STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF LEELANAU

PATRICIA I. PETROSKEY, Individually and as Personal Representative for the Estate of KENNETH LEE PETROSKEY,

Plaintiffs,

v

File No. 94-3523-NO
HON. PHILIP E. RODGERS, JR.

SYB, a Michigan Business Corporation and SUGARLOAF ASSOCIATES, a Michigan Limited Partnership, jointly and severally, CENTRAL ELEVATOR CO., INC., a Michigan Corporation, and LINDSLEY MANUFACTURING, INC., a Michigan Corporation,

Defendants.
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Mark R. Dancer (P47614)
Daniel J. Dingeman (P39920)
Attorneys for Plaintiffs

Bishop & Heintz, P.C.
Former attorneys for Plaintiffs

Clarence G. Gomery (P44168)
Former attorney for Plaintiffs

John R. Vanderveen (P40467)
Attorney for Syb, Inc.

Philip J. Crowley (P24218)
Attorney for Sugarloaf Associates

Michael J. Swogger (P42905)
Attorney for Central Elevator Co.
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DECISION AND ORDER

The substantive claims in this case having been resolved between the parties and their settlement having been approved on the record and funds disbursed to the Estate, it remains this Court's obligation to resolve a fee dispute between Plaintiffs' counsel. The disputants include Bishop & Heintz, P.C., Dingeman & Dancer, P.L.C., and Clarence Gomery. Mr. Gomery was the attorney who the Estate contacted while he was an associate with Bishop & Heintz, P.C. When Mr. Gomery chose to relocate his practice to Dingeman & Dancer, P.L.C., the case followed him. At the time the claim was settled or shortly thereafter, Mr. Gomery left the Dingeman & Dancer firm and moved to intervene in this fee dispute. Mr. Gomery's Motion for Intervention was granted and the Court heard oral argument from all interested parties on April 1, 1996. Thereafter, the Court took the matter under advisement. Having had the opportunity to consider oral arguments and having reviewed the parties' written submissions, the Court will now issue its decision. MCR 2.517.

The contingent fee properly assessed by counsel is the subject of a precise Michigan Court Rule, MCR 8.121. This rule provides that when an attorney enters into an contingency fee agreement, it is deemed fair and reasonable so long as it does not exceed one-third of the total recovery net of costs and expenses. Here, all interested counsel and the Estate agree that the fee at issue was computed consistent with MCR 8.121. The fee for division, net of costs and expenses, equals $315,532[1]. Bishop & Heintz filed an

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[1] This fee was escrowed and the remaining proceeds to the Estate were promptly distributed. Any interest which accrued

Affidavit stating that their firm invested 199.15 hours in the case. Similarly, Dingeman & Dancer filed an Affidavit indicating their investment of 743.2 hours on the matter. A significant amount of both firms' time includes the work of Mr. Gomery, an individual who was a salaried associate with each firm but who had some expectation of a "bonus" if the case was successfully concluded.

Although Mr. Gomery may have a reasonable expectation of a "bonus" as a function of his employment agreements with Bishop & Heintz or Dingeman & Dancer or both, this case is not the forum in which to resolve such a dispute. Recognizing that Mr. Gomery was a salaried associate in each firm, that he left Dingeman & Dancer and that the case did not follow him a second time, Mr. Gomery is not an attorney representing a client who is no longer bound by a fee agreement. Rather, he is an attorney no longer employed with a firm who was representing a client who may or may not be bound by a fee agreement. While quantum meruit is the basis upon which reasonable fees are determined where a firm is discharged without legitimate cause, the principle has never been applied to the salaried employee associates of such a firm. Accordingly, and without prejudice to Mr. Gomery's rights to assert his claims against each of these firms in an independent action, the Court declines to further address Mr. Gomery's claim here.

There is no dispute that Mr. Gomery was acquainted with the Petroskeys or that Mrs. Petroskey sought him out for advice and legal assistance after another recognized local law firm refused to take the case. Thereafter, substantial services were provided by

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during the escrow will be divided among counsel pro rata.

Bishop & Heintz in the form of investigation, expert witness identification, the drafting and filing a complaint and initial formal discovery. The Court, then, must review the situation in which the services of Bishop & Heintz were terminated.

When Mr. Gomery chose to relocate his employment to Dingeman & Dancer, the case did follow him. No ethical violation is alleged nor has anyone suggested that the services provided by Bishop & Heintz were deficient, failed to meet the appropriate standard of care or that they were discharged for any legitimate cause whatsoever. Accordingly, this Court finds that Bishop & Heintz were discharged ethically but without cause and that their contingent fee agreement no longer provides a basis upon which they may be compensated. Rather, Bishop & Heintz are entitled to a reasonable fee on the basis of quantum meruit. Morris v City of Detroit, 189 Mich App 271, 278 (1991); and Medbury v General Motors Corp, 119 Mich App 351, 354-355 (1982)..

In both Morris, Medbury and their predecessor, Crawley v Schick, 48 Mich App 728, 737; 211 NW2d 217 (1973), the Court of Appeals recognized the absence of a precise formula for assessing the reasonableness of an attorney's fees. Substantial discretion is provided to the trial court. However, in Morris, Medbury and Crawley several nonexclusive factors were set forth for the trial court's determination. Those factors include the following:

1. the professional standing and experience of the attorney;

2. the skill, time and labor involved;

3. the amount in question and the results achieved;

4. the difficulty of the case;

5. the expenses incurred; and

6. the nature and length of the professional relationship with the client.

Morris, supra, p 279.

The Morris Court noted that the trial court may also consider that the attorney originally agreed to render services on a contingency basis. Id. Such an attorney may appropriately be awarded a percentage of the total recovery so long as the combined attorney fees do not exceed that fee allowable under MCR 8.121.

As a corollary to this discussion, evidence was received that lawyers who refer a case to another lawyer and remain actively involved with the file generally receive a contingent fee equal to one-third of the total attorney's fee recovered. Referral fees may be ethically received so long as they comply with the conditions of the Michigan Rules of Professional Conduct, specifically 1.5(e).

> (e) A division of a fee between lawyers who are not in the same firm may be made only if:
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> (1) the client is advised of and does not object to the participation of all the lawyers involved; and
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> (2) the total fee is reasonable.

cf, RI-32 (October 6, 1989) and R-11 (July 26, 1991).

In both of the above-cited rulings, the State Bar Board of Commissioners has consistently found that the total fees assessable by counsel may not exceed the one reasonable fee sanctioned by the Court rules.

The facts of the instant case are interesting in that had Bishop & Heintz referred the case to Dingeman & Dancer and performed nearly 200 hours of service they would easily have demonstrated an entitlement to the customarily recognized fee of one-third of the recovery made by Dingeman & Dancer, a referral fee which would have provided Bishop & Heintz with a somewhat proportionally greater recovery than their investment in time but one commensurate with the risk associated with the case, the satisfactory result and recognition that they were never discharged for legitimate cause. Yet, there was no referral but the loss of a significant fee generating opportunity by the recruitment of a key employee. There was no misfeasance in Dingeman & Dancer offering employment to Mr. Gomery, but candor required counsel to recognize that the case was discussed as a part of Mr. Gomery's employment interview.

With respect to the claim of Bishop & Heintz for attorneys' fees and the Crawley factors, the Court notes that Mr. Heintz is an attorney of high professional standing within the local community and one with substantial experience in handling complex matters. Mr. Heintz is known to the Court as a trial lawyer who has received favorable jury verdicts, in addition to his regular appearance in Court in cases involving commercial or personal injury issues. The Court notes Mr. Heintz's demonstrated record of success before judge and jury in contravention to the unseemly display of Martindale Hubbell ratings in Court. Given the liberality with

which such ratings are now dispensed and the alternative procedures by which they may be received, the Court prefers to rely upon its actual experience with counsel in bench and jury trials as opposed to the opinions of a for-profit ratings agency. Here, Mr. Heintz has a demonstrated record of successful client representation of many years duration. Mr. Dancer has negotiated a successful resolution in this case and may be expected to perform well in the future.

In assessing the skill, time and labor involved, the Court recognizes that Mr. Heintz (and Mr. Gomery while with his firm) did invest significant time and labor and expense into a complex case. Mr. Dancer certainly recognizes that the case was complex as he put significantly more time into it once it came into his office and successfully preserved the core of the case for presentation to the jury despite strong efforts made by the defense to summarily dispense with it.

The third factor which the Court must review is the amount in question and the results achieved. Certainly the amount in question was always significant. Plaintiff's decedent was fully employed and relied upon by his family for economic support. He also experienced a horrible death when crushed by an elevator and was discovered by his wife, a fellow employee. Significant insurance monies were also available.

The case was complex. It involved all the circumstances surrounding the death of Plaintiff's decedent, a viable bystander claim by his wife, a co-employee, as well as issues associated with the interplay of the claimed negligence of various parties and the Worker's Compensation Act as it related to the Syb entities. Issues included both ones of liability and damage and were hardly

of the garden variety type. Again, the case appears to have been well underway while in the care of Bishop & Heintz and professionally completed by Dingeman & Dancer. While the Court empathizes with the strength of Mr. Dancer's argument and his justifiable pride in the result his firm achieved, the Court is hardly in a position to find that the result is different than that which would have been received by any of a dozen attorneys within this Circuit who regularly practice in this particular area of the law[2]. Certainly, as between Mr. Heintz and Mr. Dancer, the Court cannot say that the recovery obtained by Mr. Dancer was necessarily greater than that which would have been obtained by Mr. Heintz.

The Court has already commented upon the difficulty of the case in the context of its discussion regarding the skill, time and labor invested to resolve it. Significant expenses were incurred and they were largely incurred by Plaintiff's successor counsel in the same ratio as fees.

The professional relationship between Plaintiff's decedent's estate and Bishop & Heintz began on March 1, 1994, and terminated on November 23, 1994, after a Complaint and formal discovery began. Similarly, the relationship with Dingeman & Dancer began in November 1994 and the settlement ultimately approved by the Court was obtained following the close of discovery, mediation, a final settlement conference and rulings on the defense Motions for Summary Disposition. According to the time records of Dingeman & Dancer, the settlement was negotiated over the period January 30,

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[2] In fact, Mr. Heintz predicted fees of approximately $333,000 based upon a $1 million recovery in his correspondence of November 10, 1994. See, Exhibit 1 to Dingeman & Dancer Response Brief.

1996, through February 2, 1996. Thereafter, the work of Dingeman & Dancer was directed towards preparing for the hearing on approving the settlement, closing documents associated with it, the internal dispute between family members regarding the distribution of settlement proceeds and ultimately this fee dispute. As a practical matter, then, Bishop & Heintz devoted nine months of legal services and Dingeman & Dancer fourteen months of legal services at the point the settlement was negotiated. Consistent with the hours and expenses invested in the case, the nature and length of the professional relationship with the client was disproportionately in favor of the successor law firm.

In summary, a review of the preceding factors does not suggest any legitimate cause for the discharge of Bishop & Heintz but rather the substitution of one competent firm for another. Recognizing the general experience within the legal community as it relates to ethical referral fees and the significant efforts put forth by Bishop & Heintz, this Court is disturbed by the fee analysis offered by Dingeman & Dancer that seems both penurious and uncivil.

As a matter of public policy, the regulation of fee relationships between clients and attorneys should be structured to avoid the unseemly interference with existing economic relationships between clients and competent lawyers either consciously or implicitly through their employment efforts. There seems to be little benefit in promoting a fee sharing scheme which would be more economically beneficial to the successor firm who wins the client away than one predicated upon the civil and ethically sharing of fees and responsibility pursuant to a cooperative referral relationship.

If it is acceptable for clients to meet in the offices of successor attorneys a month prior to the formal termination of their relationship with a prior law firm and without notice to their existing attorneys, then successor counsel should understand that they are taking the case impressed with a meaningful lien. Successor counsel's active participation in the loss of another's significant business opportunity by lawful recruitment of that opportunity in one's own economic self-interest will likewise be mitigated with the knowledge that the ethical and competent predecessor counsel will share proportionately in the fruits of victory.

Here, equity requires a proportionate sharing of the fees generated.

In consideration of all the foregoing factors, the Court hereby awards to Bishop & Heintz $100,000 of the net attorneys' fees, the balance of $215,532 shall be awarded to Dingeman & Dancer. Any interest on the escrowed funds will be disbursed pro rata. Each of these firms should be impressed with their contractual or moral obligation to make whatever subsequent distributions they feel are appropriate to Mr. Gomery, the ultimate source of this largess but a person who has never denied he was fairly compensated for his work as a salaried employee.

IT IS SO ORDERED.

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HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: _____