

RENDERED: July 16, 2004, 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000124-MR

KENNETH H. BAKER
AND WO SIN CHIU

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 98-CI-006240

CARL FREDERICK AND
RICHARD SHAPERO

APPELLEES

AND

NO. 2003-CA-000139-MR (CROSS-APPEAL)

RICHARD SHAPERO AND
CARL D. FREDERICK

CROSS-APPELLANTS

v. CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 98-CI-006240

WO SIN CHIU; KENNY H. BAKER;
AND AUTO-OWNERS INSURANCE COMPANY

CROSS-APPELLEES

OPINION

AFFIRMING ON DIRECT APPEAL (NO. 2003-CA-000124-MR)
AND VACATING AND REMANDING ON CROSS-APPEAL
(NO. 2003-CA-000139-MR)

** ** * * *

BEFORE: GUIDUGLI, JOHNSON AND MINTON, JUDGES.

GUIDUGLI, JUDGE. This appeal and cross-appeal arise from the Jefferson Circuit Court's December 17, 2002, Findings of Fact, Conclusions of Law and Judgment entered following a bench trial regarding the enforcement of an attorney's lien. Wo Sin Chiu (hereinafter "Chiu") and Kenneth H. Baker (hereinafter "Attorney Baker") have directly appealed from the judgment, asserting that the lien should not be enforced and that the attorneys who filed the lien are not entitled to a fee. Richard Shapero (hereinafter "Attorney Shapero") and Carl Frederick (hereinafter "Attorney Frederick") have cross-appealed from the same judgment, arguing that they were entitled to the contracted-for fee, which was higher than that which the trial court awarded. Having reviewed the parties' arguments in their briefs and at oral argument, the record and the applicable law, we must affirm on the direct appeal and vacate and remand on the cross-appeal.

We shall first briefly summarize the facts underlying these appeals. On March 27, 1998, Chiu was involved in a motor vehicle accident when the vehicle he was driving was hit by a

car driven by James H. Dennison III. Chiu sustained serious injuries, and was hospitalized for fifteen days. During his hospital stay, Chiu retained the services of Attorney Shapero, who had also been retained to represent the interests of Chiu's passenger, David Detrana. The Employment Agreement Chiu signed, with his sister as a witness, indicated that Attorney Shapero would represent him on a 40% contingency fee basis. Attorney Shapero referred Chiu's case to Attorney Frederick, who shortly thereafter began to work on the case. A month later, Chiu, apparently dissatisfied that his case was being shuffled from attorney to attorney, sought and retained new legal counsel, and discharged Attorney Shapero and Attorney Frederick. Attorney Frederick persuaded Chiu to resume representation from him a few days later. Under Attorney Frederick's supervision, attorney Paul Hershberg began much of the legwork in the investigation of Chiu's case. During this time, Attorney Frederick received a letter from Allstate Insurance Company, the primary liability carrier, tendering policy limits of \$25,000 for Chiu's bodily injury claim. Contact had also been made with Auto-Owners Insurance Company (hereinafter "Auto-Owners") to notify it regarding the \$25,000 settlement offer from Allstate and to pay policy limits on Chiu's underinsured motorist claim.

Two months after returning to Attorney Frederick's representation and apparently still dissatisfied with the

shuffling of his case, Chiu retained Attorney Baker, whose fee would be one-third of any recovery Chiu received. Chiu eventually received \$10,000 in PIP benefits as well as the \$25,000 to settle his bodily injury claim. After filing suit, Auto-Owners agreed to settle the underinsured claim for the policy limits of \$150,000.

Upon their discharge, Attorney Frederick and Attorney Shapero filed an attorney lien to protect their right to collect a fee from Chiu's recovery. Once the case was settled, they sought and were granted leave to file an Intervening Petition to enforce their lien and collect 40% of Chiu's recovery. Auto-Owners also filed a motion to recover the \$25,000 held in escrow that it had advanced to Chiu so that it could protect its subrogation rights. A bench trial on the attorney lien enforcement was held over three days on April 26, July 2, and August 9, 2002. In their post-trial brief, Attorney Frederick and Attorney Shapero argued that they were entitled to 33 1/3% of the \$175,000 recovery, as Attorney Baker had added no real value to Chiu's recovery. On the other hand, Attorney Baker argued that Chiu's former attorneys did not have a valid and enforceable fee agreement with Chiu, and that in any event Chiu discharged them for cause, eliminating their right to recover a fee.

On December 17, 2002, the trial court entered its Findings of Fact, Conclusions of Law and Judgment. Its factual findings were as follows:

Chiu¹ sustained extensive injuries from an auto collision on March 27, 1998. He remained in the hospital for fifteen (15) days, seven (7) of those in intensive care.

Shapero received a call that Chiu wished to retain his services; a paralegal was sent to the hospital to secure Chiu's signature on an Employment Agreement. Though Chiu's sister, Yuen Chiu denies initiating the contact, she signed the Agreement and assisted her brother in signing it as well. (Respondent's Exhibit 2). This occurred on April 1, 1998.

On May 7, 1998, Chiu discharged Shapero and Frederick to hire other counsel (Respondent's Exhibit 5). Then on May 11, 1998, Chiu discharged other counsel and returned to Shapero and Frederick for representation. Thereafter, on July 14 1998, Chiu again discharged Shapero and Frederick (Chiu Exhibit 8) and engaged the services of Kenneth Baker (Chiu Exhibit 7).

A review of the testimony and exhibits indicate[s] that Shapero and Frederick rendered services to Chiu including the following:

1. April 22, 1998 - Letter to Auto-Owners demanding PIP benefits;
2. April 27, 1998 - Investigation into rental car issue;
3. April 30, 1998 - Letter to Auto-Owners to notify of underinsured claim;

¹ We have corrected the spelling of Chiu's name throughout the trial court's judgment.

4. Investigation of possible product liability claims; hired a professional engineer; viewed scene and inspected Chiu's vehicle;
5. Set up and conducted police interviews;
6. May 8, 1998 - Letter to Allstate demanding replacement vehicle;
7. May 15, 1998 - Letter to Auto-Owners requesting lump sum No Fault payment for lost wages; requesting Allstate pay the property damage part of the claim;
8. May 15, 1998 - Letter to Allstate requesting policy limits payment (\$25,000.00). Determined Auto-Owners underinsured coverage was \$150,000.00;
9. Represented Chiu's father regarding a rental car;
10. June 30, 1998 - Letter to Allstate (enclosing Chiu's medical records) demanding limits of \$25,000.00;
11. July 6, 1998 - Discussion with Allstate (demand again);
12. July 9, 1998 - Allstate agrees to pay its \$25,000.00 policy limit;
13. July 9, 1998 - Letter to Auto-Owners inquiring as to its subrogation interest.

Thereafter, on July 14, 1998, Chiu discharges counsel via letter (Intervening Petitioners Exhibit 31) without addressing specific reasons. Frederick then notified Allstate, counsel for Auto-Owners, and Baker

of his and Shapero's attorneys lien on the proceeds of any recovery.

Chiu's major complaint in this case was his feeling that he was "shuffled from attorney to attorney to attorney."

The services Baker provided Chiu from July 14, 1998 to early 2000 are outlined in Baker's Itemization of Work attached as Exhibit 2 to his Memorandum. Included in the services are investigation by accident reconstructionists and a seat belt expert, preparation and filing of Complaint and discovery normally conducted in such cases.

The trial court first addressed the legality of the Employment Agreement, noting that the allegation of unethical solicitation was not developed before finding the agreement to be valid and enforceable at least as of May 11, 1998. The trial court then held that Attorney Shapero and Attorney Frederick were not discharged for cause, and that they were entitled to a fee pursuant to LaBach v. Hampton, Ky.App., 585 S.W.2d 434 (1979). Based upon the recovery obtained for Chiu, the trial court awarded Shapero and Frederick 25% of the \$25,000 payment from Allstate and 12.5% of the \$150,000 settlement with Auto-Owners for a total fee of \$25,000. The trial court also addressed Auto-Owners' motion for the release of its escrowed funds, finding that its agreement with Chiu and Attorney Baker to indemnify it of attorney lien claims from Attorney Shapero and Attorney Frederick did not absolve it of its duty to honor their lien. Therefore, the trial court denied Auto-Owners' motion to

release the \$25,000 in escrow. This appeal and cross-appeal followed.

On direct appeal, Chiu and Attorney Baker argue that the circuit court erred in awarding fees despite Attorney Shapero's and Attorney Frederick's violations of the Rules of Professional Conduct, in finding that they were not discharged for cause, and in finding that they were entitled to receive a fee for the underinsured motorist settlement. In their responsive brief, Attorney Shapero and Attorney Frederick point out that Chiu and Attorney Baker limit their arguments to their disagreement with the trial court's factual findings. However, they argue that the trial court's factual findings are not clearly erroneous and should not be set aside. On cross-appeal, Attorney Shapero and Attorney Frederick argue that they are entitled to their contracted-for fee, less a reasonable cost for the successor counsel, although they assert that Attorney Baker added no value to Chiu's case. In total, they request a judgment against Attorney Baker and Auto-Owners in the amount of \$58,327.50, subject to a credit for the funds held in escrow, along with interest and court costs.

Our standard of review in this case is enunciated in CR 52.01, which provides, in pertinent part:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and

state separately its conclusions of law thereon and render an appropriate judgment. . . . Findings of fact 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.

In utilizing this standard of review, the Supreme Court of Kentucky has held:

[F]or purposes of appellate review, a finding of fact of a trial judge ranks in equal dignity with the verdict of a properly instructed jury, *i.e.*, if supported by substantial evidence, it will be upheld, otherwise, it will be set aside as "clearly erroneous" . . . In this jurisdiction, "substantial evidence" means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men. . . . Thus, even though the decision of the trial judge is accorded presumptive correctness on appeal, the appellate court still must review the evidence to determine whether that decision was clearly erroneous.

Owens-Corning Fiberglas Corp. v. Golightly, Ky., 976 S.W.2d 409, 414-15 (1998)(Citations omitted). Once the trial court makes appropriate factual findings, those facts must be considered in light of the applicable law. Pursuant to Sherfey v. Sherfey, Ky.App., 74 S.W.3d 777, 782-83 (2002), the resulting decision,

will not be disturbed unless it constitutes an abuse of discretion.[] "'Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.'" . . . "The exercise of

discretion must be legally sound."[]
(Footnotes omitted.)

We shall now review the trial court's judgment with this standard in mind.

As to the trial court's findings of fact, we must hold that there is substantial evidence in the record to support the factual findings, and that as such those findings are not clearly erroneous. It is apparent from the record that the trial court had to examine very contradictory testimony and make its findings based upon the credibility of the witnesses. However, it is the province of the trial court in matters tried without a jury to determine witness credibility and make appropriate findings. CR 52.01. In the present matter, these findings relate to the improper solicitation issue, which the trial court ultimately found was not sufficiently developed to support a finding of improper action, and to whether Attorney Shapero and Attorney Frederick were discharged for cause. The trial court chose to rely upon Attorney Shapero's testimony that someone had contacted his office regarding representation, despite Chiu's sister's testimony that neither she nor any member of her family called Attorney Shapero's office. Furthermore, Chiu himself testified that he did not make his complaints known to either Attorney Shapero or Attorney Frederick, and that his only real complaint was that his case

was not being handled by one attorney. Based upon our review of the record in conjunction with the trial court's judgment, we must hold that the trial court's findings are not clearly erroneous.

We must also hold that the trial court did not abuse its discretion in applying the applicable law to its findings. Attorney Baker and Chiu first argue that the trial court erred in awarding fees despite improper client solicitation. This argument is based upon SCR 3.130, Rule 7.09(1), which provides, "[n]o lawyer directly or indirectly through another person shall, in-person or by live telephone, initiate contact or solicit professional employment from a prospective client with whom the lawyer has no family or direct prior professional relationship." If illegal or unethical solicitation is established, all fees are deemed waived and are forfeited. SCR 3.130, Rule 7.10. However, Attorney Baker and Chiu's argument as to this issue must fail because we have already determined that the trial court's finding that no improper solicitation took place is supported by substantial evidence.

Attorney Baker and Chiu next argue that the trial court erred in finding that the dismissal of Attorney Shapero and Attorney Frederick was not for cause. Although we agree that "the client has the right to discharge his attorney at any time, with or without cause," Henry v. Vance, 111 Ky. 72, 63

S.W. 273, 276 (1901), Chiu's proffered reason, that he felt he was being shuffled from attorney to attorney, is clearly not enough to make the discharge for cause. In addition, Attorney Baker and Chiu continue to advance as grounds for this argument that there was improper solicitation, that Attorney Shapero's Employment Agreement did not include Attorney Frederick's name, and that there was improper contact with Chiu after the first discharge. We must agree with the trial court that there was no violation of SCR 3.130 Rule 1.5, which concerns, in part, the splitting of fees between attorneys in different firms.

Attorney Shapero's Employment Agreement states that other attorneys would be working on the case, and Attorney Frederick immediately introduced himself to Chiu as one of the attorneys who would be working on his case. Likewise, we agree that there was no violation of SCR 3.130 Rule 7.09(2)(a), which prohibits an attorney from soliciting a client when that client has made it known that he does not wish to be solicited by that attorney. Although Chiu did discharge Attorney Shapero and Attorney Frederick, the record does not reflect that he at any time indicated that he did not wish to be contacted by them.

Therefore, we hold that the trial court's findings of fact were supported by substantial evidence and that it did not abuse its discretion in determining that Attorney Shapero and Attorney Frederick were entitled to recover attorney fees.

On cross-appeal, Attorney Shapero and Attorney Frederick argue that they were entitled to the full amount of the fee they contracted for, which they then limited to \$58,327.50, equaling the one-third fee Attorney Baker collected. In its judgment, the trial court relied upon this Court's holding in LaBach v. Hampton, Ky.App., 585 S.W.2d 434 (1979), which provides that fees in such cases should be determined on a quantum meruit basis. The LaBach Court cited the earlier decision in Henry v. Vance, 63 S.W. at 276, in stating that "the recovery should be the amount of the contingent fee 'less such proportion of that sum as is reasonably represented by the labor and attention and expense that would have been required of plaintiffs to complete their undertaking, but which they did not do.'" LaBach, 585 S.W.2d at 436. The LaBach Court concluded, "our courts have used the term quantum meruit to indicate that the discharged attorney cannot rely upon the contract to collect a full fee but must deduct from the contract fee the reasonable cost of services of other attorneys required to complete the contract." Id.

In the present matter, the trial court properly stated that it was relying upon the holding in LaBach and determined that Attorney Shapero and Attorney Frederick were entitled to a fee. However, the trial court failed to completely follow LaBach and award them the requested fee, less the value Attorney

Baker added to the case. Instead, the trial court relied in part upon Attorney Frederick's admission at the hearing that they most likely would have reduced their contracted-for 40% fee to a 25% fee, and awarded them a fee of \$25,000, representing 25% of the \$25,000 recovery from Allstate and 12.5% of the \$150,000 recovery from the UIM claim. Therefore, we must hold that the trial court abused its discretion in awarding a fee of \$25,000 without first having held a hearing to determine the value of the services Attorney Baker provided, which would then be deducted from the fee² Attorney Shapero and Attorney Frederick have claimed. Although this issue was argued in the briefs, we shall allow the trial court to make its own determination as to what value Attorney Baker's services added to Chiu's recovery, if any. We further note that because Attorney Shapero and Attorney Frederick are asserting that Attorney Baker added no value to Chiu's recovery, the burden will be upon Attorney Baker to establish the worth of his services.

Lastly, Attorney Shapero and Attorney Frederick state in the conclusion of their brief that they are entitled to a judgment against Auto-Owners as well as Attorney Baker, with a credit for the \$25,000 held in escrow. Obviously, the trial

² We note that in their brief, Attorney Shapero and Attorney Frederick have claimed that they are entitled to the one-third contingency fee Attorney Baker received, while at the hearing they indicated that they would most likely have reduced their contracted for 40% contingency fee to a 25% contingency fee.

court's ruling on this matter, in which Auto-Owners' motion to release the funds to it was denied, shall stand as Auto-Owners did not perfect an appeal as to that ruling. At this point, we shall decline to alter the trial court's ruling in this regard as Attorney Shapero and Attorney Frederick were awarded a judgment against Attorney Baker and Chiu for the fee awarded on their attorney lien.

For the foregoing reasons, the Jefferson Circuit Court's Findings of Fact, Conclusions of Law and Judgment is affirmed in part as to the direct appeal and vacated in part and remanded as to the amount of the fee awarded in the cross-appeal.

ALL CONCUR.

BRIEF FOR AND ORAL ARGUMENT
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