RENDERED: OCTOBER 16, 2009; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001374-MR

BARBARA D. BONAR AND
B. DAHLENBURG BONAR, P.S.C. APPELLANTS

APPEAL FROM BOONE CIRCUIT COURT
v. HONORABLE ROBERT W. MCGINNIS, SPECIAL JUDGE
ACTION NO. 06-CI-02202

WAITE, SCHNEIDER, BAYLESS
& CHESLEY CO., L.P.A.; STANLEY M.
CHESLEY; AND ROBERT A.
STEINBERG APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND NICKELL, JUDGES; KNOPF,[1] SENIOR JUDGE.

DIXON, JUDGE: This action involves an attorney fee dispute between

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Appellants, Barbara D. Bonar and her law firm, B. Dahlenburg Bonar, P.S.C. ("Bonar"), and Appellees, Stanley M. Chesley, his law firm, Waite, Schneider, Bayless & Chesley Co., L.P.A., and associate, Robert A. Steinberg (collectively ("WSBC"), arising out of a settlement of an underlying class action lawsuit filed in the Boone Circuit Court against the Roman Catholic Diocese of Covington, *Doe v. Roman Catholic Diocese of Covington*, Civil Action No. 03-CI-00181. Following a three-day bench trial, the trial court ruled that Bonar was not entitled to any attorney's fees from the class action.

At the outset, we note that the litigation herein has been contentious at best, and the parties vehemently disagree as to virtually every aspect of this matter, from the facts to the applicable law. However, it appears clear that in August 2002, Steinberg and attorney Michael O'Hara began investigating a class action child sexual abuse case against the Diocese. Sometime in December 2002 or January 2003, Bonar and Steinberg discussed the fact that she had two clients who had also been abused by the same priest. As a result, Bonar was invited to join as a class co-counsel. The record contains several letters between Bonar and Steinberg in early 2003 discussing a potential fee arrangement. However, the parties never entered into a formal written fee contract.

The class action complaint was filed in the Boone Circuit Court[2] on February 4, 2003, with Bonar listed among class counsel and her clients as class

[2] At the time the Complaint was filed, Judge Bamburger was presiding. However, he resigned from the bench in December 2003 and Senior Judge John Potter was assigned to the case. In September 2006, the case was assigned to a second special judge, Robert W. McGinnis, following the completion of Judge Potter's senior judge service.

representatives. A petition for class certification was subsequently filed in July 2003. Among the many disputes that are alleged in the briefs, an issue arose when class counsel filed a memorandum in September 2003, alleging that the Diocese was continuing to place "sexual predators" in positions involving contact with children. Bonar thereafter contacted Steinberg and requested that her name be removed from the memorandum because it was creating conflict with her associates and peers in the Diocese. Bonar also filed documents with the trial court denying any participation in the drafting, review or filing of the memorandum.

Apparently during this same time period and unbeknownst to other class counsel, Bonar began negotiations with the Diocese's counsel, Carrie Huff, for individual settlements for the two representatives she initially brought to the class action. The record contains an affidavit by Huff, wherein she stated that Bonar negotiated and settled the two individual claims outside the class action while she was acting as class counsel. Huff further stated that Bonar ultimately negotiated individual settlements with the Diocese for 25 victims who were referred by the Diocese and who met the definition of a class member.

On October 1, 2003, *Doe* was certified as a class action. On October 10, 2003, Bonar emailed Huff that WSBC had not been informed of the individual settlement negotiations between herself and the Diocese. Further, the record contains another email from Bonar to Huff dated October 17, 2003, wherein she admitted telling clients that they were better off settling individually than joining

the class. Unquestionably, in October 2003, Bonar was acting as class counsel yet engaging in negotiations that were detrimental to the class.

On January 9, 2004, Bonar filed a motion to withdraw. Her accompanying affidavit stated that "recent changes in the composition of the class members have created a conflict of interest for Affiant, prohibiting Affiant from continuing as class counsel." On the same date she filed a notice of attorney's fee lien pursuant to KRS 376.460 and *Labach v. Hampton*, 585 S.W.2d 434 (Ky. App. 1979).[3]

Mediation proceedings in *Doe* began in June 2004, culminating in a tentative settlement in May 2005. After reviewing the proposed settlement, the trial court ordered that class members be given notice of its terms and scheduled a fairness hearing for January 9, 2006. Prior to the January hearing, Bonar filed a notice with the court that she would be asserting a claim for attorney's fees and expenses during that hearing.

Following the fairness hearing, the trial court entered an order on January 31, 2006, approving a settlement whereby the class would have approximately $80 to $85 million dollars available to it, part available immediately and the remainder available at a future date to be established. The trial court also scheduled a hearing to determine attorney's fees and ordered class counsel to file a motion for an award of attorney's fees and detailed memorandum in support thereof.

---

[3] Subsequently overruled by *Baker v. Shapero*, 203 S.W.3d 697 (Ky. 2006).

Consistent with the trial court's order, class counsel[4] filed their motion seeking an award of 30% of the settlement funds, as well as reimbursement for out-of-pocket expenses of $1,068,350.42. On February 9, 2006, Bonar also filed a separate fee petition requesting attorney's fees in the amount of 15% of the total underlying settlement as compensation for the "initiation, prosecution and ultimate settlement of the claims against the . . . Diocese." Bonar's petition also alleged for the first time that she was forced to withdraw from the class action by WSBC.

On February 23, 2006, class counsel moved to strike Bonar's fee petition. At a March 14, 2006, hearing, the trial court ruled that in the interest of trying to resolve the fee dispute "intramurally," Bonar's fee petition and all other related motions would be remanded to mediation without prejudice. Thereafter, two separate attempts to mediate the dispute failed. In May 2006, the trial court entered an order setting the attorney's fees in the underlying case at 22% of the settlement funds plus claimed costs.

In August 2006, Bonar filed a supplemental pleading in opposition to WSBC's motion to strike her fee petition. In an attached affidavit, Bonar asserted, again for the first time, that she and Chesley had entered into an oral agreement whereby WSBC would conduct "all of the legal work," but that Bonar and WSBC would be "equal partners" and split all of the settlement fees. Bonar claimed that when she later attempted to get the fee arrangement in writing, she was contacted

[4] The motion related solely to the services provided by the law firms of Waite, Schneider, Bayless & Chesley Co., LPA; O'Hara, Ruberg, Taylor, Sloan & Sergent; and Oldfather & Morris.

by Steinberg who then began to "negotiate down" her fee share in a series of letters in early 2003. Bonar asserted, as she did at trial, that since Chesley himself never renegotiated their fee arrangement, the equal partnership remained valid.

In September 2006, class counsel filed a motion for summary judgment arguing that Bonar was not legally entitled to any fees because she: (1) had not submitted any records reflecting her hourly work on the class action; (2) had a conflict of interest; (3) violated the Kentucky Rules of Professional Conduct; and (4) breached her fiduciary duties to the class members. During an October 4, 2006, hearing, the trial court noted that the issues relating to the attorney's lien and fee petition filed by Bonar were separate and distinct from other issues in the *Doe* case, and suggested that they be handled in a separate case to "streamline" the process. The parties agreed to create a new case styled *Barbara D. Bonar v. Class Counsel*.

During the ensuing months, the parties bitterly argued over every issue of the fee dispute case. Eventually, a three-day bench trial was conducted in May 2007. The trial court entered its Findings of Fact, Conclusions of Law, Opinion and Judgment on June 1, 2007, finding that: (1) Bonar's withdrawal from the class action was voluntary as a result of a conflict and not due to any actions by class counsel; (2) Bonar's numerous ethical violations would have constituted removal had she not voluntarily withdrawn; (3) Bonar's allegation of an oral agreement with Chesley whereby she would receive 50% of all awarded attorney's fees was not credible; (4) any written fee arrangement was negated when she

withdrew from the case; (5) and that she violated her fiduciary duties to the class by negotiating individual settlements while serving as class counsel. Further, the court noted:

> Even if Ms. Bonar had not voluntarily withdrawn and had not acted against the interests of the class, she would have been entitled to no fees. Had the Court found that she had been forced to withdraw, Plaintiff's total fees, measured by *quantum meruit,* would have amounted to $540,290.000 (assuming that the hours provided on her timesheet were all attributable to the class). Further, had Ms. Bonar remained in the case, she would have been entitled to approximately $1 million under the written percentage agreement with Defendant. During the trial, however, Ms. Bonar submitted fee information to the Court demonstrating that she had received $1,326,383.00 in the settlement of the individual claims of prospective class members, more than she would have received under either of the above calculations. When this amount is set off against the claimed fees, nothing is owed to her; the amount she has already received is compensation for work done prior to joining the class and for bringing in two clients as class representatives.

Bonar thereafter appealed to this Court.

On appeal, Bonar challenges not only the trial court's final order and judgment, but also numerous pretrial rulings. Specifically, Bonar argues that the trial court erred by: (1) denying her motion for partial summary judgment; (2) dismissing her claims against Chesley and Steinberg in their individual capacities; (3) improperly limiting discovery; (4) prohibiting impeachment testimony; (5) excluding expert testimony; (6) failing to afford her a fair and impartial trial; (7) making inconsistent rulings; (8) determining that *Baker v. Shapero* was dispositive;

and (9) finding that she committed numerous ethical violations. We shall address each argument in turn, providing additional facts as necessary.

Denial of Motion for Partial Summary Judgment

Bonar first argues that the trial court erred in denying her November 3, 2006, motion for partial summary judgment, wherein she argued that WSBC had conceded during a prior hearing that there was, in fact, a written fee agreement between the parties. As such, Bonar claimed there was no dispute of material fact that she was entitled to at least the amounts provided for in the written agreement, leaving only the issue of what additional value she was owed.

"The general rule under CR 56.03 is that a denial of a motion for summary judgment is, first, not appealable because of its interlocutory nature and, second, is not reviewable on appeal from a final judgment where the question is whether there exists a genuine issue of material fact." *Transportation Cabinet v. Leneave*, 751 S.W.2d 36, 37 (Ky. App. 1988) (*citing Bell v. Harmon*, 284 S.W.2d 812 (Ky. 1955)). The denial of a motion for summary judgment "can in no sense prejudice the substantive rights of the party making the motion since he still has the right to establish the merits of his motion upon the trial of the cause." *Ford Motor Credit Company v. Hall*, 879 S.W.2d 487, 489 (Ky. App. 1994) (*citing Bell*, 284 S.W.2d at 814). Accordingly, Bonar could not have been prejudiced by the denial

of her motion because she was provided the right to establish the merits of her position during the trial.

Dismissal of Claims Against Chesley and Steinberg

As previously noted, during the October 4, 2006, hearing, the trial court and parties agreed to create a separate case through which Bonar could assert her fee claims while the *Doe* case continued through the process of validating the class member claims. At that time, the parties agreed the new case would be styled *Bonar v. Class Counsel*. In response to the trial court's directive, Bonar filed a Complaint on October 30, 2006. However, the named defendants included not only WSBC, but also Chesley and Steinberg, both individually and in their roles as class counsel.

During a subsequent pretrial conference, the trial court questioned Bonar's intent to pursue individual claims against Chesley and Steinberg, noting that was not the parties' agreement when the new case was created. The court commented:

> This is about an attorney's lien and what cut of an attorney's fee she gets with the original case. It was not meant to establish a new cause of action and it does not do that. So when you are sitting here telling me that you are trying to make individual claims against these attorneys, you've set up new claims that did not exist in the original case. . . . You all have to come to an agreement on this, because this is an unorthodox way of handling this case. . . . Now the whole purpose of this was to streamline it to get you all to get this out of your way so that we can concentrate, or I can concentrate, on this case at hand. If you are not willing to agree and you are trying to build a record here, I'll throw this right back into the middle of this case the way it was, and we'll take the next two years to fight through this mess. So either you agree to it or you don't. If you're not going to agree to it, then we'll go right back to square one, and I'll

> dismiss this case on my own, and we're right back into the middle of the 13-14 volume case.

Bonar claimed that her reason for the inclusion of individual defendants was so that "Chesley . . . [would] answer interrogatories and be before the Court." The trial court responded that because Chesley was a member of WSBC, he was clearly before the court. Further, WSBC stipulated that Chesley was acting on behalf of the law firm and had absolute authority to bind the firm. As such, the trial court clarified that "class counsel" would be defined as WSBC.

The parties thereafter entered into an agreed pretrial order specifying that WSBC was the proper defendant. Further, on April 18, 2007, Bonar filed an amended complaint naming WSBC as the sole defendant. The case proceeded to trial without further amendment.

We find no merit in Bonar's claim that she was "forced . . . to enter an agreed order dismissing Chesley . . . in exchange for a clear stipulation that such dismissal would ensure the simplicity of awarding Appellant's their deserved attorney's fees." As the trial court noted, it was not until Bonar filed the October 2006, complaint that she asserted any individual claims against Chesley or Steinberg. Such was clearly in contravention of what the parties agreed to when the new case was established. Nor do we perceive how Bonar was prejudiced since WSBC stipulated that it was responsible for any and all of Chesley's actions in the case. Furthermore, we must agree with Appellees that this issue was waived upon the signing of the agreed pretrial order and the filing of the amended

complaint naming WSCB as the sole defendant. *See Browning v. Cornn*, 240 S.W.3d 671 (Ky. App. 2007).

Discovery Rulings

Bonar next argues that the trial court improperly limited her access to discovery. Specifically, Bonar sought information as to other class actions in which WSBC was class counsel, as well as its practices regarding fee splitting and opting out class members. Bonar further sought copies of all of WSBC's fee agreements with other class co-counsel in the instant underlying case. Bonar maintains that all requested information was discoverable under CR 26.02(1) and was directly relevant to her claims and defenses. We disagree.

We have reviewed all of the hearings during which discovery issues were addressed by the trial court, and would note that the trial court herein went to great lengths to simplify and clarify its rulings. Repeatedly, the court emphasized that the sole issues in the case were whether Bonar was entitled to a fee and, if so, the amount of such fee. As such, the court ruled that information as to WSBC's other class actions or its fee agreements with other co-counsel in this case had absolutely no bearing on the issues herein. Thus, discovery was limited to evidence relating to: (1) whether Bonar and WSBC had, in fact, entered into some type of fee arrangement; (2) what "value" Bonar had brought to the class action while she was co-counsel, namely the number of clients she referred that were signed as class members; and (3) the amount of time Bonar spent directly working

on the case while she was co-counsel. As the trial court commented on numerous occasions, because Bonar did not remain in the case until its settlement, neither other co-counsel's contributions nor their fee arrangement had any correlation to Bonar's fee entitlement.

We review a trial court's decision to admit or to exclude evidence for abuse of discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). A trial court abuses its discretion when its decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Id.* at 581. *See also Commonwealth v. English*, 993 S.W.2d 941 (Ky. 1999).

The purpose of our discovery rules is to simplify and clarify the issues in the case; eliminate or significantly reduce the element of surprise; achieve a balanced search for the truth; and encourage the settlement of cases. *Clephas v. Garlock, Inc.*, 168 S.W.3d 389, 393 (Ky. App. 2004) (*citing LaFleur v. Shoney's, Inc*., 83 S.W.3d 474 (Ky. 2002)). We are of the opinion that the trial court properly limited discovery to that evidence essential to a resolution of the issues. Accordingly, it did not abuse its discretion in denying Bonar's discovery requests.

Exclusion of Impeachment Testimony

Prior to trial, Bonar served subpoenas on two attorneys, Jacqueline Sawyers and Albert F. Grasch, who had allegedly entered into fee agreements with WSBC. Neither attorney was included as class co-counsel since each had represented an individual class member who had received an award in 2006, after

Bonar's withdrawal. Initially, the trial court granted both Sawyers' and Grasch's[5] motions for protective orders. However, at a May 3, 2007, pretrial hearing, the trial court agreed that Sawyers' testimony could be relevant if it contradicted Chesley's prior sworn testimony. Thus, the trial court ruled that if Bonar successfully established a foundation through Chesley at trial, Sawyers' testimony might be admissible.

Bonar attempted to call Sawyers as a rebuttal witness on the last day of trial. The trial court prohibited the testimony because it was not offered to rebut anything in WSBC's case but rather to impeach Bonar's own witness, Chesley, on a collateral matter. The trial court in ruling that whether Chesley had a fee agreement with Sawyers was irrelevant to whether he had a fee agreement with Bonar commented, "I have allowed [Chesley's] testimony on the issue of credibility, it is a collateral issue, [these facts] occurred after Bonar's withdrawal and had no relevance to her withdrawal."

A trial court has broad discretion in controlling the examination of witnesses and its decisions will not be disturbed absent an abuse of that discretion. *Stopher v. Commonwealth*, 57 S.W.3d 787 (Ky. 2001), *cert. denied*, 535 U.S. 1059 (2002). Further, absent surprise, a party cannot inquire as to collateral matters it raises on cross-examination and then introduce otherwise inadmissible evidence in rebuttal under the guise of impeachment. *Bratcher v. Commonwealth*, 151 S.W.3d 332 (Ky. 2004).

[5] The trial court eventually ruled that Bonar could take Grasch's deposition and such was admitted into evidence at trial.

We would note that at no point in her brief does Bonar actually explain either the nature or importance of Sawyers' testimony. Nonetheless, we agree with the trial court that other counsel's fee arrangements had absolutely no relevance to whether Bonar was entitled to a fee and, if so, how much.

Exclusion of Expert Testimony

Bonar retained Honorable Michael O. McDonald, a retired judge, as an expert to testify concerning: (1) her legal entitlement to fees; (2) the reasonableness of her fees; (3) the reasonableness of her withdrawal from the class action; (4) and the legal effect of withdrawal on her entitlement to fees. Although WSBC had taken Judge McDonald's deposition and had not filed a pretrial motion to exclude his testimony, it made an oral motion at trial to preclude such on the grounds that under KRE 702, Judge McDonald's testimony would not assist the court. The trial court, noting that it assumed the parties' experts would testify as to ethical issues, ruled that such testimony would not be helpful and required both parties to submit their experts' testimony by avowal.

"Preliminary questions concerning the qualification of a person to be a witness . . . or the admissibility of evidence shall be determined by the court[.]" KRE 104(a). Further KRE 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise[.]

Bonar's reliance on *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), is misplaced as Judge McDonald's testimony did not involve complex scientific or technical evidence, but rather legal principals. In fact, the trial court specifically found that Judge McDonald's opinions were not appropriate in a bench trial since the court did not need guidance on the ultimate issues to be decided from a former judge who did not have the benefit of testimony from both parties. We agree that Bonar failed to show that Judge McDonald possessed any specialized knowledge that would assist the trial court in resolving the issues at hand. Therefore, no error occurred.

Fair and Impartial Trial

As a result of the trial court's rulings regarding discovery and witness testimony, Bonar complains that she was not afforded a fair and impartial trial. She further asserts that the trial court pre-decided the issues herein and actually assisted WSBC in collecting evidence to support its position.

At trial, the court remained focused on the two issues: whether Bonar was entitled to a fee and, if so, how much. Indeed, the court disregarded and did not allow evidence of collateral issues that Bonar continued to attempt to introduce into the proceedings. Repeatedly, the court emphasized that neither WSBC's fee arrangements with other attorneys or the amount of work performed by other counsel was relevant to a determination of Bonar's entitlement, if any. Nevertheless, Bonar continuously sought the introduction of evidence pertaining to

inadmissible and irrelevant collateral issues, rather than evidence quantifying the amount of work she had performed while acting as class counsel.

Bonar also claims that she was denied a fair trial due to outside influences. Specifically, the Kentucky Bar Association had requested all records in the case once it was resolved. In response, the trial court commented that he would have referred the case to the KBA regardless of the request because he believed there were numerous ethical problems. Bonar contends that because the trial court's comments were subsequently reported in the press, she suffered prejudice because it intimated that she was under a disciplinary investigation.

Had this case proceeded to a jury trial Bonar may have had a credible argument. However, because this was a bench trial, it would be nonsensical to conclude that the trial court was improperly influenced by its own comments. Thus, we find no error.

Inconsistency of Trial Court's Orders

We also find no merit in Bonar's claims that the trial court somehow erred by entering orders that disagreed or were inconsistent with earlier rulings. Indeed, when Judge McGinnis took over the underlying *Doe* case, he commented on the record that he would give deference to Judge Potter's prior orders in the case. However, once the new fee dispute case was created, Judge McGinnis was fully entitled to enter rulings as were appropriate to the case.

Bonar asserts in her brief, without citation to the record, that Judge Potter ruled she was entitled to a percentage of the settlement fees, thus binding

Judge McGinnis to that ruling and leaving only the issue of how much she was owed. First, we find this issue to be unpreserved as it was not raised in Bonar's prehearing statement on appeal. CR 76.03(8). Second, and more importantly, without citation to the record, we are unable to locate in the proceedings below where Judge Potter made such a ruling. Certainly, contrary to Bonar's claim, Judge Potter certainly did not enter an order on the record that could be construed as the "law of the case."

Application of *Baker v. Shapero*

In its final judgment and order, the trial court ruled:

> The controlling case is the Kentucky Supreme Court decision in *Baker v. Shapero*, 203 S.W.3d 697 (Ky. 2006). This case stands for three basic principles in a situation in which a lawyer has a contingent fee agreement:
>
> 1. A lawyer can withdraw from a contingency fee case at any time on her own accord. If she does, she forfeits her fee.
>
> 2. If a lawyer is discharged for cause, she cannot receive a fee.
>
> 3. If a lawyer is discharged without cause, she is entitled to a fee, but not to the contingent fee set forth in her contract. Instead, the lawyer is entitled to a fee measured by *quantum meruit. Baker*, 203 S.W.3d at 699-700.
>
> The purpose of the third principle is to ensure that there is fairness to the lawyer who has already provided some services to the client. If, in this situation, the lawyer is discharged without cause, then she is entitled to be compensated for those services at a reasonable hourly rate.

> Applying those principles to this case, the Court hereby finds that Ms. Bonar voluntarily withdrew due to her conflict of interest, and therefore is not entitled to any fee.

In *Baker v. Shapero*, the Kentucky Supreme Court addressed the proper measure for the allowance of a fee to an attorney employed under a contingent contract who is discharged without cause before the completion of the contract. The Court noted:

> Since [*LaBach v. Hampton*, 585 S.W.2d 434 (Ky. App. 1979)], it has been noted that Kentucky's policy of allowing attorneys who are discharged without cause to claim entitlement to a contingency fee on a former client's final recovery, even though they never completed the contracted work, is an extreme minority position. Most jurisdictions only allow these discharged attorneys to claim fees on a *quantum meruit* basis. *See* Lester Brickman, *Setting the Fee when the Client Discharges a Contingent Fee Attorney*, 41 Emory L.J. 367, 373 n. 37 (Spring 1992) (citing the vast majority of jurisdictions which apply true *quantum meruit* recovery for attorneys who are discharged without cause); *Limitation to Quantum Meruit Recovery, Where Attorney Employed under Contingent-Fee Contract is Discharged without Cause*, 56 A.L.R. 5th 1, § 3(a) (1998) (same).
>
> A closer examination of *LaBach, supra*, reveals that the predecessor cases cited in that opinion do not support the reasoning therein. For example, *LaBach* cited our 1901 case of *Henry v. Vance, supra*, as authority for its decision. In *Henry v. Vance*, however, the Court specifically held that discharged attorneys "should [generally] be relegated to an action to recover [on] *quantum meruit*." *Id*. at 276. This rule, the Court determined, is consistent with the client's unqualified right "to discharge his attorney at any time, with or without cause, even in a case where a contingent fee has been agreed upon. . . ." *Id.* The reasoning and holding in *Henry v. Vance* was reaffirmed on at least two occasions

> prior to the Court of Appeals' opinion in *LaBach*. See *Hubbard v. Goffinett*, 253 Ky. 779, 70 S.W.2d 671, 672 (1934) ("It is sufficient to say that under the law of this state a client may at any time discharge his attorney, and substitute another in his place, but if he has performed services under the contract, he is entitled to recover compensation to the extent of the services performed, based on *quantum meruit*, and not on the terms of the contract."); *Gilbert v. Walbeck*, 339 S.W.2d 450, 451 (Ky.1960) ("Since a client may at any time discharge his attorney even if a contract exists, unless the attorney's services are completely performed thereunder an allowance of compensation is based upon *quantum meruit*."). . . .
>
> In accordance with the vast majority of other jurisdictions that have addressed this issue, we hold 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.

Baker, 203 S.W.3d at 699.

The trial court herein opined that although *Baker* was not squarely on point, the rationale applied therein would be equally applicable when an attorney voluntarily withdraws from a case. As such, because the trial court concluded that Bonar voluntarily withdrew from the case due to a conflict of interest, the appropriate method of determining what compensation she was owed was based on *quantum meruit*.

Nevertheless, Bonar continues to argue to this Court, as she did below, that she had a binding fee agreement with WSBC that was unaffected by her withdrawal from the case. However, Bonar's argument leads to an absurd

result because it would necessarily require the enforcement of a fee agreement even when an attorney voluntarily withdraws in the initial stages of the case. As the trial court observed, only those attorneys who remain in the class action until its completion are entitled to a percentage of the fees. Those who voluntarily withdraw or are discharged without cause are only entitled to compensation for the hourly work performed in furtherance of the case. Such rationale is consistent with the holding in *Baker*.

Furthermore, we find Bonar's reliance upon *Melvin v. Preston*, 2002-CA-000419 (August 8, 2003), an unpublished decision by a panel of this Court, unpersuasive as the issues therein concerned whether the attorneys' fee splitting arrangement violated (SCR) 3.130(1.5)(e) and whether the client's lack of knowledge of the arrangement voided the contract. Moreover, unlike the attorneys in *Melvin*, Bonar did not remain in the case until its completion. Clearly, *Melvin* has no application to the instant case.

Ethical Violations

Bonar claims that the trial court's conclusion that she committed ethical violations during her involvement in the *Doe* case was not based upon any law and underscores what she believes was the prejudice she suffered as a result of limited discovery and inconsistent rulings. We disagree.

In ruling on Bonar's conduct while acting as class counsel, the trial court determined that she violated SCR 3.130(1.3), (1.7), (1.9), and (1.16). The trial court explained in its final opinion and judgment:

Exacting fiduciary duties are imposed upon the attorney acting as class counsel. Throughout the Doe litigation, Ms. Bonar either failed or refused to understand or recognize that, when an attorney acts as class counsel, her duty is to the class, to the exclusion of individual clients. The attorney is obligated to inform any individual clients that, once they become class representatives, they are obligated to remain in the case; that the case is likely to take a long time; and that, if they choose to opt out, she may no longer represent them. The acts of settling individual cases, or advising putative members to utilize the opt-out mechanism, are detrimental to the class and cannot ethically be carried out while the attorney is class counsel. Furthermore, an attorney who has withdrawn as class counsel cannot then represent individual clients who have opted out, particularly where there is a limited fund available for settlement, without causing further detriment to her former client. Finally, it is clearly damaging to the class to engage in negative publicity which would tend to drive away current or potential class members.

In light of these principles, the Court finds that Ms. Bonar committed numerous and egregious ethical violations. Her agreement with class counsel, which purportedly allowed her to keep her own clients and settle their cases, became a fiduciary breach as soon as the class action was certified. In addition, Ms. Bonar's emails to the Diocese's attorney, Carrie Huff . . . provided evidence, in her own words, of her various conflicts: her continued settlement negotiations with the Diocese for three weeks between when the class certification was announced (i.e., the class was no longer speculative) and the certification order was entered; her failure to inform her individual clients of the amount of time required for a class action; her reference to her own ties to the Diocese; and her reference to contacts with the media, in which she portrayed the class in a negative light.

Throughout this process, Ms. Bonar was essentially serving three masters: her original two clients, the class, and the church. Her actions demonstrate a

> pattern of subordinating the interests of the class to those of her individual clients, and to her own interests in obtaining substantial attorney's fees. For example, she negotiated individual settlements for clients while serving as class counsel; engaged in negative publicity about the class (which may have resulted in the withdrawal of innumerable class members), and, after withdrawing as class counsel, caused further detriment to the class by continuing to settle individual claims on a contingency basis. Furthermore, Ms. Bonar has acknowledged her own ties to the Diocese, a conflict stemming from her original involvement in the case, which became apparent when she refused to participate in a brief filed by class counsel.

We are of the opinion that the trial court's findings with respect to ethical violations were, in fact, based on substantial evidence in the record.

Finally, we would observe that throughout her brief, Bonar posits that the trial court was clearly prejudiced against her. Our review of the record, and in particular the video proceedings, convinces us that the trial court was justifiably exasperated with both parties. Not a hearing was conducted wherein the parties could agree on even the smallest detail of the case. What began as an attempt to separate and "streamline" a fee dispute between attorneys from an underlying complex matter became in itself a complex and bitter battle. We are of the opinion that the trial court herein was faced with an unpleasant task and handled the matter with the utmost patience and skill.

The final opinion and judgment of the Boone Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

William C. Rambicure
Christopher D. Miller
Christopher B. Rambicure
Lexington, Kentucky

BRIEF FOR APPELLEES:

C. Alex Rose
James M. Gary
Louisville, Kentucky