

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

IN RE:

ORPHANS' COURT DIVISION

ESTATE OF MICHAEL SCHAAB,
Deceased

No. 2720 of 2012

**MEMORANDUM OPINION AND
ORDER OF COURT**

BY: Lawrence J. O'Toole, A.J.

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OF COMMON PLEAS
ALLEGHENY CO. PA

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This matter came before the Court on a Notice of Claim filed by the Intervenor, Farrell & Reisinger, LLC (hereinafter, "F&R"), for outstanding legal fees and costs. The principals of F&R are Thomas J. Farrell (hereinafter, "Farrell"), Jay K. Reisinger (hereinafter, "Reisinger"), and Tina Miller (hereinafter, "Miller").

After extensive discovery, a hearing was held on March 20, 21, and 24, 2014.

Background

The claim for legal fees arose from a very tragic situation that occurred at Western Psychiatric Clinic and Institute (WPIC) on March 8, 2012. On that date, Michael Schaab, the Decedent, who was an employee of WPIC, was murdered

by John Shick, who was a patient at WPIC. In the course of a shooting spree, Mr. Shick injured other persons and was eventually shot and killed by a police officer.

The Decedent was survived by his parents, Harry and Mary Schaab, and a fiancée. Mrs. Schaab was granted Letters of Administration and named the Administratrix of the Decedent's estate.

On March 29, 2012, Mr. and Mrs. Schaab retained the services of F&R for the purpose of investigating the death of their son and filing a potential wrongful death action against WPIC, the University of Pittsburgh Medical Center (UPMC), and other persons or entities. (Exhibit 1). The fee agreement provides, in pertinent part, as follows: **"We will be paid our attorneys' fees for representing you in this matter only if a recovery is actually obtained for you. Our fees will be 35% of any recovery obtained through litigation (after payment of costs described in Paragraph 3, below). In the event a recovery is made without formal litigation, our fee will be 33% of any recovery (emphasis in original)."** These percentages were set by agreement between the Schaabs and F&R, as F&R had originally proposed higher percentages.

According to the testimony of each of the principals of F&R, during their initial meeting with the Schaabs, counsel informed the Schaabs of their professional background and told them that they did not specialize in personal injury cases. Counsel also opined, after doing research and consulting with colleagues, that the fact that the Decedent was an employee of UPMC, and therefore covered under the Worker's Compensation statute, posed a serious

obstacle to suing UPMC. The Schaabs expressed deep anger towards UPMC for numerous reasons, including that they were not notified of their son's death until several hours after the shooting and that the notification came from the police and not from UPMC. (N.T. 03/20-24/14, pp. 29-32, 197-200, 358-359)

Over the next couple of months, F&R conducted its own investigation and legal research, monitored the investigation being conducted by the District Attorney's Office, monitored the investigations being conducted by OSHA and the SEIU, conferred with other colleagues on possible legal theories of recovery, met with counsel for UPMC, and met with the District Attorney regarding possible criminal charges and changes to security. The Schaabs, on more than one occasion, expressed sympathy for the parents of Mr. Shick and indicated that they did not want to sue them. (N.T. 03/20-24/14, pp. 34-43, 200-218, 360-366)

In late June 2012, the option of engaging in mediation with UPMC was discussed. Thomas Cooper, Esquire was selected as the mediator and the mediation was scheduled for July 20, 2012.¹ F&R met with the Schaabs, along with other family members, at length ten (10) days prior to the mediation to discuss strategy and the mediation process. (N.T. 03/20-24/14, pp. 44-49, 224-231)

The mediation session occurred on July 20, 2012. After an opening statement by Attorney Cooper, Farrell made a statement, Mrs. Schaab made a statement, and Jeffrey Romoff (the CEO of UPMC) made a statement. The

¹ The fact that Attorney Cooper was initially suggested by counsel for UPMC is completely irrelevant. Mr. Cooper is an very experienced attorney and a well-known and respected mediator in Western Pennsylvania. Moreover, the use of UPMC's facility for the mediation session is of no importance to this litigation.

parties then split up into separate conference rooms and Attorney Cooper began the “shuttle diplomacy” that occurs in mediations. After some period of time and several offers and counteroffers, the figure of \$1,500,000 was on the table. Attorney Cooper made it very clear to the Schaabs and F&R that UPMC would not go any higher for a number of reasons. After a thorough discussion of the options, including the possibility of terminating the mediation and walking out the door, the Schaabs agreed to accept \$1,500,000 from UPMC. This figure was memorialized in a document that was handwritten on a yellow legal pad by Attorney Cooper and signed by all parties and counsel (Exhibit 3). (N.T. 03/20-24/14, pp. 51-56, 234-235, 367-368)

Shortly after the agreement was reached, F&R offered to reduce their fee of \$500,000 (i.e., 33% of the settlement amount) to \$350,000, which would have allowed the Schaabs to accomplish their goal of providing funds to the Decedent’s fiancée to pay off her student loans. (N.T. 03/20-24/14, pp. 58, 236)

F&R received the first draft of a Release from UPMC counsel approximately a week after the settlement was reached. F&R suggested changes to opposing counsel, which were made. The Release was sent to the Schaabs for review in early September 2012. (Exhibit 5) Throughout the fall into the early winter, F&R and the Schaabs exchanged emails and spoke about the Schaabs’ requested changes to the Release. On more than one occasion, the Schaabs agreed to sign the Release, but failed to do so. This led to a meeting between the Schaabs and F&R at the end of January 2013. One of the matters discussed at this meeting was a letter that the Schaabs had received from

Attorney Mark Homyak regarding his representation of one of the other shooting victims and his intent to sue the shooter's parents and the shooter's estate. As F&R was not interested in pursuing these actions on behalf of the Schaabs, they referred the Schaabs to Attorney Michael O'Day (their current counsel in this matter). At the conclusion of the meeting, Mr. Schaab indicated that the Release would be signed over the weekend and returned to F&R. (N.T. 03/20-24/14, pp. 59-66, 240-255, 370)

The next communication that F&R received from the Schaabs was an inquiry as to what persons or entities were being "released" under the terms of the Release. F&R assured the Schaabs that the only entities being released were UPMC, WPIC, and their affiliates and related entities. The last communication that F&R received from the Schaabs was a letter terminating their representation. (Exhibit 8) (N.T. 03/20-24/14, pp. 66-67, 176, 251, 369)

Ultimately, in May 2013, a Release was executed by all parties. (Exhibit M)

Pursuant to Orders of Court dated October 31, 2013 and November 19, 2013, the Schaabs received the sum of \$985,838.10, which was their share of the settlement, and the sum of \$514,061.91, which was the portion attributable to attorneys' fees and costs, has been deposited into an escrow account.

Findings of Fact

The Court makes the following findings of fact:

- (1) F&R substantially performed the contract between the firm and the Schaabs.

(2) Mary Schaab did not sign a blank piece of paper at the conclusion of the mediation.

(3) The Release sent to the Schaabs in September 2012 released only any liability against UPMC, WPIC, and its entities.

(4) A recovery was made on behalf of the Schaabs at the time the settlement agreement was signed at the end of the mediation session on July 20, 2012. The fact that the funds were not actually paid by UPMC until over a year later is immaterial and irrelevant.

Discussion

The law in this Commonwealth is very clear that when the services of an attorney or law firm result in the creation of a fund, the attorney or law firm is entitled to be paid from the fund. Furia v. City of Philadelphia, 118 A.2d 236 (Pa. 1955); PA Manufacturer's Association Insurance Company v. Wolfe, 626 A.2d 522 (Pa. 1993). In this case, a fund was created on July 20, 2012 when the parties agreed that UPMC would pay the sum of \$1,500,000. The creation of the fund was due to the efforts put forth by F&R in representing the Schaabs prior to and during the mediation session. Under the circumstances that the Decedent would be covered under the Worker's Compensation statute, the fact that F&R was able to secure a substantial sum of money from UPMC, who was the Decedent's employer, demonstrates professional expertise on their part. Clearly, it is highly unlikely that the Schaabs could have reached this settlement without the assistance of counsel.

The Schaabs' argument that no "recovery" was made because the settlement funds were not paid until after the Schaabs terminated F&R's representation and, therefore, F&R is not entitled to a fee is simply absurd. The right to receive the settlement funds arose on July 20, 2012, when the settlement agreement was executed by the parties. The remaining work to be done on the matter—the execution of a Release—was merely wrap-up paperwork that was necessary to protect the interests of the both parties.

While this Court believes that the wording of the Release that F&R sent to the Schaabs was appropriate and it only released UPMC, WPIC, its affiliates and its entities, the fact is that a Release was eventually executed and UPMC paid the \$1,500,000 in settlement funds, as was agreed at the mediation on July 20, 2012. Rather than turn the Schaabs against F&R, current counsel for the Schaabs, to whom F&R referred the Schaabs, could have made a telephone call to F&R and suggested a wording change to the Release. He chose not to do so and this unnecessary litigation resulted.

Accordingly, the Court issues the following Order:

ORDER OF COURT

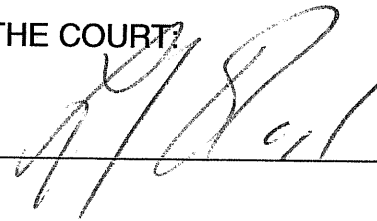
AND NOW, to wit, this 12 day of June, 2014, for the foregoing reasons, it is hereby ORDERED that the Notice of Claim is sustained.

It is further ORDERED as follows:

- (1) The sum of \$507,836.57 in counsel fees and expenses shall be disbursed to Farrell & Reisinger, LLC from the escrow account within ten (10) days; and

(2) All funds remaining in the escrow account shall be disbursed to the Estate of Michael Schaab within ten (10) days and the account shall be closed.

BY THE COURT



A.J.