THOMAS & THOMAS COURT REPORTERS, L.L.C., APPELLEE AND CROSS-APPELLANT, V. DOUGLAS SWITZER, AN INDIVIDUAL, AND HATHAWAY & SWITZER, L.L.C., APPELLANTS AND CROSS-APPELLEES.

810 N.W.2d 677

Filed January 13, 2012. No. S-11-029.

1. **Breach of Contract: Damages.** A suit for damages arising from breach of a contract presents an action at law.
2. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. The appellate court does not reweigh the evidence, but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
3. ____: ____. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
4. **Attorney Fees: Appeal and Error.** A trial court's decision denying attorney fees will be upheld absent an abuse of discretion.
5. **Contracts: Principal and Agent: Liability.** When a party contracts with a known agent acting within the scope of his or her authority for a disclosed principal, the contract is that of the principal only and the agent cannot be held personally liable thereon, unless the agent purports to bind himself or herself, or has otherwise bound himself or herself, to performance of the contract.
6. ____: ____: ____. An agent for a disclosed principal is not liable on a contract in the absence of some other agreement to the contrary or other circumstances showing that the agent has expressly or impliedly incurred or intended to incur personal responsibility.
7. **Attorney and Client: Agency.** The relationship between attorney and client is one of agency, and the general agency rules of law apply to the relation of attorney and client.
8. **Attorney and Client: Contracts: Liability.** Unless a lawyer or third person disclaims such liability at the time of contracting, a lawyer is subject to liability to third persons on contracts entered into on behalf of a client if the contract is between the lawyer and a third person who provides goods or services used by lawyers and who, as the lawyer knows or reasonably should know, relies on the lawyer's credit.
9. **Corporations: Liability.** The individual members and managers of a limited liability company are generally not liable for a debt, obligation, or liability of the company.
10. **Corporations: Fraud.** A court will disregard a limited liability company's identity only where the company has been used to commit fraud, violate a legal duty, or perpetrate a dishonest or unjust act in contravention of the rights of another.

11. **Corporations.** A limited liability company's identity as a separate legal entity will be preserved, as a general rule, until sufficient reason to the contrary appears.
12. **Corporations: Liability: Proof: Fraud.** A plaintiff seeking to impose liability on an individual member or manager of a limited liability company has the burden of proving that the company's identity should be disregarded to prevent fraud or injustice to the plaintiff.
13. **Actions: Attorney Fees: Words and Phrases.** A frivolous action is one in which a litigant asserts a legal position wholly without merit; that is, the position is without rational argument based on law and evidence to support the litigant's position.
14. ____: ____: ____. The term "frivolous" connotes an improper motive or legal position so wholly without merit as to be ridiculous.
15. **Actions: Attorney Fees.** Pro se litigants are not entitled to recover attorney fees, even if the pro se litigant is a licensed attorney.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Affirmed in part, and in part reversed and remanded with directions.

Douglas Switzer and Richard P. Hathaway, of Hathaway Switzer, L.L.C., pro se.

Ronald E. Reagan, of Reagan, Melton & Delaney, L.L.P., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

Thomas & Thomas Court Reporters, L.L.C. (Thomas & Thomas), sued Douglas Switzer, an attorney, and his law firm, Hathaway & Switzer, L.L.C. (Hathaway Switzer), for failure to pay for court reporting services. The primary issue presented in this appeal is whether Hathaway Switzer is liable to Thomas & Thomas for its fees or whether Hathaway Switzer's clients are. We conclude that Hathaway Switzer is liable.

FACTS

Thomas & Thomas sued Switzer and Hathaway Switzer for failure to pay for court reporting services provided in five cases between January 28 and October 14, 2009. (Switzer's partner was never named as an individual party to the action.) Thomas & Thomas alleged that it was owed a total of $5,992. Thomas

& Thomas alleged that demand had been made for payment more than 90 days prior to the filing of the complaint and that therefore, it was also due attorney fees pursuant to Neb. Rev. Stat. § 25-1801 (Cum. Supp. 2010). Thomas & Thomas sought a total judgment of the $5,992 it was owed and attorney fees totaling $624.21.

In an answer, Switzer individually and Hathaway Switzer denied that they requested services from Thomas & Thomas. Switzer and Hathaway Switzer also alleged that Thomas & Thomas had failed to join as necessary parties those on whose behalf the depositions were taken and who were properly liable for the costs. Hathaway Switzer alleged that it acted as an agent for its clients in its interactions with Thomas & Thomas. As an affirmative defense, Switzer asserted that Thomas & Thomas had no claim against him as an individual because he interacted with Thomas & Thomas only as a member of a limited liability company. Switzer also counterclaimed that he should be awarded at least $4,000 in attorney fees because the action against him was frivolous.

A bench trial was held. At trial, one of the owners of Thomas & Thomas, John Thomas, testified that he had been a court reporter for 35 years and that his wife and co-owner had been a court reporter for 33 years. Thomas explained the procedure used to retain Thomas & Thomas' services. In most cases, a law firm telephones Thomas & Thomas to schedule a deposition. Thomas & Thomas asks the law firm to send it a notice. The deposition request is entered in Thomas & Thomas' billing and scheduling software, which generates a confirmation sheet. The confirmation is faxed or e-mailed to the law firm that requested the services.

Thomas stated that if he had been advised that Hathaway Switzer would not be responsible for services provided for its clients, he would have either demanded cash on delivery, obtained payment before the deposition, or declined the assignment. Thomas' wife also testified that if a law firm said it was not going to be responsible for payment, Thomas & Thomas would require a retainer or payment on delivery. If payment was not promised by either of these methods, Thomas & Thomas would not accept the assignment. Thomas'

wife said these procedures are standard in the court reporting industry. However, Thomas admitted during his deposition that a majority of the payments Thomas & Thomas had received from Hathaway Switzer over the years were payments actually received from clients—e.g., a check written by a client.

The district court entered judgment for Thomas & Thomas. The court noted Thomas & Thomas' evidence that the industry standard in the local community is that the attorney is primarily responsible for the cost of court reporting services, absent an agreement to the contrary. The court found no evidence that Hathaway Switzer had informed Thomas & Thomas that the clients would be responsible for payment until after all the invoices were presented to Hathaway Switzer.

The court found, based on the custom and usage or course of dealing in the industry as proved by Thomas & Thomas, that an implied or constructive contract is created between an attorney and a court reporter that makes an attorney primarily responsible for court reporting services ordered by the attorney and rendered for the client, absent an express disclaimer of responsibility by the attorney. The court found that Thomas & Thomas proved performance of the reporting services on the order of Switzer and Hathaway Switzer, that Switzer and Hathaway Switzer were properly invoiced for the services, that the invoices were fair and reasonable for the services performed, and that Switzer and Hathaway Switzer failed to pay the invoices. The court entered judgment against Switzer and Hathaway Switzer in the amount of $5,992, along with costs. The court declined to award attorney fees to either party.

ASSIGNMENTS OF ERROR

Switzer and Hathaway Switzer assign, restated, that the district court erred in finding (1) that Hathaway Switzer was a party to a contract with Thomas & Thomas and therefore liable for payment, when Thomas & Thomas had notice that Hathaway Switzer was acting as an agent for a disclosed principal and Hathaway Switzer had disclaimed contractual liability by its prior course of dealing with Thomas & Thomas, and (2) that Switzer was liable to Thomas & Thomas although

it presented no evidence to pierce Hathaway Switzer's company veil.

On cross-appeal, Thomas & Thomas assign that the court erred in not awarding it attorney fees.

STANDARD OF REVIEW

[1-4] A suit for damages arising from breach of a contract presents an action at law.[1] In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.[2] We do not reweigh the evidence, but consider the judgment in a light most favorable to the successful party and resolve evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.[3] When reviewing questions of law, however, we have an obligation to resolve the questions independently of the conclusion reached by the trial court.[4] And a trial court's decision denying attorney fees will be upheld absent an abuse of discretion.[5]

ANALYSIS

There is no dispute in this case that someone owes Thomas & Thomas money. The question is, who? Hathaway Switzer contends that its clients are the real debtors. And Switzer contends that even if Hathaway Switzer is liable, he is not liable, in an individual capacity, for the company's debt. We address each argument in turn.

Hathaway Switzer's Liability

[5,6] Hathaway Switzer's argument rests upon basic principles of agency law. The general rule is that when a party contracts with a known agent acting within the scope of his or her authority for a disclosed principal, the contract is that of the

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[1] *Dutton-Lainson Co. v. Continental Ins. Co.*, 279 Neb. 365, 778 N.W.2d 433 (2010).

[2] *Hastings State Bank v. Misle*, 282 Neb. 1, 804 N.W.2d 805 (2011).

[3] See *id.*

[4] See *Stonacek v. City of Lincoln*, 279 Neb. 869, 782 N.W.2d 900 (2010).

[5] See *Armstrong v. County of Dixon*, 282 Neb. 623, 808 N.W.2d 37 (2011).

principal only and the agent cannot be held personally liable thereon, unless the agent purports to bind himself or herself, or has otherwise bound himself or herself, to performance of the contract.[6] Stated another way, an agent for a disclosed principal is not liable on a contract in the absence of some other agreement to the contrary or other circumstances showing that the agent has expressly or impliedly incurred or intended to incur personal responsibility.[7] Hathaway Switzer argues that it was acting as an agent for known principals: the clients of Hathaway Switzer for whose cases Thomas & Thomas' services were being sought. Thomas & Thomas does not deny knowing the identity of Hathaway Switzer's clients. So, Hathaway Switzer concludes, Thomas & Thomas' contract—and remedy—is with those known principals.

[7] There is little question that the relationship between attorney and client is one of agency and that the general agency rules of law apply to the relation of attorney and client.[8] Thus, a client may be liable for the acts of the client's attorney when such was within the attorney's scope of authority.[9] But, while general agency rules apply to the attorney-client relationship, there is much more involved than mere agency.[10] The attorney, not the client, is responsible for performing the details of litigation.[11]

[8] Thus, the Restatement (Third) of the Law Governing Lawyers provides that unless a lawyer or third person disclaims

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[6] *Broad v. Randy Bauer Ins. Agency*, 275 Neb. 788, 749 N.W.2d 478 (2008).

[7] *RSUI Indemnity Co. v. Bacon*, 282 Neb. 436, 810 N.W.2d 666 (2011).

[8] *VRT, Inc. v. Dutton-Lainson Co.*, 247 Neb. 845, 530 N.W.2d 619 (1995).

[9] See *id.*

[10] See, *Burt v. Gahan*, 351 Mass. 340, 220 N.E.2d 817 (1966); *Gaines Reporting Service v. Mack*, 4 Ohio App. 3d 234, 447 N.E.2d 1317 (1982).

[11] See *id.* See, also, *McCullough v. Johnson*, 307 Ark. 9, 816 S.W.2d 886 (1991); *Anheluk v. Kubik*, 374 N.W.2d 67 (N.D. 1985); *Molezzo Reporters v. Patt*, 94 Nev. 540, 579 P.2d 1243 (1978); *Boesch v. Marilyn M. Jones & Associates*, 712 N.E.2d 1061 (Ind. App. 1999); *Copp v. Breskin*, 56 Wash. App. 229, 782 P.2d 1104 (1989); *Ingram v. Lupo*, 726 S.W.2d 791 (Mo. App. 1987).

such liability at the time of contracting, a lawyer is subject to liability to third persons on contracts entered into on behalf of a client if "the contract is between the lawyer and a third person who provides goods or services used by lawyers and who, as the lawyer knows or reasonably should know, relies on the lawyer's credit."[12] And the Restatement specifically explains that, even when a client is a disclosed principal, a lawyer is liable for the compensation of a court reporter who reasonably relies upon the lawyer's credit.[13] "Merely disclosing the client's name does not convey that the client rather than the lawyer is to pay. Such persons are likely to rely on the credit of the lawyer because they regularly deal with lawyers, while investigating the reliability of the client might be costly."[14]

As a practical matter, in today's legal system, an attorney dealing with those who provide legal support services acts less as an agent who relies on the client for authority to manage the case, and more as a "general contractor," albeit a professional, who is responsible for supervising the various aspects of litigation.[15] In that context, it is appropriate that the attorney, with superior legal knowledge and familiarity with the case and client, should bear the burden of clarifying his or her intent regarding payment.[16] It is, in fact, a relatively simple matter for an attorney to disclaim liability with a clear statement to that effect.[17] And an attorney's liability for (and payment of) expenses of litigation is consistent with our ethical rules.[18]

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[12] Restatement (Third) of the Law Governing Lawyers § 30(2)(b) at 216 (2000). See, also, *McCullough, supra* note 11; *Anheluk, supra* note 11; *Patt, supra* note 11; *Burt, supra* note 10; *Boesch, supra* note 11; *Copp, supra* note 11; *Ingram, supra* note 11; *Mack, supra* note 10. But see, e.g., *McCorkle v. Weinstein*, 50 Ill. App. 3d 661, 365 N.E.2d 953, 8 Ill. Dec. 567 (1977).

[13] See Restatement, *supra* note 12, § 30, comment *b*.

[14] *Id.* at 217.

[15] See *Ingram, supra* note 11.

[16] *Boesch, supra* note 11.

[17] *Patt, supra* note 11; *Burt, supra* note 10.

[18] See, Neb. Ct. R. of Prof. Cond. § 3-501.8(e)(1) and (2); § 3-501.8, comment 10.

Hathaway Switzer argues that even under that rule, it still effectively "disclaimed" liability through its ordinary course of business with Thomas & Thomas: specifically, that Thomas & Thomas generally received payment for its services from Hathaway Switzer's clients. We note that this supposed course of business was not as well substantiated by the evidence as Hathaway Switzer suggests. Neither Switzer nor his partner testified, so the only evidence on this point was Thomas' deposition testimony that a "majority" of payments were apparently made by clients, and his trial testimony that he did not "dispute" Hathaway Switzer's argument that most of Thomas & Thomas' payments had been from clients.

But assuming that the evidence would have been sufficient to establish a course of business, that evidence would not establish that Hathaway Switzer disclaimed liability. Instead, it would only indicate that the bills were oftentimes paid by clients. And as the Restatement makes clear, it does not matter who pays the bill; absent an express disclaimer at the time of contracting, the attorney is responsible for payment.

Thus, even assuming that such evidence was relevant in determining whether Hathaway Switzer had disclaimed liability, it still presented the district court with what was, at best, a question of fact. Thomas & Thomas countered with direct testimony of Thomas and his wife regarding their understanding of their agreement with Hathaway Switzer and the general practice in the court reporting business from which they had formed their expectations. And, we note, Thomas & Thomas' practice was to accept employment before meeting the client, and to send its bills to Hathaway Switzer—putting Hathaway Switzer on notice that Thomas & Thomas was relying on the firm's credit, not the client's.[19] In short, the court was presented with a question of fact as to whether Thomas & Thomas should have expected Hathaway Switzer's clients to pay Thomas & Thomas' bills or whether Hathaway Switzer had effectively disclaimed liability for those bills—a question of fact which was resolved against Hathaway Switzer by the

[19] See *Copp, supra* note 11.

trier of fact and which we find sufficient evidence to support on appeal.[20]

Switzer's Liability

Switzer also argues that the court erred in holding him individually liable, essentially piercing Hathaway Switzer's "corporate veil," or company veil in this case. We find more merit to this point.

Thomas & Thomas specifically alleged that Hathaway Switzer is a limited liability company, and that fact is undisputed. Thomas & Thomas also alleged that Switzer was the party "personally engaging the services" of Thomas & Thomas, but this allegation was denied by Switzer. And Switzer repeatedly alleged that he had not, in his individual capacity, retained Thomas & Thomas' services. Switzer also raised an affirmative defense based on his allegation that he interacted with Thomas & Thomas only in his capacity as a member of Hathaway Switzer. And in his trial brief, Switzer asserted that there was no evidence he had contracted with Thomas & Thomas to provide services for his personal use. Nonetheless, without specifically discussing the issue, the court entered judgment against both Hathaway Switzer and Switzer individually.

[9-12] But the individual members and managers of a limited liability company are generally not liable for a debt, obligation, or liability of the company.[21] And a court will disregard such a company's identity only where the company has been used to commit fraud, violate a legal duty, or perpetrate a dishonest or unjust act in contravention of the rights of another.[22] The company's identity as a separate legal entity will be preserved, as a general rule, until sufficient reason to the contrary appears.[23] And a plaintiff seeking to impose liability on an individual member or manager has the burden of proving that the

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[20] See, e.g., *Ingram, supra* note 11.

[21] See Neb. Rev. Stat. § 21-2612 (Cum. Supp. 2010). See, also, Neb. Rev. Stat. § 21-129 (Cum. Supp. 2010).

[22] See *Christian v. Smith*, 276 Neb. 867, 759 N.W.2d 447 (2008).

[23] See *id.*

company's identity should be disregarded to prevent fraud or injustice to the plaintiff.[24]

No such proof was presented here. The evidence does not show that Switzer ever contracted individually with Thomas & Thomas, although he was occasionally responsible for ordering Thomas & Thomas' services. There is no evidence that Switzer ever did so in any capacity other than as a member of Hathaway Switzer. Nor is there evidence of fraud or injustice supporting disregard for the company's legal identity. In short, the record does not contain sufficient evidence (or, indeed, any evidence) to support the court's judgment against Switzer in an individual capacity. So, we find merit to this assignment of error.

Attorney Fees

[13,14] Each side of this case argues for an award of attorney fees. We find none of their arguments to have merit. Switzer argues that he should have been awarded attorney fees because Thomas & Thomas' claim against him as an individual was frivolous. A court may award attorney fees against any attorney or party who has brought or defended a civil action which alleges a claim or defense which a court determines is frivolous or made in bad faith.[25] A frivolous action is one in which a litigant asserts a legal position wholly without merit; that is, the position is without rational argument based on law and evidence to support the litigant's position.[26] The term "frivolous" connotes an improper motive or legal position so wholly without merit as to be ridiculous.[27]

[15] We reject Switzer's argument. First, Switzer did not specifically assign error to the court's failure to award fees.[28] But more pertinent, Switzer represented himself pro se. And

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[24] See *id.*

[25] Neb. Rev. Stat. § 25-824(2) (Reissue 2008).

[26] *TFF, Inc. v. SID No. 59*, 280 Neb. 767, 790 N.W.2d 427 (2010).

[27] *Id.*

[28] See *Shepherd v. Chambers*, 281 Neb. 57, 794 N.W.2d 678 (2011).

pro se litigants are not entitled to recover attorney fees, even if the pro se litigant is a licensed attorney.[29]

Thomas & Thomas also argues for attorney fees. First, it argues that Switzer's counterclaim was frivolous. But while Switzer's counterclaim lacked merit, it was directed at Thomas & Thomas' attempt to hold Switzer personally liable—a claim which we found to be unsupported by the evidence. Thus, even though Switzer was not entitled to recover an attorney fee as a "pro se litigant," we cannot say that Switzer's individual counterclaim was frivolous per se, i.e., ridiculous, or that the claim was filed with an improper motive.

Finally, Thomas & Thomas argues that it was entitled to attorney fees pursuant to § 25-1801. That section provides that a claimant with a claim amounting to less than $4,000 for, among other things, services rendered, may present that claim to the allegedly liable party and then, if the claim is not paid within 90 days, sue for the amount of the original claim and additional costs, interest, and attorney fees.[30] But Hathaway Switzer argues that § 25-1801 does not apply, because Thomas & Thomas' claim was for more than $4,000. We agree.

Thomas & Thomas attempted to bring its claim under $4,000 by styling its complaint as five separate causes of action, each based on its services with respect to five separate cases litigated by Hathaway Switzer. But organizing the complaint by client was essentially arbitrary—in some cases, for instance, Thomas & Thomas took depositions from several different witnesses and billed separately for each. And, we note, Thomas & Thomas not only sent bills to Hathaway Switzer for each deposition—it also sent a statement to Hathaway Switzer for all its past-due amounts. The total past-due amount on that statement was $5,992—the exact amount that the district court awarded. Based on the facts alleged and the evidence presented, the best characterization of Thomas & Thomas'

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[29] See *Young v. Midwest Fam. Mut. Ins. Co.*, 276 Neb. 206, 753 N.W.2d 778 (2008).

[30] See § 25-1801.

claim is that it is an action on an account.[31] As such, it is a single claim for an amount exceeding $4,000, and § 25-1801 is inapplicable.[32] We find no merit to Thomas & Thomas' cross-appeal.

CONCLUSION

We find no merit to Hathaway Switzer's claim that it was not liable for the services provided by Thomas & Thomas. Nor do we find merit to any of the arguments for attorney fees. But we find that the court erred in entering judgment against Switzer individually. The court's judgment, to the extent that it holds Hathaway Switzer liable in the sum of $5,992, is affirmed. The judgment is reversed to the extent that it holds Switzer personally liable, and the cause is remanded to the district court with directions to dismiss Thomas & Thomas' claim against Switzer as an individual.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating in the decision.

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[31] See, generally, *Sodoro, Daly v. Kramer*, 267 Neb. 970, 679 N.W.2d 213 (2004).

[32] See *Schaffer v. Strauss Brothers*, 164 Neb. 773, 83 N.W.2d 543 (1957) (refusing fees under former version of § 25-1801, based on rejection of plaintiff's argument that he filed 71 claims for $20 each instead of 1 claim for $1,420). See, also, *Hancock v. Parks*, 172 Neb. 442, 110 N.W.2d 69 (1961).

STATE OF NEBRASKA, APPELLEE, V. ROBERT J. DUNKIN, APPELLANT.

807 N.W.2d 744

Filed January 13, 2012. No. S-11-220.

1. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
2. **Postconviction: Appeal and Error.** On appeal from a proceeding for postconviction relief, the trial court's findings of fact will be upheld unless such findings are clearly erroneous.