No. 333184 - Schrader Byrd & Companion, P.L.L.C. v. Francis G. Marks, et al.

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Albright, Justice, concurring:

I write separately to concur with the majority's holding that an attorney fee arrangement in which a percentage of future client income is paid as an attorney fee is not per se impermissible. The factors articulated by the majority opinion for determining the reasonableness of such arrangement in any given case are, in my opinion, properly formulated to protect the interests of both the attorney and the client.

The dissents of Justice Maynard and Justice Benjamin raise the issue of the clients' comprehension of the nature of the agreement with their attorneys in this case. A review of the evidence of record reveals that Ms. Luther and Ms. Marks were adequately informed of the scope of the contingent fee agreement. The evidence further indicates that the application of that agreement to the portion of the settlement which created an increase in future royalty payments was also sufficiently discussed.

When it became apparent that the settlement would include both an immediate payment and the right to an increase in future payments, the parties attempted to ascertain the most appropriate manner in which the thirty percent contingency fee could be applied to the amount of increase in future payments. The March 30, 1998, discussion of this issue was

memorialized in a March 31, 1998, letter from one of the attorneys to the clients. The letter specifically invited alterations, where necessary, stating as follows: "[I]f I have misstated anything or if you have a different recollection, please let me know as soon as possible." The clients did not immediately assert any allegation of misrepresentation, concealment, or misconception regarding the application of the thirty percent contingency fee to the future payments. In fact, pursuant to that arrangement, the clients paid the attorneys thirty percent of the increase in royalty payments from April 1998 to September 2004.

In the summary judgment action below, the circuit court was presented with the question of whether a genuine issue of material fact existed regarding the agreement and its consummation. This Court has consistently emphasized the obligation of attorneys to deal with clients in utmost good faith. Yet, it is not within the authority of this Court to alter the terms or conditions of an attorney-client agreement by eliminating portions which are not within the liking of this Court. "The relationship of attorney and client is a matter of contract, expressed or implied." *State ex rel. DeFrances v. Bedell,* 191 W.Va. 513, 517, 446 S.E.2d 906, 910 (1994).

The attorneys in this case filed a motion for summary judgment, properly granted by the lower court. Syllabus point five of *Wilkinson v. Searls*, 155 W.Va. 475, 184 S.E.2d 735 (1971), explains:

> A motion for summary judgment should be granted if the

> pleadings, exhibits and discovery depositions upon which the motion is submitted for decision disclose that the case involves no genuine issue as to any material fact and that the party who made the motion is entitled to a judgment as a matter of law.

Syllabus point three of *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995), enumerates the responsibilities of the responding party, as follows:

> If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.

See also Aluise v. Nationwide Mut. Fire Ins. Co., 218 W.Va. 498, 509, 625 S.E.2d 260, 271 (2005). The evidence asserted by the clients in this case was insufficient to create a genuine issue of material fact regarding their lack of understanding or consent to the contingency fee arrangement's application to the future increase in royalties. Thus, the lower court was correct in granting summary judgment to the attorneys.

Based upon the foregoing, I respectfully concur.