

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

**JOHN M. STULL,** )  
 )  
 )  
 Defendant-below Appellant, )  
 )  
 v. ) **C.A. No. 02A-05-005 HLA**  
 )  
**THOMAS S. NEUBERGER, P.A.,** )  
 )  
 Plaintiff-below Appellee. )

Date Submitted: November 13, 2002

Date Decided: February 28, 2003

**MEMORANDUM OPINION**

**UPON DEFENDANT-BELOW APPELLANT'S APPEAL FROM THE  
COURT OF COMMON PLEAS**

**AFFIRMED**

John M. Stull, Esq., Wilmington, Delaware, Attorney for Appellant (*pro se*) - Defendant below.

Martin D. Haverly, Esq., Wilmington, Delaware, Attorney for Appellee - Plaintiff below.

**ALFORD, J.**

This 28<sup>th</sup> day of February 2003 upon review of the documents filed by the parties and the record below, it appears to the Court that:

#### PROCEDURAL HISTORY

On October 31, 2000, Appellee, Plaintiff below Thomas S. Neuberger, P.A. (“Appellee”) filed a law suit in the Court of Common Pleas (“CCP”) to enforce a contract for legal services provided to Defendant below John M. Stull, (“Appellant”). On November 1, 2000, Appellee amended his Complaint. Appellant filed an Answer and a Counterclaim on December 4, 2000 and Appellee filed a reply on December 21, 2000. Approximately eight and a half months after the law suit was filed, Appellant served Appellee’s attorney with a bill for legal services dating back approximately four years. On July 13, 2001, Appellant filed an Amended Answer and Counterclaim along with a Motion to Amend adding a counterclaim that Appellee owed Appellant for legal services Appellant provided to a mutual client, Ms. Nichols. Appellee did not oppose the Motion to Amend and it was granted. On July 27, 2001, Appellee filed an Answer to Appellant’s Amended Answer. On November 1, 2001 Appellant filed a Motion for Summary Judgment. After briefing followed by oral argument on December 21, 2001, the Court of Common Pleas denied Appellant’s Motion for Summary Judgment.

On March 7<sup>th</sup> and 8<sup>th</sup>, 2002, a Court of Common Pleas trial was held. On April 24, 2002 a decision for judgment of \$5,000.00 was entered against Appellant, and judgment in

favor of Appellee concerning Appellant's counterclaim. Before the Court is Appellant's Appeal of this judgment from the Court of Common Pleas.

#### STATEMENT OF FACTS

##### *Appellee's Principle Claim*

Appellee represented Appellant after Appellant was sanctioned for \$10,000.00 under Rule 11 in the United States District Court for the District of Delaware on June 30, 1998. Appellee presented a retainer letter to Appellant dated July 7, 1998, which stated that Appellee would represent him in this matter on appeal to the Third Circuit and before the Office of Disciplinary Counsel ("ODC"). The letter indicated that payment was at Appellee's hourly rate and this was not contingent upon the outcome of the appeal or the ODC matter. The letter stated that Appellee would charge Appellant \$210.00 per hour for his time, \$15.00 per hour for his law clerk's time, and that Appellant was responsible for any out of pocket expenses. The retainer letter is not a signed copy, however, Appellant does not dispute its validity, nor did he dispute the charges up until the time of filing of his action. Additionally, Appellee billed Appellant monthly without objection to the bills.

In representing Appellant, Appellee prepared a Rule 59(d) Motion to Stay the Proceedings in the District Court pending the outcome of the Third Circuit appeal. Appellee produced a 47 page Opening Brief and a 12 page Reply Brief for the Third Circuit appeal. Although the appeal was unsuccessful, Appellee ultimately negotiated a payment schedule

for Appellant to pay off the \$10,000.00. Additionally, Appellee was successful in persuading the ODC to dismiss the matter. Despite the July 7, 1998, retainer letter, Appellant testified that he did not request Appellee to represent him before the ODC.

The representation ended on or about April 30, 1999. Appellee claims attorney's fees in the amount of \$17,361.24. Appellant has paid the sum of \$7,000.00, thus the amount sought is \$10,361.24. Appellee did not produce itemized copies of any bills for the record, but Appellant does not dispute the fact that he was billed regularly. Appellant alleges that billing for 175 hours, for the sum of \$17,361.24 is unreasonable. During the course of representation, Appellant made payments in the form of four checks in the amount of \$500.00 each. On November 11, 1999, Appellant sent a letter to Appellee with a \$5,000.00 check enclosed which stated, "paid in full." Appellant testified that he considered this to be partial payment, drew a line through the language "paid in full" and cashed the check. His understanding was that the balance remained \$10,361.24. Appellant testified that his interpretation of the cashing of the \$5,000.00 check was that the check constituted an offer and when accepted, amounted to an accord and satisfaction.

*Appellant's Counterclaim*

In April of 1994, Appellant began representing Joanne Nichols ("Nichols") in an ERISA case involving her employer E. I. duPont de Nemours and Company ("duPont"). Appellant was later disqualified as he had previously worked as a trust lawyer for duPont.

Thus, in April of 1996, Appellant requested that Appellee take over the case. In February of 1999, the case was successfully resolved in favor of Nichols.

During Appellee's representation of Nichols, Appellant provided Appellee with various legal consulting services pertaining to the case. The parties remained in contact throughout the case, through telephone conversations and written correspondence. Appellant had entered into a retainer agreement with Nichols on February 19, 1996, two years after he started representing her and just two months prior to the time in which Appellee started representing her. Invoices were sent to Nichols dated February 6, 1999 and February 18, 1999, for Appellant's work from November 1994 to February 1996, totaling \$29,000.00.

Appellant eventually received approximately \$8,000.00 from Nichols, and Appellee testified that he also received approximately \$8,000.00. The only evidence of a formal agreement and record of billing for the Nichols case is between Nichols and Appellant.

Appellee's understanding at the time he entered into the case was that Appellant would be willing to consult with him regarding the case. Appellee was aware of Appellant's retainer agreement with Nichols for an hourly rate and was under the impression that Appellant would not expect remuneration from Appellee. Appellant's counterclaim is based on a bill that was submitted to Appellant dated July 11, 2001, charging his current hourly rate of \$300.00, for a total of \$8,780.00.

Appellee states that he never formally hired Appellant and there was no agreement of payment between the parties. Appellant states that Appellee could not have expected to receive the legal services for free, and thus Appellant seeks recovery on the basis of *quantum meruit*. Appellee argues that the fact that Appellant did not submit the bill until after Appellant had sued Nichols for legal fees, and more than two years after completion of the Nichols case, indicates the claims lack of merit.

#### STANDARD OF REVIEW

Pursuant to Delaware law, appeals in civil cases from the Court of Common Pleas to this Court are on the record and not de novo.<sup>1</sup> This Court is limited to correcting errors of law and determining whether substantial evidence exists to support factual findings of the trial court.<sup>2</sup> Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.<sup>3</sup> It is not the duty of the reviewing court to weigh the evidence, determine questions of credibility, or make its own factual findings.<sup>4</sup> In addition, when the determination of facts rests on a question of credibility and acceptance, or rejection

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<sup>1</sup> See 10 *Del. C.* § 1326(c); Super. Ct. Civ. R. 72.

<sup>2</sup> *Shahan v. Landing*, 643 A.2d 1357 (Del. 1994).

<sup>3</sup> *Oceanport Ind., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994).

<sup>4</sup> *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. Supr. 1965).

by the trial judge of live testimony, the trial judge's findings will be approved on review.<sup>5</sup> Factual findings in the case are not to be overturned on appeal if they are "sufficiently supported by the record and are the product of an orderly and logical deductive process."<sup>6</sup> However, questions of law are reviewed de novo.<sup>7</sup>

## DISCUSSION

### *Appellee's Principle Claim*

The Court below first considered the elements necessary in order to establish an accord and satisfaction, which are as follows: "(1) that a bona fide dispute existed as to the amount owed that was based on mutual good faith; (2) that the debtor tendered an amount to the creditor with the intent that payment would be in total satisfaction of the debt; and (3) that the creditor agreed to accept the payment in full satisfaction of the debt."<sup>8</sup> The lower Court found that the facts fail to support a finding that the necessary elements have been established.

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<sup>5</sup> *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. Supr. 1972).

<sup>6</sup> *Id.*; see also *State v. Cagel*, 332 A.2d 140, 142-43 (Del. Supr. 1974); *Esminger v. Merritt Marine Construction, Inc.*, 597 A.2d 854, 855 (Del. Super. 1988).

<sup>7</sup> See *Oceanport Ind. Inc.*, 636 A.2d at 899; see also *Esminger*, 597 A.2d at 855.

<sup>8</sup> *Acierno v. Worthy Bros. Pipeline Corp.*, 693 A.2d 1066, 1068 (Del. Supr. 1997); see also DEL. CODE ANN. tit. 6, § 3311.

With regard to the first element, the trial Court found that there is no clear evidence in the record that a bona fide dispute existed as to the amount that Appellant owed Appellee. However, a dispute as to Appellant's ability to pay did exist. Appellant argues that because he and Appellee had a conversation in which Appellee stated he would take \$10,000.00 to settle his bill, that a valid dispute as to the amount existed. However, the Court below found that Appellant's letter which accompanies the check with the notation "paid in full," did not reveal any bona fide dispute as to the amount owed. For example, Appellant states, "I hope the within instrument will do it. If not, we will have to deal with it." Appellant relies on *Acierno v. Worthy Brothers Pipeline Corporation*,<sup>9</sup> to argue that his inability to pay is enough to establish a bona fide dispute. However, in *Acierno* the Delaware Supreme Court states, "[a]s to the first element, to be deemed bona fide, a dispute must be (1) honest and advanced in good faith, and (2) founded on some reasonable, tenable or plausible ground."<sup>10</sup> The Court goes on to distinguish *Modern Dust Bag* upon which Appellant truly relies, which states, "[p]laintiff must show only that there is some justification for its contention and that the dispute does not represent mere arbitrary refusal on the part of plaintiff to pay a just

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<sup>9</sup>692 A.2d 1066, 1068-69 (Del. 1997).

<sup>10</sup>*Id.* at 1069.

indebtedness.”<sup>11</sup> The Supreme Court then clearly accepts the earlier language by stating, “[w]hile this standard is arguably inconsistent, we conclude that the better rule of law is articulated in the first sentence, requiring that the dispute be both honest, genuine, and advanced in good faith and rest on a substantial basis and be founded on some reasonable, tenable or plausible ground.”<sup>12</sup> The Court below did not find any substantial basis, or any reasonable tenable or plausible ground for a bona fide dispute. The Trial Court’s finding that a bona fide dispute as to amount did not exist is factual and this Court will not substitute its judgment for the findings of fact made by the trial Court if the facts are sufficiently supported by the record, as they are in the instant case.

Regarding the second element, the Court found that although it may have been Appellant’s intention that endorsement of his November 11, 1999, check would constitute payment in full, his accompanying letter was ambiguous. As previously stated, the letter did not contain a clear statement that the check was a full payment, only that Appellant was having a hard time and maybe some other arrangement could be worked out.

Finally, the Trial Court found no objective evidence in the record that Appellee accepted the check as full satisfaction of the debt. Conversely, Appellee marked through the

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<sup>11</sup>*Modern Dust Bag Co. v. Commercial Trust Co.*, 104 A.2d 378, 380 (Del. Ch. 1954).

<sup>12</sup>*Acierno v. Worthy Brothers Pipeline Corporation*, 692 A.2d 1066, 1069 (Del. 1997).

“paid in full” language on the check. Appellant argues that pursuant to *Acierno v. Worthy Brothers Pipeline Corporation*,<sup>13</sup> an overt manifestation of assent, not subjective intent (of the creditor) controls formation of the contract to accord and satisfy the debt. However, the Supreme Court further states, “[i]f a creditor cashes a check that has been clearly designated as payment in full, the creditor is deemed to have assented to the terms of the accord and is bound by the acceptance if the other two essential elements for an accord and satisfaction exist.”<sup>14</sup> The Trial Court found that the facts fail to establish the other two necessary elements for an accord and satisfaction. The Court finds that the Court of Common Pleas was not in error and that there is substantial evidence to support its finding that the facts were not sufficient to support a claim of accord and satisfaction.

With respect to Appellee’s breach of contract claim, the Trial Court pointed out that while Appellee produced a written retainer agreement, it was not signed by Appellant; and Appellee was not able to produce any itemized records of bills and hours spent on the case. Appellant did not dispute the validity of the retainer agreement, but without a clear documentation of the hours spent, the Trial Court was forced to consider any recovery based on what it found to be reasonable under the facts. It used an analysis based on *quantum*

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<sup>13</sup>693 A.2d 1066, 1070 (Del. 1997).

<sup>14</sup>*Id.* [Emphasis added.]

*meruit*.<sup>15</sup> *Quantum meruit* presupposes that an agreement existed between the party to be held liable and the party seeking compensation.<sup>16</sup> The lower Court found that Appellee did represent Appellant and performed all the work required for the Third Circuit appeal and the ODC matter. Thus, the Court below found that an agreement existed between the parties and recovery in *quantum meruit* was justified.

The Court below determined compensation owed after considering the factors discussed in *Construction Systems Group, Inc.*<sup>17</sup> The factors are as follows:

- (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 substance of the particular employment will preclude other employment by the lawyer;
- (3) The fees 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 to perform the services;
- (8) Whether the fee is fixed or contingent;
- (9) The employer's ability to pay; and
- (10) Whether claimant's counsel has received or expects to receive compensation from any other source.

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<sup>15</sup>*Heiman, Aber & Goldlust v. Ingram*, 1999 WL 1240904 (Del. Super. Ct.).

<sup>16</sup>*Bellanca Corp. v. Bellanca*, 169 A.2d 620, 623 (Del. 1961); and *Construction Systems Group, Inc. v. Council of Sea Colony, Phase I*, 670 A.2d 1337 (Del. 1995).

<sup>17</sup>670 A.2d 1337 (Del. 1995)(citing *Webb v. Harlesville Ins. Co.*, 1995 WL 716757 (Del. Super. Ct.) (citing *General Motors Corp. v. Cox*, 304 A.2d 55, 57 (Del. 1973)).

The Trial Court specifically considered that an appeal to the Third Circuit is complicated and time consuming; that Appellee's fees were usual and customary; and that Appellee has extensive experience in representing clients in the Third Circuit, enjoys a good reputation in the legal community and has a reputation for producing quality work.

Appellee represented that he spent 75 hours on the case and his law clerk spent 100 hours working on the case, which amounts to \$17,361.24. Appellant argues that it is "bizarre" that Appellee spent so much time on one brief to the Third Circuit. However, the Trial Court took note that Appellee not only prepared (i) a 47 page opening brief and a 12 page reply brief; Appellee (ii) prepared a Rule 59(d) Motion to Stay the Proceedings in the District Court pending the outcome of the Third Circuit appeal; (iii) negotiated a payment schedule for Appellant to pay off the \$10,000 sanction; and (iv) represented Appellant before the ODC and persuaded it to dismiss any actions against Appellant.<sup>18</sup>

The lower Court found Appellant's argument that Appellee's fees should be reduced because the outcome in the Third Circuit was unsuccessful without merit. From the evidence presented, the Trial Court found that Appellee was competent in his representation of Appellant and would not reduce the attorney fees simply because a client is unsatisfied with the outcome.

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<sup>18</sup>Appellant disputes any positive effect of Appellee's representation of him before the ODC.

Thus, the Court of Common Pleas found that while Appellee's hourly fee and that of his law clerk were reasonable, review of the record and failure to have itemized billing mitigated against Appellee's claim for the full amount. It determined that 50 hours was a reasonable amount to attribute to Appellee, and 100 hours was a reasonable amount to attribute to his law clerk, for a total of \$12,000.00. Appellant previously paid \$7,000.00, resulting in a \$5,000.00 balance due.

Appellant argues that the Court of Common Pleas determined that Appellee's services were only worth \$5,000. Additionally, Appellant repeatedly states that the "feeling" of the lower Court was to give Appellee something extra, over and above the "accord and satisfaction" amount. However, the lower Court articulated the reasons why it determined that \$12,000.00 was appropriate. Nowhere does the lower Court state that it feels Appellee should get paid something extra because Appellee is "a well-regarded lawyer in the civil rights field" as Appellant alleges.

The Court finds that the Court of Common Pleas exercised an orderly and logical deductive process in determining the amount in which Appellant now owes Appellee. The lower Court relied on the principle of *quantum meruit* to determine a specific figure. The trial Court made no error in applying the law to the specific facts in the record and this Court will not second guess its decision.

*Appellant's Counterclaim*

As to Appellant's counterclaim, the lower Court found that Appellant continued to work on the Nichols case even after Appellee was retained as counsel for Nichols. Next it considered whether the services were for Nichols or Appellee. The Trial Court noted that there was no retainer agreement between Appellant and Appellee, however, there was one between Appellant and Nichols. The lower Court also considered the timing of this retainer letter between Appellant and Nichols, which was February 19, 1996, two years after Appellant began representing Nichols and just prior to Appellee's representation of Nichols. It was determined that any work performed and billed by Appellant on the Nichols case is the responsibility of Nichols. Both parties testified that they received approximately \$8,000.00 in legal fees from Nichols. The Trial Court found that because there was a retainer agreement between Appellant and Nichols, and because Appellant received payment directly from Nichols, there was no merit to Appellant's counterclaim. Additionally, the lower Court considered the timing of Appellant's billing, which was July 2001, two years and five months after the Nichols case was resolved in February 1999.

Next, Appellant argues that he could not have performed work for Nichols during the period between 1996 and 1999, as any services provided to her ended on February 20, 1996. Appellant argues that if Appellant continued to represent Nichols, he would have been in violation of Judge Longobardi's Order of Disqualification. Appellant finally argues that

pursuant to *Bellanca Corp. v. Bellanca*<sup>19</sup> the doctrine of quasi-contract provides that a person may recover the reasonable value of his services where he establishes that the services were performed with the reasonable expectation that the recipient would pay for them and that the services were performed under circumstances which should have put the recipient on notice that the plaintiff expected to be paid. Appellant argues that because Appellee admitted that the services had value, he should have expected to pay for them. The Court below did not find that the circumstances put Appellee on notice that Appellant had an expectation of payment. It does not follow that simply because Appellee admits that the services had value, he should have expected to pay for them. Appellant assisted in the transition of his client to Appellee. Appellant did not obtain a retainer agreement with Appellee, and only billed Appellee on July 11, 2001, two years and five months after the Nichols case was resolved and nine months after the initial lawsuit was filed by Appellee. The Court of Common Pleas considered all of these facts in making its decision that the services were ultimately charged to Nichols and not Appellee.

The Court finds that the Court of Common Pleas' decision that Appellant owes Appellee \$5,000.00 plus costs and interest at the legal rate, is sufficiently supported by the record, and is a product of an orderly and logical deductive process.

For the forgoing reasons the decision of the Court of Common Pleas is

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<sup>19</sup>169 A.2d 620, 623 (Del. Supr. 1961).

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hereby **AFFIRMED**.

**IT IS SO ORDERED.**

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**ALFORD, J.**

Original: Prothonotary's Office - Civil Division