to fees. App. 393.

- Respondent's presentation of an entire case based on *Kopelman*, which could only be relevant if Respondent acknowledges that there are fees subject to distribution and part one of the termination provision had been satisfied;

- Respondent's own expert testimony that Petitioner should be compensated for work done after Petitioner's departure from Respondent's law firm, indicating that Petitioner was entitled to at least some fees and belying Respondent's new assertion that part one of the good cause termination provision was not satisfied.

    - Plaintiff Wallace: "And Sue, you said something about, you know, if there's quantifiable time or quantifiable effort, that should be recognized and compensated by the split of the fees?

    - Howard: "Not a 50/50 split necessarily, but certainly to the extent that time expended is a Kopelman factor, that needs to be awarded to you after left the Hinerman firm." App. 313.

Even after the hearing, Respondent filed a twenty-five page closing argument. App. 262-287. There are no references to contract defenses or entitlement to fees pursuant to the fee agreement. Simply put, this was a non-issue between the parties until the trial court created it. In doing so, the lower court departed from the well-settled framework for resolving attorney fee disputes established by this Court. The lower 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 and were argued before the lower court. 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, let alone the overarching errors of law. 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 trial court advanced an argument that no party raised or even contemplated, based on an issue (good cause) that had been admitted and that was not the focus of the *Kopelman* hearing below. In doing so the Court permits Petitioner to circumvent West Virginia law and recover on a contingent fee agreement after being discharged by a client. This ruling has effectively deprived Wallace of his due process rights for a fair hearing and a full adjudication on the merits and deprives the clients of their fundamental rights. This issue begs this Court's attention.

II. The Court's finding that Petitioner can enforce his contingent fee agreement against former 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 Petitioner is "good cause."

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. 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) (emphasis added).

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 terminated 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 lower 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 it a matter of grave importance that surely warrants this Court's addressing of this issue.

III. Petitioner, as the party attempting to enforce a non-defined, vague term in an agreement he drafted, has the burden of proof to establish that the contract term has not been met – not Petitioner nor the client.

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 lower court's order makes it clear that Petitioner (or possibly even the client), who did not draft the agreement, has the burden of establishing good cause under Respondent's contract. This violates basic tenants of contract law. Respondent 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 Petitioner, 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 highly undesirable outcome of the trial court's order; Petitioner suing former clients for duplicate fees. The court's order permits Petitioner 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 Petitioner 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.

VI. CONCLUSION

Petitioner requests that the Court overturn the lower court's Order and find, based on the complete record evidence including Petitioner's several admissions, that good cause to discharge Respondent has been established by Respondent's former clients. The Court should further hold that a client's decision to following his existing attorney to a new law firm constitutes good cause as a matter of law and that Respondent has the burden to otherwise establish that good cause has not been met. An attorney cannot circumvent West Virginia law by inserting a vague contract provision that has the same effect as complete recovery by the discharged attorney on his contingent fee agreement. Should the Court disagree with the above, the Court must permit Petitioner to submit additional evidence conforming to the new issues raised by the lower court in its March 1, 2014 Order. Otherwise, Petitioner has been deprived of his right to a fair hearing and resolution of the instant fee dispute via the framework set forth by this Court in *Kopelman*.

Respectfully submitted,

BY: _____

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CERTIFICATE OF SERVICE

Service of the *BRIEF OF THE PETITIONER* was had this 6th day of April 2015, by hand delivery to the following:

Raymond A. Hinerman, Esq.
Hinerman & Associates, PLLC
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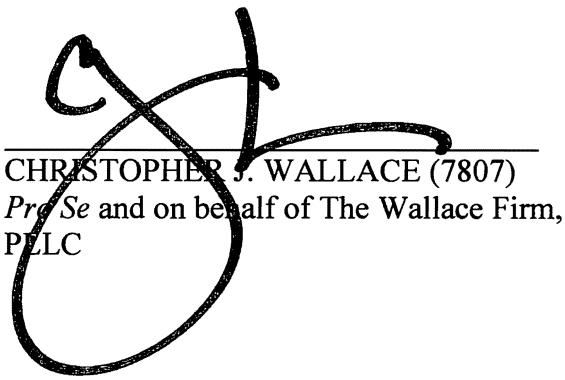

CHRISTOPHER J. WALLACE (7807)
Pro Se and on behalf of The Wallace Firm, PLLC