

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY  
STATE OF MISSOURI  
ASSOCIATE DIVISION

**FILED**

DEC 2 2019

JOAN M. GILMER  
CIRCUIT CLERK, ST. LOUIS COUNTY

JOHN IZUCHUKWU Ph.D., PE )  
 )  
Plaintiff, ) Cause No.: 18SL-AC02743  
 )  
vs. ) Division No.: 41  
 )  
McGRANAGHAN & STAWSKI LTD, )  
 )  
Defendant. )

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This matter is before the Court following bench trial on November 25, 2019. At trial, Plaintiff John Izuchukwu (hereinafter referred to as “Izuchukwu”) appeared in person and by counsel, Christopher Durso. Defendant, McGranaghan & Stawski Ltd. (hereinafter referred to as “McGranaghan”) appeared by Christopher Stawski, by and through counsel Joan M. Swartz. Izuchukwu filed a Petition alleging one count of breach of contract. McGranaghan proceeds on counterclaims for one count of breach of contract and one count of breach of the implied covenant of good faith and fair dealing. Izuchukwu seeks \$10,025, pre-judgment interest pursuant to the contract, post-judgment interest and costs. Defendant claims actual damages, costs and attorney’s fees.

The Court having fully considered the evidence presented, the credibility of the witnesses, the arguments of counsel at trial and having taken judicial notice of the Court’s own file, hereby makes the following findings of fact and conclusions of law.

**FINDINGS OF FACT**

The parties agree that Izuchukwu and McGranaghan entered into an expert engagement letter (hereinafter referred to as “contract”) on or about July 14, 2017. Izuchukwu was initially

contacted by a nurse paralegal, Kathryn Vander Woude (hereinafter referred to as “Vander Woude”) who was employed by McGranaghan. Regrettably, Vander Woude is deceased and thus unavailable for trial. Per the signed contract, Izuchukwu was to perform services as an expert for a potential wrongful death lawsuit on behalf of McGranaghan. Izuchukwu is a Professional Engineer, with a MBA as well as Ph.D. in Industrial and Mechanical Engineering. Izuchukwu has previously served as an expert, primarily in patent cases. Izuchukwu does not have any kind of medical degree.

Izuchukwu testified as to his understanding of the scope of his services to be provided, following telephone calls and emails with Vander Woude. Vander Woude was to travel from Wisconsin, where McGranaghan is located, to St. Louis with the Bi-Pap machine involved in the wrongful death case. Izuchukwu was to inspect said machine and by his own account, was to opine as to why the machine malfunctioned.

On July 31, 2017, McGranaghan paid Izuchukwu a \$4000 non-refundable retainer by check, which posted on August 7, 2017. Izuchukwu testified that he typically charges a retainer calculated to cover 25% of the projected total cost, therefore anticipating total costs of \$16,000. Pursuant to the contract, Izuchukwu was to issue bills on a biweekly basis.

The evidence at trial included a letter from Vander Woude to Izuchukwu, upon which he relied, that indicated that “[she] had copied everything that [she] thought might be helpful in understanding where we are at in this process”. The materials provided by McGranaghan to Izuchukwu included voluminous medical records, provided to Izuchukwu upon his repeated requests. Christopher Stawski, a partner at McGranaghan, testified that a medical record summary was being prepared by Vander Woude, negating the necessity of Izuchukwu reading and subsequently billing at the expert rate for their review. Izuchukwu admitted that he knew the cause of death prior to receiving the medical records. Partially due to Vander Woude’s unavailability at

trial, the record is unclear as to why the medical records were then still provided to Izuchukwu or whether or not he was told to review them.

Izuchukwu began work immediately upon receiving the signed contract and retainer. He billed 58.8 hours of work for the time period of Thursday, August 3, 2017 to Tuesday, August 8, 2017. The invoice reflects an average of 11.7 hours for five consecutive days, which notably fell over a weekend. No rush or emergency status existed as to this work. More specifically, Izuchukwu billed for review of 6,349 pages of medical records, for research on various medical events such as barometric trauma and pneumothorax, for study of literature regarding reported events of Bi-pap ventilator malfunctions and for research regarding not only the specific model of Bi-pap machine at issue but other models as well. At no time did Izuchukwu seek McGranaghan's approval for the work that he billed before or after the retainer was depleted. No evidence was presented as to whether this preparation work was ordinary or customary. Izuchukwu never explained the basis for his billed work to McGranaghan. Notably, Izuchukwu was unable to download the McGranaghan provided 'error code' disc recovered from the Bi-pap machine. As such, Izuchukwu was unable to access key information that would have been essential for him to form an opinion as to the malfunction of the machine.

Izuchukwu's invoice reflects work totaling \$14,700 and requests payment of \$10,700, reflecting crediting of the retainer. Upon receiving Izuchukwu's invoice, McGranaghan immediately contacted Izuchukwu and demanded that he cease all work on the case, which he did.

**CONCLUSIONS OF LAW**  
**PLAINTIFF'S CLAIM OF BREACH OF CONTRACT**

“A breach of contract action includes the following essential elements: (1) the existence and terms of a contract; (2) that plaintiff performed or tendered performance pursuant to the

contract; (3) breach of the contract by defendant; and (4) damages suffered by the plaintiff.”

*Keveney v. Missouri Military Academy*, 304 S.W.3d 98, 104 (Mo. 2010).

The Court finds a contract exists. Further, the Court finds agreement between the parties as to the scope of work that Izuchukwu was to perform as an engineering expert in the potential wrongful death action. The record does not reflect any request for literature review, medical research or research regarding machines other than the one at issue. All parties agree that Izuchukwu was to be retained specifically as an engineering expert regarding the malfunction of the machine in question. At no time did either party anticipate that Izuchukwu would be a medical expert, as he was not qualified. As such, much of the work done by Izuchukwu was neither contemplated by the parties nor of benefit to the defendant. Therefore, the Court finds the majority of the work performed by Izuchukwu to be outside the scope of the contract. No breach of the contract by McGranaghan for failure to pay beyond the retainer therefore exists.

**DEFENDANT’S COUNTERCLAIMS OF BREACH OF CONTRACT AND  
THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING**

As discussed above, a contract exists between the parties for expert witness services. Further, is also clear from the record that the parties agreed to a \$4,000 non-refundable retainer, as specifically denoted in the contract. The evidence revealed that Plaintiff performed some work within the scope of the contract. However, the Court finds that as the majority of work went well beyond the scope of the contract and as a result, Plaintiff breached the contract.

“Missouri law implies a covenant of good faith and fair dealing in every contract.” *City of St. Joseph v. Lake Contrary Sewer Dist.*, 251 S.W.3d 362, 369 (Mo. App. W.D. 2008). “The implied covenant of good faith prohibits contracting party from acting in such a manner as to evade the spirit of the transaction or to deny the other party the expected benefit of the contract.”

*Id.* at 370.

None of the work performed by Izuchukwu had any benefit to McGranaghan. Notably, the amount on the initial invoice is nearly the Plaintiff's anticipated total cost for his services, an estimate that included Plaintiff's possible trial testimony to be billed at a higher trial rate of \$450 per hour. Izuchukwu did not contact or gain approval from McGranaghan for said work. Not only did Izuchukwu bill for services outside the scope of the parties contract but he also billed for almost 60 hours of work purportedly done within five consecutive days, immediately after he deposited the retainer. Izuchukwu never gained possession of the Bi-pap machine at issue. The Court finds his actions to violate the implied covenant of good faith and fair dealing. As such, the Defendant prevails on both its claims of breach of contract and breach of the implied covenant of good faith and fair dealing.

When a party materially breaches a contract, the non-breaching party may terminate the contract and recover damages. *Campbell v. Shaw*, 947 S.W.2d 128, 132 (Mo. App. W.D. 1997). "Whether a breach is material or immaterial is a question of fact." *Campbell v. Shaw*, 947 S.W.2d 128, 132 (Mo. App. W.D. 1997). As such, Defendant may recover damages from Plaintiff.

The American Rule provides that each party is to bear the expense of his own attorney's fees. *City of Cottleville v. St. Charles County*, 91 S.W.3d 148, 150 (Mo.App. E.D. 2002). The exception to the American Rule permits a successful litigant to recover attorney's fees when a contract provides for recovery. *McClain v. Papka*, 108 S.W.3d 48, 54 (Mo. App. E.D. 2003). The contract, despite containing a forum clause, lacks an attorney's fees provision and as such fees shall not be ordered.

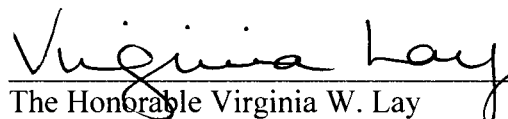
**ORDER AND JUDGMENT**

The Court finds the issues in the Plaintiff's First Amended Petition in favor of the Defendant. On Defendant's counterclaims, the Court finds in favor of the Defendant on both counts.

**WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED** that Defendant McGranaghan & Stawski have and recover from Plaintiff Izuchukwu the total judgment of \$4000.

IT IS SO ORDERED.

This 2nd day of December, 2019.

  
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The Honorable Virginia W. Lay  
Associate Circuit Court Judge, Division 41