

D. DOUGLAS HOWARD, JR.

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NO. 2001-CA-2040

VERSUS

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COURT OF APPEAL

RONALD A. JAKELIS

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FOURTH CIRCUIT

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STATE OF LOUISIANA

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 99-2895, DIVISION "D"
HONORABLE LLOYD J. MEDLEY, JUDGE

JUDGE MICHAEL E. KIRBY

(Court composed of Judge Miriam G. Waltzer, Judge Michael E. Kirby,
Judge David S. Gorbaty)

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This case involves a suit on open account filed by attorney, D. Douglas Howard, Jr., against his former client, Ronald A. Jakelis. This suit was filed on February 23, 1999 by Mr. Howard, and alleged that Mr. Jakelis owed him \$14,098.90, plus legal interest from date of judicial demand, attorney's fees and all costs of the proceedings. Mr. Howard represented Mr. Jakelis in domestic litigation, and he alleges that \$14,098.90 is the unpaid balance on Mr. Jakelis' account for professional services rendered by Mr. Howard. Mr. Howard attached to his petition a copy of a certified letter sent to and received by Mr. Jakelis. In the letter, Mr. Howard notified Mr. Jakelis of the unpaid balance on his account, and informed him that if payment were not received by the specified date, a lawsuit for the unpaid balance, attorney's fees and costs would be filed against him.

Mr. Jakelis answered Mr. Howard's petition denying all allegations, and also filed a reconventional demand in which he stated that over the course of Mr. Howard's representation of him, he paid Mr. Howard \$59,518.64 in fees and costs. He alleged that after a closer inspection of the billing records, he realized that Mr. Howard overcharged him for his

services. Mr. Jakelis, as petitioner in reconvention, alleged that he is entitled to reimbursement for amounts overcharged by Mr. Howard.

Following trial in this matter, the trial court rendered judgment in favor of plaintiff, Mr. Howard, and against defendant, Mr. Jakelis, in the amount of \$14,098.90, plus \$3,524.72 in attorney's fees, judicial interest from date of demand until paid and all costs of the proceedings. The court also dismissed with prejudice the reconventional demand filed by Mr. Jakelis. Mr. Jakelis now appeals.

On appeal, Mr. Jakelis first argues that the trial court erred in determining that Mr. Howard carried his burden of proving his entitlement to \$14,098.90, plus attorney's fees, judicial interest and costs, and in dismissing Mr. Jakelis' reconventional demand. He argues that an attorney attempting to collect fees from a client has the burden of proving the reasonableness of those fees, and that Mr. Howard did not do so.

Mr. Jakelis cites the case of Drury v. Fawer, 590 So.2d 808 (La.App. 4 Cir. 1991), as authority for his argument that an attorney seeking recovery of fees has the burden of proving the amount of fees earned, and the reasonableness of those fees. In the Drury case, this Court affirmed the trial court's determination that the attorney did not carry his burden of proving his entitlement to all of the fees billed. This Court held that this was a

factual determination that hinged entirely on the trial court's credibility call as to the sufficiency of the bills and the testimony of the attorneys who prepared the bills. Drury v. Fawer, 590 So.2d at 811.

Mr. Howard argues that the Drury court's inquiry into reasonableness as a sole basis for the collection of attorney's fees does not apply to the instant case because the suit for attorney's fees in Drury was filed prior to the 1983 amendment to La. R.S. 9:2781. He states that the 1983 amendment to La. R.S. 9:2781 first allowed use of the open account procedure to recover payment of fees for legal services.

Mr. Howard's statement that La. R.S. 9:2781 did not allow for recovery of fees for legal services prior to the 1983 amendment is incorrect. La. R.S. 9:2781 allowed the open account procedure to be used to collect fees for professional services prior to the 1983 amendment, but only if those services were rendered on a continuing basis. The 1983 amendment broadened the statute to allow professionals to also use the open account procedure to recover payment for services rendered in conjunction with a single transaction. See, Mine & Smelter, Div. of Kennedy Van Saun Corporation v. Ceres Gulf, Inc., 526 So.2d 404 (La.App. 4 Cir. 1988).

There is no dispute that Mr. Howard provided legal services to Mr. Jakelis on a continuing basis. This Court's opinion in Drury v. Fawer,

supra, indicates that the disputed legal fees in that case were also for legal services rendered on a continuing basis. However, even though the suit for attorney's fees in the Drury case was filed at a time when La. R.S. 9:2781 allowed for the stream-lined open account procedure to be used to collect fees for professional services, there is no indication in the Drury opinion that the plaintiff in that case sought to avail himself of that procedure. For that reason, we find the Drury case distinguishable from the instant case, in which Mr. Howard filed his suit on open account pursuant to the procedures set forth in La. R.S. 9:2781.

In another case involving a suit filed pursuant to La. R.S. 9:2781 for recovery of attorney's fees, the First Circuit in Deutsch, Kerrigan & Stiles v. Fagan, 95-0811, p. 5 (La.App. 1 Cir. 12/15/95), 665 So.2d 1316, 1320, stated:

Under La. R.S. 9:2781(C), "open account" includes debts incurred for legal services. In proving an open account, the plaintiff must first prove the account by showing that the record of the account was kept in the course of business and by introducing supporting testimony regarding its accuracy. Once a prima facie case has been established by the plaintiff-creditor, the burden shifts to the debtor to prove the inaccuracy of the account or to prove that the debtor is entitled to certain credits. The amount of an account is a question of fact which may not be disturbed absent manifest error. Jacobs Chiropractic Clinic v. Holloway, 589 So.2d 31, 34 (La.App. 1st Cir.1991).

Mr. Howard introduced into evidence two contracts signed by Mr. Jakelis for Mr. Howard's legal services. In those contracts, Mr. Howard's hourly rates and the rates of his associate are clearly specified. He also introduced detailed billing statements that were sent to Mr. Jakelis throughout the course of Mr. Howard's representation of him. Mr. Howard testified that Mr. Jakelis' bills were prepared in the ordinary course of business, and that all bills were paid except for the last one that is the subject of this litigation. He also testified that he made formal demand on Mr. Jakelis by certified letter for payment of the unpaid balance. He identified the letter, which stated that the balance due was \$14,098.90. The letter was introduced into evidence. Mr. Howard stated that the bills sent to Mr. Jakelis were true, correct and accurate to the best of his knowledge, information and belief. Based on the testimony and documentary evidence presented by Mr. Howard, we conclude that he established a prima facie case that he is entitled to recover the unpaid amounts billed to Mr. Jakelis.

After Mr. Howard established his prima facie case, the burden shifted to Mr. Jakelis to prove the inaccuracy of the account or to prove that he is entitled to certain credits. Mr. Jakelis does not dispute the hourly rate charged by Mr. Howard and his associate; rather, he argues that the work

performed by Mr. Howard and his associate for him did not involve the number of hours stated in his bills.

The record shows that Mr. Howard represented Mr. Jakelis for almost three years in an acrimonious, vigorously litigated divorce case. Mr. Jakelis testified that he regularly complained to Mr. Howard on the telephone about the amount of fees he charged, but Mr. Howard testified that Mr. Jakelis never disputed any amounts on his bills other than the last one. The evidence showed that Mr. Jakelis received regular itemized invoices throughout the litigation, and paid those invoices except for the last bill that is the subject of this litigation. There is no evidence in the record of any written complaint from Mr. Jakelis about the fees charged by Mr. Howard.

In his counsel's cross-examination of Mr. Howard, Mr. Jakelis attempted to establish that Mr. Howard inflated his bills by overstating the amount of time that it took for him or his associate to perform certain work for Mr. Jakelis. Mr. Jakelis' counsel questioned Mr. Howard about sixty of the charges in Mr. Jakelis' overall bill. Mr. Howard testified that these charges were accurate. Mr. Howard said that Mr. Jakelis' divorce case was difficult and complex, and his work for Mr. Jakelis was often more involved than the descriptions of tasks stated on the bills. Because Mr. Jakelis did not waive his attorney-client privilege as to his discussions with Mr. Howard

during the divorce proceedings, Mr. Howard was unable at trial to go into details of those discussions and how those discussions factored into the amount of time spent on Mr. Jakelis' case. However, even without being able to mention those discussions, Mr. Howard's testimony established that his bills were accurate and reasonable.

Mr. Jakelis testified that he complained to Mr. Howard that his bills were excessive. However, he admitted that he instructed Mr. Howard to pursue his case as vigorously as possible. Mr. Jakelis disputed Mr. Howard's statements in his bills regarding the length of time for meetings and telephone calls between Mr. Howard and Mr. Jakelis. He said someone in his office was paying Mr. Howard's bills for him, and he did not review them until he received the final bill that is the subject of this litigation.

The trial court found that Mr. Howard carried his burden of proving that he is entitled to recovery of the disputed attorney's fees, and that Mr. Jakelis did not prove that the amount claimed by Mr. Howard is inaccurate or unreasonable or that he is entitled to credits or reimbursement from Mr. Howard. We find no manifest error in the trial court's decision to render judgment in favor of Mr. Howard in the amount of \$14,098.90, plus \$3,524.72 in attorney's fees, judicial interest from date of demand until paid and costs of the proceedings. We further find no manifest error in the trial

court's decision to dismiss Mr. Jakelis' reconventional demand filed against Mr. Howard.

In his second assignment of error, Mr. Jakelis argued that the trial court erred in excluding his expert witness. Mr. Jakelis offered attorney Ellen Kessler as an expert in the practice of domestic law in Louisiana. In its reasons for judgment, the trial court stated that Ms. Kessler was denied qualification as an expert pursuant to the guidelines established by the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993), its progeny and Louisiana Code of Evidence article 702.

Louisiana Code of Evidence article 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In Darbonne v. Wal-Mart Stores, Inc., 2000-551 (La.App. 3 Cir. 11/14/00), 774 So.2d 1022, the Third Circuit summarized the law on the admissibility of expert testimony as follows:

In Mistich [v. Volkswagen of Germany, Inc., et al.], 95-0939, [(La. 1/29/96)] 666 So.2d 1073, the Louisiana Supreme Court pronounced its standard of review for the appellate courts with regard to a trial court's decision for the

admissibility of expert testimony pursuant to La. C.E. art. 702 stating that "[a] trial judge has wide discretion in determining whether to allow a witness to testify as an expert, and his judgment will not be disturbed by an appellate court unless it is clearly erroneous." Id. at 1079. Louisiana has adopted the United States Supreme Court's interpretation of Federal Rule of Evidence 702, which mirrors Louisiana Code of Evidence Article 702. State v. Foret, 628 So.2d 1116 (La.1993); White v. State Farm Mutual Automobile Ins. Co., 95-551 (La.App. 3 Cir. 7/17/96); 680 So.2d 1; See Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Daubert calls upon trial courts to perform a gatekeeping function by deciding whether the expert evidence or testimony is both reliable and relevant. Daubert, 509 U.S. at 588, 113 S.Ct. at 2794. Another recent Supreme Court case has recognized that Daubert's "gatekeeping" obligation applies not only to "scientific" testimony, but also to testimony based on technical and other specialized knowledge. Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

Counsel for Mr. Jakelis stated that he was offering Ms. Kessler as an expert in the practice of family law to testify about the amount of time it takes to perform certain tasks in a domestic case. He said that he was not offering her as an expert in the reasonableness of fees, but he admitted that he intended to ask her questions about whether or not the fees in this case were reasonable.

During questioning on her qualifications to testify as an expert

witness, Ms. Kessler stated that she could not recall ever being qualified in Louisiana as an expert in the area of family law and the reasonableness of fees in Louisiana state or federal court. She said she had never published anything on the reasonableness of fees, and she has not received any specialized training or been certified as a mediator or arbitrator on the issue of reasonableness of fees.

The trial court found that the examination of Ms. Kessler on her credentials did not establish that she had specialized knowledge that could assist the court in determining whether the fees charged to Mr. Jakelis by Mr. Howard were reasonable. Given the broad discretion accorded to the trial court on the qualification of expert witnesses, we cannot say the court abused its discretion in disallowing Ms. Kessler as an expert witness in this case.

Mr. Howard filed an answer to the appeal, asking to be awarded additional attorney's fees for defending an appeal that he alleges is frivolous. We do not find Mr. Jakelis' appeal to be frivolous. Mr. Howard's request for additional attorney's fees is denied.

For the reasons stated above, we affirm the trial court judgment.

AFFIRMED