

1999 WL 34659708 (Me.) (Appellate Brief)
Supreme Judicial Court of Maine.

Elieca TAYLOR, et al, Plaintiffs - Appellees,
v.
Richard KENNEDY, Defendant - Appellant.

No. YOR-99-68.
April 26, 1999.

On Appeal from the Superior Court York, SS

Brief of Appellees

G. Charles Shumway II, Esquire, 222 Auburn Street, Ste. 202, Portland, Maine 04103, (207) 797-2700, Attorney for Plaintiffs-Appellees.

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***iii STATEMENT OF FACTS**

In compliance with this court's remand for further proceedings consistent with its opinion found in *Taylor, et al. v. Richard Kennedy*, 719 A.2d 525 (Me. 1998) the trial court issued orders against Defendant dated January 7, 1999 for additional attorney's fees to be paid to Plaintiffs and February 9, 1999 for additional treble damages mandated by 26 M.R.S.A. §626. Both of these orders were appealed by Defendant. Copies of these orders are included in the Addendum as Exhibits A and B respectively.

The remainder of this Statement of Facts was taken verbatim from *Taylor v. Kennedy*, supra at 525.

In 1992, Clarence and Lillian Kennedy gave their only son, Richard Kennedy, their power of attorney, and he handled their **financial** affairs. Clarence and Lillian were **elderly** and suffering from a variety of ailments. In October, 1994, Richard hired Taylor to provide home care for his parents. Taylor initially worked seven hours a day, doing various household others, such as preparing meals, laundry, shopping, cleaning, and generally assisting Clarence and Lillian. In December, 1994, Richard authorized Taylor to work twelve hours per day. Richard originally paid Taylor on an hourly basis, but as of January 1, 1995, he started paying her a weekly salary, and she agreed to be responsible for her own taxes.

By late 1994, the health of Clarence and Lillian had deteriorated so substantially that they needed round the clock care. Richard authorized Taylor to hire additional caregivers. *iv In January, 1995, Taylor hired Kief and Dupais. Richard became dissatisfied with Taylor and, during a telephone call, suggested that he was going to terminate her services. In the meantime, an attorney employed by Legal Services for the **Elderly** visited Clarence, who requested that the power of attorney to Richard be revoked. The attorney prepared a revocation which Clarence signed on February 3, 1995.

Lillian died on February 11, 1995. Clarence refused to see Richard and instructed the police to keep Richard out of the house.

When Richard was informed of the revocation of the power of attorney he stopped making payments to Taylor and the other caregivers. Clarence's attorney filed a petition to have the Department of Human Services (D?? appointed as temporary conservator. The appointment was approved by the Probate Court on February 23, 1995. However, Richard refused to turn over Clarence's assets to DHS.

Through February and March, 1995, Taylor, Kief, and Dupuis continued to care for Clarence. Although they were not being paid, they stayed on because Clarence asked them to and because he told them to "put it on the tab," meaning that they would be paid once Clarence's assets were recovered from Richard. Taylor hired an additional caregiver, Manuel, for weekends, and Taylor also hired Nowak, a licensed practical nurse, to give prescribed ?? to Clarence. DHS was able to pay four of the caregivers \$200 each from a social security check that arrived for Clarence. In early April, Taylor injured her back and was not able to continue giving care. There was no money available *v to hire additional caregivers because Richard still refused to turn over his father's assets to DHS. Clarence entered a nursing home on April 5, 1995. He died on June 19, 1995. The caregivers were not paid for any services they provided between January 29, 1995 and April 5, 1995, except for the \$200 that DHS paid to Taylor, Kief, Dupuis and Manuel. ¹

***1 RULE VIOLATIONS/REQUEST FOR DISMISSAL**

M.R.Civ.P. 11 requires that any "party who is not represented by an attorney shall sign the party's pleading". **Rule 11** further states "[i]f a pleading...is not signed, it shall not be accepted for filing." This rule serves the express purpose of providing a responsible party if it is found that there is not good ground to support the pleading and/or that it is interposed for delay. Nowhere in the brief that was mailed to the undersigned by Defendant does Defendant's signature appear.

M.R.Civ.P. 75(b) states that "the Clerk of the Law Court will not accept a brief for filing unless it is accompanied by acknowledgment or certificate of service upon counsel for the other parties." Nowhere in the brief that was mailed to the undersigned by Defendant is there an acknowledgment or a certificate of service.

A fair review of Defendant's brief shows that it is not supported by good ground and that it is interposed for delay. While Defendant may be pro se, fundamental violations of two bright-line rules still require that his appeal be dismissed.

***2 ISSUES ON APPEAL BY DEFENDANT/APPELLANT²**

1. DID SUPERIOR COURT HAVE JURISDICTION OVER PLAINTIFFS' CLAIMS?
2. DID THE TRIAL JUDGE ABUSE HIS DISCRETION IN THE AWARD OF ATTORNEY'S FEES DATED JANUARY 7, 1999?
3. DID THE TRIAL JUDGE ERR WHEN HE GRANTED ELIECA TAYLOR WAGES FOR ANOTHER FOUR-FIFTHS OF A WEEK?

***3 1. SUPERIOR COURT HAD JURISDICTION OVER PLAINTIFFS' CLAIMS.**

[18-A M.R.S.A. §3-804](#) provides three options by which a creditor may present notice of his claim to the Personal Representative of an estate. Those options are 1) Claimant may deliver or mail to the Personal Representative a written, statement of the claim...; 2) Claimant may file a written statement of the claim, in the form prescribed by rule, with the clerk of the court; or 3) Claimant may commence a proceeding against the Personal Representative in any court where the Personal Representative may be subjected to jurisdiction...

Defendant was served by a sheriff in his individual and attorney-in-fact capacities (i.e. June 12, 1995), prior to the death of Clarence Kennedy. After the death of Clarence Kennedy, the complaint was amended to include his estate. The amendment was allowed after a motion hearing at which an attorney appeared on behalf of Richard Kennedy, both individually and as Personal Representative of the Estate of Clarence Kennedy (i.e. August 24, 1995). The amended complaint was served upon Richard Kennedy as Personal Representative of Clarence Kennedy's estate by an acknowledgment of service signed by the estate's attorney on September 26, 1995.

Both the letter and the spirit/purpose of [§3-804](#) have been satisfied.

It should also be noted that this defense was never raised by Defendant during the first three and one-half years of litigation, including the first appeal to the Law Court. Even if the defense ever existed, which it did not, it has long since been waived.

***4 2. THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN AWARD OF ATTORNEY'S FEES DATED JANUARY 7, 1999.**

[26 M.R.S.A. §626](#) provides that employees who prevail under such a claim shall be awarded reasonable attorney's fees to be paid by the employer. The undersigned submitted an affidavit in support of Plaintiffs' request for further attorney's fees together with an itemized statement of time from ??/ 18/97 (i.e. the date of the first request for attorney's fees. to 12/7/98 (i.e. the date of said affidavit in support of attorney's fees) with additional disbursements in the amount of \$519.22. That interval of time included various issues and hearings, most notably Defendant's first appeal to the Law Court.³

An award of attorney's fees is reviewed for an abuse of discretion. *William Musher, Inc. v. Hull*, 667 A.2d 853, 855 (Me. 1995). There has been no showing of any abuse of discretion that harmed Defendant. The only possible abuse of discretion is the trial court's continued discounting of attorney's fees requested based upon time allocated to Defendant's counterclaims for which Defendant never produced a scintilla of evidence.

***5 3. THE TRIAL JUDGE DID NOT ERR WHEN HE GRANTED ELIECA TAYLOR WAGES FOR ANOTHER FOUR-FIFTHS OF A WEEK.**

The trial court initially found the Plaintiff Elieca Taylor was unpaid for the period of time from January 29, 1995 through April 1, 1995 inclusive.

Ms. Taylor testified that her last day of daily work was Wednesday, April 5, 1995, that being the day that Clarence Kennedy entered a nursing home. (T. Vol. I, Page 65, Line 22.)

Defendant testified regarding Ms. Taylor that “as a salaried employee, you can work one hour or you can work a hundred and one hours, you get the same pay. That’s my interpretation of salary.” (T. Vol. V, Page ?? Lines 14-16.) Since Ms. Taylor worked Sunday, Monday, Tuesday, and Wednesday of a tenth week, according to Defendant’s ?? interpretation of her salary, she is entitled to be paid for a ?? week.

The trial judge declined to follow Defendant’s own definition of salary. Instead he awarded Ms. Taylor an additional four-fifths of a week’s salary. However accurate Defendant’s reminder that a week consists of seven days, it is equally true that a work week ordinarily consists of five days.

Findings of fact and conclusions of law by the trial court will be sustained unless clearly erroneous. [M.R.Civ.P. 52\(a\)](#) and [Depositors Trust Co. v. Blanchard, 377 A.2d, 101, 104 \(Me. 1977\)](#). Findings of fact will not be overturned if “there is any competent evidence in the record to support (them.” [Harmon v. Emerson, 425 A.2d, 978, 981 Me. 1981](#)).

***6 CONCLUSION**

More than four years have now passed since Plaintiffs were forced to stop caring for Defendant’s father because of nonpayment of wages. Defendant’s brief puts an interesting spin on this termination by accusing Plaintiffs of placing Defendant’s father “in a nursing home where they put him because they did not got their money.” (Defendant’s Brief, Statement of Issues, Page 1, Paragraph 8.) Does the fault really lie with the employees who spent over two months without pay caring for the father or with the family member who refused to use the father’s own money to pay for that care?

An irony of this case is that I believe the trial court sought to benefit Defendant on several occasions by compromising between Plaintiffs’ and Defendant’s positions. The trial court initially held that Plaintiffs were only employees during part of their work for Defendant’s father, thereby reducing their claim for penalties under [26 M.R.S.A. §626](#). The trial court did not initially award to Elieca Taylor any payment for her last week of work. The trial court discounted Plaintiffs’ initial request for attorney’s fees by time spent responding to Defendant’s counterclaims, despite finding that there was “not a scintilla of evidence” to support Defendant’s claims. (T. Vol. V, Page 163, Lines 7-11). For similar reasons, the trial court also discounted Plaintiffs’ second request for attorney’s fees, that order being part of this appeal.

Aside from ironies including the above, Defendant’s appeal should be dismissed for failure to comply with fundamental Rules *7 of Civil Procedure (e.g. signature by Defendant and proof of service).

Defendant’s appeal should be denied because there is no merit to any of the issues it apparently raised. 1) The Probate Code is clear that Plaintiffs were permitted to present their claim against the estate in the manner that they pursued. Even if there had been defect in notice, it has long since been waived. 2) There is no evidence that the trial court abused its discretion in the award of attorney’s fees dated January 7, 1999. 3) There is competent evidence in the record, including Defendant’s own testimony, to support at least an additional four-fifths of a week of wages being awarded to Elieca Taylor.

In short, the trial court’s orders dated January 7, 1999 and February 9, 1999 should both be upheld.

Appendix not available.

Footnotes

- 1 Incidentally, the “Certificate of Value” referred to by Defendant was personally provided by Defendant to Plaintiffs pursuant to a Request for Production.
- 2 Sine Defendant did not list his issues, I tried to distill the relevant issues that he raised and/or intended to raise. Just to clarify what I had to work from, attached in Appendix C is nine pages from Defendant's brief. Two of the first four pages are identical. The last five pages presumably form Defendant's argument. Those five pages are principally filled with allegations that are irrelevant and/or were rejected by both the trial court and this court in the first appeal.
- 3 My view of whether the attorney's fees awarded in this action have been easy money and or a windfall differ from those of Defendant. I have devoted large amounts of time to this case the past four years, together with investing over \$1,000.00 in disbursements. Much of my time was spent responding to wasteful actions initiated by Defendant such as an affirmative defense claiming that DHS was a necessary party because they assumed all responsibility for Plaintiffs' wages, two counterclaims which the trial court found were supported by not even a “scintilla” of evidence, the initial appeal by Defendant which resulted in additional orders against Defendant, and Defendant's present appeal. The rial court found that Defendant “was stubborn and resisted throughout and did not pay the money.” (T. Vol. V, Page 161, Lines 18-20.) Defendant continues to be stubborn and resistant, resulting in ever increasing attorney's fees for which he is statutorily responsible.

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