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COURT OF APPEALS
DIVISION II
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No. 34992-2-II

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

JOHN A. HOGLUND, individually, and as owner and agent of **JOHN A.
HOGLUND, P.S.**,

Respondents,

v.

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

Appellants.

**BRIEF OF APPELLANTS JAY GOLDSTEIN,
SHERELLE WILLINGHAM, AND GOLDSTEIN LAW OFFICE**

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TABLE OF CONTENTS

I. TABLE OF AUTHORITIES	iv
<u>II. ASSIGNMENTS OF ERROR</u>	<u>1</u>
<u>No. 1.</u>	<u>1</u>
<u>No. 2.</u>	<u>1</u>
<u>No. 3.</u>	<u>1</u>
<u>No. 4.</u>	<u>1</u>
<u>No. 5.</u>	<u>1</u>
<u>No. 6.</u>	<u>1</u>
<u>No. 7.</u>	<u>1</u>
<u>No. 8.</u>	<u>2</u>
<u>No. 9.</u>	<u>2</u>
<u>No. 10.</u>	<u>2</u>
<u>No. 11.</u>	<u>2</u>
<u>III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u>	<u>3</u>
<u>No. 1.</u>	<u>3</u>
<u>No. 2.</u>	<u>3</u>
<u>No. 3.</u>	<u>3</u>
<u>No. 4.</u>	<u>3</u>
<u>No. 5.</u>	<u>4</u>
<u>No. 6.</u>	<u>4</u>
<u>IV. STATEMENT OF THE CASE</u>	<u>5</u>
1. <u>Introduction</u>	<u>5</u>
2. <u>Factual background</u>	<u>4</u>
<u>V. ARGUMENT</u>	<u>16</u>
1. <u>Sherelle Willingham had Neither Actual nor Apparent Authority to Bind the Goldstein Firm to Any Fee-Sharing Agreement with Hogle; As the Agent for a Disclosed Principal, She Cannot be Personally Liable on the Alleged Contract.</u>	<u>16</u>

2.	<u>No Express Agreement was Formed on September 29, 2003, Either As to Hoglund's Scope of Work or the Amount of his Compensation. Hoglund did not Furnish Any New Consideration to Support Any New Agreement.</u>	18
3.	<u>The Trial Court Erred by Ignoring the Effect of the Graf Fee Agreement and the Hoglund Association of Counsel Agreement.</u>	21
4.	<u>The Trial Court Abused its Discretion in Admitting Evidence of Settlement Offers from a Prior Mediation in Determining Damages.</u>	25
5.	<u>The Court Erred in Awarding Prejudgment Interest on the \$40,000 Judgment Amount.</u>	26
6.	<u>The Trial Court's Finding that Service of Process was Properly Effected on Defendant Sherelle Willingham was Unsupported by Substantial Evidence.</u>	28
VI.	<u>CONCLUSION</u>	31
VII.	<u>APPENDIX</u>	34
1.	<u>Findings of Fact and Conclusions of Law</u>	34
2.	<u>Judgment</u>	34

I. TABLE OF AUTHORITIES

CASES

<i>Ausler v. Ramsey</i> , 73 Wn. App. 231, 868 P.2d 877 (1994)	20, 28
<i>Bering v. Share</i> , 106 Wn.2d 212, 721 P.2d 918 (1986)	27
<i>Cahn v. Foster and Marshall, Inc.</i> , 33 Wn. App. 838, 658 P.2d 42 (1983) <i>rev. den.</i> 99 Wn.2d 1012 (1983)	18
<i>Car Wash Enter., Inc. v. Kampanos</i> , 74 Wn. App. 537, 874 P.2d 868 (1994)	24
<i>Colonial Imports v. Carlton, N.W., Inc.</i> , 83 Wn. App. 229, 921 P.2d 575 (1996)	24
<i>Cook v. Johnson</i> , 37 Wn.2d 19, 221 P.2d 525 (1950)	18
<i>Crystal, China and Gold Ltd. v. Factoria Ctr. Invests., Inc.</i> , 93 Wn. App. 606, 969 P.2d 1093 (1999)	28
<i>Dautel v. Heritage Home Center, Inc.</i> , 89 Wn. App. 148, 948 P.2d 397 (1997) <i>rev. den.</i> 135 Wn.2d 1003, 948 P.2d 397 (1997)	25
<i>Davis v. Bafus</i> , 3 Wn. App. 164, 473 P.2d 192 (1970)	15
<i>Ebling v. Gove’s Cove, Inc.</i> , 34 Wn. App. 495, 663 P.2d 132 (1983) <i>rev.</i> <i>den.</i> 100 Wn.2d 1005 (1983)	18
<i>Griffiths & Sprague Stevedoring Co. v. Bayly Martin & Fay, Inc.</i> , 71 Wn.2d 679, 430 P.2d 600 (1967)	15
<i>In Re Estate of Falco</i> , 188 Cal. App. 3d 1004, 233 Cal. Rptr. 807 (1987)	22
<i>In Re Snyder</i> , 85 Wn.2d 182, 532 P.2d 278 (1975)	16
<i>Labriola v. Pollard Group, Inc.</i> , 152 Wn.2d 828, 100 P.3d 791 (2004)	19
<i>Lamb v. General Assocs., Inc.</i> , 60 Wn.2d 623, 374 P.2d 677 (1962)	16
<i>Mauch v. Kissling</i> , 56 Wn. App. 312, 783 P.2d 601 (1989)	16
<i>McClendon v. Callahan</i> , 46 Wn.2d 733, 284 P.2d 323 (1955)	14
<i>Rho Co. v. Dept. of Revenue</i> , 113 Wn.2d 561, 782 P.2d 986 (1989)	15
<i>Schoonover v. Carpet World, Inc.</i> , 91 Wn.2d 173, 588 P.2d 729 (1978)	16
<i>Smith v. Hansen, Hansen & Johnson, Inc.</i> , 63 Wn. App. 355, 818 P.2d 1127 (1991) <i>rev. den.</i> 118 Wn.2d 1023, 827 P.2d 1392 (1992)	16
<i>State v. Gatalski</i> , 40 Wn. App. 601, 699 P.2d 804 (1985), <i>rev. den.</i> , 104 Wn.2d 1019 (1985)	23
<i>State v. Phetford</i> , 109 Wn.2d 392, 745 P.2d 496 (1987)	26
<i>Thorndike v. Hesperian Orchards, Inc.</i> , 54 Wn.2d 570, 343 P.2d 183 (1959)	15
<i>United Pac. Ins. Co. v. Discount Co.</i> , 15 Wn. App. 559, 550 P.2d 699 (1976)	28
<i>Wright v. Merritt Realty Co.</i> , 180 Wash. 380, 268 P. 873 (1928)	15

Statutes

RCW 4.28.080 26, 27
RCW 4.28.080 (16) 27

OTHER AUTHORITIES

RPC 1.5(c) 19
RPC 1.5(e)(2) 19

II. ASSIGNMENTS OF ERROR

1. **Finding of Fact No. 2:** The trial court abused its discretion in admitting evidence of settlement offers made during the mediation of Robert Bostwick's case.
2. **Finding of Fact No. 5:** The trial court erred in finding that Willingham had apparent authority to bind Goldstein to fee-sharing agreements.¹
3. **Finding of Fact No. 6:** The trial court erred in finding that the parties agreed that Hogle would not continue to serve as lead counsel through trial and that Hogle would receive \$40,000 out of any recovery in the Bostwick case.²
4. **Finding of Fact No. 11:** The trial court erred in finding that in meetings in December 2003, defendant Willingham confirmed an agreement that plaintiff would receive \$40,000 out of any recovery.³
5. **Finding of Fact No. 17:** The trial court erred in referring to \$40,000 as "previously agreed upon."⁴
6. **Finding of Fact No. 21:** The trial court erred in finding that the Summons and Complaint were properly served on Sherelle Willingham.⁵
7. **Conclusion of Law No. 2:** The trial court erred in concluding that Willingham and Hogle entered into a contractual agreement that

¹ CP 1115.

² CP 1116.

³ CP 1118.

⁴ CP 1120-21.

⁵ CP 1121-22.

plaintiff would step down as lead counsel, that Høglund would receive \$40,000 out of any recovery.

8. Conclusion of Law No. 5: The trial court erred in concluding that Goldstein and Willingham misled the plaintiff, and that he continued to perform work on the case based on a justifiable belief that he would be paid.⁶

9. Conclusion of Law No. 6: The trial court erred in concluding that defendants Willingham and Goldstein committed breach of contract.⁷

10. Conclusion of Law No. 7: The trial court erred in concluding that Goldstein and Willingham are jointly and severally liable to Høglund for \$40,000.⁸

11. Conclusion of Law No. 8: The trial court erred in concluding \$40,000 was a liquidated sum, subject to prejudgment interest.⁹

⁶ CP 1123.

⁷ CP 1123.

⁸ CP 1123.

⁹ CP 1123.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether there is insufficient evidence to support the trial court's finding that defendant Willingham had apparent authority to bind Goldstein to a fee sharing agreement, where Goldstein made no objective manifestation indicating apparent authority? (Assignment of Error 1)
2. Whether there is insufficient evidence to support a finding of personal liability on the part of Willingham on the alleged contract because she acted as an agent for Goldstein, a disclosed principal? (Assignment of Error 1)
3. Whether there is insufficient evidence to support the trial court's finding that Willingham formed a contract with Hoglund on September 29, 2003, where: defendants did not induce Hoglund's decision to quit as lead counsel; the parties did not agree on the scope of Hoglund's continued work; they did not agree on the amount of his compensation; all substantive work performed by Hoglund was under the earlier written agreements; and Hoglund gave no new consideration to support a new agreement? (Assignments of Error 2, 3, 4, 5, 7, 8, 9, and 10)
4. Whether the finding that Sherelle Willingham was properly served with the Summons and Complaint was erroneous as being unsupported by substantial evidence? (Assignment of Error 6)

5. Whether the Court abused its discretion by admitting evidence of settlement offers made in July 2003 in the mediation of the Robert Bostwick case? (Assignment of Error 1)
6. Whether the conclusion that \$40,000 was a liquidated sum, subject to prejudgment interest, is unsupported by evidence, and is unsupported by any specific finding of fact. (Assignment of Error 11)

IV. STATEMENT OF THE CASE

1. Introduction.

Attorney John Hoglund sued attorneys Steven Meeks, Jay Goldstein¹⁰ and Sherelle Willingham for a portion of attorney's fees derived from a settlement in the personal injury case of Robert Bostwick. On June 9, 2006, the Thurston County Superior Court, Hon. Frederick Fleming, Visiting Judge, entered a judgment in favor of the plaintiff. All defendants appeal.

2. Factual background.

A. First Bostwick Agreement for Legal Services

In June 2000, Robert Bostwick retained the law firm of F. Daniel Graf to prosecute his personal injury case under a written fee agreement (Graf Fee Agreement) providing for a contingent fee of 1/3 of any recovery.¹¹ Paragraph 6 allowed the Graf firm to employ associate counsel.¹² Paragraph 10 of the Graf Fee Agreement, "Withdrawal of Attorney", provides:

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

¹⁰ Defendants Goldstein and Goldstein Law Office are collectively referred to hereinafter as "Goldstein".

¹¹ Ex. 1

¹² Ex. 1, p. 3.

under Sections Three and Five. Payment in full shall be made by client within 30 days of receipt of final billing by the attorney.¹³

2. Association Agreement

The Graf firm developed difficulties, such that it became necessary for Sherelle Willingham to associate lead trial counsel for Mr. Bostwick. Sherelle did not have the willingness or trial experience to try Mr. Bostwick's case.¹⁴

John Hoglund was an Olympia-based plaintiff's lawyer who handled major cases.¹⁵ Willingham had previously worked for his office as a contract attorney,¹⁶ and his firm was then associating with the Graf firm on other files.¹⁷

On or about June 1, 2001, Hoglund and the Graf firm entered into an Association of Counsel agreement.¹⁸ Paragraph Two of that agreement reads:

... John A. Hoglund... shall be designated as lead trial counsel and the responsible attorney for the strategic and procedural decisions to be made in furtherance of the trial or settlement on this case. [The two firms] are to be fully informed and will fully inform each other of all actions to be taken subsequent to this agreement on these files, and both firms are to be involved intimately with the decisions regarding trial strategy and procedural decisions from this point forward. **John A. Hoglund is to**

¹³ Ex. 1, p. 4.

¹⁴ RP 85, 91, 97.

¹⁵ RP 19.

¹⁶ RP 22.

¹⁷ RP 20.

¹⁸ CP 1114-15, Finding of Fact 2; Ex. 2.

personally have final decision-making authority over all such strategic and procedural decisions.¹⁹

The Graf Fee Agreement states in Paragraph 6: “Client understands and agrees that the associated attorney shall assist in prosecuting the client’s case subject to all of the terms and conditions of this attorney-client fee agreement.”²⁰ Hoglund testified that by signing the Association of Counsel Agreement he intended to become a signatory to the Graf Fee Agreement.²¹

Paragraph Three of the Association of Counsel Agreement reiterates that Mr. Hoglund “is lead trial counsel and shall have full responsibility for case handling,” and states that Mr. Hoglund’s rate of contingency compensation for cases worth over \$25,000 depends on whether he advanced the costs: 80% of the attorney fee if he advanced the costs, and 66.66% if he did not.²²

3. Hoglund Downsizes his Firm

Mr. Bostwick’s file went to the Hoglund firm.²³ Mr. Hoglund then acted as lead lawyer on the case during 2001 and 2002.²⁴ He filed suit on behalf of Mr. Bostwick in 2002.²⁵ He accompanied Mr. Bostwick to a mediation in July 2003. However, the defense would offer no more than

¹⁹ Ex. 2, p.p. 2-3. (Emphasis added.)

²⁰ Ex. 1, p.3

²¹ RP 60.

²² Ex. 2, p. 3.

²³ RP 91.

²⁴ RP 24-27.

²⁵ RP 25-26.

\$150,000 to settle the case.²⁶ This was not acceptable to either Hoglund or the Bostwicks.²⁷

Following successful years in 2002 and 2003, Hoglund decided to close his downtown Olympia office and downsize his practice.²⁸ Since he was downsizing, he knew he would not have the staff to handle complex cases that were going to take longer than a year or more to resolve.²⁹ On August 7, 2003, he wrote to the Bostwicks stating that he was merging his practice with a Tacoma law firm and offered to transfer their file to one of the partners in the Tacoma law firm.³⁰ The clients did not agree to this and requested that the file be transferred back to Sherelle Willingham.³¹

On September 29, 2003, Hoglund took the file to the office of Ms. Willingham, who was now employed by Goldstein Law Office, as the Graf firm had dissolved.³²

Sherelle Willingham and John Hoglund met on September 29, 2003. During this meeting, Hoglund expressed to Willingham a desire to shift his role from being the lead trial attorney responsible for handling the file to “an associated attorney posture”.³³ During the September 29, 2003

²⁶ The trial court admitted this and other testimony concerning the settlement offers made during the Bostwick mediation over the continuing objection of the defendants. RP 28.

²⁷ RP 27, 29.

²⁸ RP 30.

²⁹ RP 31.

³⁰ Ex. 3; RP 30

³¹ RP 61.

³² RP 32-33; 150.

³³ RP 33.

meeting, Willingham and Hoglund discussed possible ways that he might be compensated for the time he had into the case if he were to quit as lead attorney. Possibilities included Hoglund receiving 80% of 1/3 of the \$150,000 that had been offered at the first mediation,³⁴ a full 1/3 of the first \$150,000,³⁵ a 50-50 fee split up to the point of the next mediation, and a 90/10% fee split.³⁶

4. Goldstein Law Firm

Willingham had no actual authority to bind Goldstein to any fee-sharing agreements without Mr. Goldstein's prior approval.³⁷ Hoglund knew Willingham would have to check with Goldstein before she could agree to any particular fee arrangement.³⁸ Willingham never requested Goldstein approve any fee-sharing agreement with Hoglund and he never gave such approval.³⁹ Jay Goldstein has never met Mr. Bostwick, and never met with Mr. Hoglund regarding Mr. Bostwick's case.⁴⁰

Willingham did not agree to any specific fee to Hoglund in the September 29, 2003 meeting. Hoglund testified: "She said, I need to check it out; I'm not sure what the percentages should be. So, concerning the value of the case, she wasn't willing to commit to, well, you know,

³⁴ RP 36.

³⁵ RP 36.

³⁶ RP 37.

³⁷ RP 86-87, 98-99; CP 1115-16, Finding of Fact 5.

³⁸ RP 69-70

³⁹ RP 88

⁴⁰ RP 86.

we're going to pay you \$50,000 because what if the case resolves for less than \$150,000? It wouldn't be fair then. So she was unwilling to put in a precise writing at that point. ... I believed that my fee would be a percentage of the recovery."⁴¹ "... She hadn't agreed to specific numbers, but she hadn't said 50/50 is unreasonable."⁴² "Well, once again, she wasn't willing to make any commitment on the fee."⁴³ "She just couldn't agree to a definite fee amount that I would be paid."⁴⁴ "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 needed to talk to, you know, Jay, I think she mentioned this time.**"⁴⁵ "No, I don't think I had anything specifically from her about what I was to get paid. I just assumed I would."⁴⁶

Plaintiff's \$40,000 figure originated as an *approximation* in the mind of Mr. Hoglund.

Q... [H]ad there been any agreement that led you to believe that you would at least get paid \$40,000?

A: No, no. The \$40,000 came from what I thought I could get paid from them now, like April, May, of '04. And it was based on thinking I could recover maybe \$100,000, but I would have to go

⁴¹ RP 37-38.

⁴² RP 43.

⁴³ RP 50.

⁴⁴ RP 67.

⁴⁵ RP 69-70 (Emphasis added.)

⁴⁶ RP 57.

after it and pay attorney's costs to get it, so what the net result of that would be **around \$40,000**.

Q: Well, was there any doubt in your mind that after your initial meeting with Ms. Willingham in September 2003 that she had agreed that you would have a reduced role in the case?

A: Right. And she also agreed that the base fee value that I would have would be **around \$40,000**. She also agreed to that amount, too. So, yeah.

Q: But that never got formalized into how that would actually play out in any final settlement?

A: No, **it never got to a guaranteed sum that I would get paid regardless of the amount recovered**.

Q: OK.⁴⁷

Willingham sent the Bostwicks a letter dated October 8, 2003, which the clients signed and returned, releasing the Graf firm and retaining the Goldstein office to handle their personal injury claim. Hoglund received a copy of this letter.⁴⁸ Mr. Hoglund continued to work as the lead attorney, responsible for the file, into October 2003. He drove to Tacoma to meet with Dr. Wohns, a neurosurgeon, to discuss medical issues and to arrange for Dr. Wohns to sign a declaration. This work is reflected by time slips kept by Mr. Hoglund's office during this time.⁴⁹ He still considered himself to be the lead trial counsel. He testified: "I was [lead trial counsel] because no one else had been designated. ... I had control of the issues."⁵⁰

⁴⁷ RP 59. (Emphasis added.)

⁴⁸ RP 41.

⁴⁹ RP 63, 79.

⁵⁰ RP 44.

Then, as of October 17, 2003, Hogleund knew he did not want to be lead trial attorney any more.⁵¹ On October 22, 2003, Robert Bostwick signed a new Contingent Fee Agreement with the Goldstein Law Office.⁵² Hogleund considered the old Graf Fee Agreement to be superseded when the new Goldstein Fee Agreement came into existence.⁵³ Having downsized his practice and being unwilling to work the case up for trial, Hogleund was both unwilling and unable to associate on Mr. Bostwick's case on the same terms as he had with the Graf firm. Hogleund testified that he assumed Willingham was going to draft a new Association of Counsel Agreement, wherein: (1) he would no longer have final decision making authority; (2) he would no longer be lead trial counsel; (3) he would no longer have full responsibility for the file; but (4) he would have whatever duties and responsibilities the parties would work out.⁵⁴ However, the parties never agreed on a future scope of work or future compensation for Hogleund, and a new association agreement was never agreed to.

5. Lead Counsel

Hogleund and his staff kept track of the time they spent on files by a time slip system. Neither Hogleund nor anyone from his office recorded

⁵¹ RP 63-64.

⁵² RP 96.

⁵³ RP 63.

⁵⁴ RP 66.

any time spent on the Bostwick file after October 22, 2003.⁵⁵ Hoglund's expression in September 2003 of a desire to back out of the case as lead trial counsel placed Sherelle Willingham in an uncomfortable position, with a June 2004 trial date pending.⁵⁶

Meanwhile, in July 2003, sole practitioner Steven Meeks had taken office space as a tenant in the Goldstein Law suites. Meeks reviewed the Bostwick file, met with the client, and ultimately agreed to assume the role of lead trial counsel. At the time Mr. Meeks became involved, he found the file in a moderate state of preparation, with a June 2004 trial date pending.⁵⁷

Meeks initially recommended that the client try to work things out with Mr. Hoglund, but the client ultimately elected to have Meeks and Willingham work up the case for trial.⁵⁸

Meeks, Hoglund, and Willingham then met on December 3, 2003. During this meeting, Hoglund confirmed his decision to not remain on the case as lead trial counsel.⁵⁹ The parties generally discussed what possible role Hoglund might have in the case. Hoglund stated that he wanted his costs reimbursed, and that he was willing to defend, but not take depositions.⁶⁰

⁵⁵ RP 62-63; 79.

⁵⁶ RP 115.

⁵⁷ RP 115.

⁵⁸ RP 117-19.

⁵⁹ RP 66-67, 120.

⁶⁰ RP 52; 120-21.

During the December 3, 2003 meeting, Hoglund did not assert any prior agreement with Willingham regarding his compensation in the case. In this meeting, no agreement was reached as to what, if any, would be Hoglund's further scope of work on the case.⁶¹

On December 17, 2003, Hoglund, Willingham, and Meeks had a second meeting. Hoglund made it clear in this meeting that he did not want to be the trial lawyer in court, and that he did not want to handle witnesses and cross-examination.⁶²

During this meeting, Hoglund said that if he was in the case, he would leave in the approximately \$6,000 his office had advanced for costs. If he was out of the case, he wanted to be reimbursed his costs.⁶³

Since Mr. Hoglund did not want to do the work required to develop the medical issues in the case, Meeks did not see a continued role for him.⁶⁴

During this meeting, Hoglund proposed to receive 80% of a \$50,000 fee. Meeks refused to agree to this. In any event, Hoglund never pushed the issue of his fees during this meeting; rather, the focus was whether he was "in or out" of the case.⁶⁵ Hoglund never asserted that he

⁶¹ RP 49, 67, 168.

⁶² RP 51-52.

⁶³ RP 125, 139.

⁶⁴ RP 124.

⁶⁵ RP 103-04, 137-38; 163-64.

had already made a prior fee arrangement that he was going to get 80% of \$50,000.⁶⁶

6. Cost reimbursed and Secured Mediation

In February 2004, the client Bostwick reimbursed Mr. Hoglund for his advanced costs.⁶⁷

In March 2004, the defense counsel and insurer wanted to initiate a second mediation. Washington Arbitration and Mediation Service contacted Hoglund's office in March 2004. Hoglund referred WAMS to the Goldstein firm.⁶⁸ On or about March 8, 2004, Hoglund signed a Substitution of Counsel without question or objection, substituting Meeks as the lead attorney and attorney of record.⁶⁹ At this point, Hoglund had no further risk or responsibility in connection with the file.⁷⁰

During February and March 2004, Meeks and Willingham aggressively prepared the medical issues for mediation.⁷¹ Meeks and Willingham mediated the case in April 2004 with the defense and the defense insurer. Meeks and Willingham went into the mediation prepared to take the case to trial. This resulted in a substantial settlement. Meeks testified, "But if that hadn't happened, we would be going to trial. **And I**

⁶⁶ RP 168.

⁶⁷ RP 141-42.

⁶⁸ RP 54-55

⁶⁹ RP 54, 99.

⁷⁰ RP 132-33.

⁷¹ RP 129-31.

was committed to going to trial and to see where we went. Mr. Hoglund wasn't."⁷²

7. Process Service Issue

As to process service issues, Sherelle Willingham was never served with a Summons and Complaint in the present case.⁷³ The court considered a Declaration of Service signed by "S. Treiber", stating that on October 3, 2005, the declarant had served the Summons and Complaint on Sherelle Willingham "by then and there personally delivering 1 true and correct copy(ies) thereof, by then presenting to and leaving the same with SHERELLE WILLINGHAM."⁷⁴ The Court also considered the Declaration of Thyda Eang regarding service of process, verifying that Ms. Eang, the receptionist in the Goldstein firm, occupied the front desk of the office the entire day of the alleged service of process, and that no process server ever passed into the office to hand papers to Ms. Willingham.⁷⁵

V. ARGUMENT

- 1. Sherelle Willingham had Neither Actual nor Apparent Authority to Bind the Goldstein Firm to Any Fee-Sharing Agreement with Hoglund; As the Agent for a Disclosed Principal, She Cannot be Personally Liable on the Alleged Contract.**

Finding of Fact No. 5 states:

⁷² RP 132 (Emphasis added).

⁷³ RP 100.

⁷⁴ CP 1046.

⁷⁵ CP 1033-34; 5/19/06 RP 30

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.

The finding of fact of apparent authority is in reality a legal conclusion, which this Court treats as a Conclusion of Law.⁷⁶

Basic agency law precludes contractual liability on the part of either Goldstein or Willingham. First, it is conceded that Willingham had no actual authority to bind Goldstein. The contract claim against Goldstein fails on this basis.

Second, even if Willingham had authority to so contract, Willingham could not be personally liable because Hoglund knew she was the agent of Goldstein, a disclosed principal. A person who contracts in the name of a principal that exists and has capacity to contract is not liable on the contract so long as she discloses the principal.⁷⁷

Third, Goldstein cannot be liable because Willingham had no apparent authority to contract on his behalf. The only evidence that could support a finding of apparent authority on the part of Sherelle Willingham

⁷⁶ See, *McClendon v. Callahan*, 46 Wn.2d 733, 740-41, 284 P.2d 323 (1955) (Conclusion of law will be treated as such and will be evaluated for sufficiency of evidence, even though it be labeled a finding of fact.)

⁷⁷ *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); *Davis v. Bafus*, 3 Wn. App. 164, 167, 473 P.2d 192 (1970); *Wright v. Merritt Realty Co.*, 180 Wash. 380, 382, 268 P. 873 (1928).

would have had to come from Jay Goldstein. The record is empty of such evidence.

Findings of fact must be supported by substantial evidence.⁷⁸ Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded rational person of the truth of the declared premise.⁷⁹ The burden of establishing apparent authority rests on the one asserting its existence.⁸⁰ Both actual and apparent authority depend upon objective manifestations made by the principal.⁸¹ Apparent authority cannot be inferred from the acts of the agent.⁸²

In summary, Finding of Fact 5 proves that Willingham had no actual authority to bind Goldstein. Since Goldstein was a disclosed principal, Willingham cannot have personal liability for the alleged contract. There is no evidence of any manifestation on the part of Goldstein that would create an inference of apparent authority. The finding of fact is clearly unsupported by evidence.

2. No Express Agreement was Formed on September 29, 2003 Either As to Hogle's Scope of Work or the Amount of his Compensation. Hogle did not Furnish Any New Consideration to Support Any New Agreement.

The first two sentences of Finding of Fact No. 6 read:

⁷⁸ *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959).

⁷⁹ *In Re Snyder*, 85 Wn.2d 182, 185-86, 532 P.2d 278 (1975)

⁸⁰ *Schoonover v. Carpet World, Inc.*, 91 Wn.2d 173, 178, 588 P.2d 729 (1978)

⁸¹ *Smith v. Hansen, Hansen & Johnson, Inc.*, 63 Wn. App. 355, 363, 818 P.2d 1127 (1991) *rev. den.* 118 Wn.2d 1023, 827 P.2d 1392 (1992)

⁸² *Mauch v. Kissling*, 56 Wn. App. 312, 316, 783 P.2d 601 (1989) (citing *Lamb v. General Assocs., Inc.*, 60 Wn.2d 623, 374 P.2d 677 (1962))

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 on 80% of the \$50,000 in fees that would result in the \$150,000 settlement offer already obtained.

The trial judge found that Hogle had performed substantial work on the case, and then turned over his work product to Willingham, and that this work product enabled the defendants to receive substantial fees after expending little labor of their own.⁸³ On these findings, the Court went on to conclude that Hogle “agreed” to step down as lead counsel as part of an agreement that he would receive a liquidated amount of \$40,000 out of any recovery for the services and work product he had provided up to that date.⁸⁴ The Court further concluded that Hogle performed work on the file after being “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”,⁸⁵ even though no continued scope of work had been agreed to by the parties.

Hogle’s withdrawal was completely voluntary. Substantial evidence does not support any notion that he “agreed” to quit as lead trial attorney in exchange for something else.

⁸³ CP 1116-17; 1120-21 Finding of Fact Nos. 7 and 18.

⁸⁴ CP 1122, Conclusion of Law 2 and 3.

⁸⁵ CP 1123, Conclusion of Law 5.

A bilateral contract is embodied by reciprocal promises. The promise by one party is consideration for the promise by the other. Each party is bound by his promise to the other.⁸⁶

The burden of proving an express contract is on the party asserting it, who must prove that the parties expressly agreed to each essential fact, including the price, time, and manner of performance.⁸⁷

In his trial testimony, Høglund freely admitted that the parties had reached no meeting of the minds during the September or December meetings as to portend what his further participation would be in the case. Nor does the evidence support the finding that the parties agreed on September 29, 2003 to a liquidated figure of \$40,000.

Fatal to Høglund's contract claim is that by his own admission, the parties never arrived at two essential terms: (1) the amount of his compensation and (2) the scope of his duties. Simply put, Høglund promised nothing and obligated himself to nothing under the alleged agreement.

Even if the court could find a "promise" on the part of Ms. Willingham, such would be too vague to give rise to the power of acceptance where the future fee arrangement and scope of work remained uncertain.

⁸⁶ *Ebling v. Gove's Cove, Inc.*, 34 Wn. App. 495, 499, 663 P.2d 132 (1983) *rev. den.* 100 Wn.2d 1005 (1983), *citing* *Cook v. Johnson*, 37 Wn.2d 19, 23, 221 P.2d 525 (1950).

⁸⁷ *See, Cahn v. Foster and Marshall, Inc.*, 33 Wn. App. 838, 840-41, 658 P.2d 42 (1983) *rev. den.* 99 Wn.2d 1012 (1983).

Moreover, for a promise to be enforceable, it must be supported by consideration.⁸⁸ All of Hogleund's work up to the time of his withdrawal was past consideration under the Graf Contingent Fee Agreement, which could not form new consideration for the new, alleged express oral agreement. This reasoning is dispositive because Hogleund relinquished all risk and responsibility in connection with the file. Once he did so, there could be no basis in law or fact for him to claim further proprietary interest in Robert Bostwick's cause of action under the contingent fee agreement. Hogleund retained no further claim to compensation for the work he had previously performed.

Based on the foregoing, the trial court clearly erred when it granted recovery based on an alleged express oral compensation agreement. Findings 6, 11, and 17 and Conclusions of 2, 5, 6, and 7 are therefore in error.

3. The Trial Court Erred by Ignoring the Effect of the Graf Fee Agreement and the Hogleund Association of Counsel Agreement.

Any proprietary interest Mr. Hogleund had in the fee generated by Mr. Bostwick's case could only arise under the June 2000 Graf Contingent Fee Contract and the June 1, 2000 Association of Counsel Agreement, which expressly made him a signatory to the Graf Fee Agreement.⁸⁹ The

⁸⁸ *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 843, 100 P.3d 791 (2004).

⁸⁹ This is consistent with RPC 1.5(c), which requires contingent fee agreements to be in writing, and RPC 1.5(e)(2), which governs divisions of fees between lawyers on contingent fee cases.

Association of Counsel Agreement rested on the absolute premise that he would be “lead counsel” and the “responsible attorney on the file.”⁹⁰

Entitlement to the contingent fee was fully integrated into and tied to responsibility for the representation, and to Hoglund’s assumption of the risks that are always inherent in contingent fee personal injury cases. For this responsibility and risk, Hoglund was to receive 80% of the fee.

In *Ausler v. Ramsey*,⁹¹ Division I discussed the utility and risks inherent in contingent fee arrangements:

Contingent fee arrangements serve an important function ... In the typical contingent fee arrangement, attorneys in effect insure their clients and themselves against the cost of losing by covering those losses with higher-than-normal fees in winning cases. To that end, the percentages used by contingent fee contract attorneys, whether established by custom or even regulated by statute, are designed to reflect the risk of failure in a given case, as well as the overall risks in the attorney’s general practice ... Contingent fees also have drawbacks for both the attorney and the client. The victorious client’s compensation will be diminished by the attorney’s higher-than-normal fee. The attorney risks a minimal recovery, or no recovery at all. This may occur because a client wants to go to trial or appeal a case that the attorney has come to believe will be unsuccessful.

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.⁹²

⁹⁰ His agreement could not be clearer: “If anything less than full case responsibility is being asked of John A. Hoglund or his firm, that limitation should be so specified in the main Contingency Fee Agreement.” Ex. 2, p. 2. The Graf Agreement contains no such limitation.

⁹¹ 73 Wn. App. 231, 868 P.2d 877 (1994).

⁹² *Id.*, 73 Wn. App. at 237-38. (Emphasis added.)

The trial court erred in failing to meaningfully consider the voluntary nature of Hoglund's quitting as lead trial counsel in light of Washington case law and the written fee agreements.

In determining whether an attorney is entitled to compensation after withdrawing from a contingent fee contract, the Court must first determine the circumstances of the withdrawal: (1) whether the attorney withdrew voluntarily, (2) was fired by the client, or (3) withdrew for good cause, all in light of the written fee agreement. It is also relevant to consider the timing of the attorney's withdrawal or discharge in relation to the contingent event stated in the contract.

In the instant case, Hoglund signed on for only one role, that of lead trial attorney, with full responsibility for the file. His Association of Counsel Agreement very pointedly rules out any lesser role for Hoglund.

Hoglund's clear delineation of his duties in his Association of Counsel Agreement left no room for a "half-in-half-out" role in the case, whereby he could decide it was not worth his time or trouble to take the case to trial, but nevertheless claim part of the contingent fee.

The trial court erred in not holding that Hoglund's quitting as lead attorney was the same thing as complete withdrawal, triggering Paragraph 10 of the Graf Fee Agreement, requiring the attorney to then waive his fee. As the *Ausler* court stated:

[A]n 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...'⁹³

As the Court of Appeals stated, "We mirror the *Falco* court's displeasure of the interpretation of the rule that would allow attorneys to 'hedge their bets.'⁹⁴

Mr. Hogle had a choice, which was brought about solely by his decision to close down his office, discharge his staff, and "downsize" his practice: (1) retain the risk, responsibility, and possible substantial fee that would come from seeing the case through to trial or for, (2) step down from the risk and responsibility of working a major case up for a trial and waive the fee.

He chose the latter. He cooperated with the transition of Mr. Bostwick's representation to a new lead trial attorney, Mr. Meeks. He met with the new trial team on two occasions in December 2003, to try to work out some future role for himself as the case proceeded to a possible second mediation and ultimately, possibly, to trial. However, the parties never agreed on either (1) his continued scope of work, or (2) how he would be compensated.

Being unsuccessful at reaching such agreement, he collected reimbursement for his advanced costs, signed a substitution of counsel, and no longer bore any risk or responsibility for Mr. Bostwick's case.

⁹³ *Id.*, quoting *In Re Estate of Falco*, 188 Cal. App. 3d 1004, 233 Cal. Rptr. 807 (1987).

⁹⁴ *Id.*

In summary, the trial court erred in failing to conclude that Mr. Hoglund had abandoned the contract, and was therefore not entitled to recover for services rendered.

4. **The Trial Court Abused its Discretion in Admitting Evidence of Settlement Offers from a Prior Mediation in Determining Damages.**

The Court permitted, over defendants' objection, testimony from Hoglund that the defense in Mr. Bostwick's case had offered \$150,000 during a July 2003 mediation. The Court allowed extensive testimony from Mr. Hoglund as to how and why he based his alleged entitlement to fees on this offer.

The standard of review for alleged errors in the admission of evidence is abuse of discretion.⁹⁵ RCW 5.60.070 provides:

(1) 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;

⁹⁵ *State v. Gatalaki*, 40 Wn. App. 601, 610, 699 P.2d 804 (1985), *rev. den.*, 104 Wn.2d 1019 (1985).

- (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.⁹⁶

In summary, the trial court abused its discretion, both in admitting evidence of settlement offers made during Mr. Bostwick's mediation, and in basing its award of damages in this case on such testimony.

5. The Court Erred in Awarding Prejudgment Interest on the \$40,000 Judgment Amount.

The trial court's award of prejudgment interest was unsupported by evidence. Washington law only allows prejudgment interest when a claim is liquidated.⁹⁷ A liquidated claim is one "where the evidence furnishes data, which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion."⁹⁸ If the fact finder must exercise discretion to determine the amount of damages, the claim is unliquidated.⁹⁹

⁹⁶ RCW 5.60.070.

⁹⁷ *Colonial Imports v. Carlton, N.W., Inc.*, 83 Wn. App. 229, 245, 921 P.2d 575 (1996).

⁹⁸ *Car Wash Enter., Inc. v. Kampanos*, 74 Wn. App. 537, 548-49, 874 P.2d 868 (1994).

⁹⁹ *Dautel v. Heritage Home Center, Inc.*, 89 Wn. App. 148, 153, 948 P.2d 397 (1997) *rev. den.* 135 Wn.2d 1003, 948 P.2d 397 (1997)..

An award of prejudgment interest is based on the principle that when a defendant retains money that is owed to another, he should be charged interest upon it. Nevertheless, a defendant is not required to pay prejudgment interest in cases where it is not possible to ascertain the amount owed to the plaintiff until the court has exercised its discretion in determining that amount. The amount owed must be ascertainable without the aid of a discretionary court ruling concerning the amount due before the obligor can be liable for prejudgment interest.¹⁰⁰

By Hoglund's own testimony, he viewed the amount of his fee as contingent on the amount of recovery. He viewed the \$40,000 as an approximate amount, subject to his estimation by various methods: 80% of a contingent fee based on a contingent event that never occurred, and by another of Hoglund's accounts, how much he believed he could net from a \$100,000 judgment in a collection case against the appellants.¹⁰¹

Thus, by definition, the "around \$40,000" was not a liquidated amount to support prejudgment interest under Washington law. The award of damages clearly required an exercise of discretion by the trial court, and the final amount ruled upon was only one amount among many potential compensation arrangements Hoglund said that he discussed with the defendants. The judgment amount in this case is inappropriate for prejudgment interest, and the trial judge erred in so awarding.

6. The Trial Court's Finding that Service of Process was Properly Effected on Defendant Sherelle Willingham was Unsupported

¹⁰⁰ *Id.*, 89 Wn. App. at 154. (Citations omitted).

¹⁰¹ RP 59.

by Substantial Evidence.

The Court's Finding No. 21 that the summons and complaint "were properly served on ... defendant Willingham" is not really a finding of fact, but rather a conclusion of law. As a conclusion of law, it is not supported by substantial evidence.

Sherelle Willingham testified she was not served with a summons and complaint. The Court considered the Declaration of Thyda Eang. Ms. Eang, who testified that at 1:15 p.m. on October 3, 2005, the time process server S. Treiber alleged in his affidavit that he served Willingham,¹⁰² she was at the front desk of the Goldstein firm. No process server passed by her desk all day to serve Ms. Willingham.¹⁰³

Ms. Willingham gave affirmative, live testimony that she was not personally served.

The Declaration of Service of S. Treiber is very imprecisely worded, and the process server was not called as a live witness.

Hence, the trial court's factual finding was based solely on vague documentary evidence in the form of the Declaration of Service. This Court is free to review affidavits de novo, including the Affidavit of Ms. Eang and the Declaration of Service of S. Treiber.¹⁰⁴

¹⁰² CP 1046.

¹⁰³ CP 1033-34.

¹⁰⁴ See, *State v. Phetford*, 109 Wn.2d 392, 396, 745 P.2d 496 (1987).

Live testimony of Ms. Willingham, combined with the specificity of Ms. Eang's declaration, make it clear that no substantial evidence existed that would "persuade a fair minded, rational person of the truth of the declared premise."¹⁰⁵

Rather, the evidence compels the conclusion that Hoglund failed to follow RCW 4.28.080, which states in pertinent part:

The summons shall be served by delivering a copy thereof, as follows:

- . . .
- (15) In all other cases, to the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein.
- (16) In lieu of service under subsection (15) of this section, where the person cannot with reasonable diligence be served as described, the summons may be served as provided in this subsection, and shall be deemed complete on the tenth day after the required mailing: By leaving a copy at his or her usual mailing address with a person of suitable age and discretion who is a resident, proprietor, or agent thereof, and thereafter mailing a copy by first class mail, postage prepaid, to the person to be served at his or her usual mailing address. For the purposes of this subsection "usual mailing address" shall not include a United States Postal Service Post Office box or the person's place of employment.¹⁰⁶

RCW 4.28.080 (16) on its face provides for an alternative to personal service only "where the person cannot with reasonable diligence be served as described [in subsection (15)]. Reasonable diligence requires

¹⁰⁵ *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986) (quoting *Thorndyke v. Hesperian Orchards, Inc.*, *supra.*).

¹⁰⁶ (Emphases added).

the plaintiff to make honest and reasonable efforts to locate the defendant.¹⁰⁷ If the defendant cannot be found with reasonable diligence, the statute provides for service by leaving a copy at the defendant's usual mailing address under certain specified conditions, and by thereafter mailing a copy by first class mail. RCW 4.28.080 (16).

None of that was done in this case. Clearly, the process server simply left copies of the summons and complaint with unspecified employees of the Goldstein Law Office, then swore out a declaration that defendant Willingham had been served.

While "the summons need not actually be placed in the defendant's hand,"¹⁰⁸ the server must at least be in the presence of the defendant and attempt to "yield possession and control of the documents" to the defendant while the server is positioned in a manner to accomplish that act.¹⁰⁹

Here, the trial evidence proves the process server was never physically in the presence of Ms. Willingham. There is insufficient evidence to support a contrary conclusion, and the Court erred in finding that Willingham was personally served. Hoglund made no showing that any effort was undertaken to locate Willingham or to serve her at her usual place of abode. Service was therefore incomplete, and the Court never

¹⁰⁷ *Crystal, China and Gold Ltd. v. Factoria Ctr. Invests., Inc.*, 93 Wn. App. 606, 611, 969 P.2d 1093 (1999).

¹⁰⁸ *United Pac. Ins. Co. v. Discount Co.*, 15 Wn. App. 559, 562, 550 P.2d 699 (1976)

¹⁰⁹ *Id.*, at 562

acquired personal jurisdiction over her. It was erroneous to enter judgment against her.

VI. CONCLUSION

In conclusion, the trial court erred in holding that defendants Willingham and Goldstein formed and breached an express fee-sharing agreement with Hoglund.

Finding of Fact 5, that Willingham had apparent authority to bind Goldstein, is in reality a Conclusion of Law. As such, it is unsupported by the necessary evidence in the form of manifestations of apparent authority on the part of the alleged Willingham's known principal, Jay Goldstein. Since Goldstein was a known principal, if any contracts were formed, it would have been binding on him only, and not on Willingham. It was undisputed that Willingham had no actual authority to bind Goldstein. Accordingly, plaintiff's claims against appellants should have been dismissed on agency principles.

Findings 6, 11, and 17 fail for substantial evidence to prove Willingham formed an express agreement with Hoglund on September 29, 2003 whereby Hoglund agreed to step down as lead counsel in exchange for a liquidated fee of \$40,000. The Court erred in ignoring the effect of the Graf Contingency Fee Agreement and the Hoglund Association of Counsel Agreement under which Hoglund performed all of the substantive work for which he sought payment under the alleged oral assistance

agreement with Goldstein and Willingham. When Hoglund quit as lead counsel, received reimbursement for his costs, relinquished the file and signed a substitution of counsel, he did so subject to Paragraph 10 of the Graf Fee Agreement, waiving any fee from the case.

Substantial evidence does not support the Court's finding of a subsequent oral assistance agreement, where: (1) Willingham had no authority to bind Goldstein to any such agreement, as discussed above; (2) the parties never agreed on a scope of work for Hoglund; (3) the parties never had a meeting of the minds as to Mr. Hoglund's compensation; (4) Hoglund no longer had any risk or responsibility with the file; and (5) he furnished no new consideration to support a new agreement.

Conclusions 2, 5, 6, and 7, which depend on the above-referenced Findings of Fact, are erroneous.

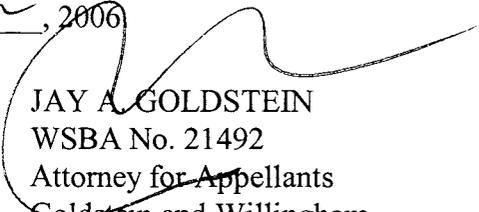
Further, Conclusion 8, which awarded prejudgment interest based upon a liquidated \$40,000 sum, must similarly fail for lack of substantial evidence to support it.

Finding 21, that Willingham was properly served with process, similarly failed for lack of substantial evidence that would be sufficient to persuade a reasonable trier of fact that Ms. Willingham was personally served with the summons and complaint. The vague and conclusory declaration from the process server and the more precise declaration of Thyda Eang were both considered by the trial court, and should be

reviewed de novo by this Court. Ms. Willingham testified unequivocally at trial that she was never served with process in this case, and this testimony was unchallenged by live testimony from any other witness. Only one reasonable conclusion is possible from this evidence—that Willingham was never served with process.

Based upon the foregoing argument and authority, appellants Goldstein and Willingham request that this Court REVERSE the trial court judgment, and dismiss plaintiff's complaint.

DATED this 26 day of October, 2006



JAY A. GOLDSTEIN
WSBA No. 21492
Attorney for Appellants
Goldstein and Willingham

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VII. APPENDIX

1. Findings of Fact and Conclusions of Law
2. Judgment

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FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.
BETTY J GOULD, CLERK

6-9-06
By _____ DEPUTY *[Signature]*

FILED
DEPT 7
IN OPEN COURT

JUN - 9 2006
Pierce County Clerk
By _____ DEPUTY *[Signature]*

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON**

JOHN A HOGLUND, individually and
as owner and agent of JOHN A
HOGLUND, P S ,

Plaintiff,

vs

STEVEN MEEKS, JAY GOLDSTEIN
and SHERRELLE WILLINGHAM,
GOLDSTEIN LAW OFFICE,

Defendants

NO 04-2-02603-0

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

THIS MATTER having come before the Court for trial commencing on
the 1st day of May, 20065 before Visiting Judge Frederck W Flemming, the
plaintiff appearing by and through his attorney, Michael W Johns, of Davis,
Roberts & Johns, PLLC, the defendants appearing by and through their
attorney, J Michael Morgan, and the Court being in all things advised, now,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
Page 1

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1
2 therefore, the Court makes the following

3 **FINDINGS OF FACT**

4 1 On or about June 26, 2000, Olympia attorney F Daniel Graf entered
5 into a contingent fee agreement with Robert Bostwick and undertook to
6 represent Mr Bostwick with respect to a personal injury claim The contingent
7 fee agreement contemplated that Mr Graf might associate outside counsel to
8 assist in the representation
9

10 2 On or about June 1, 2001, the plaintiff entered into an Association of
11 Counsel Agreement with F Daniel Graf and took over primary responsibility
12 for the Bostwick representation The Association Agreement provided that the
13 plaintiff would receive 80% of the contingent fee in the event of a recovery
14 Over the course of the next two years the plaintiff worked with Mr Bostwick to
15 advance his claim The plaintiff negotiated with the tortfeasors' insurers and in
16 December, 2002 filed a lawsuit against the tortfeasors in Cowlitz County
17 Superior Court After filing the lawsuit the plaintiff continued to develop Mr
18 Bostwick's claim through discovery depositions, written interrogatories and
19 retention of experts The plaintiff prepared for and attended a mediation with
20 the tortfeasors and their insurers on July 9, 2003, at which the tortfeasors
21 offered to pay \$150,000 00 to Mr Bostwick to settle his claims Mr Bostwick
22 rejected this offer, and following the mediation the plaintiff continued to
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24

25 FINDINGS OF FACT AND
26 CONCLUSIONS OF LAW
Page 2

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develop Mr Bostwick's claims

3 In the fall of 2003 attorney F Daniel Graf's license to practice law was
4 suspended Shortly after the mediation hearing Mr Bostwick contacted
5 defendant Willingham, who had previously been an associate of Mr Graf's
6 and who had been involved in the initial representation of Mr Bostwick in
7 2000 In October, 2003, Mr Bostwick entered into a new contingent fee
8 agreement with Goldstein Law Offices, defendant's Willingham's employer

4 Though the plaintiff had no written agreement directly with Mr
Bostwick, the defendants were aware of the terms of the plaintiff's previous
Association Agreement with attorney F Daniel Graf and both the plaintiff and
defendant Willingham anticipated that the plaintiff would continue to assist in
the Bostwick representation

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

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
Page 3

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defendant Willingham had the apparent authority to do so

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

7 The plaintiff turned over all of his work product to defendant Willingham, which included his correspondence and notes, all correspondence had to do with the subrogation contract with Mr Bostwick's union, copies of all bills, all pleadings filed in Cowlitz County, interrogatory answers developed on behalf of Mr Bostwick, copies of all medical records, notes of medical history, analysis of previous medical care, analysis of diagnoses found in the medical records, form evaluation of case's weaknesses and strengths, oral evaluation

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
Page 4

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of case handling strategies, trial preparation strategies plan, oral analysis of expert and witness needs for case development for trial, and complete mediation preparation and presentation materials. Because the plaintiff understood from his conversations with defendant Willingham that the Bostwicks had recently received a large sum of money and were thus willing to reimburse him for costs he had previously advanced in their case, the plaintiff wrote to the Bostwicks in October 2003 and provided them with the total amount of his costs.

8 Defendant Willingham thereafter prepared a notice of association of counsel with the plaintiff, which was filed with the Cowlitz County Superior Court. Plaintiff obtained the trial date in Cowlitz County for the case. Because defendant Willingham did not want to serve as lead trial counsel in the Bostwick case, in October she contacted defendant Meeks and asked him to serve as lead trial counsel.

9 Defendant Meeks had recently left employment with the attorney general's office and had opened a new practice, renting space from defendant Goldstein, though he was not associated with the Goldstein Law Offices. Defendant Meeks did not yet have any office staff, and only hired an assistant in February, 2004.

10 Because defendants Meeks and Willingham were busy working on a

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
Page 5

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case that went to trial in November, 2003, they were unable to meet with the plaintiff to discuss the plaintiffs' continued role in the case. The plaintiff in the meantime continued to work through October 22, 2003 to develop Mr Bostwick's claims.

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. The plaintiff believed that the defendants were going to further discuss among themselves exactly what role they would like the plaintiff to continue to have in the litigation. The plaintiff further believed, based upon the conversations that took place at the December meetings, and because the plaintiff had already prepared the case for mediation and there was little additional work to be done by the defendants prior to any subsequent mediation, that the defendants, though they had not agreed upon a 50/50 split of fees through mediation, did agree he was entitled to additional compensation and would propose something similar, such as a

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
Page 6

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60/40 split through mediation

12 At some time after the December meetings defendant Meeks decided that he did not want the plaintiff to continue to be involved in the Bostwick case Defendant Meeks did not, however, convey this decision to the plaintiff Defendant Meeks had no further contact with the plaintiff after the December meetings

13 On February 4, 2004 defendant Willingham spoke by phone with plaintiff's paralegal, Kim Tovani During that conversation defendant Willingham obtained an updated total of the costs the plaintiff had advanced in the Bostwick litigation so that Mr Bostwick could reimburse the plaintiff Defendant Willingham also asked Ms Tovani to inform the plaintiff that she had recently spoken with defendant Meeks about setting up a follow up meeting to negotiate fees, and that defendant Meeks had stated it was too early in the case and he wanted to wait until they were closer to resolving the case

14 Also on February 4, 2004 defendant Willingham wrote a letter to the Bostwicks to provide them with the plaintiff's costs to be reimbursed Contrary to the discussion she had the same day with Ms Tovani, defendant Willingham's further stated in the letter that the plaintiff would not continue to be involved in their case Defendant Willingham did not provide a copy of this

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
Page 7

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1
2 letter to the plaintiff or otherwise advise him that he would not continue to be
3 involved in the case

4 15 Later in February 2004 the Washington Arbitration and Mediation
5 Service contacted the plaintiff, who was still listed as the attorney of record in
6 the Bostwick case, to schedule a new mediation The plaintiff called
7 defendant Willingham to pass on WAMS's request Defendant Willingham and
8 the plaintiff further discussed the Bostwick medical records and the results of
9 defendant Meeks' review of those records
10

11 16 On March 3, 2004 defendant Willingham forwarded a notice of
12 substitution of attorneys to the plaintiff The notice substituted defendant
13 Meeks as co-counsel for the plaintiff Defendant Willingham did not discuss
14 the notice of substitution with the plaintiff The plaintiff assumed the purpose
15 of the notice was to place the tortfeasor defendants on notice that defendant
16 Meeks was attorney of record and authorized to represent Mr Bostwick at the
17 upcoming mediation
18

19 17 The defendants succeeded in settling Mr Bostwick's personal injury
20 claim for \$840,000 00 at the second mediation in early April, 2004 Shortly
21 thereafter Ms Willingham informed the plaintiff of the settlement and stated
22 that she thought he would be paid the previously agreed upon \$40,000 00 out
23 of the settlement proceeds However, when the plaintiff later contacted
24

25 FINDINGS OF FACT AND
26 CONCLUSIONS OF LAW
Page 8

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1
2 defendant Meeks, defendant Meeks denied that the plaintiff was entitled to
3 any payment out of the settlement proceeds

4 18 Though defendant Meeks testified at trial that the work product provided
5 by the plaintiff had not been of much use to the defendants, the Court finds
6 that the previous work and work product provided by the plaintiff played a
7 significant role in leading to the successful settlement of the Bostwick case
8 The plaintiff had obtained the expert medical testimony of Dr Wohms, had
9 developed Mr Bostwick's medical history, developed a pretrial strategy,
10 developed and identified the need for additional experts for trial, developed the
11 income loss potential of plaintiff's injury claim, and developed a mediation
12 strategy and presentation approach to the defendant The work product
13 provided by the plaintiff allowed the defendants to receive fees in excess of
14 \$190,000 00 despite having been involved in the Bostwick case for only a few
15 months and having expended little labor of their own

16
17
18 19 The Court finds that the testimony of the plaintiff on disputed points was
19 more credible than that of the defendants

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

23
24 21 The Court finds that the summons and complaint were properly served

25 FINDINGS OF FACT AND
26 CONCLUSIONS OF LAW
Page 9

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on all of the defendants, including defendant Willingham

From the foregoing Findings of Fact, the Court enters the following

CONCLUSIONS OF LAW

1 The Court has jurisdiction over the parties and subject matter of this action

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 \$40,000.00 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 upon that agreement

~~4. Even if the agreement between defendant Willingham and the plaintiff did not constitute an enforceable agreement, the plaintiff would be~~

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~~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~~

Handwritten initials/signature

5 The plaintiff was misled by the defendants into the belief that 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 upon \$40,000.00.

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

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

8 The \$40,000.00 was a liquidated sum and the plaintiff is thus entitled to pre-judgment interest at the rate of 12% on the \$40,000.00 from

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
Page 11

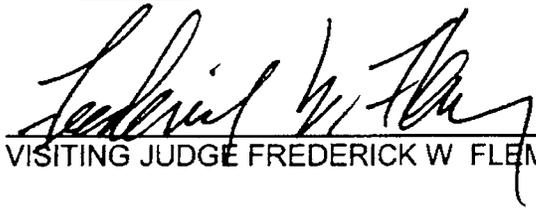
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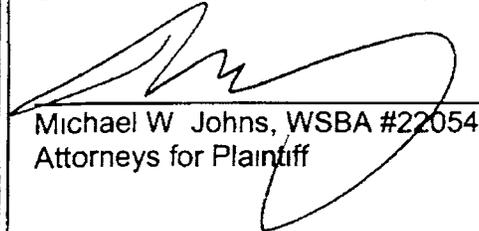
April 15, 2004 through the date of judgment The plaintiff shall be entitled to post judgment interest on the entire judgment amount, including statutory costs and attorney's fees, at the rate of 12% per annum from the date of judgment

DATED this 9TH day of June, 2006

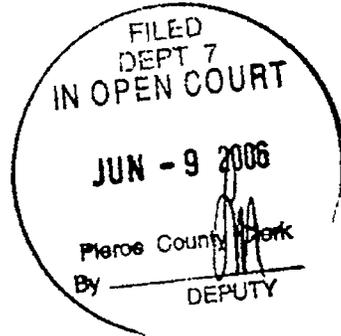


VISITING JUDGE FREDERICK W FLEMING

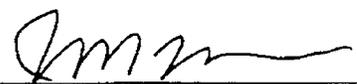
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DAVIS ROBERTS & JOHNS, PLLC



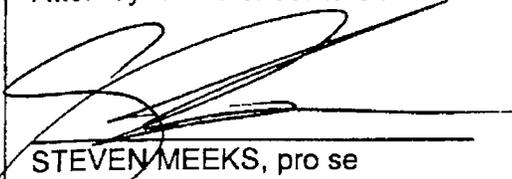
Michael W Johns, WSBA #22054
Attorneys for Plaintiff



Approved as to form



J Michael Morgan, WSBA #18404
Attorney for Defendants Goldstein and Willingham



STEVEN MEEKS, pro se

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
Page 12

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FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.
BETTY J. GOULD, CLERK
6-9-06

By _____
DEPUTY

FILED
DEPT. 7
IN OPEN COURT
JUN - 9 2006
Pierce County Clerk
By _____
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

JOHN A. HOGLUND, individually and
as owner and agent of JOHN A.
HOGLUND, P.S.,

Plaintiff,

vs.

STEVEN MEEKS, JAY GOLDSTEIN
and SHERRELLE WILLINGHAM;
GOLDSTEIN LAW OFFICE,

Defendants.

NO. 04-2-02603-0

JUDGMENT

JUDGMENT SUMMARY

1. Judgment Creditor: JOHN A. HOGLUND
2. Judgment Debtors: STEVEN MEEKS, JAY GOLDSTEIN and
SHERRELLE WILLINGHAM; GOLDSTEIN
LAW OFFICE
3. Principal Judgment: \$40,000.00
4. Pre-Judgment Interest: \$10,200.00

JUDGMENT
Page 1

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5. Attorney's Fees: \$125.00

6. Costs: \$200.00

7. Judgment Amounts Shall Bear Interest at 12% Per Annum from date of entry of judgment.

8. Attorneys for Judgment Creditor: Michael W. Johns and Davis Roberts & Johns, PLLC

JUDGMENT

THIS MATTER was tried to the Court without a jury on May 1, 2006. The Honorable Frederick W. Flemming presided at the trial.

The plaintiff appeared at the trial personally and through his attorney of record, Michael W. Johns. The defendants appeared at the trial personally and through their attorney of record, J. Michael Morgan.

The Court received the evidence and testimony offered by the parties, considered the pleadings filed in the action and heard the oral argument of the parties' counsel regarding the parties' cross claims for damages. The Court having made and entered its Findings of Fact and Conclusions of Law, it is hereby:

ORDERED, ADJUDGED AND DECREED that the plaintiff is granted judgment against the defendants, jointly and severally, in the principal

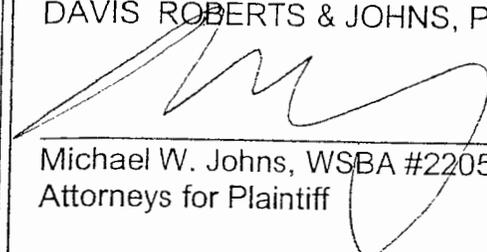
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2 amount of \$40,000.00, together with pre-judgment interest of \$10,200.00,
3 statutory attorney's fees of \$125.00 and statutory costs of \$200.00, and that
4 interest on the judgment shall accrue at 12% per annum from the date of entry
5 until satisfied.

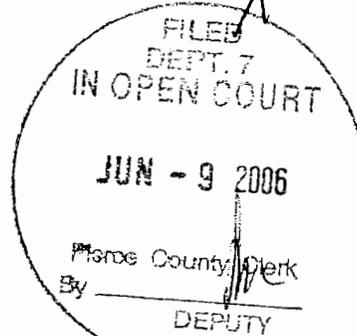
6 DATED this 9th day of June, 2006.

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11 VISITING JUDGE FREDERICK W. FLEMMING

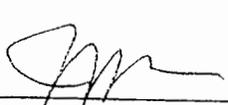
12 Presented by:

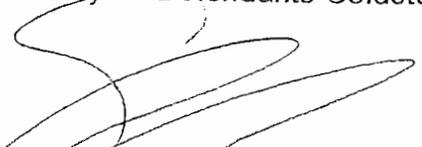
13 DAVIS ROBERTS & JOHNS, PLLC

14 
15 Michael W. Johns, WSBA #22054
16 Attorneys for Plaintiff



17 Approved as to form:

18
19 
20 J. Michael Morgan, WSBA #18404
21 Attorney for Defendants Goldstein and Willingham

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23 STEVEN MEEKS, pro se
24

25
26 JUDGMENT
Page 3

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1 **PROOF OF SERVICE**

2 On October 27, 2006, I served a complete and true copy of the original of this
3 document to:

4 Steven Meeks
5 2405 Evergreen Park Drive, Suite A-2
6 Olympia, WA 98502
7 (360) 705-1862
8 *Pro Se*

9 Davis Roberts & Johns, PLLC
10 Attn: Michael W. Johns
11 7625 Pioneer Way, Suite 202
12 Gig Harbor, Washington 98335
13 (253) 858-8606
14 *Attorney for Plaintiffs*

BY _____
DATE _____
06 OCT 2006 PM 2:39
FILED
COUNTY OF THURSTON

15 **Via:**

16 Messenger service with directions to deliver to office address shown

17 I declare under penalty of perjury under Washington law that the foregoing is
18 true and correct. Executed this 27th day of October, 2006 at Olympia, Washington.

19 
20 _____
21 DONNA PARVIN

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26
27 JAY A. GOLDSTEIN ● LAW OFFICE, PLLC
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