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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002819-MR

KEVIN W. CECIL — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 96-CI-005167

ELI GEORGE — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUDGEL, JOHNSON AND TACKETT, JUDGES.

JOHNSON, JUDGE: Kevin Cecil has appealed from an order entered by the Jefferson Circuit Court on November 6, 2000, which denied him relief on his motion challenging the propriety of the attorney's fees charged him pursuant to an employment contract. Having concluded that the trial court's factual findings were not clearly erroneous and that its legal conclusions were correct, we affirm.

This case arose out of a dispute between Cecil and his former attorney Eli George concerning the attorney's fee that

Cecil owed George for George's representation of Cecil in a personal injury action seeking damages as the result of an automobile accident. Cecil filed a lawsuit against Eck Miller Transportation Corporation following an accident in which his vehicle was struck by a truck driven by an employee of Eck Miller. Cecil was originally represented by attorney Richard Breen; and he had a written "Attorney-Client Agreement" with Breen which called for an attorney's fee of "a sum equal to one-third (1/3) of any recovery" plus reimbursement of "all expenses advanced[.]" During the pendency of his personal injury lawsuit, Cecil became dissatisfied with Breen's representation and replaced him with George. Breen then filed an attorney's lien in the lawsuit to protect his contract claim against Cecil. Subsequently, Breen, Cecil, and George agreed that Cecil would pay George an attorney's fee based on "38 1/2% of all sums recovered[;]" and that George and Breen would divide the attorney's fee equally. These terms were contained in the new written "Employment Agreement" signed by Cecil and George. George and Breen agreed between themselves to accept as their individual share of the attorney's fee a sum equal to 19 1/4% of "any recovery."

On December 23, 1999, Cecil signed a document authorizing George to settle his claim "for the total sum of $369,000.00" and to disburse the settlement proceeds by paying the two attorneys a total fee of $142,065.00, and reimbursing them $43,545.62 for expenses. On June 20, 2000, attorney Cecil

A. Blye filed a motion to enter his appearance on behalf of Cecil; and on July 27, 2000, Blye filed a motion for a hearing on Cecil's claim that he had been coerced into accepting the settlement. On October 30, 2000, the Jefferson Circuit Court held a hearing on this motion; and on November 6, 2000, the trial court entered an order denying Cecil relief on this motion and dismissing Cecil's case "as settled". The trial court stated:

> The record clearly indicates that counsel for the plaintiff, The Hon. Eli George, had actual authority from the plaintiff to settle this case for those sums, and for that reason, the terms of the settlement must be enforced and the above-styled action is dismissed as settled.

This appeal followed.

Cecil claims that he was coerced into signing the settlement agreement; and that the attorney's fees were miscalculated because they were calculated as 38 1/2% of the gross settlement amount instead of 38 1/2% of the net settlement, i.e., the settlement proceeds remaining after the case-related expenses had been deducted. A trial court's factual findings "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."[1] A factual finding is not clearly erroneous if it is supported by substantial evidence.[2]

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[1]Kentucky Rules of Civil Procedure (CR) 52.01. See also Lawson v. Loid, Ky., 896 S.W.2d 1, 3 (1995); A & A Mechanical, Inc. v. Thermal Equipment Sales, Inc., Ky.App., 998 S.W.2d 505, 509 (1999).

[2]Owens-Corning Fiberglas Corp. v. Golightly, Ky., 976 S.W.2d
(continued...)

Substantial evidence is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people.[3] "It is within the province of the fact-finder to determine the credibility of witnesses and the weight to be given the evidence."[4]

However, "[t]he construction and interpretation of a contract, including questions regarding ambiguity, are questions of law to be decided by the court."[5] "The cardinal rule of contract interpretation is that all words and phrases in the contract are to be given their ordinary meanings."[6] Under Kentucky law, contracts should be interpreted according to the parties' mutual understanding at the time they entered into the contract and "'[s]uch mutual intention is to be deduced, if possible, from the language of the contract alone.'"[7] Thus, as to

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[2](...continued)
409, 414 (1998); Uninsured Employers' Fund v. Garland, Ky., 805 S.W.2d 116, 117 (1991); Faulkner Drilling Co., Inc. v. Gross, Ky.App., 943 S.W.2d 634, 638 (1997).

[3]Golightly, supra at 414; Janakakis-Kostun v. Janakakis, Ky.App., 6 S.W.3d 843, 852 (1999)(citing Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 308 (1972)).

[4]Garland, supra at 118.

[5]First Commonwealth Bank of Prestonsburg v. West, Ky.App., 55 S.W.3d 829, 835 (2000)(citing Hibbitts v. Cumberland Valley National Bank & Trust Co., Ky.App., 977 S.W.2d 252, 254 (1998)).

[6]Fay E. Sams Money Purchase Pension Plan v. Jansen, Ky.App., 3 S.W.3d 753, 757 (1999)(citing O'Bryan v. Massey-Ferguson, Inc., Ky., 413 S.W.2d 891 (1966)).

[7]Nationwide Mutual Insurance Co. v. Nolan, Ky., 10 S.W.3d 129, 131-32 (1999)(quoting Simpsonville Wrecker Service, Inc. v. Empire Fire & Marine Insurance Co., Ky., 793 S.W.2d 825, 828-29
(continued...)

the trial court's factual findings, we are limited in our review to determining whether a finding is clearly erroneous; but as to any legal issue involved in the interpretation of the employment agreement, our review is de novo, and we need not give any deference to the trial court's legal conclusions.

We have reviewed the entire hearing held on October 30, 2000, and we cannot say that the trial court's factual finding that Cecil did not sign the settlement under duress was clearly erroneous. Cecil admitted that he was not under duress when he originally hired Breen or George, but he claimed that he felt threatened by the December 22, 1999, letter that George sent to him. The letter stated:

> I cannot and will not be responsible for some of the decisions you make which jeopardize the amount of your recovery. In other words, I do not want to be your attorney if you make decisions which cause you to lose the discounts I have negotiated. Norton's has advised us that you will lose the discount if they do not receive their check by December 31, 1999. That means I'll have to withhold the full amount from your settlement.
>
> If it is necessary for me to withdraw as your attorney, I will also ask the Court for permission to negotiate the check and receive my fee and expenses and the fee and expenses I am required to pay Mr. Breen. I will make separate checks to you and the medical providers and let you handle your own dispute over payment or pay another lawyer to do so. I will file a Motion and ask the Court to hear the matter on January 4, 2000 at 1:00 p.m. You should be present to protect your

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[7](...continued)
(1990)).

> own interest and I would recommend you employ your own attorney.
>
> While you may not care about getting your money, I do care about getting what I'm entitled to under our contract, and I intend to ask the Court for permission to take that money.

The undisputed background to this letter is that George had negotiated discounts on the charges from several of Cecil's medical providers. The Norton's discount referenced in the letter amounted to $7,154.05 that would have been lost if the payment had not been made before the end of the year. As of the date of the letter, George had nine days to send Norton's the payment to guarantee that Cecil would receive the agreed upon discount. The letter merely stated the simple fact that Cecil had a deadline to meet if he wanted to guarantee that he would receive the discount.

"For actionable civil duress to have occurred, there must be 'an actual or threatened violation or restraint on a man's person, contrary to law, to compel him to enter into a contract or discharge one.'"[8] While Cecil testified at the hearing that he was under duress, it was within the purview of the trial court as the fact-finder to judge the credibility of the witnesses and to weigh the evidence. This letter did not constitute evidence that could be deemed sufficient to have required the trial court to find that George had misrepresented

[8] Boatwright v. Walker, Ky.App., 715 S.W.2d 237, 243 (1986)(citing Bond State Bank v. Vaughn, 241 Ky. 524, 44 S.W.2d 527, 528 (1931); and Fratello v. Fratello, 118 Misc. 584, 193 N.Y.S. 865 (1922)).

the facts or that he was threatening Cecil so as to have compelled Cecil to enter into the settlement. Since there was substantial evidence to support the trial court's findings, we cannot hold the findings to be clearly erroneous.

Cecil also contends that the attorney's fee claimed by George is not reasonable and that it was not calculated properly. Cecil's employment agreement with George, which was signed by Cecil and George on July 27, 1998, stated:

> I, Kevin Cecil, employ Eli George Law Office to represent me in any and all claims I may have against Mr. Harper and Eck Miller because of injuries I received in the truck/auto accident on June 15, 1995 in Louisville, Kentucky.
>
> I agree to pay my attorney thirty eight and one-half percent (38 1/2%) of all sums recovered. On February 7, 1996 I employed Richard Breen to represent me for injuries received in the accident. I agreed to pay Mr. Breen one-third (1/3) of any sums recovered. Mr. George agrees to pay all sums due Mr. Breen by reason of the contract from his thirty eight and one-half percent (38 1/2%) fee.
>
> I will reimburse Mr. Breen for his expenses from my portion of the recovery, as agreed to in the Agreement. I will also reimburse Eli George Law Office for court costs and expenses advanced from my portion of the amount recovered [emphasis added].
>
> It is agreed that if nothing is recovered my attorney will receive nothing for his services and my attorney will waive reimbursement of any expenses he advances.

The gross settlement with Eck Miller was for $369,000.00, and the total attorney's fee of $142,065.00 was based on 38 1/2% of that amount. Cecil claims that the itemized

expenses should have been subtracted from the total settlement before the attorney's fees were calculated. Since the itemized expenses were $43,545.62, the net settlement would have been $325,454.38 before the deduction of attorney's fees. The attorney's fees calculated on the net settlement would have been $125,299.94 or $16,765.06 less.[9]

Cecil has failed to cite this Court to any authority that would support his claim that the attorney's fee agreement is unfair or unreasonable. The only case cited by Cecil is Cox v. Cooper,[10] which is not on point. In Cox, the former Court of Appeals of Kentucky held that unless the parties otherwise agreed, a contingent fee contract is based on the amount of the recovery and not the amount of the verdict. Unlike the present case, Cox involved a situation in which a portion of the total jury verdict was not recoverable. The Court stated that a contingent attorney's fee must be based on the amount actually recovered by the client and not the total amount of a verdict, part of which is unrecoverable. While Cox does not address the issue before this Court (whether it is permissible for the parties to agree that a contingent attorney's fee will be based on the gross settlement rather than the net settlement) it can be argued that Cox actually supports George's position since the Court stated that "[a] contingent fee contract is based on the

[9]In his brief, Cecil claims the difference is $18,393.00, but he has apparently made a calculation error.

[10]Ky., 510 S.W.2d 530, 538 (1974).

recovery[.]" That is exactly how George computed the contingent attorney's fee herein - on the actual settlement recovery of $369,000.00.

Furthermore, "[a]bsent an agreement as to the amount of the fee before the services were rendered, the law implies an agreement that the attorney will be reasonably compensated."[11] In the case sub judice, the parties did in fact enter into an agreement as to attorney's fees. We are not aware of any case law that would support the conclusion that the agreement in the present case was unfair or unreasonable. The terms of the agreement were not ambiguous and the contract clearly stated that the case expenses would be paid from Cecil's portion of the recovery. Accordingly, the disbursements of the attorney's fees and the case-related expenses were fair and reasonable and the disbursements were calculated correctly.

For the foregoing reasons, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Cecil A. Blye
Louisville, Kentucky

BRIEF FOR APPELLEE:

Eli George
Louisville, Kentucky

[11]Daniels v. May, Ky., 467 S.W.2d 372, 373 (1971)(citing Garnett v. Walton, Ky., 242 S.W.2d 107 (1951)).