

APR 19 2010
COURT OF APPEALS
FOR THE STATE OF
WASHINGTON

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OF THE STATE OF WASHINGTON

Case No. 285529

Appeal from Spokane County Superior Court, No. 09-2-02455-8

JESSICA TURBIN
Plaintiff/ Respondent

Vs.

AARON LOWE P.S. et al.
Defendants/ Appellants

OPENING BRIEF OF APPELLANTS

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A. STANDARD OF REVIEW

The standard of review in this matter is whether or not the trial court abused its discretion in only awarding attorney fees that were 25% of the pending settlement offer in this matter. *Crest Inc. v. Costco Wholesale Group*, 128 Wn.App. 760, 115 P.3d 349 (2005).

B. ASSIGNMENT OF ERRORS

1. The trial court erred by only awarding 25% of the pending settlement offer when the parties ratified contract provided that 33.3% was owed Mr. Lowe for his attorney fees.

2. The trial court erred by only assessing prejudgment interest from the date that Ms. Turbin ultimately resolved her claim and not from the time when Mr. Lowe's attorney fees were determinable.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERRORS

1. What does the parties' ratified contract provide regarding what contingent attorney fees be for an adult?

2. When does interest begin to accrue on Mr. Lowe's liquidated claim?

D. SUMMARY OF ARGUMENT

1. In this case Mr. Lowe represented Ms. Turbin for injuries sustained in an accident. Mr. Lowe is seeking 1/3 payment on a pending offer when he was fired, and interest on his costs and fees from the date he

was fired. Mr. Lowe is entitled to 1/3 of the offer of settlement that was pending when he was fired since Ms. Turbin ratified the parties' contract after she became an adult, and since the parties never modified their ratified contract, and additional consideration was not required for the all the provisions of the parties' ratified contract to be in full force and effect.

2. Interest on Mr. Lowe's liquidated attorney fees accrues from the time he was fired since his fees could be determined by multiplying the pending settlement amount by a set percentage of 1/3 as set forth in the parties' ratified contract.

E. STATEMENT OF THE CASE

Ms. Turbin was injured while a minor on April 15, 2004. CP 61 Initially, her father executed a contingency fee contract with Mr. Lowe. Unfortunately, Ms. Turbin's father died so Ms. Turbin's mother also executed the same contract with all the same provisions. CP 61 Later, as an adult, Ms. Turbin ratified the same contingency fee contract with Mr. Lowe, that was signed on Ms. Turbin's behalf by her mother and father. CP 61 Ms. Turbin did not execute another or different contract with Mr. Lowe. CP 61 Contrary to the trial court's assumption, there were never any modifications to the parties' ratified contract. CP 50-60

It is undisputed that the parties continued working under the same ratified contract after Ms. Turbin became an adult. CP 61 Ms. Turbin

ratified the parties' agreement by her actions, on the record, and the trial court held Ms. Turbin ratified the contract as an adult. CP 61 There were no modifications to the parties' ratified contract from when Ms. Turbin was a minor to when she ratified the contract as an adult. CP61

Most of the issues regarding this appeal, with the exception of when Ms. Turbin was injured and her initial healthcare treatment, occurred while Ms. Turbin was an adult. CP 50-60 As an adult Ms. Turbin came to Mr. Lowe's office to discuss the case. CP50-60, 61 The parties discussed the case on the telephone while Ms. Turbin was an adult. CP 50-60 Mr. Lowe met with Ms. Turbin while she was an adult and her relatives to discuss her case. CP5-60 Mr. Lowe gathered medical records. Mr. Lowe complied those records. CP 50-60 Mr. Lowe reviewed those records. CP 50-60 Mr. Lowe negotiated on behalf of Ms. Turbin while she was an adult. CP 50-60 Ms. Turbin as an adult was informed of offers by Travelers insurance by Mr. Lowe, and she authorized counteroffers. CP50-60, 61 Mr. Lowe argued theories of liability. CP 50-60 Ms. Turbin ratified the parties' contract as an adult. CP 61 Mr. Turbin fired Mr. Lowe as an adult. CP 50-60, 61 Ms. Turbin did not terminate Mr. Lowe as her attorney until April 11, 2007, nor did she inform anyone else that Mr. Lowe was not acting as her attorney until that date. CP 50-60 Mr. Lowe substantially performed the duties under the parties agreement. CP 61 Ms.

Turbin also agreed on April 10, 2007, when Travelers made the \$115,932.69 final total settlement offer while Mr. Lowe was still her attorney. CP 50-61 Traveler's made no offer of settlement while Ms. Turbin was a minor. CP 50-60

Even though Ms. Turbin's injuries occurred when she was a minor, her injuries continued into her adulthood. CP 50-60 She even complained of new injuries as an adult as a result of her accident. Even after hiring new counsel, Ms. Turbin was treated by new healthcare providers for new alleged injuries and damages after April, 2007, as a result of her accident. CP 50-60, 61

On April 10, 2007, Mr. Lowe informed the insurance carrier regarding Ms. Turbin's accident that Ms. Turbin would accept the carrier's last and final offer of \$115,932.69. CP 50-60 Shortly thereafter, Mr. Lowe received a letter from Van Camp & Deissner, stating that Ms. Turbin was represented by Mr. Deissner. CP 50-60 Two (2) years later, on April 3, 2009, Ms. Turbin through her new counsel accepted the same settlement offer of \$115,932.69 that was obtained by Mr. Lowe in April, 2007. CP 50-60

The trial court properly determined that Mr. Lowe was entitled to contingent fee, but since the contract was originally executed when Ms. Turbin was a minor, the trial court held Mr. Lowe was only entitled to

25% of the pending settlement of \$115, 932.69 rather than the 1/3 of the pending settlement. CP 61 Mr. Lowe as outlined below asserts that the trial court's improper determination of Mr. Lowe's contingency fee is not supported by the facts or law regarding this fee issue. Mr. Lowe is requesting that he be awarded 1/3 of the pending settlement of \$115, 932.69 at the time he was fired. CP 50-60

The trial court also held that interest on Mr. Lowe's attorney fees was to begin accruing when Ms. Turbin eventually settled the case in April, 2009. CP 61 As set forth below, the trial court's determination regarding when interest begins to accrue in this matter is not supported by the facts or construing case authority in this matter. Mr. Lowe asserts that interest on his contingent fee should run from the time he secured the last offer from the carrier in this matter in April, 2007. CP 50-60

Ms. Turbin mistakenly believed that with new counsel she could obtain more money from the carrier in her original accident. CP 50 -60 The carrier was Travelers Insurance. CP 50-60 Ms. Turbin's injuries continued after Ms. Turbin turned eighteen (18) years of age in June, 2006. Even after hiring new counsel, Ms. Turbin was treated by new healthcare providers in 2007 and 2008 in an attempt to inflate her special damages and obtain more funds from Travelers. CP 50-60 Ms. Turbin's gamble, however, did not pay off for her, and her actions eventually ended

up costing her more money, but she made her choices as informed adult.

CP 50-60

Eventually, Travelers brought suit in an attempt to enforce the agreement negotiated in April 2007. CP 50-60 Spokane County Judge Price in Cause No. 08-203489-0 ruled that Ms. Turbin would not be bound by the settlement Mr. Lowe negotiated on Ms. Turbin's behalf because Ms. Turbin did not execute the final settlement documents. CP 50-60 Ms. Turbin was given the opportunity to take her case to trial to see how much more money a jury would award her for her injuries. CP 50-60

The problem for Ms. Turbin, however, was that Mr. Lowe had negotiated an extremely favorable settlement for her relative minor injuries, and Travelers was going to withdraw the settlement if it was not accepted shortly after Judge Price's decision so two (2) years after it was initially offered, Ms. Turbin accepted the total settlement offer of \$115,932.69. CP 50-60 With the settlement, Ms. Turbin agreed what her case was worth. CP 50-60 If Ms. Turbin thought her case was worth more, she could have taken it to trial to have a jury make that determination. CP 50-60 By her own actions and statements, Ms. Turbin agreed that the value of her case was \$115, 932.69. Ms. Turbin tried for three (3) years as an adult to obtain more money from Traveler's, but she was unsuccessful.

By accepting this offer, there were number of issues that arose that Ms. Turbin had to deal with namely: (1) Ms. Turbin has more than one attorney to pay for the same settlement; (2) Mr. Lowe's was entitled to his 1/3 attorney fees and costs; and (3) Ms. Turbin was liable for interest on Mr. Lowe's liquidated fees from April 2007. CP 50-60

Here, the trial court ruled that Mr. Lowe *substantially performed* his duties under the parties' contingency fee contract. CP 61 Moreover, the trial court ruled that because Mr. Lowe substantially performed his duties under the parties' contingency agreement, settlement was a reasonable certainty. CP 61 Thus, the trial court concluded Mr. Lowe was entitled to payment under the parties ratified contingency fee contract. CP 61

Even though Ms. Turbin argued before the trial court that Mr. Lowe was not entitled to any attorney fees under the parties' ratified contract, Ms. Turbin did not cross appeal any portion of the trial court's order in this matter.

F. LEGAL ARGUMENT

1. Argument regarding 1/3 contingent fee.

In reviewing these sorts of cases involving contingent fees, the appellate courts primarily cite the cases of *Taylor v. Shigaki*, 84 Wn.App. 723, 930 P.2d 340 (1997) and *Goncharuk v. Barrong*, 132 Wn.App. 745,

133 P.3d 510 (2006). In *Taylor, supra*, the client discharged his attorney shortly before trial. At the time of the discharge, the attorney had negotiated a proposed settlement of \$225,000.00 on behalf of the client. The client discharged the attorney, and declined the settlement offer. Later, the client settled with the insurance company for more money, and the attorney brought an action for his contingent fee, costs, pre-judgment interest, and fees for having to litigate the attorney fee contingent issue. The trial court awarded the \$75,000 contingent fee for the 1/3 of \$225,000.00 offer that was pending at the time of the attorney's firing. The trial court also held that the \$75,000.00 contingent attorney fee was a liquidated amount and the attorney was awarded pre-judgment interest. The interest was calculated from the time the attorney was fired and based upon the pending offer at the time the attorney was fired. Moreover, the court awarded additional attorney fees for having to go before the court to collect the contingent attorney fees.

The appellate court noted that normally an attorney who is discharged before full performance under a contingency fee contract is not entitled to the contingency fee, but in this case the appellate court confirmed the attorney *substantially performed* his duties under the contract. *Id.* at 728. The court held:

A discharged attorney has substantially performed his or her duties when the attorney's efforts make a settlement "practically certain," even if the settlement occurs after the client fires the attorney. (Emphasis in original) (Citations omitted)

Id. at 729. The client then argued that he had the right to fire the attorney at any time. The court confirmed that the attorney can be fired, but client does not have a right not to pay what the attorney has earned under the contingent fee agreement. *Id.* at 730. The client then argued that he only owed the attorney an hourly rate for working on his case once the attorney was fired. In dismissing this argument, the court held:

[T]he court will not give effect to (contract) interpretations that would render contract obligations illusory. (Citation omitted) If a client is allowed to use an attorney's services to obtain a settlement offer and then fire the attorney before accepting to escape paying a contingency fee, the obligation to pay the fee could be unilaterally avoided. Such a result cannot be sanctioned.

Id. at 730. The appellate court affirmed the award of the 1/3 contingent attorney fees on the total amount of the pending settlement at the time of the attorney's firing. The court also reaffirmed the fired attorney was entitled to pre-judgment statutory interest, costs, attorney fees for having to bring the issue before the trial court, and costs and fees on appeal. *Id.* at 732. The trial and appellate courts held that in situations like *Taylor's*, *supra*, the issue of contingent attorney fees were liquidated amounts, and

accordingly, were subject to prejudgment interest on the pending offer at the time the attorney was fired until the time the attorney was ultimately paid. *Id.* at 732.

The other case that is often cited by courts in awarding contingent fees is *Goncharuk v. Barrong*, 132 Wn.App. 745, 133 P.3d 510 (2006). This was a medical malpractice case where the plaintiff, Goncharuk, was initially represented by local attorney Mark Kamitomo. Mr. Kamitomo gathered records, developed a theory of liability against the defendant doctors, and negotiated on behalf of the plaintiff. Mr. Kamitomo received an offer by the defendant's doctors insurance company, and Mr. Kamitomo strongly recommended that the plaintiff accept the offer. In response, the Mr. Kamitomo, like Mr. Lowe, received a discharge letter from Van Camp law firm. Mr. Van Camp settled with one defendant doctor for less money than was offered while Mr. Kamitomo represented the plaintiff, and the other defendant doctor received a defense verdict. Consequently, Mr. Van Camp's involvement in this case resulted in less money in terms of a settlement or verdict available to the plaintiff, just like what happened to Ms. Turbin in this case. Mr. Kamitomo, like Mr. Lowe, also filed a lien for his attorney fees.

In determining the contingent attorney fees for Mr. Kamitomo, Spokane Superior Court Judge Austin awarded Mr. Kamitomo his 1/3

contingent fee on the pending settlement offer obtained by Mr. Kamitomo and costs at the time Mr. Kamitomo was fired. The appellate court affirmed the \$83,333.00 award the contingent fee and \$2,246.00 in costs holding that Mr. Kamitomo substantially performed his duties under the parties' contract and common law. The courts noted there were only minor and relative unimportant deviations before the settlement was practically certain, even though the actual settlement occurred after Mr. Kamitomo was discharged.

The plaintiff also argued then, like now, that Mr. Kamitomo should not receive any of his fees because the plaintiff did not accept the offer of settlement while Mr. Kamitomo was still his attorney. The court of appeals ruled, however, that the fact regarding that the plaintiff did not accept the offer while Mr. Kamitomo was still the plaintiff's attorney did not change the legal analysis of these issues. In citing, *Taylor, supra*, the court reaffirmed that:

The right to attorney fees does not depend on a client's acceptance of an offer... (Citation omitted)... Because the decision to accept or reject settlement offers belongs to the client... Mr. Van Camp's subsequent work on Ms. Goncharuk's case does not change our analysis because settlement remained a reasonably certainty.

Id. at 750 . Moreover, the court held that Mr. Van Camp's efforts failed to add any value to the case. History teaches us that after this law firm

gets involved with matters with pending settlements, the client ends up with less funds for their injuries.

In the case before this Court, attorney Aaron Lowe substantially performed his duties under the contract. CP 61 Mr. Lowe met with Jessica Turbin and her relatives regarding her accident both while Ms. Turbin was a minor and an adult. CP 50-60 Aaron Lowe acting on behalf of Ms. Turbin gathered Ms. Turbin's medical records. CP 50-60 Aaron Lowe reviewed her medical records. CP 50-60 Mr. Lowe investigated the nature and extent of Ms. Turbin's injuries. CP 50-60 Mr. Lowe developed theories of liability. CP 50-60 He prepared a settlement brochure and sent the brochure off to Traveler's Insurance Company while Ms. Turbin was an adult. Aaron Lowe, as Ms. Turbin's attorney, negotiated on her behalf. CP 50-60 Mr. Lowe substantially performed his duties under the contract with Ms. Turbin, and that is why the trial court held that Mr. Lowe was entitled to a contingent fee. CP 61 Mr. Lowe filed a lien for his attorney fees. The trial court, however, mis-read, mis-understood, and mis-applied *Forbes v. American Building Maintenance Co. West*, 148 Wn.App. 273, 198 P. 3d 1042 (Div. 2009).

Before Mr. Lowe was discharged as Ms. Turbin's attorney in April 2007, Travelers offered to settle Ms. Turbin's case for a total amount of

recovery of \$115,932.69. The relevant portion of Mr. Lowe and Ms.

Turbin's ratified contract provides that:

Client shall pay attorney for his services in the primary claim against a third party or against an underinsured/ uninsured motorist policy, a sum equal to 33.3% of the total amount of recovery, whether by negotiation or suit. The fee shall be twenty-five percent (25%) for minor children and workman's compensation claims. CP 50-60

Most of the issues related in this matter occurred while Ms. Turbin was an adult. Ms. Turbin's claim with Traveler's was resolved while Ms. Turbin was an adult. Ms. Turbin did not request the court review her settlement under the Superior Court Special Proceeding Rules as a minor.

As an adult for almost three (3) years, Ms. Turbin attempted, without success, to obtain more money from Travelers for her general and special damages. If Ms. Turbin's gamble had paid off and she received substantially more money from Travelers, we probably would not be here today. Ms. Turbin, however, choice not to go to trial regarding what amount a jury would award for her injuries, and she settled for the same total amount of recovery of \$115,932.69 in April 2009. The problem for Ms. Turbin since she did not receive a greater total amount of settlement from Travelers is that she ended up with less money in her pocket than she would if she settled in April 2007 but that is the gamble she alone as an adult decided to take. Those are the consequences of Ms. Turbin's choices

she made, and the trial court's Solomonistic attempt to split the baby thereby reducing the attorney fees owed by Mr. Lowe is without factual or legal support, and must be reversed. Moreover, Mr. Lowe should not be required to pay for Ms. Turbin's poor decisions.

Initially, the trial court relied on *Forbes v. American Building Maintenance Co. West*, 148 Wn.App. 273, 198 P.3d 1042 (2009) for the premise that when a contingent fee contract is modified to increase an attorney's compensation after the attorney is employed is unenforceable. *Id.* at 286. This holding, however, is not applicable to the facts of the case at bar because the facts as to what occurred between Mr. Lowe and Ms. Turbin are dissimilar.

In *Forbes, supra*, the basic issue was which contract provision was applicable: a judgment contingency or a settlement contingency. There is no issue whether a judgment contingency or a settlement contingency is applicable before the court in this case. Moreover, in *Forbes, supra*, the parties modified the contract several times so there was an issue whether or not there was new consideration for these successive modifications.

There were no modifications to the contractual terms between Ms. Turbin and Mr. Lowe. Moreover, as outlined below, since Ms. Turbin ratified the same contract that was executed by her parents there was no requirement for new consideration since there was no modification of the

contract provisions. Thus, the trial court's quotations from, and reliance upon, *Forbes, supra*, is inapposite since the facts and law are so dissimilar when compared to what happened in this matter. Since *Forbes, supra*, is not applicable, Mr. Lowe is entitled to 1/3 the total settlement when the case authority of *Taylor and Goncharuk, supra*, are applied to the facts of this matter.

Specifically, the trial court cited in support of its decision not to award Mr. Lowe his 1/3 attorney fee that:

Modification of a contract by subsequent agreement requires a meeting of the minds and consideration separate from that of the original contract...modification to increase an attorney's compensation after the attorney is employed is unenforceable if it is not supported by new consideration.
(Citations omitted)

The problem with the trial court's improper legal analysis is that none of the facts set forth in the trial court's basis for its opinion are not present in the situation between Ms. Turbin and Mr. Lowe. The facts here are more like *Taylor, supra*, than they are *Forbes, supra*.

There was no modification of the contract between Ms. Turbin and Mr. Lowe ever. There is a dispute as to how the contract will be applied to Ms. Turbin, but there was never a modification of the contract or its provisions. There was no renegotiation of Mr. Lowe for higher fees. Mr. Lowe is not asking for an increase of attorney fees beyond what Ms.

Turbin already agreed to by her ratification of the parties' contract as an adult. The parties disagree on which provision of the contract apply to the facts of this case, but the parties are not requesting this Court interrupt modifications in their contract or renegotiations of their contract because those events did not occur. There was no new contract or terms agreed to by the parties. Essentially, the trial court held, without any supporting case authority or facts, that Ms. Turbin was initially injured as a minor, she would only be required to pay Mr. Lowe 25% of any settlement even though her injuries and case continued on into her adulthood. The facts and law do not support such a flawed legal analysis, and there was no new consideration required by Ms. Turbin's ratification.

It was a legal impossibility for Ms. Turbin to ratify the parties' contract while she was still a minor. Accordingly, it is incorrect for the trial court to hold and base its order on the statement that:

Ms. Turbin was minor when she entered into (ratified) the contract, and (she) did not authorize (a) modification or increase of the contingent fee, (accordingly) the contingency fee rate shall remain at 25%. CP 61

Ms. Turbin ratified the contract as written after she became an adult. It is a legal impossibility for Ms. Turbin to ratify the parties' contract as a minor as outlined below. Ms. Turbin ratified the parties' contract by her actions. Ms. Turbin's new attorney admitted on the record that she ratified

the parties' contract after Ms. Turbin became an adult. After ratification, Ms. Turbin as an adult was bound by all the terms of the parties' contract. There was never a modification of the parties' contract so that trial court ruling regarding this issue is not supported by any fact, and it was improper for the trial court to assume these incorrect facts since the parties did not modify any terms of their contract. Since the parties ratified their contract, and did not modify it, the trial court's reliance on *Forbes, supra*, is misplaced.

A person can be held to have ratified a contract if, after discovery of the facts that would warrant rescission, s/he is silent or continues to accept the benefits under the contract. *Snohomish County v. Hawkins*, 121 Wn.App. 505, 89 P.3d 713 (2004). As outlined below, many ratification issues are discussed in terms of principal/agency.

The facts, and the resulting case authority, in *Forbes, supra*, are not close, or applicable to, the facts here. The question becomes what rules of law control these types of factual situations where the issue stem from ratification and not modification? There is no case in Washington directly on point. There are, however, cases in other jurisdictions that are summarized in the treatises that opine how this case should be decided.

At common law the contract of an infant or minor is voidable. Vol. 3, Arthur L. Corbin, *Corbin on Contracts*, Section 9.18 at page 294

(1996) Supp. (12/1/09); *Paulson v. McMillan* 8 Wash.2d 295, 111 P.2d 983 (1941). In modern times, an infant has the power after the reaching the age of eighteen (18) to ratify or disaffirm the contract made in infancy. *See, e.g.*, RCW 26.28.030. This new promise to perform or ratification is binding on the parties without new consideration. (Cases cited under footnote 2 Vol. 3, Arthur L. Corbin, Corbin on Contracts, Section 9.18 at page 295 (1996) Supp. (12/1/09)):

The reason the law and the community enforce these new promises without consideration is grounded in the past transaction (the minor's voidable promise), and the consideration that was given for it. This is one more clear example of a contract being made on the basis of "past consideration." (Citations omitted)

Id. at 295.

If one party (a parent) makes a contract on behalf of another party (a minor) as a principal, the later is not bound by the contract. Vol. 3, Arthur L. Corbin, Corbin on Contracts, Section 9.21 at page 299 (1996) Supp. (12/1/09). The Restatement of Agency (Second) section 82 provides that:

Ratification is the affirmance by the person of a prior (a parent) act which did not bind the principal (the child) but which was done or professedly done on the principal's (child's) account, whereby the act, as to some or all persons, is given as if originally authorized by the principal (the child). (Citations omitted)

Id. at 299.

By such ratification, the principal (or minor which is now a ratifying adult) is bound to perform the promises that were made before by the agent as if originally authorized by the principal. The ratification requires no new consideration. *Id.* at 299.

Corbin at section 27.4 page 8 goes on to discuss a how and when a minor can ratify a contract made while s/he was under the age of eighteen (18).

The general rule is that an infant's contract is voidable by the infant. The exercise of this power is often called "disaffirmance." The effective surrender of the power is known as "ratification."... An effective ratification obviously cannot take place before the attainment of majority; any purported ratification before that time suffers from the same infirmity of voidability as the contract itself. Ratification may take place in three ways: failure to make a timely disaffirmance; express ratification; and conduct manifesting an intent to ratify. No consideration is required to create an effective ratification. (Citations omitted).

Vol. 7, Arthur L. Corbin, Corbin on Contracts, Section 27.4 (1996) Supp. (12/1/09). Ms. Turbin ratified the parties contingency fee agreement all three ways once she became an adult, and the trial court so found she ratified the parties contract.

In Washington, any person eighteen (18) years or older may enter into a legally binding contract. RCW 26.28.015. A younger person may make contracts and enforce them, but may disaffirm them. RCW 26.28.030; *See, e.g., Paulson v. McMillan*, 8 Wn.2d 295, 111 P.2d 983

(1941). The purpose of RCW 26.28.030 is to protect minors from injustice and wrong, but the statute is not to be used to injury others. *Wise v. Truck Insurance Exchange*, 11 Wn. App. 405, 523 P.2d 431 (1974). A contract entered into by a guardian on behalf of a minor may not be disaffirmed by the minor, assuming the contract is otherwise valid and the guardian has acted within his or her proper authority. *See, e.g.*, RCW 11.92.035.

Here, it is undisputed, and the finding of the trial court, Ms. Turbin ratified the contract with Mr. Lowe with all the contractual provisions. She ratified this contract as an adult because it was a legal impossibility for Ms. Turbin to ratify the contract as a child. Ms. Turbin did not disaffirm the parties' contract after she became an adult. Accordingly, the adult provision providing that Mr. Lowe's attorney fees would be 1/3 total settlement amount must be applied in this matter. The trial court's order applying 25% to the total settlement amount is without a factual or legal basis, and therefore, the order must be reversed.

Corbin has summarized the cases that have looked at this issue and reported that no new consideration is needed when the parties merely ratified an existing contract and when the parties did not modified the contract like in *Forbes, supra*. Accordingly, the trial court's reliance on *Forbes, supra*, and attempting to conclude there must be new

consideration before Mr. Lowe is entitled to 1/3 attorney fee for Ms. Turbin's claim is not supported by *Forbes, supra*, or the other legal authority on the issue.

If this matter had concluded when Ms. Turbin was a minor; and she had no new injuries and damages as an adult; and she did not ratify the parties' contract, we probably would not be in this appellate court because Mr. Lowe's attorney fees for a minor is limited to 25%, and the parties would have a hearing pursuant to SPR's. These are not, however, the facts of this case. Ms. Turbin made all of her decisions as an adult. Ms. Turbin had new injuries as a result of this accident as a adult even after she fired Mr. Lowe as her attorney. There is no question what the attorney fees are for an adult under the parties' ratified contract. The attorney fees for an adult under the parties' ratified contract are 1/3 of the pending settlement offer of \$115, 932.69 and not 25% of the of the pending settlement offer. *See, e.g., Taylor, supra*. There are no facts or legal authority to support the trial court's analysis and conclusions regarding this issue.

Accordingly, Mr. Lowe is requesting this court find that he is entitled to 1/3 the pending settlement offer the trial court's analysis of the issue is without factual or legal support as outlined above.

Since *Forbes, supra*, is not applicable to the facts of this case, we are back where we started. When the rules outlined above in *Taylor* and

Goncharuk, supra, are applied to the facts of this case, this Court must reverse the trial court lack of analysis, and award Mr. Lowe his 1/3 attorney fees as set forth in the parties' ratified contract on the offer that was pending at the time he was fired in April, 2007.

2. Argument regarding interest on liquidated fee.

The trial court ordered interest should accrue from when Ms. Turbin ultimately settled with Traveler's in April, 2009. The trial court improperly concluded that Mr. Lowe's contingency fee could not be determined with exactness until Ms. Turbin settled with Travelers. Interest, however, should accrue from April, 2007, based upon the facts in this matter, and the case authority outlined below.

The trial court's analysis implies that Mr. Lowe's fee was somehow determined by Ms. Turbin's ultimate resolution of the case in April 2009. There is no support for such analysis anywhere in any case authority. Mr. Lowe's contingency fee was determinable on the day he was fired even though the parties are still arguing over the proper computation of his fee.

Mr. Lowe's fee would not have increased if Ms. Turbin settled her case for more money with Travelers. *See, e.g., Taylor, supra*. Similarly, Mr. Lowe's fee would not have decreased if Ms. Turbin received less at trial. *See, e.g., Goncharuk, supra*. Thus, the relevant case authority

highlights just how utterly confused the trial court was in determining when interest should begin accruing since the basis of her decision is "... the contingency fee could not have been calculated with exactness until the settlement (with Traveler's) was finalized." This basis for the trial court's order regarding this issue is just flat out wrong. This holding by the trial court is not supported by any fact or case authority. Since Mr. Lowe's liquidated fee was not outcome determinative upon Ms. Turbin's ultimate resolution of her personal injury claim with Traveler's or at trial, the fee could have been determined the day it was due: the day he was fired since there was also a pending settlement offer. The trial court does not offer why it could not determine Mr. Lowe's attorney fees on the day he was fired because eventually the trial court allegedly determined Mr. Lowe's fee by multiplying the pending offer amount by the incorrect child's rate of 25%. The trial court could have made that same mistake on the day Mr. Lowe was fired. The trial court, by taking the incorrect action it did, affirmed Mr. Lowe's attorney fees were determinable on the day he was fired. Consequently, the trial court basis for her order that Mr. Lowe's fee could not be determined until Ms. Turbin finally resolved her case has no basis in logic or reason.

The common law regarding prejudgment interest is fairly straightforward. Prejudgment interest is allowed in civil cases regarding

an attorney's liquidate contingent fee on a pending settlement. *See, e.g., Taylor v. Shigaki*, 84 P.2d 723, 930 P.2d 340 (1997). The award of prejudgment interest is based upon the public policy that a person retaining money belonging to another should pay interest on that sum to compensate for the loss of the money's "use value." *Hansen v. Rothaus*, 107 Wash.2d 468, 473, 730 P.2d 662 (1986). Prejudgment interest is properly awarded when an amount claimed is "liquidated." *PUD 1 v. International Insurance Co.*, 124 Wash.2d 789, 810, 881 P.2d 1020 (1994). A sum is liquidated if it is readily determinable without reliance on opinion or discretion. *Buckner v. Berkey Irrigation Supply*, 89 Wn.App. 906, 951 P.2d 338 (1998). A dispute over the amount owed does not make a claim unliquidated. *King Aircraft Sales Inc. v. Lane*, 68 Wn.App. 706, 846 P.2d 550 (1993). Prejudgment interest should be awarded when a claim is unliquidated but is determinable by computation with reference to a fixed standard in a contract. *Hadley v. Maxwell*, 120 Wn.App. 137, 141-142, 84 P.3d 286 (2004) (quoting *Lakes v. Vondermehden*, 117 Wn.App. 212, 217, 70 P.3d 154 (2003)). A prejudgment interest award compensates the plaintiff for the "use loss" of his damage amount from the time of his loss or when it damage is liquidable when the case is resolved or at the time of judgment. *Matson v. Weidenkopf*, 101 Wn.App. 472, 3 P.3d 805 (2000). Prejudgment interest is

avored in the law because it promotes justice, and prejudgment interest accrues from the date the claim arose to the date the claim was resolved or the date of judgment. *Seattle-First National Bank v. Washington Insurance Gurantee Ass'n*, 94 Wn.App. 744, 972 P.2d 1282 (1999). A claim is "liquidated" such that prejudgment interest may be awarded, when the evidence furnishes data which makes computation of the amount owed possible without having to resort to opinion or discretion. *Matson, supra*. Prejudgment interest runs from the date of the recording of the lien, rather than when the lien was finally adjudicated. *Rosellini v. Banchemo*, 83 Wash. 2d 268, 517 P.2d 955 (1974). Prejudgment interest on liquidated damages is computed from the date of the breach of contract. *Underwood v. Sterner*, 63 Wn.2d 360 387 P.2d 366 (1963).

Here, the trial court ruled based upon the trial court's misunderstanding, mis-reading, and mis-application of *Forbes, supra*, that prejudgment interest does not begin to accrue until the time the case is ultimately *settled*. It was merely the facts of *Forbes, supra*, that the case was settled and the attorney was fired essentially the same day. The attorney in *Forbes, supra*, was awarded prejudgment interest from the time she was fired, which is the general rule. Mr. Lowe's contingent fees were determinable on the day he was fired by multiplying 1/3 times the pending settlement offer of \$115, 932.69. Mr. Lowe filed a lien for his

attorney fees shortly after being fired. The attorney in *Forbes, supra*, also filed a lien the next day after she was fired.

Mr. Lowe's attorney fees were determinable by computation with reference to a fixed standard within the parties' ratified contract. CP 50-60 Mr. Lowe's attorney fees as outlined above are 1/3 of Traveler's total pending settlement offer of \$115, 932.69 on the day he was fired. CP 50 - 60 Accordingly, this is a liquidated amount, or unliquidated amount that is determinable by computation with reference to a fixed percentage with the parties' ratified contract. Accordingly, interest on Mr. Lowe's fees should accrue from April, 2007, and not 2009.

This general rule was applied in *Taylor, supra*. Zeder the plaintiff's attorney in *Taylor, supra*, had negotiated a \$225,000.00 purposed settlement before he was fired by plaintiff, Taylor. After being fired, attorney Zeder filed a lien for his 1/3 attorney fees on the purposed settlement of \$225,000.00. The trial court and appellate court affirmed Zeder's award of his 1/3 contingent attorney fees on the pending settlement offer when Zeder was fired. Zeder's fee was not contingent upon the ultimate resolution of the case. Moreover, the trial court and appellate court held that Zeder was entitled to prejudgment interest from the time he was fired. This interest amounted to almost \$6,000.00. Additionally, the trial court and appellate court ruled that

Zeder was entitled to several thousand more dollars in costs and fees for having to go after Taylor for his fees at the trial and appellate courts levels.

The appellate court held that since neither party asked for the trial court's discretion in determining attorney fees, the dispute over contingent attorney fees was a case over which contractual provisions would be applied. Since the clauses provided an amount that could be computed without discretion, the courts held that contingent attorney fees in those types of situations were liquidated, and thus, Zeder was entitled to interest on his fees since the time he was fired. The fact that the parties disputed the amount owed does not affect the result that the fees were liquidated.

The court noted that:

Mere difference of opinion as to the amount is... no more a reason to excuse [a party] from interest than a difference of opinion whether he legally ought to pay at all, which has never been held an excuse. (Citations omitted) . The [trial] court properly awarded prejudgment interest.

Id. at 732.

Applying all of these principals to the case at bar, Mr. Lowe's fees were determinable on the day he was fired. Mr. Lowe's fees were liquidated. Mr. Lowe's fees were determinable by multiplying the pending settlement offer by 1/3 on the day he was fired. Accordingly, Mr.

Lowe's is entitled to interest on his fees from April, 2007, when he was fired.

G. MR. LOWE'S REQUEST FOR ATTORNEY FEES PURSUANT TO RAP 18.1

Mr. Lowe is requesting that he be awarded attorney fees on appeal pursuant to RAP 18.1. In this matter below, Ms. Turbin took the legal approach that she would throw every bit of mud possible on the wall in arguing why Mr. Lowe was not entitled to any attorney fees for securing an outstanding pending settlement before he was fired. The facts and case authority as outlined above, however, dictates that not only was Mr. Lowe entitled to a contingency fee of 1/3, but he is also entitled to interest on his fee from the time he was fired since there was also a pending settlement. All the facts and legal authority cited above are incorporated in this section.

Ms. Turbin's actions forced Mr. Lowe to appeal to this court to obtain what he is due under the facts, the case authority, and the parties' ratified contract. Accordingly, Mr. Lowe is entitled to costs and fees on appeal. *Perkins Coie v. Williams*, 84 Wn. App. 733, 929 P.2d 1215 (1997).

H. CONCLUSION

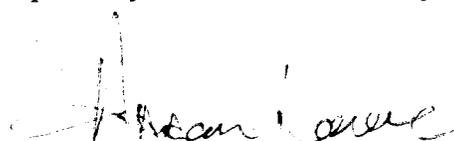
The trial court erred by only awarding Mr. Lowe 25% of the total pending settlement offer at the time he was fired by Ms. Turbin. The trial

court's reading, reliance, and application of *Forbes, supra*, to decide the issues in this matter is misplaced. Ms. Turbin ratified her contract with Mr. Lowe she did not modify it. Once the principals set forth in *Taylor, supra*, are applied to the facts of this case, Mr. Lowe is entitled to 1/3 of the pending settlement offer on the day he was fired.

Mr. Lowe's attorney fees were liquidated. Mr. Lowe's fees were determinable on the day he was fired. Mr. Lowe's fees are 1/3 of the pending settlement offer on the day he was fired. Accordingly, Mr. Lowe is entitled to interest on his attorney fees from the day he was fired and not from when the trial court presumably determined attorney fees.

Mr. Lowe is entitled to attorney fees and cost on appeal pursuant to RAP 18.1. For all of the above reasons, Mr. Lowe is asking this Court to reverse the trial court's decision on these issues.

Respectfully submitted this 9th day of April, 2010.


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