IN THE COURT OF APPEALS OF TENNESSEE

MIDDLE SECTION, AT NASHVILLE

BILLIE WHEELER, next of kin and mother of Barry Cecil Ford, deceased,	)	
Plaintiff	)	**Appeal No. 01A01-9701-CV00006**
JULIA ROBERTS, next of kin and mother of Dustin Ross Nolen, deceased,	)	**Davidson Co. Circuit No. 94C-1384 & 94C-2726**
Plaintiff/Appellee	)	
vs.	)	
LYLE H. BURLEY, CENTRAL TRANSPORT, INC., and WHITE CARTAGE CO.,	)	
Defendants	)	
MILTON ELLIS NOLEN, next of kin and father of Dustin Ross Nolen, deceased,	)	
Plaintiff/Appellant,	)	
vs.	)	
LYLE H. BURLEY, CENTRAL TRANSPORT, INC., and WHITE CARTAGE CO.,	)	
Defendants.	)	

O P I N I O N

_____The only issue before the Court on this appeal involves the proper distribution of a portion of attorney's fees emanating from an agreed settlement.

Julia Roberts and Milton Nolen were husband and wife prior to their Mississippi divorce in 1984. Their adult son, Dustin Ross Nolen along with Barry Cecil Ford were killed April 23, 1994 when the motorcycle, operated by Nolen with Ford as a passenger, collided with a trailer truck, owned and operated by the Defendants, Central Transport Inc., and Lyle H. Burley.

Billy Wheeler, mother and next of kin of Barry Cecil Ford and Julia Roberts, mother and next of kin of Dustin Ross Nolen, both employed the Nashville firm of Flynn and Neenan to represent them in wrongful death actions. Charles Patrick Flynn and Michael K. Radford undertook the representation of both Wheeler and Roberts and on May 4, 1994 filed a joint complaint against the Defendants alleging negligence and seeking extraordinary relief in order to keep the truck, involved in the accident, available for investigation.

Flynn and Neenan accepted the Barry Cecil Ford and Dustin Ross Nolen cases on a one- third (a) contingent fee contract.

The natural father of Dustin Ross Nolen to wit, Plaintiff, Milton Ellis Nolen, employed William B. Bruce and Nancy K. Corley of the Nashville Bar on a one-third (a) contingency fee contract and on August 23, 1994, these attorneys filed on behalf of Milton
Ellis Nolen a wrongful death case against Central Transport Inc, and Lyle R. Burley asserting that Milton Ellis Nolen was next of kin within the meaning of T.C.A. §20-5-106 and that the cause of action for the death of Dustin Ross Nolen survived to him.

To put it mildly, the relationship between Julia Roberts and Milton Ellis Nolen was
somewhat strained. Their respective counsel became afflicted with the same malady and the result was predictable.

On October 17, 1994, an Order was filed in the Probate Court of Davidson County, reflecting a July 27, 1994 hearing wherein Julia Roberts was named as Administrator of the Estate of Dustin Ross Nolen.

After considerable discovery, marked by much unpleasantness, the parties on June 23, 1995 reached a settlement agreement whereby the Defendants paid Five Hundred Thousand ($500,000) Dollars to settle the Ford case and Four Hundred Thousand

($400,000) Dollars to settle the Nolen case. There was no problem relative to the Ford case and little problem relative to the division after attorneys fees of the Nolen recovery, but no agreement could be reached as to the division of the One Hundred Thirty-three Thousand Three Hundred Thirty-three and thirty-three cents ($133,333.33) Dollars in attorneys fees in the Nolen case.

The Defendants thus interpleaded the Four Hundred Thousand ($400,000.00) Dollars settlement of the Nolen case and by Order entered August 23, 1995, the Clerk of the Court distributed Two Hundred Thousand ($200,000) Dollars of the Nolen settlement to Julia Roberts and her attorney Charles Patrick Flynn. The Clerk also distributed One Hundred Fifty Thousand ($150,000) Dollars of the Nolen settlement to Milton Ellis Nolen and his attorneys William B. Bruce and Nancy K. Corley. The balance of Fifty Thousand ($50,000)) Dollars was held by the Clerk pending resolution of the issues related to litigation expenses, past due child support and proper distribution of remaining attorneys fees.

The parties were able to agree on all issues except for the distribution of attorneys fees which was decided by the Trial Court in an Order of June 10, 1996 holding in part as follows:

> "1. The total recovery in the Nolen case by way of settlement was $400,000.00 and the appropriate fee attributable to this recovery, which should be distributed between the attorneys for the Plaintiffs, is $133,333.33. Counsel for the Plaintiff, Milton Nolen, has thus far received a fee of $33,333.33. Counsel for the Plaintiff, Julia Roberts, has thus far received a fee of $66,666.66.
>
> 2. There has been lots of acrimony between the parties, Julia Roberts and Milton Nolen, in this case. The Court is of the opinion and finds that it was necessary for the Plaintiff, Milton Nolen, to be represented by independent counsel in this case. The Court finds, however, that despite the Plaintiff, Milton Nolen's independent representation, counsel for the Plaintiff, Julia Roberts, did the lion's share of the work in this case and performed that work in a very short time. The Court is of the opinion that counsel for the Plaintiff, Julia Roberts, performed two-thirds of the work involved in prosecuting this case and counsel for the Plaintiff, Milton Nolen, performed on-third of the work involved in this prosecuting case.

> 2. (sic) The Court is of the opinion and finds that counsel for the Plaintiff, Julia Roberts, should receive two-thirds of the total fee in this case or $88,888.88 based upon their performance of two-thirds of the work in this case. The Court is of the opinion and finds that counsel for the Plaintiff, Milton Nolen, should receive one-third of the total fee in this case or $44,444.44 based upon their performance of one-third of the work involved in this case. Amounts already received by counsel in the Nolen case as fees should be credited toward these amounts."

Milton Ellis Nolen appeals from this judgement of the Trial Court.

On appeal the appellant asserts:

> "1. The trial erred as a matter of law by applying the 'fund doctrine' to the division of attorney fees, since this case is not a Class Action."

This case exhibits an unfortunate flaw in the statutory "wrongful death" law in Tennessee.

Until the enactment of Chapter 17 of the Public Acts of 1851, Tennessee followed the common law rule that every right of action for personal injury died with the demise of the injured person. The 1851 Act was essentially a counter part of what is familiarity known as "Lord Campbell's Act" passed by the British Parliament in 1846.

> "It manifestly abrogates the common law rule just mentioned, and keeps alive the deceased persons right of action in every instance in which he leaves surviving a widow or child or next of kin."
>
> East Tennessee V & G Railway Co. Lilly 190 Tenn. 563 and 18 S.W. 243,244

The present version of "Lord Campbell's Act" in Tennessee is reflected in Tennessee Code Annotated §20-5-106. Providing:

> "(a) The right of action which a person, who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another, would have had against the wrongdoer, in case death had not ensued, shall not abate or be extinguished by the person's death but shall pass to the person's surviving spouse and, in case there is no surviving spouse, to the person's children or next of kin; . . ."

The proper construction of this section of the Code has long been settled in Tennessee.

> "This section does not create a new cause of action for the plaintiffs, but simply preserves" . . .(the decedent's) . . . "right of action which would otherwise be extinguished by her death. (Citations omitted) The right of action for wrongful death is that which the deceased would have possessed had she lived, and any recovery is in the right of the deceased."
>
> Rogers v. Donelson-Hermitage Chamber of Commerce
> 807 S.W.2d. 242 (Tenn. App. 1990)

The problem immediately becomes self-evident. The decedent is a single person with a cause of action for injuries inflicted by the wrong-doer against him. His cause of action is single, entire and indivisible. When he dies from these injuries this single, entire and indivisible cause of action does not abate, but passes first to his surviving spouse. This presents no problem if he has a surviving spouse. It presents no problem, if he is survived by a single child.

What we have at bar however, is a twenty-four (24) year old decedent with no surviving spouse and no surviving children. His "next of kin" are his mother and his father. They thus, under the statute, take jointly this single, entire and indivisible cause of action, preserved for the deceased by T.C.A. §20-5-106. Unfortunately, the relationship between the surviving father and mother is --to be charitable--something less than amicable.

Immediately following the death of Dustin Ross Nolen, his mother, Julia Roberts employed on a one-third (a) contingent fee contract, Charles Patrick Flynn and Michael K. Radford to pursue the wrongful death action under the statute.

Sometime later, Milton Ellis Nolen, father of the decedent Dustin Ross Nolen employed William R. Bruce and Nancy K. Corley to pursue the same wrongful death case on his behalf as equal next of kin. This contract of employment was also a one-third (a) contingent fee contract.

From the beginning, all parties acknowledged that the mother and father would share equally the net proceeds from any settlement or verdict in the case.

The only testimonial record before this Court is the transcript of the proceedings of June 5, 1996 before Judge Shipley, which is limited to the testimony of Charles Patrick Flynn and Nancy Corley. Everything else in this testimonial transcript is argument of counsel over the division of the attorneys fees all other matters having been settled.

The Trial Judge who had presided over all proceedings in the case below found as a fact that Flynn and Radford had done "the lion's share"of the work throughout this case and the record before this Court certainly supports such a finding.

Flynn and Radford filed the suit quickly, took Court action to compel the Defendants to preserve the truck in its original condition, hired expert witnesses and advanced all the money out pocket.

All parties agreed that the Four Hundred Thousand ($400,000) Dollars settlement was an advantageous one. If indeed the parties had settled everything at that time on the basis of the respective contingent fee contracts, Roberts would have received Two Hundred Thousand ($200,000) less Sixty-six Thousand Six Hundred Sixty-six Dollars and sixty-six cents ($66,666.66) attorneys fees payable to Flynn and Radford and Nolen would have received Two Hundred Thousand ($200,000) less Sixty-six Thousand Six Hundred Sixty-six Dollars and sixty-six cents.($66,666.66) attorneys fees payable to Bruce and Corley as attorneys fees. This was not however the settlement. The Defendants interpleaded the Four Hundred Thousand ($400,000) Dollars and the Clerk disbursed Two Hundred Thousand ($200,000) Dollars to Mrs. Roberts from which Sixty-six Thousand Six Hundred Sixty-six Dollars and sixty-six cents.($66,666.66) was paid to Flynn and Radford as contingent attorneys fees. One Hundred Fifty Thousand ($150,000) Dollars was paid from the Court to Nolen with Thirty-three Thousand Three Hundred

Thirty-three Dollars and thirty-three cents ($33,333.33) being paid to Bruce and Corley as attorney fees. The other Fifty Thousand ($50,000) Dollars was left for the Trial Court to settle and the hearing of June 5, 1996 was for the purpose of giving the Trial Court a testimonial basis for making some kind of a decision.

As a result of this hearing , the Trial Court applied equitable principles paralleling the "common fund doctrine" articulated in Hobson v. First State Bank 801 S.W. 2d 807 (Tenn. App. 1990).

Appellant argues that the Trial Court erred ". . . as a matter of law . . ." by applying the common fund doctrine in this case, since it does not involve a class action.

This question is answered clearly in Hobson v. First State Bank 801 S.W. 2d 807 (Tenn. App. 1990) wherein the "common fund doctrine" is applied in Tennessee based primarily on Vincent v. Hughes Air West, Inc., 557 F.2d 759 (9th Cir. 1977), a case in which the 9th Circuit Court of Appeals held specifically that Vincent was not a class action. The fact that a "general class" of "next of kin" exists does not make a "class action" within the meaning of Rule 23 of the Tennessee Rules of Civil Procedure.

Thus, in the case at bar the "common fund" doctrine and its applicability present factual issues for determination rather than an issue of law. The factual record before this Court is quite limited in comparison to the factual record that was before the Trial Judge.

In discussing the general rule, that when third parties -- in this case, the Appellant Nolen -- hire their own attorneys and appear in the litigation the original claimant cannot shift to them his attorneys fees, the Court in Hobson applied the exception to this general rule, laid out in Vincent observing:

> " 'The purpose of this exception is of course identical to the purpose of the broader common fund doctrine itself: avoidance of unjust enrichment, or as it has been referred to in this litigation, "coattailing." ' "

In close analogy to the case at bar is in re: Matter of Estate of Jeffrey Lee Stout, #01A01-9308-CH-00360, released by the Western Section Court of Appeals on July 29, 1994. The *Stout* case is one in which the adult son of the parties had been killed leaving no children and only his parents as next of kin. The parties were divorced and the wife qualified as Administrator of the Estate and employed Neal and Harwell in the wrongful death action. They did everything and settled the case for Five Hundred Sixty Thousand ($560,000) Dollars, under a one-third (1/3) contingency fee contract. The father of the decedent, John I. Sandlin attempted to intervene and objected to attorneys fees being paid to Neal and Harwell out of his one-half (½) of the net proceeds.
His own attorney sought to share the attorney fee, although he had done little or no work. The Court of Appeals applied *Hobson* and denied his application.

In the case at bar, no question is made but that Bruce and Corley performed services, not the least of which, was to convince their client that the settlement was in the best interest of everyone. The principle set forth in *Hobson* and *Stout*, however, is the best solution to the problem of a single, entire and indivisible cause of action being made divisible by multiple successions to the cause of action as successors are established by T.C.A. 20-5-106. The remedy fashioned by the Trial Judge in dividing the attorneys fees, two-thirds (b) to Flynn and Radford and one-third (a) to Bruce and Corley, not only appears fair and equitable to this Court, but is well within the discretion vested in the Trial Judge.

The judgement below is affirmed and the cause remanded for such further proceedings as conform to this Opinion.

Cost of appeal are assessed against the Appellant.

WILLIAM B. CAIN, JUDGE

CONCUR:

HENRY F. TODD,
PRESIDING JUDGE, MIDDLE SECTION

BEN H. CANTRELL, JUDGE