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

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Benjamin, Justice, dissenting:

The Majority affirmed the circuit court's finding of summary judgment based upon the Majority's conclusion that the fees-from-future-royalties arrangement was not *per se* impermissible. In so doing, the Majority established a factor test to determine whether an attorney is entitled to receive fees through such an arrangement. The first factor is the consideration of whether the terms of the fee agreement between the attorney and client provide for a fees-from-future-royalties arrangement. The second factor is "whether, when viewed in the context of the entire representation of the client by the attorney, the fees are fair and reasonable." I must disagree with the Majority's determination that the fee herein – even when analyzed under the Majority's own factor test – was either contemplated by the fee agreement or is "fair and reasonable."

I do not disagree that a fair contingent fee was the appropriate measure for the work of Shrader Byrd & Companion, P.L.L.C (herein after "SBC") in settling the Garner Williams litigation and obtaining a settlement of $3.5 million dollars for Ms. Marks and Ms. Luther. I take issue, however, with the Majority's holding that such a contingent fee should be extended to future royalties gleaned from the preparation of a new lease which resulted

during the settlement of the case.

The Majority relies on *Shiya v. National Committee of Gibran*, 381 F.2d 602, 607-608 (2d Cir. 1967) to support its position. The *Shiya* court concluded that the somewhat ambiguous contingent fee agreement involved in the attorney-client relationship therein applied to renewal copyright royalties based on the unambiguous language of negotiations which tended to prove that the parties involved were aware that those renewal royalties were included in the subject matter of the litigation. Language such as "all sums involved or connected with the litigation," "requested thirty percent for his compensation of the monies that shall be adjudged to inure to the benefit of the committee" and "a fee equal to twenty-five percent of the total recovery" tended to support the court's conclusion therein that, in the negotiation of the contract, the parties understood that the contingent fee was applicable to all renewal royalties. The situation in *Shiya* is not, however, analogous to that in the case before us..

The language of the contingent fee agreement executed between SBC and Ms. Marks and Ms. Luther makes clear that SBC was retained to recover:

> loss of income and other damages sustained by Client as a result of the wrongful and improper mining of mineral property...in which Client owns an undivided interest, with this employment being on a contingent fee basis as follows:

> FIRST: In the event that a settlement is effected after the institution of an action or actions, but prior to trial or trials of said action or actions, then and in that event Client agrees to pay said attorneys 30% of the amount collected by any such settlement in each such action.

I cannot agree with the Majority that this contingent fee contract contemplated that the "amount collected by any such settlement" was meant to include future royalties when the agreement clearly states that it was executed in regard to action for "loss of income" resulting from the "wrongful and improper mining of mineral property." Future royalties based upon lawful and authorized mining of mineral property are not "lost income" from "wrongful and improper mining." On the contrary, future royalties are income yet to be realized.

To support its contention that the future royalties provided for in the 1998 lease are part of the "amount collected by [the] settlement" and subject to the contingent fee agreement, the Majority focuses on the fact that the 1998 lease itself states that the lease is "part of the complete compromise and settlement of all claims by Marks, Luther, Laxare and Cannelton." However, this language is irrelevant to the question of what the contingent fee agreement contemplated. The contingent fee agreement only contemplated that SBC would be entitled to thirty percent of whatever lost income and other damages were collected in the settlement of the dispute. While the new lease was drafted and executed as a necessary part of the settlement (which found that Ms. Marks and Ms. Luther were not bound by the prior lease) it has little or nothing to do with the loss of income and other damages that Ms. Marks

and Ms. Luther suffered while their mineral rights were robbed under the old lease.

That is not to say that SBC should be left uncompensated for its work in the preparation of the lease. However, I find it unconscionable to allow SBC to collect what will surely amount to millions of dollars over the years for the simple act of preparing a mineral lease. Had SBC simply billed Ms. Marks and Ms. Luther for a multi-million dollar lump-sum fee for the preparation of the lease, the circuit court and this Court surely would have disapproved. Can it justly be said that a legal fee which will, over time, amount to millions of dollars for the simple preparation of a mineral lease can be justified simply by calling it part of a contingent fee agreement or simply because Ms. Marks and Ms. Luther acquiesced to it for a period of time? I think not.

In *Committee on Legal Ethics of West Virginia State Bar v. Tatterson*, 177 W.Va. 356, 352 S.E.2d 107 (1986), this Court held in Syllabus Point 2:

> If an attorney's fee is grossly disproportionate to the services rendered and is charged to a client who lacks full information about all of the relevant circumstances, the fee is "clearly excessive" within the meaning of Disciplinary Rule 2-106(A), even though the client has consented to such fee. The burden of proof is upon the attorney to show the reasonableness and fairness of the contract for the attorney's fee.

Moreover, in Syllabus Point 3, the Court held, "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 Disciplinary Rule 2-106(A)." I can find nothing in the record that would lead me to believe that when the contingent fee agreement was executed in 1988, Ms. Marks and Ms. Luther had any sort of understanding that the contingent fee would be based on anything more than recovery of their loss of income and other attendant damages. There is nothing that would lead me to believe that Ms. Marks and Ms. Luther intended to obligate themselves to give SBC thirty percent of any and all future royalties.

Likewise, I do not find any "real risk," such that might support an otherwise unreasonable fee, which would justify SBC's collection of thirty percent of future royalties. The preparation of the lease itself proposed no real risk to SBC, and certainly there is no current risk to the law firm now that the lease has been executed. Furthermore, SBC admits in its brief that it has only spent approximately "52.35 lawyer hours and 51.55 paralegal hours on issues related to the Garner Williams litigation (including the Lease and side letter agreement)" since the settlement as opposed to the approximately 4,062.45 lawyer hours and 920.35 paralegal hours alleged to have been spent prior to the settlement. I think one may rightly assume that SBC has probably spent even less time – if any – on issues related to the Garner Williams litigation since the submission of that brief. Indeed, SBC's only apparent job at this point is to sit back and watch the checks roll in.

Suffice it to say, I find that the contingent fee herein as applied to future royalties resulting from the preparation of the new lease to be grossly disproportionate and clearly excessive in light of *Tatterson*. I also find – in light of the Majority's new factor test – that the terms of the contingent fee agreement do not contemplate that the fee would be applied to future royalties and that it is unfair and unreasonable to apply the fee to such future royalties. Accordingly, I respectfully dissent from the Majority opinion.