

1993

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Recommended Citation

Craig R. Heidemann, *Connecticut's Trail by Lawyer: Contract Disputes and the Attorney Fact-Finder - Beizer v. Goepfert*, 1993 J. Disp. Resol. (1993)

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CONNECTICUT'S TRIAL BY LAWYER: CONTRACT DISPUTES AND THE ATTORNEY FACT-FINDER

*Beizer v. Goepfert*¹

I. INTRODUCTION

The rules of professional conduct in most states require attorneys to enter into written agreements with their clients when contracting on a contingent fee basis.² In so doing, the parties define the existence and limits of their attorney-client relationship.³ In the present case, an attorney and his client agreed to a ten percent contingent fee; however, the lawyer transferred to a new firm prior to the conclusion of the case.⁴ Subsequently, the client signed a new, identical agreement provided by the attorney's new firm.⁵ In the contract, the attorney used the previously agreed-upon fee percentage instead of the standard office rate used by the attorney's new firm.⁶ After the case settled, the senior partner in the attorney's new firm withheld the settlement from the client and brought suit demanding a larger contingent fee.⁷ The trial court, relying on a state statute allowing contract disputes of under \$15,000 to be referred to a fact-finder, did just that.⁸

The trial court adhered to the fact-finder's conclusions and granted judgment for the client on his counterclaim.⁹ On appeal, the plaintiff characterized his action as sounding in tort and alleged that it was improperly referred to the fact-finder.¹⁰ The appellate court held that the case was properly referred to the fact-finder, and that the plaintiff had wrongfully withheld the settlement from the client.¹¹

1. 613 A.2d 1336 (Conn. App. Ct. 1992).

2. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(c) (1991) (stating that contingent fee agreements must be in writing).

3. *See generally* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1991) (defining the attorney-client relationship).

4. *Beizer*, 613 A.2d at 1338.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 1339.

9. *Id.*

10. *Id.*

11. *Id.* at 1340.

II. FACTS AND HOLDING

On July 4, 1986, defendant Michael Goepfert entered into an oral contract for professional services with his friend Neil Johnson, an attorney.¹² Johnson agreed to handle Goepfert's personal injury claim against the town of Tolland on a ten percent contingency fee basis.¹³ At that time, Johnson was an associate in the law firm of Teitenberg and Wallace.¹⁴ In December of 1986, Johnson left Teitenberg and Wallace and began working for the plaintiff's firm.¹⁵ Following the transfer, Johnson and Goepfert signed a standard-form professional services agreement provided by the plaintiff's new firm.¹⁶ On the form, Johnson modified the standard fee by crossing out the thirty-three and one-third percent figure used by his firm and replacing it with the ten percent figure previously agreed upon in July.¹⁷

In August of 1987, Goepfert's personal injury claim with the town was settled for \$34,000.¹⁸ Johnson recommended the settlement to Goepfert, and plaintiff Beizer of Johnson's law firm approved.¹⁹ After the settlement, Beizer demanded payment of thirty-three and one-third percent of the recovery from Goepfert. Goepfert would only pay ten percent.²⁰ Beizer withheld the standard fee from the settlement and brought the instant action on August 18, 1988, alleging breach of contract and recovery in quantum meruit.²¹ The plaintiff amended his complaint on December 30, 1988, adding Johnson as a party defendant. In so doing, Beizer claimed that Johnson had altered the contingency fee agreement without authority.²²

Beizer commenced a second action in July of 1989 alleging that: (1) the defendants conspired to defraud the plaintiff; (2) Johnson breached his employment contract; and (3) Johnson tortiously interfered with the contractual relationship between the plaintiff and Goepfert.²³ Goepfert then filed a counterclaim against Beizer, alleging breach of contract and wrongful refusal to pay under the professional services contract.²⁴

12. *Id.* at 1338.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

On February 27, 1989, Beizer signed the first action on the trial list as a nonjury matter.²⁵ On November 20, 1990, he signed the second action on the trial list as a jury matter.²⁶ However, neither the plaintiff nor the defendant followed the required procedure or paid the required statutory jury fee necessary to have any of the claims heard by a jury.²⁷ Consequently, the cases were never placed on the jury docket.²⁸ In February of 1990, the trial court granted the plaintiff's motion to consolidate his two claims.²⁹ In accordance with state law, the court referred the dispute to an attorney fact-finder prior to trial and neither party objected.³⁰

The attorney fact-finder determined that the plaintiff had failed to meet his burden of proof in both actions and on all claims. As a result, the fact-finder recommended to the court that judgment be granted in favor of the defendant as to plaintiff's claims and that judgment be granted in favor of the defendant on his counterclaim for breach of contract and wrongful withholding of the settlement.³¹ The trial court overruled plaintiff's subsequent objections to the fact-finder's determinations.³² The court followed the recommendations of the attorney fact-finder and entered judgment in favor of the defendant on the counterclaim in the amount of \$7933, plus the costs of the counterclaim.³³ The plaintiff appealed the judgment.³⁴ On appeal, it was held that the case was properly referred to the fact-finder, that the findings were not clearly erroneous, and that the plaintiff wrongfully withheld the settlement from the client.³⁵ The judgment of the trial court was affirmed.³⁶

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 1338-39.

31. *Id.* at 1339.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 1341, 1343, 1344.

36. *Id.* at 1344.

III. LEGAL BACKGROUND

A. Referral to Fact-finders

In Connecticut, parties in civil cases are entitled to have their cases heard by a jury.³⁷ However, when a jury trial is not requested, or when requested in improper fashion, the parties will have their case heard by a judge acting as the finder of fact.³⁸ Connecticut state law provides that judges may refer certain pending cases to "[q]ualified members of the bar to sit as adjuncts to the trial bench in nonjury cases for the purpose of accelerating the disposition of cases."³⁹ Referring disputes to an attorney fact-finder increases efficiency, saves time, and, most often, produces equitable results.⁴⁰ However, parties may object to the referral before the fact-finder hears the case.⁴¹

According to the legal history of the Connecticut statute authorizing referral of such cases to fact-finders, the statute is intended "[t]o establish, in an effort to reduce the pending civil caseload, a system of fact-finders for certain non-jury cases and a system of arbitration for jury cases. . . ."⁴² The final form of the Connecticut statute reads as follows:

[J]udges of the superior court may make such rules as they deem necessary to provide a procedure in accordance with which the court, in its discretion, may refer to a fact-finder . . . *any contract action* . . . in which only money damages are claimed and which is based upon an express or implied promise to pay a definite sum, and in which the amount . . . is less than fifteen thousand dollars. . . . Such cases may be referred to a fact-finder only after the pleadings have been closed, a trial list claim has been filed, no claim for a jury trial has been filed at the time of reference, and the time prescribed in section 52-215 . . . has expired.⁴³

37. U.S. CONST. amend. VII; CONN. CONST. art. I, § 19.

38. CONN. GEN. STAT. § 52-549(n) (1983) (contract claims referred to fact-finder); CONN. GEN. STAT. § 52-215 (1983) (docketing of jury and court cases).

39. CONN. GEN. STAT. § 52-549(n) (1983).

40. See generally *Rostenberg-Doern Co. v. Weiner*, 552 A.2d 827 (Conn. App. Ct. 1989).

41. The Connecticut Supreme Court identified a strong public policy behind requiring parties to object *before* the fact-finder's determination; such policy discourages litigants from reserving their objections to attack an unfavorable outcome. *Bowman v. 1477 Central Ave. Apartments*, 524 A.2d 610, 613 (Conn. 1987).

42. *Beizer*, 613 A.2d at 1339-40 (citing 25 H.R.PROC., Pt. 24, 1982 Sess., p. 7665, remarks of Rep. Richard D. Tulisano).

43. CONN. GEN. STAT. § 52-549(n) (1983) (emphasis added). According to § 52-215, the jury trial claim must be filed within thirty days of the return day or within ten days after joining an additional issue of fact. CONN. GEN. STAT. § 52-215 (1983).

A similar statute, Section 52-434(a)(4), authorizes the referral to referees of a broader assortment of disputes involving greater monetary values.⁴⁴ Attorneys appointed as fact-finders under Section 52-549 possess less authority.⁴⁵ The Connecticut Appellate Court has stated, "[w]hile the two referral programs differ in name, source of appointment and scope of authority, under both programs the referees 'share the same function of fact-finders whose determination of the facts is reviewable in accordance with well-established procedures prior to the rendition of judgment by the court.'"⁴⁶ Under either program, there is no authority for the fact-finder to render judgments.⁴⁷ Because the attorney referee has no power to render a judgment, he is simply a fact-finder.⁴⁸

B. Objections to the Referral Programs

Objections to the programs authorized under Connecticut law for the referral of disputes to attorney fact-finders and referees include: (1) that it violates the due process clause of the Fourteenth Amendment to the United States Constitution and the analogous "remedy by due course of law" provision of the Connecticut Constitution;⁴⁹ (2) that the delegation by the Connecticut legislature of the authority to refer disputes to fact-finders is improper and violates the Connecticut Constitution, thus depriving the trial courts of subject-matter jurisdiction necessary to render judgments on the finding of facts,⁵⁰ and (3) that the standards for selecting fact-finders are vague, ambiguous, and insufficient.⁵¹

When faced with these objections, the courts of Connecticut and other jurisdictions have analyzed and rejected them.⁵² Because the statutes authorize trial courts to make referrals to the fact-finder or referee with the consent of the parties, the due process challenge to the statutes has consistently failed.⁵³ The Connecticut Supreme Court stated in *Seal Audio, Inc. v. Bozak, Inc.* that the court was:

44. *Rostenberg-Doern*, 552 A.2d at 830 (citing CONN. GEN. STAT. § 52-434(a)(4)).

45. *Id.*

46. *Id.* (quoting *E.I. Constr., Inc. v. Scinto*, 530 A.2d 1081, 1083 (Conn. App. Ct. 1987)).

47. *Health Planning Assocs., Inc. v. Whitlock*, 529 A.2d 1352, 1354 (Conn. App. Ct. 1987).

48. *Seal Audio, Inc. v. Bozak, Inc.*, 508 A.2d 415, 421 (Conn. 1986).

49. *Id.* at 417.

50. *Health Planning Assocs.*, 529 A.2d at 1353.

51. *Id.*

52. Regarding both the aforementioned constitutional challenges, the United States Supreme Court has rejected a claim that federal due process protection requires a trial judge to hear personally the testimony of witnesses in order to determine contested factual issues relating to the admissibility of incriminating statements of a defendant in a criminal case. *See United States v. Raddatz*, 447 U.S. 667, 677 (1980).

53. *Seal Audio*, 508 A.2d at 425. The widespread use of magistrates in the federal courts to find facts and recommend decisions has been upheld in the rare instances where it has been claimed to violate due process. *See Mathews v. Wever*, 423 U.S. 261, 269 n.5 (1976); *Coolidge v. Schooner California*, 637 F.2d 1321, 1325-26 (9th Cir. 1981).

[N]ot aware of any authority . . . that even arguably supports the proposition that reference of a nonjury civil case to a nonjudicial agency to find facts and make recommendations on legal questions violates the right to due process of law so long as these determinations can be adequately reviewed in a judicial forum under procedures similar to those provided by [Connecticut's] rules of practice.⁵⁴

As for the subject-matter jurisdictional challenge, Connecticut courts have held that when the cases fit within the statutory framework, and the fact-finder is properly selected, the trial court does have subject matter jurisdiction to render judgment on the fact-finder's determinations.⁵⁵ Regarding the challenge that the standards for selecting fact-finders are vague and insufficient, the Connecticut Appellate Court stated, "The statute and the rules governing fact-finders provide . . . adequate standards and safeguards."⁵⁶

C. Contract Claims Covered by § 52-549

Before the instant case, Connecticut courts had not decided precisely what constituted a contract claim under Section 52-549. However, in *J. Dunn & Sons, Inc. v. Paragon Homes of New England*,⁵⁷ the New Hampshire Supreme Court set out the considerations for determining the nature of a claim. The Connecticut Court of Appeals thereafter adopted these considerations in the instant case.⁵⁸ In *J. Dunn & Sons*, the court examined whether the pleadings sounded in contract in order to decide if an arbitration clause applied to the dispute at hand. The court presented the following considerations for determining the classification of a claim: "The source or origin of the duty alleged to have been violated; the nature of the grievance; the character of the remedy such facts indicate; [and] the type of damages sought. . . ."⁵⁹ The court adopted the RESTATEMENT (SECOND) position that "[t]he purpose of the contract duty is to secure the receipt of the thing bargained for, while the tort duty which results from the contract relation of the parties is that a party must refrain from conducting itself so as to cause a particular harm to the other party."⁶⁰

Disputes regarding professional services contracts and claims in quantum meruit are contract-based claims, while those regarding the wrongful withholding of money due under a contract are tort-based.⁶¹ Tortious interference involves

54. *Seal Audio*, 508 A.2d at 423.

55. *Health Planning*, 529 A.2d at 1354 (held that the delegation of authority to the judges of the Superior Court to establish the fact-finder program did not violate the defendant's constitutional rights).

56. *Id.*

57. 265 A.2d 5 (N.H. 1970).

58. *See Beizer*, 613 A.2d at 1339.

59. *J. Dunn & Sons*, 265 A.2d at 7 (citing 1 AM. JUR. 2D *Actions* § 8 (1962)).

60. *Id.* at 8 (citing 1 RESTATEMENT (SECOND) OF TORTS § 4 cmt. c (1965)).

61. *See generally J. Dunn & Sons*, 265 A.2d at 7-8.

an underlying contract. Its elements include "a contractual or beneficial relationship, the defendants' knowledge of that relationship, the intent to interfere with it, and the consequent actual loss suffered by the plaintiff."⁶²

D. Standard of Review for Fact-finder's Decision

After an appointed fact-finder decides the facts, an aggrieved party has a statutory outlet for review. CONNECTICUT PRACTICE BOOK § 546H provides:

[a] party may file objections to the acceptance of a finding of facts on the ground that conclusions of fact stated in it were not properly reached on the basis of the subordinate facts found, or that the fact-finder erred in rulings on evidence or in other rulings, or that there are other reasons why the finding of facts should not be accepted. Objections must be filed within fourteen days after the filing of the finding of facts.⁶³

When an aggrieved party requests the trial court to substitute its own findings of fact for those of the fact-finder, the trial court must determine whether or not the objectionable findings were "clearly erroneous."⁶⁴ In a contract action, findings of fact should be overturned only when they are clearly erroneous.⁶⁵

IV. THE INSTANT DECISION

The *Beizer* court found that the requirements of the statute⁶⁶ authorizing the referral of "any contract action" to an attorney fact-finder were satisfied in the instant case.⁶⁷ The court reasoned that the statute granted the court subject-matter jurisdiction to refer the dispute to the attorney referee.⁶⁸ The statute authorizes the referral of "any contract action" to the referee.⁶⁹ Although the *Beizer* court noted that "[t]he meaning of 'any contract action' as used in this statute is not specifically defined,"⁷⁰ the court held that because the statute did not use the words "only contract actions," the plain meaning of the statute vested

62. Hart, Nininger & Campbell Assocs., Inc. v. Rogers, 548 A.2d 758, 764 (Conn. App. Ct. 1988).

63. Shaw v. L.A. Socci, Inc., 587 A.2d 429, 432 n.9 (Conn. App. Ct. 1991) (citing CONN. PRAC. BOOK § 546H).

64. *Id.* at 432.

65. Wilcox Trucking, Inc. v. Mansour Builders, Inc., 567 A.2d 1250, 1252 (Conn. App. Ct. 1989), cert. for appeal denied, 573 A.2d 318 (Conn. 1990).

66. CONN. GEN. STAT. § 52-549(n) (1983).

67. *Beizer*, 613 A.2d at 1339.

68. *Id.*

69. *Id.*

70. *Id.*

the court with the power to refer a dispute sounding mostly in contract, but also in tort.⁷¹ It held that the "statute does not necessarily exclude cases with a mixture of claims based in contract and tort."⁷² For these reasons, the court held that the statutory requirements of Section 52-549 were met and the referral was proper.⁷³

The court found the disputes in the instant case to be "contract actions" for purposes of the statute.⁷⁴ The plaintiff's claims arose from both the professional services contract signed by Johnson and Goepfert, and from Johnson's employment contract with the plaintiff.⁷⁵ Johnson sought damages in the amount of the difference between the standard contingent fee, thirty-three and one-third percent, and the altered ten percent figure.⁷⁶ The court adopted the RESTATEMENT (SECOND) position that "[t]he purpose of the contract duty is to secure the receipt of the thing bargained for."⁷⁷ The court found all of the claims involved⁷⁸ to be generally contractual in nature under the RESTATEMENT (SECOND) test.⁷⁹ The court restated its holding in *McKeever v. Von Reiter*⁸⁰ that the coding of an action does not determine the basis or classification of the claim for purposes of Section 52-549(n).⁸¹

Although the plaintiff contended that the trial court lacked subject-matter jurisdiction based on failure to satisfy the statutory language, Beizer also claimed that the trial court lacked subject-matter jurisdiction because he had claimed the case for a jury trial.⁸² In response, the appellate court noted Beizer's numerous failures to follow statutory procedure in requesting a jury trial.⁸³ The court stated that procedural requirements in obtaining a jury trial do not violate the Connecticut constitutional right to a trial by jury.⁸⁴ First, the court noted that Beizer failed to file a jury-docket claim slip required by Section 52-215.⁸⁵

71. *Id.* at 1339-40.

72. *Id.* at 1340.

73. *Id.* at 1339.

74. *Id.* at 1340.

75. *Id.*

76. *Id.*

77. *Id.*

78. Beizer's claims included: (1) one against Johnson for breach of employment contract, tortious interference with a contract relationship, and conspiracy to defraud; and (2) one against Goepfert for breach of professional services contract, conspiracy to defraud, and for recovery in quantum meruit. Goepfert counterclaimed for breach of professional services contract. *Id.* at 1340-41.

79. *Id.* at 1340.

80. 544 A.2d 242, 243 (Conn. App. Ct. 1988) (holding that an action seeking to recover for damage to an automobile engine allegedly caused by work improperly performed was a negligence action and could not be referred to a fact-finder under § 52-549).

81. *Beizer*, 613 A.2d at 1341.

82. *Id.*

83. *Id.*

84. *Id.* at 1342 (citing *Shelby Mutual Ins. Co. v. Bishop, Kirk & Saunders, Inc.*, 535 A.2d 387 (Conn. App. Ct. 1988)).

85. *Id.* at 1341.

Second, the court noted that Beizer never paid the \$100 jury fee required by Section 52-258.⁸⁶ The court held that Beizer's claim slip for the trial list, which was filed on November 20, 1990, and which indicated that the second action was a jury matter, did not satisfy the statutory requirements.⁸⁷ It ultimately held that the referral of the consolidated cases did not implicate the subject-matter jurisdiction of the trial court and was properly referred under Section 52-549(n).⁸⁸

Next, the court discussed the plaintiff's claim that the findings of the attorney referee were clearly erroneous.⁸⁹ The plaintiff claimed that there was insufficient evidence to support the conclusions of the fact-finder.⁹⁰ Noting that great deference is generally given to the fact-finder,⁹¹ the Connecticut Court of Appeals held that the factual findings, as adopted by the trial court, were not clearly erroneous.⁹²

Lastly, the court held that there is no rule of law requiring the trial court to have the transcripts of the hearing with the fact-finder before rendering judgment.⁹³ Curiously, the transcripts were in the possession of the plaintiff.⁹⁴ Chastising the plaintiff, the appellate court stated, "[i]f the plaintiff felt that transcripts were crucial to his objections [to the findings of the referee], he should have submitted them to the trial court."⁹⁵ Thus, the appellate court concluded that the trial court properly rendered judgment in the instant case and the trial court's judgment was affirmed.⁹⁶

V. COMMENT

For the most part, the Connecticut system of referring certain classes of disputes to attorney fact-finders has achieved its goal of removing cases from the jury docket. At the same time, it has reached fair and equitable results similar to those of juries which would have decided the facts in these matters. If it seems that the novelty of the fact-finder system, coupled with the fact that it is relatively untested nationwide, might deprive a party of a "fair shake," one must remember that parties who choose to have their dispute heard by the fact-finder are protected within this system by numerous safeguards. For instance, they can opt out of the

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 1341-43.

90. *Id.* at 1342.

91. *Id.*

92. *Id.* at 1343.

93. *Id.*

94. *Id.* at 1344.

95. *Id.*

96. *Id.*

referral by filing a claim slip for a jury trial;⁹⁷ they can object to the findings of the fact-finder and suggest that the trial judge disregard them if they are clearly erroneous;⁹⁸ and of course, the parties have the normal avenues of relief through the appellate process.

It would seem that the only failures of the system are in the eyes of those parties and attorneys who are not able to succeed on the merits of their case in front of the fact-finder. In the instant case, for example, Beizer failed to object to the referral, he failed to file a jury claim slip for his consolidated actions, and he failed to make a case in front of the fact-finder. For these reasons, Beizer probably would have preferred a jury trial. But would there have been a different result? Probably not. Surprisingly, with the number of cases referred to fact-finders each year, few appellants succeed in challenging the findings of the attorney fact-finder as clearly erroneous.⁹⁹ This would seem to suggest that there is an element of reliability in the Connecticut referral plan.

It is interesting to note that besides Connecticut, no other state in the country has instituted an alternative dispute resolution framework involving attorney fact-finders. It would seem that based on the successes and failures of the Connecticut system, and the ever-increasing backlog of cases in state courts, other states may begin to examine the Connecticut system for application in their own court systems in the near future.

The fact-finder program might be compared to the federal Magistrate system instituted in 1968 as part of a Congressional court-reform package.¹⁰⁰ The Magistrate system has, in part, relieved some of the congestion in the overburdened federal system. And while the magistrates originally were only empowered to preside over preliminary hearings and issue warrants; today, with the consent of the parties (as in Connecticut), the magistrates can render final judgments.¹⁰¹ If the Connecticut fact-finder program works as well as the Magistrate system, perhaps many states in the future will choose to adopt similar systems, thus expanding and improving on past successes while learning from the failures that time will expose in such programs.

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97. See CONN. GEN. STAT. § 52-215 (1983).

98. *Cashman v. Calvo*, 493 A.2d 891, 894-95 (Conn. 1985).

99. See, e.g., *Rostenberg-Doern*, 552 A.2d at 833-34 (affirming the findings of the trial court, which accepted the findings of the attorney referee); *Seal Audio*, 508 A.2d at 426-27 (declining to review as "plain error" the failure to obtain the consent of the parties under the existing conditions of implied consent).

100. See 28 U.S.C. §§ 631-639 (1988).

101. *Id.* § 636(c)(1).