IN THE COURT OF APPEALS OF TENNESSEE

AT KNOXVILLE

E1999-01963-COA-R3-CV

PST VANS, INC. and JAMES A. COUTERMARSH, Plaintiffs, v. GINGER GAYLE REED, Defendant-Appellant, and ROSIE CLARK REED, Defendant-Appellee.	C/A NO. 03A01-9901-CV-00113 APPEAL AS OF RIGHT FROM THE BLOUNT COUNTY CIRCUIT COURT HONORABLE W. DALE YOUNG, JUDGE

For Appellant	For Appellee
WANDA G. SOBIESKI R. RICHARD CARL, II Sobieski, Messer & Associates Knoxville, Tennessee	JOE H. NICHOLSON ANGELIA D. MORIE Nicholson, Garner & Duggan Maryville, Tennessee

O P I N I O N

AFFIRMED AND REMANDED

Susano, J.

This is an action of interpleader. It presents a dispute between the widow of Lowell Kenneth Reed ("Reed") and one of his three adult children. The plaintiffs in the instant case, PST Vans, Inc. ("PST") and James A. Coutermarsh ("Coutermarsh"), are judgment debtors as a result of an action filed in federal court by Rosie Clark Reed ("the Widow") seeking to recover for the wrongful death of her husband. Ginger Gayle Reed ("the Daughter"), one of Reed's children by an earlier marriage, intervened in the federal court action. Because of a disagreement between the Widow and the Daughter regarding the proper division of the funds from the wrongful death action, the plaintiffs filed this action and deposited $172,163.15[1] with the clerk of the trial court. Following a hearing on January 26, 1999, the trial court filed its memorandum opinion adopting the disposition of the funds suggested by the Widow. The Daughter appeals, raising the following issues:

> 1. Did the trial court err in assessing the attorney's fees of the Widow and her litigation expenses against the entire fund?
>
> 2. Did the trial court err in finding the Widow's expenses to be reasonable, and should the expenses -- that could have been, but were not, recovered from the defendants in the wrongful death action -- be charged against the Daughter's share of the proceeds?
>
> 3. Did the trial court err in denying the Daughter's motion for stay and in distributing the proceeds immediately?

I.

The basic facts in the wrongful death action and the events leading up to it are not in dispute.

Reed died June 27, 1993, when the motorcycle that he was riding collided with a truck driven by Coutermarsh, an employee of PST. Shortly after the accident, the Widow hired Joe H. Nicholson, Esquire, and his law firm, Nicholson, Garner & Duggan (collectively "the Nicholson law firm"), to represent her in pursuing a claim against Coutermarsh and PST for the wrongful death of her husband.[2] The Nicholson law firm subsequently prepared and filed a complaint in the United States District Court for the Eastern District of Tennessee at Chattanooga styled "Rosie C. Reed, individually and as widow of Lowell Kenneth Reed, deceased v. PST Vans, Inc., a corporation, and James A. Coutermarsh." On September 6, 1995, the federal court entered an order permitting the Daughter to intervene as a party in the pending wrongful death action. That court found "that without intervention [the Daughter's] interest as a practical matter would not be protected nor would her interest be 'adequately represented by existing parties,'" quoting from Rule 24(a), Fed.R.Civ.P.[3] The Daughter was represented in the federal court action, as she is here, by Wanda G. Sobieski, Esquire, and her law firm, Sobieski, Messer & Associates (collectively "the Sobieski law firm").

The federal court action went to trial before a jury. That jury found in favor of the Widow's claim and assessed damages of $300,000,[4] but found that Reed was 49% at fault. Accordingly, the award was reduced by the jury to $153,000.

II.

In the instant case, the Nicholson law firm filed a Notice of Attorney's Lien, claiming, on behalf of the Widow, litigation and related expenses of $103,215.32 and its contract attorney's fee of $57,330, being approximately[5] one-third of the amount deposited in court by the plaintiffs in this interpleader action.

The trial court held a hearing on the claim of the Nicholson law firm on January 26, 1999. On February 18, 1999, the trial court filed a memorandum opinion, which provides as follows:

> The Court heard oral argument of Counsel on January 26, 1999 relative to the lien for fees heretofore filed by Mr. Nicholson and as to certain expenses claimed by Defendant, Rose Clark Reed, from the proceeds on deposit in the above-captioned case. The Court took the matters under advisement.
>
> The Court has carefully reviewed all of the data of record in this case and concludes that Mr. Nicholson is entitled to the fees per his contract and the

expenses claimed are reasonable and were necessary to prosecute the cause of action to judgment.

Accordingly, the Court expressly approves expenses claimed by Rosie Clark Reed in the amount of $103,215.32 and Mr. Nicholson ’s fees based on one-third of the tendered judgment.

Mr. Nicholson will prepare an appropriate Order, pursuant to the provisions of this Memorandum and submit to opposing Counsel for their approval as to form and the Order will be tendered to the Court for entry not later than twenty (20) days from the date hereof.

III.

In this non-jury case, our review is *de novo* upon the record, with a presumption of correctness as to the trial court's factual determinations, unless the evidence preponderates otherwise. Rule 13(d), T.R.A.P.; ***Union Carbide Corp. v. Huddleston,*** 854 S.W.2d 87, 91 (Tenn. 1993); ***Wright v. City of Knoxville***, 898 S.W.2d 177, 181 (Tenn. 1995). The trial court's conclusions of law, however, are accorded no such presumption. ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996); ***Presley v. Bennett***, 860 S.W.2d 857, 859 (Tenn. 1993).

IV.

The Daughter's primary argument, in its most general terms, is that the trial court's division[6] of the fund is not equitable. More specifically, her arguments are as follows: (1) the litigation expenses and the one-third contingent fee of the Nicholson law firm should not have been charged against the entire fund; (2) the disbursement to the Nicholson law firm for fees and reimbursement of expenses amounted to 93% of the total fund which is an inequitable percentage of the recovery; (3) the trial court erred in approving some clearly unreasonable expenses; and (4) the Nicholson law firm should not be allowed to collect expenses from the fund that were collectable from the defendants in the wrongful death action.

V.

The parties sharply disagree as to the involvement of the Sobieski law firm in the wrongful death action. There is less disagreement as to the involvement of the Nicholson law firm in the preparation and trial of the federal court action.[7] This latter assertion can be seen from the following excerpt from the reply brief filed by the Sobieski law firm on behalf of the Daughter:

> [The Daughter] has never disputed the fact that appellee's counsel did the lion's share of the trial preparation, nor has she disputed that he argued the case to the jury. In his words, he had "exclusive control over the litigation." In fact, it was at the request of appellee's counsel that [the Daughter's] attorney did not sit at the counsel's table, and kept a low profile in the courtroom, so as not to create any question in the jury's mind as to who [the Daughter] was and why she had separate counsel.

(Citation omitted). We will now examine the parties' respective positions with respect to the work of the Sobieski law firm.

In the Daughter's brief, she states that

> [i]t is undisputed that [the Daughter] actively intervened in the federal lawsuit, was represented at depositions, and appeared throughout the trial. She was not a passive beneficiary.

If, by this statement, the Daughter is claiming that her counsel, the Sobieski law firm, played an *active* role in the preparation and trial of the federal court lawsuit, that assertion is hardly "undisputed"; rather it is sharply contested by the Widow, as demonstrated by the following excerpts from the Widow's brief:

> Counsel for [the Widow] [was] responsible for and did in fact do all substantive work associated with the trial of the matter.
>
> * * *
>
> [Prior to the time that the Daughter intervened], [the Widow] and her counsel engaged in extensive discovery and investigation regarding the accident which claimed the life of Lowell Kenneth Reed.
>
> * * *
>
> On July 21, 1995, after much of the investigation in the matter was concluded and after discovery was at an end, [the Daughter] filed a motion to intervene.
>
> * * *
>
> [The Daughter] did nothing more than hamstring the Plaintiff below in the presentation of the case.
>
> * * *
>
> Counsel for [the Widow] conducted all investigation in the matter, conducted all discovery, and presented all evidence at trial.
>
> * * *
>
> ...the attorneys for [the Widow]... contributed all funds toward the expense of the complex litigation.

It is clear from these competing excerpts that the respective *positions* of the parties as to the contribution of the Daughter and her counsel to the securing of the judgment in the federal court action are, in fact, diametrically opposed.

VI.

We have recognized in earlier cases that the relative contributions of parties and their counsel to the securing of a single judgment, in a wrongful death action, that inures to the benefit of more than one beneficiary is an important consideration in deciding how fees and expenses should be assessed. Two unreported cases are particularly instructive. *See* ***Wheeler v. Burley***, C/A No. 01A01-9701-CV-00006, 1997 WL 528801 (Tenn.Ct.App. M.S., filed August 27, 1997), and ***In re Estate of Stout***, C/A No. 01A01-9308-CH-00360, 1994 WL 287765 (Tenn.Ct.App. W.S., filed June 29, 1994). A review of these two cases reveals the following principles concerning the proper application of the " common fund doctrine."

Generally, attorneys may look only to the clients with whom they contract for their compensation, even where a third party incidentally benefits from the work done for the client. ***Stout***, at *3 (quoting ***Hobson v. First State Bank***, 801

S.W.2d 807, 809 (Tenn.Ct.App. 1990)). The common fund doctrine is an exception to this general rule. ***Stout,*** at *3. The doctrine provides that "a private plaintiff, or his attorney, whose efforts create, discover, increase or preserve a fund to which others also have a claim is entitled to recover from the fund the costs of his litigation, including attorneys' fees." ***Id***. (quoting ***Vincent v. Hughes Air West, Inc.***, 557 F.2d 759, 769 (9th Cir. 1977)). Application of the doctrine effectively spreads "litigation costs proportionately among all the beneficiaries so that the active beneficiary does not bear the entire burden alone and the 'stranger' beneficiaries do not receive their benefits at no cost to themselves." ***Stout***, at *3.

Where there are multiple claimants to a fund, each of which retains his or her own attorney to participate in the case, however, the question of whether and how the common fund doctrine should apply becomes more difficult. It cannot be said that claimants who contribute to procurement of a fund through individual effort or expense receive their benefit at no cost to themselves. Thus, the common fund doctrine is generally not applied against parties retaining their own counsel. ***Id***., at *4, *see also* ***Wheeler***, 1997 WL 528801 at *4. However, where the contribution of a "lead" plaintiff or attorney and the contribution of the objecting plaintiff or attorney are unequal, courts may apply the common fund doctrine to avoid the unjust enrichment of the more passive plaintiff or attorney. ***Stout***, at *4; ***Wheeler***, at *4-*5 (both

cases citing ***Hobson***, 801 S.W.2d at 809).

In ***Stout***, Jeffrey Lee Stout died, leaving his divorced parents as his next of kin. His mother brought a wrongful death action and employed the law firm of Neal and Harwell on a one-third contingent fee basis. Stout's father hired his own attorney. Neal and Harwell negotiated a $560,000 settlement, and the father and his attorney objected to Neal and Harwell's expenses and fees being paid out of the entire fund. The trial court found that "[t]he services rendered by Neal & Harwell to date have inured to the benefit of the entire estate and both potential beneficiaries" and ordered Neal and Harwell's one-third fee to be paid out of the entire fund. ***Stout***, at *3. We affirmed, holding that "[b]ecause Neal & Harwell did the lion's share[8] of the work, Neal & Harwell was properly paid from estate funds before the funds were divided between the beneficiaries." ***Id***., at *4.

The facts in ***Wheeler*** are similar to those in ***Stout***. The adult son of divorced parents died, leaving his parents as his only next of kin. The mother brought a wrongful death action and employed counsel on a one-third contingent fee basis. The father hired his own counsel to pursue the same wrongful death case, also on a one-third contingent fee agreement. The trial court found that the mother's counsel had performed two-thirds of the work involved in prosecuting the case while the father's counsel had performed one-third of

the work involved. The trial court then awarded one-third of the entire fund as attorneys' fees and ordered that this fee be split two-thirds to the mother's counsel and one-third to the father's counsel. On appeal, we noted that the trial judge had found as a fact that the mother's counsel had done the "lion's share" of the work and that the record "certainly supports such a finding." ***Wheeler***, at *3. We concluded that the remedy fashioned by the trial court "not only appears fair and equitable to this Court, but is well within the discretion vested in the Trial Judge." ***Id***. at *5.

The Daughter relies on the case of ***Travelers Ins. Co. v. Williams***, 541 S.W.2d 587 (Tenn. 1976). ***Williams*** involves a dispute between an insured and his insurer as to whether the insured's attorney was entitled to his one-third contingent fee out of the share of a recovery against a tortfeasor that represented the insurer's subrogation interest. The insurer's right of subrogation arose out of medical payments made to the insured for the benefit of his minor child. In ***Williams***, the insurance company advised the insured that it would "handle [its] own subrogation." ***Id***. at 588. It advised the insured that it did not want the insured to protect its subrogation rights. ***Id.*** at 590. The Supreme Court in ***Williams*** concluded

> that the facts of this case do not entitle the insured's attorney to receive any fee from the insurer with respect to the

subrogation claim; he acted as a volunteer.

Id. at 591.

We do not believe that ***Williams*** and its progeny are applicable to this case. ***Williams*** involves subrogation; the instant case involves the pursuit of a wrongful death claim by the individual to whom the right to pursue the claim is expressly granted by statute. *See* T.C.A. § 20-5-110(a). In our judgment, the common fund doctrine as discussed in ***Stout*** and ***Wheeler*** is the doctrine applicable to the case at bar.

VII.

As previously discussed, this matter was before the trial court on diametrically-opposed positions with respect to the contribution of the Daughter and her counsel to the securing of the $153,000 judgment. In order to apply the applicable principles of the common fund doctrine, the trial court had to make a number of factual determinations, the most important of which were the extent of the involvement of the Sobieski law firm in the securing of the judgment and the reasonableness of the litigation and associated expenses of the Widow. The threshold determination for us is whether the evidence preponderates against the trial court's express factual determinations with respect to the fees and expenses presented by the Nicholson law firm and the trial court's implied factual determination that the work performed by the

Sobieski law firm did not contribute to the judgment in the wrongful death case in a way which would require a different disposition of the judgment proceeds under the ***Stout*** and ***Wheeler*** opinions.

In order to test the trial court's factual determinations under our well-established standard of review, we must review the record to search for the preponderance of the evidence. The portion of the record formerly referred to as the technical record includes the Notice of Attorney's Lien filed by the Nicholson law firm, supported by a detailed listing of the litigation and associated expenses in the revised amount of $103,215.32. Supporting bills and checks take up some 190 pages of the technical record. Also included in the technical record are the Widow's answers, under oath, to 26 interrogatories and requests to produce. These responses pertain to her fee contract with the Nicholson law firm and her claimed expenses of $103,215.32.

In response to the Widow's filings, Ms. Sobieski filed her affidavit stating that she represented the Daughter; that she was a member in good standing of the Knoxville Bar; that her standard hourly rate was $135.00; that "[t]he attached statements represent a true and accurate assessment of attorney's fees and expenses in this case"; that the fees and expenses were reasonable under the circumstances; that her total fees as of January 24, 1999, were $21,447.50 "for 225.50

hours at an effective rate of [$]95.11"; that her expenses were $645.27 as of January 24, 1999; that she was due finance charges of $5,802.05 as of January 24, 1999; and that her total entitlement was $27,894.82 as of January 24, 1999. While the affidavit refers to “attached statements,” there are none in the record.

There is a serious deficiency in this record -- we do not have Ms. Sobieski’s “attached statements” and, more importantly, we do not have a transcript or statement of the evidence from the critical hearing before the trial court on January 26, 1999. The court’s memorandum opinion reflects that the court “carefully reviewed all of the data of record in this case.” This presumably includes all of the material presently in the technical record.[9] Significantly, the memorandum opinion also recites that the trial court “heard oral argument.” While, generally speaking, argument of counsel is not considered evidence, *see* ***State v. Roberts***, 755 S.W.2d 833, 836 (Tenn.Crim.App. 1988), that is not the case here. This is because the attorneys who presented argument were the ones who knew best what each law firm did in the wrongful death litigation. As officers of the court, they had a professional responsibility to truthfully state the facts that were within their personal knowledge on the critical subject of who did what and when. In this respect, they were factual witnesses, and it seems beyond doubt that their statements in argument were received by the trial court as

evidence on these significant factual matters. In any event, there is certainly nothing in the record now before us to substantiate the Daughter's apparent claim that her attorneys performed valuable services that contributed to the securing of the judgment in this case.

The record before us does not contain all of the evidence that impacted the trial court's implicit finding that the respective roles of the two law firms were such as to justify the court's disposition of the judgment proceeds. The same can be said of the trial court's determination that the Widow's expenses were reasonable. We simply do not have a complete record of the evidence received by the trial court. It was the appellant's responsibility to furnish us a record that would permit us to reach the issues raised by her. *See* Rule 24, T.R.A.P. In the absence of such a record, "we must assume that the record, had it been preserved, would have contained sufficient evidence to support the trial court's factual findings." ***Sherrod v. Wix***, 849 S.W.2d 780, 783 (Tenn.Ct.App. 1992).

The parties make many statements in their briefs regarding their services in the wrongful death action. These statements are important in establishing their respective *positions*, but they cannot be accepted by us as *evidence*. We are an appellate court. We do not receive new evidence on appeal. Our role is to review the actions of trial courts

based upon the evidence presented to those courts. ***Tennessee Public Service Co. v. City of Knoxville***, 91 S.W.2d 566, 572 (Tenn. 1936). We cannot do that in this case because of the deficiency in the record.

Accordingly, we cannot say that the evidence preponderates against the trial court's factual findings underpinning its legal judgment. We certainly cannot say, under the teachings of ***Stout*** and ***Wheeler***, that there is no set of facts in the instant case that could possibly justify the trial court's judgment.

VIII.

The issue of the trial court's failure to grant a stay is rendered moot by our decision in this case.

IX.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant. This case is remanded to the trial court for the collection of costs assessed below.

_____
Charles D. Susano, Jr., J.

CONCUR:

_____
Herschel P. Franks, J.

_____
D. Michael Swiney, J.