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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0440-21**

DAVID S. BUNEVICH,

Plaintiff,

and

MARIA MADALENA FERREIRA,

Plaintiff-Appellant,

v.

DEL VACCHIO, O'HARRA, PC
and RICHARD DEL VACCHIO,
Individually,

Defendants-Respondents.

Submitted November 7, 2022 – Decided December 19, 2022

Before Judges Whipple and Mawla.

On appeal from the Superior Court of New Jersey, Law
Division, Hunterdon County, Docket No. L-0137-19.

Michael W. Rosen, attorney for appellant.

Respondents have not filed a brief.

PER CURIAM

In 2010, Plaintiff Maria Ferreira's son was killed in a motor vehicle accident. Plaintiff David Bunevich probated her son's estate, and appointed Ferreira as administratrix. He referred Ferreira to the legal services of defendants Del Vacchio O'Hara, P.C. (defendants), who went on to represent her in a wrongful death action.

Defendants and Ferreira agreed on a one-third contingency fee. Bunevich was to receive one-third of that fee for referring the case to defendants. After several years of litigation, sometime around 2017, Ferreira agreed to settle the wrongful death action for \$100,000. Defendants did not inform Bunevich of this settlement, and as such he was not paid his forwarding fee.

In 2019, Bunevich contacted defendants to ascertain the status of the case and his fee. He retained counsel when defendants proved elusive. To explain the delay, defendants falsely claimed the wrongful death suit was still subject to an ongoing appeal. However, the appeal had been decided by this court two years prior, in 2017.

As Bunevich continued to investigate the wrongful death settlement, he discovered that defendants had improperly deducted certain disbursements from Ferreira's share of the settlement. Ferreira therefore joined him and the two filed

suit against defendants, alleging breach of contract, fraudulent concealment, breach of fiduciary duty, professional negligence, and legal malpractice.

The parties entered into a tentative settlement agreement in November 2019. Under the settlement, as referenced by the trial court, defendants were to pay \$8,516. The deal fell apart when defendants failed to make the agreed upon payment.

On January 4, 2021, the motion judge ordered partial summary judgment on the issue of Ferreira's overcharge, awarding her \$4,612.03 as the result of the improper disbursements. The court did not award Bunevich his referral fee, as it found issues of fact precluded summary judgment.

Ferreira then sought an award of attorney's fees relating to services rendered on her behalf, totaling \$23,197.50.¹ The court granted a reduced award of \$7,145 on September 27, 2021.² To reach this figure, the trial judge reasoned: 1) defendants did not purposely intend to defraud Ferreira; 2) counsel's hourly

¹ Ferreira sought fees twice. The first time, the court declined, reasoning that an award would be premature because of outstanding unresolved claims.

² The court found that fees were recoverable due to a lawyer's breach of fiduciary duty, relying on Rule 4:42-9 and Packard-Bamberger & Co., Inc. v. Collier, 167 N.J. 427, 443 (2001) ("Accordingly, we hold that a successful claimant in an attorney-misconduct case may recover reasonable counsel fees incurred in prosecuting that action.").

rate of \$400 was unreasonably high for the area of practice and should be reduced to \$350; 3) for certain time periods, work on Ferreira's claim should be separated from services rendered on Bunevich's behalf; and finally 4) Ferreira was not entirely successful because the initial aborted settlement was for \$8,516, whereas she ultimately only recovered \$4,612. Accordingly, the court discounted a large portion of the fee award by the ratio of settlement to actual recovery—fifty-four percent. The present appeal asks whether these adjustments were proper.

Following this decision, plaintiff filed a motion for reconsideration.³ Plaintiff first contended that the court's finding that defendants did not deliberately defraud Ferreira was thrown into question by newly discovered evidence in the form of a decision rendered by the New Jersey Disciplinary Review Board (DRB) censuring defendant Del Vacchio.⁴

Plaintiff also challenged the court's previous fifty-four percent reduction. In plaintiff's view, the court erred by concluding that the \$8,000 was to go entirely to the client (Ferreira), and therefore arrived at the wrong ratio by which

³ Defendant first appealed the fee award decision but later dropped it.

⁴ The DRB decision did not concern Ferreira, Bunevich, or anything else in this matter.

to discount the success of her claim. Plaintiff asserted that \$4,000 of the settlement was intended to be paid to counsel as an attorney's fee, and Ferreira was to receive the other half. Therefore, her ultimate recovery of \$4,612 represented recovery in full and did not justify the court's discounting.

Finally, plaintiff also sought a writ compelling defendant's bank to pay the previously awarded legal fees.

The motion court granted the writ mandating the turnover but declined to modify the award of fees. The court reasoned it lacked jurisdiction to modify an award and make additional findings in light of an already pending appeal. Neither the record nor appellant's brief make clear which appeal this statement references, because defendants withdrew their appeal from the initial award of attorney's fees over a month prior to this subsequent decision. The court also defended its discounting methodology, stating:

[T]he point of the court's discounting was that the case went on for almost two years after the November 2019 settlement, and the additional net recovery to Miss Ferreira was rather nominal.

The attorney[']s fees and costs . . . she was to receive . . . pursuant to the November 2019 settlement was \$4,516.

The amount that the [c]ourt ultimately allowed by way of additional costs and recovery was \$4,612, so there really wasn't much difference.

. . . .

[I]f a motion to enforce the November 2019 settlement had been filed in late 2019, there is a very good chance that the plaintiff would have prevailed, been awarded the \$8,516 settlement amount, plus counsel fees on the motion to enforce the settlement.

So the court could have denied all counsel fees after November 2019. . . . [T]he [c]ourt looked for a fair way to give plaintiff a fair amount for additional legal fees but not one hundred percent of those fees because the legal fees generated from November 2019 forward yielded no meaningful benefit to Ms. Ferreira.

And as counsel is well aware, one of the RPC⁵ 1.5[(a)] factors that a court is obligated to consider in determining a reasonable amount of counsel fees is the amount involved and the results obtained.

Plaintiff appeals from this final order denying the motion for reconsideration, arguing the court erred in reducing the fee by the ratio of expected versus actual recovery and by failing to find that defendant deliberately overcharged Ferreira. We affirm.

Defendants have not filed a brief, and as such the initial award of attorney's fees in this matter is uncontested. The only issue before us is whether the trial court's calculation was correctly determined.

⁵ Rules of Professional Conduct.

Trial courts have "broad discretion as to when, where, and under what circumstances counsel fees may be proper and the amount to be awarded." Passaic Valley Sewerage Com'rs v. St. Paul Fire and Marine Ins. Co., 206 N.J. 596, 619 (2011) (citations omitted). "[A] reviewing court will disturb a trial court's award of counsel fees 'only on the rarest of occasions, and then only because of a clear abuse of discretion.'" Litton Indus., Inc. v. IMO Indus. Inc., 200 N.J. 372, 386 (2009) (emphasis added) (citing Packard-Bamberger, Inc., 167 N.J. at 444). A "trial court [is] in the best position to weigh the equities and arguments of the parties" Packard-Bamberger, 167 N.J. at 447.

The abuse of discretion standard essentially means "a reviewing court should not substitute its judgment if the trial court's ruling was within a range of acceptable decisions." In re Kollman, 210 N.J. 557, 577 (2012) (internal quotations and citations omitted). However, where a ruling is based on a mistaken application of the law, an appeals court reviews de novo. Kavanaugh v. Quigley, 63 N.J. Super. 153, 158 (App. Div. 1960); accord Payton v. N.J. Tpk. Auth., 148 N.J. 524, 559 (1997).

To determine the amount of fee awards, courts apply the test described in Rendine v. Pantzer, 141 N.J. 292, 334-35 (1995). See also Klawitter v. City of Trenton, 395 N.J. Super. 302, 337 (App. Div. 2007) (holding that an attorney

who represents more than one plaintiff is entitled to fees only with respect to the plaintiffs who have prevailed). First, the court derives a "lodestar fee" by multiplying a reasonable hourly rate by the number of hours reasonably worked. Walker v. Giuffre, 209 N.J. 124, 130 (2012). "Reasonableness" is informed by the factors listed in RPC 1.5(a), such as the customarily charged fee for similar services, the amount involved, whether the party was successful, and whether the fee is fixed or contingent.⁶ Id. at 131.

Then, the lodestar amount may be reduced if the attorney does not achieve a complete recovery of relief sought. Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 23 (2004). Proportionality between the damages recovered and the attorney-fee award is not required. Ibid. Indeed, success is to be measured "qualitatively" rather than "quantitatively"—there is no "per se requirement that there be a close

⁶ Here, the relevant factors under RPC 1.5(a) include:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

. . . .

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

. . . .

(8) whether the fee is fixed or contingent.

relationship between recovery fees awarded for services rendered." New Jerseyans for Death Penalty Moratorium v. N.J. Dept. of Corr., 185 N.J. 137, 154 (2005) (quoting N. Bergen Rex Transp., Inc. v. Trailer Leasing Co., a Div. of Keller Sys., 158 N.J. 561, 574 (1999)). The Court rejects "a mathematical approach comparing the total number of issues in the case with those actually prevailed upon because such a ratio provides little aid in determining what is a reasonable fee in light of all the relevant factors." Ibid. (internal quotations and citations omitted). Instead, the Court in New Jerseyans held the proper procedure is to examine the factors in RPC 1.5(a) in their totality, then determine whether the attorney "achieved a high degree of success." 185 N.J. at 156. If so, the full lodestar amount is due. Id. at 158. But see Szczepanski v. Newcomb Medical Center, Inc., 141 N.J. 346, 368 (1995) (instructing trial court to closely scrutinize lodestar fee request to verify that hours were reasonably expended).

Plaintiff first argues the trial court's reduction of certain portions of attorney's fees based on the ratio of the \$8,000 settlement amount to the ultimate recovery of \$4,612 was an abuse of discretion.

Under RPC 1.5(a), one of the factors a court may consider when determining reasonableness is "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal

service properly[.]" RPC 1.5(a)(1). The court may also consider "the amount involved and the results obtained" when considering reasonableness. RPC 1.5(a)(4).

Here, the judge based his adjustment on these two factors. He first noted plaintiff never sought an order to enforce the earlier settlement, which would have likely concluded the case, and then reasoned:

I have to take into consideration the fact that . . . from . . . the time that the settlement fell apart to the time that the [c]ourt entered its judgment. . . . [T] he plaintiff achieved a significantly less favorable result than had been achieved through the settlement that was reached back in October 2019. . . . [T]he plaintiffs' level of success was only [fifty-four] percent of what had been achieved and could've been achieved had the settlement back in November 2019 gone forward and had a motion been filed to enforce that settlement.

[Emphasis added.]

Plaintiff is correct, to the extent this is simply a proportionality inquiry, this analysis is improper. See Furst, 182 N.J. at 23. Success is properly measured qualitatively, not quantitatively, and here the plaintiff prevailed on the issue. New Jerseyans, 185 N.J. at 154-55. Discounting based on a solely quantitative analysis is not allowed.

However, the judge's decision does not rest solely on those quantitative grounds. His opinion also noted the feasibility of enforcing the earlier

settlement order. This relates directly to RPC 1.5(a)(1)—"the time and labor required, the novelty and difficulty of the questions involved"—and as such the viability of settlement enforcement was a fair consideration for the court to base its reasonableness determination upon when calculating the lodestar. If the court found that the difficulty of the questions involved as well as the time and labor required rendered the fees sought unreasonable because enforcing the settlement was a feasible option that plaintiff did not pursue, that determination is permissible on an abuse of discretion standard. See Kollman, 210 N.J. at 577.

The court was clearly concerned plaintiff's counsel was "making work" for himself by refusing to seek enforcement of the settlement and sought not to reward that behavior. "The court looked for a fair way to give the plaintiff a fair amount for additional legal fees but not one hundred percent of those fees because the legal fees generated from November 2019 forward yielded no meaningful benefit to Ms. Ferreira." So, it cannot be said the trial court's determination was solely "based on irrelevant or inappropriate factors," as is required for reversal. Garameaux v. DNV Concepts, Inc., 448 N.J. Super. 148, 155-56 (App. Div. 2016).

To the extent we have not addressed plaintiff's remaining arguments, we are satisfied they are without sufficient merit to warrant further discussion in a

written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION