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IN RE: ALLEGED MAHWAH  
TOXIC DUMP SITE LITIGATION

"Applicable To All Cases"

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION

BERGEN COUNTY

CASE NO. 277 MT

MASTER DOCKET No. BER-L489-08

CIVIL ACTION

OPINION

**Decided: November 5, 2010**

**Appearing:**

**Frank V. Floriani, Esq., for Plaintiffs (Sullivan Papain Block  
McGrath & Cannavo P.C.)**

**Counsel of Record (no appearance on this application):**

**Brian J. McCormick, Jr., Esq., for Plaintiffs Thompson & Brannick  
(Sheller PC)**

**Mark J. Semeraro, Esq., for Defendant Borough of Ringwood  
(McManimon & Scotland, LLC)**

**Alan E. Kraus, Esq., for Defendants Ford Motor Company, Ford  
International Services, Inc., Ringwood Realty Corporation (Latham  
& Watkins, LLP)**

**Robert J. Saville, Esq., for Defendants and Third Party Plaintiffs URS  
Corporation and URS Group, Inc. (Winston & Strawn, LLP)**

**W. Lane Miller, Esq., for Defendant J.I. Kislak Co. (Law Offices of  
W. Lane Miller)**

**John C. Garde, Esq. for Defendant Arrow Group Industries, Inc.  
(McCarter & English, LLP)**

**Christopher J. McKenzie, Esq., for Third Party Defendants Arcadis  
(Beveridge & Diamond)**

**MARTINOTTI, J.S.C.**

I. Facts

The underlying controversy in this case involves alleged damages for personal injuries on behalf of current and former residents of the community of Upper Ringwood, New Jersey, some of whom are minors. The Plaintiffs live or lived near the Ringwood Mine Landfill Site which was used by Defendants in the late 1960s and early 1970s as a dumping site for industrial waste. In 2006, the Plaintiffs brought a civil action for damages allegedly caused by exposure to toxic and hazardous substances at, around and emanating from the Site.

In the Summer and Fall of 2008, Plaintiffs' Counsel, Sullivan Papain Block McGrath & Cannavo P.C. and The Cochran Firm ("Counsel"), engaged in extensive settlement discussions with Ford Motor Company ("Ford"), Ford International Services, Inc., Ringwood Realty Corporation, Arrow Group Industries, Chromalloy American Corporation, URS Corporation and URS Group, Inc.(collectively, "the Ford Defendants") and the Borough of Ringwood (collectively, "Ringwood"). A settlement was reached. The settlement with the Ford Defendants, which included settlements with adults and settlements with minors, was to remain confidential. However, because "Friendly"

Hearings needed to be conducted in order to approve Counsel's fees on the minor Plaintiffs' awards, the settlement with the minor Plaintiffs could not be confidential.<sup>1</sup>

On July 19, 2010, Counsel made the present Motion for an Order modifying the contingent attorneys' fees pursuant to R. 1:21-7 (f) and (i).<sup>2</sup> There were several comments filed in response to that application. On August 23, 2010, the Court heard arguments from Counsel and comments from several Plaintiffs who appeared. At the conclusion the Court instructed Plaintiffs' Counsel to provide a comparison of the total fee under R. 1:21-7 as it relates to application for modification pursuant to R. 1:21-7 (f).<sup>3</sup> Plaintiffs' Counsel made an application to file this information under seal pursuant to R. 1:2-1 and R. 1:38-11 (b) in order to honor the confidentiality provision of the parties' contract. That motion was denied on October 8, 2010. On October 19, 2010, Counsel advised the Court that the total settlement was \$12.5 million.

## II Legal Analysis

### i. Legal Standard

R. 1:21-7 provides the guidelines for the setting and modification of attorney's fees in tort cases. R. 1:21-7 (c) establishes that the fee structure for the first \$2 million in recovery (after deductions for disbursements in connection with the institution and prosecution of the claim) shall be 33 1/3% on the first \$500,000 recovered; 30% on the next \$500,000 recovered; 25% on the next \$500,000 recovered; and 20% on the next

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<sup>1</sup> The "Friendly's" were conducted on March 15-16, 29-31, April 12-14, and May 13, 2010. At the Friendly's the Court approved the gross settlement per Plaintiff subject to disbursements for fees and expenses.

<sup>2</sup> This Court has authority to hear this application by designation from the Honorable Peter E. Doyne, A.J.S.C.

<sup>3</sup> Although Counsels' Fees were not approved, on August 23, 2010 this Court approved disbursements for expenses, as determined by the Special Master.

\$500,000 recovered. From this statutory fee structure, two types of fee modifications are available. R. 1:21-7 (f) allows an attorney who considers the statutory fee schedule on the first \$2 million to be inadequate to apply to the Court for an enhanced fee, subject to the Court's finding of reasonableness.<sup>4</sup> For all amounts recovered in excess of \$2 million, R. 1:21-7 (c) (5) provides that the fee shall be a reasonable fee made by application of Counsel. Although this Motion was filed under R. 1:21-7 (f), because the fee modifications are to be applied globally to all the adult Plaintiffs' settlements, including aggregate amounts totaling over \$2 million, both a R. 1:21-7 (f) and a R. 1:21-7 (c) (5) analysis are appropriate.

In deciding a R. 1:21-7 (f) motion, the burden is on the attorney to show the fee permitted by the schedule is inadequate. Anderson v. Conley, 206 N.J. Super. 132, 147 (App. Div. 1985). Applications for a fee in excess of the statutory fee schedule are reserved for exceptional cases; for example, where a showing is made of the particular difficulty of the litigation. Id. at 146; see Pressler and Verniero, Current N.J. Court Rules, comment 7 on R. 1:21-7 (2010). The moving Counsel must demonstrate that 1) the fee allowed under the rule is not reasonable compensation for the services actually rendered, and 2) the case presented problems which required exceptional skills beyond that normally encountered in such cases where the case was unusually time consuming. Wurtzel v. Werrer, 201 N.J. Super. 544, 549 (App. Div. 1985), certif. denied, 102 N.J. 353 (1985).

In deciding a R. 1:21-7 (c) (5), where an attorney seeks a “reasonable” fee on the amount of recovery in excess of \$2 million, no burden of proof is placed on the moving

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<sup>4</sup> R. 1:21-7 (i) makes these rules applicable in multiple party actions after individual settlements are aggregated.

party. In re Estate of F.W., supra, 398 N.J. Super. 344, 357-58 (App. Div. 2008). That discretion is left to the Court based on the factors listed in New Jersey RPC 1.5:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly;
2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
3. The fee customarily charged in the locality for similar legal services;
4. The amount involved and the results obtained;
5. The time limitations imposed by the client or by the circumstances;
6. The nature and length of the professional relationship with the client;
7. The experience, reputation and ability of the lawyer or lawyers performing the services;
8. Whether the fee is fixed or contingent.

There are eleven groups of Plaintiffs, designated as A through K, with the groupings determined according to the documented nature and severity of the Plaintiffs' injuries. The gross awards per category, and the actual recoveries after deductions for costs but before attorneys' fees, are as follows:

Category	Gross Award	Disbursements	Recovery after deductions for costs
A	\$7,000.00	\$1,861.30	\$5,138.70
B	\$9,000.00	\$2,393.10	\$6,606.90
C	\$10,000.00	\$2,659.00	\$7,341.00
D	\$11,000.00	\$2,925.00	\$8,075.10
E	\$15,000.00	\$3,988.50	\$11,011.50
F	\$25,000.00	\$6,647.49	\$18,352.51
G	\$35,000.00	\$9,306.49	\$25,693.51
H	\$55,000.00	\$14,624.49	\$40,375.51
I	\$45,000.00	\$11,965.49	\$33,034.51
J	\$65,000.00	\$17,283.48	\$47,716.52
K	\$62,142.87	\$16,523.77	\$45,619.10

Included in groups A, B, C, F, G, and H are minors on whom Friendly's have been conducted. Counsel has asked this Court to set attorneys' fees, not including the minor

Plaintiffs in each category, at 15% for categories A through D and 30% for categories E through K. For minors in all categories, Counsel seeks a fee of 25%.<sup>5</sup>

Under the statutory fee schedule, deductions for disbursements are made before calculating attorneys' fees. After these disbursements, the total recovery for all Plaintiffs combined comes to \$9,176,253. Applying Counsel's requested fees of 15% to adult Plaintiffs in categories A through D and 30% in categories E through K, and applying the requested 25% fee for minors in all categories, Counsel's fee amount on the first \$2 million would be \$533,712.30. Under the statutory fee schedule, the first \$2 million would justify a fee amount of \$541,666.67.

ii. R. 1:21-7 (f) analysis

The factors germane to a R. 1:21-7 (f) analysis are whether the fee allowed under the rule is reasonable compensation for the services rendered, and whether the case presented problems which require exceptional skills such that the case was unusually time consuming. Though Counsel did not provide time records, this Court finds that the analysis and explanation set forth in Mr. Floriani's certification are sufficient to evaluate this application. "[T]he failure to submit time records in support of an increased fee application under R. 1:21-7 (f) is not fatal." Estate of F.W., 398 N.J. Super., 344, 356-57 (App. Div. 2008) (citing Bolle v. Community Memorial Hospital, 145 N.J. Super. 593, 596 (App. Div. 1976).

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<sup>5</sup> There was an application to modify the fee schedule for the minor Plaintiffs. The Court has considered the correspondence in support of Counsel's request.

iii. R. 1:21-7 (c) (5) analysis

Since the statutory fee for the first \$2 million and the requested fee for the first \$2 million differ so minimally, it is the fee on the recovery above \$2 million that is the true concern of the present Motion. Procedurally, this is a R. 1:21-7 (f) motion; however, the substantive analysis of the reasonableness of the fee is essentially the same as a R. 1:21-7 (c) (5). "Although [R. 1:21-7 (c) (5)] directs an attorney to make an application for a reasonable fee pursuant to R. 1:21-7 (f), we are satisfied that the rule's intent is only to require that the application complies with the procedural requirements of notice and of a hearing as stated in subsection (f)." Estate of F.W., at 357. What is a "reasonable" fee for the recovery above the first \$2 million turns on an application of the factors listed in NJ RPC 1.5. Id.

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly;
2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
3. The fee customarily charged in the locality for similar legal services;
4. The amount involved and the results obtained;
5. The time limitations imposed by the client or by the circumstances;
6. The nature and length of the professional relationship with the client;
7. The experience, reputation and ability of the lawyer or lawyers performing the services;
8. Whether the fee is fixed or contingent.

It is apparent that this litigation was very labor-intensive, involved complex issues, and would have limited Counsel's ability to seek additional employment. There was clearly a great investment of attorney time and effort, as well as an investment of time and effort in procuring experts and preparing the complex issues of the extent of environmental damage and its relation to the Plaintiffs' health. These cases, though designated a mass tort pursuant to Supreme Court's order of November 30, 2007, were

actually prosecuted individually, rather than as a group. Since the usage of bellwether cases was rejected, the Court essentially managed these cases as individual claims, requiring Counsel to make full discovery, including two sets of interrogatories, an exchange of medical records, and depositions of every Plaintiff. Counsel estimates that they received nearly 900,000 documents from various discovery requests to state, local, and federal agencies. The completion of Court-ordered fact sheets required, according to Counsel, hundreds of attorney hours, including at one point the staffing of the local Church where fact-interviews were held from 10 am to 11 pm. In addition, as most of the clients live in a relatively isolated rural community and most do not have automobiles, client communications were hard to maintain. Therefore, regular quarterly meetings at the town Church were necessary. In this fashion, Counsel maintained a professional relationship with their clients over the course of five years. At times, private investigators were hired to locate clients who had disappeared.

In presenting the terms of the settlement to the Plaintiffs, individual meetings were conducted with most of the 626 Plaintiffs, who tendered individual releases. Once the settlement was ratified, Richard H. Schaffer, an attorney with experience in mass environmental tort litigation, was retained as a neutral third-party to allocate the settlement money.<sup>6</sup> In addition to his review of the medical records, pleadings and interrogatories, Mr. Schaffer took testimony from over 200 Plaintiffs in live proceedings. Counsel was present at each of these meetings.

Since this litigation involved scientific, medical and technical issues of considerable complexity, more than a dozen experts were retained before and during the litigation in fields as diverse as geology, epidemiology, oncology, pulmonology,

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<sup>6</sup> See allocation charts, page 5, supra, 12-14, infra.

toxicology, groundwater dynamics, dosage recommendations, internal medicine, attic dust sampling, water sampling, air sampling, solid waste disposal, blood testing, property appraisal, and air/water plume dispersion modeling. A dozen tours of the site, along with the necessary sampling analysis, were conducted.

These efforts yielded information that raised considerable concerns as to proving causation. Dr. David Fernandes, a Board Certified Pediatrician and Assistant Professor of Clinical Pediatrics and Preventive Medicine at SUNY Downstate Medical Center, reviewed all relevant medical records and concluded within a reasonable degree of medical certainty that Plaintiffs' health problems are not attributable to exposure to toxins discharged by Defendants. Serum levels for heavy metals were tested and found to be in the normal range and those Plaintiffs with asthma or reactive airway disease, in general, had many possible familial and social risk factors including inadequate nutrition, exposure to cigarette smoke, and poor medical care. See J-1, in evidence March 15, 2010, Affidavit of David R. Fernandes, M.D. Dr. Kenneth Pinsker, a Board Certified pulmonologist and Professor of Medicine at Albert Einstein College of Medicine, reviewed all relevant medical records and concluded within a reasonable degree of medical certainty that there was no evidence that environmental pollution caused any demonstrable lung damage in any of the claimants. See J-2, in evidence March 15, 2010, Affidavit of Kenneth L. Pinsker, M.D. Experts in toxicology concluded that there was no systemic way to evaluate the Plaintiffs' ingestion of, inhalation of, or dermal contact with contaminants; there was only anecdotal evidence. There was no way to reliably establish the dosage of toxins that Plaintiffs received. There was also no proof that Defendants' disposal activities led to contamination of the drinking water of the community.

In addition to the causation issues raised by these expert reports, there were other significant legal issues potentially undermining Plaintiffs' claims. Since toxic exposure had been identified as early as the 1970's, and the site was one of the first to be designated a "Superfund" site by the EPA in the 1980's, the statute of limitations defense (as to the adult Plaintiffs, but not the minor ones) was a concern to Counsel. There were immunity issues as to the Borough of Ringwood, a public entity that could be expected to argue that it bore no liability for the fact that third-party polluters used the Site to dump toxic waste.

These cases were vigorously litigated by all parties. Counsel originally filed in United States District Court, and opposed a motion by Defendants to remove to New Jersey State Court, which they ultimately lost. Counsel defeated motions to dismiss and a motion for a potentially fatal "Lone Pine" case management order, which would have required Plaintiffs to prove, at the outset of litigation, each of the Plaintiffs' individual injuries, specific information establishing a causal connection between each injury and the alleged conduct of defendants, the dates on which each individual Plaintiff first incurred the harm, and a quantification of the amount of each toxic substance that each individual plaintiff was allegedly exposed to. Counsel, a highly regarded and competent firm with vast experience in mass torts, eventually achieved a fair settlement for their clients in spite of considerable causality issues.

Individual retainers were signed with each client, which provided for contingent, rather than fixed fees, at the rate prescribed by R. 1:21-7 (c). Therefore, at the time of retention, the Plaintiffs expected that Counsel would receive a 33 1/3% fee on the first \$500,000 recovered; 30% on the next \$500,000 recovered; 25% on the next \$500,000

recovered; and 20% on the next \$500,000 recovered.<sup>7</sup> Furthermore, the percentages now sought by Counsel (15% to 30%) are not unreasonable given the frequency of one-third contingency fees in mass torts involving multi-million dollar settlements.

As with a R. 1:21-7 (f) motion, the lack of detailed time records is not fatal to a R. 1:21-7 (c) (5) analysis, "but [the analysis of the requested fee] could be better evaluated if such records were kept and produced." Bolle at 593. "The initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." Blum v. Stenson, 465 U.S. 886, 888 (1984). Although the work done clearly required many billable attorney hours, not knowing the precise amount, this Court has no "initial estimate of a reasonable fee" with which to work. Additionally, although the vast majority of the work done on the case appears to have been absolutely necessary, there are some issues as to whether all of the visits to the community were necessary for communication. Counsel claims that it was necessary as the vast majority of Plaintiffs cannot travel by car and do not have working phones, many clients claim that they do have working phones and that they were never actually asked to come to Counsel's offices.

### III Objections/Comments

This Court received five letters from Plaintiffs, one of which was co-signed by 54 Plaintiffs and one which was signed simply "For the People." Two additional letters, from non-Plaintiff interested parties, were also received. In addition, two Plaintiffs,

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<sup>7</sup> It is noteworthy that no single recovery in any category is above \$250,000. Therefore, a 33 1/3% fee would be expected but for R. 1:21-7 (i).

Leah I. Milligan and Rhoda L. Nieves, appeared and testified at the August 23, 2010 hearing.

IV. Conclusion

This Court finds, for the reasons set forth above, that Counsel has satisfied the criteria set forth in R. 1:21-7 (c) (5) and will award Counsel fees in the amount of \$2,280,878.05 as illustrated and allocated in the following charts:

Adults

Category (number of Plaintiffs in each category)	Gross Recovery	Disbursements	Net Recovery	Attorney Fees (percentage)	Remainder to Client
A (78)	\$7,000.00	\$1,861.30	\$5,138.70	\$770.81 (15%)	\$4,367.89
B (31)	\$9,000.00	\$2,393.10	\$6,606.90	\$991.04 (15%)	\$5,615.86
C (58)	\$10,000.00	\$2,659.00	\$7,341.00	\$1,101.15 (15%)	\$6,239.85
D (33)	\$11,000.00	\$2,924.90	\$8,075.10	\$1,211.27 (15%)	\$6,863.83
E (147)	\$15,000.00	\$3,988.50	\$11,011.50	\$3,028.16 (27.5%)	\$7,983.34
F (93)	\$25,000.00	\$6,647.49	\$18,352.51	\$5,046.94 (27.5%)	\$13,305.57

Category (number of Plaintiffs in each category)	Gross Recovery	Disbursements	Net Recovery	Attorney Fees (percentage)	Remainder to Client
G (10)	\$35,000.00	\$9,306.49	\$25,693.51	\$7,065.72 (27.5%)	\$18,627.79
H (10)	\$55,000.00	\$14,624.49	\$40,375.51	\$11,103.27 (27.5%)	\$29,272.24
I (26)	\$45,000.00	\$11,965.49	\$33,034.51	\$9,084.49 (27.5%)	\$23,950.02
J (11)	\$65,000.00	\$17,283.48	\$47,716.52	\$13,122.04 (27.5%)	\$34,594.48
K (7)	\$62,142.87	\$16,523.77	\$45,619.10	\$12,545.25 (27.5%)	\$33,073.85

Infants

Category (number of Plaintiffs in each category) <sup>8</sup>	Gross Recovery	Disbursements	Net Recovery	Attorney Fees (percentage)	Remainder to Client
A (15)	\$7,000.00	\$1,861.30	\$5,138.70	\$616.64 (12%)	\$4,500.00

<sup>8</sup> Since many of the infants are of tender years and the net recovery to them, under counsels' formula, is not sufficient, the Court, rather than apply a percentage, has set a minimum recovery in categories A, B, and C.

Category (number of Plaintiffs in each category)	Gross Recovery	Disbursements	Net Recovery	Attorney Fees (percentage)	Remainder to Client
B (8)	\$9,000.00	\$2,393.10	\$6,606.90	\$856.90 (13%)	\$5,750.00
C (9)	\$10,000.00	\$2,659.00	\$7,341.00	\$807.51 (11%)	\$6,500.00
F (84)	\$25,000.00	\$6,647.49	\$18,352.51	\$4,588.13 (25%)	\$13,764.38
G (5)	\$35,000.00	\$9,306.49	\$25,693.51	\$6,423.38 (25%)	\$19,270.13
H (8)	\$55,000.00	\$14,624.49	\$40,375.51	\$10,093.88 (25%)	\$30,281.63