KENNETH BRANSCUM	*	**NO. 2001-CA-0852**
VERSUS	*	**COURT OF APPEAL**
TERRY CATHERINE D/B/A CATHERINE'S JANITORIAL	*	**FOURTH CIRCUIT**
INDUSTRIAL SERVICE, HERMITAGE INSURANCE	*	**STATE OF LOUISIANA**
COMPANY, FLOOR BLAZER, INC. AND ABC INSURANCE	*	
COMPANY	*	

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 95-1542, DIVISION "N"
Honorable Ethel Simms Julien, Judge

* * * * * *

Charles R. Jones
Judge

* * * * * *

(Court composed of Judge Charles R. Jones, Judge Michael E. Kirby, and Judge Max N. Tobias, Jr.)

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AFFIRMED IN PART,
REVERSED IN PART,
REMANDED

Appellants/Intervenors, Kenneth Zezulka, Philip K.Wallace, and Phillip K. Wallace, P.L.C. are the original attorneys representing the Appellee, Mr. Kenneth Branscum, on the merits of this case and they appeal three separate judgments regarding the apportionment of attorneys' fees. Specifically, within those judgments, they appeal the decisions by the district court to grant them $8,182 in attorneys' fees, to deny their Motion for Accounting of Attorneys Fees, and to prohibit them from sharing in any future monies generated by this case. Following a review of the record, we

affirm in part and reverse in part.

Facts and Procedural History

This case arises out of the personal injury lawsuit filed by Kenneth Branscum against Terry Catherine d/b/a Catherine's Janitorial Industrial Service (hereinafter "Catherine's"), Hermitage Insurance Company, Floor Blazer, Inc., and ABC Insurance Company. Mr. Branscum sued alleging he sustained toxic poisoning from fumes ingested from a floor scrubber/polishing machine operated by Catherine's at Mr. Branscum's place of employment, a convenience store. Appellants/Intervenors, Kenneth Zezulka, Phillip K. Wallace, and Phillip K. Wallace, P.L.C. (hereinafter collectively "Intervenors") were the initial attorneys representing Mr. Branscum in this matter. Mr. Branscum discharged the Intervenors and subsequently employed three different successor attorneys before the case was ultimately settled by the fourth set of attorneys, Sacks & Smith. Sacks & Smith collected the contingent attorney fees.

The Intervenors had a contigency contract with Mr. Branscum agreeing to payment of forty percent of the gross amount collected for attorney's fees. Upon settlement of the case, Sacks & Smith refused to pay attorneys fees or expenses to the Intervenors causing them to file a Petition of Intervention in order to recover attorneys' fees and expenses.

After a hearing on the Motion to Intervene, the district court awarded $8,182 plus expenses to the Intervenors on June 30, 1999. Mr. Branscum, the Defendant-in-Intervention, filed a Motion for New Trial, and the Intervenors filed a Motion for Accounting of Attorneys Fees and a Rule to Show Cause why future settlement funds should not be identified and placed in escrow by a third party intervenor. On October 27, 2000, the district court partially denied and partially granted the Motion for New Trial, and denied the Motion for Accounting of Attorneys Fees and the Rule to Show Cause. The district court also awarded $491 to the Intervenors for expenses and costs. Through a Supplemental and Amending Final Judgment dated October 27, 2000, the district court clarified the previous judgments by reiterating the award of $491 in expenses and costs, and affirming other decisions and provisions contained in the first judgment. It is from these three judgments the Intervenors appeal.

Attorneys' Fees

The first issue raised by the Intervenors is whether the district court erred in finding that the Intervenors are only entitled to $8,182 in attorney's fees. The Intervenors argue that the district court concluded that they spent fifty hours or less on this case, although the evidence controverts this

conclusion. They argue that the evidence produced by their exhibits indicates a total of eighty-seven hours were spent on the case in which they should be compensated $8,921.25. The Intervenors further argue that the district court concluded that the Sacks & Smith firm performed legal work in excess of 1,500 hours, although there is no basis nor foundation in the record for this finding. They further argue that the district court evaluated the ratio between the hours spent by the two sets of attorneys and arrived at the three percent to be awarded to the Intervenors in attorneys fees.

The Intervenors further contend that the method of evaluation of attorneys fees used by the district court penalized them by awarding *quantum meruit* in the bill submitted, as opposed to the contribution to the case, since they had a contingency agreement with Mr. Branscum. They contend that they were discharged under *Saucier v. Hayes Dairy Products, Inc.*, 373 So.2d 102 (La.1979), the case in which the Supreme Court expressly denounced the method of *quantum meruit* for compensating an attorney retained under a contingency fee contract. They argue that the amount expressed in the contigency fee contract is the proper frame of reference for the determination of compensation for an attorney prematurely discharged without cause. They further contend that pursuant to *O'Rourke v. Cairns* 95-3054 (La. 11/25/96)., 683 So.2d 697, *quantum meruit* analysis

cannot be confined by actual hours spent without consideration of the risks involved in agreeing to the contigency fee contract, when counsel is dismissed without cause by the client in the contigency agreement context. They also argue that *O'Rourke* requires the application of *Saucier* in cases of discharge with cause of an attorney retained on contingency. The Intervenors contend that pursuant to *Saucier*, proper action by the district court would have been to calculate the highest ethical contingency to which the client contractually agreed in any of the contingency fee contracts executed, allocate the fee between discharged and subsequent counsel based upon the *Saucier* factors, consider the nature and gravity of the cause which contributed to the dismissal of the attorney, and accordingly reduce the amount awarded by a percentage that is commensurate with the cause.

The Intervenors aver that consideration must be given to the contribution and impact the Intervenors' involvement had on the final result of the case, and then award a percentage of attorneys' fees to the contributing attorneys. They further aver that fifteen percent of the attorneys' fees generated would be appropriate compensation based on their contribution to the outcome of the case.

In response to the Intervenors, Mr. Branscum argues that the Judgment and the Reasons for Judgment indicate that the district court

considered the contributions of the Intervenors, as the amount awarded is close to the amount that the Intervenors submitted as due. He also argues that *Saucier* and *O'Rourke* apply to this case; however, Mr. Branscum's argument departs from that of the Intervenors in the application of the two cases. Mr. Branscum argues that the *Saucier* factors and *quantum meruit* methodology employ essentially the same factors, and would produce the same result. However, he contends, the district court properly applied the *Saucier* factors to the facts of the case, and found that the Intervenors were only entitled to the portion of the contingency fee that was earned during the time that they represented Mr. Branscum. As such, he argues that the Intervenors performed a small fraction of the legal work in achieving the partial settlement of the case.

Mr. Branscum further argues that in the application of the first *Saucier* factor, the time and effort expended by the attorneys before their discharge, indicates that the Intervenors' contribution was nominal, as they only represented him for three and one-half months, wrote a few letters, filed only one pleading, included hours worked by the secretary and the paralegal in the billable hours, and inflated the amount of time needed to accomplish the tasks that they completed. In consideration of the second *Saucier* factor, Mr. Branscum argues that no evidence was presented to indicate that the

Intervenors were precluded from other employment because they accepted his case. Mr. Branscum contends that the third *Saucier* factor considers whether the fee sought is customary, and that this factor disfavors the Intervenors because they had no interaction with the defendants, took no discovery, nor appeared for any hearings. In applying the fourth *Saucier* factor, which examines whether the work performed by the discharged attorney significantly contributed to the results obtained in the case, Mr. Branscum argues that the discovery and pretrial preparation performed by his current attorneys contributed significantly more to the settlement of his case than the petition filed by the Intervenors. He argues that his current representatives had to amend the petition four times, took several depositions including some taken out of state, filed several motions, served other discovery requests, and that it was this trial preparation that lead to the favorable outcome of this case.

Additionally, Mr. Branscum argues that neither he nor his case imposed any time limits upon the Intervenors under the fifth *Saucier* factor. Mr. Branscum further argues that the Intervenors do not find favor under the sixth *Saucier* factor, which examines the nature and length of the professional relationship, because the length of his relationship with them was brief and only existed from the time of his injury to their discharge three

and one-half months later. Application of the seventh *Saucier* factor weighs against the Intervenors, Mr. Branscum contends, because the Intervenors lacked the necessary expertise in toxic tort claims, product liability claims, or cases involving brain damage as this case required. Mr. Branscum concedes that there is no dispute that the fee at issue was contingent upon a favorable recovery obtained through the work of the attorneys hired under the eighth *Saucier* factor. However, he does argue that the Intervenors did not perform much work in achieving the settlement.

Overall, Mr. Branscum argues that the Code of Professional Responsibility only allows attorneys to collect reasonable fees commensurate with the work performed. Additionally, he argues that he lost confidence in the Intervenors' ability to adequately represent his interests, which is sufficient grounds for dismissal for cause. He further argues that he based this decision on the advice of Attorney Zezulka, who indicated that the firm where he was employed did not have the experience necessary to successfully handle a complex toxic tort case.

The record does not indicate that the district court erred in awarding the Intervenors 3% of the attorney's fees. However, the district court erred in allocating a specific amount to the percentage found. The amount prescribed in the contingency fee contract, not *quantum meruit*, is the proper

frame of reference for fixing compensation for the attorney prematurely discharged without cause. *Saucier v. Hayes Dairy Products, Inc.*, *supra*. Ascertaining whether termination of an attorney was with or without cause, for purposes of determining fee to which the attorney is entitled, is a factual determination and will only be disturbed on appeal upon finding of manifest error. *O'Rourke*, 683 So.2d at 703. Rule 1.5 of the Rules of Professional Conduct outlines the following factors in determining the reasonableness of a fee:

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

Saucier,373 So.2d at 110-111.

Focusing alone upon the attorney's investment of time, or even considering in addition such matters as counsel's skill, the importance of the

case and other readily identifiable factors, does an injustice to the attorney. *Id.* at 118.

The district court found in its reasons for judgment and the record supports the following facts:

> Kenneth Zezulka and Philip Wallace' (the Wallace firm) conducted and [sic] initial interview with plaintiff, prepared a letter to the insurer, request for medicals and the petition for damages after research over a four month period, finally filing the petition [sic]. The firm neither initiated nor responded to discovery. Time spent on the case amounted to 50 or fewer hours.

Additionally in the reasons for judgment, the district court reasoned that:

> The testimony revealed that all attorneys involved had the requisite skill, if not experience to handle this matter. Each attorney had a 40% contract with the client which was appropriate given the complexity and expense of the litigation. In addition, the court was not convinced that there was conduct amounting to the level of cause for termination on the part of the Wallace firm or Ms. Zakotnik.
>
> However, the work of Wallace and Zakotnik contributed very little to the settlement of the matter [sic] having been discharged so early in the progress of the proceedings. Their work was less than 5% of the total effort made toward settlement.
>
> Based on the efforts of the attorneys, the amount of work performed, and the contribution toward settlement herein [sic] the court awarded the Wallace firm and Bonnie Zakotnik 3% and 2% respectively of the total attorney fees obtained plus

expenses.

The record does not indicate that the district court manifestly erred in finding that the Intervenors were discharged without cause. The district court did not find testimony with respect to the discharge of the Intervenors for cause credible, and specifically articulated in its reasons for judgment that the court was not convinced that the Intervenors were discharged for cause. Therefore, the district court did find that the contingency fee contract, and not *quantum meruit,* was the appropriate method of determining compensation for the Intervenors.

Although the district court did not expressly articulate in its reasons for judgment each *Saucier* factor to be considered, it focused on the contributions of the attorneys to the successful settlement of the case, and not merely the hours spent. The district court provided sufficient reasons to indicate that the *Saucier* factors were applied, and therefore, we find that the district court did not manifestly err in awarding the Intervenors 3% of the attorneys fees. However, we do find that the district court erred in allocating a specific amount to the value of the 3%, as there was insufficient information to make such a calculation of this amount. We shall discuss this issue more fully in the discussion of the second issue.

Accounting of Attorneys Fees

The second issue raised by the Intervenors is whether the district court erred in denying the Intervenors' Motion for Accounting of Attorneys Fees. The Intervenors argue that they are entitled to an accounting of the attorneys fees, because they have demonstrated that they have earned a portion of said fees. They argue that they have not received payment for their services, which amounts to the unjust enrichment of the successor attorneys. And they argue that they have not received an accounting for the attorneys fees because the successor attorneys have refused to provide such accounting, even though the Intervenors notified the successor attorneys prior to settlement that they were asserting their rights to the attorneys fees owed to them.

Mr. Branscum argues in response that only he, and not the successor attorneys, have been sued, which is necessary for the assertion of rights to an accounting of the attorney's fees. Further, he argues that the Intervenors are not entitled to an accounting on all fees received by the successor attorneys, but only for the portion of the fee to which they are entitled.

In order for an accurate determination to be made as to the value of the 3% in attorneys fees awarded to the Intervenors, an accounting of attorney's fees must be provided by the successor attorneys. Therefore, the district court erred in denying the Intervenors' Motion for Accounting of

Attorney's Fees. In *Leydecker v. Leininger*, 93-2320 (La.App. 4 Cir. 2/25/94), 633 So.2d 804, this Court indicated that an accounting of the attorney's fees are owed by the new attorney to the original attorney where the client has contracted with a succession of attorneys for representation. "To the extent that the new attorney collects the entire fee [sic] he owes an accounting and payment to the original attorney for that portion of the fee to which [the original attorney] is entitled under the *Saucier* guidelines." *Id.* at p.3, 633 So.2d at 806. It is irrelevant whether the original attorney pursues the claim against the new attorney directly, because the original attorney makes a claim against the proceeds of the settlement. However, from the language in *Leydecker*, the original attorneys are limited to an accounting of that portion of the attorney's fees to which they are entitled to under *Saucier*. Thus, we find that the Intervenors are entitled to an accounting of the attorneys fees, but such accounting is limited to the 3% of the attorneys fees awarded by the district court.

Future Monies

The final issue raised by the Intervenors is whether the district court erred in finding that the Intervenors are not entitled to and shall not share in any future monies from this case, either by settlements or judgments. The Intervenors argue that they should receive payment not only for the portion

of the case in which they were involved, but must be paid a percentage of their contribution to the entire case.

Mr. Branscum asserts, however, that the Intervenors are only entitled to a reasonable fee, and that future monies are irrelevant. He also contends that the Intervenors did not contribute to the claims against subsequent defendants named in amendments to the petition filed by the Intervenors, where such claims may result in future settlements or judgments. Therefore, he argues, the Intervenors are not entitled to portions of fees against those unnamed defendants. We disagree.

We find that the district court erred in determining that the Intervenors are not entitled to and shall not share in any future monies from this case, either by settlements or judgments. In *O'Rourke, supra*, the client was not liable for more than one contingency fee to be appropriately apportioned among the attorneys. However, if future money is made in which the contingency fee is appropriately applied, the Intervenors are entitled to their portion of said contingency fee.

Decree

For the foregoing reasons, we affirm the award of 3% to the Intervenors, Kenneth Zezulka, Phillip K. Wallace, and Phillip K. Wallace, P.L.C., but vacate the specific amount of $8,182 to be the value of the 3%

awarded. We further reverse the judgment of the district court denying the Motion for Accounting of Attorneys Fees. We also reverse the judgment of the district court denying the Intervenors claim to future monies from future settlements or judgments. The matter is remanded to the district court for further proceeding not inconsistent with this decree, with each party bearing its costs.

AFFIRMED IN PART,
REVERSED IN PART,
REMANDED