

RENDERED: JANUARY 4, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001254-MR

THEODORE H. LAVIT
D/B/A THEODORE H. LAVIT
& ASSOCIATES, P.S.C.

APPELLANT

v. APPEAL FROM MARION CIRCUIT COURT
HONORABLE ROBERT W. MCGINNIS, JUDGE
ACTION NO. 09-CI-00288

REBECCA R. CLEMENTS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, LAMBERT, AND STUMBO, JUDGES.

CLAYTON, JUDGE: This is an appeal of the denial of attorney's fees after a bench trial in the Marion Circuit Court. Based upon the following, we affirm the decision of the trial court.

BACKGROUND INFORMATION

Appellee, Rebecca R. Clements, was the primary beneficiary of her husband's approximate \$5 million estate. The decedent's brothers contested his will and, as part of their basis, alleged Clements may have been responsible for the decedent's death either through action or inaction. Representing Clements in the estate matter were attorneys Jerry Fowler, II and Joseph Mattingly, III. Since it was possible Clements could be charged criminally, Fowler and Mattingly arranged for her to be represented by the Appellant, Theodore H. Lavit. Mattingly and Fowler petitioned the court and were granted a release of \$25,000 to Clements for various expenses, including legal fees.

What is referred to as Phase One of the criminal issue by Lavit began in early 2007. Clements gave Lavit a \$5,000 retainer fee and he reviewed her file. Lavit also contends that he assisted Mattingly and Fowler with issues that arose during the civil litigation of the estate. Mattingly and Fowler deny this. In May of 2007, Lavit contends his employment was terminated since it appeared there would be no criminal charges brought against Clements. In her brief, however, Clements asserts there was no such termination.

Lavit contends that Clements later learned that information regarding her possible involvement in the death of her late husband would be presented to the Washington County grand jury on July 5, 2007. This is considered Phase Two of the proceedings by Lavit. No true bill was returned by the grand jury. Lavit then

brought an action in Marion Circuit Court for attorney fees he asserts he did not receive.

The Marion Circuit Court conducted a bench trial on the issue on June 7, 2011, and on July 5, 2011, issued Findings of Fact and Conclusions of Law in favor of Clements. Lavit then filed this appeal.

STANDARD OF REVIEW

Kentucky Rules of Civil Procedure (CR) 52.01 provides that “[f]indings 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 witnesses.” Findings are considered to be “clearly erroneous . . . if they are manifestly against the weight of the evidence.” *Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008); *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967).

With this standard in mind, we review the trial court’s findings and conclusions.

DISCUSSION

Lavit first contends that the trial court erred in making findings of fact which were inconsistent with its conclusions of law. Specifically, Lavit contends that the trial court found that Mattingly and Fowler contracted on behalf of Clements to employ him for her criminal representation, that the Phase One fee of \$5,000 was negotiated by Clements’s agents, that Clements paid the Phase One fee without ever discussing it with Lavit, that the representation had concluded, that additional work was undertaken in Phase Two and that no discussion was had between the

parties regarding any additional fee for Phase Two. He argues that the trial court then made conclusions of law that there was no contact between the parties and that they did not have a meeting of the minds as to fee. Lavit contends this conclusion is inconsistent with the above findings.

The trial court did not differentiate in either its findings or conclusions between a Phase One and a Phase Two of the representation of Clements by Lavit. In fact, the only person who so refers to what might be considered the two phases of the representation is Lavit. While Lavit is correct that the acts of an agent bind the principle when the agent is acting within the scope of his authority, *Kentucky Home Life Ins. Co. v. Johnson*, 263 Ky. 787, 93 S.W.2d 863 (Ky. 1936), we agree with the trial court that there was no meeting of the minds regarding a specific fee for what Lavit considers a second phase of his representation of Clements.

Lavit's second argument on appeal is that the trial court erred by failing to award him the agreed upon fee. As set forth above, however, we agree with the trial court that there was no meeting of the minds between either Clements or Lavit, or one of her civil attorneys and Lavit, regarding a specific fee outside of the initial retainer. Thus, we affirm the decision of the trial court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Joseph R. Stewart
Lebanon, Kentucky

BRIEF FOR APPELLEE:

Rebecca R. Clements, *pro se*
Jeffersonville, Indiana