RENDERED: DECEMBER 7, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001393-MR

THE GETTY LAW GROUP, PLLC
(f/k/a GETTY, KEYSER & MAYO, LLP) APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NOS. 99-CI-00290 AND 99-CI-01467

BOWLES RICE McDAVID GRAFF
& LOVE, PLLC APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, MAZE AND NICKELL, JUDGES.

DIXON, JUDGE: Appellant, The Getty Law Group, PLLC ("Getty Group"), appeals from orders of the Pike Circuit Court allocating attorney's fees between itself and Appellee, Bowles Rice McDavid Graff & Love, PLLC ("Bowles Rice"). For the reasons set forth herein, we affirm.

Getty Group is a professional limited liability company located in Lexington, Kentucky, that is engaged in the practice of law. Its members, Richard Getty, Gregory Keyser and Walker Mayo III, are all former members of Bowles Rice, a West Virginia professional limited liability company also engaged in the practice of law and with offices in Kentucky. When Getty, Keyser and Mayo left Bowles Rice in February 1998, a number of disputes arose between the two law firms with regard to fees on cases transferred from Bowles Rice to Getty Group. Two particular disputes are pertinent to this appeal.

In June 1996, Bowles Rice undertook the representation of Mildred Coleman in her employment lawsuit against United States Cellular Corporation. The record reveals that Coleman retained Bowles Rice specifically because she wanted Getty to represent her. Indeed, Getty was in charge of the Coleman case, although pretrial matters were largely handled by another attorney at Rice Bowles, Anthony Tokarz. At the time Getty left Bowles Rice, Coleman was given the option to continue representation with that firm or transfer her case to Getty Group. She chose the latter and thereafter signed a new contingency fee contract. In December 1998, Getty Group settled Coleman's case for $950,000, with Getty Group receiving $304,000 in fees and $22,109.68 in expenses pursuant to the fee contract.

The second matter originated in 1995 when Getty, who was then a partner in the Lexington, Kentucky, office of Frost & Jacobs, undertook the representation of Terry and Gay Cantrell and their company, Camp Fork Fuels, in litigation filed

against them by Bank One. Getty continued to represent the Cantrells and Camp Fork when he opened the Lexington office of Bowles Rice in January 1995. Getty remained the primary attorney, but as in the Coleman case, other attorneys in the office sometimes handled pretrial maters. In March 1998, the Cantrells and Camp Fork elected to have their case transferred to Getty Law Group and thereafter signed a new contingency fee contract. Ultimately, Getty settled the litigation and Getty Group received $480,000 in fees and $10,893.08 in expenses pursuant to the fee contract.

Following Getty's settlement of each of the above cases, Bowles Rice filed an attorneys' lien on the award claiming that it was entitled to a percentage of the fees and expenses. On February 25, 1999, Getty Group filed the instant litigation seeking declaratory relief as to the respective right to the fees generated in the two matters. Thereafter, numerous proceedings and appeals occurred which need not be discussed herein, other than to point out that the Kentucky Supreme Court ultimately instructed the trial court to apply the standard set forth in *Baker v. Shapero*, 203 S.W.3d 697 (Ky. 2006),[1] in dividing the fees and costs between the two law firms. Accordingly, on May 5, 2010, the trial court entered an order stating:

[1] In *Baker*, the Supreme Court held "that when an attorney employed under a contingency fee contract is discharged without cause before completion of the contract, he or she is entitled to fee recovery on a *quantum meruit* basis only, and not on the terms of the contract." 203 S.W.3d at 699. *Baker* overruled this Court's holding in *LaBach v. Hampton,* 585 S.W.2d 434, 436 (Ky. App. 1979), that the discharged attorney should recover the amount of the agreed upon contingent fee less "the reasonable cost of services of other attorneys required to complete the contract."

> [T]he Court will apply *Baker* to all three fee cases. The Court still believes that these cases are not discharged attorney cases, but ones where an attorney leaves a firm and his clients follow him. The rationale of *Baker* applies nonetheless. The work performed for the clients at the old firm must be compensated.
>
> If the contracts had been for an hourly rate, it would be easily resolved. The Court would have made a simple calculation of multiplying the reasonable hourly rate by the number of hours worked. However, the contracts were contingent fee contracts, and the Court has no hard and fast way to determine the value of the old firm's work in relation to the total fee earned. The reasonable hourly rate at the time the work was done and the number of hours worked are certainly factors in deciding the old firm's share of the fee based on *quantum meruit*. In fact, this Court believes that there is a rebuttable presumption that a firm's hourly rate would represent the value of its work.

The trial court thereafter scheduled an evidentiary hearing on the matter.

On September 30th and November 4th, 2010, the trial court held an evidentiary hearing during which both sides presented evidence and testimony. Specifically, Bowles Rice submitted hourly billing statements indicating hourly attorney's costs, as well as advanced expenses and costs as follows:

> In the Coleman Matter: $109,299.95 in fees (net of redactions) and $12,031.92 in costs;
>
> In the Cantrell Matter: $129,248.99 (including costs)

Getty Group, however, took the position that its work had more value because Getty had more experience in the areas of each matter. Further, Getty Group introduced testimony that the work Tokarz performed on the cases while at Bowles Rice was so deficient that it provided no benefit and even negated the value of his

services on both cases. Getty Group asserted that it was essentially forced to "start from scratch" and retake discovery in both cases. As such, Getty Group claimed that the quality of Bowles Rice's services did not justify the fees it claimed entitlement to.

On January 21, 2011, the trial court entered its findings of fact, conclusions of law, and judgment awarding Bowles Rice the amount claimed in its billing statements. The trial court found that although both cases were more successful after being transferred to Getty Group, the work completed at Bowles Rice did not become less valuable than the attorney's billable rate. Specifically, the trial court noted:

> Because attorneys regularly charge an hourly rate for their time, this Court has previously ruled that the time and hourly rate charges by the Bowles Rice firm created a presumption of the *quantum meruit* value of its services performed in the underlying cases. The final value would then be determined after hearing evidence about the nature and quality of the work done by the competing attorneys and the amount in controversy.
>
> Getty has argued that the fee awarded to Bowles Rice should be determined by the settlement value of the cases when the cases were taken by the new Getty law firm. If *Baker* applies, this is simply not the law. In the quoted portion above the Court clearly stated that the *quantum meruit* assessment of attorney fees was not to be based on the terms of the contract between the attorney and the client. In other words, it is the value of the attorney's work and not the value of the case at any particular time. . . . Clearly, a *quantum meruit* value of the attorney's work has no relationship to recovery value of the case.

Getty Group thereafter filed a motion to alter, amend or vacate which resulted in the trial court rendering a second findings of fact, conclusion of law and judgment. Therein, the trial court further explained:

> Getty's testimony that he retook depositions of witnesses already taken by Tozark is not correct. This Court asked the parties to determine the number of hours Tokarz expended in the taking of depositions that Getty had to repeat. In fact, no deposition of any witness was repeated. However, this Court believes that the discovery strategy of Getty enhanced the value of the underlying claims. This Court also believes that would have happened if Getty remained at Bowles Rice. At some point it seems likely that Getty would have taken a more involved role and reshaped the underlying cases in a similar manner. In any event, this Court does not believe Tokarz's work in these cases to be without value or less valuable than his normal hourly rate.
> ….
> Because the Getty firms have failed to rebut the presumption relied upon by the Court, this Court finds as a fact that the billable hours and rates supplied by Bowles Rice represent the *quantum meruit* value of their services.

Getty Group subsequently appealed to this Court as a matter of right.

On appeal, Getty Group argues that the trial court abused its discretion in establishing a rebuttable presumption and shifting the burden of proof to Getty Group. Further, Getty Group contends that the trial court ignored substantial evidence rebutting the presumption that Bowles Rice's billing statements were a reasonable value of its services. Finally, Getty Group challenges the trial court's award of prejudgment interest.

As stated in Kentucky Rules of Civil Procedure (CR) 52.01, "[f]indings of fact, shall not be set aside unless clearly erroneous, and due regard shall be given

to the opportunity of the trial court to judge the credibility of the witnesses." On appeal, this Court will not reverse the trial court's findings of fact unless such were clearly erroneous. *See Largent v. Largent*, 643 S.W.2d 261 (Ky. 1982). Hence, the dispositive question is whether the trial court's findings of fact are not supported by substantial evidence. "The test of substantiality of evidence is whether when taken alone or in the light of all the evidence it has sufficient probative value to induce conviction in the minds of reasonable men." *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972) (citing *Blankenship v. Lloyd Blankenship Coal Company, Inc*., 463 S.W.2d 62 (Ky. 1970).

Furthermore, "clearly erroneous" does not mean absent contradicted proof. Regardless of conflicting evidence, the weight of the evidence or the fact that the reviewing court would have reached a contrary finding, as stated in CR 52.01, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Such tasks, judging the credibility of witnesses and weighing evidence, are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal." *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (citation omitted); *see also Allen v. Devine*, 178 S.W.3d 517, 524 (Ky. App. 2005).

At the outset, we must agree with Bowles Rice that Getty Group's complaint regarding the rebuttable presumption is not preserved. It is well-settled that a trial court must be given the opportunity to rule in order for an issue to be preserved for appellate review. *See Grundy v. Commonwealth*, 25 S.W.3d 76, 84

(Ky. 2000); *Shelton v. Commonwealth*, 992 S.W.2d 849, 852 (Ky. App. 1998). "It goes without saying that errors to be considered for appellate review must be precisely preserved and identified in the lower court." *Skaggs v. Assad, by and through Assad*, 712 S.W.2d 947, 950 (Ky. 1986) (citing *Combs v. Knott County Fiscal Court*, 283 Ky. 456, 141 S.W.2d 859 (Ky.1940); CR 76.12(4)(c)(iv)(1-1-85)). At no point in the underlying proceedings did Getty Group challenge the trial court's May 5, 2010, order applying a rebuttable presumption that Bowles Rice's hourly rate represented the value of their services. Indeed, the evidentiary hearing proceeded according to such standard without objection by either party. As such, whether this Court would uphold such a presumption has no relevance herein. Getty Group did not properly raise the issue in the trial court and we will not consider it for the first time on appeal.

Likewise, we find no merit in Getty Group's contention that the trial court failed to consider any factors beyond Bowles Rice's billing statements in reaching its decision that such reflected the value of its services. Getty Group cites to several decisions from other jurisdictions holding that a *quantum meruit* evaluation involves an analysis of many factors, not simply the amount of time spent on the matter. *See Spencer v. Oklahoma Gas & Electric Co.*, 171 P.3d 890 (Okla. 2007); *Fowler v. Jordan*, 430 So.2d 711 (La. App. 1983); s*ee also Howell v. Highland Cemetery Co.*, 297 Ky. 659, 181 S.W.2d 44 (1944). Getty Group argues that it presented substantial evidence to rebut the presumption that the billing statements were reflective of Bowles Rice's services.

It appears that this factual scenario creates an issue of first impression in the Commonwealth. *Baker v. Shapero* concerned an attorney's right to compensation following the discharge without cause by his client. In overruling prior precedent, the *Baker* Court held that a discharged attorney is entitled to recover fees only on a *quantum meruit* value of services rendered, rather than under the original contingency fee contract. *Id.*, 203 S.W.3d at 699. However, as noted by the trial court, and affirmed on appeal, the principles of *Baker* apply equally to the facts at hand.

Quantum meruit is defined as "damages awarded in an amount considered reasonable to compensate a person who has rendered services in a quasi-contractual relationship." *See Black's Law Dictionary* 1276 (8th ed. 2004). Damages awarded thereunder are based upon a legal fiction implying an obligation to pay reasonable compensation for services rendered. 66 Am.Jur.2d *Restitution and Implied Contracts* §§ 6, 37 (2010); 1 *Williston on Contracts* §§ 1:6, 68:1 (4th ed.2010).

In determining the share of recovery from a judgment or settlement as between a discharged and successor attorney for the *quantum meruit* value of their services, courts in other jurisdictions have considered numerous factors, including the nature and extent of the services rendered by the discharged attorney within the scope of the contingency-fee contract; the nature and extent of the services rendered by the second attorney; the training, knowledge, experience and reputation of each attorney, and the benefit to the client. *See Limitation to*

quantum meruit recovery, where attorney employed under contingent-fee contract is discharged without cause, 56 A.L.R.5th 1 (1998). Since *quantum meruit* is based upon an implied promise that a person will pay "reasonable" and just compensation for "valuable" services provided at that person's request or with his or her approval, the burden is generally upon the discharged attorney to prove the reasonable value of the services performed. *Id.* The instant case differs somewhat in that the trial court established a rebuttable presumption of reasonableness. Nevertheless, in matters relating to an award of "reasonable" attorney's fees in situations where the claimant attorney was discharged without cause by his or her client, other jurisdictions have held that the trial court is considered vested with broad discretionary powers, and its decision will not be reversed on appeal absent an abuse of that discretion. *Id.*

Also citing to numerous decisions from other jurisdictions, the trial court herein was well aware of the factors to be considered and did so in reaching its decision. The trial court took into account Getty's expertise versus that of Tokarz, and noted that such was reflected by the fact that Tokarz's hourly rate was significantly less than Getty's rate. Further, the trial court agreed with Getty Group that the settlement value of the subject cases was "greatly enhanced" after Getty became more involved at the new firm. Nevertheless, the court ruled that the final settlement value of the cases was simply not determinative of the value of work completed at Bowles Rice. Quoting the Kentucky Supreme Court in *Baker v. Shapero*, the trial court reiterated that "when an attorney employed under a

contingency fee contract is discharged without cause before the completion of the contract, [the attorney will be] entitled to a fee recovery on a *quantum meruit* basis only, and not on the terms of the contract." We agree with the trial court not only that the *Baker* decision explicitly contradicts Getty Groups' position, but also that Getty Group failed to rebut the presumption that Bowles Rice's billing statements were reasonable.

The true fallacy, if not absurdity, in Getty Group's position is the fact that Getty was the responsible billing attorney while both cases were being handled by Bowles Rice. It was not random happenstance that Coleman and the Cantrells sought the services of Bowles Rice and were assigned to Getty. Rather, Coleman and the Cantrells testified that they specifically retained Getty to represent them in their underlying actions. In essence, Getty is trying to convince this Court, as he attempted to do in the lower court, that his management of the cases at Bowles Rice was worthless, but miraculously resulted in worthy settlements once he formed a new law firm. Tokarz, the attorney who performed the pretrial work in both matters and whom Getty Group has unceremoniously disparaged, was supervised by Getty, who was head of litigation at Bowles Rice at the time.

Like the trial court, we have no doubt that had Getty remained at Bowles Rice, these two cases would have enjoyed the same success as they did with Getty Group. Getty Group's belief that the superiority of its services somehow negates the hourly work performed at Bowles Rice is untenable and unsupported by the record. Based upon the holding in *Baker* and Getty Group's failure to overcome

the rebuttable presumption established by the trial court, the award to Bowles Rice was proper.

Finally, Getty Group argues that the trial court erred in awarding Bowles Rice a portion of the accrued interest. Getty Group points out that against its wishes, all of the fees and costs earned from the underlying cases were deposited with the circuit court clerk in 1998, where it has remained in an escrow account awaiting disposition of this matter. In its judgment, the trial court awarded each party a proportional share of the interest collected on that sum. As such, Bowles Rice received 44.55% of the accrued interest. However, Getty Group argues that it requested years ago that the money be placed into higher yielding certificates of deposit, but that Bowles Rice refused to agree. Thus, Getty Group contends that having the funds remain in the clerk's account yielding interest at 1.5% to 2.0% deprived it not only of access to the funds but interest earned at a commercially reasonable rate. Accordingly, Getty Group argues that it is entitled to the full amount of interest earned.

The award of prejudgment interest is a matter within the sound discretion of the trial court. *Reliable Mechanical, Inc. v. Naylor Indus. Services, Inc.*, 125 S.W.3d 856, 858 (Ky. App. 2003). Unless the trial court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles, it will not be reversed on appeal. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). In responding to Getty Group's complaint on this issue in its motion to alter, amend or vacate, the trial court noted, "this Court will not invest money that

belongs to others and believes that simple interest earned in a federally insured bank account is the proper way for the Court Clerk to store the money of this kind." We agree and further find no abuse of discretion in the trial court's allocation of interest in proportion to fees awarded.

For the reasons set forth herein, the judgments of the Pike Circuit Court are affirmed.

ALL CONCUR.

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