No. 27051 - Lawyer Disciplinary Board v. Belinda S. Morton, a member of The West Virginia State Bar

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OF WEST VIRGINIA

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Davis, Chief Justice, dissenting:

In this lawyer disciplinary proceeding, the Hearing Panel Subcommittee found that Belinda S. Morton (hereinafter referred to as "Ms. Morton") violated Rule 1.5(a)(1) of the Rules of Professional Conduct by obtaining a fee of $1,500.00 from medical payments made to her client, David E. Willis, by his own insurance carrier. The Hearing Panel recommended that Ms. Morton be publicly reprimanded, ordered to repay the client $1,500.00, and ordered to pay the costs of this proceeding. The majority opinion has rejected the Hearing Panel's recommendation and dismissed the charge against Ms. Morton. For the reasons set out below, I dissent.

I. Ms. Morton was not Retained to Receive Undisputed Medical Payments from Her Client's Insurer.

At the outset, let me clarify that my dissent should in no way be viewed as a criticism of contingent fees. Rather, 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.

The record in this case is quite clear. Mr. Willis retained Ms. Morton to recover compensation from the party who injured him in an automobile accident, that is, H & W Trucking Company and its driver, Donald F. Reed. Nevertheless, the majority opinion contends that the contract entered into between Mr. Willis and Ms. Morton permitted Ms. Morton to retain a percentage of the medical payments remitted without dispute by Mr. Willis' own insurer. I find no provision in the contract between Ms. Morton and Mr. Willis permitting Ms. Morton to keep any portion of undisputed medical payments made to Mr. Willis. On the contrary, the contract clearly demonstrates that Ms. Morton was retained for *the sole purpose of seeking compensation from the tortfeasor*. She was not hired to merely receive checks from the insurance company on behalf of Mr. Willis, and she should not be compensated for performing such an unnecessary service.

II. The Fee Obtained by Ms. Morton was Clearly Excessive.

State Farm *never disputed* Mr. Willis' entitlement to medical payments under his own insurance policy. In fact, State Farm never sought to evade its payments or even contest the legitimacy of the injuries involved. In other words, absolutely no legal services were necessary to obtain the med-pay portion of Mr. Willis' insurance. Thus, to "earn" the $1,500.00 contingency fee the majority has allowed in this case, Ms. Morton performed only one act. She telephoned State Farm and instructed them to add her name to all medical payment checks issued on behalf of Mr. Willis and to forward the checks to her office. The

net result of Ms. Morton's conduct was to cause Mr. Willis to be indebted to his medical providers for the sum of $1,500.00 -- the amount of med-pay benefits Ms. Morton retained.

Mr. Willis was understandably upset at having to pay his medical providers $1,500. He had paid insurance premiums that entitled him to have his medical bills paid in full, and State Farm had unequivocally provided him with the money. However, as a result Ms. Morton's fee, Mr. Willis incurred debt to his medical providers that would otherwise have been paid by this insurance.

Mr. Willis filed an ethical complaint against Ms. Morton. An Investigative Panel thereafter charged Ms. Morton with obtaining an excessive fee in violation of Rule 1.5(a)(1) of the Rules of Professional Conduct.[1] The Hearing Panel eventually issued its recommended decision finding that Ms. Morton violated Rule 1.5(a)(1) by obtaining a fee "grossly excessive for the services actually performed." The Hearing Panel's finding was correct.

The resolution of this case should have been guided by this Court's decision in

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[1]Rule 1.5(a)(1) states as follows:

> (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[.]

Committee on Legal Ethics of West Virginia State Bar v. Tatterson, 177 W. Va. 356, 352 S.E.2d 107 (1986).[2] The attorney in *Tatterson* entered into a contingency fee agreement, with an elderly blind woman, that involved recovery of life insurance proceeds. The life insurance proceeds were for the suicide death of the woman's son. The amount of the life insurance proceeds was $61,000.00. After the insurance company paid out the full amount of the insurance proceeds to the woman, the attorney deducted his contingency fee of 33%. An ethical complaint was subsequently filed against the attorney charging him with obtaining an excessive fee, misrepresenting the degree of difficulty of obtaining the life insurance proceeds, and engaging in unethical conduct while a disciplinary proceeding was pending against him. This Court found the evidence supported the charges against the attorney, who had done nothing more than assist the woman in filling out forms to obtain the insurance proceeds. In *Tatterson*, we explained:

> 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 [the rules].

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[2]*Tatterson* was a disciplinary proceeding where a recommendation was made that the attorney's license be annulled.

Tatterson, 177 W. Va. at 363, 352 S.E.2d at 113-114 (citations omitted). Plainly, the instant case is a perfect example of the type of contingent fee misconduct that was condemned in *Tatterson*.

Several decisions from other jurisdictions similarly conclude that it is improper for attorneys to demand fees for collecting undisputed medical payments from their clients' insurers. For example, in *Attorney Grievance Commission v. Kemp*, 496 A.2d 672 (Md. 1985), two attorneys were charged with obtaining an excessive fee from their client. The attorneys represented the client as a result of injuries she received in an automobile accident. The attorneys had a contingency contract agreement with the client. During the course of prosecuting the tort claim, the attorneys obtained one-third of the medical payments the client received from her insurer. An ethical complaint was eventually filed against both attorneys for retaining one-third of the client's medical payments. The Maryland Court of Appeals found that the fee was excessive and issued a reprimand against both attorneys. The court reasoned as follows:

> [I]t is manifest that Med. Pay is not dependent, for the most part, upon the skills of a lawyer. The risk of uncertainty of recovery is, therefore, low indeed. Under these circumstances, it would be the rare case where an attorney could properly resort to a contingency fee for the payment of Med. Pay. As we see it, the better course would be for lawyers to supply the insurer with the requisite Med. Pay documentation as an accommodation to the client or subject to a minimal charge.
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> . . . In our view, because there was no dispute as to payment under Med. Pay and because the insurer made payment upon receipt of the completed benefit form and medical report, the fee charged by respondents was clearly

excessive and thus in violation of DR 2-106(A).

Kemp, 496 A.2d at 679.

The Supreme Court of Illinois' decision in *In re Teichner*, 470 N.E.2d 972, (Ill. 1984) also supports this position. *Teichner* was a lawyer disciplinary matter wherein the attorney was charged with obtaining an excessive fee.[3] The attorney and his client had entered into a contingency fee agreement for the recovery of death benefits from the client's deceased husband's insurer, and for prosecuting a related products liability claim. The agreement permitted the attorney to receive one-fourth of the amount recovered by *settlement or judgment* from the death benefits; and one-third of the amount recovered in exchange for representation on the products liability claim. Payment of the death benefits was never an issue of dispute. Nevertheless, when the insurer paid over the sum of $27,598.71, the attorney retained one-fourth of the proceeds. An ethical complaint was later filed against the attorney. A disciplinary hearing panel found the fee obtained from the death benefits was excessive. The Supreme Court of Illinois agreed with the hearing panel, and commented:

> There is greater merit, in our opinion, in the hearing panel's position that no fee was due unless recovery occurred pursuant to a "settlement" or "judgment." Obviously there was no judgment, and a settlement normally presupposes a dispute or disagreement. Here, the insurer did not question complainant's right to the insurance proceeds. Its payment was routine, and, as the hearing panel found, complainant would have received the same amount at the same time had she never seen respondent. Given the fact that the unquestioned, routine payment here does

[3]There was also a charge of converting and commingling client funds.

> not come within the normal definitions of a settlement, and did not result from a judgment, . . . we cannot disagree with the panel's finding that the terms of the contract do not entitle respondent to a fee.

Teichner, 470 N.E.2d at 977 (internal citations omitted).[4]

In the instant case, there has been *no indication* that State Farm opposed the medical payments on behalf of Mr. Willis. Thus, there was no "risk" involved that would justify Ms. Morton obtaining a contingency fee for monies which she had absolutely no role in recovering for Mr. Willis. Clearly, under *Tatterson*, *Kemp*, and *Teichner*, Ms. Morton was not entitled to obtain $1,500.00 from Mr. Willis' medical payment.

III. Time Spent Pursuing a Tortfeasor does not Justify Attorney's Fees for Collecting Undisputed Medical Payments.

In order to justify Ms. Morton's attorney's fees in this case, the majority opinion had to combine "apples and oranges." There was no dispute in this proceeding that Ms. Morton put in roughly forty hours working on Mr. Willis' claim against the tortfeasor. Because she was retained to litigate a case against the tortfeasor, I do not oppose Ms. Morton receiving monies, based upon her contingency fee contract, for this work. Indeed, our court, along with the majority of other courts, has consistently upheld contingency fee contracts. *See Kopelman and Assocs., L.C. v. Collins*, 196 W. Va. 489, 496 n.7, 473 S.E.2d 910, 917 n.7 (1996)

[4]The attorney was disbarred.

("[C]ourts 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."). *Accord Johnson v. Guardianship of Ratcliff*, 34 S.W.3d 749 (Ark. Ct. App. 2000); *Brunswick v. Safeco Ins. Co.*, 711 A.2d 1202 (Conn. App. Ct. 1998); *Arabia v. Siedlecki*, 789 So. 2d 380 (Fla. Dist. Ct. App. 2001); *Sosebee v. McCrimmon*, 492 S.E.2d 584 (Ga. Ct. App. 1997); *Lewsader v. Wal-Mart Stores, Inc*., 694 N.E.2d 191 (Ill. App. Ct., 1998); *Revere Transducers, Inc. v. Deere & Co*., 637 N.W.2d 189 (Iowa 2001); *Baugh v. Baugh*, 973 P.2d 202 (Kan. Ct. App. 1999); *Francis v. Hotard*, 798 So. 2d 982 (La. Ct. App. 2001); *Brown & Sturm v. Frederick Road Ltd. P'ship*, 768 A.2d 62 (Md. Ct. Spec. App. 2001); Cambridge Trust Co. v. Hanify & King Prof'l Corp., 721 N.E.2d 1 (Mass. 1999); *Goldstein & Price v. Tonkin & Mondl*, 974 S.W.2d 543 (Mo. Ct. App. 1998); *Lozano v. GTE Lenkurt, Inc*., 920 P.2d 1057 (N.M. Ct. App. 1996); *Speken v. Columbia Presbyterian Med. Ctr.*, 726 N.Y.S.2d 652 (2001); *Robinson, Bradshaw & Hinson, P.A. v. Smith*, 532 S.E.2d 815 (N.C. Ct. App. 2000); *Ryan v. Terra Vista Estates, Inc*., 657 N.E.2d 522 (Ohio Ct. App. 1995) *Transcontinental Gas Pipeline Corp. v. Texaco, Inc*., 35 S.W.3d 658 (Tex. Ct. App., 2000); *Gravel & Shea v. White Current Corp*., 752 A.2d 19 (Vt. 2000). However, a contingent fee should be collected only for work contemplated in the contingent fee contract. The majority opinion in this case has determined that the forty hours Ms. Morton worked on Mr. Willis' claim against the tortfeasor should be used to justify her retention of the $1,500 in undisputed medical payments. This commingling is unjustified and unsupportable. The majority opinion cited to no prior decision of this Court, nor any court in the country, that has combined an

attorney's legitimate work hours under a contingency fee contract with the improper retention of a client's medical payments.

IV. The Majority Opinion Undermines the Integrity of the Legal Profession.

The greatest problem I have with the majority opinion is the long-term negative impact this decision will have on the legal profession in this State, and on the people served by our legal profession. Prior to the instant case, the law espoused by this Court has been that "a contingent fee is clearly excessive if the skill and labor required of the lawyer are grossly disproportionate to the fee." *Committee on Legal Ethics of the West Virginia State Bar v. Gallaher*, 180 W. Va. 332, 335, 376 S.E.2d 346, 349 (1988) (citations omitted). No skill or labor was required for Ms. Morton to obtain medical payments from State Farm. Ms. Morton simply picked up her telephone and said, in effect, "send me the money." In *Tatterson*, this Court affirmed that it was "the duty of the courts to guard against the collection of a clearly excessive fee, thereby . . . protecting the public and maintaining the integrity of the legal profession." 177 W. Va. at 363, 352 S.E.2d at 114 (citations omitted). *See also In re Teichner*, 470 N.E.2d 972, 977 ("The purpose of this court's attorney-disciplinary process is to safeguard the public, maintain the integrity of the legal profession, and protect the administration of justice from reproach.") In rendering the decision in the instant case, the majority has abandoned the duty of this Court to protect the public and maintain the integrity of the legal profession.

In my concurring and dissenting opinion in *Bass v. Coltelli-Rose*,[5] I addressed the propriety of a contingency fee arrangement for medical payments as follows:

> It is most unusual for lawyers to seek fees from medical payments. In fact, the majority of the plaintiffs' bar does not take a contingency fee on medical payment recoveries obtained from their client's own insurer.

Bass, 207 W. Va. 730, 735 n.3, 536 S.E.2d 494, 499 n.3 (2000) (per curiam) (Davis, J., concurring and dissenting). The proprietary concerns I expressed in *Bass* were expanded upon in the dissenting opinion of Justice Scott as follows:

> Unfortunately, the majority deemed it unnecessary to engage in discussion of the reasonableness or excessiveness of the fee charged. . . It is clear to me that these fees should have been found to be excessive. Basically, [the lawyer] 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.
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> 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[.]
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[5]The decision in *Bass* involved a lawsuit that was filed against an attorney by a client. The client sought to recover a contingent fee that the attorney obtained from the client's automobile insurance medical payments. The circuit court granted summary judgment in favor of the client. On appeal, this Court addressed the sole issue of whether the contract between the attorney and client permitted recovery of a contingent fee from the client's medical payments. We found that the wording of the contract permitted such recovery and, therefore, reversed the summary judgment order.

> Under the[] rules of professional conduct, as well as the standards enunciated by this Court interpreting those rules, the contingent fee charged by [the lawyer] 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 [the lawyer] to receive the medical payment proceeds de minimis, at best; but, the fee was simply not based upon any contingent event.

Bass, 207 W. Va. at 736-738, 536 S.E.2d at 500-502 (Scott, J., dissenting).

Neither the public nor the legal profession is served by allowing lawyers to collect a percentage of *noncontested medical payments* from their client's insurer. Under the majority opinion, in situations where a client's insurer does not dispute coverage, every lawyer in this state may now pick up the telephone and say to their client's insurer, "send me the money." This is wrong.

In this case, Ms. Morton received $1,500 for simply saying "send me the money." What happens when a client's medical bills are $100,000 or more, and the client's insurer intends to pay the bills without dispute? The client will be saddled with an outstanding medical debt that, but for the opinion in this case, would have been paid in full by the client's insurer. The public should not be subjected to such overreaching by the legal profession. *See Anderson v. Kenelly*, 547 P.2d 260, 261 (Colo. Ct. App. 1976) ("Caveat emptor is not a legal maxim attributable to the attorney-client relationship."). Nor should the legal profession be allowed to conduct itself on such a low ethical level permitting this type of client abuse.

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