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COURT OF APPEALS  
DIVISION II  
TACOMA, WA  
FILED

42216-6-II  
NO. ~~39483-9-11~~

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

DANIEL E. BELSVIG )  
 )  
 Appellant, )  
 )  
 vs. )  
 RANDY JOE KARR AND )  
 LAUREN W. BELSVIG, )  
 Respondents. )

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BRIEF OF RESPONDENT

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**COURT OF APPEALS, DIVISION II  
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DANIEL E. BELSVIG )  
 ) No. 39483-9-II  
 Appellant, )  
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 vs. )  
 RANDY JOE KARR AND )  
 LAUREN W. BELSVIG, )  
 Respondents. )

**ISSUES PERTAINING TO ASSIGNMENTS OF ERRORS**

1. Did the Trial Court properly exercise its discretion by awarding reasonable attorney's fees for work admittedly performed by counsel when the client refused to co-operate in the provision of necessary discovery, refused to communicate with counsel and had already retained new counsel without obtaining the required contractual consent counsel?
2. Did the Trial Court properly exercise its discretion when it awarded reasonable attorney's fees based on uncontroverted evidence as to the reasonableness and necessity of the time spent and the fees requested?
3. Is the judgment creditor counsel entitled to attorney's fees on appeal where the contract expressly provides for such fees?

**ANSWER TO ISSUES PERTAINING TO ASSIGNMENT OF  
ERROR**

1. The Trial Court properly exercised its discretion when it awarded reasonable attorney's fees for work admittedly performed when the client refused to co-operate in conducting discovery, refused to communicate with counsel and had already substituted counsel without counsel's knowledge or consent as required by contract.
2. The Trial Court properly exercised its discretion when it awarded reasonable attorney's fees based on uncontroverted evidence as to the reasonableness and necessity of the time spent and the fees requested. Peter Kram is entitled to attorney's fees on appeal because the contract expressly provides for such fees.
3. Peter Kram is entitled to reasonable attorney's fees on appeal where the contract expressly provides for such fees.

**STATEMENT OF THE CASE**

Daniel Belsvig was injured when Randy Joe Karr broke into his home and assaulted him. The next night Mr. Belsvig suffered a fractured neck in a one-car accident which appeared unconnected to Mr. Karr's assault and occurred more than 24 hours after the assault. Daniel Belsvig signed a written contingent fee retainer agreement hiring Peter Kram to pursue his personal injury actions against Randy Joe Karr. A copy of the

contract is found in CP 7-14. The contract has a provision for attorney's fees in the event of a dispute. The contract provides:

5. I agree not to substitute attorneys without the consent of Leggett & Kram, except for misconduct or incapacity of said attorney to act; if substitution is effected in violation hereof it shall be entitled to the fee hereinabove stated or a reasonable fee as set by the Court; ....

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.

With the client's consent, Kram, Johnson, Wooster & McLaughlin, P.S., later substituted in for Leggett & Kram.

When Mr. Belsvig retained the law firm to represent him he was confronted with and very close to the expiration of the statute of limitations which would have applied if Mr. Karr's assault was determined to be an intentional tort. With Mr. Belsvig's consent counsel prepared a Summons and Complaint naming Mr. Karr as the sole Defendant, CP 99-102. The suit was timely filed and served. CP 103

Mr. Karr's defense team took the deposition of Daniel Belsvig in November, 2009. Belsvig's deposition went on for over 4 ½ hours at which point it was adjourned. Defense counsel repeatedly sought a date on which to resume the deposition. Belsvig declined to provide any information regarding this matter or communicate with counsel.

CP 7-14; 61-73. Belsvig also declined to provide a hard figure in response to defenses request for a settlement demand. Despite repeated efforts, Mr. Belsvig's attorney was unable to obtain a date for the resumption of the deposition and any authority to settle the matter. The Defendant's insurance policy had a limit of \$300,000. CP 61-73

Unknown to counsel Mr. Belsvig had retained Nelson Berry to take over the lawsuit. Mr. Berry prepared and signed a Complaint dated December 4, 2009. In his Complaint Mr. Berry sued Belsvig's former spouse on the theory that she somehow was part of the activities of Defendant Karr. The claim against Lauren Belsvig was consolidated with the Karr lawsuit. When Mr. Belsvig failed to cooperate with counsel and provide him any information, a Notice of Intent to Withdraw was filed together with an Attorney's Lien on the case CP 1-2. Belsvig had already retained Berry and signed the Lauren Belsvig Complaint. CP 61-73. Berry proceeded to consolidate the cases of Belsvig v. Karr and Belsvig v. Lauren Belsvig. CP 106-108, His lawsuit against Lauren Belsvig was dismissed and attorney's fees were awarded against Belsvig and his attorney. CP 106-108. Shortly before trial against Karr the matter between Belsvig and Karr settled. CP 7-14; 76-82. The issue of Peter Kram's attorney's lien was preserved in the settlement documents.

Following a hearing and review of *Ausler v. Ramsey* 73 Wash. App. 231, 868 P. 2d 877 (1994), and various documents submitted by Peter Kram and Daniel Belsvig the court ruled that Ausler was not controlling on the facts presented. The court granted judgment to Peter Kram for fees in the amount of \$22, 584. CP 83-84. The outstanding costs with accrued interest were paid by agreement. Belsvig filed this appeal.

### ARGUMENT

1. The Trial Court properly exercised its discretion when it awarded reasonable attorney's fees for work admittedly performed when the client refused to co-operate in conducting discovery, refused to communicate with counsel and had already substituted counsel without counsel's knowledge or consent as required by contract.

Following a hearing, a review of *Ausler v. Ramsey* 73 Wash. App. 231, 868 P. 2d 877 (1994), and the documents in the record, the court ruled that Ausler was not controlling on the facts presented. The court also had the benefit of having seen Mr. Berry's futile attempt to assign fault to Ms. Belsvig in this matter. Judge McCarthy had available to him declarations from counsel regarding detailed time records of the time spent CP 76-82. A declaration from Ben F. Barcus, an attorney in Tacoma, opined that the time spent was reasonable, that the fees charged were reasonable and were in fact somewhat low given counsel's experience.

CP 74-75. No countervailing affidavit was ever submitted to suggest that the time records submitted to the court were in fact inaccurate or incorrect.

Having heard the evidence from both sides and argument from both counsel on two separate occasions, Judge McCarthy awarded the sum of \$22,584 from the net proceeds of the tort settlement. This amount is being held by the court clerk pursuant to court order. In the hearing before Judge McCarthy, Berry did not produce his own contingent fee agreement nor did he produce in time records of his own. He provided no countervailing testimony that the fees were unreasonable or that the hourly rate was too high. The only evidence before Judge McCarthy on the reasonableness and necessity of fees were from Peter Kram and Ben Barcus. CP 74-75, 76-82. Both documents confirmed the reasonableness of the requested fees. The court cannot be said to have abused discretion when it relied on the only evidence before it.

Mr. Belsvig cites a number of cases which do not address the actual facts in this case. Mr. Berry and his client are entitled to believe whatever they like but they are not entitled to rewrite either the contract or the facts in this case. The following facts are either conceded or not contradicted in this matter are the following:

1. There was a written contract. CP 7-14.

2. The time records were kept and produced for the court. CP 76-82.

3. The original Complaint drafted for Mr. Belsvig was never amended as to Mr. Karr. CP 99-102.

4. Mr. Barcus and Mr. Kram provided the only declarations concerning the reasonableness and necessity of the fees. CP 74-75; 76-82

5. Mr. Berry did not provide his own declaration as to time and expenses, apparently on the belief that he did not have to and the court should just presume his \$100,000 fee was reasonable.

Unlike *Ausler v. Ramsey*, *supra*, this trial court never found an absence of good cause and Belsvig had already obtained new counsel. As the court said in *Ausler v. Ramsey*, 73 Wash. App. at 234:

“The determination of attorney fees is a matter left to the discretion of the trial court..... Discretion is abused when it results in a decision that is manifestly unreasonable, or is exercised based on untenable grounds or for untenable reasons.” (citations omitted)

The appellant does not claim that the court’s decision was on untenable grounds or for untenable reasons. The evidence is precisely contrary to that position. The appellant cites *Herzog Aluminum, Inc. v. General American Window Corp*, 39 Wash. App. 188, 692 P. 2d 867 (1984). This case confirms the right of persons to obtain attorney’s fees under RCW 4.84.330. Mr. Belsvig signed a contract which explicitly

provides for attorney's fees. CP 7-14. Belsvig did not identify this as an error on appeal. See appellant's brief. The *Herzog* case allowed attorney's fees attorney's fees in the matter. There is no showing that the fees here awarded were unreasonable. RCW 4.84.330 is mandatory because it says the prevailing party "shall" be entitled to attorney's fees. Belsvig never denies the existence of this contract but somehow seeks to avoid its natural consequences after he surreptitiously obtained different counsel, failed to cooperate with the attorney and failed to disclose these facts.

*Ausler v. Ramsey, supra*, identified some of the reasons for good cause. 73 Wash. App at 236, n. 4, where the court held that good cause existed where the client was uncooperative, where there was a "breakdown in communication" or the client degrades the attorney. Here Belsvig obtained another attorney who ultimately ended up having attorney's fees assessed against himself and his client. CP 106-108, 7-14. The fact that Belsvig has to pay these rather than Mr. Berry is irrelevant. Belsvig's attempt to hide what he was doing to the detriment of counsel and at the same time playing the lack of cooperation card simply does not mean Judge McCarthy erred.

2. The Trial Court properly exercised its discretion when it awarded reasonable attorney's fees based on

uncontroverted evidence as to the reasonableness and necessity of the time spent and the fees requested.

In State ex. rel. Carroll v. Junker, 79 Wash. 2d 12, 482 P. 2d 775

(1971), the Court discussed the composition and elements of judicial discretion. The Junker court held, 79 Wash. 2d at 26:

“Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously.... Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.”  
(citations omitted)

Judge McCarthy had before him objective criteria upon which to apply these elements of discretion. The criteria included the time recorded and undisputed, the declaration of Mr. Barcus as to the reasonableness of the time and fees, the actual contract providing for these fees, the decision by Belsvig to retain new counsel even before the Notice of Intent to Withdraw was provided and the failure of the client to cooperate. Judge McCarthy had plenty of facts in front of him upon which to base his decision and thus these un-rebutted facts make his decision neither arbitrary nor capricious. Similarly, there is no abuse of discretion because, given the un-rebutted declarations on file herein, the decision was not manifestly unreasonable. It was not issued on untenable grounds. Mr.

Berry has elected not to provide a transcript of the court proceedings in this matter nor did he seek any findings of fact and conclusions of law as the bases for Judge McCarthy's decision. The fact that he could have made these records more complete is his own failure. He is not entitled to shift the blame over to the judge who addressed the issues based on the evidence or lack of evidence provided by Belsvig.

Belsvig does not suggest that the fee itself was unreasonable. In fact he repeatedly said there is no fee that should be paid. This is not the state of the facts nor the law. It ignores the attorney's lien which was never challenged at the outset. Only after the case was settled did Belsvig and counsel attempt to change their story. They made no objection to the validity of the lien at the time it was filed and thus could have be said to have waived his challenge.

Washington Courts never held that attorneys may not recover on quantum meruit. In *Ausler v. Ramsey*, 73 Wash. App. at 236, the court stated that an attorney hired on a contingent fee basis may recover fees for work already performed when the attorney-client relationship has been terminated. The court held,

“[W]hen an attorney withdraws from a case, if the withdrawal was for “good cause” or was “justified”, then the attorney may recover based on quantum meruit.

In this case the court determined precisely that and it specifically distinguished Ausler v. Ramsey from the facts before it.

Belsvig cites the Estate of Falco, 188 Cal.App.3d 1004, 233 Cal. Rptr. 807 (1987), for the proposition that this was a dispute only over the value of the case. This is simply untrue and neither the facts of this case nor Mr. Belsvig's affidavit address the issue of failure to provide a time to continue the deposition nor Belsvig's duplicitous hiring of Berry without notifying counsel. In the Falco case the withdrawing attorney focused on his analysis of the case rather than on the co-operation portion. As the Falco court stated the facts in the record provided no indication of the reasons for withdrawal. This is not so here. Furthermore, Belsvig ignores the very language of the contract he signed in order to obtain a contingent fee representation. The contract is explicit in that attorney's fees are warranted where withdrawal is done without consent as here and nothing is provided by Belsvig or his counsel rebutting the proposition that the contract does not apply or that the fees were unreasonable. The appellant cannot remake the facts in this case. The cases cited simply do not help him but rather support the proposition adopted by the trial court. Because there is no abuse of discretion here this court ought not overturn the decision of the trial court in this matter.

3. Peter Kram is entitled to attorney's fees on appeal because the contract expressly provides for such fees.

RAP 18.1 requires counsel to address the issue of attorney's fees on appeal. The attorney's fees on appeal should follow the decision of the trial court which has held that quantum meruit fees are appropriate.

As far back as 1900 the Washington Supreme Court held that counsel was to be paid before another could be substituted. *Payette v. Willis*, 23 Wash. 299, 63 P. 254 (1900). The court was construing the predecessor to Washington's current lien statute, RCW 60.40.010, which provided an attorney's lien against any judgment recovered for the value of services provided by the attorney. The court stated, 23 Wash. at 307:

“ The effect of this judgment is simply to require the payment of compensation to an officer of the court for services rendered before another shall be substituted.”

The court found an absolute right to obtain payment in these matters. Washington Courts have held that where an attorney is discharged or prevented from performing the services in a contingent fee matter the measure of damages is reasonable compensation for services actually rendered *Ramey v. Graves*, 112 Wash. 88, 91, 191 P. 801 (1920). This approach is supported by the language of RCW 60.40.010(4) which provides the following protection for attorneys:

“An attorney has a lien for his compensation, whether specially agreed upon or implied, as herein after provided:....(4) upon a judgment to the extent of the value of any services performed by him in the action.

Here a lien was properly filed and in fact the notice of substitution explicitly refers to the lien and does not waive any claim thereto. CP 3-4. All of these facts support the conclusion that the fee was reasonable, warranted, appropriate and ought not be disturbed by an appeal.

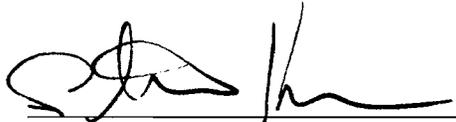
Belsvig does not provide any indication of what he thinks is a reasonable attorney fee. The court has already found \$230 an hour to be reasonable. This court should apply that fee on appeal because it has been judicially determined to be reasonable based on the only evidence before it. However, if the court is basing attorney's fees on current rates, my current rate is \$250 per hour. Belsvig paid the outstanding costs but the costs are necessarily tied into the prosecution of the case and the effort required to gather the evidence and analyze it. It would seem inconsistent at best and hypocritical at worst to allow Belsvig to claim that the costs were reasonable that the fees incurred to gather the information, analyze it and go forward was not reasonable. This court should award Peter Kram reasonable fees on appeal

## CONCLUSION

This court should affirm the trial court award. There is no factual basis for a remedy different from that provided by the trial court.

Belsvig's sole method of operation here appears to be name-calling without a proper analysis of the contract. For these reasons counsel requests that the court affirm the trial court, dismiss the appeal and grant attorney's fees on appeal.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of September, 2011.

  
\_\_\_\_\_  
Peter Kram, WSBA 7436  
Respondent

11 SEP 16 PM 12  
STATE OF WASHINGTON  
BY C  
DEPUTY

42216-6  
NO. ~~39483-9-11~~

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

DANIEL E. BELSVIG	)	
	)	
Appellant,	)	DECLARATION OF SERVICE BY MAIL
	)	
vs.	)	
RANDY JOE KARR AND	)	
LAUREN W. BELSVIG,	)	
<u>Respondents.</u>	)	

KNOW ALL PERSONS BY THESE PRESENTS: That I, Stacey McKee, the undersigned, of Tacoma, in the County of Pierce and State of Washington, have declared and do hereby declare:

That I am not a party to the above-entitled action, am over the age required and competent to be a witness;

That on the 13th day of September, 2011, I placed in the United States Mail with first class postage prepaid an envelope containing the following documents:

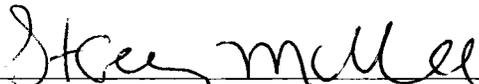
1. Brief of Respondent;
2. This Declaration of Service by Mail

properly addressed to the following person:

Nelson Berry  
Attorney at Law  
1708 Bellevue Ave  
Seattle, WA 98122-2017

I declare under penalty of perjury under the laws of the State of Washington and  
of the United States that the foregoing is true and correct.

Signed at Tacoma, Pierce County, Washington this 13th day of September, 2011.

  
Stacey McKee

Kram & Wooster  
1901 South I Street  
Tacoma WA 98405  
(253) 272-7929