IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

ANGELA MARTIN, et al.,	)	
	)	
Plaintiffs, `	)	
	)	Cause No. 22042-0883
v.	)	
	)	Division No. 6
SURVIVAIR RESPIRATORS, INC., and BACOU-DALLOZ., S.A.	)	
	)	
	)	
Defendants.	)	

COURT ORDER AND JUDGMENT

This Court need not recite the tragic facts of this case that have brought the below described issues before the court. It, in fact, personally recalls the magnitude of the fire that took the life of an heroic firefighter, Derek Martin, as it occurred close to the Court's residence. Further, this Court was an (outside, but interested) observer to the trial resulting therefrom conducted nearly three years ago in Division 22 of this Circuit before the Hon. Michael B. Calvin (now retired) and was impressed by its duration, complexity and intensity.

The below described matters are now before **this** Court because it was the acting Presiding Judge at the time of the January 15, 2010 filing of DEFENDANT'S MOTION TO DISCHARGE APPEAL BONDS. Said motion recited, in short, that the sizable judgment in favor of Plaintiffs therein had been affirmed by the Missouri Court of Appeals, Eastern District, on August 4, 2008 and that Defendants' last appeal efforts herein had been denied by the State's Supreme Court on December 22, 2009. Additionally, exhibits were attached to said motion reflecting payments made by Defendants along with acknowledgments of receipt by Schlicter, Bogard & Denton

[hereinafter referred to as SBD].

Defendant's motion was set for a hearing on or about January 21, 2010, whereon all parties, other than the below described Intervenors, appeared and the Court ruled on said motion ordering, *inter alia*, that the funds payable to decedent's mother, Joyce Martin [hereinafter referred to as MOTHER], and those in dispute as between the various Plaintiffs' counsel be paid into the Registry of the Court; that certain undisputed funds be disbursed; and that Defendants' motion be sustained upon the clearance of the various deposited checks. Thereafter, a number of other motions and memoranda were filed regarding the attorneys' fees claims of various counsel, including:

1.) PLAINTIFFS' MOTION TO ADJUDICATE ATTORNEY'S LIENS ON JOYCE MARTIN'S SHARE OF RECOVERY AND MOTION FOR AN AWARD OF ATTORNEY'S FEES AND EXPENSES FROM JOYCE MARTIN TO SCHLICTER, BOGARD & DENTON, WHO GENERATED THE AWARD; MOTION TO ADJUDICATE ATTORNEY'S LIEN OF SCHLICTER, BOGARD & DENTON AND STATE OF MISSOURI'S LIEN ON AGGRAVATING CIRCUMSTANCES DAMAGES AWARD; and PLAINTIFF'S MOTION FOR AN AWARD OF ATTORNEY'S FEES AND EXPENSES FROM LONNIE SIDES TO SCHLICTER, BOGARD & DENTON, WHO GENERATED THE AWARD,

2.) PLAINTIFF JOYCE MARTIN'S MOTION FOR AN ORDER AUTHORIZING THE CIRCUIT CLERK [to] ISSUE CHECKS TO HER AND HER COUNSEL AND OTHERS, PURSUANT TO SECTION 537.095 M.S., and

3.) GOFFSTEIN, RASKAS, POMERANTZ, KRAUS & SHERMAN, LLC AND

ATTORNEY DON SHERMAN's MOTION TO INTERVENE FOR PURPOSES OF FILING MOTION TO ENFORCE ATTORNEY LIEN AND/OR TO HAVE FEE DETERMINED; and INTERVENOR GOFFSTEIN, RASKAS, POMERANTZ, KRAUS & SHERMAN, LLC AND DON R. SHERMAN'S MOTION FOR LEAVE TO SCHEDULE TESTIMONIAL MOTION [hereinafter collectively referred to as INTERVENOR'S MOTIONS]

These above motions were called for hearing on March 1, 2010. In addition to these motions, the various parties filed a number of memoranda (or brought to this Court's attention others previously filed) including PLAINTIFF ANGELA MARTIN'S MOTION FOR AN AWARD OF ATTORNEY'S FEES FROM PLAINTIFF JOYCE MARTIN AND SUGGESTIONS IN SUPPORT filed by SBD on 6/22/08 [hereinafter referred to as SBD'S FIRST MOTION FOR FEES]; MEMORANDUM OF LAW IN SUPPORT OF MOTION TO ENFORCE ATTORNEY'S LIEN AND/OR TO HAVE FEE DETERMINED, INCLUDING REQUEST TO HOLD MOTION IN ABEYANCE AND REQUEST FOR EVIDENTIARY HEARING filed in July, 2008 by Don Sherman [hereinafter referred to as MEMO FOR INTERVENOR'S FEES]; OBJECTION OF INTERVENOR LONNIE SIDES TO PLAINTIFFS MOTION FOR AN AWARD OF ATTORNEYS FEES AND EXPENSES FROM THE DAMAGE AWARD IN FAVOR OF INTERVENER LONNIE SIDES filed on 1/22/10 by Don Schlapprizzi, Mr Sides' lawyer; MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR AN AWARD OF ATTORNEY'S FEES FROM JOYCE MARTIN TO SCHLICTER, BOGARD & DENTON, AND IN OPPOSITION TO JOYCE MARTIN'S MOTION FOR AN ORDER AUTHORIZING THE CLERK [TO] ISSUE CHECKS TO JOYCE MARTIN AND HER

ATTORNEYS filed by SBD on 2/5/10 [hereinafter referred to as SBD'S FIRST MEMO FOR FEES]; SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR AN AWARD OF ATTORNEY'S FEES TO SCHLICTER, BOGARD & DENTON AND IN OPPOSITION TO JOYCE MARTIN'S MOTION TO ISSUE CHECKS filed on 2/25/10 by SBD [hereinafter referred to as SBD'S SUPPLEMENTAL MEMO FOR FEES]; and PLAINTIFF JOYCE MARTIN'S MEMORANDUM OF LAW RELATING TO ATTORNEYS' FEES CLAIMED BY GOFFSTEIN, RASKAS, POMERANTZ, KRAUS & SHERMAN filed on or about 2/26/10 by Stacey Hancock [hereinafter referred to as MOTHER'S OPPOSITION TO INTERVENOR'S FEES]; all together with exhibits (joint and individual).

In essence, the matters before the Court involve the various claims for attorneys' fees by SBD, Stacey Hancock [hereinafter referred to as HANCOCK] and Intervenors [hereinafter referred to as SHERMAN] [1] . Evidence was adduced and argument concluded on March 1, 2010, and the matters were, thereafter, taken under submission.

Additional memoranda were filed after the hearing, including the POST-HEARING MEMORANDUM REGARDING STACEY HANCOCK'S ADMISSION IN OPEN COURT THAT SHE HAS ALREADY RECEIVED A FEE FROM HER CLIENT'S NET RECOVERY filed by SBD on 3/3/10; STACEY HANCOCK'S RESPONSE TO SCHLICTER, BOGARD & DENTON'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR AN AWARD OF ATTORNEY'S FEES AND POST-HEARING MEMORANDUM REGARDING STACEY HANCOCK'S STATEMENT IN OPEN COURT filed by HANCOCK on 3/16/10

[1] The matters related to costs advanced and expenses incurred by SBD were resolved among the parties as were the claims involving Lonnie Sides.

[hereinafter referred to as HANCOCK'S RESPONSE TO SBD'S SUPPLEMENTAL MEMO]; RESPONSE TO STACEY HANCOCK'S POST-HEARING MEMORANDUM filed on 3/18/10 by SBD; and THE GOFFSTEIN FIRM'S POST HEARING MEMORANDUM IN RESPONSE TO THE SCHLICTER FIRM'S POST HEARING MEMORANDUM AND THE HANCOCK FIRM'S POST HEARING MEMORANDUM filed by SHERMAN on 3/26/10 [hereinafter referred to as INTERVENOR'S POST-HEARING MEMO].

After reviewing all of the above motions and memoranda, together with the plethora of exhibits (joint and individual) connected with all of the filings, and reviewing the cases cited by the parties, and now being fully advised of the premises, the Court finds as follows.

The instant action was a wrongful death petition filed by SBD [2] representing Angela Martin [hereinafter referred to as WIFE] and the three children of decedent. Members of the relevant class also include Joyce Martin [MOTHER] and Lonnie Sides [hereinafter referred to as FATHER]. MOTHER has been represented herein by three separate attorneys, and FATHER by Don Schlapprizzi. After a trial that took more than a month, following intense pre-trial preparation that involved scores of depositions and travel across the United States, Judgment was entered in favor of Plaintiffs and against Defendants on 9/19/07 for $12,000,000 in compensatory damages and $15,000,000 in punitive damages (these amounts would later be increased substantially after computations for pre and post judgment interest).

Just as clear as was the tragedy of the loss of the heroic firefighter Derek Martin

[2] It is, perhaps, an understatement to say that SBD were the lead attorneys in prosecuting this case from filing through successful appeal (which, incidentally, also included an affirmation of the order of apportionment).

has been the unfortunate antagonism and animosity between his WIFE and MOTHER. From this Court's review of the documents filed herein, it is clear that this seriously affected trial preparation, trial strategy and any ability to come to any sort of amicable resolution of the distribution of the judgment. On November 5 – 6, 2007, Judge Calvin conducted a two-day evidentiary hearing on this question wherein MOTHER asked the Court to divide the judgment equally between herself, WIFE and each of the three children; and WIFE asked the Court to grant MOTHER the total sum of $75,000 from what came to be more than the $27 million verdict [3]. On 4/10/08, Judge Calvin entered his judgment of apportionment at: 49.5% to Angela Martin [WIFE]; 12.5% to each of Jordan, Denzel and Kayla Martin (decedent's three children); 12.5% to Joyce Martin [MOTHER] and .5% to Lonnie Sides [FATHER] (see Joint Exhibit 17). As FATHER'S claims have since been resolved among the parties, there is no need to make further reference to matters related to him.

In an undated (and non-file stamped) document [the original of which this Court could not find in the rather voluminous official court file herein but the authenticity of which was not disputed by the parties]**,** the Attorney General of the State of Missouri consented to the State being added as a party to the lawsuit and consented to the amount of $3,535,975.20 as being the net amount payable to the State "from the parties proportionately" and further consented to payment of $3,750,000 attorney's fees to SBD as well as litigation expenses of $214,024.80 being paid to the firm "for a net of

[3] The jury's verdicts were in favor of Plaintiffs and against Defendants in the amounts of $12,000,000 as compensatory damages and $15,000,000 as punitive damages. However, including pre and post judgment interest, the total payable from Defendants appears to this Court to be $40,497,998.28. Exhibits to various filings show that Defendants paid a total of $18,029,444.27 as the compensatory distribution on 1/8/10 and the sums of $22,429,963.97 on 12/31/09 and $38,591.04 on 1/8/10 as the punitive distributions.

$3,535,975.20 payable to the State in full satisfaction of the State's lien." This Court presumes that the "litigation expenses of $214,024.80" referred to in the document relate to the proportional share of the before noted and resolved issue of SBD's total advanced expenses in the prosecution of this case of $770,566.35.

As will soon become clear, if not so already, it is difficult to decide where to begin to unravel the quagmire presented here. MOTHER had professional relationships with three lawyers in succession: She first retained Don Sherman of Intervenors Goffstein, Raskas, Pomerantz, Kraus & Sherman (SHERMAN) on 10/13/03 (preceding the filing of the instant suit by SBD) before discharging him on or about 4/4/06 whereupon she briefly (4/7/06 to 10/6/06) was represented by Alif Williams (who makes no claim for fees here); and lastly (from 10/11/06 to present) by Hancock & Associates (HANCOCK). SBD, **without a written contract** with MOTHER, makes claims in *quantum meruit* from all proceeds apportioned/attributable to her and, failing that, from various portions of her recovery and/or such segments of her apportionment such as those that represent pre and/or post judgment interest, for work and/or pre-judgment interest for the period of time **before** MOTHER was represented by HANCOCK, and/or attorney's fees on the pro rata portion of the judgment that is attributable to or arises out of such monies awarded to the State by operation of law as its share of the punitive damages award.

As it is the "cleanest" issue herein (which isn't saying much), the Court will first address INTERVENOR'S MOTIONS. On 6/18/08, after his Judgment on apportionment, Judge Calvin directed that the prior attorneys of Joyce Martin (MOTHER) be given "10 days to submit [an] Affidavit of Services Rendered."

(JoyceMartin Exhibit 23). Thereafter, SHERMAN filed Intervenors MEMO FOR INTERVENOR'S FEES arguing, *inter alia*, that Intervenors had a contingent fee contract (1/3 of the amount recovered) with MOTHER and that, because the case was then on appeal with no final judgment, it was too early to determine their discharged attorneys' fees (this position was evidently well taken because motions regarding attorneys' fees were not then decided).

Joint Exhibit 9 sets out MOTHER'S 10/13/03 (again, executed before suit was filed) contract with SHERMAN for 1/3 of any amount recovered by settlement, compromise or suit. SHERMAN continued as MOTHER'S attorney until he received the letter from Joyce Martin dated 4/4/06 stating "I Joyce Martin no longer will be using your services as my attorney effective immediately. Thanks in advance!" (Joint Exhibit 10). **Nothing** in that letter or, apparently, in **any** letter or communication **ever** indicated to SHERMAN the reasons for his discharge.

As stated at page 3 of MEMO FOR INTERVENOR'S FEES, "[i]t is well settled law in Missouri, and elsewhere for that matter, that the measure of recovery for the discharged attorney under a contingency fee contract terminated before the occurrence of the contingency is based in *quantum meruit*." SHERMAN denies Hancock's position that Sherman's rights to fees had been forfeited (a denial that is supported by his 4/7/06 letter to MOTHER reflected in the last 2 pages of Goffstein Firm Exhibit 24 and with which this Court agrees) and notes that the issue is the reasonable value of his services and that the factors in that determination are the time, nature, character, and amount of services rendered, the nature and importance of the litigation, degree of responsibility imposed on or incurred by the attorney, the amount of money or property involved, the

degree of professional ability, skill and experience called for and used, and the result achieved. See Arnett v. Johnson, 689 S.W.2d 836 (Mo.App. 1985) (attorney's fees awarded in *quantum meruit* are not necessarily determined by the hours expended multiplied by an hourly rate when it awarded $125,000 from a $750,000 fee for the discharged attorney).

SHERMAN noted that he was entitled to an evidentiary hearing to allow the Court to determine the reasonable value of his services. On 3/1/10 he received one. He recited his experience and the work he performed, that he had received no complaints or dissatisfaction until he received the discharge letter, that the firm expended 100 – 150 hours on the case, and that his normal hourly rate was $300 per hour. Repeating what will be a frequent refrain by SBD concerning the alleged relative little that was done by HANCOCK, SHERMAN claims that the reasonable value of the services he provided MOTHER is 50% of the total attorney's fees payable to HANCOCK.

On 2/26/10, before the 3/1/10 evidentiary hearing, HANCOCK filed MOTHER'S OPPOSITION TO INTERVENOR'S FEES, citing, *inter alia*, the case of Plaza Shoe Store, Inc. v. Hermel, Inc., 636 S.W.2d 53, 58-60 (Mo.banc 1982) for the propositions that a terminated lawyer's only recovery before completion of a contingent fee contract is in *quantum meruit* and repeated the factors previously discussed in the MEMO FOR INTERVENOR'S FEES for this determination. In rhetorically asking the question of what is the reasonable value of the Sherman's firm expenditure of 100 to 150 hours, HANCOCK notes that SHERMAN's request would amount to "almost $10,000 / hour." Normally, this Court would agree with HANCOCK's assertion that a client should not have to pay for duplicative services. But, it is not so quick to do so, especially if and

when they are occasioned by the client. This Court recalls its private practice experience and the difficulties often associated with trying to get paid for work you have already done or, on the other hand, having to "pick up the pieces" from a prior attorney's work.

After the 3/1/10 hearing, counsel for SHERMAN filed INTERVENOR'S POST-HEARING MEMO repeating the position that a limitation to an hourly rate is "unsupported by law and fact", adding to the comparative analysis of Arnett, *supra*, and making reference to the case of Goldstein and Price, L.C. v. Tonkin & Mondl, L.C., 974 S.W.2d 543 (Mo.App. 1998) where a substantial sum was awarded to a similarly situated attorney in *quantum meruit*. Again, stating on page 3 of its motion the SBD refrain that "while the Hancock Firm did a commendable job on the apportionment issue, the Hancock Firm cannot avoid the fact that its efforts leading up to the trial and jury verdict were negligible."

This Court finds that SHERMAN's work on behalf of MOTHER from before the suit was filed until he was rather unceremoniously discharged was valuable and did confer benefit on MOTHER.[4] And, after taking into account all of the relevant factors set out in law for this determination (the time, nature, character, and amount of services rendered, the nature and importance of the litigation, degree of responsibility imposed on or incurred by the attorney, the amount of money or property involved, the degree of professional ability, skill and experience called for and used, and the ultimate result achieved), this Court finds that the reasonable value of the services provided by SHERMAN to MOTHER to be $150,000.

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[4] The circumstances present here are **not** like those present in Reid v. Reid, 950 S.W.2d 289 (Mo.App.W.D. 1997), cited in opposition to SHERMAN's claims. In that case, the Court of Appeals found that the attorneys did **not** use a high degree of professional ability and skill and that the services rendered were not of an extraordinary benefit to client – a situation that is not present here.

On 10/11/06, after she had hired and fired in succession Don Sherman and Alif Williams, MOTHER retained HANCOCK. The pertinent term in that agreement called for an attorney's fee of 33 1/3 % "of any recovery obtained by settlement" or 40% "of any recovery obtained following filing suit". (Joint Exhibit 14). There was **no** provision in **this** contract [5], presumably voluntarily signed by MOTHER, indicating **any** intention by MOTHER **or agreement** by HANCOCK that **anyone else's legal work** on the case would "come out of" the bargained attorney's fee due HANCOCK [6]. Nothing herein shall be construed as any ORDER to direct that the sums due SHERMAN be paid from any other source than those monies hereafter ordered paid to MOTHER [7].

The most difficult considerations and surgical dissections in this case involve the various claims and subclaims by SBD for attorney's fees from MOTHER. Throughout its various motions, memoranda and oral arguments, the oft-stated common theme of SBD's position has been that **it** was responsible for the size of the judgment herein and that **it** should be rewarded therefore by receiving attorney's fees in connection therewith – both through its contract with WIFE and the three children which are not at issue here [8]

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[5] As contrasted by the contract language involved in the cases of Arnett v. Johnson, 689 S.W.2d 836 (Mo.App.E.D. 1985) and Goldstein and Price v. Tonkin & Mondl, L.C., 974 S.W.2d 543 (Mo.App.E.D. 1998) discussed in various memoranda herein, wherein the prior attorneys' fee claims were **expressly** provided for in the subsequent attorney's contracts.

[6] There was, however, some acknowledgment of SHERMAN's prior work in HANCOCK's letter to him of 2/7/07 (Joint Exhibit 11).

[7] This Court is mindful of the relatively recent and marginally analogous (and, therefore, only marginally instructive) case of Hilton v. Davita, Inc., 302 S.W.2d 157 (Mo.App.E.D. 2009) where the decedent's wife and his five children from previous marriage hired an attorney to represent then in a wrongful death case. Late "in the game" (much later than here) the children hired another attorney. The trial court levied the contracted-for attorney's fees on the entire award (including apportionment to the five children) to the first attorney and awarded fees for the second attorney from the net payable to these children, resulting in their paying twice for legal representation. It is interesting to note that in a short opinion affirming the trial court's decision there was **no** mention of *quantum meruit*!

[8] Although there was no direct testimony of SBD's written contract with WIFE and decedent's

and in *quantum meruit* [9] from the amounts apportioned to MOTHER and/or, contingently, by its agreement with the Attorney General for the portion of the punitive damages award attributable to her but payable to the State. [10]

The gist of SBD's arguments raised in their motions and memoranda and at the hearing in support of its claims for attorney's fees in *quantum meruit* from the amounts recovered by MOTHER [11] is that HANCOCK's contract with MOTHER is unenforceable because it is unreasonable since she did so little to generate the award and, therefore, the "fair and reasonable" fees that are envisioned when there is no contract [12] should go to SBD because **it**, again, was responsible for the judgment (and, hence, all of the apportioned awards). [13] Further, SBD argues it is entitled to the fees on the portion of MOTHER's award attributable to pre-judgment interest since **it** was the one who made the relevant demand that triggered same and most of these amounts was earned before

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children, paragraph 15 of the 6/27/08 affidavit of J. Brad Wilmoth, an employee of SBD, filed as Exhibit 1 of SBD'S FIRST MOTION FOR FEES filed on that date, avers a one-third attorney's fee – this arrangement is further supported, anecdotally, by the AFFIDAVIT OF ANGELA MARTIN filed 1/15/10 regarding the award to her minor daughter Kayla Martin.

[9] SBD seeks a fee of 50% of the recovery of MOTHER in quantum meruit and supports the reasonableness of that request by the affidavit of Alan Mandel, a well respected personal injury attorney in the area's legal community.

[10] Reference the undated memo from the Attorney General referred to on pp. 6-7 herein.

[11] The Court will treat separately herein SBD's claims for attorney's fees on the amounts payable to the State of Missouri as its statutory share of the punitive damages verdict.

[12] See Section 537.095.4, RSMo.

[13] SBD has said it has "no problem" with HANCOCK taking her contracted fee on the "net" monies paid to MOTHER after an attorney's fee award to SBD. See SBD'S FIRST MOTION FOR FEES. This position was, in essence, repeated on page 1 of SBD's POST-HEARING MEMORANDUM REGARDING STACEY HANCOCK'S ADMISSION IN OPEN COURT THAT SHE HAS ALREADY RECEIVED A FEE FROM HER CLIENT'S NET RECOVERY wherein SBD asserts that HANCOCK's admission that she took a fee from the $700,000 advance to Joyce authorized by this Court "is conclusive, clear evidence that Ms. Hancock and her client contemplated that the contract only applies to the net amount payable to Joyce Martin after subtracting the fees for generating the judgment,. . . . " This last over-reaching comment is hardly worth a response.

HANCOCK's contract with MOTHER was entered.

SBD cites Brown v. Whitaker, 926 S.W.2d 1 (Mo.App.W.D. 1996) for the proposition that an attorney is only entitled to a contingency fee to the extent that his/her work actually procures a positive result for the client. SBD'S FIRST MEMO FOR FEES at p. 1. SBD argues that an attorney (HANCOCK) cannot contract for an unreasonable contingent fee not related to what he/she does or risks (in short: no work + no risk = no contingent fee). Id at pp. 10-11. In this case, SBD asserts, HANCOCK did and risked (virtually) nothing. Therefore, since there (effectively) would be no contingent fee agreement in place, it is SBD that would be entitled to a fee in *quantum meruit*, which it claims should be 50% of MOTHER's recovery (see footnote 9, supra).

This oft repeated theme of SBD's position can also be found in paragraph 9 of its MOTION TO ADJUDICATE ATTORNEY'S LIEN OF SCHLICTER, BOGARD & DENTON AND STATE OF MISSOURI'S LIEN ON AGGRAVATING CIRCUMSTANCES DAMAGES AWARD filed 1/19/10 wherein it states that "[t]he $27 million verdict in this case was the culmination of extraordinary effort and a massive commitment in time and resources by the firm of Schlicter, Bogard & Denton over a nearly five year period which maximized the total recovery for all of the beneficiaries of the wrongful death claims." In part responding to HANCOCK's observation that her work **did**, in fact, benefit MOTHER because she was able to obtain an apportionment share for her client of 1/8 of the recovery while SBD urged a share of only $75,000, SBD argued that it "is entitled to a fee for its efforts in maximizing the value of the indivisible claim for Derek Martin's wrongful death, on behalf of all of the surviving family members. Had SBD not vigorously pursued the indivisible wrongful death claim on

behalf of all the family members, there would not have even been any recovery to apportion to Joyce Martin, and it would have been unnecessary to hold an apportionment hearing. The manner in which the Court ultimately apportioned the recovery, or arguments made at the apportionment hearing, are irrelevant to the fee determination." SBD'S FIRST MEMO FOR FEES at p. 14.

SBD also contends that the HANCOCK-MOTHER contract should not be enforced and was void at its inception because it was never carried out. There was no settlement and, SBD argues, HANCOCK did not file suit (nor could she have since the applicable three year statute of limitations had run by the date of her contract). SBD'S SUPPLEMENTAL MEMO FOR FEES at p. 9. SBD concludes that "[u]nder Hancock's proposal, an attorney could sign an agreement with a wrongful death claimant the day before judgment or even after judgment and collect millions of dollars despite doing no work." Id. at 19.

However, SBD argues that even if the HANCOCK-MOTHER contract **is** valid, "there is no rational basis for the Stacey Hancock-Joyce Martin contract to apply retroactively to legal services performed in the several years before the contract existed." Id. at p. 7. SBD cites the holding in Collins v. Hertenstein, 181 S.W.3d 204, 214 (Mo.App.W.D. 2005) that "recognized that an attorney discharged before the end of the case is entitled to a fee in *quantum meruit* for the benefits conferred on the client prior to termination" for the proposition that an attorney (obviously, SBD here) is entitled to a fee for work done **before** the party signs a contract with the current attorney (HANCOCK)[14]. SBD'S SUPPLEMENTAL MEMO FOR FEES at p. 8.

[14] This argument, it seems, effectively ignores the fact that from **before** the instant action was filed, MOTHER had an attorney contract in place continuously with **someone.**

Further, SBD also claims that even if the HANCOCK-MOTHER contract is valid, it does not apply to the pre-judgment interest earned on the verdicts. SBD argues that **it** was the one who issued (long before HANCOCK's entry into the case) the demand letters pursuant to Section 408.040, RSMo, that triggered the sizable (more than one million dollars) prejudgment interest award portion of the sum later apportioned to MOTHER. SBD'S SUPPLEMENTAL MEMO FOR FEES at pp. 2-3.

HANCOCK responds to SBD by noting that SBD **never** had **any** contract with MOTHER (and from its review of this case, it is clear that SBD's positions herein were, in fact, antagonistic to that of MOTHER [15]); MOTHER **did** have a contract for attorney's fees in place (again, as previously noted, MOTHER was, in fact, represented for the entire pendency of the suit); and, SBD is, therefore, because of the provisions of statute, not entitled to **any** attorney's fees from her **regardless** of how much work (or its quality) SBD performed. This position was echoed at page 4 of INTERVENOR'S POST-HEARING MEMO which stated that "[b]ecause the Schlicter Firm never had a contract with Joyce Martin, it has no valid legal basis to claim any portion of the attorney's fees on Joyce Martin's share." HANCOCK repeats this position by noting that the statute (Section 537.095, RSMo) directs fees to be awarded "by contract" so what happens when there is no contract is irrelevant because here there is one (there actually have been three). She adds that the statute makes no distinctions between pre and post-judgment interest, between compensatory and punitive damages and between pre-trial, trial and appellate

[15] At one point, SBD states that "Joyce Martin's argument [regarding this antagonism] is illogical because arguing *in favor* of a larger share of recovery to Joyce Martin would have required the firm to violate its duty to act in the best interests of its clients. Had the firm argued for a larger share for Joyce, this would have necessarily decreased the amount to be distributed to Angela Martin and her three children.". SBD'S FIRST MEMO FOR FEES at p. 14. HANCOCK **could** have responded, and in essence did, with something like "EXACTLY! This is why Joyce was **not** your client."

work; and, further, that "SBD has no standing to contest a contractual arrangement between Joyce Martin and Hancock & Associates". MOTHER'S OPPOSITION TO INTERVENOR'S FEES at pp. 2 & 3. Additionally, HANCOCK notes that the record is clear that "throughout the apportionment hearing and appellate process, Schlicter, et al insisted that Joyce Martin was only entitled to $75,000, or less than ¼ of 1% of the award, and as such, should not now be permitted to claim a portion of her award after arguing vociferously against any meaningful award to her." MOTHER'S OPPOSITION TO INTERVENOR'S FEES at p. 5.

SBD contends that, despite wanting MOTHER to have but $75,000, it "was working throughout the time through the verdict for the benefit of Joyce Martin" and that its work increased the value of the total recovery by more than $7M in pre-judgment interest. (most of which work was done before Hancock got into case). SBD'S FIRST MEMO FOR FEES at p. 2.

Again, indicative of the intensity of this animosity were the repeated efforts of WIFE through SBD to continually repeat and re-litigate that nature of the relationship (or lack thereof) between the deceased and MOTHER. This resulted in trial strategy agreements regarding testimony of the parties and included provisions for MOTHER's attorneys not to sit at counsel table or participate in the trial and for MOTHER not to testify and not be present during the presentation of Defendants' case. [16] This followed a pre-trial letter from SBD to HANCOCK setting out SBD's belief that if Joyce testified it would damage the case and be counter-productive to maximizing the verdict and he

[16] The parties entered an agreement (Joint Exhibit 15) which provided that "[i]t is agreed that this method of handling the trial is in the best interest of all parties in maximizing the total recovery and avoiding damaging the case. Angela Martin and her children and their counsel agree that in the event of a verdict in favor of plaintiff, nothing in this agreement will be used against any party in determining the apportionment of any recovery."

agrees that her agreement to this "does not in any way prejudice her in her claim after a trial for whatever amount she wants to claim. As I stated, the priority must be to obtain the highest possible verdict and avoid any[thing . . .] which could change the posture of the case from the spotlight shining on the defendants' bad corporate conduct so as to make the overall pie bigger to be divided later." Joint Exhibit 16. HANCOCK now responds that "[h]is argument here argues against the spirit of this agreement." HANCOCK'S RESPONSE TO SBD'S SUPPLEMENTAL MEMO at p. 2. This Court tends to agree with this comment. There is nothing before the Court from which it can conclude that SBD **ever** asked HANCOCK to do anything other than stay out of its way – it is hardly fair to now criticize her doing just what she was asked to do.

The Court feels little need to address the equitable common fund argument also posited in SBD'S FIRST MEMO FOR FEES. This Court is most familiar with the cited case of Lett v. City of St. Louis, 24 S.W.3d 157 (Mo.App.E.D. 2000), as **it** was the trial court reversed therein. In that case, this Court (correctly, it still believes) awarded attorney's fees for actions that (indirectly – but in a real sense) benefited (by a change in governmental policy resulting from the suit) non-litigants to that action. Needless to say, that while this Court still believes in that principle, MOTHER, by operation of law if nothing else, is **not** (and, pardon the double negative) a non-litigant in the instant action and the ruling in Lett still stands..

Few of the cases cited by the parties in their respective briefs really aid the Court is its difficult tasks here. Most stand for general propositions of law that are hardly in dispute other than, perhaps, to question their applicability. Two Eastern District opinions decided in consecutive years, however, are particularly noteworthy regarding the issues

just discussed and provide guidance and direction if not mandates: Keene v.Wilson Refuse, Inc., 788 S.W.2d 324 (Mo.App.E.D. 1990) and Schaffer v. Bess, 822 S.W.2d 871 (Mo.App.E.D. 1991)

In Keene, a widow hired an attorney on a 1/3 contingency fee contract to pursue a wrongful death action on her behalf as well as her and decedent's son's and his parents' behalf. Decedent's other son from his first wife hired a different attorney. The first attorney (hired by decedent's wife) "alone was responsible for the development and preparation of the liability aspects of the case" and when the trial court approved a structured settlement, it awarded that first attorney his full 1/3 fee and ordered the son from decedent's first wife (who, it appears to this Court, was in an analogous situation to MOTHER in the instant cause) to pay a 1/3 fee even though that son had never signed a contract with the first attorney. Id. at 325. In reversing this finding, the reviewing court held that

> "**[o]nly 'if there is no contract, or** if the party sharing in the proceeds **has no attorney** representing him' **does the court have discretion to award a fee to the original plaintiff's attorney from the funds allocated to others** sharing in the proceeds. Under the circumstances the clear language of the statute does not authorize an award of attorney's fees 'as the court deems fair and equitable.' . . . [Further, t]he statute does not permit the trial court or this court to consider the question of conscionability or fairness where a valid contract between attorney and client is in evidence. **If there is an issue of unconscionability or fairness regarding a contingent fee contract in a wrongful death case, the legislature has seen fit to leave it as a matter between the client and his attorney who is subject to the letter and to the spirit of the Supreme Court Rules of Professional Conduct**. [emphasis added]"

Id. at 327. [17]

A year and a half later, the same court handed down the Schaffer case. While this

[17] The Keene court, also, rejected any entitlement to a fee from the first son's "share of the 'common fund' created through his efforts." Id. See discussion of "common fund" argument in the instant cause on page 17 herein.

case involved a rather complicated set of facts that included a party having two existing concurrent attorney's fees contracts – neither of which had been cancelled (unlike the facts in the present cause), the actual holding of the court affirmed the principles above enunciated in Keene, *supra*, and noted:

> "*Keene* addressed a situation where a minor, by his next friend, contracted with one attorney to represent him. Another attorney, with whom the minor, by his next friend, had not contracted, was responsible for the development and preparation of the liability aspects of the case. The trial court, having determined that the attorney with whom the minor, by his next friend, had not contracted had performed a majority of the work, awarded that attorney, and not the minor's attorney, part of the minor's recovery. We determined that the minor's attorney had to be paid as contracted. Moreover, we determined that **where a minor, by a next friend, has retained counsel to represent him, a trial court may not award attorney's fees, as it deems fair and equitable, to another attorney with whom the minor, by his next friend, has not contracted regardless of whether that attorney performed a majority of the work in obtaining the minor's award**. [emphasis added]"

Schaffer, *supra* at p. 880.

The Court agrees that the pre-trial, trial and post-trial efforts of SBD to obtain and keep the verdicts in this case are the "stuff of legends". The Court, however, cannot find sufficient cause, under all of the circumstances present, to invalidate the HANCOCK-MOTHER agreement and, therefore, finds it to be a valid contract. That agreement/contract, again, provided for an attorney's fee to HANCOCK of 40% of "**the recovery obtained** [emphasis added]" by MOTHER. Where there is language in the statutes that guides this Court's hands, it must follow it. Again, Section 537.095.4(2), RSMo, requires the attorney's fees to be paid "**as contracted** [emphasis added]" The holdings in Keene and Schaffer cause this Court to find that SBD is not lawfully entitled to any attorney's fees on the amounts **obtained** by MOTHER whether they reflect work done before HANCOCK's entry into the case or whether they are related to pre or post-

judgment interest. This, however, does not end this Court's task.

The remaining issue presents even greater difficulty for the Court. By statute the State is entitled to one-half of any punitive damages award, here one-half of $15,000,000 or $7,500,000 less attorney's fees and expenses. Section 537.675.3, RSMo, provides, in pertinent part:

> " Any party receiving a judgment final for purposes of appeal for punitive damages in any case . . . shall notify the attorney general of the state . . . . The state of Missouri shall have a lien for deposit into the tort victim's compensation fund to the extent of fifty percent of the punitive damage final judgment which shall attach in any such case after deducting attorney's fees and expenses. . . . The lien shall not be satisfied out of any recovery until the attorney's claim for fees and expenses is paid. . . . "

But, after "deducting" **whose** attorney's fees and expenses?

SBD cites 's Fust v. Att'y Gen. of Mo., 947 S.W.2d 424, 427 (Mo.banc 1997) for the proposition that a plaintiff who receives a punitive damages judgment **never** acquires a proprietary interest in the portion of the judgment subject to the State's interest. Further, the argument goes, that since MOTHER never acquired a proprietary interest in the portion of the award that inures to the State, these amounts were not part of any **recovery obtained** and so are **not** covered by the HANCOCK-MOTHER contract at all. Therefore, SBD argues, "[t]he attorney's fees from the State's share of the recovery must be awarded in a manner that is fair and equitable under the circumstances." SBD'S FIRST MEMO FOR FEES at page 8 and SBD'S SUPPLEMENTAL MEMO FOR FEES at p. 3.

HANCOCK's response to SBD's position is that the 1/8 pro rata share of the State's portion of the punitive damages award (1/8 of $7,500,000) is attributable to MOTHER and is, necessarily, covered by the HANCOCK-MOTHER attorney's fees

contract and that HANCOCK is entitled to the contracted 40% fee (her position on whether the State can elect to pay something in addition to that amount or whether it should revert to someone – her client – with no proprietary interest therein – is of no real import to the question before this Court unless it agreed with Hancock at which point, the State has the inherent power to pay an additional 10% to SBD). HANCOCK'S RESPONSE TO SBD'S SUPPLEMENTAL MEMO at p. 5.

The previously cited cases of Brown v. Whitaker, Goldstein and Price v. Tonkin & Mondl, L.C., and Arnett v. Johnson point to the necessity of looking to the language of the contract in analyzing the proper course of review. Here, the contract language triggering **any** attorney's fees to HANCOCK is "any recovery obtained" (which sounds much like the language in Brown of "amounts paid me"). In view of these cases and the holding in Fust, this Court concludes that the amounts recovered by the State as its share of the punitive damages award are **not** covered by the language in the HANCOCK-MOTHER contract. The next question for this Court, then, is whether they are covered by **any** contract (i.e. does the undated document signed by the Attorney General referenced on pages 6-7 herein constitute an attorney's fees contract?). SBD asserts that "**the only contract involving the State is with SBD, not Stacey Hancock. Hancock's contention that her claim arises by contract cannot apply to a fee on the State's portion of the award since she has not contract with the State**. [emphasis present in document]." SBD'S SUPPLEMENTAL MEMO FOR FEES at p. 4. Further, SBD contends, the State can, and has, chosen who to pay (SBD) and in what amount for its portion of the judgment herein. [18] RESPONSE TO STACEY HANCOCK'S POST-

[18] See aforementioned memorandum by the State agreeing to pay SBD one-half of its $7,500,000 award in attorney's fees as well as a proportional amount of litigation expenses (an issue of which there is

HEARING MEMORANDUM at p. 2. For all intents and purposes, the non-file stamped document signed by the Attorney General referenced above **does** appear to this Court to be a contract for attorney's fees.

This Court recognizes the very real problems that may possibly occur with this reading of the pertinent cases and statutes coupled with the potential for the Attorney General to "contract" with inappropriate counsel for attorney's fees on the State's portion of a punitive damages award. But, **this** court did not write this law and must interpret it as written. The Court is compelled, then, to find that just as it is constrained by the wording of the statute in denying SBD's claims for attorney's fees on any portion of the award **recovered** by MOTHER, it is likewise constrained to deny HANCOCK's efforts for attorney's fees on the portion of the award **payable** to the State.[19]

If the relationship between SBD and the State as evidenced by the aforementioned document is **not** a "contract" as envisioned by Section 537.095.4(2), RSMo, then there exists **no** contract at issue relating to the State's interests herein and this Court **may**, then, award "**the attorney who represents the original plaintiff** [SBD] such fee for his services, from such persons sharing in the proceeds [the State], as the court deems fair and equitable under the circumstances. [Emphasis added]" This Court holds that an attorney's fee of $468,750 is fair and equitable under all of the circumstances present herein and, if the aforementioned document is **not** a contract, chooses to so award to SBD.

WHEREFORE, it is the ORDER and JUDGMENT of this Court that the pending

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no remaining dispute).

[19] The amounts in question here are represented by the figure computed from 12.5% of State's interest in the total punitive damage award of $7.5M (i.e. $937,500. 50% of which is $468,750). SBD'S SUPPLEMENTAL MEMO FOR FEES at p. 4.

motions are each denied in part and granted in part, in that:

1.) Intervenor SHERMAN shall receive from the amounts held in the registry of this Court by prior ORDER the sum of $150,000 in *quantum meruit* as and for his attorney's fees;

2.) SBD shall be entitled to retain (as already paid) the sum of $468,750 in attorney's fees from that portion of the judgment that was apportioned to MOTHER but which was paid to the State as punitive damages;

3.) HANCOCK is entitled to receive from the amounts held in the registry of the Court such sum as would equal 40% of the judgment to which MOTHER is entitled less any amounts previously advanced to her;

4.) MOTHER is entitled to receive the balance of such sums held in the registry of this Court; and

5.) The parties are to bear their own costs, if any, with respect to the proceedings before this Division that occurred on or after January 15, 2010.

Dated: June 30, 2010

SO ORDERED:

Michael P. David,
Judge

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