Rel: June 7, 2019

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

2180184

Christopher E. Rose

v.

Penn & Seaborn, LLC; Cervera, Ralph, Reeves, Baker & Hastings, LLC; and Joel Gregg

Appeal from Pike Circuit Court
(CV-13-900051)

THOMPSON, Presiding Judge.

Christopher E. Rose, appearing pro se, appeals from a judgment of the Pike Circuit Court ("the trial court") ordering him to pay an attorney fee to Penn & Seaborn, LLC

("P&S"); Cervera, Ralph, Reeves, Baker & Hastings, LLC ("CRRB&H"); and Joel Gregg (P&S, CRRB&H, and Gregg are hereinafter referred to collectively as "the attorneys").

The record indicates the following. Rose retained Shane Seaborn of P&S and Grady Reeves and Clifton Hastings of CRRB&H to represent him in connection with claims he was pursuing against corporate defendants pertaining to gasoline that had leaked from underground fuel-storage tanks into the soil on his property. Seaborn associated Gregg as counsel because Gregg has experience in underground-tank litigation. Rose signed a contingent-fee employment contract ("the fee agreement") in which he agreed to pay the attorneys 45% "solely from the proceeds" of the net amount recovered, "whether by settlement, trial, or otherwise."

In March 2013, Seaborn, Reeves, and Hastings filed on behalf of Rose a complaint against the corporate defendants in connection with the leaked gasoline. In the complaint, Rose asserted a number of tort claims and sought monetary damages against the corporate defendants. On January 30, 2015, the parties mediated the claims and agreed to settle the case for

$100,000, and Rose executed a settlement agreement ("the first settlement agreement").

On August 13, 2015, the corporate defendants filed a motion to enforce the first settlement agreement, asserting that Rose had refused to present the agreement and a release discharging the corporate defendants from liability on the claims ("the release") to the individual who held the mortgage on the property at issue for his consent and approval as required by the first settlement agreement. On September 9, 2015, the trial court entered a summary judgment enforcing the first settlement agreement.

On September 14, 2015, Rose sent an e-mail to Seaborn informing him that Rose was "terminating our agreement." Rose wrote that he was meeting another attorney to "make plans" to appeal the September 9, 2015, judgment, adding that Seaborn was "ordered to refrain from any further interaction with the [defendants] or the judge in this matter on my behalf" and to "withdraw, remove, or prevent subordinate attorneys retained by you to assist in this case" from taking any further action. Rose explicitly stated that he "fully and completely rescind[ed] any agreement that gives you any authority to

represent or bind me in any agreements." Rose then said: "This email is intended as an emergency stop work order to provide reasonable review of the facts and to investigate charges of ethics violation, case tampering and negligence." On September 16, 2015, the attorneys filed a notice of an attorney's lien in the trial court. They also filed a motion to withdraw from their representation of Rose.

Rose, acting pro se, proceeded with an appeal of the September 9, 2015, judgment. On April 29, 2016, this court reversed that judgment on the ground that a genuine issue of material fact existed as to why the mortgage holder, Rose's father-in-law, Glen Bracewell, had not signed the release and no legal argument had been made by any party as to the legal effect of Bracewell's failure to fulfill that requirement specified in the first settlement agreement. Rose v. Interstate Oil Co., 208 So. 3d 26, 29 (Ala. Civ. App. 2016). The cause was remanded for further proceedings. Id.

It is undisputed that, after the case was remanded, the parties, including Bracewell, who had been added as a party to the action on March 13, 2018, reached a new agreement to settle the matter for $125,000 ("the second settlement

agreement"). On May 7, 2018, Rose, still appearing pro se, filed in the trial court a "memorandum in opposition to [the] fee" that the attorneys sought for their work in this matter and requested a release of the attorney's lien. Bracewell, who was represented by counsel, filed a response to Rose's memorandum in opposition to the fee, referencing "the $125,000 settlement proceeds" set out in the second settlement agreement and arguing that he was entitled to "the entire principal sum of $100,000 plus all accumulated and accrued interest." On May 23, 2018, the attorneys filed a response to Rose's memorandum, attaching the fee agreement and correspondence from Rose, including the e-mail in which Rose terminated their representation.

On October 24, 2018, the trial court held an ore tenus hearing on the attorney-fee issue. At that hearing, Rose testified that, while they were representing him, the attorneys did their jobs and that Seaborn was a "skilled, competent attorney." However, Rose said, he did not believe that the attorneys were entitled to compensation in this matter because he questioned their ethics and he believed that they had tried to "defraud" Bracewell. Rose testified that he

had hired Seaborn, that Seaborn was his employee, and that, as Seaborn's employer, it was Rose's "responsibility to hold him to an account." He also said that "it is not unreasonable to be stern or strong with an employee." Rose made unsupported speculative or conjectural statements, but he presented no evidence of any wrongdoing or misconduct by any of the attorneys.

Seaborn, Reeves, Hastings, and Gregg testified regarding their experience, their billing rates, and the estimated amount of time each had put into this case before Rose discharged them. Seaborn testified that he had associated Gregg on the matter because, he said, Gregg had an expertise in underground-tank litigation. Seaborn said that, among other things, he had both propounded discovery and worked with Rose to respond to discovery. Seaborn had also taken depositions. That discovery was used in reaching both settlements in this action. Based on the testimony the attorneys presented, it appears that, if Rose were billed by the hour, he would owe the attorneys a total of more than $63,310. The attorneys' expenses were $3,411.50. Other

attorneys testified regarding the reasonable amount of an attorney fee for the work performed.

On November 7, 2019, the trial court entered an order awarding the attorneys a fee equaling 45% of $96,588.50, which represents the amount of the first settlement agreement--$100,000--less expenses of $3,411.50; the attorney fee was calculated to be $43,464.83. Adding expenses of $3,411.50, the trial court entered a total award to the attorneys in the amount of $46,876.33. In determining the award, the trial court explained:

> "In making the foregoing award of fees and expenses, the Court, of course, considered the contingency fee employment contract, as well as the numerous hours expended by counsel in handling the case, their time records reflecting the nature of the services performed and the amount of time it consumed, the reasonableness of the services performed, the fees customarily charged in the locality of Pike County for similar services undertaken on a contingent fee basis, and perhaps most importantly, that their efforts were the procuring cause of the first $100,000.00 of the achieved final settlement."

Rose filed a timely notice of appeal to this court, which transferred the appeal to our supreme court for lack of subject-matter jurisdiction. The supreme court then

transferred the case to this court pursuant to § 12-2-7(6), Ala. Code 1975.

At the hearing on the issue of an attorney fee, the trial court received both ore tenus and documentary evidence.

> "'"The ore tenus rule is grounded upon the principle that when the trial court hears oral testimony it has an opportunity to evaluate the demeanor and credibility of witnesses." Hall v. Mazzone, 486 So. 2d 408, 410 (Ala. 1986). The rule applies to "disputed issues of fact," whether the dispute is based entirely upon oral testimony or upon a combination of oral testimony and documentary evidence. Born v. Clark, 662 So. 2d 669, 672 (Ala. 1995). The ore tenus standard of review, succinctly stated, is as follows:
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> > "'"[W]here the evidence has been [presented] ore tenus, a presumption of correctness attends the trial court's conclusion on issues of fact, and this Court will not disturb the trial court's conclusion unless it is clearly erroneous and against the great weight of the evidence, but will affirm the judgment if, under any reasonable aspect, it is supported by credible evidence."'
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> "Reed v. Board of Trs. for Alabama State Univ., 778 So. 2d 791, 795 (Ala. 2000)(quoting Raidt v. Crane, 342 So. 2d 358, 360 (Ala. 1977))."

Spencer v. Spencer, 258 So. 3d 326, 327-28 (Ala. 2018).

In this appeal, Rose observes that the attorneys did not represent him in his previous appeal, that the original judgment that ordered the enforcement of the first settlement agreement was reversed, and that the attorneys were not representing him when the second settlement agreement was reached. Rose further points out that the fee agreement did not include appellate work. He maintains that the attorneys "declined to take an appeal," saying that he gave them an opportunity to represent him on appeal before he discharged them. Accordingly, Rose argues, because the attorneys were not representing him when the second settlement was reached, they were not entitled to receive a fee. This is the same argument Rose made to the trial court in his memorandum in opposition to the fee.

In support of his argument, Rose cites opinions from other states that are factually distinguishable from the instant case. For example, Dinter v. Sears, Roebuck & Co., 278 N.J. Super. 521, 651 A.2d 1033 (1995), which Rose says is a leading case regarding this issue, involved a fee dispute between successive trial lawyers who represented the Dinters, the plaintiffs in a negligence action. The first case was

tried before a jury, which found against the Dinters. 278 N.J. Super. at 523, 651 A.2d at 1034. The Dinters had a contingent-fee agreement with Bertram Siegel, the attorney who represented them in the first action. After a judgment was entered on the jury's verdict in favor of the defendant, the Dinters wanted to appeal. Siegel would not represent them on appeal unless they paid the costs for appeal, especially the cost for the trial transcript. Their fee agreement did not include appellate work. 278 N.J. Super. at 523-24, 651 A.2d at 1034. The Dinters then retained a different attorney, Bennett J. Wasserman, to represent them on appeal. On appeal, the New Jersey appellate court reversed the judgment and remanded the case for another trial. 278 N.J. Super. at 524, 651 A.2d at 1034. Wasserman continued to represent the Dinters under a new contingent-fee agreement. The case then settled for $850,000. Siegel sought a portion of the settlement proceeds owed to Wasserman, claiming he was entitled to fees under Siegel's own contingent-fee agreement. Id. The New Jersey trial court agreed and awarded Siegel a $45,000 quantum meruit fee and costs of $7,656.68. 278 N.J. Super. at 523, 651 A.2d at 1034.

The New Jersey appellate court reversed the judgment awarding Siegel a fee, noting that Siegel had not forwarded his file to Wasserman, who had conducted additional discovery and had obtained various court orders to compel Siegel to provide him with certain other discovery items. 278 N.J. Super. at 528, 651 A.2d at 1036. The appellate court explained its decision to reverse the award of an attorney fee to Siegel, writing:

> "It is clear that an attorney who, acting pursuant to a contingent fee agreement, voluntarily withdraws from representation before or without achieving any recovery for his client is not entitled to be compensated for services rendered absent a breach by the client or some ethical reason which might have required the withdrawal. International Materials v. Sun Corp., 824 S.W.2d 890, 895 (Mo. 1992) has synthesized the usual rule:
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> > "'The general rule is that a lawyer who abandons or withdraws from a case, without justifiable cause, before termination of a case and before the lawyer has fully performed the services required, loses all right to compensation for services rendered.'
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> "This rule applies with even greater force where the withdrawing attorney failed to earn the contingent fee, having achieved no recovery for the client. See Faro v. Romani, 641 So. 2d 69 (Fla. 1994); Plaza Shoe Store, Inc. v. Hermel, 636 S.W.2d 53, 59-60 (Mo. 1982). Where the client elects to proceed with an appeal with a new attorney after the first attorney was unsuccessful at the trial level, it has

> been held that quantum meruit is not available because the lawyer completed his work at the trial level, albeit, unsuccessfully. Robinowitz v. Pozzi, 127 Or. App. 464, 872 P.2d 993, 996 (1994)."

Dinter, 278 N.J. Super. at 532, 651 A.2d at 1038.

The New Jersey appellate court concluded that Siegel's representation of the Dinters ended when he declined to prosecute the appeal. In other words, his representation ended with the trial, which had yielded nothing for the Dinters. Siegel's fee agreement ended at the same time, the appellate court said, and "Siegel could not then have reasonably expected payment after he was terminated." 278 N.J. Super. at 533, 651 A.2d at 1039.

In this case, the attorneys achieved a settlement to which Rose had agreed. Not until Rose refused to perform under the first settlement agreement and the corporate defendants moved the trial court for an order to enforce it did Rose have an "adverse judgment" from which to appeal. Additionally, despite Rose's contention that the attorneys "declined to take an appeal," the trial court could have determined from the evidence, specifically the e-mail Rose sent to Seaborn "terminating our agreement" after the enforcement order was entered, that Rose--not the attorneys--

made the decision to have someone else represent him on appeal. In other words, the attorneys did not abandon the case. It was at that point that the attorneys filed the attorney's lien to obtain payment for the services they had rendered to Rose. Rose then proceeded pro se to reach a settlement with the corporate defendants for $125,000.

Our supreme court has considered the award of an attorney fee under circumstances similar to those in the instant case. In Triplett v. Elliott, 590 So. 2d 908, 910 (Ala. 1991), our supreme court wrote:

> "This Court has held that the purpose of the attorney's lien statute, § 34-3-61, Code of Ala. 1975, is to protect the attorney from loss of his investment in time, effort, and learning, and the loss of funds used in serving the interest of the client. Carnes v. Shores, 55 Ala. App. 608, 610-11, 318 So. 2d 305, 307 (1975). The protection afforded by the statute is not limited to attorneys of record at the time of settlement or when judgment is rendered.
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> "The trial court in the present case relied on Gaines, Gaines & Gaines, P.C. v. Hare, Wynn, Newell & Newton, 554 So. 2d 445 (Ala. Civ. App. 1989), in which a discharged firm sought to enforce a previous fee agreement and to establish an attorney's lien on any amount recovered. The trial court held that the discharged firm was entitled to a fee recovery based on the theory of quantum meruit for the reasonable value of services it had rendered. The Court of Civil Appeals affirmed.

> "It is well established in Alabama that upon an attorney's discharge, the prior part performance of a contract entitles the attorney to recover for those services rendered. As the Court of Civil Appeals pointed out in Gaines:
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> > "'"The rule in Alabama is that an attorney discharged without cause, or otherwise prevented from full performance, is entitled to be reasonably compensated only for services rendered before such discharge. Hall v. Gunter, 157 Ala. 375, 47 So. 155 [[1908)]. This appears to be the prevailing rule where the contract, as here, called for a contingent fee. 6 C.J. p. 724, § 293." Owens v. Bolt, 218 Ala. 344, 348, 118 So. 590 (1928).'
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> "554 So. 2d at 448.
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> "The trial court in the present case properly considered the several factors set out in Peebles v. Miley, 439 So. 2d 137 (Ala. 1983), for determining a reasonable attorney fee and for arriving at a quantum meruit recovery. The court in Gaines applied the Peebles factors also. 554 So. 2d at 449. Some of the factors are the time consumed; the reasonable expenses incurred by the attorney; whether the fee is fixed or contingent; and the nature and length of the professional relationship."

This court recently set forth the factors to be used in determining a reasonable attorney fee:

> "In Van Schaack v. AmSouth Bank, N.A., 530 So. 2d 740, 749 (Ala. 1988), our supreme court explained:
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> > "'In Peebles[v. v. Miley, 439 So. 2d 137 (Ala. 1983)], this Court added five more criteria to the seven that had been enumerated in our cases. The complete list

> of criteria used in the estimation of the value of an attorney's services now includes the following: (1) the nature and value of the subject matter of the employment; (2) the learning, skill, and labor requisite to its proper discharge; (3) the time consumed; (4) the professional experience and reputation of the attorney; (5) the weight of his responsibilities; (6) the measure of success achieved; (7) the reasonable expenses incurred; (8) whether a fee is fixed or contingent; (9) the nature and length of a professional relationship; (10) the fee customarily charged in the locality for similar legal services; (11) the likelihood that a particular employment may preclude other employment; and (12) the time limitations imposed by the client or by the circumstances.'"

Harris v. Capell & Howard, P.C., [Ms. 2170973, Jan. 11, 2019] ___ So. 3d ___, ___ (Ala. Civ. App. 2019).

Unlike the plaintiffs in Dinter, Rose benefitted financially from the work the attorneys performed in that Rose agreed to settle the matter for $100,000 based on the work the attorneys had conducted. Rose was the party who did not perform as required under the first settlement agreement, resulting in a summary judgment ordering the enforcement of that agreement. Rose appealed from that judgment. Based on the evidence presented in this case, the trial court reasonably could have determined that Rose discharged the

attorneys without cause and without giving them the opportunity to handle the appeal or further settlement negotiations. Accordingly, under Triplett and Gaines, Gaines & Gaines, P.C. v. Hare, Wynn, Newell & Newton, 554 So. 2d 445 (Ala. Civ. App. 1989), which was discussed in Triplett, the attorneys were entitled to recover a reasonable attorney fee.

In awarding the attorneys a fee of $43,464.83, the trial court stated that it had considered the fee agreement, the "numerous hours expended," the nature of the services performed, the reasonableness of the services performed, the fees customarily charged in Pike County for similar services undertaken on a contingent-fee basis, and the fact that the attorneys' efforts "were the procuring cause of the first $100,000 of the achieved final settlement." In other words, the $25,000 added to the amount of the settlement in the second settlement agreement was not considered when the trial court calculated the attorney fee.

In his original brief on appeal and again in his reply brief, Rose makes the argument that, if the attorneys are entitled to receive a fee, the trial court erred in awarding them "a portion of the contingency fee." Instead, Rose

maintains that the remedy would be to award reasonable compensation for services rendered before the attorneys' discharge on the theory of quantum meruit. We note that, based on the number of hours the attorneys worked and their respective hourly billing rates, which testimony from an attorney not involved in this case indicated was reasonable, the attorney fee based on the fee agreement was approximately $20,000 less than if the fee were calculated at an hourly rate for the work performed.

Based on the record before us, we conclude that the trial court's judgment awarding the attorneys a combined fee of $43,464.83 and costs of $3,411.50 was supported by the evidence. Accordingly, the judgment is affirmed.

AFFIRMED.

Moore, Donaldson, Edwards, and Hanson, JJ., concur.