Franklin County Ohio Clerk of Courts of the Common Pleas- 2022 Nov 30 10:21 AM-20CV003954

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

KEGLER BROWN HILL & RITTER CO., LPA,	:	
Plaintiff,	:	Case No. 20CV-3954
vs.	:	(JUDGE FRYE)
CARLO M. CROCE, M.D.,	:	
Defendant.	:	

POST-TRIAL DECISION

I. Introduction.

Kegler Brown Hill & Ritter Co., LPA ("KBHR") filed this suit against their former client, Dr. Carlo Croce, for breach of contract from non-payment of legal fees (Count One), a claim on his open account (Count Two), and a claim for promissory estoppel/unjust enrichment/quantum meruit (Count Three). Dr. Croce filed an Answer in which he asserted affirmative defenses to plaintiff's claims, including a counterclaim seeking an equitable recoupment due to allegedly negligent representation by KBHR.

In a decision filed August 10, 2022 the court granted summary judgment to the law firm for breach of contract (and the redundant claim on an open account) due to non-payment of legal fees as billed under a written Engagement Agreement. The promissory estoppel/unjust enrichment/quantum meruit claim in Count Three was dismissed due to the fact the parties' relationship was governed by an enforceable contract. Because the amount of fees due the law firm was contested in the Civ. R. 56 proceedings, and specifically because there was insufficient evidence about whether the fees charged were reasonable and necessary, the court granted summary judgment as to liability only. The court also addressed the defendant's recoupment argument and concluded it was an equitable defense for which no jury trial is available. The parties were invited to waive a jury and try the entire case to the court, but that suggestion was declined.

The court held a jury trial between October 24 and October 31, 2022. Dr. Croce, two members of the KBHR firm who had been the most active in representing Dr. Croce, and two independent expert witnesses testified. The jury charge (at p. 6) framed the two related issues submitted to the jury as:

> 1) whether, as of the date in the summer of 2018 when the firm withdrew from representing Dr. Croce, additional legal fees which the firm claims were improperly left unpaid by Dr. Croce had been **reasonable**; and
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> 2) whether the firm's work reflected in their fees claim had been **necessary** to effectively represent Dr. Croce and try to fulfill his legitimate requests of the firm. (emphasis in original).

After what clearly appeared to be careful deliberation the jury returned a verdict for plaintiff for all the unpaid fees sought by KBHR in the amount of $923,445.51. In answering interrogatories, the jury explicitly found that Dr. Croce breached his contract with the firm and confirmed that he "owes additional and unpaid reasonable attorney fees" in the amount of the verdict.

The court conducted the recoupment portion of trial on November 21. Additional testimony was received from four witnesses, and one new witness who had not testified to the jury was heard. The court received short supplemental briefing thereafter. This Decision resolves the recoupment issue and constitutes the court's findings of fact and conclusions of law.

II. The Interplay between the jury verdict and the equitable defense.

Ohio law provides that when a claim for professional malpractice is barred by the running of the one-year statute of limitations, as it is here, there remains a right to seek equitable recoupment. That opportunity survives as long as the main cause of action is timely. Equitable recoupment may offer a defendant a reduction in the amount of plaintiff's damages if the evidence proves that a plaintiff did not fully comply with covenants owed that arise from the same contract or transaction for which damages are sought. *Riley v. Montgomery,* 11 Ohio St.3d 75, paragraph one of the syllabus.

Recoupment arises in equity. *Columbus Steel Castings Co. v. Transportation & Transit Assocs, LLC,* 10th Dist. No. 06AP-1247, 2007-Ohio-6640, ¶ 73*; Reeves v. Columbia Gas of Ohio (In re Reeves),* 256 B.R. 766, 771 (N.D. Ohio Bankr. 2001); *see also*

Black's Law Dictionary, (Rev'd 4th Ed. 1968) at 1439-40 [citing New York and Vermont cases]; *Black's* (9th Ed. 2009) at 1388; *Exact Software v. Infocon Systems, Inc.*, N.D. Ohio Case No. 3:03CV7183, 2011 U.S. Dist. LEXIS 66462, *8 (Carr, J.) ("Ohio courts have long held that no right to a jury trial attaches to actions to enforce a lien for attorney fees."). "Equity arose to make exceptions when rules of law would work injustice in particular cases or to deal with some novel situation not covered by rules of law." *ZF Micro Solutions, Inc. v. TAT Capital Partners, Ltd.*, 82 Cal. App.5th 992, 1000, 298 Cal. Rptr.3d 385 (4th Dist. 2022). An equitable recoupment defense to a suit for unpaid legal fees essentially amounts to a claim for legal malpractice but cannot result in any affirmative recovery by the defendant client, only a reduction of the amount owed. *Kravitz, Brown & Dortch, LLC v. Klein*, 10th Dist. No. 16AP-200, 2016-Ohio-5594, ¶¶ 26 – 27.

As this court discussed with the parties on several previous occasions, trials in which some issues are properly tried to a jury but also include equitable elements which must be tried to the bench are challenging. Equitable claims do not trigger a right to a jury trial. *Turturice v. AEP Energy Services*, 10th Dist. No. 06AP-1214, 2008-Ohio-1835. To the extent that factual findings are appropriately made by a jury in hearing their part of a trial, those are binding on a judge subsequently trying equitable issues involving the same facts. *Id.* at ¶ 13, quoting *Tull v. United States*, 481 U.S. 412, 425 (1987). This approach is taken routinely. *E.g., Covidien LP v. Esch*, 993 F.3d 45, 56 (1st Cir. 2021), citing *Teutscher v. Woodson*, 835 F.3d 936, 944 (9th Cir. 2016).

In the jury trial last month Dr. Croce argued various reasons why legal fees claimed to be due and unpaid were not reasonable, or necessarily incurred. In doing so defendant invited the jury to consider whether KBHR's lead lawyer Thomas Hill lacked experience representing a plaintiff in a defamation case against a media defendant, and whether that impacted the fees charged; whether KBHR failed to identify and understand the allegedly "leading" if not "controlling" Ohio decision in *Am. Chemical Soc. v. Leadscope, Inc.*, 133 Ohio St.3d 366, 2012-Ohio-4193; whether the firm failed to appropriately brief Dr. Croce about *Leadscope* and that it might prove fatal to his *New York Times* lawsuit; and whether Dr. Croce would have initiated, or continued for so long, his litigation against the *New York Times* if he had been warned one cannot force a newspaper to print a "retraction." In response to these and other arguments by the defense, the jury deliberated for hours

before deciding against Dr. Croce. As mentioned earlier, they awarded KBHR all of the fees sought for all of the firm's unpaid work.

Had the jury agreed that some KBHR work was unnecessary because, for example, a good lawyer would have recognized that *Leadscope* doomed the *New York Times* lawsuit, the jury verdict would necessarily have been lower. Similarly, had the jury concluded that a significant amount of legal work performed by KBHR was excessive because Mr. Hill was not sufficiently experienced to take on the *New York Times*, or because he and his colleagues misapplied their effort by learning too much about the scientific basis for criticism of Dr. Croce, then one must logically infer that the jury would have found at least some fees claimed were excessive and unreasonable and, for that reason, returned a lower verdict.[1]

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[1] At pp. 6 – 7 of the final charge the jury was instructed (emphasis in original):

> Legal billing is **reasonable** when you conclude it is fair under all the circumstances to both the firm and Dr. Croce. This requires you to consider the fee agreement made at the outset; the requests made by the client of the law firm; any time pressure or lack thereof under which the firm was working; the subject matter of the work; and the complexity of not only the scientific material being discussed but also the legal rules that had to be addressed. A **reasonable** fee will fairly compensate a lawyer for time and effort invested. A fair fee may reflect the experience, skill and reputation a lawyer brings to an engagement. You may conclude that a reasonable legal fee should also take into account the skill and reputation of the lawyers opposing a client's position. You may also consider other factors, such as the likelihood, if apparent to the client, that the acceptance of particular employment will preclude a lawyer or law firm from taking on other clients.
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> Legal work is **necessary** when a client expressly or impliedly asks a lawyer to do a task, or more generally simply authorizes a lawyer to take on broad responsibilities and/or multiple related projects. In evaluating whether legal work was **necessary** you must consider what the client requested be done; what results had been obtained as of the time the firm withdrew as Dr. Croce's lawyers; and any explicit restrictions or limitations on the scope of work placed on the firm by Dr. Croce, either initially or over the following months as the legal work progressed.
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> As you were instructed at the outset of this trial, an hourly rate contract between a lawyer and a client is not a blank check. But, a lawyer is entitled to a fair fee, which is reasonable for performing necessary work.
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> Finally, you are advised that you must not make a decision using mere guesswork or speculation. Your decision must be based on the evidence. While you are permitted to draw reasonable inferences and make reasonable estimates in calculating any damages due for unpaid fees you conclude are owed, remember that the plaintiff has the burden of proof. If you find the plaintiff law firm failed to carry its burden of proving a basis in evidence from which you can decide fees due and unpaid, if any, then your verdict must be for the defendant.

The conclusions necessarily drawn from the jury's verdict may not be disturbed in this court's resolution of the legal malpractice/recoupment issues.

III. The Court's Findings on Recoupment.

After considering the issues tried to the jury, all the evidence introduced at the jury trial and the recoupment hearing, and the credibility of all witnesses including both "independent" expert lawyer witnesses, the court finds that no basis has been proven to reduce the verdict amount through recoupment.

Dr. Croce has a world-class intellect. He is a recognized leader in his scientific field. Not only is he a medical doctor but he is also a geneticist and cancer researcher. His work has also been recognized with some 70 separate scientific awards including the Dan David Prize in 2018, awarded through a university in Israel. Tens of thousands of scientific papers written by others cite his work. Importantly, he also has more than a little prior experience in business and legal affairs. Dr. Croce is named on patents reflecting some of his scientific work and receives royalties from licensing them. Prior to engaging KBHR Dr. Croce worked with lawyers to successfully write and prosecute such patent applications based upon his discoveries. Dr. Croce also had previous experience in a major lawsuit he won against Christie's art auction house, apparently arising from his world-class art collection of 16th and 17th century paintings.

Suggestions that Dr. Croce was naïve about litigation matters when he retained KBHR, or while their work was ongoing simply are not credible. Similarly, suggestions that Dr. Croce was not kept reasonably apprised of the essential issues in his complicated assortment of legal matters are not credible. The evidence proves that KBHR told Dr. Croce that their work would be expensive and sent sensibly detailed fees statements each month as work progressed. The firm's lawyers met with Dr. Croce from time to time, and were fully prepared to meet with Dr. Croce even more frequently had he requested more briefings or deeper explanations. KBHR did not violate any professional obligations owed under the Ohio Rules of Professional Conduct (or otherwise) in respect of communications with Dr. Croce.

The magnitude of different but related legal matters that confronted Dr. Croce and lead him to retain KBHR was enormous. After Dr. Croce's work - and reputation – were harshly criticized by Dr. Sanders of Purdue University and repeated in a front page story

in the *New York Times*, inquiries followed by the Inspector General from an agency of the United States Government because the Government funded some research through The Ohio State University. Things like that had to be understood and promptly addressed by KBHR. Publishers of scientific articles with which Dr. Croce was associated also raised questions that required prompt and sensible responses. Other work as shown at trial was needed relatively quickly in the face of the universe of threats against Dr. Croce and his professional standing.

Texas lawyer Carl Kolb's testimony at the jury trial that KBHR could have greatly minimized work was not viewed favorably by the jury and is not persuasive to this court. Mr. Kolb found it unnecessary that the law firm devoted significant time to gaining an understanding of the scientific issues raised by Dr. Sanders and other critics of Dr. Croce.[2] To the extent this court must make a finding about the same argument raised as a recoupment defense the court emphatically disagrees with Mr. Kolb. It would be malpractice for a lawyer to undertake to represent a world-class scientist like Dr. Croce when his scientific work and published conclusions were widely attacked but then postpone most serious inquiry into the science at issue.

This court also disagrees with Mr. Kolb's view that Dr. Croce ought to have been more fully briefed—indeed warned—about *Leadscope*, or that "retraction" might not prove to be a remedy legally available in the *New York Times* lawsuit. As to the latter, experienced trial lawyers know that most civil cases which survive a Civ. R. 12(B)(6) motion will be guided toward settlement negotiations by the trial judge if not by the parties' own lawyers. Had the motions to dismiss been denied and, as is highly predictable, the scientific basis for Dr. Croce's positions been communicated to and understood by the *New York Times'* lawyers as pretrial discovery progressed, the newspaper might well have negotiated toward some version of a retraction. In other words, a negotiated settlement may well have skirted formal limitations in Ohio's "correction" statute, and readily resolved the *New York Times* lawsuit once the lawyers defending the newspaper understood Dr. Croce's view of the science. Practically speaking that would have met Dr. Croce's foremost goal of restoring his good name. So, the mere

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[2] In Mr. Kolb's April 5, 2021 expert report, at page 15, he stated his opinion that 83% of the "'Science' hours are unnecessary." That opinion was offered before the jury.

fact that KBHR concluded after preliminary legal research in April 2017 that "retraction" was not a legal remedy that could be judicially imposed for libel did not preclude some equivalent resolution through settlement had the federal cases remained viable following preliminary rulings on motions to dismiss.

The foremost difficulty with most of Mr. Kolb's opinions is that his view that the firm did not perform well is grounded in hindsight.[3] Today we know how District Judge Graham and the Sixth Circuit ultimately resolved the *Sanders* and *New York Times* cases. Therefore, it may seem superficially sensible to suggest that Dr. Croce ought to have been given more warnings about the possibility of losing his cases, or about how *Leadscope* might be applied by a federal judge. That view is incorrect. This court adheres to the view it expressed throughout this case (and communicated in the jury charge) that hindsight is not properly used to evaluate KBHR's work:

> You may be wondering what the outcome was of Dr. Croce's lawsuits against Dr. Sanders of Purdue University and against the New York Times. However, that information has not been introduced into evidence and you must not speculate about it. The reason for that limitation is you cannot decide this case fairly from hindsight. Dr. Croce and the firm undertook this legal engagement on an hourly rate basis, not based on a contingency such as whether the firm would win the cases. If this were a contingency fee case then the firm might only be owed a legal fee if it won the cases. But the relationship between the firm and Dr. Croce ended months before there was any outcome in the lawsuits, so you must focus on what work was necessary and what fee was reasonable based upon the time the work was being done. As of the time the firm withdrew no one yet knew how the court cases would come out. The later outcome of the two court cases is simply irrelevant to the fee issues you must decide.
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> (Jury charge, pp. 5 – 6.)

The question primarily presented to this court but not to the jury is whether there were professional ethics violations by KBHR involving so-called "informed consent" or

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[3] The court is also somewhat troubled by the fact that defendant's April 5, 2021 expert report (Exhibit 242), prepared by attorney Kolb pursuant to Civ. R. 26(B)(7), did not suggest that *Leadscope* ought to have been specifically discussed with Dr. Croce after the initial motion to dismiss hearing before Judge Graham; or that KBHR was obligated to more specifically detail for Dr. Croce why retraction might not be available as an ultimate legal remedy, or that a *per quod* remedy might be unavailable. Mr. Kolb was candid at the recoupment hearing in acknowledging these were newly discovered opinions. The opinions were not excluded because in any complicated case experts invariably learn more as trial unfolds. Nevertheless, in this instance, late-developed opinions could have been disclosed prior to the recoupment hearing, and therefore impact the court's view of Kolb's credibility.

other communications with the client. These are argued to include failures to reasonably brief Dr. Croce about hazards he faced with lawsuits against Dr. Sanders and the *New York Times*, an inquiry by the Inspector General, Ohio State University's internal reviews, and questions raised by professional journals. One answer to this is implicit in the Engagement Letter agreed upon by Dr. Croce in December 2016 as KBHR was retained. It warned Dr. Croce "there is no certainty" as to the outcome of potential litigation, and "no representation that damages will be recoverable resulting from any claim *** or, if they are recoverable, what the amount of those damages could be." For a sophisticated and learned man like Dr. Croce this certainly telegraphed that ongoing attention to his legal affairs—including an ongoing financial cost-benefit analysis—would be prudent. In his testimony at trial Dr. Croce acknowledged he knew the law firm's work would be expensive, but he never contacted the firm to request it cut back on work. With billings in the tens of thousands of dollars arriving each month a sensible cost-benefit analysis ought to have been an obvious point of focus. Instead, Dr. Croce testified, he didn't look in great detail at the invoices. It did not violate any rule or professional standard of care owed for KBHR to assume that their highly experienced and intelligent client monitored his own finances without persistent needling from the lawyers.

Plaintiff's expert witness Lee Plakas carefully examined the law firm's work and the resulting fees claim. He concluded there were no deficiencies in the firm's communications with the client or other professional or ethical failures, and that all of the work billed was necessary and reasonably charged. Those were highly credible opinions.

The most troublesome part of this story is Dr. Croce's response when his legal fees began to fall into arrears. He testified at trial that he "always intended to pay" but concluded—and communicated to KBHR as the overdue account grew—that he was "illiquid." The firm was told he would promptly sell some of his artwork. They allowed months to pass while they continued to work, recognizing that it can take some time in dealing with New York City (or perhaps worldwide) art dealers. Only after months passed did the firm give up the ghost and withdraw. During this period Dr. Croce and two others jointly won the 2018 scientific prize awarded in Israel noted above. With it came $1 million split three ways. After receiving his share Dr. Croce bought more art rather than paying down his fees account owed KBHR.

This seriously undermines Dr. Croce's credibility. The incident also undermines the contention raised in a variety of ways that Dr. Croce's fees were run-up improperly while he was being misinformed by his lawyers. Proximate cause of some harm to the client is one of the essential elements of any legal malpractice claim. There must not only be an attorney-client relationship and evidence of failure to conform to the standard of practice but also "a causal connection between the conduct complained of and the resulting damage or loss." *Creech v. Gaba,* 10th Dist. No. 15AP-1100, 2017-Ohio-195, ¶ 9, citing *Vahila v. Hall*, 77 Ohio St.3d 421, 427 (1997). No proximate cause exists here in favor of Dr. Croce. Arguments that steps taken or left undone by KBHR somehow harmed him with unnecessarily higher legal fees he did not implicitly authorize are a post-hoc fabrication to obscure what really happened.

IV. Prejudgment Interest.

Plaintiff filed a detailed motion for prejudgment interest on November 9, 2022. The court agrees it is legally proper. Prejudgment interest at 4% is therefore **GRANTED** and should be applied to the jury verdict of $923,445.51 when drafting the Final Judgment, using the methodology explained in the affidavit of attorney Lorianne Fuhrer. Prejudgment interest shall run until December 9 in anticipation that shortly after that date the Final Judgment will be entered. Thereafter, post-judgment interest applies as calculated under Ohio law.

V. Conclusion.

All issues having been appropriately tried, plaintiff is directed to promptly draft, circulate, and submit a Final Judgment consistent with the foregoing. Court costs are to be taxed against defendant.

Any objections of form to plaintiff's draft Judgment shall be discussed promptly by counsel and, if not resolved, defendant shall file his objections with the court within 48 hours after the plaintiff's version of the Judgment is tendered. Obviously by agreeing to the form of the Final Judgment defendant is not waiving his position on the substance of the court's decisions.

IT IS SO ORDERED.

Franklin County Court of Common Pleas

Date: 11-30-2022

Case Title: KEGLER BROWN HILL & RITTER CO LPA -VS- CARLO M CROCE

Case Number: 20CV003954

Type: DECISION

It Is So Ordered.

/s/ Judge Richard A. Frye

Court Disposition

Case Number: 20CV003954

Case Style: KEGLER BROWN HILL & RITTER CO LPA -VS- CARLO M CROCE

Motion Tie Off Information:

1. Motion CMS Document Id: 20CV0039542022-11-0999980000
   Document Title: 11-09-2022-MOTION - PLAINTIFF: KEGLER BROWN HILL & RITTER CO LPA - FOR PREJUDGMENT INTEREST
   Disposition: MOTION GRANTED