**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**February 27, 2007**

**A. John Voelker**
**Acting Clerk of Court of Appeals**

**NOTICE**

**This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.**

**A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.**

**Appeal No. 2006AP80** **Cir. Ct. No. 2003CV444**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT III**

---

**LANCE D. GRORUD BY HIS GUARDIAN AD LITEM STEVEN G. DANIELSON AND SHARON R. GRORUD AS SPECIAL ADMINISTRATOR OF THE ESTATE OF MARTIN J. GRORUD, DECEASED,**

**PLAINTIFFS,**

**TRACE M.J. GRORUD AND TRISTAN M.J. GRORUD BY THEIR GUARDIAN AD LITEM, JOHN C. CABANISS,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**HEIDI L. FENCL, MID-CENTURY INSURANCE COMPANY AND ABC INSURANCE COMPANY,**

**DEFENDANTS,**

**GUELZOW LAW OFFICES, LTD.,**

**RESPONDENT.**

---

APPEAL from an order of the circuit court for Chippewa County: FREDERICK A. HENDERSON, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PETERSON, J. This is a dispute over distribution of attorneys' fees between two attorneys representing different plaintiffs in a three plaintiff wrongful death action. Because the settlement of all three plaintiffs' claims was brought about by the efforts of only one of the attorneys, the court awarded that attorney a percentage of the entire settlement under the common fund doctrine. Counsel for the other two plaintiffs argues the common fund doctrine does not apply, and the first attorney was not entitled to any fees from his clients' portion of the settlement absent an agreement or attorney client relationship with them.[1] We disagree and affirm the circuit court's order.

## FACTS

¶2 Martin Grorud died in a boating accident on June 8, 2002. The boat was driven by Martin's fiancé, Heidi Fencl. At the time, Fencl was pregnant with Trace and Tristan Grorud. Martin, who was thirty years old at the time of his death, also left a son, Lance Grorud, who was six years old at the time. Lance's mother is Sharon Grorud, Martin's ex-wife.[2]

[1] Appellants in this appeal are attorney John Cabaniss and Trace and Tristan Grorud. However, because this is a dispute over attorney fees, for clarity we refer to the appellants collectively as Cabaniss in the body of this opinion.

[2] For clarity, we refer to all parties with the last name Grorud by their first names throughout.

¶3 On August 30, 2002, Sharon retained attorney Thomas Guelzow to file a wrongful death action on behalf of Lance. Over the course of the following year, Guelzow retained investigators and experts, took videotape statements from witnesses, and performed a reconstruction of the accident. On October 30, 2003, attorney John Cabaniss informed Guelzow he had been retained by Fencl to represent her twin boys, Trace and Tristan, and was in the process of being appointed their guardian ad litem.[3]

¶4 Guelzow filed suit on November 7, 2003. The complaint listed Lance, Trace, Tristan, and the administrator of Martin's estate as plaintiffs. Attorney Steven Danielson was listed as guardian ad litem for Lance, and Attorney John Cabaniss was listed as guardian ad litem for Trace and Tristan. Fencl and her insurer, Mid-Century Insurance Company, were listed as defendants.

¶5 Around the time the suit was filed, a dispute developed between Guelzow and Cabaniss over their respective roles in the case. In letters to Cabaniss, Guelzow maintained it was a conflict for Cabaniss to simultaneously be counsel on the case and guardian ad litem for Trace and Tristan. Guelzow stated his role was to recover the maximum amount possible, and the court would divide the amount recovered between Martin's children.

¶6 Cabaniss replied that he had been retained by Fencl to represent Trace and Tristan's interests, that he would be both their attorney and guardian ad litem, and that he believed he could serve in both roles without a conflict. In an

[3] Trace and Tristan were born September 19, 2002.

August 5, 2004 telephone call, Cabaniss took the position that he was co-counsel, not simply guardian ad litem, and that he and Guelzow should split the attorney fees based on the amount distributed to each child. Guelzow disagreed, pointing out the amount of time and money his firm had invested in the case.

¶7 In January 2005, Mid-Century offered to settle the suit as to all claims for $450,000, $50,000 less than its policy limit. A hearing to obtain court approval of the settlement was set for February 17. At the hearing, all parties stated the amount of the total settlement was reasonable and recommended the court approve it. However, they disagreed over how attorney fees would be distributed. Guelzow argued he was entitled to one third of the $450,000 settlement as attorney fees based on the common fund doctrine and the greater share of the work and risk he had undertaken. Cabaniss argued fees could be awarded only based on fee agreements between the attorneys and their clients, and that awarding Guelzow a share of the total recovery was impermissible because it would allow Guelzow to recover fees from Trace and Tristan when he had no fee agreement with them.

¶8 The court agreed with Guelzow, and awarded him one third of the $450,000 settlement as attorney fees. The court held open the question of how the remaining funds would be allocated between the children pending a judicial determination of paternity for Trace and Tristan. Paternity was later established and the court ordered that Lance, Trace and Tristan receive equal shares of approximately $92,000 each, based on the amount remaining after deducting Guelzow's fees and costs and expenses of the estate. Lance was awarded his $92,000 share less approximately $4,000 in guardian ad litem fees. Trace's and Tristan's shares were each reduced by approximately $20,000 in attorney fees and

expenses based on Cabaniss's twenty percent contingent fee agreement with Fencl.

## STANDARD OF REVIEW

¶9 Whether the common fund doctrine applies to a given set of facts is a question of law. *See* ***Wisconsin Retired Teachers Ass'n v. Employe Trust Funds Bd.***, 207 Wis. 2d 1, 36, 558 N.W.2d 83 (1997).

## DISCUSSION

¶10 Generally, under the American Rule, each litigant is responsible for his or her own attorney fees. ***Id.*** The common fund doctrine is an exception to that rule. The common fund doctrine recognizes that a "litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." ***Boeing Co. v. Van Gemert***, 444 U.S. 472, 478 (1980). This rule is based on the "free rider" problem: that "persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." ***Wisconsin Retired Teachers Ass'n***, 207 Wis. 2d at 36.

¶11 The United States Supreme Court described the common fund doctrine in federal courts as follows:

> In this Court's common-fund and common-benefit decisions, the classes of beneficiaries were small in number and easily identifiable. The benefits could be traced with some accuracy, and there was reason for confidence that the costs could indeed be shifted with some exactitude to those benefiting.

***Alyeska Pipeline Serv. Co. v. Wilderness Soc.***, 421 U.S. 240, 264 n.39 (1975).

¶12 In ***Wisconsin Retired Teachers Association***, our supreme court applied the common fund doctrine to a class action suit brought by three groups representing annuitants in the Wisconsin Retirement System. The court awarded the attorneys for the three groups fees out of the total amount recovered, even though some of the annuitants were not represented by any of the attorneys. ***Wisconsin Retired Teachers Ass'n***, 207 Wis. 2d at 37.

¶13 The court concluded the common fund doctrine was applicable based on the three part test in ***Alyeska Pipeline Service***. It reasoned:

> By recovering funds paid from the annuity reserve … the attorneys for [the three groups] are vindicating the property rights of all annuitants, not just those of the members of the three groups. Also, once the [defendant] equitably distributes the recovery, the benefiting annuitants may be identified with certainty and ease. Furthermore, the benefits and costs of litigation are easily apportioned among the recipient annuitants. Because the attorney fees are "taken off the top," a recipient annuitant will pay litigation costs in exact proportion to the distribution that he or she receives.

***Wisconsin Retired Teachers Ass'n***, 207 Wis. 2d at 37.

¶14 This analysis is equally applicable here. The class of benefiting parties here is small: Martin's three children and his estate. Under WIS. STAT. § 895.04(3), all parties were required to join in a single suit to pursue damages based on Martin's death.[4] In addition, at the time this case was settled, all three of Martin's children had a unified interest in obtaining the highest amount possible from Mid-Century.

[4] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶15 Because of this unity of interest, the benefits of Guelzow's work are directly traceable to all three of Martin's children. Guelzow's fee was based on his work establishing Fencl's liability for the accident and his efforts settling with Mid-Century. In order to recover from Mid-Century, all of Martin's children had to prove that Fencl's negligence caused the accident. Like the annuitants in ***Wisconsin Retired Teachers Association***, who all had an interest in establishing that the defendants had wrongfully taken their property, all of Martin's children had an interest in establishing that Fencl's negligence caused the accident. In addition, to show damages close to Mid-Century's policy limit, Guelzow retained an expert who estimated the total economic losses to all of Martin's children at $800,000. At the settlement stage, Guelzow's retention of the expert, as well as his other efforts to settle the case, benefited all parties equally because at that stage all survivors had a unified interest in having as large a settlement to divide as possible.[5]

¶16 Finally, like the attorneys in ***Wisconsin Retired Teachers Association***, Guelzow's contingent fee was taken as a percentage of the entire recovery. This meant that, like the annuitants in ***Wisconsin Retired Teachers Association***, each of Martin's children paid Guelzow an equal percentage of his recovery. Each child therefore paid Guelzow in "exact proportion" to the benefits

[5] Had the case gone to trial, the children's interests might have been adverse because the jury would have set an amount for each child independently. *See* ***Keithley v. Keithley***, 95 Wis. 2d 136, 138, 289 N.W.2d 368 (Ct. App. 1979) (jury sets award to each party based on that party's loss, not any rigid formula). This does not change the fact that at the settlement stage, their interests were aligned.

that child received from Guelzow's work.[6] *See* ***Wisconsin Retired Teachers Ass'n***, 207 Wis. 2d at 37.

¶17 Cabaniss makes two arguments in response. First, he argues Guelzow is barred from accepting any fees from Trace and Tristan because Guelzow did not have an attorney client relationship or fee agreement with them. He also argues ***Wisconsin Retired Teachers Association*** is distinguishable because he did some work, albeit less than Guelzow, on the liability issues and settlement negotiation.

¶18 Cabaniss's first argument is without merit. The common fund doctrine is specifically designed to remedy inequalities resulting between unaffiliated parties. *See* ***Boeing***, 444 U.S. at 478; ***Wisconsin Retired Teachers Ass'n***, 207 Wis. 2d at 37. The doctrine is not based on agreements or any attorney client relationship between parties, and Wisconsin courts have enforced the doctrine in the absence of any agreement or attorney client relationship. *See* ***Wisconsin Retired Teachers Ass'n***, 207 Wis. 2d at 37.

¶19 Cabaniss next argues that he "actively participated as counsel for Trace and Tristan … and advanced costs of over $3,000 on their behalf."[7] However, he fails to point to anything in the record indicating he provided any assistance whatsoever in establishing Fencl's liability for the accident or procuring

[6] In the end, Martin's three children received equal shares of the settlement. This meant that each child paid Guelzow the same amount as well as the same percentage.

[7] At the circuit court, Cabaniss also argued he worked in the liability phase of the trial by researching the liability issue, by attending mediation, and by advising Fencl to send a letter to Mid-Century "instructing" Mid-Century to settle the case for its policy limits. Cabaniss does not renew those arguments on appeal.

the settlement; instead, his actions can all be attributed to apportioning the settlement.

¶20 In this respect, this case closely parallels ***Ninaus v. State Farm Mut. Auto. Ins. Co.***, 220 Wis. 2d 869, 584 N.W.2d 545 (Ct. App. 1998). In ***Ninaus***, an injured party's attorney argued he was entitled to take his fee out of the entire settlement, including the portion that the plaintiff's subrogated medical insurer was entitled to. ***Ninaus***, 220 Wis. 2d at 883-84. The subrogated insurer disagreed, arguing it had been named in the original suit, had taken part from the beginning, and had hired its own attorney. ***Id.*** at 885-87. We rejected the insurer's arguments:

> The issue is not whether [the subrogated insurer] was actively involved in representing its own interests…. Of course it was; its interests were adverse to [the injured party's]. The issue is whether [the subrogated insurer] did anything to represent its interests in the course of [the plaintiff's] legal efforts to reach a settlement—a settlement that, ultimately, provided money for [the subrogated insurer].
>
> Clearly, [the subrogated insurer] did nothing, but ultimately benefited from the efforts of [the injured party's] attorneys.

***Id.*** at 885.

¶21 Although this is not a subrogation case, in all other respects this case directly corresponds to ***Ninaus***. Because of the specific facts and circumstances involved and the conduct of the attorneys, this case proceeded in two distinct phases: a liability and settlement phase, and an apportionment of damages phase. While Cabaniss participated fully in the apportionment of damages, Cabaniss points to no evidence indicating he provided any assistance whatsoever in establishing Fencl's liability for the accident or procuring the settlement.

¶22 The record shows that prior to approval of the settlement, Cabaniss filed only four documents: a notice of appearance, a petition for appointment of Cabaniss as guardian ad litem, a consent of guardian ad litem, and an expert witness list that simply stated that Trace and Tristan reserved the right to call expert witnesses retained by Guelzow. None of these documents give any indication Cabaniss did any work on the liability portion of the case or negotiation of the settlement.

¶23 Cabaniss also asserts he advanced $3,000 to Trace and Tristan and spent a significant amount of time working on the case, including attending depositions, prior to the settlement. However, Cabaniss fails to differentiate between time he spent working on apportioning the settlement, time he spent in his role as guardian ad litem, and time he spent working on liability issues and settlement negotiations.

¶24 In sum, Cabaniss fails to specifically identify any expenditure or instance in the record showing he did anything toward establishing Fencl's liability or procuring the settlement.[8] Instead, Cabaniss's work was exactly the same as the subrogated insurer in ***Ninaus***: recovering a share of a settlement that was created by the efforts of another party. Because Guelzow's work resulted in a $450,000 common fund that benefited all plaintiffs, it would be inequitable to

[8] Cabaniss does not argue he is entitled to an evidentiary hearing to put in additional evidence showing he was in fact involved in procuring the settlement.

allow Trace and Tristan to take from that fund without providing Guelzow reasonable compensation[9] for his work.[10]

*By the Court*—Order affirmed.

Not recommended for publication in the official reports.

[9] Cabaniss argues in his reply brief that the court's award of fees to Guelzow was not reasonable. We generally do not consider arguments raised for the first time in a reply brief. ***Schaeffer v. State Personnel Comm'n***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989). We decline to make an exception here, especially because it appears this argument was also raised for the first time on appeal.

[10] We are aware that this result leaves unchanged the fact that Trace and Tristan have paid two contingency fees. However, in this appeal we are limited to the issue of Guelzow's fee. Any claim by Trace and Tristan against Cabaniss based on the conduct that led to Guelzow receiving a fee from their share is not before us.

In addition, no issue is before us with regard to the award of fees to Cabaniss out of Trace and Tristan's share of the settlement. Those fees were awarded after the circuit court awarded Guelzow a share of the entire settlement. Cabaniss was both attorney for Trace and Tristan and their guardian ad litem at the time, as he was throughout this suit. It would be speculation to say what, if any, issues would have been raised by an independent guardian ad litem at that point. However, we are very disturbed that the award of attorney fees—and this appeal—took place without any independent representation of Trace and Tristan's best interests.

¶25 CANE, C.J. (*dissenting*). The majority concludes attorney Guelzow is entitled to collect attorney fees from the entire settlement amount under the common fund doctrine. Because I would hold the common fund doctrine does not apply to the present case, I respectfully dissent.[1] As an equitable principle, I would also point out the inequity of applying the doctrine in this wrongful death action where two of the three children will be required to pay attorney fees twice.

¶26 The Wisconsin Supreme Court first adopted the common fund doctrine in ***Wisconsin Retired Teachers Association v. Employe Trust Funds Board***, 207 Wis. 2d 1, 558 N.W.2d 83 (1997). In ***Wisconsin Retired Teachers Association***, the court held the common fund doctrine applied to a class action lawsuit over the constitutionality of a statute that paid supplemental benefits to retired teachers from a retirement trust account, concluding "the attorney fees awarded in this case are part of the cost of administering the trust, and are therefore properly borne by the trust under the common fund doctrine." ***Id.*** at 38.

¶27 I have no problem applying the common fund doctrine in wrongful death actions, but it must be applied only under the correct circumstances. The common fund is an exception to the general rule that attorney fees may be awarded only when authorized by contract or statute. *See* ***id.*** at 36. As an

[1] I note my analysis closely mirrors that of ***Valder Law Offices v. Keenan Law Firm***, 129 P.3d 966 (Ariz. App. 2006), which addresses the exact issues presented in this case. I conclude its reasoning is consistent with Wisconsin law and the facts presented.

exception, there are limitations to its use. In ***Wisconsin Retired Teachers Association***, our supreme court agreed with the United States Supreme Court that the elements of the appropriate application of the common fund doctrine include the following three factors: (1) whether the classes of beneficiaries are small in number and easily identifiable, (2) whether the benefits can be accurately traced, and (3) whether the costs can be shifted with some exactitude to those benefiting. ***Id.*** at 37; ***Alyeska Pipeline Serv. Co. v. Wilderness Soc.***, 421 U.S. 240, 264 n.39 (1975).

¶28 Applying these three factors to the present case illustrates the common fund doctrine does not apply. The first factor has been satisfied in this case. We have a small and easily identifiable class or group of people, consisting of Martin Grorud's children—Lance, Trace, and Tristan. However, the second and third factors for applying the common fund have not been satisfied. The benefits cannot be accurately traced to the efforts of Guelzow nor can the costs be shifted with some exactitude to those benefiting.

¶29 Here, the court awarded Trace and Tristan (the twins) a third each of the overall settlement of $450,000. Thus, the question is: what portion of that amount can be traced accurately and shifted with some exactitude to the efforts of Guelzow? If this were a case in which the twins were not actively represented by another attorney, I would agree with Guelzow that both considerations have been met. In that situation, the benefits could be traced accurately and fees could be shifted with some exactitude to Guelzow. This, however, is not the present case.

¶30 Attorney Cabaniss was retained to represent the twins well in advance of the settlement mediation. When asked by the court what he did, Cabaniss asserted without objection that in representing the twins, he reviewed the

underlying investigative materials, looked at the damages issue, did legal research on the liability for the damages, engaged in negotiations with the other attorneys, went to all but one deposition and asked questions regarding liability, participated in the settlement mediation, and advanced costs to the twins. Importantly, Cabaniss was required to establish the paternity of the twins, which was critical to their recovery. This was a meaningful representation. Because of the presence of an attorney actively representing the twins, and the nature of Wisconsin wrongful death law, the benefits of Guelzow's role in the litigation cannot be accurately traced nor can a fee be shifted to the twins with some exactitude.

¶31 Wisconsin's wrongful death statute, WIS. STAT. § 895.04(3), provides:

> If separate actions are brought for the same wrongful death, they shall be consolidated on motion of any party. Unless such consolidation is so effected that a single judgment may be entered protecting all defendants and so that satisfaction of such judgment shall extinguish all liability for the wrongful death, no action shall be permitted to proceed except that of the personal representative.

Here, Martin's father Delbert Grorud brought suit on behalf of Martin's estate, as its personal representative. Under § 895.04(3), Delbert, who was represented by Guelzow, could proceed forward to establish liability because of the presence of several wrongful death actions that were consolidated by the pleadings. *See* ***Nichols v. United States Fid. & Guar. Co.***, 13 Wis. 2d 491, 496, 109 N.W.2d 131 (1961).

¶32 However, wrongful death beneficiaries also have a right to participate in the action. ***Id.***; *see also* WIS. STAT. § 895.04(1). While the personal representative may be entitled to litigate liability, sometimes beneficiaries have opposing interests, which explains why all beneficiaries are entitled to

representation and to present their case. The beneficiaries in this case had opposing interests in that Lance Grorud challenged whether the twins were related to Martin. He took the position that he was the sole beneficiary, unless the twins could establish paternity.

¶33 Applying the common fund doctrine to wrongful death actions is problematic when more than one counsel meaningfully participates in establishing a judgment or settlement. The first problem is that the fund, defined as the total damages awarded to all parties, is based on a composite of damages of differing beneficiaries. In both Wisconsin cases and federal cases, the doctrine has been applied where each beneficiary's claim is a "mathematically ascertainable claim to part of a lump-sum judgment." ***Boeing Co. v. Van Gemert***, 444 U.S. 472, 479 (1980); *see also* ***Wisconsin Retired Teachers Ass'n***, 207 Wis. 2d at 38. That is not the case here.

¶34 The second problem is that wrongful death damages are separate and distinct from each other. Therefore, each wrongful death beneficiary may use separate counsel to establish his or her damages. Injuries, obviously, are unique to each beneficiary and not necessarily tied to the liability issues. Simply because the claims are consolidated in one wrongful death action, it does not follow that the interests of the various beneficiaries are identical.

¶35 The third problem is that the only aspect of the case the personal representative necessarily establishes for the represented beneficiaries is liability, not their damages. While Guelzow might maintain he represented everyone's interests in establishing liability, he cannot plausibly argue he represented everyone's interest regarding damages where his client initially maintained the

position that he was the only one entitled to recover. This position creates a conflict of interest to which Cabaniss was hired to, and did, refute.

¶36 The fourth and final problem is the fund from which Guelzow seeks recovery, the $300,000 awarded to the twins, is inextricably interwoven with considerations of damages and liability in which both Guelzow and Cabaniss participated. The considerations of damages and liability are inextricably interwoven because there can be no liability without damages. Guelzow contends he only established liability and his job was to get as much money as possible. I fail to see how Guelzow can maintain this position. In essence, his argument is the settlement should be a certain amount of dollars based on the presence of three children that need to recover damages; however, if the other two children cannot prove paternity, his client is entitled to all the damages based on the presence of three claims. This logic is inconsistent on its face.

¶37 Although Guelzow may have worked a benefit for the twins by establishing liability, that is not the standard for recovery under the common fund doctrine. The court must be able to trace accurately the benefits and allocate costs of litigation with some exactitude. ***Boeing***, 444 U.S. at 479.

¶38 Here, there are no mathematically precise claims to the lump sum. Rather, Lance and the twins have separate and distinct injuries. Cabaniss participated in establishing those damages and evaluating them for his client. As noted above, the twins have a right to participate in establishing their damages. The twins exercised that right here; had they not participated through Cabaniss's representation, they would not have recovered any money. On these facts, as a matter of law, a specified portion of the $300,000 award cannot be traced accurately to efforts of Guelzow rather than Cabaniss.

¶39 While not binding upon this court, I find the reasoning in the following two cases illustrative. In ***Morris B. Chapman & Associates, Ltd. v. Kitzman***, 739 N.E.2d 1263, 1274 (Ill. 2000), the Illinois Supreme Court applied the common fund doctrine where the lawyers seeking recovery on the common fund theory were the only lawyers involved in obtaining an $800,000 settlement on behalf of all plaintiffs in a wrongful death suit. The other lawyers became involved after the recovery had been obtained. ***Id.*** at 1266. Additionally, in ***Kerr v. Killian***, 3 P.3d 1133, 1139 (Ariz. App. 2000), lawyers obtained a judgment from which those benefiting from the judgment only had to apply a "formula for computing individual refunds" and "prove their individual claims against the judgment fund." In ***Kerr***, "the judgment fund itself [was] a quantifiable sum … created by the litigation undertaken by the representative plaintiffs." ***Id.***

¶40 Those circumstances are not the facts of the present case. Cabaniss participated in the judgment by reviewing the work product and by participating in the settlement mediation. The twins' claims were not simple mathematical applications of a formula to determine their damages, but a consideration of factors that are not easily quantifiable. Additionally, there was no way Guelzow could represent the twins because he had a conflict of interest in representing both Lance's interests and the twins. This conflict was made obvious when Guelzow's client took the position that, unless the twins proved paternity, they could not share in any recovery.

¶41 Three final considerations also weigh against the application of the common fund doctrine. First, the doctrine is an exception to the general rule that an attorney cannot obtain fees absent a contract or statutory provision. *See* ***Wisconsin Retired Teachers Ass'n***, 207 Wis. 2d at 38. Additionally, under ethical rules governing attorney conduct, an attorney cannot request fees without a

contract or statutory provision. SCR 20:1.5 (2006). To be consistent with the policy of these rules, any exceptions must be based on the ability to trace accurately and with some exactitude. Relaxing the standard to award fees to an attorney who can show he or she did the "lion's share" of the work modifies the common fund doctrine. This is especially true when, as here, the work done by an attorney that benefited the other beneficiaries was no greater than that which was done for the plaintiff with whom counsel had a fee agreement.

¶42 Second, I do not doubt that Guelzow shouldered a lion's share of the litigation. However, that was his decision. He could easily have agreed to share the responsibility with the twins' attorney, but did not. The mere fact that he did the bulk of the litigation is not and should not be the determinative factor. When there are problems tracing and assessing the benefits, ancillary litigation will be required to resolve any differences. This litigation would be necessary to determine which lawyer did what and the extent to which that work contributed to the verdict. In many cases, and such is the case here, the only solution would be a costly hearing to present the contested views. The public policy of this state is to "avoid thorny factual inquires," particularly where those inquires amount to nothing more than "swearing matches." ***Manitowoc Western Co. v. Montonen***, 2002 WI 21, ¶22, 250 Wis. 2d 452, 639 N.W.2d 726. When given a choice, we should construe rules, whether common law or statutory, consistent with the policy of not allowing an attorney to recover attorney fees in the absence of a contract or statutory provision. The common fund doctrine should be applied only in exceptional circumstances; this is not one of those circumstances.

¶43 Third, the effect of allowing Guelzow to recover from the entire settlement is forcing the twins to pay double attorney fees. While Guelzow vigorously asserts the injustice of reducing the amount of money he was awarded,

there is a greater injustice in the fact that the twins are forced to pay double attorney fees for their recovery. This result is in and of itself inconsistent with the common fund doctrine because the twins are being asked to carry a disproportionate cost of the litigation. *See* ***Wisconsin Retired Teachers Ass'n***, 207 Wis. 2d at 37.

¶44 For these reasons, I dissent and would hold that as a matter of law the common fund doctrine is not applicable to the facts of this wrongful death action.