

**IN THE COURT OF APPEALS**  
**ELEVENTH APPELLATE DISTRICT**  
**LAKE COUNTY, OHIO**

|                              |   |                            |
|------------------------------|---|----------------------------|
| SCHRAFF & KING CO., L.P.A.,  | : | <b>O P I N I O N</b>       |
| Plaintiff-Appellee,          | : |                            |
| - VS -                       | : | <b>CASE NO. 2012-L-010</b> |
| M. BRYAN CASEY, INDIVIDUALLY | : |                            |
| AND AS TRUSTEE OF THE JEANNE | : |                            |
| CASEY TRUST, UTD 7/19/00,    | : |                            |
| Defendant-Appellant.         | : |                            |

Civil Appeal from the Lake County Court of Common Pleas, Case No. 10CV000194.

Judgment: Affirmed.

*John P. Thomas*, Schraff & King Co., L.P.A., 2802 S.O.M. Center Road, Suite 200, Willoughby Hills, OH 44094 (For Plaintiff-Appellee).

*Kevin L. Starrett*, Law Office of Kevin L. Starrett, 17½ North Franklin Street, Chagrin Falls, OH 44022 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} This appeal is from a final judgment of the Lake County Court of Common Pleas, in which appellee, Schraff & King Company, L.P.A., prevailed on its basic claim for breach of contract. Appellant, M. Byran Casey, primarily seeks to challenge the trial court's determination that he is still liable to appellee for attorney fees for work the law firm performed on an underlying probate matter. Specifically, he asserts that the trial court should have found that he had already paid sufficient fees in light of the nature of

the services rendered.

{¶2} At some point in the early 2000's, appellant was appointed the trustee of his mother's inter vivos trust, the Jeanne Casey Trust. At the time of his appointment, the trust did not have any liquid assets, but did own at least three properties in, or near, Cuyahoga County, Ohio. As a result of the lack of funds, appellant periodically would loan money to the trust by making transfers from his personal bank accounts to the trust account. Subsequently, he would allegedly re-pay the "loans" by issuing a check on the trust account to himself. In addition, appellant would sometimes use funds in the trust account to directly pay his personal debts.

{¶3} After his mother passed away, appellant did not immediately take steps to sell the hard assets of the trust. Instead, he lived in his mother's former home for a period of time, and attempted to make repairs to the other properties. When, after four years, the inter vivos trust still had not been settled, appellant's two siblings brought an action in the Cuyahoga County Probate Court for an accounting of the assets and to remove him as trustee. As the primary grounds for their complaint, the two siblings alleged that appellant had improperly commingled trust assets with his personal assets.

{¶4} Within two months of the filing of the "removal" proceeding, appellant had a meeting with Attorney Patricia Schraff, a partner in Schraff & King, appellee, at which time they reviewed the general terms of the Jeanne Casey Trust, and discussed the basic facts of the pending litigation. At the close of the discussion, it was agreed that Attorney Schraff and the law firm would represent appellant and the trust in various legal matters. Even though the "removal" case was the primary impetus for the agreement, appellant also hired Attorney Schraff's firm to provide trust administration

and accounting services, and to defend the trust against two other pending claims that had been brought by two separate law firms.

{¶5} On the same day of the meeting, appellant and Attorney Schraff executed a written fee agreement that was prepared by her law firm. The initial paragraph of the agreement stated that appellant was retaining Attorney Schraff and the firm to represent him for purposes of “Estate Planning.” The text of the agreement did not expressly refer to the inter vivos trust or the “removal” proceeding; however, in signing the agreement, appellant designated himself as a trustee. The agreement further stated that Attorney Schraff would be primarily responsible for providing the legal services, and that she was to be paid at an hourly rate of \$190. Finally, the agreement indicated that any service performed by a firm paralegal would be billed at \$85 per hour.

{¶6} Pursuant to the terms of the written agreement, appellant was obligated to pay an initial retainer fee of \$1,500. He satisfied this particular debt with a check from his personal bank account. Yet, in paying subsequent bills for legal services, appellant would sometimes employ funds from the trust account.

{¶7} During the first two months of Attorney Schraff’s representation, appellant personally prepared an accounting of all trust transactions over the preceding four years, including the “loans” from him and their re-payment. Although appellant initially sought Attorney Schraff’s advice regarding the document, no employee of the firm was involved in its creation. At the first pre-trial conference before the Cuyahoga County trial court, a copy of appellant’s accounting was provided to opposing counsel and the court. In the ensuing months after the initial conference, though, opposing counsel began to assert certain questions about the document. As a result, beginning in March

2005, Attorney Schraff's staff started to compile a second accounting and an accompanying summary. This project took approximately two months to complete, and constituted the majority of the law firm's pre-trial work.

{¶8} Attorney Schraff attended at least two additional pre-trial conferences in the Cuyahoga County litigation. As part of these proceedings, she attempted to engage in settlement negotiations. However, the attempts proved fruitless, in part because the two plaintiffs-siblings were not required to attend the conferences. In regard to pre-trial discovery, Attorney Schraff did answer certain interrogatories propounded by opposing counsel, but did not put forward any interrogatories on behalf of appellant or conduct any depositions of the two siblings.

{¶9} Eventually, a three-day trial was conducted in the "removal" action before a probate court magistrate. In his subsequent written decision, the magistrate found in favor of appellant on the siblings' claims of malfeasance, concealment, and bad faith. Nevertheless, the magistrate still found that appellant had breached his fiduciary duty as a trustee by mismanaging the assets of his mother's trust. Hence, it was recommended that appellant be removed as trustee and be held personally liable for a surcharge in the amount of \$37,633.24.

{¶10} Attorney Schraff filed objections to the magistrate's decision on behalf of appellant, along with two reply briefs. Notwithstanding her efforts, the Cuyahoga Court trial court adopted the magistrate's various recommendations. At that point, appellant approached Attorney Schraff about the possibility of pursuing a direct appeal of the final determination. Attorney Schraff declined to perform this work for appellant, and the law firm's representation of him and the trust ended.

{¶11} Upon making the necessary calculations, Attorney Schraff and the law firm concluded that the total value of the services rendered for appellant and the trust was \$64,222.50. It was also determined that, while the Cuyahoga County litigation had been pending, appellant had paid the sum of \$30,868 on this debt. As previously indicated, appellant used funds from his personal accounts to make some of the payments, while trust funds were employed for the remaining payments. When the law firm, appellee, was unable to collect any more payments on the remaining debt after the attorney-client relationship was terminated, it instituted a separate action against appellant in the Lake County Court of Common Pleas. In addition to alleging that appellant had breached the fee agreement by not paying for the services rendered, appellee's complaint also stated that he had been unjustly enriched through his acceptance of the completed work.

{¶12} After filing his answer to the complaint, appellant moved the Lake County trial court to take judicial notice of certain matters relating to the Cuyahoga County probate case, including the docket of the proceeding, two magistrate's decisions, and Local Rule 71 of the Cuyahoga County Court of Common Pleas. Since this motion was not filed until three days prior to the commencement of the bench trial, the trial court did not have an opportunity to render a written judgment on the matter. At the outset of the hearing, the court indicated that it would not take judicial notice of any of the documents cited by appellant, except for the local rule.

{¶13} Attorney Schraff was the sole witness to testify on behalf of appellee. In relation to the nature of the fee agreement between the parties, she stated that she was representing appellant both individually and as the trustee, and that he fully understood this point throughout the attorney-client relationship. In this regard, she denied that she

ever told appellant that the trust would be responsible to pay all attorney fees pertaining to the “removal” action on his behalf. Furthermore, Attorney Schraff gave an extended explanation of the various work which was completed for appellant and the trust. As to the production of the second accounting, she testified that it was necessary to conduct legal research on many of the transfers or expenditures in order to find a justification for appellant’s acts.

{¶14} In testifying on his own behalf, appellant asserted that, contrary to what was stated in the fee agreement, he did not hire Attorney Schraff and the law firm to do any estate planning for him. As to the nature of the work, he further stated that Attorney Schraff did not provide any services regarding the actual administration of the trust, and that he had been primarily responsible for producing a proper accounting. Concerning the payment of the attorney fees, appellant testified that Attorney Schraff informed him at their initial meeting that, under the terms of the trust, all expenses associated with the probate proceeding would be paid by the trust. Finally, he testified that, in his opinion, the law firm’s representation of him had been deficient because: (1) it would have been possible to settle his dispute with his siblings if Attorney Schraff would have taken their depositions; (2) there had been no true need to produce a second accounting; and (3) Attorney Schraff’s use of the second accounting at trial had created needless confusion which contributed to the judgment against him.

{¶15} In rendering final judgment in favor of appellee on its complaint, the Lake County trial court concluded that the law firm had satisfied the elements for a breach of contract. First, the court found that the fee agreement had been between the law firm and appellant personally. Second, the court found that, given the nature of the removal

case and the amount of work required, the amount of billable hours charge by the firm was fair and reasonable. Third, the court found that the charged rate of \$190 per hour was also fair and reasonable. Fourth, the court found that appellant had breached the fee agreement by not paying the full amount of \$64,222.50. Based upon this, appellant was ordered to pay appellee the sum of \$34,036.81.

{¶16} After the trial court had released a second judgment containing additional findings of facts, appellant brought the instant appeal. He now raises the following three assignments of error for review:

{¶17} “[1.] The trial court committed error in determining that the fee agreement for ‘Estate Planning’ services prepared by Schraff & King and signed by [appellant] in his capacity as trustee only was an enforceable contract that obligated [appellant] individually to pay for Schraff & King’s trust administration services and/or litigation defense services.

{¶18} “[2.] The trial court committed err[or] in determining that the fee charged by Schraff & King in the underlying probate litigation held in Cuyahoga County Probate Court was reasonable and not clearly excessive.

{¶19} “[3.] The trial court committed err[or] in determining that Schraff & King was authorized to charge and collect payments from the Jeanne Casey Trust without the authorization or approval of the Cuyahoga County Probate Court and/or the consent of other trust beneficiaries.”

{¶20} Under his first assignment, appellant challenges the trial court’s finding as to the existence of a binding fee agreement. Specifically, appellant submits that the trial court should have found that he could not be held individually responsible for the total

amount of the attorney fees. In support of this argument, he emphasizes that, as part of his trial testimony, he stated that it had been his intent to hire Attorney Schraff and the law firm both individually and as the trustee for his mother's trust. Based upon this, he contends that he could not be found liable for any of the fees unless the law firm drew a distinction between work performed for him individually and work performed solely for the trust.

{¶21} Our review of the trial transcript readily shows that appellee, the law firm, introduced a copy of the written fee agreement into evidence as part of its case-in-chief. A review of the typed language of that document further shows that it does not contain any reference to the Jeanne Casey Trust or to appellant's status as the trustee. That is, the first sentence of the document expressly states that the fee agreement was between appellant and the law firm.

{¶22} In signing the fee agreement at the bottom of the single page, appellant did write the word "Trustee" beside his name. But, there is no other written language on the page which would indicate that the insertion of that word was intended to change or modify any terms of the typed language.

{¶23} As this court has noted on numerous occasions, the first step of contract construction is to determine whether the terms of the written agreement are ambiguous. See, e.g., *Gates v. Ohio Savings Assn.*, 11th Dist. No. 2009-G-2881, 2009-Ohio-6230, ¶24. If the wording of the agreement is plain and unambiguous, then no other steps of contract construction can be taken, and the document must be applied as written. *Id.*

{¶24} In summarizing the foregoing elementary rule of contract construction, the Fifth Appellate District has indicated:



{¶25} “The question of whether a contract is ambiguous is a question of law to which this court applies a de novo standard of review. (\*\*\*) The purpose of contract construction is to effectuate the intent of the parties. (\*\*\*) It is well established in Ohio law that a court must give meaning to all provisions of a contract if possible. (\*\*\*) Where the parties, following negotiations, make mutual promises which thereafter are integrated into an unambiguous written contract, duly signed by them, courts will give effect to the parties’ expressed intentions. (\*\*\*) Intentions not expressed in writing are deemed to have no existence and may not be shown by parole evidence. (\*\*\*) Pursuant to this rule, it has been held that when a term in an agreement is unambiguous, then the words must be given their plain, ordinary and common meaning; however, when the term is not clear, parole-evidence is admissible to explain the meaning of the words. (\*\*\*)’ (Citations omitted.)” *Barnes v. Barnes*, 5th Dist. No. 2003CA00383, 2005-Ohio-544, ¶18, quoting *Schumacher v. Covenor*, 5th Dist. No. 2004-CA-00018, 2004 Ohio App. LEXIS 5233.

{¶26} In the instant action, in arguing that it was not intended that he would be solely liable for the attorney fees, appellant does not point to any of the typed language in the fee agreement itself. Instead, he refers to his trial testimony, in which he asserted that Attorney Schraff told him during their initial meeting that the trust would be liable for any fees he incurred in relation to the removal proceeding. However, in light of the fact that appellant’s testimony clearly constitutes parole evidence, it can only be considered under the foregoing case law if the controlling terms of the written fee agreement were ambiguous.

{¶27} Upon reviewing the controlling typed language in the fee agreement, this

court holds that such an ambiguity does not exist. In regard to who were the parties to the agreement, the first sentence of the document plainly states that only appellant was retaining the services of the law firm. Again, the sentence does not make any reference to the trust or appellant's status as trustee. Furthermore, given that appellant's insertion of the handwritten word "Trustee" did not refer to any specific term of the agreement, its presence on the document did not, by itself, create any ambiguity. Thus, when taken as a whole, there was no dispute that the fee agreement was solely between the law firm and appellant individually.

{¶28} As a separate argument under this assignment, appellant argues that the fee agreement was not enforceable against him because, in describing the nature of the work to be performed by the law firm, it only referred to "Estate Planning." However, in raising this point, appellant has not asserted that Attorney Schraff and the law firm tried to bill him for work which was not originally contemplated by the parties. Furthermore, even if it can be said that the phrase "Estate Planning" was somewhat vague, a review of the testimony of the witnesses on this point fails to reveal any disagreement as to the scope of the intended work product. Therefore, since the record before this court does not support the conclusion that the law firm breached the scope of the fee agreement, it was still binding on appellant. For this reason, appellant's first assignment lacks merit.

{¶29} Under his second assignment, appellant submits that the trial court should have rejected the law firm's assertion that it was entitled to a total amount of \$64,222.50 in attorney fees. Appellant contends that he should not have been required to pay any additional fees because the entire sum sought by the firm was both unreasonable and excessive. In support of this contention, he emphasizes that, at the conclusion of the

Cuyahoga County probate action, he was removed as trustee and was ordered to pay a surcharge of \$37,633.24.

{¶30} As a general proposition, in a legal proceeding for fees, the attorney has the burden of showing: (1) the reasonableness of work hours devoted to the matter; and (2) that the time was both fairly and properly used. *In re Guardianship of Spagnola*, 195 Ohio App.3d 719, 2011-Ohio-5602, ¶14 (11thDist.), quoting *Climaco, Seminatore, Delligatti & Hollenbaugh v. Carter*, 100 Ohio App.3d 313, 323 (1995). In explaining the standard for attorney fees further, this court has stated:

{¶31} “OhioSup.R. 71 provides that attorney fees in all matters shall be governed by Rule 1.5 of the Ohio Rules of Professional Conduct. Prof.Cond.R. 1.5 provides that the factors to be considered in determining the reasonableness of a fee 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; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee 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 performing the services; and (8) whether the fee is fixed or contingent.” *Brancaatelli v. Soltesiz*, 11th Dist. No. 2011-L-012, 2012-Ohio-1884, ¶48.

{¶32} As was noted above, in contesting the fee judgment in this case, appellant focuses upon the fourth factor under Prof.Cond.R. 1.5. That is, he asserts that a total fee of \$64,222.50 had to be deemed excessive when he was the losing party before the

probate court and was found liable for a new judgment debt of \$37,633.24.

{¶33} As to this point, this court would indicate that Attorney Schraff expressly addressed the “outcome” issue as part of her trial testimony. According to her, the law firm considered the ruling in the probate proceeding to be a “win” for appellant. As the basis for her viewpoint, Attorney Schraff emphasized that, although the probate action resulted in a monetary judgment of \$37,633.24, the siblings had sought over \$100,000 in damages from appellant. It was also noted that, even though appellant was found to have violated his fiduciary duty to the trust, the probate court had rejected the siblings’ claims of malfeasance, concealment, and bad faith.

{¶34} Given this evidence, the trial court could have properly found that Attorney Schraff and the law firm had achieved the best outcome possible in light of appellant’s general admission that he had commingled his personal funds with the trust funds. To this extent, the trial record did not support a finding in appellant’s favor on the “outcome” factor.

{¶35} As part of this assignment, appellant further argues that the charged fees were excessive because the firm’s representation was seriously deficient. Our review of appellant’s trial testimony readily shows that he attempted to address the quality of the representation during his direct examination. However, while cross-examining appellant on the matter, appellee was able to establish that, after Attorney Schraff had terminated the firm’s representation of appellant, he had filed a pro se submission with the probate court concerning the general issue of attorney fees. It was further established that this submission had not contained any complaint about the quality of representation he had received during the removal action. Based upon this, the trial court could have found

that appellant's present complaints as to the firm's legal representation were not entitled to any credibility.

{¶36} Finally, appellant claims that Attorney Schraff and the law firm should not be permitted to recover the entire amount of the fees from him because they failed to adequately distinguish between the work performed for him personally and work solely for trust. Regarding this point, it must be noted that the trial testimony did indicate that the law firm did engage in some work which was ultimately beneficial only to the trust. Nevertheless, this court would again cite the fact that fee agreement did not contain any reference to a separate payment from the trust for work solely completed for it. The trial court found appellant had agreed to be personally liable for all services rendered by the law firm.

{¶37} Taken as a whole, the testimony of Attorney Schraff was sufficient to show that the firm's hourly rate of \$190 was reasonable for the locality, and that the amount of work charged by the firm was legitimate in light of the nature of the removal action and the other legal issues resolved during the representation. Accordingly, since the trial court's fee judgment was supported by some competent, credible evidence, appellant has failed to demonstrate that any abuse of discretion took place at the trial level. For this reason, appellant's second assignment is without merit.

{¶38} Under his final assignment, appellant maintains that the fee determination cannot be upheld because Attorney Schraff and the law firm never proved that they had previously obtained the approval of the Cuyahoga County trial court. He contends that court approval is mandated under Loc.R. 71 of the Cuyahoga County Court of Common Pleas before any attorney fees can be paid from trust funds.

{¶39} As to this argument, this court would reiterate that the fee judgment in this case was not rendered against the Jeanne Casey Trust; instead, the order to pay the attorney fees was rendered solely against appellant individually. Given the nature of the trial court's judgment, there would be no need to satisfy the Cuyahoga County local rule. Rather, the local rule would only apply to any request appellant might make to the trust for reimbursement of any amount paid to the firm. Thus, since Attorney Schraff and the law firm was not required to obtain the approval of the Cuyahoga County trial court, the final assignment in this appeal does not state a viable reason for reversing the attorney fees judgment.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDALL, J.,

concur.