

RENDERED: APRIL 22, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000008-MR

BOWLES, RICE, MCDAVID, GRAFF &
LOVE, PLLC

APPELLANTS

APPEAL FROM PIKE CIRCUIT COURT
v. HONORABLE EDDY COLEMAN, JUDGE
ACTION NOS. 96-CI-00429, 99-CI-00290 AND 99-CI-01467

GETTY, KEYSER & MAYO, LLP;
S & L COAL SALES, INC.; AND
THOMAS E. BULLEIT, JR.

APPELLEES

AND NO. 2004-CA-000172-MR

THOMAS E. BULLEIT, JR., ESQ.

APPELLANT

APPEAL FROM PIKE CIRCUIT COURT
v. HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 96-CI-00429

GETTY, KEYSER & MAYO, LLP; AND BOWLES,
RICE, MCDAVID, GRAFF & LOVE, PLLC

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: KNOFF AND TACKETT, JUDGES; EMBERTON, SENIOR JUDGE.¹

TACKETT, JUDGE: The law firm of Bowles, Rice, McDavid, Graff & Love, PLLC ("Bowles Rice") appeals from the order of the Pike Circuit Court dividing a contingent fee with the firm of Getty, Keyser & Mayo, ("Getty") and with Thomas E. Bulleit, Jr. This case is before this Court for a second time, this Court having previously reversed the circuit court after the court erroneously applied the rule of law in splitting fees. This Court directed the circuit court to apply the formula of LaBach v. Hampton, 585 S.W.2d 434 (Ky.App. 1979), and award the contingent fee to Bowles Rice less an amount to Getty equal to the reasonable value of its services rendered. On remand the circuit court again misapplied the rule of law, granting a premium to Getty, and its order must again be reversed.

The underlying case was originally brought by Bowles Rice on behalf of client S & L Coal, Inc. During the course of the representation, Getty, Keyser & Mayo separated from Bowles Rice to form their own firm, and Bowles Rice gave the client the option to have Bowles Rice continue the representation or to have the new firm handle the case. The client opted to have Getty handle the case, and ultimately Getty settled the case for a total of \$1.4 million.

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

The circuit court ordered that the fee be split as follows: \$68,256.75 to Bowles Rice, with the remaining \$474,243.25 to Getty. Bulleit claims a referral fee, which he states that he has never been given the opportunity to enforce, arguing that his claim should be treated as entirely separate from the dispute between Bowles Rice and Getty. This Court reversed the circuit court's decision and ordered it to conduct a new hearing to determine the reasonable value of the services rendered by Getty. Instead, the court did not conduct a new hearing, ostensibly in the name of judicial economy, and the court found that Getty's services were worth \$437,097.00, awarding a premium due to the quality of its representation. The court also specifically stated that Bowles Rice's services "added no value" to S & L's case.

We find that the circuit court did not properly follow the mandate set out in this Court's prior opinion. This Court specifically stated that the value of Bowles Rice's services was not at issue, and that an evidentiary hearing was to be conducted to set the value of the services reasonably required of Getty to complete the contract. Nothing in LaBach authorizes the kind of "premium" the court awarded Getty. We hold now that the court abused its discretion by not conducting the hearing mandated by this Court and by awarding a premium to Getty. Of particular significance is that the circuit court stated in its

January 12, 2004 order in a related case between these parties that this Court "applied the wrong rule of law in the S & L case", then attempted to distinguish LaBach from the facts of this case. The court has no discretion to determine that a case is inapplicable once this Court has stated that it is the applicable rule of law. Perhaps the court's comment is a statement of mere opinion, but we find that the court's final order does not follow the intent of this Court's prior order. We reverse once again with instructions to apply LaBach as written, awarding Getty only the reasonable value of its services without an unauthorized "premium", regardless of the client's degree of satisfaction with Getty's services.

With respect to Bulleit's claim, we hold that on remand, the court should assign Bulleit's claim for an evidentiary hearing as requested, to determine the value of Bulleit's claim.

For the foregoing reasons, the judgment of the Pike circuit court is reversed and remanded for an evidentiary hearing conducted in a manner consistent with the opinion of this Court.

EMBERTON, SENIOR JUDGE, CONCURS.

KNOFF, JUDGE, CONCURS AND FILES SEPARATE OPINION IN WHICH EMBERTON, SENIOR JUDGE, ALSO JOINS.

KNOPF, JUDGE, CONCURRING: I concur in the reasoning and the result of the majority opinion, but I write separately because I agree with the trial court that the prior panel of this Court misapplied the rule set out in Labach v. Hampton.² In the first appeal, the prior panel found that S & L Coal's desire to have Getty continue his representation was a good reason to discharge Bowles Rice, but was not a "discharge for cause" within the meaning of Labach v. Hampton. However, in Labach, the client discharged two attorneys without cause before a third attorney settled the case. The Court in Labach held that the discharged attorneys could not rely on their contingent fee contracts to collect their full fees, "but must deduct from the contract fee the reasonable cost of services of other attorneys required to complete the contract."³

I do not believe that the rule set out in Labach v. Hampton was applicable to this case. Bowles Rice directed S & L Coal to choose whether it would commit to continued representation by Bowles Rice or to representation by Getty's firm. Unlike in Labach, the termination of the contract between S & L Coal and Bowles Rice was by mutual agreement. Ideally, Bowles Rice would have had an agreement with Getty, Keyser & Mayo addressing sharing of fees in this situation. In the

² 585 S.W.2d 434 (Ky.App. 1979).

³ Id. at 436.

absence of such an agreement, Bowles Rice waived its right to the contingent fee provided in the contract. At most, Bowles Rice is only entitled to the reasonable value of its services plus expenses incurred prior to the termination of the contract.

Nevertheless, the ruling by this Court in the prior appeal is law of the case, and the trial court was not at liberty to depart from the mandate set out in that opinion.⁴ Under the rule set out in Labach v. Hampton, the trial court must award the entire contingent fee to Bowles Rice, subject to an offset for the reasonable value of the services provided by Getty, Keyser & Mayo and by Bulleit. Although the trial court stated that it applied this standard, it did not conduct an additional hearing and it simply reinstated the allocation of fees set out in its first decision. Therefore, I reluctantly agree with the majority that this case must be remanded for an evidentiary hearing and additional findings consistent with the August 21, 2001, opinion of this Court.

⁴ See Siler v. Williford, 375 S.W.2d 262, (Ky. 1964), "When an appellate court decides a question concerning evidence or instructions, the question of law settled by the opinion is final upon a retrial in which the evidence is substantially the same and precludes the reconsideration of the claimed error on a second appeal."

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