

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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COURT OF APPEALS NO. ~~39483-9-II~~  
PIERCE COUNTY SUPERIOR COURT NO. 93-3-04576-9

IN THE COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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DANIEL E. BELSVIG,

Appellant,

v.

RANDY JOE KARR AND LAUREN W. BELSVIG,

Respondents.

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OPENING BRIEF OF APPELLANT

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C. Nelson Berry III  
WSBA No. 8851  
Attorney for Appellant

Berry & Beckett, P.L.L.P.  
1708 Bellevue Avenue  
Seattle, Washington 98122  
(206) 441-5444

**ORIGINAL**

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*Assignment of Errors.*

1.           The lower court abused its discretion by failing to hold that when a lawyer, who represents a client on a contingency fee arrangement, voluntarily withdraws from that representation before the contingency is realized because of a disagreement over the value of the case, the withdrawal is not for “good cause” or justified, and as a consequence, the attorney waives his/her claim for fees.

2.           The lower court erred by holding that when a lawyer, who represents a client on a contingency fee arrangement, voluntarily withdraws from that representation before the contingency is realized, the attorney is entitled to recover his/her attorney fees at his/her hourly rate for the time s/he expended on the case.

*Issues Pertaining to Assignment of Errors.*

1. Did the lower court abuse its discretion by failing to hold that when a lawyer, who represents a client on a contingency fee arrangement, voluntarily withdraws from that representation before the contingency is realized because of a disagreement over the value of the case, the withdrawal is not for “good cause” or justified, and as a consequence, the attorney waives his/her claim for fees? (*Assignment of Error No. 1*).
2. Did the lower court err by holding that when a lawyer, who represents a client on a contingency fee arrangement, voluntarily withdraws from that representation before the contingency is realized, the attorney is entitled to recover his/her attorney fees at his/her hourly rate for the time s/he expended on the case? (*Assignment of Error No. 2*).

*Statement of the Case.*

On December 8, 2001, Randy Karr broke into Daniel Belsvig's home and assaulted him. (CP 20).

On March 4, 2008, Daniel Belsvig retained the law firm of Leggett & Kram to recover for the injuries he sustained in that assault, pursuant to a Contingency Agreement (CP13). On November 14, 2008, Belsvig agreed to amend the contingency fee agreement by substituting the law firm of Kram, Johnson, Wooster & McGlaughin, P.S. in place of Leggett and Kram. (CP 12).

Belsvig and Kram disagreed about the value of the case. In addition, Kram wanted to mediate the case, rather than litigate. And, he wanted Belsvig to give him the authority to settle it for considerably less than what Belsvig believed his case to be worth. At that point in time, Kram had not even spoken to any of Belsvig's doctors. Belsvig was unwilling to give Kram that authority. (CP 8, 20-21).

Kram then sent Belsvig a letter on November 30, 2009, (CP 21, 24-25) stating:

More significantly, I requested a reasonable settlement figure from you and you have declined to provide one. I cannot even begin to select a mediator

until I have a reasonable figure against which to work. I do not have those figures. Absent a reasonable settlement figure received from you by noon on Wednesday, December 2, 2009, I will have no choice but to withdraw. While I would be happy to continue this case with a reasonable settlement figure in hand and some December, 2009, dates to finish your deposition I do not now have them. It may be more appropriate for you to find another lawyer whose view of the value and nature of this case is more closely aligned with yours. These things happen in litigation. Should you elect to find someone else our office will be entitled to and will retain a lien on this case for our time and the outstanding expenses. The outstanding expenses will continue to accrue interest until paid. Thank you for your attention to this matter.

When Belsvig did not provide Kram with “a reasonable settlement figure... by noon on Wednesday, December 2, 2009” (CP 21), Kram filed a Notice of Intent to Withdraw (CP 27-28), and his Notice of Claim of Attorney’s Lien on December 8, 2009 (CP 30-31).

A Notice of Withdrawal and Substitution of Counsel was filed a week later on December 15, 2008, identifying C. Nelson Berry III as Belsvig’s new counsel. (CP 21).

More than two years later, Belsvig was able to obtain a settlement which was satisfactory to him (CP 16-19). Through his counsel, he immediately sent Kram a check for the outstanding out-

of-pocket expenses he had incurred during the time he had been represented by Kram in exchange for a release of his Notice of Attorney's Claim of Lien (CP 9, 10, 14, 22).

Kram then filed a Motion to Pay Attorney's Lien. (CP15).

Over Belsvig's objections, the lower court entered a Judgment and Order On Motion to Pay Attorney's Lien against Belsvig for the time that Kram had spent during his representation of Belsvig at his hourly rate. (CP 76-84).

Belsvig then filed a timely Notice of Appeal of this Judgment and Order On Motion to Pay Attorney's Lien. (CP 85-88).

*Argument.*

- 1. When A Lawyer, Who Represents A Client On A Contingency Fee Agreement, Voluntarily Withdraws From That Representation Before The Contingency Is Realized Because Of A Disagreement Over The Value Of The Case, The Attorney Waives His/Her Claim For Fees.**

Ordinarily, the determination of whether to award attorney fees is a matter left to the discretion of the trial judge.<sup>1</sup> A trial court abuses its discretion only when its decision is manifestly

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<sup>1</sup> *Ausler v. Ramsey*, 73 Wash.App. 231, 234, 868 P.2d 877 (1994).

unreasonable or based on untenable grounds.<sup>2</sup> A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. It is based on untenable grounds if the factual findings are unsupported by the record. It is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.<sup>3</sup> A decision based on a misapplication of law rests on untenable grounds.<sup>4</sup>

Whether Kram is entitled to recover attorney fees from Belsvig in this case is governed by *Ausler v. Ramsey*, 73 Wn.App. 231, 868 P.2d 877 (1994), whose facts are nearly identical to those here.

Ausler hired Blumenthal to pursue a personal injury suit against Ramsey. Blumenthal withdrew from her case before settlement, and filed an attorney's lien on any judgment she might receive. Ausler retained another attorney, and settled the lawsuit.

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<sup>2</sup> *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).

<sup>3</sup> *In re Marriage of Littlefield*, 133 Wash.2d 39, 46-47, 940 P.2d 1362 (1997).

<sup>4</sup> *Ausler*, 73 Wash.App. at 235, 868 P.2d 877 (citing *In re Marriage of Bralley*, 70 Wash.App. 646, 651, 855 P.2d 1174 (1993)).

The trial court awarded Blumenthal a fee, based on *quantum meruit*, for work he performed on the suit before withdrawing.

The Court of Appeals reversed, holding that an attorney hired on a contingent fee basis who withdraws from the case before settlement or judgment may recover fees for work already performed, based on *quantum meruit*, only if the withdrawal was for “good cause” or “justified.”<sup>5</sup> One who asserts the right to fees from a contingency fee case has the burden to show that the withdrawal is justified.<sup>6</sup>

In arguing that he should receive fees for the work he performed, Blumenthal claimed that he withdrew “because he believed that Ausler was not heeding his best legal advice, was acting in contradiction to her best interests and because she failed to respond in writing” to a letter he wrote her.<sup>7</sup>

The Court of Appeals held that his withdrawal was not justified, because the record did not support his claim that Ausler did not

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<sup>5</sup> *Ausler*, 73 Wash.App. at 236, 868 P.2d 877.

<sup>6</sup> *Estate of Falco*, 188 Cal.App.3d 1004, 1016, 233 Cal.Rptr. 807 (1987).

<sup>7</sup> *Ausler*, 73 Wash.App. at 234, 868 P.2d 877.

cooperate. Rather, the Court concluded that the record showed that Blumenthal voluntarily withdrew because he disagreed with his client about the value of her claim and whether it should be arbitrated or tried.<sup>8</sup>

In reaching its decision, the *Ausler* court explicitly adopted the rule in the majority of jurisdictions that when an attorney withdraws from a case, that attorney may recover fees on a *quantum meruit* basis, provided the withdrawal is for good cause or was justified.<sup>9</sup> After discussing the societal benefits and burdens of contingent fee agreements to injured persons and those who represent them, the *Ausler* court stated the rationale for denying fees when withdrawal is not justified:

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

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<sup>8</sup> *Ausler*, 73 Wash.App. at 239, 868 P.2d 877.

<sup>9</sup> *Ausler*, 73 Wash.App. at 236, 868 P.2d 877 (citing Wade R. Habeeb, Annotation, *Circumstances Under Which Attorney Retains Right to Compensation Notwithstanding Voluntary Withdrawal From Case*, 88 A.L.R.3d 246 (1978), *superceded by* George L. Blum, J.D., Annotation, *Circumstances Under Which Attorney Retains Right to Compensation Notwithstanding Voluntary Withdrawal From Case*, 53 A.L.R. 5th 287 (1997)).

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.<sup>10</sup>

Accordingly, since Mr. Kram voluntarily elected to withdraw from his representation of Daniel Belsvig before the contingency was realized because he disagreed with his client about the value of his claim, his withdrawal was not for "good cause" or "justified", he waived his fee, and his Motion to Pay Attorney's Lien should have been denied.<sup>11</sup>

In this case, the court below abused its discretion by awarding Kram a judgment for his attorney fees, based on his hourly rate. The Judgment and Order on Motion to Pay Attorney's Lien should be vacated.

**2. A Lawyer Representing A Client  
On A Contingency Fee Agreement  
Who Voluntarily Withdraws Before  
The Contingency Is Realized, Is  
Not Entitled To Recover His/Her  
Fees At His/Her Hourly Rate.**

Even if Kram's withdrawal before the contingency had been realized was for "good cause" or "justified", it would have been error

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<sup>10</sup> *Ausler*, 73 Wash.App. at 237-38, 868 P.2d 877.

for the court below to enter a judgment for his attorney fees, based on his normal hourly rate, as the court did here. As the Court observed in *Ausler*:

We also question whether an attorney's normal hourly rate should always be the touchstone of quantum meruit. Here, Blumenthal asked for 32.5 hours at his normal rate of \$100 per hour. Quantum meruit, however, means "as much as he deserves." We see no invariably necessary connection between an attorney's normal hourly rate and the fee he (or she) deserves in any one contingency fee case. To the contrary, allowing the normal hourly fee, a fee usually obtained for completed legal work, would again allow the attorney in part to "hedge his bet" or "have her cake and eat it too." If he or she were to withdraw from the case, the quantum meruit fee would still cover all of the time spent on the case.<sup>12</sup>

Accordingly, the court below compounded its error in awarding Kram his attorney fees in the first place, by calculating that award based on Kram's normal hourly rate, rather than "as much as he deserve[d]" for the legal services he rendered in this case. When Kram withdrew, his contingency fee agreement did not magically transform into an hourly fee agreement.

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<sup>11</sup> *Ausler*, 73 Wash.App. at 239, 868 P.2d 877.

<sup>12</sup> *Ausler*, 73 Wash.App. at 238, note 6, 868 P.2d 877

**3. If the Respondent Seeks Fees Based On His Contingency Agreement, the Appellant Should Be Awarded His Reasonable Attorney Fees And Expenses.**

It is not clear whether Kram believes he is entitled to recover his reasonable attorney fees, pursuant to his Contingency Agreement (CP 13) which states in pertinent part:

7. Should the terms of this Agreement require enforcement, I agree to pay all costs and expenses, including a reasonable attorney's fee, for such enforcement, plus tax thereon, if any, and agree that venue of any such action will be Pierce County, State of Washington.

In his Motion to Require Supersedeas Deposit of Funds (CP 91), Kram wrote:

The amount should include the judgment, projected interest and appellate attorney's fees, if applicable. The contract calls for attorney's fees in the event the creditor must make efforts to collect.

Even though the parties agreed to supersede this judgment for a sum which did not include Kram's requested attorney fees on appeal, because of a prior agreement between counsel as to the supersedeas amount, he has refused to indicate whether he will seek them in this Court.

If he does, the Appellant is making this argument now to comply with RAP 18.1(b). If he does not, then this section of the Opening Brief may be ignored.

In this case, Kram waived his claim for attorney fees because he voluntarily withdrew from his contingency agreement, before the contingency was realized because he disagreed with his client about the value of the case. Accordingly, his withdrawal was neither justified nor for good cause.

But, even if Kram's withdrawal had been justified or for good cause, he would only have been able to recover his attorney fees on a *quantum meruit* basis, not on the basis of his Contingency Agreement contract.

As the Court held in *Herzog Aluminum, Inc. v. General American Window Corp.*, 39 Wn.App. 188, 197, 692 P.2d 867 (1984), attorney fees may be awarded to the prevailing party in any action where it is alleged that a party is liable on a contract which contains such a fee-shifting provision, even if the contract itself is unenforceable:

Accordingly, we conclude that the broad language "[i]n any action on a contract" found in RCW 4.84.330 encompasses

any action in which it is alleged that a person is liable on a contract. Further, because General American obtained a judgment dismissing Herzog's cause of action, General American became a "prevailing party" within the meaning of that statutory terminology. Hence, General American was properly entitled to an award of reasonable attorney fees incurred at trial.

Thus, if Kram seeks attorney fees on appeal based upon his Contingency Agreement, Belsvig will seek his, pursuant to the authorities stated above.

### **CONCLUSION**

For each of the foregoing reasons, this Court should hold, as the Court did in *Ausler*, that when an attorney, who represents a client on a contingency fee agreement voluntarily withdraws from that representation before the contingency is realized because of a disagreement over the value of the case, his/her withdrawal is not for good cause or justified, and the attorney waives his/her claim for attorney fees.

The lower court should be reversed and the Judgment and

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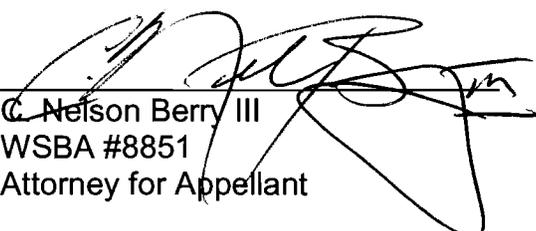
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STATE OF WASHINGTON

Order on Motion to Pay Attorney's Lien should be vacated.

BY \_\_\_\_\_  
DEPUTY

Respectfully submitted this 10th day of August, 2011.

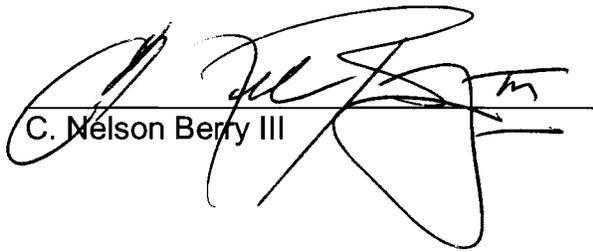
  
C. Nelson Berry III  
WSBA #8851  
Attorney for Appellant

#### CERTIFICATE OF SERVICE

I certify that on the 10th day of August, 2011, I mailed a true and accurate copy of the foregoing Opening Brief of Appellant, by first class mail, postage prepaid, to:

Peter Kram  
Kram, Johnson, Wooster & McLaughlin, P.S.  
1901 South I Street  
Tacoma, Washington 98405

Attorney for Respondent

  
C. Nelson Berry III