

STATE OF MICHIGAN
COURT OF APPEALS

NANCY B. FINCH, P.C.,

Plaintiff/Counterdefendant-
Appellee/Cross-Appellant,

v

DARLENE McDONOUGH,

Defendant/Counterplaintiff-
Appellant/Cross-Appellee.

UNPUBLISHED
January 28, 2000

No. 208635
Dickinson Circuit Court
LC No. 95-008939-CK

Before: Griffin, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

This case involves a fee dispute between plaintiff, an attorney, and her former client, defendant. The action was initiated by plaintiff after defendant refused to pay money allegedly owed pursuant to a contingency fee agreement for services rendered in an action against defendant's former employer. Plaintiff claimed the fee agreement had been lost; defendant denied that any such agreement existed. Following a bench trial, the trial court held that plaintiff's proofs were insufficient to show the existence of a contingency fee agreement and, pursuant to a counterclaim by defendant, awarded defendant \$1,122.72 after finding that she had overpaid plaintiff. Defendant appeals as of right from the order of judgment and plaintiff cross appeals. We affirm.

I

In 1990, defendant retained a law firm to represent her in connection with a dispute she was having with her employer regarding a job transfer. Plaintiff was the attorney assigned to her case. Defendant was a client of the firm for only a short time before plaintiff decided to start her own practice. Because plaintiff was familiar with defendant's case, defendant retained her rather than remain with the firm.

Defendant and plaintiff both testified that they initially agreed to an hourly fee of \$65 because it appeared that defendant's employer was close to proposing a settlement. However, when the prospect of settlement became unlikely, plaintiff testified that she sent a letter to defendant in which she stated that

if it became necessary to file a lawsuit, a contingency fee agreement would have to be executed; in February 1991, she purportedly sent defendant a copy of a contingency fee agreement for defendant's signature after discussing such an arrangement with her client.

The parties disagree regarding whether the contingency fee contract was ever signed by defendant. Defendant acknowledged that she received a letter from plaintiff dated February 1, 1991, in which plaintiff referenced a standard contingency fee agreement, but testified that she never signed it. Defendant testified that it was her understanding that plaintiff would continue to work for her on an hourly fee basis.

Plaintiff, on the other hand, testified that defendant signed the contingency fee agreement in her presence, agreeing to pay one-third of any amount recovered. Plaintiff's legal assistant testified that defendant was in fact presented with a contingency fee agreement and that plaintiff told defendant the agreement would have to be signed before the case could go forward. The legal assistant recalled seeing a signed contingency fee contract in defendant's file. However, plaintiff represented at trial that she could no longer find the fee agreement.

Plaintiff initiated a lawsuit on defendant's behalf and testified that defendant no longer received billing statements reflecting an hourly rate after August 1991; after that date, she worked for defendant on a contingency fee basis. The parties to defendant's lawsuit reached a settlement in December 1991. Defendant's employer paid the \$225,000 settlement, and plaintiff withheld \$30,000 as part of her purported contingency fee. Plaintiff claimed that defendant owed her a balance of \$21,194.56, representing twenty-five percent of the settlement less payments defendant had made pursuant to the hourly fee agreement.

In April 1995, plaintiff initiated the present lawsuit against defendant for unpaid attorney fees. Defendant counterclaimed, arguing that she had overpaid plaintiff because the \$30,000 withheld by plaintiff exceeded the costs and hourly fees to which plaintiff was entitled. At the close of proofs at trial, defendant moved for a directed verdict, claiming that plaintiff had failed to proffer sufficient proof that a contingency fee agreement ever existed. The trial court agreed and found that plaintiff had not carried her burden of proof in this regard. In its subsequent written findings of fact and conclusions of law, the trial court found that plaintiff owed defendant \$1,122.72 as a result of defendant's overpayment of attorney fees.

Defendant now appeals the order of judgment, claiming that the trial court erred by accepting plaintiff's representations regarding the time she spent on defendant's case and awarding defendant only \$1,122.72. Plaintiff cross appeals, claiming that the trial court erred in finding that plaintiff failed to proffer sufficient proof of the existence and terms of the alleged contingency fee agreement.

II

Defendant alleges clear error regarding several facets of the trial court's findings of fact and conclusions of law leading to the ultimate conclusion that a judgment in the amount of \$1,122.72 should be entered against plaintiff in defendant's counterclaim. In particular, defendant contends that the trial

court erred when it found that plaintiff rendered services to defendant worth over \$30,000; defendant maintains that the trial court improperly accepted as true the accuracy of plaintiff's compilation of time spent representing defendant, without questioning her credibility or weighing countervailing evidence. We disagree.

We review a trial court's findings of fact for clear error. *Bracco v Michigan Technological Univ*, 231 Mich App 578, 585; 588 NW2d 467 (1998). "Findings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). "A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *In re Forfeiture of \$19,250*, 209 Mich App 20, 29; 530 NW2d 759 (1995).

In order to reach its conclusion, the trial court had to resurrect the billing file in the underlying lawsuit. It did so as follows:

The Court finds that the parties entered into an agreement whereby the plaintiff would provide legal services at the rate of \$65.00 per hour. From the evidence available, until mid May of 1991, periodic billings showing the amount of monthly attorney fees earned at the \$65.00 per hour rate were sent to the defendant. The Court further finds that the plaintiff did not keep hourly time records after a time because the plaintiff believed a contingency fee agreement was operating and that time records would no longer be needed. . . .

[A] total of 571.95 billable hours are shown as having been spent on the file, with costs of \$1,679.40 being expended. Plaintiff's statement to the defendant on or about December 30, 1991, (defendant's exhibit #4), lists attorney fees earned as being \$8,059.36. Yet the plaintiff stopped keeping time records at an earlier date because she believed the matter had been converted to a contingency fee agreement well prior to the December settlement of the underlying suit. It is not reasonable to assume, in light of all the evidence of the work done on the file, that this amount, \$8,059.36, was intended to reflect *all* the work done prior to December 30, 1991. It is, however, reasonable to assume that this amount reflects work actually charged up to that point in time when plaintiff stopped keeping specific time records and converted the file, in her mind, to a contingency fee file. The difficulty is finding when such point in time occurred. This event happened more than six years ago in the middle of litigation, and establishment of the point in time is aggravated by poor memories and poor records.

* * *

Prior to the settlement with [defendant's employer], the defendant had paid to the plaintiff \$4,850.00 toward the attorney fees. That figure, together with \$30,000.00 received from the settlement of the litigation, indicates that the plaintiff was paid \$34,850.00 before this present lawsuit began, and this Court so finds.

* * *

From the evidence presented at trial, when plaintiff quit keeping track of hours is best reflected by the apparent cessation of her practice of sending monthly statements for services rendered. The last such statement in evidence is one dated May 16, 1991. (defendant's exhibit #10). . . . [W]ork listed as being done on defendant's exhibit #10 . . . concluded with the May 10, 1991 phone conference . . . and shall be used by this Court as the cut off of the actual work comprising the \$8,058.36 in attorney fees. Although the plaintiff's compilation shows \$13,178.75 in fees earned prior to May 10, 1991, this Court finds that on December 30, 1991 the account became stated between the parties at \$8,059.36 as of May 10, 1991. . . .

Thus, the time on the plaintiff's compilation for attorney time from November 1990 through May 10, 1991 shows fees earned of \$13,178.75, while the account stated fees earned for this period was \$8,059.36. After subtracting \$8,058.36 (the amount of the account stated) from \$13,178.75 (the amount shown in the compilation as earned to May 10, 1991 fees), and deducting that figure, \$5,120.12, from the total compilation billing of \$38,847.40, the Court finds the total earned for attorney fees and costs is \$33,727.28. As the defendant has paid the plaintiff \$34,850.00, there has been a resulting overpayment of \$1,122.72. [Emphasis in original.]

Defendant challenges the trial court's findings of fact regarding plaintiff's credibility and the court's finding that plaintiff's representation of defendant on an hourly basis ended in May 1991. We are not persuaded that these findings were clearly erroneous. Regarding plaintiff's credibility, we defer to "the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). Regarding the date when plaintiff's representation of defendant ceased, the last billing statement produced for review by the trial court was dated May 1991. Based on this evidence, the court was justified in finding that plaintiff stopped sending hourly statements after May 1991, and that plaintiff did so because she thought her work from that time forward would be compensated pursuant to a contingency fee agreement. Given the detailed proofs adduced at trial, we are left with no firm conviction that an error was made by the trial court in this regard.

Defendant further contends that the trial court improperly determined that defendant's exhibit number four, a document handwritten by plaintiff and dated December 1991, represented an account stated. Although there was no evidence that defendant ever assented to the contents of the document at issue, thereby rendering questionable the court's characterization of the exhibit as an account stated, see *A Krolk & Co v Ossowski*, 213 Mich 1, 7; 180 NW 499 (1920), this error, if any, does not require reversal because the court's use of an "account stated" resulted in plaintiff being credited with only \$8,059.36 rather than the \$13,178.75 reflected by plaintiff's compilation. Thus, any mischaracterization in this regard inured to defendant's benefit.

Moreover, contrary to defendant's assertion, we conclude that the trial court, using this exhibit, accurately determined the amount owed during the pertinent time period. Despite inconsistencies in plaintiff's record keeping, the court reconciled the relevant exhibits, factoring in and considering

(reasonably, we believe) that “it is not reasonable to assume, in light of all the evidence of the work done on the file, that this amount, \$8,059.36, was intended to reflect *all* the work done prior to December 30, 1991” and that “there is a lag time between the work being done and later being itemized on a billing.” We find no clear error in the trial court’s computations and resultant judgment of \$1,122.72 to defendant.

III

In her cross appeal, plaintiff argues that the trial court clearly erred by finding that no contingency fee agreement existed and thus granting defendant’s motion for a directed verdict on this point. We disagree.

In the context of a civil bench trial, this Court treats a motion for a “directed verdict” as a motion for an involuntary dismissal pursuant to MCR 2.504(B)(2). *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995). MCR 2.504(B)(2) provides, “[i]f the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in MCR 2.517.” MCR 2.517, in turn, states that a court shall make “[b]rief, definite, and pertinent findings and conclusions” and that it may do so either “on the record or . . . in a written opinion.” While stating its findings, a court need not engage in “over elaboration of detail or particularization of facts.” MCR 2.517(A)(2). We review the court’s ultimate determination de novo and review the findings of fact supporting that determination for clear error. *Begola Services, supra* at 639.

On the issue of the existence of a contingency fee agreement, the trial court in this matter held in pertinent part:

If the fee agreement was . . . entered into in February, there were billings that came after that that suggested that there was still billings on the basis of time, but the biggest problem I have, I simply don’t have any agreement in front of me. I believe that’s fatal to the plaintiff’s case. Even if one was signed, I still don’t know what the terms are of that agreement, and that – that is essential that those terms be before the Court before it can say anything with regard to a contingent fee agreement.

I think the fact that it is lost, is not here, and, in fact, as I look at all the evidence here, I just cannot be convinced that there was at any time any contingency fee agreement, and since the plaintiff has that burden of establishing that, I’m satisfied the plaintiff has not established that burden and the claim for any contingency fee would be denied.

The court clearly based its decision on the facts that no fee agreement was produced, that the testimony did not adequately establish the terms of the proposed agreement, and that the evidence showed that defendant continued to be billed on an hourly basis after plaintiff claimed to be working on a contingency fee basis. The absence of any written agreement tended to corroborate defendant’s claim that she never executed one and never received a bill reflecting a contingency fee arrangement. The trial court did not clearly err when it found that plaintiff failed to carry its burden of proof.

Affirmed.

/s/ Richard Allen Griffin
/s/ David H. Sawyer
/s/ Michael R. Smolenski