STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Nichols and Skinner, L.C.,
Petitioner

vs) No. 11-0169 (Hampshire County 06-C-36)

F. Samuel Byrer, Respondent

FILED
June 24, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

The law firm Nichols & Skinner, L.C. (petitioner herein), appeals the circuit court's order determining an attorney's fee charging lien dispute between the firm and a lawyer whom it had formerly employed, F. Samuel Byrer (respondent herein). Mr. Byrer filed a response brief.

This Court has considered the parties' briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, 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.

Mr. Byrer was employed at Nichols & Skinner, L.C. (hereinafter N&S) from 1984 until August of 2007. In July of 2005, lawyer H. Charles Carl, III, contacted Mr. Byrer about becoming co-counsel for plaintiff Brian K. Cosner in the instant civil action. Mr. Cosner's minor son had been killed in a single-vehicle accident caused by Mr. Cosner's mother-in-law, Leona K. Wagoner, who was also killed in the accident. Mr. Byrer, on behalf of N&S, accepted the case. N&S and Mr. Carl had a contingency fee contract with Mr. Cosner, and N&S and Mr. Carl agreed that they would equally split expenses and any attorney's fees. Mr. Byrer and Mr. Carl filed suit asserting a wrongful death claim against the executor of Mrs. Wagoner's Estate, and asserting an underinsured motorist coverage claim against Erie Insurance Company, which had provided an insurance policy with a "non-owned vehicle provision" to a business owned by Mr. Cosner.

While the Cosner suit was pending, Mr. Byrer's employment at N&S terminated in August of 2007. There is a factual dispute as to whether Mr. Byrer had agreed to leave on a certain date, or whether N&S "locked" him out. On August 27, 2007, Mr. Cosner signed a form electing to have his case transferred to Mr. Byrer's new law firm, and the circuit court entered an order substituting the Byrer law firm on September 21, 2007.

The Cosner case went to mediation on September 27, 2007, where it was successfully settled. Mr. Byrer and Mr. Carl have testified that they did not expect the case to settle because they were pursuing a difficult legal theory against Erie and because their client was insisting that Mrs. Wagoner's Estate accept some responsibility by contributing to the settlement. After the mediation, Mr. Byrer provided several hours of legal services on the case in order to effectuate a property transfer in satisfaction of the settlement agreement.

On October 11, 2007, N&S filed a Notice of Charging Lien seeking a share of the attorney's fees earned in the Cosner case. One-half of the attorney's fees went to Mr. Carl, while the remaining one-half was held in escrow pending resolution of the charging lien. The charging lien issue went to a hearing before the circuit court on April 14, 2010. Because there was no contract to provide a basis for determining the amount of the attorney's fee to which N&S and Byrer each would be entitled, the circuit court applied the factors of *Kopelman & Associates, L.C. v. Collins*:

> 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 & Associates, L.C. v. Collins*, 196 W.Va. 489, 473 S.E.2d 910 (1996); Syl. Pt. 2, *Shaffer v. Charleston Area Medical Center*, 199 W.Va. 428, 485 S.E.2d 12 (1997).

In an order entered September 7, 2010, the circuit court discussed and weighed the *Kopelman* factors to conclude that Mr. Byrer is entitled to 70% of the attorney's fees held in escrow and N&S is entitled to 30% of the attorney's fees held in escrow. The circuit court found, *inter alia*, that "[a]lthough N&S had a larger amount of time invested in the case before it settled, the Court believes that the events occurring after Mr. Byrer's departure from N&S, and his skill and expertise, were more important than most of the time N&S spent on this case."

N&S appeals the circuit court's charging lien decision and asserts that it should be awarded 85% of the fees held in escrow. It argues, *inter alia*, that, through the date of settlement, far more time was spent on the case by the firm of N&S than was spent by the Byrer firm. However, as we made clear in *Kopelman*, the amount of time spent on a case is but one factor for consideration. Moreover, Mr. Byrer was required to work additional hours after the agreement was reached to effectuate the settlement.

N&S also argues that the circuit court gave too much weight to the fact that Byrer did most of the work on the case while the case was at N&S. N&S also argues that the court erred in finding that Byrer incurred risk by taking this case, which was deemed difficult and unlikely to settle, to his newly-formed law firm. However, upon a review of the circuit court's order, we find that these were but a few of the facts that the circuit court considered in its *Kopelman* analysis. A copy of the circuit court's September 7, 2010, "Order Determining Nichols & Skinner, L.C.'s Charging Lien" is attached and incorporated by reference.

Upon a careful review of the record, the parties' arguments, and the circuit court's order, we find no abuse of discretion in the circuit court's fee determination. Accordingly, we affirm.

Affirmed.

ISSUED: June 24, 2011

CONCURRED IN BY:

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

IN THE CIRCUIT COURT OF HAMPSHIRE COUNTY, WEST VIRGINIA

F-1
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BRIAN K. COSNER, Administrator of the Estate of Gage Cary-Scott Cosner, Deceased, and as an Individual,

Plaintiff,

v.

Civil Action No. 06-C-36
Honorable Donald H. Cookman

CRAIG WAGONER, Executor of the Estate of Leona K. Wagoner, Deceased, and ERIE INSURANCE PROPERTY AND CASUALTY COMPANY,

Defendants.

ORDER DETERMINING NICHOLS & SKINNER, L.C.'S CHARGING LIEN

This matter came on for a bench trial on April 14, 2010, for this Court to consider a Charging Lien; upon the papers and pleadings filed herein; upon the appearance of the law firm of Nichols & Skinner, L.C., by John C. Skinner, Jr. and Andrew C. Skinner, in person and by counsel Ray A. Byrd and John Porco; upon the appearance of F. Samuel Byrer, in person and by counsel Allan N. Karlin; upon Proposed Findings of Fact, Conclusions of Law, and Order Submitted on Behalf of F. Samuel Byrer, filed on July 13, 2010; upon a proposed Order Determining Nichols & Skinner, L.C.'s Charging Lien, filed on July 21, 2010; upon Nichols & Skinner L.C.'s Reply filed on July 27, 2010; upon a Reply Brief on Behalf of F. Samuel Byrer filed on August 23, 2010; and upon a letter submitted by attorney John Porco on August 23, 2010.

Upon consideration of the testimony of the witnesses presented and exhibits introduced into evidence, the arguments of counsel, proposed orders, and pertinent legal authorities, the Court makes the following findings of fact and thereafter separate conclusions of law:

Findings of Fact

History of the Nichols & Skinner and F. Samuel Byrer Relationship

1. F. Samuel Byrer ("Mr. Byrer") is an attorney with a law office in Jefferson County, West Virginia.

2. Nichols & Skinner, L.C. ("N&S") is a law firm located in Jefferson County, West Virginia.

3. Mr. Byrer was employed as an attorney at N&S from the fall of 1984 until sometime in August of 2007. (Tr. 21:22-22:3, Apr. 14, 2010.)[1]

4. John C. Skinner, Jr. ("Mr. Skinner") was the sole owner of N&S from 1979 to 2007. (Tr. 136:20-24.)

5. In 2006, Mr. Skinner announced that he intended to retire. (Tr. 139:6-10) At the time, in addition to Mr. Skinner, four other attorneys worked at the firm: Mr. Skinner's sons, Stephen and Andrew Skinner, Pete Pentony, and Mr. Byrer. (Tr. 127:8-9.) Mr. Skinner suggested that the four attorneys purchase his interest in the firm. (Tr. 127:6-14.)

6. Mr. Byrer decided that he could not remain with the firm based on his conclusion that the firm would not be financially successful under Mr. Skinner's suggestion. (Tr. 95:12-15.)

7. In May 2007, Mr. Byrer discussed leaving the firm with Mr. Skinner. (Tr. 95:15-24, 140:1-4.) Mr. Byrer and Mr. Skinner dispute whether or not they reached an agreement on the exact date when Mr. Byrer would cease working at N&S. N&S contends that July 31, 2007

[1] Unless otherwise indicated, all transcript citations refer to the bench trial held on April 14, 2010.

was the agreed date and Mr. Byrer contends that they never agreed on a date. (Tr. 96:14-97:1, 137:17-20, 142:12-13, 147:1.)

8. In an attempt to reach an agreement about Mr. Byrer's transition, he and Mr. Skinner participated in an unsuccessful mediation on August 1, 2007. (Tr. 99:23-24.) Prior to August 1st, Mr. Skinner admitted that he did not meet with Mr. Byrer to discuss the status of his cases or to do anything to formalize a transition. (Tr. 149:15-18.) However, Mr. Skinner did testify that he asked Mr. Byrer for his feedback regarding communicating with the clients about his departure but Mr. Byrer did not provide any feedback. (Tr. 139:1-5.)

9. On August 2, 2007, Mr. Byrer contends that Mr. Skinner locked him out of the N&S office. (Tr. 30:24-31:5, 99:13-19.) Mr. Byrer was provided with a letter stating that August 2nd would be the last day of his employment. (Ex. 3.) As a result of his accrued vacation pay, Mr. Byrer stayed on the N&S payroll until August 31, 2007. (Tr. 23:16-21, 33:23-24, 143:19-22.) Mr. Skinner testified that he kept Mr. Byrer as an employed lawyer of N&S through August as an accommodation so that Mr. Byrer and his wife could remain on the N&S health insurance policy for a medical procedure that Mr. Byrer's wife was having in August. (Tr. 138:5-15, 144:4-9.)

10. Mr. Byrer and Mr. Skinner dispute the actual date of Mr. Byrer's last day of employment with N&S. Mr. Byrer contends it was August 3, 2007, and N&S contends it was August 31, 2007. (Tr. 22:11-12, 143:21-22.) Apparently, the parties do not dispute that Mr. Byrer did not work inside the physical structure of the N&S law office after August 1, 2007.

11. On August 2, 2007, Mr. Byrer did not have a new office for himself and he did not have malpractice insurance. (Tr. 96:5-8.)

12. After August 2, 2007, Stephen Skinner sent letters, on behalf of N&S, to Mr. Byrer's clients at the firm. (Ex. 1, N&S 00317; Tr. 165:9-11.) Mr. Byrer did not see these letters until after he retained counsel. (Stipulation and Agreed Order, May 17, 2010; Tr. 115:4-22.)

The Underlying Civil Action

13. The underlying case involved a tragic car accident that occurred on March 21, 2004 in Hampshire County, West Virginia. Seven-year-old Gage Cosner and his grandfather, Leroy F. Wagoner, were passengers in a vehicle driven by Gage Cosner's grandmother, Leona K. Wagoner. Mrs. Wagoner passed out while driving and the vehicle struck a tree. All three occupants were killed. (Ex. 1, N&S 00035-00045; Tr. 177:4-13.)

14. Brian Cosner, Gage Cosner's father, retained attorney H. Charles Carl, III, ("Mr. Carl") to represent him in a wrongful death action against the Estate of Leona K. Wagoner. Mr. Carl, who has an office in Hampshire County, then contacted Mr. Byrer and requested that they work together in representing Mr. Cosner. (Tr. 101:3-6, 174:1-3, 176:13-177:3.)

15. Mr. Carl contacted Mr. Byrer because they had worked together previously on another wrongful death case and Mr. Carl was "impressed with him [Mr. Byrer], how he handled not just the legal part of it but his kindness towards them [the clients]. (Tr. 176:20-24.)

16. When Mr. Carl contacted Mr. Byrer, he was employed as an attorney at N&S. Mr. Carl and Mr. Byrer represented Mr. Cosner on a contingent fee basis and agreed that, in the event of a favorable result, the fee would be divided evenly. (Ex. 1, N&S 00047.) Mr. Byrer also suggested that the fee agreement with Mr. Cosner "include 'any money recovered as well as any property or things of value' because of the issues surrounding the farm." (*Id.*) The farm was

a several hundred acre tract located mostly in Fort Ashby, West Virginia, owned by Mrs. Wagoner. (Ex. 1, N&S 00048-00060.)

17. Before Mr. Byrer became involved in the case, Mr. Cosner had already received a policy limits offer of $50,000.00 from Mrs. Wagoner's automobile liability insurance carrier and a policy limits offer of $25,000.00 from his personal automobile underinsured insurance carrier. (Tr. 37:1-23, 55:14-15, 179:3-5.) However, Mr. Cosner was not interested in settling the case unless Mrs. Wagoner's Estate accepted responsibility for the death of Gage Cosner by contributing to the settlement. (Tr. 177:3-6.)

18. Mr. Cosner, along with his brother Gary Cosner, owned and operated the business known as Springfield Valley Paving ("SVP"). (Tr. 175:18-21.) Erie Insurance Property & Casualty Company ("Erie") issued an insurance policy to SVP which contained underinsured motorist coverage with limits of $500,000.00. (Tr. 44:8-15.) Even though SVP did not own the vehicle involved in the accident and even though Mr. and Mrs. Wagoner and Gage Cosner were not employees of SVP, Mr. Byrer concluded that there was an "interesting UIM issue re personally owned truck insured under business policy." (Ex. 1, N&S 0005; Tr. 39:5-8.)

19. On or about March 17, 2006, Mr. Carl and Mr. Byrer filed this civil action on behalf of Mr. Cosner against the Estate of Mrs. Wagoner for wrongful death and against Erie seeking a declaratory judgment that the Erie policy issued to SVP provided underinsured motorist coverage. (Ex. 1, N&S 00017 and 00087-00132.)

20. After Mr. Byrer left N&S, Stephen Skinner sent a letter to Mr. Cosner advising him that Mr. Byrer had left the firm. (Ex. 1, N&S 00317-00318; Tr. 114:22-115:3.) Mr. Cosner signed a form indicating that he "would like for my case and file to be transferred to F. Samuel Byrer." (Ex. 1, 00320; Tr. 121:13-16.)

21. On September 21, 2007, the Court entered an Agreed Substitution of Counsel providing, in part, that "F. Samuel Byrer be and hereby is substituted as counsel for Plaintiff in this matter and that [N&S] be relieved as counsel for Plaintiff and shall have no further obligations in this case." (Ex. 1, NYS 00343-00344; Tr. 122:5-16.)

22. Both Mr. Carl and Mr. Byrer were very credible in their testimony that this case was difficult to settle. (Tr. 107:7-16, 178:3-181:24.) In addition, both expected to have a hearing or trial on one or both of the issues: the damages to be assessed against Mrs. Wagoner's Estate and the liability of Erie under the SVP policy. (Tr. 111:8-9, 179:15-17, 182:1-3.) Mr. Carl testified that he did not know if Mr. Cosner would proceed in the suit against the Wagoner heirs and therefore reduced his fee to ten percent. (Tr. 180:1-5.)

23. On July 2, 2007, attorney Oscar M. Bean issued a letter to counsel memorializing an agreement of the parties for Mr. Bean to mediate this case in his office on August 8, 2007. (Ex. 1, N&S 00309-00311.) However, the mediation was delayed because counsel for the heirs of Mrs. Wagoner did not arrange for the heirs to attend the mediation. (Tr. 50:13-21.)

24. Mr. Byrer was emphatic in his testimony that had the mediation taken place on August 8, the case would not have settled because Mr. Cosner would not have meaningfully participated without the heirs' presence and participation. (Tr. 51:11-16.)

25. At mediation, settlement depended on two issues. First, Mr. Carl and Mr. Byrer contended that there was underinsurance coverage through the SVP commercial automobile insurance policy with Erie because Mr. Cosner's personal vehicle was listed on one of the documents relevant to his business policy. Second, Mr. Carl and Mr. Byrer insisted that the Estate of Mrs. Wagoner directly contribute toward the settlement. This resulted from Mr.

Cosner's desire to have the Wagoner family members demonstrate, "some respect that he had lost his child in that accident." (Tr. 179:23.)

26. A settlement agreement was reached at the mediation on September 27, 2007. The settlement included a payment from Erie and a transfer of certain real estate from the Wagoner Estate to Mr. Cosner. (Ex. 1, N&S 00396-00420.) However, the consummation of the settlement involved additional work to implement the property transfer, to obtain a right-of-way for access from the highway to the property, and to clear title as there was a deed of trust against the property. (Tr. 67:18-69:8, 180:12-19, 181:22-24, 184:19-187:24.) As a result of these issues, the approval of the settlement was delayed. The Order approving the settlement was entered on August 26, 2008. (Ex. 1, N&S 00430-00440.) As of the date of the bench trial, Mr. Cosner still did not have clear title to the property because the Estate had not been settled. (Tr. 197:17-22.)

27. A review of the N&S timesheets reveal 129.40 hours worked on the case and expenses incurred of $3,329.18. (Ex. 1, N&S 0004-00010; Tr. 57:1-2.) Between the date Mr. Byrer first began working on this case and the time he left N&S, he and Mr. Pentony were the only attorneys at N&S who worked on the case. (Tr. 57:6-14.) A review of Mr. Byrer's timesheets reveals that after leaving N&S and up until November 2008, he worked 107.6 hours on the case and incurred expenses of $2,308.23. (Ex. 1, N&S 00011-00016; Tr. 28:1-24, 30:7-18.) The expenses have already been reimbursed. (Tr. 159:20-23.) Mr. Byrer has represented that his hourly rate at N&S was $200.00 per hour and N&S did not elicit testimony on nor dispute this figure. (Prop. Ord. p.12, ¶ 6.)

28. Mr. Byrer admitted that he was not a "meticulous timekeeper" and that all of his work at N&S does not appear on the N&S timesheets. (Tr. 101:17-102:13.) Mr. Byrer testified

that he had no objection to time being added to the N&S timesheets to recognize missing items, and that the Court may add whatever missing time it deems fair. (Tr. 102:19-23.) Mr. Byrer testified that many of these items were short documents prepared by his secretary or they required no work on his part. (Tr. 78-85.) Mr. Byrer spent time on the following items but they do not appear on the N&S timesheets:

- F. Samuel Byrer letter to H. Charles Carl, III, dated December 14, 2004 requesting insurance information. (Ex. 1, N&S 00046; Tr. 71:1-4.)
- F. Samuel Byrer letter to H. Charles Carl, III, dated March 9, 2005 regarding draft Complaint. (Ex. 1, N&S 00047; Tr. 71:7-9.)
- F. Samuel Byrer letter to H. Charles Carl, III, dated July 8, 2005 regarding draft Complaint and telephone call with Vince King regarding UIM coverage. (Ex. 1, N&S 00061; Tr. 71:10-15.)
- F. Samuel Byrer retention letter to Vince King dated July 15, 2005 enclosing various Springfield Valley Paving insurance papers. (Ex. 1, N&S 00082; Tr. 71:21-23.)
- F. Samuel Byrer letter to Fleming Insurance Agency dated July 28, 2005 requesting Springfield Valley Paving insurance information such as policy, riders, endorsements, and dec pages. (Ex. 1, N&S 00084; Tr. 72:1-4.)
- F. Samuel Byrer letter to Vince King dated August 9, 2005 enclosing Erie Insurance's August 3 letter and enclosures. (Ex. 1, N&S 00086; Tr. 72:5-10.)
- Answer, Affirmative Defenses and Cross-claims of Erie Insurance filed on May 10, 2006. (Ex. 1, N&S 00017; Tr. 73:1-74:1.)
- Letter to F. Samuel Byrer and other counsel from the Court dated July 5, 2006 regarding proposed Agreed Scheduling Order. (Ex. 1, N&S 00017; Tr. 74:6-19.)
- F. Samuel Byrer letter to counsel dated August 20, 2006 suggesting that Oscar Bean mediate per court order to mediate. (Ex. 1, N&S 00147; Tr. 75:19-76:1.)
- F. Samuel Byrer letter to H. Charles Carl, III, dated November 26, 2006 raising issue of bifurcating insurance coverage and wrongful death. (Ex. 1, N&S 00167; Tr. 76:6-10.)
- Plaintiff's First Document Requests to Defendant Craig Wagoner, Executor of the Estate of Leona K. Wagoner served on November 28, 2006. (Ex. 1, N&S 00169; Tr. 76:11-77:3.)
- Defendant Erie Insurance Property and Casualty Insurance Company's Responses to Plaintiff's Request for Admission served on November 29, 2006. (Ex. 1, N&S 00172; Tr. 77:4-20.)
- Defendant Erie Insurance Property & Casualty Insurance Company's Responses to Plaintiff's First Document Requests served on November 29, 2006. (Ex. 1, N&S 00176, 0000183; Tr. 77:21-24.)
- Counsel for Erie fax to F. Samuel Byrer dated November 29, 2006 enclosing Erie document production. (Ex. 1, N&S 00191; Tr. 79:11-80:14.)

- Plaintiff's Motion to Extend Expert Witness Deadline served on November 30, 2006. (Ex. 1, N&S 00227; Tr. 80:15-81:4.)
- F. Samuel Byrer letter to Vince King dated December 4, 2006 enclosing Erie Insurance's November 29 document production. (Ex. 1, N&S 00238; Tr. 82:14-23.)
- Plaintiff's Final Witness List served on January 2, 2007. (Ex. 1, N&S 00239; Tr. 82:24-83:12.)
- F. Samuel Byrer letter to counsel dated January 10, 2007 offering January and February dates for mediation with Oscar Bean per court order to mediate. (Ex. 1, N&S 00242; Tr. 83:13-20.)

Mr. Byrer accepted Mr. Byrd's representation that there are no time entries for the following (Tr. 84:14-85:11):

- Counsel for Erie letter to F. Samuel Byrer dated January 24, 2007 enclosing Fleming Insurance Agency file. (Ex. 1, N&S 00247.)
- F. Samuel Byrer letter to Vince King dated January 30, 2007 enclosing Fleming Insurance Agency file. (Ex. 1, N&S 00252.)
- Agreed Order Continuing Trial entered by the Court on February 2, 2007. (Ex. 1, N&S 00254.)
- Amended Agreed Scheduling Order entered by the Court on February 20, 2007. (Ex. 1, N&S 00257.)
- F. Samuel Byrer letter to counsel dated March 27, 2007 offering April dates for Cosner and Fleming depositions and asking if everyone agrees "the schedule mediation for a date following the depositions." (Ex. 1, N&S 00268.)
- Plaintiff's Document Request to Defendant Erie Insurance Company served on April 3, 2007. (Ex. 1, N&S 00273.)
- Plaintiff's Notice of Deposition (Scott Fleming) served on April 5, 2007. (Ex. 1, N&S 00275.)
- F. Samuel Byrer submits info to Vince King in a letter dated April 16, 2007. (Ex. 1, N&S 00285.)
- Notice regarding Mediation scheduled for August 8, 2007 served on June 25, 2007. (Ex. 1, N&S 00302.)
- Second Amended Agreed Scheduling Order entered by the Court on June 29, 2007. (Ex. 1, N&S 00305.)
- Oscar Bean letter dated July 2, 2007 regarding mediation scheduled for August 8, 2007. (Ex. 1, N&S 00309.)

29. N&S filed a Notice of Charging Lien on or about October 11, 2007. (Ex. 1, N&S 0001-0003, 00021.) N&S and Mr. Byrer have been unable to reach an agreement as to their respective shares of the attorney fee earned in this case.

Conclusions of Law

A. N&S has the burden of proof in this matter. *See* syl. pt. 2, *U.S. Blowpipe Co. v. Spencer*, 61 W.Va. 191, 56 S.E. 345 (1907) ("To render a mechanic's lien valid it must appear upon its face that all the provisions of the statute necessary to its creation have been substantially complied with, and where, by proper pleadings, a fact material and necessary to its validity is put in issue, the burden is upon the one asserting the lien to establish such fact by proof."); *see also* Tr. 8:4-11.

B. "A charging lien is the equitable right of an attorney to have fees and costs due the attorney for services in a particular action secured by the judgment or recovery in such action...A charging lien brought against another attorney may proceed in a separate suit or the underlying action in which the attorneys had formerly worked on together." Syl. pt. 4, *Shaffer v. Charleston Area Med. Ctr., Inc.*, 199 W.Va. 428, 485 S.E.2d 12 (1997.)

C. There is no contract between Mr. Byrer and N&S that provides a basis for determining the amount of the attorney fee that should be paid to N&S. In the absence of a contract, N&S is entitled to receive payment in quantum meruit for the work done by Mr. Byrer while he was employed by N&S. *See* W.Va. Code § 30-2-15 (1923) (Repl. Vol. 2007) ("An attorney shall be entitled for his services as such to such sums as he may contract for with the party for whom the service is rendered; and, in the absence of such contract, he may recover of such party what his services were reasonably worth.")

D. The West Virginia Supreme Court of Appeals' ("Supreme Court") decision in *Kopelman & Assoc., L.C. v. Collins* is determinative of the issues presented in this case. 196 W.Va. 489, 473 S.E.2d 910 (1996). Just as in this case, *Kopelman* involved "how a law firm in a contingency fee case should be compensated when lawyers from that firm leave and take

contingency fee clients with them." *Id.*196 W.Va. at 493, 473 S.E.2d at 914. The firm sued two former associates for a share of the attorney fees earned in cases that originated while the attorneys were employed by the firm. *Id.* The circuit court determined that the proper method of dividing the fees between the firm and the former associates was to calculate the amount by multiplying the associate's hourly rate earned at the firm by the number of hours they worked on the case plus the firm's out of pocket expenses. *Id.*

E. On appeal, the Kopelman law firm argued there should be an equitable division of contingency fees based upon the ratio of time spent on the cases. *Id.*. The Supreme Court recognized that, where a law firm is discharged from further representation of a client and there is no agreement regarding the division of fees, the firm is entitled to compensation pursuant to a quantum meruit determination. *Id.* 196 W.Va. at 499. However, the Supreme Court rejected the circuit court's formulaic reliance on the attorney's hourly rate, times the number of hours worked, and concluded that the circuit court should consider a number of other factors to determine the reasonable value of services rendered. *Id.* The Supreme Court stated that although the method of determining the reasonable value by calculating the hourly rate may be the easiest way to resolve disputes, it does not necessarily produce a fair and just result. *Id.* 196 W.Va. at 497, 473 S.E.2d at 918.

> 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 disturbed unless the circuit court abused its discretion.

Id. at syl. pt. 2. In accord with the mandate in syllabus point 2, this Court will consider the following *Kopelman* factors:

F. **Relative Risks Assumed by Each Firm.** The Court agrees with N&S's statement of the law that "[a] contingent fee lawyer bears the risk of receiving no pay if the client loses and is entitled to a compensation for bearing that risk." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 35 cmt. c (1998). When Mr. Byrer began working on this case while at N&S, Mr. Cosner had already been assured $75,000.00 in insurance proceeds from Mrs. Wagoner's liability insurer and from his own underinsurance coverage. (Tr. 55:14-15.) Therefore, the Court concludes that N&S had little risk with regard to losing expenses. For the same reason, N&S was assured at least some fee from the proceeds of those policies because Mr. Carl had agreed to include fee sharing as to the $75,000.00. (Tr. 55:15-18.) In fact, Mr. Skinner testified that the case did not involve a lot of risk because "you've got a single car wreck and the coverage issue, and you've got someone with significant assets." (Tr. 158:13-16.) Mr. Skinner went on to say that, "[i]t was zero risk..." (Tr. 159:1.)

G. On the other hand, the Court finds that Mr. Byrer assumed responsibility for a case with significant risk at a time when he was just beginning to build his own practice. When Mr. Byrer assumed responsibility for the case, he was no longer working within the security of an established law firm. Mr. Byrer had no office, no malpractice insurance, and few cases. During this time of upheaval, Mr. Carl and Mr. Byrer believed that the case was unlikely to settle. (Tr. 107:5-8, 180:24-182:3.) The claim against Erie involved a high risk. (*Id.*) Both attorneys also understood that Mr. Cosner would not settle without a significant contribution

from Mrs. Wagoner's Estate, and that such a contribution would have to be approved by the heirs. (*Id.*) Even after the settlement, not all of the risk was eliminated. (Tr. 66:1-69:8.)

H. The Court finds, despite what Mr. Skinner testified, that this case involved a significant amount of risk and that N&S bore that risk for over three years. When Mr. Byrer assumed that same risk at transfer, there was an expectation that the case would not settle and a continuing risk that there might not be a significant recovery. When Mr. Byrer assumed responsibility for the case, N&S was rid of a case that involved an unlikely settlement, as believed by the attorneys, and had already been assured at least some fee and reimbursement of its expenses. The fact that Mr. Byrer and Mr. Carl were successful in settling the case in September 2007 was not due to a lack of risk; rather, it was the result of the excellent work done by Mr. Carl and Mr. Byrer. Mr. Byrer's experience and expertise in wrongful death cases were instrumental in overcoming the risks associated with this case. Although N&S did have some risk, Mr. Byrer assumed that same risk while he was attempting to build a new practice following his departure from N&S. Therefore, the Court concludes that this factor weighs in favor of Mr. Byrer.

I. **Frequency and Complexity of Any Difficulties Encountered by Each Firm.** The Court finds that Mr. Byrer handled some of the difficulties of this case, particularly discovery and the Erie policy issue, while working at N&S and after leaving N&S. In fact, Mr. Skinner admitted at the hearing that he was not aware of the problems involved in settling the case. (Tr. 157:8-158:3.) After leaving N&S, Mr. Byrer handled the additional difficulty of navigating the intense emotional upheaval among the Wagoner heirs and Mr. Cosner. (Tr. 107:9-10.) Mr. Byrer has faced additional difficulty in implementing the settlement agreement. For these reasons, the Court concludes that this factor weighs slightly in favor of Mr. Byrer.

J. **Proportion of Funds Invested and Other Contributions Made by Each Firm.** N&S worked approximately 129.40 hours and advanced $3,329.18 in expenses. No other attorney at N&S made a substantial contribution to the case. Although Mr. Pentony handled some matters, Mr. Byrer did the majority of the work. After leaving N&S, Mr. Byrer worked 107.6 hours and advanced $2,308.23 in expenses as of November 2008. The Court concludes that based on the number of hours worked and the amount of expenses advanced, this factor weighs slightly in favor of N&S.

K. **Quality of Representation.** Mr. Carl testified that he consulted Mr. Byrer because of his expertise in the wrongful death area. (Tr. 177:1-2.) The Court also believes that N&S is a law firm of high quality. The Court concludes that this factor does not weigh in favor of either party because Mr. Byrer did the majority of the work for N&S and for his own firm and the quality of his representation remained the same.

L. **Degree of Skill Needed to Achieve Success.** Mr. Byrer demonstrated a very high level of skill. N&S contributed to Mr. Cosner's recovery but Mr. Byrer was crucial in the success of the case. Without a resolution, there could be no fee. The ultimate resolution of this case took place under the control of Mr. Byrer. This case was very difficult to settle. Mr. Byrer had a client who had suffered the tragic loss of his only child and his soon-to-be ex-wife had allied herself with her siblings, who are the heirs of the Estate. (Tr. 107:10-16.) Mr. Cosner had made it clear to his attorneys that he would not settle unless the Estate contributed to the settlement and the heirs accepted responsibility for the death of his son. (Tr. 191:13-20.) In addition, Mr. Byrer had to litigate against Erie on a difficult legal theory and he had to convince the Wagoner heirs that they should contribute some of their potential inheritance to Mr. Cosner.

Mr. Byrer conducted most of the discovery and pursued the Erie claim while working at N&S. None of the other lawyers at N&S played a substantial role in litigating or settling the case.

M. It was at the mediation, after he had left N&S, that Mr. Byrer's skills were really put to use. Mr. Carl and Mr. Byrer testified that they had no expectation the case would settle. (Tr. 107:5-8, 178:8-9.) It was only during the mediation when everything came together, that Mr. Byrer was able to negotiate a successful resolution to the case. When asked to comment on Mr. Byrer's representation, Mr. Carl testified, "if it hadn't been for him we wouldn't have gotten the thing done." (Tr. 190:13-16.) Mr. Byrer achieved success at the mediation, after he left N&S, and to do so required a high degree of skill. The Court believes that Mr. Byrer's skill is the major reason a settlement was reached. Obviously Mr. Byrer exhibited the same degree of skill while working at N&S as he does for his own firm, but the Court concludes that this factor weighs in favor of Mr. Byrer.

N. **Result of Each Firm's Efforts.** For more than three years at N&S, Mr. Byrer conducted most of the discovery and obtained the information supporting the coverage argument against Erie.[2] (Tr. 41:6-13, 42:9-12, 111:19-112:5, 188:12-21.) After he left N&S and particularly at the mediation, Mr. Byrer navigated the complex family dynamics and emotional pain of the Wagoner heirs and Mr. Cosner. Mr. Byrer's efforts at N&S and on his own contributed to the final result. The Court would note that there was no indication that Mr. Byrer left N&S at that particular time in order to gain an advantage regarding the fee in this case. Although Mr. Byrer spent more time on the case prior to the settlement while he was at N&S, the Court believes that the most critical time in terms of a favorable result was spent by Mr. Byrer after he left N&S. Therefore, the Court concludes that this factor weighs in favor of Mr. Byrer.

[2] *But see* Tr. 34:9-35:10: Mr. Byrer testified there were pending discovery issues after August 31, 2007 although no discovery actually took place between August 31, 2007 and September 27, 2007.

O. **Reason the Client Changed Firms.** When Mr. Cosner was notified that Mr. Byrer was no longer employed by N&S, he was given the choice to keep the case with the firm or Mr. Byrer. Mr. Carl recommended that Mr. Cosner transfer his file from N&S to Mr. Byrer because Mr. Carl went to N&S solely because he wanted Mr. Byrer to work on the case. (Tr. 183:18-184:3.) Therefore, the Court concludes that this factor weighs in favor of Mr. Byrer.

P. **Viability of the Claim at Transfer.** Viability is a consideration of whether the case was initially speculative but concrete by the time it moved to the second firm. *Kopelman*, (citing *La Mantia v. Durst*, 234 N.J.Super 534, 540-41, 561 A.2d 275, 278 (1989). Here, the case was viable at the time of transfer, in terms of initial settlement discussions, but the risk assumed by Mr. Byrer was high. Mr. Byrer testified that as of the day of his departure from N&S, he "had no reasonable expectation that we were anywhere close to settlement." (Tr. 107:7-8.) The only certainty at the time of transfer was the $75,000.00 that had already been secured by Mr. Carl. Therefore, the Court concludes that this factor does not weigh in favor of either party.

Q. **Amount of Recovery Realized.** The Court is familiar with the recovery realized because it approved the settlement. The amount of attorney fee to be divided is sufficient to permit a reasonable award to both N&S and Mr. Byrer.

R. The *Kopelman* decision makes clear that the factors to be considered in deciding how a law firm in a contingency fee case should be compensated when lawyers from that firm leave and take contingency fee clients with them are rooted in, arise under, and are limited to, the underlying contingency fee case producing the attorney fee. *See eg*, 196 W.Va. at 499-500, 473 S.E.2d at 920-21. The Court finds that N&S and Mr. Byrer are limited to factors rooted in and arising under the *Cosner* case. Also, the Court previously entered an Order on December 10,

2009, that "[t]he parties have further agreed that Mr. Byrer will not raise issues regarding his employment relationship with Nichols & Skinner and/or his contention that he was a de facto partner in this proceeding." Therefore, the Court declines to consider any other factors, although allowed by *Kopelman*.

S. This is a tragic case, not only because of three deaths that resulted from the vehicle accident but because a twenty-four year working relationship and friendship has ended up at opposing tables in a courtroom. This case was particularly tragic for Mr. Cosner, who lost his son and divorced his wife as a result of the accident. As Mr. Byrer testified, "The family was in a shambles emotionally over the losses. Brian Cosner faced a case where he was administrator of his son's, seven-year-old son's, estate, bringing a suit against the boy's grandmother, who caused the death." (Tr. 107:9-13.)

T. The Court does not want to permit Mr. Byrer to obtain a windfall by failing to recognize the value of N&S's willingness to risk the money and time to develop Mr. Cosner's claim at the outset and for the three following years. However, it seems inequitable to allow N&S to get the larger share of the fee when Mr. Byrer did the majority of the work and because his degree of skill was crucial to the settlement of this case. Furthermore, the Court would emphasize that this was a difficult case. The Erie insurance issue was part of the difficulty, but the more complex issue was handling Mr. Cosner's emotional turmoil and his insistence that the Wagoner Estate contribute to the settlement. Although N&S had a larger amount of time invested in the case before it settled, the Court believes that the events occurring after Mr. Byrer's departure from N&S, and his skill and expertise, were more important than most of the time N&S spent on this case.

U. The Court concludes that N&S is equitably entitled to greater compensation than what its hours and standard rates would suggest.[3] Most of the *Kopelman* factors weigh in favor of Mr. Byrer. However, Mr. Byrer did work on this case for three years while he was employed at N&S. Therefore, the Court believes that a 70/30 split of the fee, with Mr. Byrer receiving the larger portion, represents a fair and just resolution of the dispute.

WHEREFORE, in consideration of the foregoing, the Court does hereby **ADJUDGE** and **ORDER** that F. Samuel Byrer is awarded seventy percent (70%) of the amount held in the escrow account and Nichols & Skinner, L.C. is awarded thirty percent (30%) of the amount held in the escrow account. This 70/30 split of the fee includes the original amount and interest accrued. The amount held in the escrow account has not been disclosed due to the confidentiality of the settlement. It is further **ORDERED** that counsel shall contact the Court in writing, preferably by Agreed Order, as to those portions of the transcript that are to be sealed, within fourteen (14) days from the date of this Order. The Court will hold the transcript in its office until contacted by counsel or until the fourteen days have elapsed. If counsel fail to contact the Court in writing, the transcript will be filed as is after fourteen days.

- The Circuit Clerk shall mail true copies of this Order to all counsel of record.
- The objection of the parties to any and all adverse rulings is noted.

mailed to N&S & FSB. 9/8/10

ENTERED this 7th day of September, 2010.

DONALD H. COOKMAN, JUDGE

[3] For this reason, the Court declines to add time to compensate for the missing items from the N&S timesheets.