

**STATE OF WEST VIRGINIA  
SUPREME COURT OF APPEALS**

**David A. Ford and Carey, Scott,  
Douglas & Kessler, P.L.L.C.,  
Respondents Below, Petitioners**

**FILED**

June 8, 2012  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

vs) **No. 11-0882** (Logan County 08-C-297)

**The Calwell Practice, P.L.L.C. and  
Thomas F. Basile, Petitioners Below,  
Respondents**

**MEMORANDUM DECISION**

Petitioners, David A. Ford and the law firm of Carey, Scott, Douglas & Kessler, P.L.L.C., by counsel, Jeffrey M. Wakefield and Erica M. Baumgras, appeal the orders of the Circuit Court of Logan County entered November 10, 2010, and May 3, 2011, which determined the distribution of attorney's fees between various counsel for the plaintiff in the underlying personal injury lawsuit. Respondent law firm The Calwell Practice, P.L.L.C. filed a response by its counsel, Rudolph L. DiTrapano and Robert M. Bastress III. Respondent lawyer Thomas F. Basile, self-represented, filed a response.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

This appeal involves an attorney's fee dispute between petitioners and the respondents in the underlying personal injury lawsuit. That lawsuit is based upon an April 22, 2007, car accident in which a commercial vehicle struck the vehicle driven by Sarah Ellis in which her husband Roger Ellis was a passenger. Mr. Ellis was rendered a quadriplegic as a result of the collision.

Shortly after the accident, Mrs. Ellis went with relatives to The Calwell Practice, P.L.L.C. ("Calwell") where she met with David Ford, a Calwell associate. Mrs. Ellis did not know David Ford before this meeting. At this time, respondent Thomas Basile was also employed by Calwell. Mrs. Ellis signed a contingency fee agreement with Calwell on behalf of herself and Mr. Ellis.

Calwell represented Mr. and Mrs. Ellis for approximately ten months during which time it conducted a factual investigation, retained an engineering expert who opined that the accident was caused by the tortfeasor's excessive speed and improperly secured load, and an expert life care planner. Both experts were utilized throughout the litigation by subsequent attorneys. The circuit court concluded that "liability was thus clear after the Calwell Law Practice's investigation of the case and the preparation of the initial expert report by Keystone Engineering . . . ." David Ford had significant interaction with Mr. and Mrs. Ellis during the time that Calwell represented them before he left that firm on February 11, 2008.

According to the circuit court's findings, approximately two weeks before Ford left Calwell, Ford began to repeatedly tell Mr. and Mrs. Ellis that Calwell was going to attempt to settle their case prematurely and for less money than it was worth because the firm needed money to fund other litigation. The circuit court found that Ford showed "too little loyalty" to Calwell, his employer, and actively engendered suspicion of Calwell's motives. The circuit court concluded: "the field of suspicion had been plowed and fertilized."

On February 5, 2008, Stuart Calwell and Ford attended a meeting with Mr. and Mrs. Ellis at the Ellis home. Mrs. Ellis testified that Ford had previously told Mr. Ellis that Stuart Calwell did not usually go to clients' homes and did not know what was going on with the Ellis case. Mr. Ellis testified in his later deposition that he determined at this meeting that he did not like Stuart Calwell because he would not look him in the eye and because Mr. Ellis felt uncomfortable with him.

On February 8, 2008, Calwell discharged respondent Thomas Basile. The next day, Saturday February 9, 2008, Ford thought he was also discharged because he was locked out of the office building. Ford did not check with anyone to see if he was actually discharged.

The next day, Sunday, February 10, 2008, Ford and his family traveled to the Ellis home. According to the testimony of Roger Ellis, Ford advised Mr. and Mrs. Ellis that they had the option of staying with Calwell or finding a separate attorney. According to the testimony of Mrs. Ellis, the couple made a joint decision to change counsel based upon the negative information about Calwell provided to them by Ford. The Ellises signed a letter, drafted by Ford, firing Calwell and signed a new contingency fee contract with Ford. The new contract with Ford was dated February 11, 2008.

On Monday, February 11, 2008, Ford resigned from Calwell. For several months, Ford and Thomas Basile formed a law firm, Ford & Basile. Basile provided the office space in his home. During this time frame, Ford and Basile attended a meeting of all of the counsel in the Ellis case and a mediation on June 10, 2008. The Ellises did not have a contingency fee agreement with Basile or Basile & Ford law firm. However, Basile paid the life care planner and the engineer and retained a third expert, Dr. William Cobb, to prepare an economic report. In the Summer of 2008, Ford left the firm of Ford & Basile, taking the Ellis case, and began searching for co-counsel to assist him with the litigation of the Ellis case.

In August of 2008, Ford entered into a written agreement with petitioner Carey, Scott, Douglas & Kessler to litigate the Ellis case. Attorney's liens were filed by Calwell and Thomas Basile. Ford filed a motion to quash Basile's attorney lien. The Ellis case settled for a confidential amount. The portion of the settlement proceeds for attorney's fees was placed in escrow and the circuit court gave the parties to the fee dispute ninety days to conduct discovery.

The parties filed pretrial memoranda and exhibits. The circuit court held telephonic status conferences on July 19 and 21, 2010. During the July 21 conference, the circuit court advised the parties that they would each be afforded one and one-half hours to make their presentation to the court on the next day. No objections were made by the petitioners to the method of presentation.

On July 22, 2010, the circuit court conducted the fee dispute hearing. The petitioners called witnesses: Jack Kessler, Michael Carey and David Ford. Copies of the depositions of Roger Ellis, David Ford and Sarah Ellis were also submitted to the circuit court.

On November 11, the circuit court issued a thirty-five page Memorandum Opinion and Order, awarding the attorney's fee as follows: 55% to The Calwell Practice; 33% to petitioners and 12% to Thomas Basile. In reaching the award, the circuit court indicated that it followed a quantum meruit analysis as expressed in *Kopelman and Associates L.C. v. Collins*, 196 W.Va. 489, 473 S.E.2d 910 (1996). The circuit court found that Ford's conduct was reprehensible and considered Ford's misconduct as part of its analysis under *Kopelman*.

The petitioners and Basile filed post-trial motions pursuant to Rules 59 and 60 of the West Virginia Rules of Civil Procedure. Basile had previously filed a motion for sanctions against Ford which had not been ruled upon by the circuit court. Following a hearing on the post-trial motions, the circuit court entered an order denying petitioners' post-trial motion but finding in favor of Basile on his Rule 60 motion and motion for sanctions, thus reduced petitioners' percentage from 33% to 31% and increased Basile's percentage from 12% to 14%. Thus, the ultimate distribution of the attorney's fee was: The Calwell Practice 55%, petitioners 31% and Basile 14%.

“In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to *de novo* review.’ Syllabus point 2, *Walker v. West Virginia Ethics Commission*, 201 W.Va. 108, 492 S.E.2d 167 (1997).” Syl. Pt. 1, *Trickett v. Laurita*, 223 W.Va. 357, 674 S.E.2d 218 (2009). This Court has previously recognized in *Kopelman* that a decision in a fee dispute case such as the current matter “rests in the sound discretion of the circuit court, and it will not be disturbed unless the circuit court abused its discretion.”

### **Failure to Hold Trial**

The petitioners argue that the circuit court erred in failing to provide the petitioners with a full trial on the merits. Petitioners acknowledge that they did not object to the hearing style format proposed by the circuit court, but argue that this was because the circuit court had previously “determined that the dispute before the Court was a ‘narrow attorney[’s] lien dispute’ which was very different from claims which [Calwell] had asserted against Ford in a separate civil action.” That reference was to a separate civil action Calwell brought in Kanawha County, which included a claim that Ford had tortiously interfered with the fee contract with Plaintiff Ellis. The Circuit Court of Logan County had previously denied Calwell’s motion to transfer the present dispute to Kanawha County because it concluded that the issues in the Kanawha County case were beyond the scope of the attorney’s lien dispute. In response, the respondents assert that the petitioners were aware from discovery and from the pretrial memoranda that Ford’s misconduct would be an issue raised in the fee dispute hearing.

In denying petitioner’s post-trial motion on this issue, the circuit court recognized that “[t]he issues in this dispute were extensively briefed and the Court reviewed hours of video deposition testimony . . . The Court [indicated that it] was well aware of the issues, arguments and evidence being put forth in support of the positions of each party.” After reviewing the issue, this Court concludes that the circuit court did not err in utilizing the hearing format in question.

### **Attorney Misconduct**

Petitioners next argue that the circuit court erred in considering Ford’s alleged misconduct as part of the quantum meruit analysis. This Court has set forth the following directive for circuit courts confronted with an attorney’s fee dispute such as the one in the instant action:

Although the amount of time spent by each respective firm is an important consideration in a contingency fee case where lawyers employed by one firm leave that firm and take a client with them and no contract exists governing how the fees are to be divided, a circuit court also must consider retrospectively upon the conclusion of the case: (1) the relative risks assumed by each firm; (2) the frequency and complexity of any difficulties encountered by each firm; (3) the proportion of funds invested and other contributions made by each firm; (4) the quality of representation; (5) the degree of skill needed to achieve success; (6) the result of each firm’s efforts; (7) the reason the client changed firms; (8) the viability of the claim at transfer; and (9) the amount of recovery realized. This list is not exhaustive, and a circuit court may consider other factors as warranted by the circumstances in addition to awarding out-of-pocket expenses. In making its determination, however, a circuit court must make clear on the record its reasons for awarding a certain amount. Such a determination rests in the sound discretion of the circuit court, and it will not be disturbed unless the circuit court abused its discretion.

Syl.Pt. 2, *Kopelman and Associates, L.C. v. Collins*, 196 W.Va. 489, 473 S.E.2d 910 (1996).

In this case, the Court concludes that the circuit court did not abuse its discretion by considering Ford's conduct in reaching its determination as to the proper distribution of the attorney's fees.

The petitioners also argue that the circuit court improperly used Rule 60(b) of the West Virginia Rules of Civil Procedure and the motion for sanctions filed by respondent Thomas Basile to alter the fee allocation judgment. Under the facts and circumstances of this case, the Court having reviewed the issue finds no error.

### **Insufficiency of the Evidence**

Finally, the petitioners argue that the circuit court's findings of fact were insufficient to support the attorney's fee distribution because the petitioners allege that the testimony of Mr. Ellis was substantially discounted as to the reason the Ellises changed counsel. While Mr. Ellis testified that he did not feel comfortable with Stuart Calwell and that this was the reason that he wished to change counsel, his wife testified that the reason involved the conduct of Ford in relating negative information to them about Calwell. In light of this conflicting testimony, the circuit court placed greater emphasis upon the testimony of Sarah Ellis, concluding that the testimony of Mrs. Ellis was the "more credible of the two reasons for the switch." The Court concludes that the circuit court's findings of fact were not clearly erroneous and therefore finds no error.

For the foregoing reasons, we affirm.

Affirmed.

**ISSUED:** June 8, 2012

**CONCURRED IN BY:**

Chief Justice Menis E. Ketchum  
Justice Robin Jean Davis  
Justice Brent D. Benjamin  
Justice Margaret L. Workman  
Justice Thomas E. McHugh