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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001268-MR

WO SIN CHIU and
KENNETH H. BAKER — APPELLANTS

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

CARL D. FREDERICK and
LAURA WASZ, PERSONAL REPRESENTATIVE
OF THE ESTATE OF RICHARD SHAPERO — APPELLEES

OPINION
AFFIRMING IN PART;
REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, MOORE AND VANMETER, JUDGES.

CLAYTON, JUDGE: Wo Sin Chiu ("Chiu") and Kenneth Baker ("Baker"), collectively the "Appellants," have appealed from the Jefferson Circuit Court's order awarding Carl Frederick ("Frederick") and the estate of Richard Shapero, collectively the "Appellees," post-judgment interest from a December 17, 2002, judgment. After careful review of the record and the applicable law, we affirm in

part, reverse in part, and remand for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

This case involves an attorney's lien dispute arising from the legal representation of Chiu. In March 1998, Chiu was involved in a motor vehicle accident and retained the services of Shapero. The employment agreement signed by Chiu indicated that Shapero would represent him on a 40 percent contingency fee basis. Shapero referred Chiu's case to Frederick, who commenced work on the case. Thereafter, Chiu retained new legal counsel, as he was unhappy that his case was being shuffled from attorney to attorney. Frederick was able to persuade Chiu to resume representation from him a few days later, and during this time, Frederick received a letter from Allstate Insurance Company, the primary liability carrier, offering policy limits of $25,000 for Chiu's bodily injury claim. Still dissatisfied with the handling of his case, Chiu again discharged Frederick and Shapero and retained Baker. Chiu eventually received a total settlement of $175,000.

Appellees filed an attorney's lien against the settlement, and a bench trial on the enforcement of the lien was held. In its findings of fact, conclusions of law and judgment entered on December 17, 2002, the trial court found that the employment agreement was valid and enforceable, that Appellees were not discharged for cause, and that they were entitled to a fee pursuant to *LaBach v. Hampton*, 585 S.W.2d 434 (Ky. App. 1979). Based upon the recovery received by Chiu, the trial court awarded Appellees 25 percent of the $25,000 payment from

Allstate and 12.5 percent of the remaining $150,000 settlement for a total fee of $25,000. The trial court apparently arrived at this number in part based on Frederick's admission at the hearing that he and Shapero most likely would have reduced their contracted-for 40 percent fee to a 25 percent fee.

Appellants appealed this judgment to this Court, and Appellees cross-appealed, arguing that they were entitled to their contracted-for fee, less a reasonable cost for the successor counsel. This Court upheld the trial court's factual findings, but found that under *LaBach*, Appellees were entitled to have their fee based on the contingent fee contract less the value of Baker's services as successor counsel. Therefore, the Court affirmed in part and remanded as to the amount of the fee awarded in the cross-appeal.

Thereafter, Appellants appealed to the Kentucky Supreme Court, which granted discretionary review. In a published opinion, the Supreme Court overruled *LaBach* and held that when an attorney employed under a contingency contract is discharged without cause before the completion of the contract, he or she is entitled to fee recovery on a quantum meruit basis only, and not on the terms of the contract. As such, the Court of Appeals opinion was reversed and the matter was remanded to the trial court for proceedings in conformity with the opinion.

After the case was returned to the trial court, the parties declined to offer additional evidence, as Appellees felt that they had presented sufficient evidence at the original bench trial for the court to make a determination as to what they should recover on a quantum meruit basis. The trial court entered a judgment

re-affirming its original findings of fact and concluding that Appellees were entitled, based on a quantum meruit theory of recovery, to an attorney's fee award of $27,000. Thereafter, the trial court also entered an order that post-judgment interest would run on the $25,000 portion of the court's judgment beginning on the date of the original judgment in December 2002.

Thereafter, the trial court entered another order denying Appellants' motion to set aside the $27,000 judgment, noting that its findings of fact in the original order remained undisturbed by both the Court of Appeals and the Supreme Court. The trial court also noted that it had applied those findings to the factors under a quantum meruit analysis and had entered judgment in favor of Shapero and Frederick in the sum of $27,000. This appeal followed.

ANALYSIS

On appeal, if a trial court's findings are supported by substantial evidence, those findings will be upheld as not being clearly erroneous. *Owens-Corning Fiberglas Corp. v. Golightly,* 976 S.W.2d 409, 414 (Ky. 1998); Kentucky Rules of Civil Procedure (CR) 52.01. With regard to the trial court's application of law to those facts, this Court will engage in a de novo review. *Keeney v. Keeney,* 223 S.W.3d 843, 848-49 (Ky. App. 2007).

Appellants first argue that the trial court erred in ordering post-judgment interest from the date of the original judgment rather than from the date of its revised order. Our review of the record and the applicable caselaw, however,

shows that the trial court correctly ordered post-judgment interest from the date of the original judgment.

Kentucky Revised Statutes (KRS) 360.040 states that "[a] judgment shall bear twelve percent (12%) interest compounded annually from its date." In *Com., Transp. Cabinet, Dept. of Highways v. Esenbock*, 200 S.W.3d 489 (Ky. App. 2006), this Court examined KRS 360.040 in a situation similar to this case. In *Esenbock*, a plaintiff involved in a car accident filed a claim with the Kentucky Board of Claims claiming that the Transportation Cabinet was responsible for insufficient road conditions. The Kentucky Board of Claims entered an order determining that the Transportation Cabinet was 20 percent at fault, that the plaintiff was 20 percent at fault, and that the other driver was 60 percent at fault. In calculating the Transportation Cabinet's damages owed to the plaintiff, the Board applied, without regard to the actual damages suffered by the plaintiff, the Cabinet's 20 percent comparative fault to the then-existing $100,000 statutorily prescribed limitation on awards contained in KRS 44.070(5). This calculation determined the Cabinet's comparative fault liability to be $20,000. The plaintiff's collateral source payments of $11,015.75 were subtracted from the Cabinet's comparative fault liability to arrive at a net award of $8,984.25.

The Cabinet appealed the Board's decision to the circuit court, and on February 10, 1999, the circuit court entered an order affirming the Board's decision, reducing the award to an enforceable judgment. That decision was then appealed to the Court of Appeals, which concluded that the Board had erroneously

calculated the award to the plaintiff and that, based upon *Truman v. Kentucky Bd. of Claims*, 726 S.W.2d 312 (Ky. App. 1986), the award should be based on 20 percent of the actual damages suffered, less collateral source payments, but not to exceed $100,000. The Court of Appeals remanded the matter to the Board for a proper determination of the damage award.

On remand, the Board applied *Truman* in conformance with the Court of Appeal's instructions, which resulted in an amended award to the plaintiff of $69,297.15. The plaintiff requested an award of post-judgment interest pursuant to KRS 360.040 and calculated from February 10, 1999, the date of the first judgment. The Cabinet took the position that post-judgment interest should run from February 10, 1999, only on the lower amount that was originally affirmed by the circuit court, and that post-judgment interest on the incremental increase should run only from the date of the Board's amended award. The Court, however, found that once a judgment is entered, and the amount of the judgment is subsequently increased pursuant to the mandate of an appellate court, the increased judgment bears interest from the date of the original judgment.

The situation in *Esenbock* is analogous to this case. Here, the trial court originally entered an incorrect judgment understating the award to which Appellees were entitled. The Supreme Court ultimately issued a directive which had the effect of enlarging the award to the Appellees. Therefore, just as in *Esenbock*, interest should run from the date of the original erroneous judgment, and we affirm the trial court to the extent that it held so.

Appellants argue that the action of the Supreme Court was to fully reverse the trial court, thereby "wiping out" the original judgment. In this case, as in *Esenbock* and unlike the cases cited by Appellants, the appellate courts still held that Appellees were entitled to recover. The courts simply reversed the method used by the trial court to establish how much Appellees were entitled to recover. As stated in *Livingston County. v. Dunn*, 300 Ky. 367, 376, 190 S.W.2d 328, 332 (Ky. 1945):

> The fact that we have increased the amount found [to] be owing, obviously does not alter the fact that [the defendant] was then adjudged to owe the County in a settlement of his accounts . . . .

Appellants further argue that post-judgment interest can only be claimed by Appellees when the amount due is "unavailable" to them. Because the parties had agreed that counsel for Appellees would hold $25,000 in an interest-bearing account pending the outcome of the attorney lien proceedings, Appellants argue that when the trial court entered its judgment on December 17, 2002, the escrowed funds were "unrestricted," and that no other party other than Appellees had any legal claim to the funds. This argument, however, was not presented to the trial court, and we therefore decline to address the merits. The foundation of appellate review is based on the principle that the lower court has first had a chance to deliberate and decide upon the issues. *Florman v. MEBCO Ltd. Partnership*, 207 S.W.3d 593 (Ky. App. 2006). As stated by this Court:

> The Court of Appeals is one of review and is not to be approached as a second opportunity to be heard as a trial

> court. An issue not timely raised before the circuit court cannot be considered as a new argument before this Court.

Id. at 607(*quoting Lawrence v. Risen*, 598 S.W.2d 474, 476 (Ky. App. 1980)).

While we agree with the trial court that judgment began to accrue on the date of the original judgment, we disagree that it should only accrue on the amount of $25,000. Kentucky jurisprudence dictates that a judgment entered after remand should place each party in the position it would have been in had the trial court's original action been correct. *Elpers v. Johnson*, 386 S.W.2d 267, 268 (Ky. 1965). Therefore, in order to place the parties in the position they would have been in had the trial court not erred in the first judgment, Appellees are entitled to receive from Appellants interest of 12 percent per annum on the entire amount of $27,000 from December 17, 2002, rather than simply on the amount of the original judgment of $25,000. This also comports with *Esenbock*, in which the entire increased judgment bore interest from the date of the original judgment.

Based on the foregoing, we affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Kenneth Baker
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BRIEF FOR APPELLEES:

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