No. 33184 – Schrader Byrd & Companion, P.L.L.C. v. Francis G. Marks, et al.

Maynard, Justice, dissenting:

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I would reverse the circuit court's award of summary judgment on behalf of SBC because I believe there is a question of fact regarding whether Ms. Marks and Ms. Luther understood the nature of the contingent fee agreement as it related to the execution of the new lease.

At the outset, I wish to make clear that I find nothing improper with the fact that SBC received one-third of the $3.5 million that Ms. Marks and Ms. Luther received which amounted to $1,050,000.00. SBC expended thousands of lawyer and paralegal hours on the litigation and was very effective in achieving a desirable result for Ms. Marks and Ms. Luther. Certainly, lawyers should be well compensated for their expertise and hard work. However, I believe that SBC's work on the new lease must be judged separately from the original contingent fee arrangement.

Under our law, "The fundamentals of a legal contract are competent parties, legal subject matter, valuable consideration and mutual assent. There can be no contract if there is one of these essential elements upon which the minds of the parties are not in

agreement." Syllabus Point 5, *Virginian Export Coal Co. v. Rowland Land Co.*, 100 W.Va. 559, 131 S.E. 253 (1926). There is evidence below that Ms. Marks and Ms. Luther simply did not assent to paying SBC 30% of the increase in all future royalty payments.

Further, "courts as a matter of public policy give particular scrutiny to fee arrangements between attorneys and clients, casting the burden on attorneys who have drafted the retainer agreements to show that the contracts are fair, reasonable, and fully known and understood by their clients." *Shaw v. Manufacturers Hanover Trust Co.*, 68 N.Y.2d 172, 176, 499 N.E.2d 864, 866, 507 N.Y.S.2d 610, 612 (1986) (citations omitted). Unfortunately, neither the circuit court nor a majority of this Court gave careful scrutiny to the fee arrangement at issue. SBC should have the burden of proving to the trier of fact that the fee agreement is fair, reasonable, and actually what the parties agreed to. Considering the highly unusual nature of the fee agreement and its potential for the payment of sizable fees to SBC, I believe that the burden of proof on SBC's part would be a heavy one.

Finally, I firmly believe that fee arrangements like the one at issue should not be encouraged by this Court. May we never see the day when lawyers who negotiate leases on behalf of Wal-Mart receive compensation in the form of 5% of that store's future earnings. Such a practice would unduly entangle lawyers in the affairs of their clients and arguably give these lawyers an ownership interest in the businesses they represent, all to the

detriment of the legal profession.

Accordingly, for the reasons set forth above, I dissent.