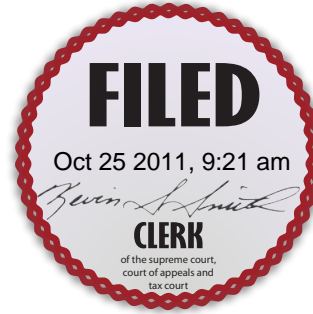


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



APPELLANT PRO SE:

KAREN NEISWINGER
Indianapolis, Indiana

APPELLEES PRO SE:

NATHANIEL LEE
Lee, Cossell, Kuehn & Love, LLP
Indianapolis, Indiana

ROBERT DELANEY
Williams, Delaney, & Simkin
Richmond, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

KAREN NEISWINGER,)
)
Appellant-Respondent,)
)
vs.) No. 89A01-1012-CT-667
)
NATHANIEL LEE and ROBERT DELANEY,)
)
Appellees-Petitioners.¹)

APPEAL FROM THE WAYNE SUPERIOR COURT
The Honorable Darrin M. Dolehanty, Special Judge
Cause No. 89D01-0007-CT-13

October 25, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

¹ The appeal arises out of the civil case of *Sherrie L. Allen and Kevin Allen v. Kevin Johnson and the City of Eaton, Ohio*, with the same lower-court cause number.

BRADFORD, Judge.

Appellant-Respondent Karen Neiswinger appeals from the trial court's order apportioning attorney's fees between her and Appellees-Petitioners Nathaniel Lee and Robert Delaney for work done on behalf of Plaintiffs Sherrie L. and Kevin Allen. Neiswinger contends that the trial court erred in awarding only three percent of attorney's fees to her, erred in declining to reimburse her for some alleged expenses, and abused its discretion in denying her motion for sanctions for discovery violations. We affirm.

FACTS AND PROCEDURAL HISTORY

This fee dispute arises from a personal injury claim filed by Sherrie and Kevin Allen against Kevin Johnson and the City of Eaton, Ohio. The Allens hired Delaney and entered into a retainer agreement with him on May 31, 2000. The retainer agreement, to which neither Neiswinger nor Lee was ever a party, provided, in part, that "[i]n the event parties agree to terminate this agreement at client's request and parties agree that attorney will be paid on an hourly basis, the hourly rate will be \$150.00 per hour." Appellant's App. p. 31. At some point, Delaney recruited Neiswinger as associate counsel with the verbal understanding that they would equally share any fee that might result from the case. The Allens' complaint, after initial drafting by Delaney and editing by Neiswinger, was filed on or about July 13, 2000.

Neiswinger continued to work on the case, contributing various pleadings, discovery-related pleadings, and correspondence to Delaney and deposing the Allens and Johnson. Eventually, the relationship between Neiswinger and Delaney's law partner Clyde Williams, with whom she had worked on other cases, deteriorated. On September

10, 2004, Neiswinger issued a memorandum to Delaney advising him that she was going to notify the Allens that she would be withdrawing from the case. On the same day, Delaney faxed Neiswinger, advising her that his firm was not aware of any expenses incurred on her behalf to that date.

On September 24, 2004, Neiswinger issued a letter to the Allens telling them that she would be withdrawing from the case, that the reason was a dispute with Williams, that she would not be taking any further action in the case, that she would not withdraw unless the Allens requested her to, and that she still expected to be paid from any settlement that might occur. On October 29, 2004, Delaney requested that Neiswinger withdraw her appearance in a letter, to which was attached a letter from the Allens requesting that she withdraw. On or about October 30, 2004, Neiswinger filed her notice of withdrawal and notice of her intention to hold a lien, claiming a lien on twenty percent of all amounts recoverable through settlement or judgment and expenses of \$286.50.

Following Neiswinger's withdrawal, Delaney recruited Lee as co-counsel. Following two mediation sessions, the Allens accepted a \$225,000.00 settlement offer from the defendants, of which amount \$7500.00 satisfied a medical lien, \$7500.00 was paid to Delaney and Lee for expenses, \$75,000.00 was paid to the Wayne County Clerk to hold in trust for attorney's fees, and \$135,000.00 was paid to the Allens. On or about April 3, 2008, the parties filed a stipulation of dismissal, and on April 7, 2008, the trial court issued an order of dismissal. On April 11, 2008, Delaney filed a "Petition for Determination of Attorney Fees."

On October 16, 2008, Neiswinger filed a motion for sanctions, alleging that Lee and Delaney had not properly responded to her discovery requests. On October 6, 2010, the trial court denied Neiswinger's motion for sanctions. The trial court's order on sanctions read, in part, as follows:

Having reviewed the numerous Discovery-related pleadings and Orders in this matter, and having heard today the arguments of counsel, the Court finds that the Motion for Sanctions should be denied.

Without a doubt, the Court is neither amused nor impressed with the way that Discovery has been handled in this matter, by any of the involved parties. The requests are lengthy; the responses, vague. Deadlines have been disregarded. The Court's efforts to shore-up the Discovery failings have been largely bypassed, if not ignored.

From all appearances, both sides have gone out of their way to "plead" each other to a standstill. Attorney Neiswinger has consistently argued that opposing counsel have not provided requested Discovery. Attorneys Lee and Delaney argue that they have responded, and that they went so far as to tender their entire case file to Attorney Neiswinger, who then refused to take it. Based upon the pleadings and arguments of counsel, the Court finds that the moving party has not sustained her motion with sufficient evidence to show that sanctions are in order, and the motion is therefore denied.

Appellant's App. p. 469.

Meanwhile, after two and one-half years, multitudinous filings from both sides regarding the merits of the fee dispute, and a hearing, the trial court issued an "Order Regarding Attorney Lien" on November 18, 2010. In its order, the trial court concluded that (1) Neiswinger was not entitled to compensation pursuant to the retainer agreement Delaney signed with the Allens, (2) she was not denied the right to compensation due to voluntary withdrawal because she had sufficient good cause to withdraw, (3) she was entitled to compensation of \$1666.67 under the equitable doctrine of quantum meruit, and

(4) she was entitled to reimbursement of \$286.50 for expenses. The trial court's order read, in part, as follows:

8. On the day before the running of the statute of limitations, Delaney drafted a complaint for editing, and sent it to Neiswinger for editing.
9. Neiswinger edited the complaint and it was filed on or about July 13, 2000.
10. After the complaint was filed, Neiswinger contributed various pleadings to the personal injury case, including: Case Management Order, Strike from Mediator Panel, Statement in Opposition to Motion for Summary Judgment, Designation of Evidence for summary judgment motion, and witness and exhibit list.
11. Neiswinger also contributed some Discovery related pleadings to the personal injury case, including: subpoena to Dr. Duerden, interrogatories and requests for production to Defendants, and a supplemental request for production.
12. Neiswinger also generated correspondence in the personal injury case, including memos to co-counsel.
13. Neiswinger was also involved in Discovery depositions, including the deposition of the clients and Defendant Johnson.

....
37. Neiswinger has submitted as evidence ... an estimate of the time she spent on the personal injury suit. Comparing the exhibit to the corresponding pleadings, the Court concludes that the "estimate" has been significantly inflated. Neiswinger claims to have spent 121.45 hours on the personal injury case. The Court does not accept this estimate as fact.

....
The Court has carefully considered Neiswinger's participation in the personal injury suit, including her pleadings, correspondence, memos, "recruitment" of experts for trial, participation in the hearings, negotiations, and discovery efforts including depositions. The Court has also considered how these efforts may have benefited the clients, in the form of a more favorable settlement that they would have received without those efforts, as well as how the efforts benefited Delaney and Lee, in the form of relieving them from the need for similar efforts.

In short, the Court concludes that Neiswinger's participation in the personal injury case accomplished little and minimally contributed to the ultimate settlement. She added value to the case by redrafting the complaint, but given the minimal requirements for notice in such complaints, and the opportunities for reasonable amendment if needed, this task was of minor value. She participated in depositions of the Plaintiffs and Defendant,

however the parties agreed that the real issue in the personal injury case was related to the medical experts. Neiswinger did not participate in those depositions, and in fact ceased all participation shortly before an important medical expert deposition. She participated in the summary judgment/motion to dismiss litigation, however withdrew from the case before those issues were finally determined. She issued letters and memos, and participated otherwise in the case, however the evidence presented does not convince the Court that the letters, memos and other efforts contributed positively in the effort to obtain a settlement for the clients. Having considered the factors set out above, the Court concludes that Neiswinger's lien is valid in the amount of \$1,666.67.

Appellant's App. pp. 2, 4, 7. On November 20, 2010, Neiswinger filed a motion to correct error, which motion the trial court denied.

DISCUSSION AND DECISION

Standard of Review

When, as here, the trial court enters findings of fact and conclusions thereon, we apply the following two-tiered standard of review: we determine whether the evidence supports the findings and the findings support the judgment. *Clark v. Crowe*, 778 N.E.2d 835, 839 (Ind. Ct. App. 2002). The trial court's findings of fact and conclusions thereon will be set aside only if they are clearly erroneous, that is, if the record contains no facts or inferences supporting them. *Id.* at 839-40. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. *Id.* at 840. This court neither reweighs the evidence nor assesses the credibility of witnesses, but considers only the evidence most favorable to the judgment. *Id.*

I. Whether the Trial Court Erred in Allocating Attorney's Fees

"On appeal from an award of attorney's fees, this court applies the 'clearly erroneous' standard to factual determinations, reviews legal conclusions de novo, and

determines whether the amount of a particular award constituted an abuse of the trial court's discretion." *Nunn Law Office v. Rosenthal*, 905 N.E.2d 513, 516 (Ind. Ct. App. 2009) (citations omitted). "An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it." *Id.* (citation omitted). "A trial court has wide discretion in awarding attorney's fees." *Id.* (citation omitted). "The trial court may look to the responsibility of the parties in incurring the attorney's fees, and the trial judge has personal expertise that he or she may use when determining the reasonableness of the fees." *Id.* (citation omitted).

Neiswinger claims that none of the trial court's findings supports its conclusion that she is entitled to three percent of the attorney's fees. In this case, the trial court concluded, and Neiswinger does not dispute, that Neiswinger's share of the fee would be determined by application of quantum meruit.

"Quantum meruit is an equitable doctrine that prevents unjust enrichment by permitting one to recover the 'value of work performed or material furnished if used' by another and if valuable." *Galanis v. Lyons & Truitt*, 715 N.E.2d [858,] 861 [(Ind. 1999)] (quoting 17A C.J.S. Contracts § 440 at 553 (1963)). "Where there is a successor lawyer, the benefit the client received from the predecessor's work is either retained by the client in the form of obtaining a more favorable fee agreement, or it is transferred to the successor in the form of relieving the successor of the need to expend the same effort." *Id.* at 861–62. In [such cases], if [the predecessor] is not compensated for the work [she] performed on [the] case, [the successor attorneys are] unjustly enriched. *See id.* at 862. "The dollar value to offset the unjust enrichment is based on the value conferred on the client, not the effort expended by the lawyer, although the two may be the same in many instances." *Id.*

Determining the proper value of the predecessor's services is ultimately a question of fact for the trial court. *Id.* Significantly, the value of a discharged lawyer's work on a case is not always equal to a standard rate multiplied by the number of hours of work on the case. *Id.* "In determining the reasonable value of the legal services rendered, the time

expended by the attorney alone is not a controlling factor. Among other things, consideration may be given to the general quality of the effort expended by the attorney.’” *Id.* (quoting *Kizer v. Davis*, 174 Ind. App. 559, 569, 369 N.E.2d 439, 446 n.9 (1977) (internal citations omitted)).

Id. at 520.

Here, we cannot say that the trial court abused its discretion in apportioning attorney’s fees. First, we note that the trial court found Neiswinger’s estimate of time spent on the case to be inflated, a finding that we will not disturb on appeal. Moreover, we can find no fault with the trial court’s evaluation of Neiswinger’s efforts and their worth to the Allens or to Delaney and Lee. In summary, the trial court concluded that Neiswinger’s amendment of the original complaint was not significant given the ease with which complaints can be amended later; her depositions of the parties were minimally helpful when medical depositions were far more important, depositions in which she did not participate; her participation in litigating some important issues was minimal because she withdrew before final resolution; and she prepared memoranda and letters to little effect. Indeed, Neiswinger points to no specific flaw in these conclusions, claiming only on appeal that “[t]he majority of the substantive attorney work was done by [her].” Appellant’s Br. p. 44. Even if this were true, however, this argument does not address the quality of work or its value to the clients or successor attorneys.

Neiswinger's argument amounts to an invitation to reweigh the evidence, one that we decline.²

II. Whether the Trial Court Erred in Calculating Neiswinger's Expenses

As previously mentioned, the trial court ordered that Neiswinger be reimbursed \$286.50 for expenses. Neiswinger contends that the trial court erred in refusing to reimburse her for an additional \$250.00. While Neiswinger points to evidence in the record allegedly tending to support the additional expenses, the trial court was under no obligation to credit any of this evidence, and did not. Indeed, the trial court specifically found that "the \$250.00 alleged expense is not sufficiently supported by the evidence." Appellant's App. p. 37. We will not disturb this factual determination on appeal.

III. Whether the Trial Court Abused its Discretion in Denying Neiswinger's Motion for Sanctions

Neiswinger contends that the trial court abused its discretion in denying her Trial Rule 37 motion for sanctions for discovery violations, for what she characterizes as "extensive frivolous arguments, ignoring of court orders, rehashing of issues already settled, vexatious delays and factual misrepresentations by Delaney and Lee." Appellant's Br. p. 49-50. "A trial court enjoys broad discretion when ruling upon discovery matters, and we will interfere only when an abuse of discretion is apparent." *Smith v. Smith*, 854 N.E.2d 1, 4 (Ind. Ct. App. 2006) (citing *Davidson v. Perron*, 756

² Neiswinger also argues that the trial court erroneously addressed Appellees' argument that she was not entitled to any of the attorney's fees because she "abandoned" the Allens. The trial court, however, decided this issue in Neiswinger's favor, concluding that she had sufficient cause to withdraw and allowing her to recover some attorney's fees. We will not disturb the trial court's conclusion on this issue.

N.E.2d 1007, 1012 (Ind. Ct. App. 2001)). “An abuse of discretion occurs when the decision is against the logic and natural inferences to be drawn from the facts of the case.” *Id.* (citing *Davidson*, 756 N.E.2d at 1012). “Because of the fact-sensitive nature of discovery issues, a trial court’s ruling is given a strong presumption of correctness.” *Id.* (citing *Davidson*, 756 N.E.2d at 1012). “Further, a trial court enjoys broad discretion in determining the appropriate sanctions for a party’s failure to comply with discovery orders.” *Id.* (citing *Vernon v. Kroger*, 712 N.E.2d 976, 982 (Ind. 1999)). “Absent clear error and resulting prejudice, the trial court’s determinations with respect to violations and sanctions should not be overturned.” *Id.* at 4-5 (citing *Davidson*, 756 N.E.2d at 1013).

We conclude that the trial court did not abuse its discretion in denying Neiswinger’s motion for sanctions. It is apparent from the trial court’s order that it found neither side in the fee dispute to be without fault. The trial court noted, and apparently accepted, Delany and Lee’s argument that they had tendered their entire case file to Neiswinger, who refused to accept it. Under the circumstances, where the trial court has found both sides at fault, we cannot say that declining to impose sanctions on one side only is against the logic and natural inferences to be drawn from the facts of the case. The trial court found that Neiswinger had produced insufficient evidence to warrant sanctions, and we will not disturb that finding on appeal. The trial court did not abuse its discretion in denying Neiswinger’s motion for sanctions.

The judgment of the trial court is affirmed.

ROBB, C.J., and BARNES, J., concur.