

Circuit Court for Prince George's
County Case #CAL 93-20475

IN THE COURT OF APPEALS OF MARYLAND

No. 9

September Term, 1998

MILLICENT SOMUAH

v.

JEREMY FLACHS

Bell, C.J.
Eldridge
Rodowsky
Chasanow
Raker
Wilner
Cathell,

JJ.

Dissenting Opinion by Rodowsky, J.,
in which Wilner, J., joins.

Filed: December 18, 1998

Rodowsky, J., dissenting.

The majority opinion in effect overrules *Skeens v. Miller*, 331 Md. 331, 628 A.2d 185 (1993), while transparently denying that it does so. In addition to its disregard of *stare decisis*, the opinion unnecessarily muddles Maryland law concerning attorney-client retainer contracts, concerning contracts to be performed to the satisfaction of the promisee, and concerning the difference between express and implied contracts.

I

Prior to today's decision Maryland law concerning the rights of the parties to an attorney-client retainer contract was relatively well-settled in five aspects. First, "the authority of an attorney to act for a client is revocable at the will of the client. The client's power to discharge the attorney is an implied term of the retainer contract." *Id.* at 335, 628 A.2d at 187 (citations omitted). Second, "[b]ecause the client's power to end the relationship is an implied term of the retainer contract, the modern rule is that if the client terminates the representation, with or without cause, the client does not breach the retainer contract, and thus, the attorney is not entitled to recover on the [express] contract." *Id.* Third, "[i]f the client discharges the attorney for cause, the prevailing rule is that the attorney may not recover any compensation." *Id.* Fourth, "if the representation is terminated either by the client without cause or by the attorney with justification, the attorney is entitled to be compensated for the reasonable value of the legal services rendered prior to termination." *Id.* at 336, 628 A.2d at 187. Fifth, the attorney's claim for the reasonable value of services rendered prior to termination may be asserted when the client terminates the representation

without cause, even where the parties had agreed on a contingent fee. This fifth rule was the holding in *Skeens*. *Id.* at 344, 628 A.2d at 191.

Nothing in the prior decisions of this Court suggests that "cause" for the termination of an attorney's services, which precludes the attorney's right to any compensation, is anything other than a material breach of the contract by the attorney. *St. Paul at Chase v. Manufacturers Life Ins. Co.*, 262 Md. 192, 217-18, 278 A.2d 12, 25, *cert. denied*, 404 U.S. 857, 92 S. Ct. 104, 30 L. Ed. 2d 98 (1971); *Maryland Credit Fin. Corp. v. Hagerty*, 216 Md. 83, 92, 139 A.2d 230, 234 (1985) (where the employment contract is for a term, "cause" for discharge which terminates the employer's obligation to pay, means a material breach by the employee of the employment contract). Here, the majority opinion in effect asserts that "cause" for termination comes in two varieties. The first, which I shall call "High Grade" cause, carries that degree of substantiality which excuses the promisor from paying promised compensation. The second variety, which I shall call "Low Grade" cause, is a creature of the majority opinion and is not "cause" at all as conventionally used in the employment context.

What I call "High Grade" cause, the majority terms "'cause' for the forfeiture of an attorney's compensation." *Somuah*, ____ Md. at ____, ____ A.2d at ____ [slip opinion at 22]. This is an objective determination. The majority and I agree that if the client has "High Grade" cause for terminating the retainer contract, the attorney is not entitled to any compensation for services. What I call "Low Grade" cause, the majority calls "a 'basis' for an attorney's discharge." *Id.* The majority's "basis" seems to be no more than a bona fide dissatisfaction on the client's part with the attorney's performance. It is a subjective standard.

In Part V of the majority opinion, the Court holds that, if the client terminates because of a bona fide dissatisfaction, this "basis" does not bar *quantum meruit* recovery by the attorney for services rendered prior to the termination, but the *quantum meruit* claim becomes contingent and accrues only if, as, and when there is a recovery in the litigation underlying the terminated retainer contract.

On this aspect of the case the majority and I part company. There is no such thing, in my opinion, as "basis," or "Low Grade" cause, and the attorney's right to sue, where the retainer contract has been terminated by the client without traditional, *i.e.*, High Grade cause, is not deferred or converted into a contingent claim.

The majority opinion does not address what constitutes the total absence of cause, even as the majority would define it, but it appears that this would be a bad faith claim of dissatisfaction as the reason for terminating the retainer contract. I infer that, under these circumstances, the majority would honor present Maryland law and permit an immediate suit for the value of the services rendered prior to termination. Thus, instead of permitting an attorney's *quantum meruit* action whenever there is an absence of traditional or High Grade cause for termination, and by permitting an immediate action only if there is a bad faith claim of dissatisfaction with the attorney's services, the majority has for all practical purposes changed the holding in *Skeens* that recognizes accrual of the *quantum meruit* cause of action at the time of termination in any case in which the client terminated without traditional or High Grade cause.

Patently, the purpose of the majority's creation of Low Grade cause is purportedly to distinguish the case at bar from *Skeens*. Part V of the majority opinion tells us that the holding in *Skeens* is really limited to cases in which attorneys are discharged for High Grade cause, whereas the instant matter involves Low Grade cause. If, however, the client's reason for termination is only Low Grade cause, then, under the majority rationale, the attorney has no claim for compensation unless and until the contingency specified in the terminated retainer contract is fulfilled. Under Maryland law prior to today cause was either traditional or High Grade cause, or it was not cause at all.

In the instant matter the petitioner did not have traditional cause. The subject accident occurred in Prince George's County, Maryland on a dual lane highway with a low concrete median. The petitioner was a passenger in a taxicab that was struck in the rear by a vehicle driven by a drunk driver, who apparently had \$100,000 of insurance coverage. The impact caused the taxicab to be propelled over the median strip, to flip, and to land upside down. The petitioner was thrown from the vehicle, possibly as a result of a defective seat or seat belt, and she suffered several broken limbs and a broken jaw. The respondent was sought out by the petitioner's family. He visited the petitioner in Prince George's General Hospital and was engaged by a signed contingent fee agreement. Thereafter the respondent did the following:

- obtained the police report;
- interviewed the three or four eyewitnesses;

- arranged to meet the investigating officer and the eyewitnesses at the accident scene further to determine what happened;

- obtained medical records from the hospital and from the three or four treating physicians;

- engaged an expert in highway design safety to report on possibly defective design of the median;

- put Prince George's County, Maryland on notice under the Local Government Tort Claims Act;

- engaged a nationally known expert in auto design safety to report on possibly defective seat or seat belt design by the manufacturer;

- located, purchased, and stored the demolished taxicab;

- photographed and obtained from others photographs of the petitioner and caused a "day-in-the-life" video film of the petitioner to be made; and

- met with the petitioner on approximately six occasions.

When petitioner's claim had been developed by respondent to the point where suit should be brought, he concluded that the action should be filed in the Circuit Court for Prince George's County, inferentially because all potential defendants were suable there. The respondent thereupon, quite properly, sought to associate local counsel under an arrangement between local counsel and himself that would involve no additional cost to the petitioner. As an attorney who was not admitted to the Bar of this Court, but who had associate local counsel, respondent would be permitted to file and try petitioner's action

under Rule 14 of the Rules Governing Admission to the Bar, Annotated Code of Maryland, Maryland Rules Vol. 2, at 671-72. Rule 14(d) permits the judge presiding over the trial to waive the requirement for presence at trial of local Maryland counsel.

At the point in the relationship between petitioner and respondent when a local counsel was being sought, petitioner discharged respondent. Under the authority of *Skeens* respondent brought the instant suit, without awaiting the outcome of petitioner's action in the hands of another attorney. Trial of the instant action was to a jury which was instructed on the five rules of Maryland law set forth above. The jury was told, without objection, that cause means "good and valid reason." Respondent claimed \$11,324.66 in out-of-pocket expenses, and the jury awarded \$11,261.01. The respondent claimed compensation for his services by valuing 57.9 hours of time devoted to the matter at \$150 per hour, or a total of \$8,685. The jury awarded \$8,685. Because, concededly, there was no High Grade cause for petitioner's terminating the retainer contract, the majority is forced to create the Low Grade variety of cause in this case in order to find a "basis" for making respondent's *quantum meruit* claim an "if, as and when" claim.

The majority seeks to demonstrate Maryland law's recognition of Low Grade cause by borrowing from cases involving contracts under which the promisor's obligation to continue to pay for personal services is *expressly* conditioned on the promisor's continued satisfaction. *Somuah*, ____ Md. at ____, ____ A.2d at ____ [slip opinion at 10]. Maryland law requires that, in order for an employment contract to be conditioned upon the employer's

subjective satisfaction, the employer must include an express provision to that effect in the employee's contract.

Ferris v. Polansky, 191 Md. 79, 59 A.2d 749 (1948), cited by the majority, involved a contract under which an inn hired a small band to perform on weekend evenings from October 11, 1946, through April 30, 1947, but with the following proviso: "If Band proves unsatisfactory contract is subject to 2 weeks notice." *Id.* at 82, 59 A.2d at 750. We explained the operation of such an express provision in these words:

"In a contract where the employer agrees to employ another as long as the services are satisfactory, the employer has the right to terminate the contract and discharge the employee, whenever he, the employer, acting in good faith is actually dissatisfied with the employee's work. This applies, even though the parties to the employment contract have stipulated that the contract shall be operative during a definite term, if it provides that the services are to be performed to the satisfaction of the employer. It is not necessary that there exist grounds deemed adequate by the trier of facts for the employer's dissatisfaction. He is the judge as to whether the services are satisfactory. However, this dissatisfaction, to justify the discharge of the employee, must be real and not pretended, capricious, mercenary, or the result of a dishonest design. If the employer feigns dissatisfaction and dismisses the employee, the discharge is wrongful. The employer in exercising the right of dismissal because of dissatisfaction must do so honestly and in good faith."

Id. at 85-86, 59 A.2d at 752.

Similarly, *H & R Block, Inc. v. Garland*, 278 Md. 91, 359 A.2d 130 (1976), involved a contract that expressly provided: "Employee's failure to perform the duties of his employment as assigned to him in a satisfactory manner ... shall, without limitation, constitute a failure of performance under this Agreement." *Id.* at 93, 359 A.2d at 131. *See also Volos Ltd. v. Sotera*, 264 Md. 155, 159, 286 A.2d 101, 104 (1972) (where the contract

provided that it "may be terminated for cause by Employer, including but not limited to Employee's failure to perform his duties in a satisfactory, competent and reasonable manner").

The retainer contract between the parties to the instant action does not contain any express satisfaction provision, and "in view of the confidential nature of the relationship between attorney and client and the evil that would be engendered by friction or distrust," *Skeens*, 331 Md. at 335, 628 A.2d at 187, it is doubtful that a retainer agreement could contain such a provision. Such a provision would operate as a limitation on the power of the client to terminate. In any event, it is totally unnecessary for the majority to read a satisfaction provision into a retainer agreement inasmuch as those contracts are terminable at will. *Id.*

The rules that are set forth in *Skeens*, and the cases cited therein are described in 3 D. Dobbs, *Dobbs Law of Remedies* § 13.5, at 556 (2d ed. 1993), as follows:

"When the client discharges the attorney before the contract is substantially performed, the personal and confidential relationship of attorney and client is implicated. The traditional view is that because of the special nature of the attorney-client relationship, the client must be free to discharge the attorney at any time. This view seems to imply that the client would not be liable on the contract if he discharges the attorney before the attorney has fully performed. Under that view, the client is liable to make restitution for benefits received but not liable for the attorney's expectancy. Put otherwise, the attorney recovers *quantum meruit*, not contract damages."

(Footnote omitted).

II

The majority in the instant matter postpones accrual of the claim for restitution in a contingent fee retainer contract that has been terminated by a client for Low Grade cause until "the fulfillment of the contingency, *i.e.*, where the plaintiff/former client obtains a final judgment." *Somuah*, ____ Md. at ____, ____ A.2d at ____ (slip opinion at 27). This is contrary to what we held in *Skeens* and, in my opinion, *Skeens* was correctly decided. The contingency is a provision of the express contract, but here the client terminated that contract without cause, that is, without any material breach by the attorney. The attorney's claim then becomes one for restitution, and the damages are the value of the services rendered prior to the date of termination. Because the plaintiff/former client, who has been benefitted by the services of the first attorney, makes those benefits available, at the time of termination, to the replacement attorney, the claim in *quantum meruit* unconditionally accrues at the time of termination.¹

As Dobbs points out, "[s]tatute of limitations aside, the accrual question is mainly a roundabout way of reaching a different issue: how should the court measure restitution?" *Dobbs Law of Remedies* § 13.5, at 558. In the instant matter, the respondent proved the value of his services by multiplying the time devoted to the matter by his hourly rate, and the

¹If there is no recovery in the underlying suit, the client is liable to the prior attorney for the value of services only if the client terminated the retainer contract without traditional employment contract cause.

jury agreed. No issue is presented in this case concerning that method of calculation. Therefore, in my view, the judgment of the Court of Special Appeals should be affirmed.

III

Further, there appears to be an inconsistency between the mandate under the majority opinion and the reasoning of the majority. The special interrogatories that the jury in this case answered clearly awarded \$11,261.01 as reimbursement to respondent for out-of-pocket expenses. That portion of the judgment in the circuit court for the respondent was not, even under the express contract, subject to the contingency. The majority, ___ Md. at ___ n.2, ___ A.2d at ___ n.2 [slip opinion at 2 n.2], has quoted the portion of the retainer contract dealing with court costs. The applicable provision reads as follows:

"Client agrees to pay all costs of investigation, preparation and trial of the case, and authorizes and directs [respondent] to deduct from the Client's share of proceeds, and pay directly to any doctor, hospital, expert, or other creditor, any unpaid balance due them for Client's care and treatment, or for their services and/or testimony related to this case."

The first clause unconditionally places the obligation for the described expenses on the client, while the second clause is an authorization for the attorney to withhold from any recovery otherwise payable to the client the amount of the described expenses. Consequently, the mandate at least should affirm that part of the judgment that awards expenses.

Judge Wilner has authorized me to state that he joins in the views expressed herein.