

**STATE OF WASHINGTON
COURT OF APPEALS, DIVISION II**

JOHN A. HOGLUND, et al.,
Respondent

v.

STEVEN MEEKS, JAY
GOLDSTEIN and SHERELLE
WILLINGHAM; GOLDSTEIN LAW
OFFICE,
Appellants

NO. 34992-2-II

Thurston County Superior Court
Cause No. 04-2-02603-0

BRIEF OF APPELLANT STEVEN MEEKS

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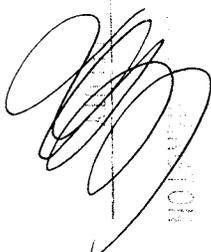
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STATE OF WASHINGTON
COURT OF APPEALS
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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	3
ASSIGNMENTS OF ERROR.....	4
STATEMENT OF THE CASE.....	10
ARGUMENT.....	27
I. Waiver of Right to Fee Implied and Express..	27
II. Findings & Conclusions Not Supported by Substantial Evidence.....	32
III. Alleged Contract Violates Public Policy.....	45
CONCLUSION.....	47
PROOF OF SERVICE.....	48

TABLE OF AUTHORITIES

<i>Ausler v. Ramsey</i> 73 Wn. App. 231, 868 P. 2d 877 (1994).....	27, 28
<i>Beltran v. DSHS</i> 98 Wn. App. 245, 989 P. 2d 604 (1999).....	35
<i>Cavers v. Old Nat'l Bank & Union Trust Co.</i> 166 Wn. 449, 7 P. 2d 23 (1932).....	27, 28
<i>Citizens v. Public Hosp. Dist. 304</i> 78 Wn. App. 333, 897 P. 2d 1267.....	33
<i>City of Tacoma v. State</i> 117 Wn. 2d 348, 816 P. 2d 7 (1991).....	36
<i>Griffiths & Sprague Stevedoring v. Bayly etc.</i> 71 Wn. 2d 679, 430 P. 2d 600 (1967).....	41
<i>Ino Ino, Inc. v. City of Bellevue</i> 132 Wn. 2d 103, 937 P. 2d 154 (1997).....	36
<i>Klontz v. Puget Sound Power & Light Co.</i> 90 Wn. App. 186, 911 P. 2d 280 (1998).....	36
<i>Lamb v. General Associates, Inc.</i> 60 Wn. 2d 623, 374 P. 2d 677 (1962).....	42
<i>Mauch v. Kissling</i> 56 Wn. App. 312, 783 P. 2d (1989).....	42
<i>Mazon v. Krafchick</i> -- Wn. 2d --, 144 P. 3d 1168 (2006).....	45
<i>McCormick v. Lake Wash. Sch. Dist.</i> 99 Wn. App. 107, 992 P. 2d 107 (1999).....	36
<i>Ramey v. Graves</i> 112 Wn. 88, 191 P. 801 (1920).....	27
<i>Rho Co. v. Dept of Revenue</i> 113 Wn. 2d 561, 782 P. 2d 986 (1989).....	41
<i>Ross v. Scannell</i> 97 Wn. 2d 598, 647 P. 2d 1004 (1982).....	27, 28
<i>Ryan v. State of Washington</i> 112 Wn. App. 896, 51 P. 3d 175 (2002).....	28, 29
<i>Smith v. Hansen et al.</i> 63 Wn. App. 355, 818 P. 2d 1127 (1991).....	42
<i>Smith v. WIGA</i> 77 Wn. App. 250, 890 P. 2d 1060 (1994).....	44
<i>State v. Gatalski</i> 40 Wn. App. 601, 699 P. 2d 804 (1985).....	35
<i>State ex rel Carroll v. Junker</i> 79 Wn. 2d 12, 482 P. 2d 775 (1971).....	35
<i>Unigard Ins. Co. v. Leven</i> 97 Wn. App. 417, 983 P. 2d 1155 (1999).....	36
RCW 5.60.070.....	34
RPC 1.5(e).....	46
Restatement (Second) of Agency §27.....	42

ASSIGNMENTS OF ERROR¹

Assignment of Error No. 1: Entry of Finding of Fact No. 2:

2. On or about June 1, 2001, the plaintiff entered into an Association of Counsel Agreement with F. Daniel Graf and took over primary responsibility for the Bostwick representation. The Association Agreement provided that the plaintiff would receive 80% of the contingent fee in the event of a recovery. Over the course of the next two years the plaintiff worked with Mr. Bostwick to advance his claim. The plaintiff negotiated with the tortfeasors' insurers and in December 2002 filed a lawsuit against the tortfeasors in Cowlitz County Superior Court. After filing the lawsuit the plaintiff continued to develop Mr. Bostwick's claim through discovery depositions, written interrogatories and retention of experts. **The plaintiff prepared for and attended a mediation with the tortfeasors and their insurers on July 9, 2003, at which the tortfeasors offered to pay \$150,000.00 to Mr. Bostwick to settle his claims.** Mr. Bostwick rejected this offer, and following the mediation the plaintiff continued to develop Mr. Bostwick's claims. *CP 1115.*

Error: Abuse of discretion by admission of evidence of settlement offer made at mediation, in violation of RCW 5.60.070(1).

Issue Pertaining: Whether evidence of an amount offered in settlement at a mediation session was inadmissible under RCW 5.60.070(1).

Assignment of Error No. 2: Entry of Finding of Fact No. 5:

5. In late September 2003 the plaintiff and defendant Willingham met to discuss the plaintiff's continued role in the Bostwick case and the plaintiff's fee. The plaintiff and defendant Willingham had previously worked together on many cases and had a close, friendly relationship. Defendant Willingham had worked as a contract attorney for the plaintiff immediately after graduating law school. **Though both defendants Willingham and Goldstein testified without contradiction that defendant Willingham did not have the authority to bind Goldstein law offices to fee-sharing agreements, the Court finds that defendant Willingham had the apparent authority to do so.** *CP 1115.*

¹ The challenged portions of the subject Findings and Conclusions are in bold.

Error: Entry of finding without supporting substantial evidence of record.

Issue Pertaining: Is Finding of Fact No. 5 supported by substantial evidence?

Assignment of Error No. 3: Entry of Finding of Fact No. 6:

6. At their September 2003 meeting the plaintiff and defendant Willingham agreed that the plaintiff would not continue to serve as lead counsel through trial. **They further agreed that the plaintiff was entitled to receive \$40,000.00 out of any recovery in the Bostwick case, which figure was based upon 80% of the \$50,000.00 in fees that would result from the \$150,000.00 settlement offer already obtained.** The plaintiff and defendant Willingham discussed possible **further** fees for the plaintiff based upon his continued work in the case. These discussions included a possible 50/50 split of fees through a second mediation, and a possible 90/10 split of any recovery at trial. The plaintiff and defendant Willingham did not reach agreement as to any specific role the plaintiff would continue to play or any **additional** fee to which he would be entitled. *CP 1116.*

Error: Entry of finding without supporting substantial evidence of record.

Issue Pertaining: Is Finding of Fact No. 6 supported by substantial evidence?

Assignment of Error No. 4: Entry of Finding of Fact No. 11:

11. Defendants Meeks and Willingham met with the plaintiff in December, 2003 to discuss his continued involvement in the case. The parties had two meetings, on December 2, 2003 and again on December 17, 2003. Though the parties did not reach an agreement at these meetings as to what the plaintiff's continued role and final compensation would be, **defendant Willingham, prior to the arrival of defendant Meeks, again confirmed her agreement that the plaintiff would receive \$40,000.00 out of any ultimate recovery for his prior work on the case. * * * CP 1118.**

Error: Entry of finding without supporting substantial evidence of record.

Issue Pertaining: Is Finding of Fact No. 11 supported by substantial evidence?

Assignment of Error No. 5: Entry of Finding of Fact No. 18:

18. Though defendant Meeks testified at trial that the work product provided by the plaintiff had not been of much use to the defendants, the Court finds that the **previous work and work product provided by the plaintiff played a significant role in leading to the successful settlement of the Bostwick case. *** The work product provided by the plaintiff allowed the defendants to receive fees in excess of \$190,000.00 despite having been involved in the Bostwick case for only a few months and having expended little labor of their own.**
CP 1118.

Error: Entry of finding without supporting substantial evidence of record and with consideration of inadmissible evidence pertaining to mediation, under RCW 5.60.070(1).

Issue Pertaining: Is Finding of Fact No. 18 supported by substantial admissible evidence?

Assignment of Error No. 6: Entry of Finding of Fact No. 17:

17. **The defendants succeeded in settling Mr. Bostwick's personal injury claim for \$840,000.00 at the second mediation in early April 2004.***previously agreed upon*****
CP 1120-21.

Error: Entry of finding without supporting substantial evidence of record and with consideration of inadmissible evidence pertaining to mediation, under RCW 5.60.070(1).

Issue Pertaining: Is Finding of Fact No. 17 supported by substantial admissible evidence?

Assignment of Error No. 7: Entry of Finding of Fact No. 20:

20. The Court finds that **the defendants, including defendant Meeks, received a substantial benefit from the plaintiff's work product and that they were aware that the plaintiff expected to receive payment for that benefit. CP 1118.**

Error: Entry of finding without supporting substantial evidence of record and with consideration of inadmissible evidence pertaining to mediation, under RCW 5.60.070(1).

Issue Pertaining: Is Finding of Fact No. 20 supported by substantial admissible evidence?

Assignment of Error No. 8: Entry of Conclusion of Law No. 2:

2. The plaintiff had a contractual right to serve as lead counsel in the Bostwick case and receive 80% of any attorney's fees realized on any recovery in that case. **The plaintiff relinquished that right as part of the September 2003 agreement reached by defendant Willingham and the plaintiff. CP 1122.**

Error: Entry of Conclusion without supporting Finding and/or Finding not supported by substantial evidence

Issue Pertaining: Is Conclusion of Law No. 2 supported by substantial admissible evidence?

Assignment of Error No. 9: Entry of Conclusion of Law No. 3:

3. **Defendant Willingham and the plaintiff in September 2003 entered into an agreement that the plaintiff would step down as lead counsel and would receive \$40,000.00 out of any recovery in the Bostwick case for the services and work product he had provided up to that date. That agreement**

constituted a contractual agreement between the plaintiff and the defendants Willingham and Goldstein. The plaintiff was entitled to rely on that agreement. CP 1122

Error: Entry of Conclusion without supporting Finding and/or Finding not supported by substantial admissible evidence

Issues Pertaining: Is Conclusion of Law No. 2 supported by substantial admissible evidence?

Assignment of Error No. 10: Entry of Conclusion of Law No. 5:

5. The plaintiff was misled by the defendants into the belief that he would continue to be involved in the Bostwick case and that he would receive additional compensation for that continued involvement. The plaintiff continued to perform work on the Bostwick case based on a justifiable reliance on that belief. The Court concludes, however, that because the parties never reached an agreement as to the plaintiff's continued role and compensation, any further award would be based upon speculation. The Court thus concludes that the plaintiff is not entitled to any additional compensation over **the agreed \$40,000.00. CP 1123.**

Error: Entry of Conclusion without supporting Finding and/or Finding not supported by substantial admissible evidence

Issues Pertaining: Is Conclusion of Law No. 5 supported by substantial admissible evidence?

Assignment of Error No. 11: Entry of Conclusion of Law No. 6:

6. The defendants' failure to pay plaintiff the agreed upon \$40,000.00 constitutes a breach of contract. CP 1123.

Error: Entry of Conclusion without supporting Finding and/or Finding not supported by substantial admissible evidence

Issues Pertaining:

- (1) Is Conclusion of Law No. 6 supported by substantial admissible evidence as to each of the defendants?
- (2) Is the purported contract void as against public policy?

Assignment of Error No. 12: Entry of Conclusion of Law No. 7:

7. **Defendants are jointly and severally liable to the plaintiff for the \$40,000.00. CP 1123.**

Error: Entry of Conclusion without supporting Finding and/or Finding not supported by substantial admissible evidence

Issues Pertaining:

- (1) Is Conclusion of Law No. 7 supported by substantial admissible evidence as to each of the defendants?
- (2) Is the purported contract void as against public policy?

STATEMENT OF THE CASE

Robert Bostwick in June 2000 entered a written agreement with the Olympia law firm of F. Daniel Graf to prosecute his personal injury case against Lakeside Industries, on a one-third contingent fee basis (“Bostwick-Graf agreement”). *Exhibit 1*. Under this contract, Mr. Graf was authorized at his expense² to employ associate counsel to assist in the matter, who would be subject to all of its terms and conditions and assume joint responsibility with Mr. Graf for the client’s representation. *Exhibit 1, ¶ 6*. Mr. Graf retained attorney John A. Hoglund under a separate but correlative written agreement (“Graf-Hoglund agreement”). *Exhibit 2*. By this contract, Mr. Hoglund agreed to serve as lead trial counsel as a signatory to the Graf-Bostwick agreement and undertake full responsibility, with personal final decision-making authority, for the handling of the case and all of the strategic and procedural decisions to be made in furtherance of its trial or settlement, in return for 80% of the one-third contingent attorney fee.³ *Exhibit 2, ¶¶ 1-3*.

The contract which Mr. Hoglund entered also provided that he could voluntarily withdraw from the representation prior to

² The contract specified that the overall attorney fee would not be increased by any association of attorney.

³ The agreed share was 80% if Mr. Hoglund advanced more than \$6,000 in costs and 66.66% if he did not. He eventually did advance that amount in costs, so 80% became the operative rate.

completion, but that if he did so he waived the right to any attorney fee whatsoever, *Exhibit 1, ¶10*:

“10. *Withdrawal of Attorney.* Attorney may withdraw from client’s representation in this case on reasonable notice to client, provided that in the event of such withdrawal attorney shall be entitled to no fee pursuant to Section Two, but shall be reimbursed for any cost advances made for client under Sections Three and Five.⁴ Payment in full shall be made by client within 30 days of receipt of final billing by the attorney.”

The client file was transferred in its entirety to Mr. Hoglund, and for the next three years it was handled completely by he and his staff; Ms. Willingham did not have any involvement in the matter during this time except for periodic communications with Mr. Hoglund’s paralegal and with the client. *RP 32-34, 91-92.* In July 2001, she ceased working for the Graf firm and took a position as an employee associate with attorney Jay A. Goldstein. *RP 32-34, 91-92..*

Mr. Hoglund filed suit in Cowlitz County Superior Court in December 2002. *RP 25.* On July 9, 2003, the matter went to mediation. *RP 27-29.* There, the defense reportedly offered \$150,000 to settle the matter,⁵ but this offer was deemed completely inadequate, by both Mr. Bostwick and Mr. Hoglund,

⁴ Each emphasis in quoted material in this brief is added by the author unless otherwise indicated as original.

⁵ As will be discussed later, the trial court admitted evidence of the content of the mediation discussions despite the confidentiality mandate of RCW 5.60.070, over defendants’ objections. *RP 28.*

was rejected, and the mediation ended with no settlement achieved. *RP 28-29.*

A month later, on August 7, Mr. Hoglund informed Mr. Bostwick by letter, *Exhibit 3*, that he had decided to downsize his practice, let his staff go, merge with a Tacoma law firm, and relinquish his role as lead trial counsel to Ken Golden, a partner in that firm. Mr. Bostwick did not wish to accept this change and wanted Ms. Willingham to become actively involved, to which Mr. Hoglund had no objection. *RP 32.* Mr. Bostwick also called Ms. Willingham, saying that he was very concerned about his file and that he wanted it to be kept at her office. *RP 32.* Ms. Willingham telephoned Mr. Hoglund and left a message to this effect, and, pursuant to the client's mandate, he promptly had the file delivered to her office. *RP 32-33.*

Attorney Steven Meeks had become a tenant in the Goldstein law suite on July 1, 2003, and was acting as associated counsel on several personal injury cases with the Goldstein firm through Ms. Willingham. *RP 113.* After Mr. Bostwick's call to her, she consulted with Mr. Meeks on the matter, who agreed to meet with she and the client. *RP 113-116.* In that meeting, Mr. Meeks heard and discussed with the client all of his concerns regarding Mr. Hoglund's representation to date, and advised him to request a personal meeting with Mr. Hoglund to discuss them further with

him, and that if Mr. Hoglund did not want to continue in that role, he would be interested in discussing taking over. *RP 117.*

On September 26, 2003, Ms. Willingham advised Mr. Bostwick by letter that, because Mr. Graf had been disqualified from law practice, it would be necessary to execute a new legal services agreement between him and her new firm, the Goldstein Law Offices, and likewise that a new association agreement between the Goldstein firm and Mr. Hoglund had to be entered. *Exhibit 4.*

On September 29, 2003, Mr. Hoglund and Ms. Willingham met to discuss plans for the case.⁶ *RP 32-38.* Mr. Hoglund informed Ms. Willingham that he no longer wanted to be lead trial counsel on the matter but was willing to continue participating in a supporting role, with her taking over as lead. Ms. Willingham did not necessarily want to take over the lead, and said that a new lead counsel would have to be retained if Mr. Hoglund withdrew from that role. The two discussed the subjects of what new role Mr. Hoglund might play in the case and what a new compensation arrangement might be. Mr. Hoglund testified on direct as follows:

A. At that meeting of September 29th. . . I also told [Sherelle] of my practice changes and how I believed that based on that that I should shift my role in handling the Bostwick case from being lead trial attorney. . . that I should move from that into an associated attorney posture with the case.^{***} I said, Sherelle, you can be the trial lawyer. She said, well, I'm not sure I want to do that, I haven't

⁶ Ms. Willingham remembers the discussion being by telephone, but Mr. Hoglund's assertion that it was a personal meeting is assumed as true.

done that. Even though she was involved in a couple of trials that fall, you know, she wasn't comfortable with it.***So we talked about the role we would have. *** And so I thought it was going to be a shifting.

* * *

Now, Sherelle wasn't with Mr. Graf's office anymore. She was with a different office, the Goldstein office. So I knew some new attorney fee agreement had to be initiated to confirm the arrangement with the client.

Q. Okay. Well, let me hand you...Exhibit 4. Can you tell me what that is?

A. Exhibit 4 is a letter from Sherelle Willingham from the office Jay Goldstein, dated September 26, 2003, to the clients, Mr. and Mrs. Bostwick.

Q. And what's the gist of that letter?

A. Well, the most important thing I saw in the letter is the second sentence of the second paragraph: you understand that because of this change in her status, it is necessary to work out a new legal services agreement between you and my new firm. Likewise, my new firm will need to work out an association agreement with John Hoglund.

* * *

Q. Okay. Let me hand you what's been marked as Exhibit No. 5. Can you tell me what that is?

A. Exhibit 5 is a copy of a memo entitled "Robert Bostwick Task List." This memo is dated September 29, 2003, was prepared by Sherelle. It was an outline of the agenda that Sherelle and I talked about at our September 29 meeting in Olympia.

Q. [re handwritten notes and numbers written by Sherelle] What is that referring to?

A. She notes we have a record of time spent on the case, first, \$150,000, 80/20, Rob needs to charge Dan Graf, 50/50 percentage up to mediation, post-mediation 90/10, John as consultant.

Q. So what is that referring to?

A. I believe those notes refer to the communications that she and I had at that meeting, which was, number one, in my role in the case I had established a base value. They had offered \$150,000 at the mediation based on all the work I had done. My fee interest was one-third of that under the 80/20 agreement I had with Mr.

Graf. So that would be about \$40,000. 80 percent of 50 is 40,000.

* * *

Q. What was her reaction to those suggestions in September?

A. Well, she wasn't – she didn't say, no, we're never going to do that, we're not—she didn't say no. She said, I need to check it out; I'm not sure what the percentages should be. We also discussed a number of case concerns and problems I had. So, concerning the value of the case, she wasn't willing to commit to, you know, we're going to pay you \$50,000, because what if the case resolved for less than \$150,000? It wouldn't be fair then. So she was unwilling to put in a precise writing at that point.

Q. But did you feel you had an agreement as to being paid some sum of money if a settlement was successful in mediation?

A. Absolutely. I believed that Sherelle Willingham and I had an agreement to associate with each other in the handling of this personal injury case. I believe that my fee would be a percentage of the recovery.

* * *

Q. Was there going to be an association agreement prepared between you and the Goldstein Law Office?

A. Yes, it was my understanding, but she kept indicating she was going to prepare it, so I did not prepare one myself.*** Up to that point in time, the fall of 2003, I mean, I had dealt with a dozen different lawyers, and all kinds of association situations where we sometimes had things in writing and sometimes didn't. We always split fees based on the work done on the case and the results that were obtained. We rarely agreed on, you know, certain monetary amounts being guaranteed to a lawyer before a contingency fee case was resolved.

RP 32-38.

On October 8, 2003, Ms. Willingham sent a letter to the client regarding the new attorney representation situation, which was returned signed with approval by the client. *Exhibit 7.* Mr. Hoglund testified that he knew of, understood and approved this situation:

Q. Okay. I'll go ahead and show you what is marked as Exhibit No. 7. Tell me what that is.

A. Exhibit 7 is a letter from Sherelle Willingham dated October 8, 2003 to Mr. and Mrs. Robert Bostwick, concerning the contingency fee agreement, a letter of understanding between she and the Goldstein office, signed by the Bostwicks.

Q. So what was your understanding at this point as to what was going to be happening on the case?

A. Well, the bottom of this letter, the client signed this statement: the undersigned released the firm of Dan Graf and in its place retained the Goldstein Law Office to handle their PI claim.

Well, I knew that, you know, because of my arrangement shifting, there was going to be a change. Sherelle and I had talked about it. This CF agreement was something we had talked about that she needed to do. When they said they were putting themselves in place of the Graf firm, I thought, well, all right, that probably meant they were going to associate me like Dan Graf had associated me. ***

RP 41-45.

Following the meeting, the situation was that Mr. Hoglund was definitely resigning as lead trial counsel and wanted to move to a supporting role with Ms. Willingham in the lead, but Ms. Willingham had not decided that she would do that. Mr. Hoglund by letter, *Exhibit 6*, sought cost reimbursement from Mr. Bostwick because he was no longer going to be lead counsel:

Q. Okay. So what caused you to send this letter on October 3rd to Mr. Bostwick?

A. ...we found out that Robert Bostwick had gotten some kind of a retirement fund payout, or something in the multiple thousands of dollars, for which he bought his son a motorcycle or something. You know, at the time that Sherelle and I talked about changing roles, we talked about the outstanding costs, which were at that point a little less than \$6,000. And the bills that were coming in from the medical records the defense had ordered – the defense ordered medical records – we had to get a copy of those records. And we got the bills from Medreco and those other firms, and they were getting to be one, two thousand dollars so there was a question: Now who is going to pay these

outstanding, ongoing costs? We had been doing so as the main handling lawyer. Well, now, Sherelle and her office had the file, they were, you know, going to be controlling the case file and so forth, and so I said, well, your office should probably, you know, take over these costs. And so I gave her the bills outstanding.

RP 39-40.

On October 15, he met personally with Mr. Bostwick's treating physician, which was the only and last substantive task he performed on the file since the July mediation. *RP 44-45.*

Ms. Willingham consulted Mr. Meeks about taking over the role of lead counsel, and a meeting among the three to discuss the situation was set for December 2, 2003. *RP 116-117.*

Mr. Meeks was late to the meeting, so prior to his arrival, Mr. Hoglund and Ms. Willingham talked further about Mr. Hoglund's resignation and possible further participation in the case, at *RP 49-50:*

A. *** On December 3rd, Sherelle and I first got together. Steve was a little late. And we talked initially about the fee agreement. We talked about the outstanding costs I had. She indicated she wasn't able to be definite about it, but she definitely wanted to let me know that she and Steve wanted to associate and work with me on the case. Now, we didn't define scope. But, you know, what that meant was, I was the person in charge, I knew all of the issues in the case, and so let's talk about who is going to work these issues. That's what I was thinking. So I wasn't – you can be in charge, fine, but someone has to work these issues, so I'm assuming that associated counsel meant we were going to work together on the medical issues, the trial prep issues, on getting ready for a second mediation, which meant perhaps getting a stronger neurologic opinion from Dr. Wohns, and that sort of thing.

They didn't agree, but, once again, I brought these issues up to Sherelle. They weren't saying, no, don't do anything on them, we're not going to have you work, on them. No, nothing like that was ever said to me. And we didn't talk about the amounts or the percentages at that meeting. We talked about the importance of

Steve Meeks looking at the medical records and coming to an understanding of the medical issues. ***

Q. Before Mr. Meeks got there, though, did you and Ms. Willingham discuss at least the prior \$150,000 offer?

A. Well, once again, she wasn't willing to make any commitment on the fee. We talked about my basic fee interest being at least what the mediation had resulted in. And it was a base amount. It was a base, in my mind. It was never the total fee. But I had already done some work since July. I had several different things in the case, so I thought it would be the base fee of that plus something. She was unable to make a commitment.

After Mr. Meeks arrived, his first inquiry was to ascertain with certainty whether or not Mr. Hoglund was resigning as lead counsel. Mr. Hoglund unequivocally and unconditionally stated that this was so, but that he was offering to continue in the case in a subordinate role with Mr. Meeks as lead and Ms. Willingham:

Q. In the December 3rd meeting, isn't it true that you affirmed unequivocally you did not want to be the trial attorney on the case?

A. I did not want to be the in-court acting acting attorney. I did affirm that. And I also very clearly mentioned other things I was interested and willing to do.

RP 66-67.

Mr. Hoglund then continued, agreeing that no agreement was reached as to whether he would be further involved or as to any compensation, and he also affirmed that, although the subject was discussed in the September 29 meeting, Ms. Willingham never agreed to his proposal regarding the "base value fee interest" of \$40,000:

Q. And isn't it true that out of that December 3rd meeting that you testified that no agreement was reached as to the scope of your further involvement, if any; correct?

A. Correct.

Q. And there was no agreement reached as to what compensation you were to have, if any, for that involvement?

A. That's correct, but at the beginning of that meeting I mentioned to Sherelle the base value of my fee interest being at least the \$40,000 based on the value of that mediation.

Q. But she didn't agree to that?

A. She didn't say, no, it's not. She said, yes, I understand that. She just couldn't agree to a definite fee amount that I would be paid.

Q. She didn't agree to it, did she?

A. No.

RP 66-67.

The cross-examination then went on to whether Mr. Hoglund knew that Ms. Willingham had to clear any agreement with Mr. Goldstein, and then halted for the lunch recess. When the questioning resumed, Mr. Hoglund then changed the testimony he had just given:

Q. The question was, Mr. Hoglund, whether you knew that for Sherelle to agree to any kind of fee arrangement she would have to clear it with Jay; is that correct?

A. No, not in the original agreement. She agreed in September to a minimum of \$40,000 based on the value I had brought to the case in the mediation, and there was no disagreement that she was going to associate me as an attorney. So, no, she didn't have to talk to Jay about those things at all.

RP 69.

So, over lunch, the \$40,000 *discussion* between he and Ms. Willingham on September 29 had become a \$40,000 *agreement*.

Defense counsel immediately went to Mr. Hoglund's deposition to impeach him on this point:

Q. Could you open your deposition to page 63?

A. Sure.

Q. On line 20, page 63, did you give the following testimony beginning at line 20: "Sherelle said to me several times, well, yes, we want to work together, I want to work with you together. But, no, she wasn't – she did not agree to what I was trying to affirm in terms of fee amount. She didn't agree to it. She said I need to talk to, you know, Jay, I think she mentioned this time.

Was that your testimony?

A. Yes, it is.

RP 69-70.

Mr. Hoglund also testified that he never mentioned the \$40,000 "agreement" to Mr. Meeks in that meeting or a subsequent one on December 17:

Q. ...You're claiming that as of September 29th, you had formed an agreement with Sherelle that you were going to get 80 percent of the \$50,000?

A. Yes.

Q. You did not assert that agreement in the December 3rd meeting or in the December 17th meeting, did you?

A. Well, my notes of the December –

Q. No, I'm asking you, yes or no?

A. – 3rd meeting indicates I did raise that, and I wrote down those numbers.

Q. Did you ever tell the other folks in the meeting that, hey we have an agreement here and this is my agreement and it's going to be 80 percent of that \$50,000, and that's it, that's my fee?

A. No, I didn't.

Q. Okay. You never put a confirming letter to anybody?

A. No. It was part of the fee, and Sherelle and I talked about it.

* * *

Q. What about the amended complaint in this case that asserts that the parties never arrived at an agreement for Mr. Hoglund's compensation? Was that an error in your pleadings?

A. There was no agreement with regard to any percentage split, but there certainly was an agreement in my mind with Ms. Sherelle in our conversations about the base value of the fee.

Q. It says the parties did not reach agreement as to his compensation. Is that a false statement?

A. No. It means we didn't come to an entire agreement.

RP 163-165.

Following this testimony on rebuttal cross-examination, the court inquired of Mr. Hoglund as to what fee he was seeking in the action, and he claimed that it was not the \$40,000 but a 50-50 split of the entire fee generated by the settlement at the second mediation, based on his work prior to his resignation:

THE COURT: So, what do you think your fee should be in this thing?

THE WITNESS: I think, Your Honor, I should receive at least \$40,000, which is what I had an interest in as of the mediation, which I had done all the work for, created a value of.***

THE COURT: So you are saying what, then?

THE WITNESS: That there should be a 50/50 split of the attorney's fee that was paid.

* * *

THE COURT: So they had 23 percent of 850,000,⁷ and that's about 195,000.

⁷ The court impermissibly considered this figure because it was part of the confidential mediation discussions. *See* mediation confidentiality argument below.

THE WITNESS: Correct.

THE COURT: And you want half of that?

THE WITNESS: Correct.

THE COURT: And \$40,000 more.

THE WITNESS: No. It was a 50/50 split. It would be a total percentage split, and that would include the \$40,000. The base value of my fee should be \$40,000.

THE COURT: And that would include half of the 195.

THE WITNESS: The half of the 195 would include the 40.

RP 165-166.

With confirmation of Mr. Hoglund's unequivocal and unconditional resignation in the first meeting, Mr. Meeks agreed with the Goldstein firm to take over as lead trial counsel in conjunction with Ms. Willingham; no agreement for Mr. Hoglund's continuation in the case in a supporting role was ever reached in the December meetings, but the possibility of such role was also never ruled out, and it remained under consideration by Mr. Meeks if circumstances warranted as he and Ms. Willingham developed the case further. *RP 123-125.* Mr. Hoglund was reimbursed in full for his cost advances in early February. *RP 124-126.*

With the June 2004 trial date approaching, in March 2004, the defense suggested that the parties in the case engage in another mediation session, Mr. Bostwick accepted Mr. Meeks' and Ms. Willingham's advice to engage in a second mediation, even though he and counsel considered the likelihood of achieving a

settlement to be remote, and that mediation then occurred in early April 2004. *RP 130-132.*

Because a formal substitution of counsel of record had not yet been done, Ms. Willingham drafted that and sent it to Mr. Hoglund, who signed and returned it to Ms. Willingham without expression of any objection, comment, or reservation whatsoever, either in the document itself or by extrinsic communication to her, Mr. Meeks, or their respective staff members. *Exhibit 10; RP 54-55; RP 107.* Mr. Hoglund knew of the impending mediation because he had discussed it by telephone with Ms. Willingham with an offer of assistance if desired. *RP 54; 107.*

It is undisputed that Mr. and Mrs. Bostwick, Mr. Meeks and Ms. Willingham attended the mediation, and a settlement in an amount satisfactory to Mr. Bostwick was achieved, far in excess of the final defense offer made at the first mediation. Mr. Hoglund requested that he be paid a share of the attorney fee generated by the settlement, and when compromise discussions failed, commenced this action, on December 28, 2004 against Mr. Meeks, Ms. Willingham, and Mr. Goldstein.

The case went to bench trial on May 1, 2006, on these causes of action: breach of contract or quantum meruit against Ms. Willingham and Mr. Goldstein, and quantum meruit only against Mr. Meeks.

On June 9, 2006,⁸ the court entered its findings of fact and conclusions of law, and judgment, in the matter, finding each of the three defendants jointly and severally liable to Mr. Hoglund for \$40,000 plus prejudgment interest. *CP 1110-1124*. The conclusions of law as proposed by Mr. Hoglund and entered by the court are as follows:

2. The plaintiff had a contractual right to serve as lead counsel in the Bostwick case and receive 80% of any attorney's fees realized on any recovery in that case. The plaintiff relinquished that right as part of the September 2003 agreement reached by defendant Willingham and the plaintiff.

3. Defendant Willingham and the plaintiff in September 2003 entered into an agreement that the plaintiff would step down as lead counsel and would receive \$40,000 out of any recovery in the Bostwick case for the services and work product he had provided up to that date. That agreement constituted a contractual agreement between the plaintiff and the defendants Willingham and Goldstein. The plaintiff was entitled to rely on that agreement.

4. [proposed quantum meruit conclusion withdrawn by plaintiff at hearing prior to entry]

5. [plaintiff not entitled to any additional compensation over the agreed upon \$40,000 due to lack of agreement as to any future role/compensation]

6. The defendants' failure to pay the plaintiff the agreed upon \$40,000 constitutes a breach of contract.

7. Defendants are jointly and severally liable to the plaintiff for the \$40,000.

8. The \$40,000 was a liquidated sum and the plaintiff is thus entitled to pre-judgment interest at the rate of 12% on

⁸ Proposals and objections as to findings and conclusions were first heard on May 19 but the hearing was not completed. Revised proposals and objections were filed, and the hearing concluded on June 9.

the \$40,000 from April 15, 2004 through the date of judgment.***

Plaintiff had originally proposed, as No. 4, a conclusion of law as to liability under quantum meruit theory:

4. Even if the agreement between defendant Willingham and the plaintiff did not constitute an enforceable agreement, the plaintiff would be entitled to recover from the defendants under the doctrine of quantum meruit. The plaintiff provided valuable service and work product to all of the defendants, which service and work product were accepted by the defendants, who used and enjoyed by them while on notice that the plaintiff expected to be paid for that and work product. *[sic]*

The record of the June 9 hearing reveals that the court rejected each defendant's objections to this proposed conclusion and its correlative finding of fact and orally ruled that it would be included. The discussion then turned to the propriety of a prejudgment interest award, as reflected in No. 8. During this discussion, defendant Meeks pointed out to the court that an award based upon quantum meruit analysis inherently cannot meet the legal definition of a "liquidated sum" because its determination is a matter of judicial discretion rather than ready calculation as in breach of contract theory. Upon hearing this argument and being asked for response by the court, plaintiff's counsel chose to withdraw the proposed conclusion, and, as shown by the hand-done and initialed strike marks, Conclusion No. 4 was expressly NOT entered by the court by stipulation of Mr. Hoglund through his counsel. *RP June 9 2006, 10-12.*

With the elimination of any conclusion of law based on quantum meruit, Mr. Meeks pointed out at the June 9 hearing that, since Conclusions 2 and 3 and their correlative findings expressly state that the supposed contract to pay Mr. Hoglund \$40,000 for his past work on the file was entered between he and Ms. Willingham/Mr. Goldstein, not Mr. Meeks, there was no longer any basis in either the findings or conclusions for a judgment against him. Mr. Meeks then requested that the court amend Conclusions of Law Nos. 6 and 7 to limit the term "defendants" therein to Ms. Willingham/Mr. Goldstein, and order dismissal of the action with prejudice as against him instead of entering judgment. The court denied this request. *RP June 9 2006, 12-14.*

Mr. Meeks then formally moved for reconsideration, which was heard on June 16, 2006 and denied, *CP 1064-1105; RP June 16, 2006, 1-11*, following which a timely notice of appeal was filed. *CP 1135..*

ARGUMENT

“An attorney employed on a contingent fee basis may not determine that it is not worth his time to pursue the matter, instruct his client to look elsewhere for legal assistance, but hedge his bet by claiming a part of the recovery if a settlement is made or a judgment obtained.”

--*Ausler v. Ramsey*, 73 Wn. App. 231, 237 (1994)

I. PLAINTIFF WAIVED ANY RIGHT TO COMPENSATION FOR PRIOR WORK BY HIS VOLUNTARY WITHDRAWAL FROM THE CLIENT'S REPRESENTATION, AS A MATTER OF LAW AND CONTRACT

The law regarding when an attorney hired on a contingent fee contract may recover fees for his work is very well settled in this state. If the attorney completes or substantially completes the agreed services, he may recover on the contract. *Ramey v. Graves*, 112 Wn. 88, 191 P. 801 (1920); *Cavers v. Old Nat'l Bank & Union Trust Co.*, 166 Wn. 449, 7 P. 2d 23 (1932); *Ross v. Scannell*, 97 Wn. 2d 598, 609, 647 P. 2d 1004 (1982). If, however, the attorney ceases to render the required legal services for his client prior to substantial completion of them, he may not recover fees for prior work on the contract, but must seek recovery on the theory of quantum meruit, *i.e.* the “reasonable value” of those services. *Ramey*, 112 Wn. at 91; *Ross*, 97 Wn. 2d at 609. This does not mean that the attorney may always recover in quantum meruit; it means only that if the attorney is entitled to

fees, it can only be on the basis of quantum meruit. *Ausler v. Ramsey*, 73 Wn. App. 231, 235, 868 P. 2d 877 (1994).

The availability of quantum meruit recovery depends upon whether the attorney was discharged or prevented from performing the service, or whether he voluntarily withdrew. If discharged or prevented from performing, quantum meruit recovery is available. *Ramey*, at 91; *Ross*, at 609. If the withdrawal is voluntary, quantum meruit recovery is allowed only if the withdrawal is for “good cause,” as defined in *Ryan v. State of Washington*, 112 Wn. App. 896, 903, 51 P. 3d 175 (2002):

“Courts have found ‘good cause’ where the attorney knows that the client’s claim is fraudulent, the attorney has professional objections to the client’s retention of additional counsel, the client is uncooperative, the attorney and client suffer a ‘breakdown’ in communication, the client degrades the attorney (usually by claiming the attorney was dishonest), the client refuses to pay justified attorney fees and costs or ethical rules require the attorney to withdraw.... It has been held unjustifiable for an attorney to withdraw from a case because the client has retained other counsel, the attorney does not believe the negotiated contract with the client is sufficiently compensatory, the attorney feels that the case has no potential or the client refuses to accept a settlement offer.” (Emphasis added.)

In *Ausler*, a client’s first attorney withdrew from the case because he believed that the client was not heeding his advice, was acting in contradiction to her best interests, and did not respond to one of his letters, and then filed an attorney’s lien on any judgment received by the client. The client’s new attorney did additional work on the matter, and as a result increased the defense settlement offer to the point where the client agreed to

accept it. The client then moved to determine the validity of the first attorney's lien. The trial court granted the claim for the full amount sought. The Court of Appeals, Division I, reversed, noting the observation in the California case of *Estate of Falco* that :

“An attorney employed on a contingent fee basis may not determine that it is not worth his time to pursue the matter, instruct his client to look elsewhere for legal assistance, but hedge his bet by claiming a part of the recovery if a settlement is made or a judgment obtained.”

The *Ausler* court then stated that it mirrored the *Falco* court's displeasure with an interpretation of the rule that would allow attorneys to “hedge their bets”:

“Clients often must accept the drawbacks of a contingent fee arrangement if they want to acquire an attorney at all. Attorneys must do the same. Therefore, an attorney should not be permitted to withdraw from a “bad case” on grounds that the client “uncooperatively” wishes to go to trial, thereby eliminating his or her exposure to risk, and still recover fees for that case.”

Id., at 237-238.

The court held that the attorney's reasons for withdrawal did not constitute good cause or justification as a matter of law, and declared that by the withdrawal the attorney had waived his fee as a matter of law.

In *Ausler*, the suing attorney was the one hired directly by the client. In *Ryan* eight years later, the same court (Division I) considered facts exactly like here, where the client retained the first attorney and that attorney retained another to assist in the case. The client hired attorney Bryan Hugo on a contingent fee

basis, and Mr. Hugo retained Attorney Howard Stein to assist in the representation. Hugo and Stein worked together on the case for four years, when Stein withdrew based on his decision to work exclusively on matters for his own clients. Later, the case settled, and Stein filed a lien for compensation based on his work prior to the withdrawal. The trial court granted the claim.

Division I reversed, reiterating the rule it had adopted in *Ausler* and summarizing the general standards for determining when “good cause” or “justification” for withdrawal may be found to exist, as quoted above. The appeals court reversed, finding as a matter of undisputed fact that Stein’s withdrawal was not for any of these reasons and thus that he thus failed to meet his burden to show that it was justified or for good cause so as to warrant recovery of fees.

Here, it is absolutely undisputed that Mr. Hoglund was hired under a written contingent fee agreement to be lead trial counsel for Mr. Bostwick, that he voluntarily and unequivocally resigned from that role as of September 29, 2003 well before completion of the representation he contracted to perform, and that he did so simply because he didn’t want the responsibility and continued exposure to the economic risk inherent in contingent fee representation anymore: no claim was ever made that the withdrawal was for any of the reasons listed in *Ryan*. So, by doing

so, he waived any right to compensation for his prior work on the matter as a matter of law, even if he hadn't specifically contracted to do so, as will be discussed next.

This case contains one fact that the *Ausler, Ryan* and other cases just discussed did not: a controlling contractual provision which has the legal effect of an express waiver of any right to fees, quoted above but repeated here:

"10. Withdrawal of Attorney. Attorney may withdraw from client's representation in this case on reasonable notice to client, provided that in the event of such withdrawal attorney shall be entitled to no fee pursuant to Section Two, but shall be reimbursed for any cost advances made for client under Sections Three and Five.⁹ Payment in full shall be made by client within 30 days of receipt of final billing by the attorney."

The existence of this contractual promise by Mr. Hoglund stands uncontradicted in the record: he made no argument and presented no evidence that he did not so agree. Accordingly, in addition to the implied waiver as a matter of law represented by the *Ausler* and *Ryan* holdings, Mr. Hoglund expressly waived any right to a fee for his prior work.

The only way that Mr. Hoglund could avoid this result was to claim that the contract had been modified or replaced by a new one, and that is what he did, and it is this claim that forms the basis for the trial court's award of damages in this case.

⁹ It is undisputed that Mr. Hoglund was repaid all his cost advances shortly after his withdrawal.

II. SUBSTANTIAL ADMISSIBLE EVIDENCE DOES NOT SUPPORT THE FINDINGS OF FACT AND CONCLUSIONS OF LAW THAT DEFENDANTS ARE LIABLE TO PLAINTIFF FOR BREACH OF CONTRACT JOINTLY OR SEVERALLY

Mr. Hoglund pleaded a “continued assistance” agreement whereby the defendants allegedly agreed that he would continue in a subordinate role in the case, stating in the pleading that no agreement as to his duties or compensation was ever reached, and then asserting in trial testimony – in plain self-contradiction on cross-examination – that this agreement had been entered between he and Ms. Willingham at the September 29 meeting and that she had agreed that he would get 50%, with at least \$40,000, of any eventual attorney’s fee paid generated by the case, with the \$40,000 calculation being based on the fact that the defense had previously made a \$150,000 settlement offer.

The trial evidence does not support any finding or conclusion of contract liability against any of the defendants because (1) no agreement to pay Mr. Hoglund as described was ever reached between he and Ms. Willingham, (2) even if there was, Mr. Goldstein is not liable on such contract because Ms. Willingham did not have the actual or apparent authority to enter it without his knowledge and consent, (3) even if there was, Ms. Willingham is not liable personally on it since the contract purportedly was with the Goldstein firm who indisputably was a disclosed principal, and (4) even if there was, and whether or not

Mr. Goldstein or Ms. Willingham is bound, Mr. Meeks was not a party to that contract or in any other form of legal relationship with Mr. Hoglund that would subject him to liability for the \$40,000 contract award.

A. Lack of Substantial Admissible Evidence re Formation

The terms of an alleged contract must be proved, and a defendant's objective manifestation of assent to those terms at the time they enter the contract must be proved by admissible, substantial evidence. *Citizens v. Public Hosp. Dist.* 304, 78 Wn. App. 333, 341, 897 P. 2d 1267 (1995).

1. Price Term Not Proved by Admissible Evidence

The basic essential elements of proof for a breach of contract claim are contractual duty, breach and resulting damage. Duty is established by proof of contract formation by objective manifestation of assent to all material terms, which here includes the price that Mr. Hoglund was allegedly to be paid. The damage caused by the breach is measured, in a case like this, by that price. So, for Mr. Hoglund to validly prove his contract claim in terms of duty and damages, he must present evidence of how much he was entitled to, and, of course, such evidence must be admissible.

The only evidence in the record which establishes the price term and basis for the awarded damages is Mr. Hoglund's

testimony about what occurred in the first mediation, *i.e.* that the defense had offered \$150,000 to settle the matter. The trial court admitted this evidence over defendants' objection under RCW 5.60.070, which then enabled Mr. Hoglund to further claim that Ms. Willingham agreed that he would be paid 80% of one-third of this amount. Admission of this evidence was error, and such error is clearly prejudicial since, without it, Mr. Hoglund could not establish two of the basic elements of his contract claim.

RCW 5.60.070 (1) reads:

If there is a court order to mediate, a written agreement between the parties to mediate, or if mediation is mandated under RCW 7.70.100, then any communication made or materials submitted in, or in connection with, the mediation proceeding, whether made or submitted to or by the mediator, a mediation organization, a party, or any person present, are privileged and confidential and are not subject to disclosure in any judicial or administrative proceeding except:

(a) When all parties to the mediation agree, in writing, to disclosure;

(b) When the written materials or tangible evidence are otherwise subject to discovery, and were not prepared specifically for use in and actually used in the mediation proceeding;

(c) When a written agreement to mediate permits disclosure;

(d) When disclosure is mandated by statute;

(e) When the written materials consist of a written settlement agreement or other agreement signed by the parties resulting from a mediation proceeding;

(f) When those communications or written materials pertain solely to administrative matters incidental to the mediation proceeding, including the agreement to mediate; or

(g) In a subsequent action between the mediator and a party to the mediation arising out of the mediation.

The standard of review for alleged errors in the admission of evidence is abuse of discretion. *State v. Gatalski*, 40 Wn. App. 601, 610, 699 P. 2d 804 (1985). There is an abuse of discretion when the discretion exercised is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn. 2d 12, 26, 482 P. 2d 775 (1971); *Beltran v. DSHS*, 98 Wn. App. 245, 256, 989 P. 2d 604 (1999).

Here, the confidentiality and nondisclosure in judicial proceedings mandate is clear, with no proof of any of the exceptions in the record. The admission of this evidence was therefore an abuse of the trial court's discretion.

2. The Elements of Contract Formation Were Not Proved By Substantial Evidence

The essential elements of contract formation are of course an offer, objectively manifested acceptance to the terms proposed by a person with authority to do so, and consideration. The courts' findings in this regard are:

2. The plaintiff had a contractual right to serve as lead counsel in the Bostwick case and receive 80% of any attorney's fees realized on any recovery in that case. The plaintiff relinquished that right as part of the September 2003 agreement reached by defendant Willingham and the plaintiff.

3. Defendant Willingham and the plaintiff in September 2003 entered into an agreement that the plaintiff would step down as lead counsel and would receive \$40,000 out of any

recovery in the Bostwick case for the services and work product he had provided up to that date. That agreement constituted a contractual agreement between the plaintiff and the defendants Willingham and Goldstein. The plaintiff was entitled to rely on that agreement.

On review, the appellate court determines whether the findings of fact are supported by substantial evidence and, if so, whether the findings support the conclusions of law and judgment. *City of Tacoma v. State*, 117 Wn.2d 348, 361, 816 P.2d 7 (1991). Evidence is substantial if, when viewed in the light most favorable to the prevailing party, it would persuade a rational person of the truth of the finding. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 112, 937 P.2d 154, 943 P.2d 1358 (1997).

Self-serving testimony contradicting prior depositions cannot be used to create an issue of material fact. When a party has given clear answers to unambiguous deposition questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with testimony that merely contradicts, without explanation, previously given clear testimony. *McCormick v. Lake Wash. Sch. Dist.*, 99 Wn. App. 107, 992 P. 2d 107 (1999); *Unigard Ins. Co. v. Leven*, 97 Wn. App. 417, 431, 983 P. 2d 1155 (1999). See also *Klontz v. Puget Sound Power & Light Co.*, 90 Wn. App. 186, 192, 951 P. 2d 280 (1998)

The only source of evidence as to the terms of the purported September 29 agreement was the testimony of Mr. Hoglund, and he never testified that Ms. Willingham agreed that he would receive \$40,000 out of any recovery in the Bostwick case for the services and work product he had provided up to that date. As seen in the exchange with the court quoted above, and by his own testimony as to the discussion on September 29, his testimony was that the agreement was that he be paid 50% with a minimum of \$40,000 out of any settlement proceeds, with that to be adjusted by agreement should the matter have to go to trial, in return for his continued participation in the case. This is fundamentally different from the agreement being, as stated in the finding, that he would be paid \$40,000 for his past work even if he didn't participate further. No testimony whatsoever, however liberally read, supports this version of the supposed agreement. The absurdity of this is demonstrated by its plain effect: Ms. Willingham and new lead counsel would take on all responsibility of the case through trial and possible appeal, including the risk of a jury verdict below the \$150,000 "threshold", with the first \$40,000 of anything recovered as a fee going to Mr. Hoglund for doing nothing and assuming no risk whatsoever.

It is undisputed that, at the September 29 meeting, Mr. Hoglund stated to Ms. Willingham his unequivocal intent to resign

his contracted-for position as lead trial counsel, and that he offered to continue in the case in a subordinate role with either her or someone else as lead, with his compensation for such continued performance to be 50% of any attorney fee generated by any eventual settlement in the case, with a minimum of \$40,000. By Mr. Hoglund's own pleading and testimony, his offer was never accepted by any of the defendants, including Ms. Willingham in the September 29 meeting. They discussed his proposal, but it was never agreed to by Ms. Willingham. The offer was plainly premised on Mr. Hoglund continuing in the case in some role, and Ms. Willingham made it plain that whether he would do so and if so what his compensation calculus may be could not be decided until a decision was made as to who would be lead counsel. It is undisputed that Mr. Meeks became lead counsel in Mr. Hoglund's place, that Mr. Hoglund's continued participation and his proposed fee plan was discussed, and that the decision was made not to accept his offer to become involved at all, subject to later revisitation if Mr. Meeks decided that was warranted.

The only testimony that Ms. Willingham "agreed" on September 29 came in Mr. Hoglund's self-contradiction at trial as outlined above. This is not substantial evidence which can support a finding of objectively manifested acceptance. Mr. Hoglund's after-lunch statement that Ms. Willingham agreed to his proposal

on September 29 was in flat contradiction to his before-lunch statement that she had not so agreed, and thus cannot be regarded as substantial evidence to support the trial court's finding of contract entry.

Moreover, even if such evidence can be considered, the substantial evidence standard still cannot be met. At best, the evidence would show only that Ms. Willingham agreed to the proposed compensation plan if Mr. Hoglund were to continue in a subordinate role. That means in contract analysis that her purported "acceptance" was provisional or contingent upon the occurrence of a later event. Since this event (Mr. Hoglund's retention in a subordinate role) never happened, this means that no binding contract was ever formed. This is reflected in the court's Finding No. 5 wherein it rejected the claim that the "continued assistance" contract calling for the 50/50 split with a \$40,000 minimum was ever formed. This finding is a verity since Mr. Hoglund did not appeal it.

And, there is no substantial evidence to support a finding that Mr. Hoglund gave consideration for the supposed agreement. He had already performed the services for which the \$40,000 was supposedly intended as compensation, and the contract under which he performed them clearly stated that he waived any right to a fee upon his voluntary resignation. He did not agree to do, and

did nothing substantial in addition to the past services, so did not give any consideration for the supposed promise by Ms.

Willingham. So, the second sentence of Finding No. 2 – that Mr. Hoglund relinquished that right as part of the alleged September 29, 2003 agreement reached by he and defendant Willingham – is not supported by any substantial evidence in the record.

B. Willingham Not Liable Due To Her Status As Agent for Disclosed Principal

Assuming *arguendo* that admissible substantial evidence supports a finding that Ms. Willingham expressed agreement to the alleged new contract terms with Mr. Hoglund, he still had the burden of proving by substantial evidence facts which establish that each defendant was a party to or otherwise bound by such contract. He did not do so, as will now be discussed in this and sections C and D of this argument.

It is undisputed that Mr. Hoglund knew, at the time of the September 29 meeting and thereafter, that the Goldstein Law Firm represented Mr. Bostwick, that Ms. Willingham was an employee of Mr. Goldstein assigned to handle the case, that any agreement regarding his retention in the case would be with the Goldstein firm, and that any recovery out of which Mr. Hoglund might be paid would come from the attorney fee paid to the Goldstein firm under the primary attorney-client contract. It is also undisputed that Mr.

Hoglund was told by Ms. Willingham that she would have to clear any secondary counsel agreement with Mr. Goldstein.

These facts establish that Ms. Willingham engaged in all counsel retention discussions, including the alleged one with Mr. Hoglund, as an agent for a disclosed principal, and thus cannot be held personally liable on the alleged contract. *See, e.g. Rho Co. v. Dept of Revenue*, 113 Wn. 2d 561, 587, 782 P. 2d 986 (1989); *Griffiths & Sprague Stevedoring Co. v. Bayly Martin & Fay, Inc.*, 71 Wn. 2d 679, 686, 430 P. 2d 600 (1967).

C. Goldstein Not Liable Due To Lack Of Willingham Actual Or Apparent Authority To Bind Goldstein Firm To Alleged Contract

It is undisputed that Mr. Hoglund never discussed the terms of the alleged contract with anyone other than Ms. Willingham, and in particular never discussed with either Ms. Willingham or Mr. Goldstein whether Ms. Willingham had the authority to agree to the alleged contract on behalf of Mr. Goldstein. Since the alleged contract was to be with the Goldstein firm, and the person with whom the alleged agreement was made was indisputably an agent for the firm, an essential element of proof of contract formation is that Ms. Willingham had either the actual or apparent authority to bind Mr. Goldstein.

The undisputed testimony, from Mr. Goldstein and Ms. Willingham, unexamined or contradicted in any way by Mr. Hoglund, was that she did not have the actual authority to do so, and the trial court so expressly found by stipulation of Mr. Hoglund. The court did find, however, that she had the apparent authority to do so, and on this basis held Mr. Goldstein vicariously liable for her alleged agreement. But, there is absolutely no evidence in the record which supports this finding.

Restatement (Second) of Agency §27 says in pertinent part:

“Apparent authority to do an act can be created by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.”

Thus, apparent authority depends upon manifestations by the principal to the third person: apparent authority is not created merely because the agent is appointed to or occupies a high position in the principal’s organization, and it cannot be inferred from the acts of the agent. *Smith v. Hansen, et al.*, 63 Wn. App. 355, 363-366, 818 P. 2d 1127 (1991); *Mauch v. Kissling*, 56 Wn. App. 312, 316, 783 P. 2d (1989), citing *Lamb v. General Assocs., Inc.*, 60 Wn. 2d 623, 374 P. 2d 677 (1962).

Here, Mr. Hoglund presented no evidence whatsoever which tended to establish that Mr. Goldstein had made any form whatsoever of objective manifestation to him that Ms. Willingham had the authority to bind him to the alleged contract.

D. Meeks Not Liable Due To Status As Nonparty To Contract Or As Otherwise Owing Any Legal Duty To Hoglund

Finding No. 3 states expressly that the purported contract was entered by Mr. Hoglund with Ms. Willingham and Mr. Goldstein; it does not state that Mr. Meeks was a party to it. This is in complete accord with the pleadings on which the case went to trial, where Mr. Meeks was alleged to be liable under quantum meruit theory only and not as a party to any contract with Mr. Hoglund, and in complete accord with the trial evidence, where there is not one shred of testimony that Mr. Meeks ever contracted with Mr. Hoglund. The undisputed testimony is that Mr. Meeks contracted with the Goldstein firm to become lead trial counsel after Mr. Hoglund resigned.

Despite this, and despite Mr. Hoglund's voluntary withdrawal of the quantum meruit conclusion of law, the trial court still entered Conclusion of Law No. 9, stating that the "defendants" – including Mr. Meeks -- were jointly and severally liable to Mr. Hoglund on the alleged contract. This was done over Mr. Meeks' clear objection and argument made orally at the final hearing on entry of the findings and conclusions and in writing via his motion for reconsideration on this specific subject.

This is clear error on the part of the trial court. For a person to be jointly or severally liable on a contract, he must be a party, or

promisor, in such contract. This question is determined under the common law of contracts. *Smith v. WIGA*, 77 Wn. App. 250, 258, 890 P. 2d 1060 (1994):

“At common law, a joint contract is an agreement by all of the promissors that the act promised shall be done. It is treated as the single obligation of all jointly and the individual obligation of none. For any breach of the contract, there is but one cause of action and the joint obligors are jointly liable for the damages suffered by the obligee.”

There is no finding of fact in this case that Mr. Meeks ever entered so as to become a promisor on, the purported contract. The findings regarding this are specifically limited to defendants Willingham and Goldstein.

The finding that Mr. Meeks was “aware” of such contract when he entered his contract with the Goldstein firm is immaterial for two reasons. First, it itself has no support in the evidence whatsoever. Mr. Hogle never testified in any way to that effect, and, since Ms. Willingham denied that she had ever so agreed, she naturally did not testify that she made Mr. Meeks aware of it. Second, even if Mr. Meeks was so aware, this awareness does not make him a party to it.

Accordingly, the conclusion of law that Mr. Meeks is liable to plaintiff for breach of contract either jointly or severally is not supported by any finding of fact. Plaintiff never even proposed such a finding, because plaintiff never adduced evidence or even argued that Mr. Meeks was a party to the contract.

III. THE ALLEGED CONTRACT VIOLATES PUBLIC POLICY AND IS THEREFORE VOID AND UNENFORCEABLE

On October 19, 2006, the Washington Supreme Court issued its decision in *Mazon v. Krafchick*, -- Wn. 2d --, 144 P. 3d 1168 (2006), regarding when one attorney may sue another for loss of prospective fees. The court stated:

Washington ethical rules are clear that the standards of the legal profession require undeviating fidelity of the lawyer to his client. No exceptions can be tolerated. Public policy prohibits an attorney from owing a duty to anyone other than the client when the collateral duty creates a risk of divided loyalty due to conflicts of interest or breaches of confidence.

* * *

We . . . adopt a bright-line rule that no duties exist between cocounsel that would allow recovery for lost or reduced prospective fees. As cocounsel, both attorneys owe an undivided duty of loyalty to the client. The decisions about how to pursue a case must be based on the client's best interests, not the attorneys'. The undivided duty of loyalty means that each attorney owes a duty to pursue the case in the client's best interests, even if that means not completing the case and forgoing a potential contingency fee.

If we were to recognize an attorney's right to recover from cocounsel prospective fees, potential conflicts of interest that harm the client's interests may arise. Cocounsel may develop an impermissible self-interest in preserving the claim for the prospective fee, even when the client's interests demand otherwise.

Additionally, the question of whether an attorney's claim conflicts with the client's best interests may be difficult to answer. Discretionary, tactical decisions, such as whether to advise clients to settle or risk proceeding to trial and determining the amount and structure of settlements, could be characterized by cocounsel as a breach of the contractual duties or general duties of care owed to one another and provide a basis for claims seeking recovery of prospective fees. As the California Supreme Court recognized, in comparing the issue to lawsuits for prospective fees between successive attorneys, public confidence in the legal system may be eroded by the spectacle of lawyers squabbling over the could-have-beens of a concluded lawsuit, even when the client has indicated no dissatisfaction with the outcome. Considerations of public policy support the conclusion

that an attorney's duty of undivided loyalty to his client should not be diluted by imposing upon him obligations to the client's former attorney, or at least obligations greater than the client himself owed to the former attorney.

In addition, fee sharing among lawyers is governed by

RPC 1.5(e):

A division of fee between lawyers who are not in the same firm may be made only if:

* * *

(2) The division is in proportion to the services provided by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; the client is advised of and does not object to the participation of all the lawyers involved; and the total fee is reasonable.

If Mr. Hogle had been retained to continue in the case, and his 50/50 split with \$40,000 agreed to by the Goldstein firm and Mr. Meeks, and the client was so advised and did not object, there would be no problem. But, he wasn't, and the court's judgment is based on the finding that the contract was different than as contemplated in RPC 1.5(e): that Mr. Hogle gets paid \$40,000 from the attorney fee recovered by Ms. Willingham and Mr. Meeks, even though he resigned from all participation in the case. This plainly violates the rule: (1) since Mr. Meeks indisputably never agreed, the division of fees would not be proportionate to the services provided by each lawyer, (2) Mr. Hogle had expressly resigned from joint representation in the case, and (3) there is no proof that the client was advised of and did not object to the purported agreement.

Allowing Mr. Hoglund to sue for the \$40,000 "minimum" fee even though he would have no further participation in the case would place all counsel in the same position regarding the client as that discussed in *Mazon*, with the same pressures and potential conflicts of interest in Mr. Meeks and Ms. Willingham as discussed in that opinion. As stated in *Mazon*, Mr. Meeks and Ms. Willingham can be held to owe no duty to anyone other than the client when the collateral duty creates a risk of divided loyalty due to conflicts of interest or breaches of confidence. Accordingly, since the entire judgment is based upon a purported contract which violates RPC 1.5(e) and the principles espoused in *Mazon*, it must be reversed because such contract is void as against public policy.

CONCLUSION

For the foregoing reasons, appellant requests that this court reverse the judgment against him and remand with instructions to dismiss with prejudice.

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