

**IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

NEW CASTLE AUTO AUCTION)
& CONSIGNMENTS, INC.,)
)
Plaintiff-Below/Appellant,)
)
v.)
)
ERIC RILEY & JEANNE RILEY,)
)
Defendants-Below/Appellees.)
)

C.A. No. CPU4-13-001066

D. Miika Roggio, Esquire
Silverman, McDonald & Friedman
1010 N. Bancroft Parkway, Suite 22
Wilmington, DE 19805
Attorney for Appellant

David J.J. Facciolo, Esquire
Minster & Facciolo, LLC
521 West Street
Wilmington, DE 19801
Attorney for Appellees

DECISION ON ATTORNEY'S FEES

I. *Procedural Posture*

On November 25, 2015, this Court issued a Memorandum Opinion and Order on the breach of contract issue in this case, awarding Appellant \$8,574.50 plus pre- and post-judgment interest at the legal rate, court costs, and attorney's fees. In the decision, the Court found that—based upon the factors set forth in *Delaware Professional Conduct Rule 1.5(a)*—Appellant was entitled to an award of reasonable attorney's fees. The Court directed Appellant's counsel to file an affidavit of attorney's fees with the Clerk of Court within fifteen days, and advised Appellees'

counsel that they would be granted fifteen days to file a written response. The Court stated that it would then issue a separate written decision on the amount of attorney's fees.¹

On December 2, 2015, Appellant's counsel submitted an affidavit of attorney's fees, requesting \$14,640.00 for 73.2 hours billed at \$200.00 per hour. The time sheet, which was attached as Exhibit A, denoted work performed from March 20, 2013 to November 2, 2015. Instead of filing a response to Appellant's affidavit, Appellees appealed to the Delaware Superior Court on December 22, 2015. On November 21, 2016, the Superior Court dismissed the appeal, deeming the judgment not final.²

On March 8, 2017, Appellant's counsel submitted a letter to this Court requesting an award of attorney's fees, revising the original attorney's fees time sheet to include costs incurred defending against Appellees' appeal. On March 15, 2017, this Court issued an Order requesting that Appellees file a response to Appellant's affidavit of attorney's fees by March 30, 2017. Appellees submitted their response to the Court on April 11, 2017, contesting the award of attorney's fees solely in connection with their "improvident interlocutory appeal." Appellees argue that those fees should only be considered after Appellees properly appeal this decision, and the Superior Court remands this case for a second attorney's fees determination.

II. *The Law*

In Delaware, the general rule—the venerable “American Rule”—is that each party is responsible for its own costs and attorney's fees unless there is a contractual or statutory basis for the award of such fees.³ When such an appropriate basis exists—as in the present case—the

¹ *New Castle Auto Auction & Consignments, Inc. v. Eric Riley & Jeanne Riley*, C.A. No. CPU4-13-001066, at *9 (Del. Com. Pl. Nov. 25, 2015).

² *Eric Riley & Jeanne Riley v. New Castle Auto Auction & Consignments, Inc.*, C.A. No. N15A-12-005 JAP, at *4-5 (Del. Super. Nov. 21, 2016). The Superior Court's opinion was docketed on December 29, 2016, but the dismissal was only brought to this Court's attention by Appellant's March 8th letter.

³ See *Maple Hill Homeowners Ass'n v. Newton*, 2015 WL 1205283, at *3 (Del. Com. Pl. Mar. 9, 2016) (citing *Dixon v. Council of Cliff House Condo.*, 2009 WL 545537, at *3 (Del. Com. Pl. Dec. 8, 2009)).

United States Supreme Court has held that “even for work performed on the successful claim, the court ‘should award only that amount of fees that is reasonable in relation to the results obtained.’”⁴ The determination of whether attorney’s fees requested in a particular case are reasonable is within the discretion of the Court.⁵ Delaware precedent requires the Court to consider the following factors:

(a) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (b) The likelihood, if apparent to the client, that the substance of the particular employment will preclude other employment by the lawyer; (c) The fees customarily charged in the locality for similar legal services; (d) The amount involved and the results obtained; (e) The time limitations imposed by the client or by the circumstances; (f) The nature and length of the professional relationship with the client; (g) The experience, reputation, and ability of the lawyer or lawyers to perform the services; (h) Whether the fee is fixed or contingent; (i) The employer's ability to pay; and (j) Whether claimant's counsel has received or expects to receive compensation from any other source.⁶

III. *Analysis*

In the present case, there is a contractual provision which states, “[t]o the extent not prohibited by applicable law, you agree to pay *any attorney’s fees* and collection costs we incur *at any time* in collecting amounts you owe under this Contract, *including* during any bankruptcy proceedings or upon *any appeal*.”⁷ Because the contractual language that underlies Appellant’s claim does not differentiate between an improper appeal and an appeal based on a final judgment, Appellant’s counsel is entitled to attorney’s fees incurred while defending against Appellees’ improper appeal. That is, Appellees cannot force Appellant to defend an improper

⁴ See *Dreisbach v. Walton*, 2014 WL 5426868, at *5 (Del. Super. Oct. 27, 2014) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983)).

⁵ See *Dixon v. Council of Cliff House Condo.*, 2009 WL 5455537, at *4 (Del. Com. Pl. Dec. 8, 2009).

⁶ See *id.* (citing *General Motors Corp. v. Cox*, 304 A.2d 55 (Del. 1973); Del. Lawyers’ Rules of Prof’l Conduct R. 1.5(a)).

⁷ *New Castle Auto Auction & Consignments, Inc. v. Eric Riley & Jeanne Riley*, Appellant-Below, Appellant New Castle Auto Auction & Consignment’s Closing Statement, C.A. No. CPU4-13-001066, at *17 (filed November 4, 2015) (emphasis added).

appeal *and* pay for such forced representation, as the contractual right present in this case supplants the American Rule.⁸

In total, Appellant counsel requests \$23,800.00 in attorney's fees for 119.0 hours billed at \$200.00 per hour. Counsel's revised time sheet denotes work performed from March 20, 2013 to November 21, 2016. This case is fact-intensive, but is not particularly complex; it concerns a breach of contract and related questions of jurisdiction and mitigation. The Court also considered the fact that Appellant's counsel: was not prevented from simultaneously handling other matters; diverged from communal billing standards by charging a lesser hourly rate than a junior associate at a small-sized Delaware law firm;⁹ was granted a full judgment award;¹⁰ is an experienced member of the Delaware bar who is employed by a small-sized Delaware law firm; and charged an hourly fee for services rendered. The Court did not attribute weight to factors (e) and (f) in its analysis, as the former was not relevant and the Court professes no knowledge as to the nature and length of the professional relationship present here.

Turning to Appellant's original affidavit and request of \$14,640.00 in attorney's fees, the Court notes that Appellees did not challenge the reasonableness of the attorney's fees. However, the Delaware Court of Chancery has opposed the notion that a trial court should relax its reasonable analysis when the attorney's fees are "uncontested."¹¹ In Appellant's written closing statement, Appellant's counsel offered the following defense of the demanded award:

⁸ See *Gould v. Wien*, 2009 WL 2436594, at *2 (Del. Com. Pl. Aug. 6, 2009) (noting the ridiculous nature of requiring a plaintiff to defend against the defendant's unsuccessful appeals and then force plaintiff to use her judgment to pay her attorney's fees when the defendant knew the appeals would necessitate the plaintiff's refutation).

⁹ See *Shoppes of Mount Pleasant, LLC v. J.M.L., Inc.*, 2015 WL 4755491, at *4-5 (Del. Com. Pl. Aug. 4, 2015) (junior associate at Delaware law firm would charge \$250.00 per hour for work on a breach of contract action).

¹⁰ See *Dreisbach*, 2014 WL 5426868, at *5 ("The Court finds that Appellants' success in the instant case was limited both in the monetary amount recovered and in the number of claims on which Appellants prevailed.").

¹¹ See *In re Paetec Holding Corp. S'holder Litig.*, 2013 WL 1110811, at *6-7 (Del. Ch. Mar. 19, 2013) (quoting *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 149-50 (Del. 1980)) (applying the *Sugarland* factors under the common benefit exception to the American Rule); see also *In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116,

The Court should be aware that this litigation has been extremely prolonged, and that undersigned counsel has billed NCAA very conservatively in an effort to make the litigation cost-effective. The original appeal was filed in April 2013. Undersigned counsel has defended a Motion to Amend the Answer to Add Counterclaims, issued and answered written discovery, responded to a Motion for Sanctions, engaged in mediation, responded to a Motion to Dismiss, prepared for trial three times as a result of several continuances of same, and prepared the instant written closing. Furthermore, the complicated factual background to this dispute was undoubtedly apparent to the Court at trial.¹²

After dissecting counsel's time increments and analyzing the above factors, the Court finds Appellant counsel's descriptions to be detailed, and most charged time increments reasonable. However, counsel's billing of 11.9 hours for email and phone communications, 12.4 hours for courtroom appearances, and 12.8 hours for the written closing statement gave the Court pause.

The amount billed for email and phone conversation is not *prima facie* unreasonable, yet the billed hours include duplicate billings for overly-simple tasks and six-minute charges for each incidental communication.¹³ The amount billed for courtroom appearances is miscalculated, as only 8.1 hours were directly involved in courtroom representation and there is no indication that the ancillary time was similarly utilized. Finally, the amount billed for the written closing statement is excessive when the statement is purely factual. That is, the written closing statement rehashed the factual record for persuasive affect and contained no outside research regarding the breach of contract issue. The Court is cognizant that Appellant's counsel charged a lower hourly rate; nevertheless, the Court must weigh all factors in its analysis. In light of these concerns, and after careful consideration of the relevant factors listed above, the

1137 (Del. Ch. 2011) ("In both [contested and uncontested fee] scenarios, the Court has an independent duty to award a fair and reasonable fee.").

¹² *New Castle Auto Auction & Consignments, Inc. v. Eric Riley & Jeanne Riley*, Appellant-Below, Appellant New Castle Auto Auction & Consignment's Closing Statement, C.A. No. CPU4-13-001066, at *17 (filed November 4, 2015).

¹³ For example, on October 16, 2014, counsel charged twenty-four minutes for an email conversation and, on June 2, 2015, counsel charged eighteen minutes for phone and email conversations regarding the same matter.

Court awards Appellant's counsel \$12,580.00 for attorney's fees incurred while representing his client in the Court of Common Pleas.¹⁴

Regarding counsel's second affidavit and request for \$9,160.00 in attorney's fees related to representing Appellant in the Delaware Superior Court, this Court notes that Appellees' late *Court Ordered Response to Application For Attorney's Fees* contested these additional requested attorney's fees. Succinctly, Appellees argue that this Court should hold off on determining attorney's fees concerning the "interlocutory appeal" until Appellees' proper appeal is resolved. Appellees rely on this Court's decision in *Gould v Wien* for support; however, that attorney's fees decision does not articulate, expressly or implicitly, support for Appellees' position.¹⁵ In fact, this Court's second attorney's fees award in the remanded *Gould v. Wien* decision also does not support Appellees' position.¹⁶ Further, assuming *arguendo* Appellees are correct, this Court would be adjudicating based on a presumption that Appellees would indeed appeal for a second time.¹⁷ This Court declines to follow such a speculative position.

After dissecting counsel's time increments and analyzing the above factors, the Court finds Appellant counsel's descriptions to be detailed, and a majority of the billed time increments to be reasonable. Again, while Appellees only objected to the timing of the appellate fees determination and not the reasonableness of the request, the Court is required to perform a thorough review of the reasonableness of the requested attorney's fees.¹⁸ Appellant's counsel

¹⁴ See *Miller v. Silverside*, 2016 WL 4502012, at *8 (Del. Super. Aug. 26, 2016) ("In this case, the trial court properly explained the standard under Rule 1.5 of the Delaware Lawyers' Rules of Professional Conduct and its reasons for awarding attorneys' fees and costs The trial court need not address each Rule 1.5 factor individually." (footnotes omitted)).

¹⁵ See generally *Gould v. Wien*, 2007 WL 4158041 (Del. Com. Pl. Nov. 15, 2007).

¹⁶ See generally *Gould*, 2009 WL 2436594.

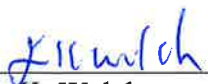
¹⁷ Notably, if Appellees do not choose to appeal, then additional legal fees could result upon an application for fees.

¹⁸ See *In re Paetec Holding Corp. S'holder Litig.*, 2013 WL 1110811, at *6-7.

spent 3.2 hours on pre-submission matters and communications;¹⁹ 15.2 hours reviewing court documents during the drafting process; and 27.4 hours on researching, formatting, and drafting an Answering Brief. However, the Court is troubled that 26.2 of the total 45.8 hours were spent reviewing the transcript and trial documents and, at the same time, drafting the statement of facts for this one brief. Specifically, the fact section is only thirteen double-spaced pages in a thirty-two-page brief, and nearly a fourth of the fact section is a verbatim recitation from Appellant's written closing statement to this Court. Moreover, Appellant's counsel was considerably familiar with the details of the case, with less than a two-month gap of time between the filing of Appellant's closing argument in this Court and the notification that Appellees were appealing to the Superior Court. Based on review of the relevant factors listed above, the Court finds the requested amount to be unreasonable, and awards Appellant's counsel \$7,160.00 for attorney's fees incurred while defending against Appellees' improper appeal to the Superior Court.

Therefore, after consideration of all relevant factors, the Court **AWARDS** attorney's fees to Appellant's counsel in the amount of \$19,740.00.²⁰

IT IS SO ORDERED this 17 day of April, 2017.



John K. Welch,
Judge

¹⁹ The Court took into consideration the existence of certain unusual time increments on the time sheet, for example, billing eighteen minutes to "ascertain" the deadline for the Answering Brief on three separate occasions: January 13, 2016, February 4, 2016, and February 18, 2016.

²⁰ This Court has noted that a "fee award which exceeds the damages awarded is not a novel concept in Delaware." *Shoppes of Mount Pleasant, LLC*, 2015 WL 4755491, at *3.