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| **NORMAN PENTON D/B/A PENTON STUDIO** | * | **NO. 2006-CA-1310** |
| | * | **COURT OF APPEAL** |
| **VERSUS** | | |
| | * | **FOURTH CIRCUIT** |
| **GEORGE W. HEALY, IV** | | |
| | * | **STATE OF LOUISIANA** |

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APPEAL FROM
FIRST CITY COURT OF NEW ORLEANS
NO. 2002-52257, SECTION "B"
Honorable Angelique A. Reed, Judge

* * * * * *

**Charles R. Jones**
**Judge**

* * * * * *

(Court composed of Judge Charles R. Jones, Judge Dennis R. Bagneris Sr., and Judge Max N. Tobias Jr.)

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**AFFIRMED**

The Appellant, Norman Penton d/b/a Penton Studio, appeals a First City Court judgment which awarded him $2,719.00 in attorney's fees. We affirm.

This case arises out of the production of twenty-three large photographic exhibits by Norman Penton, d/b/a/ Penton Studio, in less than fifteen hours for use as a demonstrative aid by the Appellee's, Mr. George Healy's, expert witness in an ongoing trial (the "Seither case") in the Civil District Court for the Parish of Orleans.

The facts of this case are presented by the prior appeal, *Penton v. Healy*, 2003-0614, (La.App. 4 Cir. 12/17/03), 863 So.2d 684 ("Penton I"), and *Penton v. Healy*, 2004-1470, (La.App. 4 Cir. 1/26/05), 894 So.2d 537 ("Penton II"), and by supervisory writ, *Penton v. Healy*, 2004-C-0611, *unpub*., (La.App. 4 Cir. 6/15/04).

In *Penton I*, we affirmed the judgment in Mr. Penton's favor, but vacated the judgment regarding the amount due to Mr. Penton. Additionally, we remanded the case for a determination of the fees due Mr. Penton, an abuse of process claim, and, if necessary, attorney's fees.

On March 24, 2004, following remand of this case, the trial court found $2,000.00 to be a reasonable fee due Mr. Penton, but the trial court

did not provide specific reasons for doing so. The trial court denied Mr. Penton's claim for attorney's fees and also denied Mr. Penton's claims for abuse of process, stating:

> Regarding plaintiff's claim for abuse of process and subsequent attorney's fees, the court does not find that it was unreasonable for the defendant to dispute the plaintiff's statement for services. A range of reasonable fees exists which could be awarded to plaintiff for his photographic services. The court finds plaintiff's bill of $6,796.37 for photographs to be unreasonable and excessive. The defendant had no ulterior motive in failing to pay the invoice other than to dispute its reasonableness. Defendant, in fact, did offer to pay plaintiff a sum that he determined to be reasonable.

Mr. Penton sought to appeal this judgment in April 2004, but the trial court denied the motion for appeal as untimely under La. C.C.P. art. 5002. Mr. Penton sought supervisory review of the trial court's denial of his motion to appeal. This Court found that Penton's appeal was timely because he filed his motion for appeal within ten days of the service date of the notice of signing judgment sent to his counsel's correct address. *Norman Penton D/B/A Penton Studio v. George Healy*, IV, 2004-C-0611, *unpub*., (La.App. 4 Cir. 6/15/04). Thus, the appeal, *Penton II*, went forward.

In *Penton II*, which this Court affirmed in part, vacated in part, reversed in part, and remanded, we determined that: (1) the trial court did not abuse its discretion in disregarding an expert's testimony; *Penton*, p. 5,

894 So.2d at 540; (2) the photographer's invoiced fee of $6,796.37 was a reasonable price; *Id*, p. 7, 894 So.2d at 542; (3) the photographer was entitled to an award of attorney's fees; *Id.*, and (4) the motion to determine costs of exhibits was not an abuse of process. *Id., p. 8, 894 So.2d* . at 542.

The remanded matter subsequently went forward on a third merits trial. The attorney for Mr. Penton, Mr. Santo DiLeo, testified that the sum of $27,791.38 in attorney's fees and costs were due as represented in six invoices that expand for the entire five years of litigation from November 26, 2001 to date.

Mr. Penton called an expert, Terrence J. Lestelle, concerning the reasonableness of the attorney's fees expended in the present matter. However, the trial court refused to recognize Mr. Lestelle as an expert.

Mr. Healy, the Appellee, testified briefly and then called Mr. Richard Levin as an expert in collections law. Mr. Levin was subsequently accepted as an expert by the trial court. At the conclusion of trial, the trial court took the matter under advisement, and on July 20, 2006, rendered judgment awarding 40% of the principal amount of $6,796.37 or $2,719.00, in attorney's fees. However, the court did not award judicial interest from the date of judicial demand. This appeal followed.

In the instant appeal, Mr. Penton raises five assignments of error,

enumerated as follows:

1. The trial court abused its discretion when it did not set a reasonable attorney's fee based on the actual legal services rendered as evidenced by appellant's invoices for attorney's fees and the pleadings contained in the record and the Rules of Professional Conduct, Rule 1.5, titled *Fees*, but rather a perfunctory and simple contingency fee.
2. The trial court erred as a matter of law in using a flat contingency fee as its determination of reasonable attorney's fees, contrary to the agreement of $150.00 per hour plus expenses between Mr. Penton and his counsel within the meaning of La. R.S. 9:2781(A).
3. The trial court erred as a matter of law in not awarding legal interest from date of judicial demand on the attorney's fees awarded by it pursuant to La. R.S. 9:2781.
4. The trial court abused its discretion when it accepted the Appellee's expert, but rejected Mr. Healy's expert.
5. The trial court abused its discretion when it did not award an expert fee to Mr. Penton's expert.

**Discussion**

In his first and second assignments of error, Mr. Penton asserts that the trial court abused its discretion when it did not set a reasonable attorney's fee based on the actual legal services rendered as evidenced by Mr. Penton's invoices for attorney's fees, and the Rules of Professional Conduct, Rule 1.5, titled *Fees*, but rather awarded a contingency fee. Mr. Penton also asserts that the trial court erred as a matter of law when it used the flat contingency fee as its determination of reasonable attorney's fees, contrary to the agreement of $150.00 per hour plus expenses between Mr. Penton and his counsel within the meaning of La. R.S. 9:2781(A).

Appellate courts review appeals from an award of attorney fees under the abuse of discretion standard. As we stated in *Vignette Publications, Inc. v. Harborview Enterprises, Inc*., 2000-1711 (La.App. 4 Cir. 9/12/01), 799 So.2d 531,

> A trial judge has much discretion in fixing attorney's fees, and its award will not be modified by a reviewing court absent a showing of an abuse of discretion. Citing *Gravolet v. Board of Com'rs for Grand Prairie Levee Dist.*, 95-2477 (La.App. 4 Cir. 6/12/96), 676 So.2d 199. In *State, Dept. of Transp. and Development v. Williamson*, 597 So.2d 439, 441-442 (La.1992), the Louisiana Supreme Court stated:
>
> > Courts may inquire as to the reasonableness of attorney fees as part of their prevailing, inherent authority to regulate the practice of law. [citations omitted] ... Factors to be

> taken into consideration in determining the reasonableness of attorney fees include: (1) the ultimate result obtained; (2) the responsibility incurred; (3) the importance of the litigation; (4) amount of money involved; (5) extent and character of the work performed; (6) legal knowledge, attainment, and skill of the attorneys; (7) number of appearances made; (8) intricacies of the facts involved; (9) diligence and skill of counsel; and (10) the court's own knowledge. [footnote & citations omitted].

*Vignette*, p. 11, 799 So.2d at 538.

In the present matter, Mr. Penton argues that the trial court disregarded the facts and evidence presented at trial and employed a 40% contingency fee as its reasonable determination of attorney's fees due by him, where the contractual agreement with his counsel was for $150 per hour, plus out-of-pocket expenses. He asserts that the perfunctory application of a percentage is devoid of any relationship to the evidence presented at trial, which comprised the amount $27,791.38.

Mr. Healy disagrees with Mr. Penton's assertion that the trial court erred in its determination of attorney's fees. Instead, he contends that the trial court appropriately fixed a reasonable attorney's fee at 40% of the amount of the open account judgment, or $2,719.00.

The American Bar Association Model Rules of Professional Conduct (2002 edition), Rule 1.5, titled *Fees*, provides:

> (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (8) whether the fee is fixed or contingent.

Mr. Penton maintains that pursuant to the aforementioned Rule, the trial court is required to award attorney's fees based on the "determinable amount" of $150 per hour and out-of-pocket expenses agreed to by himself and his counsel. He further contends that based on this arrangement, the trial court could have determined what was reasonable from the $27,791.38,

but the trial court could not "obviate the attorney contract and substitute a contingency fee of 40%." Furthermore, he maintains that both experts testified that the hourly fee of $150 per hour was reasonable.

Our review of this record reveals that the original amount sought by Mr. Penton's attorney was $27,791.38. A cumulative bill representing hourly fees, as well as costs, was included in the record reflecting this amount. Additionally, Mr. Penton's attorney also testified that the aforementioned amount was due because so much time was required of him due to Mr. Healy's indifference in resolving the matter. Mr. Penton takes great pains to meticulously set forth his justification for the fees he claims are due under each of the categories listed under the APA Model Rules for Professional Conduct, Rule 1.5; however, the record also indicates, via the testimony of collection expert, Mr. Levin, that Mr. Penton's counsel filed "meritless" motions. The trial court also noted that Mr. Penton's counsel filed "unnecessary pleadings" in this matter, including a suit that was filed in an improper venue against Mr. Healy. Additionally, Mr. Penton's counsel also failed to update the trial court of a change in his address while the lawsuit was pending, which resulted in Mr. Penton's counsel filing a supervisory writ with this Court. Hence, Mr. Healy should not be forced to pay fees for matters that were not due to his fault.

This Court has previously held that the "[d]etermination of the value of legal services rendered falls particularly within the discretion of the trial court." *Drury v. Fawer*, 590 So.2d 808, 811 (La.App. 4th Cir. 1991). *Black's Law Dictionary* (2004 Ed.) defines an abuse of discretion as "[a]n adjudicator's failure to exercise sound, reasonable, and legal decision-making." In its reasons for judgment, the trial court noted that it had discretion to set attorney's fees, but also indicated that "[t]he attorney's fees sought to be collected in this matter are more than four times the judgment. The court finds that Penton's request for $27,791.38 for attorney's fees to be unreasonable and excessive."

The trial court considered the facts and law in this matter and determined an appropriate fee. The trial court, in its discretion, concluded that the attorney's fee sought by the Mr. Penton was grossly excessive, given the Model Rule 1.5 "reasonableness" criteria, considering the services performed in this matter. Thus, based upon our review of the record, we find that Mr. Penton's first and second assignments of error do not have merit.

In his third assignment of error, Mr. Penton maintains that the trial court erred as a matter of law in not awarding legal interest from date of judicial demand on the attorney's fees awarded pursuant to La. R.S. 9:2781.

Conversely, Mr. Healy contends that although the statute itself provides for attorney's fees, it is silent with respect to interest on attorney's fees and therefore the trial court did not include interest because the statute itself is silent as to interest. La. R.S. 9:2781, titled, *Open accounts; attorney fees; professional fees; open account owed to the state*, paragraph "A," provides:

> When any person fails to pay an open account within thirty days after the claimant sends written demand therefor correctly setting forth the amount owed, that person shall be liable to the claimant for reasonable attorney fees for the prosecution and collection of such claim when judgment on the claim is rendered in favor of the claimant. Citation and service of a petition shall be deemed written demand for the purpose of this Section. If the claimant and his attorney have expressly agreed that the debtor shall be liable for the claimant's attorney fees in a fixed or determinable amount, the claimant is entitled to that amount when judgment on the claim is rendered in favor of the claimant. Receipt of written demand by the person is not required.

The Supreme Court noted in *Sharbono v. Steve Lang & Son Loggers*, 97-0110, p. 8 (La. 7/1/97), 696 So.2d 1382, 1388, that "attorney's fee awards depend for their very existence upon a discretionary finding of the trier of fact, any amount of attorney's fees awarded to the victor is "due" (sic) only from the date of judgment." Hence, Mr. Penton's third assignment of error is without merit since interest can only be applied once a judgment

has been rendered in this matter, and not from the date of judicial demand.

In his fourth and fifth assignments of error, Mr. Penton argues that the trial court abused its discretion when it accepted Mr. Healy's expert, but rejected Mr. Penton's expert; and the trial court abused its discretion when it did not award an expert fee to Mr. Penton's expert.

In *Madison v. Ernest N. Morial Convention Center-New Orleans***,** 2000-1929 (La.App. 4 Cir. 12/4/02) 834 So.2d 578, we reiterated:

> If the trial court or jury's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse, even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Martin, supra.* Where there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong. *Id.; Rosell v. ESCO,* 549 So.2d 840, 844 (La.1989). The determination of an expert's credibility is also a factual question subject to the manifestly erroneous/clearly wrong standard of review. *Id.; Martin, supra.* The rule that questions of credibility are for the trier of fact applies to the evaluation of expert testimony, unless the stated reasons of the expert are patently unsound. *Lasyone v. Kansas City Southern R.R.*, 00-2628 (La.4/3/01), 786 So.2d 682. The evaluation of and resolution of conflicts in expert testimony are factual issues to be resolved by the trier of fact, and the determinations of the fact finder should not be disturbed on appeal in the absence of manifest error. *Id.*

*Madison,* pp. 18-19, 834 So.2d at 590.

Although Mr. Penton acknowledges that the trial court has wide discretion to accept or reject experts, he argues that the trial court abused its discretion when it rejected his expert, Mr. Lestelle. Mr. Lestelle was tendered as an expert in determining what constitutes a reasonable attorney's fee. At trial, Mr. Lestelle conceded that he does not specialize in collection matters; rather, he testified that he was a maritime and admiralty attorney in private practice. Mr. Penton asserts that Mr. Lestelle has over 30 years of practice in litigating the reasonableness of attorney's fees concerning the Longshoremen's and Harbor Workers' Administrative Law cases.

Mr. Healy maintains that the trial court properly exercised its discretion in rejecting Mr. Penton's expert. In support of his argument, he cites La. C.E. art. 702, titled *Testimony by experts*, which provides, "[i]f 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." Mr. Healy maintains that although Mr. Lestelle was tendered as an expert in determining what is a reasonable attorney's fee, he did not demonstrate any special expertise beyond that of any experienced practitioner or judge in assessing the reasonableness of attorney's fees.

Conversely, Mr. Healy's expert, Mr. Richard Levin, was qualified as an expert in the field of collections law. He has lectured before professional groups and organizations concerning collection matters, and is also a member of the National List of Collection Attorneys, as well as National Subrogation. Mr. Levin was qualified to address the fee customarily charged in the locality for similar legal services. This is further substantiated by Mr. Levin's occupation as a practicing attorney in the locality providing similar legal services. Therefore, the fact that his testimony was directed solely to the issue of the reasonableness of the attorney's fee was proper.

After taking the testimony of both "experts" tendered by the parties into account, the trial court accepted Mr. Levin as an expert in his field, but rejected Mr. Lestelle. The trial court determined that Mr. Lestelle's practice areas were primarily maritime and personal injury, rather than collections. Additionally,

> [A]s with other costs, the trial court enjoys great discretion under La. C.C.P. art. 1920 in the taxing of expert witness fees. *Boseman v. Orleans Parish School Board*, 98-1415, p. 9 (La.App. 4 Cir. 1/6/99), 727 So.2d 1194, 1199. Trial courts are not bound by agreements concerning expert witness fees, by the expert's statements concerning his charges, or by the actual fee paid to an expert witness. *Id.*

*Mitter v. Touro Infirmary*, 2003-1608, p. 11 (La.App. 4 Cir. 4/21/04), 874 So.2d 265, 272.

Thus, these assignments of error do not have merit and we reject Mr. Penton's assessment that the trial court abused its discretion in rejecting Mr. Lestelle's testimony as an expert witness, in addition to not awarding expert witness fees to Mr. Penton's expert.

## DECREE

For the reasons stated herein, we affirm the judgment of the trial court.

**AFFIRMED**