DAVID W. OESTREICHER, II		**NO. 2003-CA-0449**
VERSUS		**COURT OF APPEAL**
ROBERT L. HACKETT		**FOURTH CIRCUIT**
		STATE OF LOUISIANA
CONSOLIDATED WITH:	*	**CONSOLIDATED WITH:**
	*	
ROBERT L. HACKETT AND STEPHEN L. DUNNE	*	**NO. 2003-CA-0450**
VERSUS	*	
DAVID WALLACE OESTREICHER, II	*	
	*	
	* * * * * * *	

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NOS. 94-9735 C/W 94-12790, DIVISION "C-6"
Honorable Roland L. Belsome, Judge
* * * * * *
CHIEF JUDGE JOAN BERNARD ARMSTRONG
* * * * * *

(Court composed of Chief Judge Joan Bernard Armstrong, Judge David S. Gorbaty and Judge Edwin A. Lombard)

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AFFIRMED IN PART; REVERSED IN PART AND REMANDED

STATEMENT OF THE CASE

David W. Oestreicher, II sued his former law partner, Robert L. Hackett, to recover a portion of the attorney's fee collected by Hackett in Cormier v. City of Lake Charles, claiming a half share in the fee under the terms of a letter agreement of November 15, 1993, entered into among Hackett, Oestreicher and Hackett's new partner, Stephen L. Dunne. By subsequent amending petitions, Mr. Oestreicher added Mr. Dunne and his insurer as defendants; claimed reimbursement of expenses Mr. Oestreicher incurred in Ambrose v. New Orleans Police Department Ambulance Service;

claimed half the appraised value of the former firm's physical assets, and rental payments; claimed reimbursement of American Express account charges and interest, for an accounting of Mr. Oestreicher's interest in fixtures and movables in Hackett & Dunne's law office and related costs and attorney's fees; claimed reimbursement of funds allegedly diverted from the Cormier case to pay Hackett & Dunne's expenses; and claimed half of the legal fees Mr. Hackett has earned or will earn from legal services rendered to the one hundred ninety-nine clients listed in the Client Data Base List prepared in November, 1994 in connection with the dissolution of Oestreicher & Hackett.

On August 11, 1994, Mr. Hackett and Mr. Dunne, his new law partner, filed a petition for damages against Mr. Oestreicher, alleging breach of contract dated March 3, 1994 obliging Mr. Oestreicher to transfer all active files to Hackett & Dunne; tortious interference with contract of representation relating to the Ambrose case; breach of the covenant of good faith and fair dealing; wrongful seizure, abuse of process and fraud and ill practice in connection with the Cormier case; libel and damage to reputation.

Mr. Oestreicher sought and obtained a preliminary injunction

requiring Hackett to deposit half of the Cormier fee into the registry of the court. We affirmed that judgment in Oestreicher v. Hackett, 94-2573 (La.App. 4 Cir. 5/16/95), 660 So.2d 29, writ denied, 95-2592 (La. 12/8/95).

After Mr. Hackett deposited the funds in the court registry, he withdrew the funds and obtained an *ex parte* order from a duty judge allowing him to substitute a non-interest-bearing "injunction bond," in violation of the trial court's three-day notice requirement. The trial court denied Mr. Oestreicher's motion to annul the substitution and sanctioned Mr. Hackett. We granted Mr. Oestreicher's writ application and ordered Mr. Hackett to return the money to the district court registry in Oestreicher v. Hackett, 95-2708 (La.App. 4 Cir. 1/22/97), unreported.

On July 9, 1996, the trial court granted Mr. Oestreicher's motion for partial summary judgment awarding him half of the $604,562.18 attorney's fee and half of the $19,043.78 costs incurred in the Cormier case, less a credit and offset of half of the outstanding $158,261.41 balance of the Oestreicher & Hackett line of credit at the Whitney National Bank of New Orleans. We affirmed that judgment in Oestreicher v. Hackett, 95-2274 (La.App. 4 Cir. 3/12/97), unreported. In our opinion, we recognized the

validity of the letter agreement of November 15, 1993 between Mr. Oestreicher and Mr. Hackett setting forth their respective rights and responsibilities with regard to the dissolution of Oestreicher & Hackett. The Louisiana Supreme Court denied writs in Oestreicher v. Hackett, 97-0948 (La. 6/10/97), 695 So.2d 960. On December 10, 1997, Mr. Dunne filed a petition partially to nullify the trial court's judgment.

On August 29, 1997, the trial court granted Mr. Oestreicher's motion for partial summary judgment to recover charges incurred on the partnership's American Express card account in the amount of $7,412.03, and for $11,216.50 as reimbursement of half the value of fixtures and furnishings transferred to Hackett & Dunne, less a set-off of $6,810 still in dispute. On September 26, 1997, Mr. Hackett suspensively appealed from the trial court's judgment of August 29, 1997.

On September 9, 1997, Mr. Oestreicher moved for partial summary judgment against Mr. Dunne for the $11,216.50 reimbursement.

On September 18, 1997, on Mr. Oestreicher's motion, the district court rendered judgment against United States Fidelity and Guaranty Company, the surety on the injunction bond, in the amount of $232,672.27

with legal interest from judicial demand and costs.

On September 3, 1997, Mr. Oestreicher moved for summary judgment and alternatively to strike Mr. Hackett's and Hackett & Dunne's reconventional demand and petition for injunction. Mr. Hackett was duly served with a notice that the matter would be heard on March 9, 2001 at 9:00 in the morning. Mr. Hackett made no appearance and filed no opposition to Mr. Oestreicher's motions. The matter was called for hearing on March 9, 2001 at 10:15 in the morning, and the trial court found the pleadings, law and argument of counsel supported Mr. Oestreicher's motions. Following the hearing, counsel for Mr. Dunne orally moved that the trial court hear his motion filed on September 19, 1997 for leave to file supplemental and amended reconventional demand against Mr. Oestreicher, and third party demands against Oestreicher & Hackett I and II, a cross-claim against Mr. Hackett and request for sequestration. The trial court granted Mr. Dunne's motion to file these pleadings; ordered him to appear personally in New Orleans for deposition on or before March 16, 2001, and ordered him to provide, no later than at the beginning of his deposition, all documents he intends to seek to admit at trial. The court ordered that should Mr. Dunne

not comply with these orders, the trial court would not hear the allegations and claims set forth in Mr. Dunne's pleadings. The trial court entered judgment in favor of Mr. Oestreicher on March 14, 2001, dismissing Mr. Hackett's reconventional demand and assessing costs against Mr. Hackett, and granted Mr. Oestreicher's motion to quash Mr. Hackett's records deposition.

On March 28, 2001, Mr. Oestreicher moved to strike Mr. Dunne's reconventional demand, third party demands, cross-claim and request for sequestration, alleging *inter alia* that Mr. Dunne failed to appear for deposition as required by the trial court's order granting leave to file these pleadings. On May 18, 2001, Mr. Dunne moved for partial summary judgment declaring that Mr. Oestreicher is not entitled to a half interest in the Cormier fee, awarding the fee to Mr. Dunne, declaring that Hackett & Dunne is legally subrogated to Whitney's rights relative to Mr. Oestreicher's and Mr. Hackett's $158,261.46 solidary debt and entering judgment in favor of Hackett & Dunne against Mr. Oestreicher and Mr. Hackett for $158,261.46 plus legal interest from June 20, 1994 when the debt was paid. Mr. Oestreicher moved to strike Mr. Dunne's motion. On August 8, 2001,

the trial court granted Mr. Oestreicher's motion to strike and exceptions to Mr. Dunne's supplemental and amended reconventional demand, third party demands, cross-claim and request for sequestration, and granted Mr. Oestreicher's motion to strike Mr. Dunne's motion for partial summary judgment. At that time, the trial court also disposed of Mr. Dunne's motion for new trial of the trial court's judgment of July 30, 2001 granting Mr. Oestreicher's motion for summary judgment dismissing Mr. Dunne's claims. The trial court referred to the judgment of the Fifth Circuit Court of Appeal in Niemann v. American Gulf Shipping, Inc., 96-687 (La.App. 5 Cir. 1/15/97), 688 So.2d 42, determining that the partnership separation agreement was valid as written.

On August 14, 2001, the trial court dismissed Mr. Oestreicher's new claim for half the value of furniture and fixtures and for half of attorney's costs in the Ambrose case as barred by the *res judicata* effects of the judgments rendered in favor of Mr. Oestreicher on August 29, 1997 and July 9, 1996. The trial court also denied Mr. Hackett's and Mr. Dunne's joint motion for new trial or rehearing of the judgments of March 14, 2001 granting Mr. Oestreicher's motions for summary judgment and to quash, and

exceptions.

On October 1, 2001, Mr. Dunne moved for an appeal of the trial court's judgment of July 30, 2001 dismissing his claims "and for an appeal of all other orders and judgments relating to Dunne's claims."

On October 12, 2001, Mr. Oestreicher filed a motion for devolutive appeal of the judgment of August 14, 2001, insofar as it states that "all proceedings relative to the remaining claims of Hackett & Dunne partnership are stayed pending appeals."

On September 7, 2001, Mr. Hackett filed a "Notice of Intention to File Writ Application/Appeal, Request for Return Date and Request for Extension of Time to File Such Application." The trial court granted the request by order of September 10, 2001, fixing the "writ application/appeal" return date for October 1, 2001. Attached to these documents is a copy of the trial court's judgment of August 14, 2001.

STANDARD OF REVIEW

Appellate courts review summary judgment *de novo*, using the same criteria applied by trial courts to determine whether summary judgment is

appropriate. Independent Fire Insurance Company v. Sunbeam Corp., 99-2181, 99-2257 (La. 2/29/2000), 755 So.2d 226. We also review matters of law *de novo.*

ASSIGNMENT OF ERROR BY MR. HACKETT: The trial court erred in dismissing Mr. Hackett's reconventional demand in David W. Oestreicher, II v. Robert L. Hackett, No. 2003-CA-449.

The trial court dismissed Mr. Hackett's reconventional demand by judgment of March 14, 2001. The judgment of August 14, 2001 from which Mr. Hackett appeals denied his motion for new trial or rehearing of the March judgment.

Mr. Hackett assigns as error Mr. Oestreicher's utilization of partial summary judgments to achieve recovery of attorney's fees and expenses pursuant to the November 15, 1993 agreement between Mr. Hackett and Mr. Oestreicher. Mr. Hackett provides no authority for his claim that this procedure somehow was contrary to law. The discussion of prior litigation does not support his contention of error in the August 14, 2001 judgment from which he appeals. At the conclusion of the assignment of error, Mr.

Hackett says, “Appellant seeks that evidentiary hearing.” It is clear from the record that various claims have been disposed of over the years through contradictory motions for summary judgment heard by the trial court. The validity of the Oestreicher & Hackett termination agreement letter; Mr. Oestreicher’s entitlement to one half of the Cormier fee, to reimbursement of one half of the Cormier expenses, to one half of the Ambrose fee and reimbursement of half of the Ambrose expenses, to half of the value of the undisputed furnishings and fixed assets of Oestreicher & Hackett, to reimbursement of the American Express account, and the allocation of the Whitney line of credit have been adjudicated by final judgments in the trial court and, in several instances, in this court as well.

The trial court correctly noted that while there may be many issues resolved and unresolved among the parties, the only issue before the court on August 8, 2001 was its dismissal in March of the reconventional demand. The trial court noted that it did so not only because Mr. Hackett did not appear in court, but significantly because he did not file any opposition to Mr. Oestreicher’s motion.

A new trial must be granted on contradictory motion only if the

judgment appears clearly contrary to the law and evidence, upon newly discovered evidence that could not have been obtained before or during trial with due diligence, or upon proof that a jury was bribed or behaved improperly so that impartial justice has not been done. LSA-C.Civ.Pro. art. 1972. Mr. Hackett failed to prove any of these conditions at the hearing on his motion for new trial. The trial court has discretion to grant a new trial where there is good ground therefor, except as otherwise provided by law. LSA-C.Civ.Pro. art. 1973. Under the particular facts of this case, we find no abuse of the trial court's discretion to deny Mr. Hackett's motion for a new trial.

Mr. Hackett argues that he has been denied an evidentiary hearing; however, he had the opportunity from the inception of this litigation in 1994 to March 2001 to move for such a hearing or, failing that, to produce contrary documentary evidence.

This assignment of error is without merit.

FIRST ASSIGNMENT OF ERROR BY MR. DUNNE: The trial court erred in dismissing Mr. Dunne's first supplemental and amended

reconventional demand with prejudice for failure to appear at deposition.

At the conclusion of the March 9, 2001 hearing on Mr. Oestreicher's motion for summary judgment, Mr. Dunne's counsel orally moved the trial judge to hear Mr. Dunne's motion for leave to file a supplemental and amended reconventional demand, two third-party demands, a cross-claim and a request for sequestration. This motion, originally filed in 1997, had not been heard previously. The argument before the trial court is not a part of the record; however, Mr. Dunne claims in his appellate brief that he had no notice of the September 7, 2000 pretrial conference at which deadlines for pre-trial motions were set, and the matter was set for trial on the merits on April 2, 2001. Following an off-record discussion at the March 9th hearing, counsel for Mr. Oestreicher said, "We won't object to the filing of that petition if Mr. Dunne presents himself before next Friday for deposition with all of the issues and all of the documents substantiating the allegations." The judge replied, "That sounds reasonable. You have a trial date shortly. That's good. Okay." Mr. Dunne's counsel asked if Mr. Dunne would be required to come to Louisiana from Florida, and the trial judge said, "I'm

gonna [sic] let him amend his petition. But I want the guy to go ahead and show up for deposition. See if he can make it in. . . . Get him here. Take the deposition. Let's see if we can hold on to the trial date. If you have a problem, I'll deal with it. Okay?"

It is clear from the record that neither the trial judge nor Mr. Oestreicher would have consented to the filing of the pleadings unless Mr. Dunne made himself available for deposition within the time period set by the court.

We note that, in general, discovery matters are within the discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion.

Mr. Dunne complains that because he has poor night vision, he must schedule his deposition to preclude the necessity of driving at night. He has not shown that the proposed setting would require him to drive at night.

Mr. Dunne contends that as a party, he cannot be required to be deposed unless the circumstances are such that an oral examination is the only satisfactory way discovery may be made, relying on Hohner v. Travelers Ins. Co., 246 So.2d 727 (La.App. 4 Cir. 1971). In that case, this

Court refused to require the plaintiff to spend $1600 to come to New Orleans from her home in Alaska for her deposition, where the defendants had not previously filed written interrogatories or attempted to depose her by written interrogatories. This Court applied LSA-C.Civ.P. art. 1452, protecting a party from undue expense, annoyance, embarrassment and oppression. Mr. Dunne has not shown that he would be required to expend the equivalent of $1600 in twenty-first century dollars to attend a deposition in New Orleans, or that the deposition would cause sufficient annoyance, embarrassment or oppression to come within the ambit of the codal provision. Furthermore, LSA-C.Civ.Pro. art. 1426 provides that a party seeking protection from annoyance, embarrassment, oppression or undue burden or expense is required to proceed by motion for a protective order. Mr. Dunne did not avail himself of that provision.

Mr. Dunne relies on Broda v. Jack Sutton Co., Inc., 488 So.2d 226 (La.App. 4 Cir. 1986) for the proposition that the court must consider cost involved in travel to Louisiana, complexity of the case, potential recovery and whether any other discovery methods had been attempted. In that case, plaintiff was a New Jersey resident, suing for return of a $5,000 deposit.

Defendant reconvened for $12,500. We held that when plaintiff has claimed only $5,000 in a simple sale and delivery case, defendant is not entitled to have the court order plaintiff to spend at least ten percent of her maximum recovery to attend a deposition in New Orleans. Mr. Dunne also relies on O'Rourke v. Hilton Hotels Corporation, 560 So.2d 76 (La.App. 4 Cir. 1990). Plaintiff, a Mobile, Alabama resident, sued Hilton for $10,000, the value of two rings she claims disappeared from her room at the Hilton Hotel in New Orleans. The trial court had ruled that Ms. O'Rourke must attend a deposition in New Orleans. Because of the simplicity of the case and the limited potential recovery, we held the defendant should take plaintiff's deposition in Mobile or pay for her travel expenses to New Orleans.

The factors outlined in the jurisprudence have been held to apply equally to defendants and plaintiffs. In re Medical Review Panel of Hughes, 2001-2313 (La.App. 4 Cir. 1/23/02), 807 So.2d 1074.

In the instant case, the record is replete with the fruits of extensive discovery. Contrary to Mr. Dunne's suggestion in brief, the case is complex, stretching over nine years, two appeals and seven applications for writs to this Court. The amount in controversy has been hundreds of thousands of

dollars.

Applying the reasoning of these cases to the instant case, we find no abuse of the trial court's discretion in requiring Mr. Dunne to attend a deposition in New Orleans.

Mr. Dunne alleges in his appellate brief that the court order requiring his appearance at the deposition in New Orleans was obtained through ill practice as it contained a punitive provision never mentioned by the judge at the hearing. However, as noted above, the judge made it clear at the hearing at which Mr. Dunne was represented by counsel that Mr. Dunne's appearance for his deposition as outlined at the hearing was a condition precedent to the judge's granting Mr. Dunne's motion to file the pleadings at issue. There simply is no basis in the record for the suggestion of ill practices.

Mr. Dunne suggests that we should reverse the trial court because dismissal has been held to be a draconian penalty to be applied only in extreme situations. However, this argument misapprehends the posture of the case. The trial court did not dismiss Mr. Dunne's pleadings. Rather, he did not allow them to be filed, the condition precedent to his grant of

permission for their filing having failed.

This assignment of error is without merit.

SECOND ASSIGNMENT OF ERROR BY MR. DUNNE: The trial court erred in denying Mr. Dunne's motion for partial summary judgment relative to the validity of the liquidation agreement.

Mr. Dunne asks this Court essentially to revisit its earlier decision that the three-page letter agreement of November 15, 1993 set forth the rights and responsibilities of Messrs. Hackett and Oestreicher with respect to the dissolution of Oestreicher & Hackett and, specifically, the fees and expenses attached to the Ambrose and Cormier cases and the Whitney line of credit. See also, Niemann v. American Gulf Shipping, Inc., at p. 7, 88 So.2d at 45 This Court rejected Mr. Dunne's contention that his note of January 6, 1994 added a "fourth page" to the letter agreement of November 15, 1993. In our March 1997 opinion in Oestreicher v. Hackett, we affirmed the trial court's finding that the three-page letter agreement was valid and binding, and we found that the letter of November 15, 1993 constituted an offer by Mr. Hackett to Mr. Oestreicher that Mr. Oestreicher accepted.

In dismissing Mr. Dunne's various claims against Mr. Oestreicher arising out of the purported partnership of Hackett & Dunne, the trial court doubtless relied upon Mr. Dunne's own uncontroverted affidavit dated July 10, 1995 and filed in the record of No. 94-12790. In that affidavit, Mr. Dunne admits that Mr. Oestreicher fulfilled his obligations under the letter agreement. Mr. Dunne avers under oath:

> I am the same party to the November 15, 1993 agreement between David W. Oestreicher, II, Robert L. Hackett, and myself regarding the transfer of files from Oestreicher & Hackett to Hackett & Dunne. Pursuant to the agreement, David W. Oestreicher physically transferred all of his files to the offices of Hackett & Dunne. . . . Nothing further was expressly required of Oestreicher under the agreement. . . . I am not aware of any instance where Oestreicher diverted any fees to his personal account earned between his move to 862 Camp Street and his leaving in June of 1994. . . .At all times, Robert L. Hackett managed the receipt and distribution of the funds from the case of . . . Cormier . . Oestreicher also attempted to generate business for the firm of Hackett & Dunne including RESPA claims against Fleet Mortgage and GMAC, a claim for Pipeliners Corp. and a claim for Stutz against Reebok. I discussed with Robert L. Hackett his obligation to pay Oestreicher some share of the fees received from these cases. Hackett agreed that we had the obligation but we never paid Oestreicher. A petition was filed on behalf of Stephen L. Dunne and the firm of Hackett & Dunne against Oestreicher which was never presented to me in

> advance of its filing and I never gave my approval to the filing on my behalf. It is my position that because Robert L. Hackett failed to perform any of his obligations under the partnership agreement with me, that said partnership, due to a failure of cause, was never formed.

The trial court correctly found that the substance of Mr. Dunne's motion for summary judgment, directed to Mr. Oestreicher, had been addressed by final judgment rendered in 1997, and that his various arguments concerning his rights as a partner in Hackett & Dunne vis-a-vis Mr. Oestreicher were contrary to Mr. Dunne's own sworn affidavit.

This assignment of error is without merit.

THIRD ASSIGNMENT OF ERROR BY MR. DUNNE: The trial court erred in dismissing Mr. Hackett's reconventional demand for failing to appear at a motion hearing.

For the reasons assigned in our disposition of Mr. Hackett's assignment of error, this assignment is without merit.

MR. OESTREICHER'S ASSIGNMENTS OF ERROR: The district court was manifestly erroneous in dismissing Mr. Oestreicher's claim to

half of $6,810, the disputed amount of the furnishings and fixtures, without having resolved the disputed portion; in dismissing his claim to reimbursement of approximately $4,000 in costs associated with the Ambrose matter; and in failing to address the issue of Mr. Dunne's joint liability, *vel non,* as a partner of Hackett & Dunne for obligations owed by the firm to Mr. Oestreicher.

The trial court dismissed these claims based on the alleged *res judicata* effect of the court's judgment of August 29, 1997. A clear reading of that judgment reserves the parties' rights to a later resolution of the disputed assets valued at $6,810. Such a resolution has not yet been made. Furthermore, the August 1997 judgment does not address the Ambrose issue or Mr. Dunne's liability for Hackett & Dunne obligations. Therefore, these issues were not resolved by the judgment of August 29, 1997 and are not barred by the doctrine of *res judicata.*

Mr. Oestreicher's assignment of error has merit, and we remand the case to the trial court for the determination of title to the $6,810 in disputed assets, the allocation of costs in the Ambrose matter and Mr. Dunne's liability *vel non* for any debts owed by Hackett & Dunne to Mr. Oestreicher.

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CONCLUSION AND DECREE

For the foregoing reasons, we affirm the judgment of August 14, 2001 insofar as it denies the joint motion of Robert Hackett and Stephen Dunne for New Trial and/or Rehearing of the trial court's judgments of March 14, 2001. We reverse the judgment of August 14, 2001 insofar as it dismisses Mr. Oestreicher's claim for half the value of disputed items of furniture and fixtures; for half the amount of the costs in the Ambrose matter; and for a determination of Mr. Dunne's liability *vel non* for Hackett & Dunne's obligations to Mr. Oestreicher. We affirm the trial court's judgment of July 30, 2001 disallowing the filing of Mr. Dunne's first supplemental and amending reconventional demand, two third party demands, cross-claim and request for sequestration. We remand the case for determination of Mr. Oestreicher's claims to half of the disputed furniture, fixtures and costs of the Ambrose matter, and for determination of Mr. Dunne's liability *vel non* for the obligations of Hackett & Dunne. Each party is to bear his own costs of this appeal.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED