

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2005 CA 1917

GEORGIA GULF CORPORATION

VERSUS

RALPH SLAUGHTER, SECRETARY, DEPARTMENT OF  
REVENUE AND TAXATION

consolidated with

2005 CA 1918

BRETT CRAWFORD AND THE STATE OF LOUISIANA,  
DEPARTMENT OF REVENUE AND TAXATION

VERSUS

GEORGIA GULF CORPORATION

Judgment rendered: September 20, 2006

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On Appeal from the 19<sup>th</sup> Judicial District Court  
Parish of East Baton Rouge, State of Louisiana  
Suit Number 399,376 c/w 467,931; J Sec. 25  
The Honorable Curtis A. Calloway, Judge Presiding

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Intervenor, pro se

BEFORE: PETTIGREW, DOWNING AND HUGHES, JJ.

*JTK Pettigrew, J. concurs with Results  
Hughes, J. concurs.*

## **DOWNING, J.**

Primarily at issue in this appeal is whether the trial court abused its discretion in awarding the intervenor in this matter, Tracy Mitchell, attorney fees in the amount of \$50,000.00 for his services in connection with the collection of a tax debt. Appellant, Georgia Gulf Corporation (Georgia Gulf), asserts that if any attorney fees are due, the amount awarded is unreasonably high. Mr. Mitchell argues in his answer to the appeal that the trial court had no reasonable basis on which to vary below the statutory amount of attorney fees, \$74,979.64. The Louisiana Department of Revenue (Department), appellee herein, argues that the trial court judgment should be affirmed. Concluding that the trial court did not abuse its discretion or otherwise err in making its award, we affirm the judgment of the trial court.

### **PERTINENT FACTS AND HISTORY**

Georgia Gulf and the Department disagreed on the amount of tax Georgia Gulf owed for the year 1990 and the years 1992 and 1996 as a result of recapitalization. Regarding the 1990 dispute, Georgia paid the tax under protest and filed suit to have the amount of liability reduced. Regarding the 1992 and 1996 dispute, Georgia Gulf and the Department's auditor had tentatively agreed on an amount of tax liability, but the Department rejected the proposed settlement. It had Mr. Mitchell institute a suit to collect approximately \$3,200,000.00 in alleged taxes due. The two lawsuits were consolidated.

In 2001 the Department ended its attorney-client relationship with Mr. Mitchell and had in-house counsel settle the disputes. Mr. Mitchell filed an intervention in the consolidated suit to protect his interest in attorney fees to which he might be entitled.

The first lawsuit was settled for the amount that was paid under protest, \$229,214.03. The second suit was settled for \$520,582.35, which represented the amount tentatively agreed to by the auditor, plus accrued interest.

The trial court subsequently held a hearing on Mr. Mitchell's motion for attorney fees and awarded him \$50,000.00 with interest from date of judgment.

Georgia Gulf appeals asserting two assignments of error, summarized as follows: 1) that the award of attorney fees in the amount of \$50,000.00 was manifestly erroneous; 2) the trial court abused its discretion in excluding from evidence the reasons for ending the attorney-client relationship between the Department and Mr. Mitchell.

Mr. Mitchell answered the appeal, asserting six assignments of error, summarized as follows: 1) the amount of attorney fees is too low; 2) the trial court ordered that judgment interest begin to run on the incorrect date; 3) the trial court erred in apparently not accepting the Department's stipulation that Mr. Mitchell had a valid contract with it for the performance of legal services; 4) the trial court erred in denying his motion to compel Georgia Gulf to disclose the legal fees it paid to counsel; 5) the trial court awarded an insufficient amount of expert witness fees to a third party; 6) the trial court erred in casting costs against him and the Department.

## **DISCUSSION**

### *Attorney Fee Amount*

The primary issue on appeal is the award of attorney fees to Mr. Mitchell pursuant to La. R.S. 47:1512, which provides an additional charge of 10% for attorney fees when a tax matter is referred to an attorney for collection. Georgia Gulf argues that no attorney fees are due because, they

assert, Mr. Mitchell pursued litigation on theories of law that were not supported by law. They argue that once Mr. Mitchell was removed from the case, the matter was settled on terms the parties had agreed on five or six years earlier. Mr. Mitchell argues that the statutory fee was reasonable for the work he performed and that the trial court erred in lowering it from \$74,979.64, which is 10 % of the total settlement amount.

“A trial court has much discretion in fixing attorney fees, and its award will not be modified on appeal, absent an abuse of discretion.” **J. Ray McDermott, Inc. v. Morrison**, 96-2685, p. 4 (La.App. 1 Cir. 11/7/97), 702 So.2d 364, 367. In determining the amount of award in this type case, the inquiry for the trial court is whether the 10% fee is reasonable under the factors of Rule 1.5 of the Rules of Professional Conduct. Here, the trial court’s oral reasons for judgment indicate that it considered the appropriate factors from the “attorney fee cases” in setting the attorney fee award herein. The record indicates that the trial court was fully aware that La. R.S. 47:1512 allowed for an award of 10% of its judgment. Regarding Georgia Gulf’s argument, the trial court noted that despite the novelty of Mr. Mitchell’s legal theories, he did ethically prosecute the litigation pursuant to a contract with the Department. Regarding Mr. Mitchell’s arguments, the trial court apparently concluded that an award of 10% in attorney fees was excessive for the legal services performed in this case. *See Id.* The trial court particularly factored into its analysis the fact that Mr. Mitchell did not complete his contract for legal services.

Under these circumstances, we conclude that an award of \$50,000.00 is a reasonable amount and that the trial court did not abuse its discretion in failing to award less or more than this amount. Georgia Gulf’s and Mr. Mitchell’s first assignments of error are without merit.

### *Excluded Evidence*

Georgia Gulf next argues that the trial court erred in sustaining the Department's objection of privilege regarding the disclosure of the reasons for Mr. Mitchell's replacement as attorney of record. We assume, without deciding, that the trial court erred in excluding the sought evidence, or in not first determining whether the evidence was privileged. But we conclude that the error is harmless in that the trial court reduced the statutory fee to a reasonable fee under the circumstances, as it would have done had the discontinuance of Mr. Mitchell been found to be for cause.

Had evidence established that Mr. Mitchell was terminated for cause, he would still be entitled to a fee in *quanti minoris*. The language of his contract with the Department did not preclude a fee. It provided that "[t]he right of J. Tracy Mitchell to receive payments for its services as provided herein shall survive any termination of this contract by the Secretary of the Department of Revenue and Taxation, if such termination is without cause." (Emphasis added.) The contract provided for payment in accordance with La. R.S. 47:1512. It did not preclude payment for his services.

Further, "counsel discharged for cause are to be compensated on a *quantum meruit* basis." **O'Rourke v. Cairns**, 95-3054, p. 10 (La. 11/25/96), 683 So.2d 697, 703. And in a contingency fee arrangement such as the one before us, *quantum meruit* is not limited to hours spent. **Id.** "A calculation based on hours alone is a bright-line rule which fails to consider the unique character of the contingency fee contract, including risks not encountered in hourly or fixed fee agreements, which Louisiana courts have recognized for many years." **Id.**

The term, "*quantum meruit*," pertinently means "the reasonable value of services." **Black's Law Dictionary**, 8<sup>th</sup> Ed. (2004), p. 1276. Included in

the evidence before the trial court was the fact that Mr. Mitchell's performance was a factor in the non-renewal of his contract. We have concluded above that the trial court did not err in determining a reasonable amount for Mr. Mitchell's attorney fee. Accordingly, any error by the trial court in excluding evidence of the reason for not renewing Mr. Mitchell's contract was harmless. Accordingly, we pretermitted specific decision of Georgia Gulf's second assignment of error.

Even so, we note that the Department's blanket assertion of privilege is misplaced. The United States Supreme Court provides the following instruction in this regard in **Upjohn Co. v. U.S.**, 449 U.S. 383, 395-96, 101 S.Ct. 677, 685-86, 66 L.Ed.2d 584 (1981):

The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney:

“[T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, ‘What did you say or write to the attorney?’ but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.” (Citation omitted.)

Further, as the court in **U.S. v. Davis**, 636 F.2d 1028, 1044 (5th Cir. 1981), instructed, “[f]inancial transactions between the attorney and client . . . are not within the privilege except in special circumstances . . . .” Therefore, before it can prevail on an objection based on the attorney-client privilege, the Department must show a real intrusion on the privilege.

#### *Other Matters*

In his second assignment of error asserted in his answer to appeal, Mr. Mitchell argues that the trial court failed to accept the Department's stipulation that Mr. Mitchell had a valid contract for legal services. From

the record and the trial court's oral reasons, it is clear that the trial court did accept the existence of a valid contract for legal services. This assignment of error is without merit.

In his third assignment of error, Mr. Mitchell argues that the trial court erred in awarding interest on attorney fees only from May 12, 2005, the date of judgment. This assignment of error is also without merit. Interest on attorney fees runs from the date of judgment because they are not due prior to that time. **Sharbono v. Steve Lang & Son Loggers**, 97-0110, p. 10 (La. 7/1/97), 696 So.2d 1382, 1388.

In his fourth assignment of error, Mr. Mitchell argues that the trial court erred in not awarding a greater amount of witness fees to Robert Rainer. We note that Mr. Mitchell is not aggrieved by this award and that Mr. Rainer has not appealed the amount of his fee. Mr. Mitchell makes no showing of a right to have the judgment revised in this regard. *See* La. C.C.P. arts. 2082 *et seq.* Accordingly, we pretermit review of this assignment of error.

In his fifth assignment of error, Mr. Mitchell argues that the trial court erred in casting him and the Department for costs along with Georgia Gulf. La. C.C.P. art. 1920 provides that a trial court may render judgment for costs against any party "as it may consider equitable." A trial court's assessment of costs cannot be reversed except on a showing of an abuse of discretion. **State ex rel. Guste v. Nicholls College Foundation**, 592 So.2d 419, 422 (La.App. 1 Cir. 1991). Here, the trial court found partly for and against all three parties cast in judgment. Further, on the Department's behalf, it argues that the trial court judgment should be affirmed in full. The trial court did not abuse its discretion in apportioning costs. This assignment of error is without merit.

In its sixth assignment of error, Mr. Mitchell argues that the trial court erred in denying his motion to compel information regarding legal fees paid by Georgia Gulf. Mr. Mitchell did not argue this matter before the trial court, and he cites no authority for his proposition other than some amorphous public policy. We find no merit in this assignment of error.

Additionally, this court issued a show cause order on December 8, 2005 ordering the parties to show cause “why the record on appeal in the above-referenced matter should or should not be supplemented with copies of the ‘Memorandum in Opposition to Taxpayer’s Motion for Summary Judgment’ . . . .” This show cause order was referred to the merits. Neither Georgia Gulf nor the Department objects to the inclusion of this brief. We note that inclusion of the memorandum would not add additional evidence to the record. We therefore order, pursuant to our show cause order, that the record be supplemented with Mr. Mitchell’s memorandum.

#### **DECREE**

We affirm the judgment of the trial court. We order that the record be supplemented with Mr. Mitchell’s Memorandum in Opposition to Taxpayer’s Motion for Summary Judgment that was the subject of our December 8, 2005 show cause order. Costs are to be split equally between Georgia Gulf Corporation and Mr. Tracy Mitchell.

**AFFIRMED; RECORD SUPPLEMENTED**