

No. 34992-2-II

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

FILED
STATE COURT
APR 11 2011
BY: [Signature]

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.

**REPLY BRIEF OF APPELLANTS
GOLDSTEIN AND WILLINGHAM**

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II. ARGUMENTS

1. Hoglund's Assertion That Willingham had Apparent Authority to Bind the Goldstein Firm to the Alleged Fee Sharing Agreement is Negated by (1) The Absence of Any Outward Manifestation of Assent by Jay Goldstein and (2) Hoglund's Affirmative Knowledge that Willingham Needed, and had not Obtained, Goldstein's Approval.

Finding of Fact No. 5 confirms that Ms. Willingham had no actual authority to enter into a fee-sharing agreement with Hoglund. The trial court erred in concluding that Goldstein vested Willingham with apparent authority, where (1) Hoglund had actual knowledge Willingham needed and had not gotten Goldstein's approval to enter into any such agreement, and (2) Goldstein did nothing objectively to create the appearance of apparent authority.

Apparent authority exists only to the extent that it is reasonable for the third person dealing with the agent to believe that the agent is authorized. **Further, the third person must believe the agent to be authorized.** In this respect, apparent authority differs from [actual] authority since an agent who is authorized can bind the principal to a transaction with a third person who does not believe the agent to be authorized.¹

Hoglund argues that Goldstein conferred apparent authority because “must have been aware of” and “accepted the benefit of”,² certain actions on the part of Willingham such as arranging to obtain the client's file, filing a Notice of Association of Counsel, conducting attorney-client communications and signing documents, etc.

¹ *Smith v. Hansen, Hansen & Johnson, Inc.*, 63 Wn. App. 355, 365, 818 P.2d 1127 (1991), rev. den., 118 Wn.2d 1023, 827 P.2d 1392 (1992) quoting Restatement (Second) of Agency § 8, Comment c. (Emphasis added.)

² Respondent's Brief, p.10.

Smith v. Hansen, Hansen & Johnson, Inc., supra, disposes of this argument. Fentron employed Foster as a “manager of manufacturing services”, furnishing him with business cards, an office and a telephone. Foster had actual authority to purchase materials but not to sell them.³ Foster sold a quantity of surplus glass to Hansen and his architecture firm, HH & J. Fentron in reality had planned to have the glass destroyed due to manufacturing deficiencies. Unbeknownst to Fentron, Foster sold the glass to a scrap yard, pocketed the proceeds, and then resold the same glass to HH & J, who paid for it and installed it on an office renovation project.⁴

Fentron and HH & J later learned of Foster’s fraud. Nevertheless, Fentron demanded payment for the materials and in doing so failed to disclose to Hansen that it had rejected the glass for manufacturing deficiencies, even after it learned HH & J had installed the glass on one of its projects. Ultimately, the glass failed, and HH & J obtained a judgment against Fentron, from which Fentron appealed.⁵

Among the issues on appeal was whether Foster had apparent authority to sell products on behalf of Fentron. This Court held that apparent authority was not created “merely because the agent was appointed to or occupies a high position in the principal’s organization”, or by virtue of the fact that it furnished him with an office, telephone

³ *Id.*, 63 Wn. App. at 355-56.

⁴ *Id.*, at 359-60.

⁵ *Id.*, at 362.

number, and business cards that said he was a “manager of manufacturing services”.⁶ This Court found that while the evidence amply showed that Hansen and HH & J *subjectively* believed that Foster was authorized by Fentron, this type of evidence did not support a reasonable inference that Hansen’s belief was “objectively reasonable”.⁷

This Court does not even have to reach the inquiry as to whether any belief on the part of Høglund as to Willingham’s authority was “objectively reasonable”, because Høglund had actual knowledge that Willingham needed Goldstein’s approval to agree to the alleged fee arrangement and did not have such approval. As he testified, “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.**”⁸ This actual knowledge negates the notion of apparent authority.

Even without regard to such actual knowledge, under this Court’s holding in *Smith*, Goldstein would have had to do more than just employ Willingham, provide her with business cards, an office, and a telephone, and allow her to interact with clients. Rather, he would have had to objectively manifest to Høglund that she had authority to bind him to the alleged fee agreement, with Høglund’s interpretation of such manifestations being objectively reasonable. With the record devoid of

⁶ *Id.*, at 366.

⁷ *Id.*, at 368.

⁸ RP 69-70 (Emphasis added.)

any such evidence, the reference to apparent authority contained in Finding of Fact No. 5 fails as being unsupported by substantial evidence.

2. Goldstein's Receipt of a Contingent Fee Pursuant to a New Fee Contract with Client Robert Bostwick was not a Ratification of the Entirely Separate Oral Fee-Sharing Agreement Advanced by Hoglund.

Hoglund argues that by accepting part of the ultimate contingent fee, Goldstein "ratified" and thus became bound by the September 29, 2003 contract. However, Goldstein's acceptance of the benefits of the October 2003 Goldstein-Bostwick fee agreement is immaterial to ratification of the alleged Hoglund agreement – a totally different contract, of which he was unaware. Implied ratification occurs

[I]f the . . . principal, with **full knowledge of the material facts** (1) receives, accepts, and retains benefits from **the contract**, (2) remains silent, acquiesces, and fails to repudiate or disaffirm **the contract**, or (3) otherwise exhibits conduct demonstrating an adoption and recognition of **the contract** as binding.⁹

The present case involves two entirely separate contracts: the October 2003 Goldstein-Bostwick contingency fee agreement *which Goldstein approved of and knew about*, and the alleged September 29, 2003 oral assistance agreement asserted by Hoglund, *which Goldstein neither approved nor knew about*. Acceptance of the benefits of the former simply did not equate to a knowing acceptance latter.

⁹ *Smith*, 63 Wn. App. at 369, quoting *Barnes v. Treece*, 15 Wn. App. 437, 443, 549 P.2d 1152 (1976). (Emphasis added.)

The Goldstein firm's receipt of part of the contingent fee from its own fee agreement with client Robert Bostwick was a benefit of the *Bostwick* contract, not the alleged Hoglund contract.

Since Goldstein knew nothing of the alleged Hoglund contract, it logically follows that there could be no inference from the evidence in the record that he knowingly acquiesced in, recognized, or adopted Hoglund's fee-sharing expectations as binding.

3. As the Agent of a Disclosed Principal, Willingham Would Have no Personal Liability on the Contract, if One Existed.

Since Hoglund offers no legal authority or argument to rebut Petitioners' Argument that Sherelle Willingham, as the agent of the Goldstein Law Firm, a disclosed principal, could have no personal liability on the alleged contract, Hoglund would be deemed to have conceded Petitioners' position on this issue.

4. Substantial Evidence did not Support Finding of Fact No. 6 and Conclusion of Law No. 3, That the Parties Formed an Express Agreement That Hoglund Would be Paid \$40,000.00 out of any Recovery in the Bostwick Case.

In his first Complaint, Hoglund asserted only one cause of action, which was for quantum meruit for the value of Mr. Hoglund's "work product and services" rendered in the case prior to his quitting in October 2003. Paragraph 7 of the Complaint¹⁰ reads:

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 the defendants anticipated that the plaintiff would continue to assist in the Bostwick representation. The plaintiff provided all of his work

¹⁰ CP 605-6.

product to the defendants and met with them in December 2003 to discuss his continued involvement in the case. **Though the parties agreed that the plaintiff would continue to assist in the case, the parties did not reach an agreement as to his compensation.**

In Paragraph 11 of the Complaint, Mr. Hoglund defined the measure of his claimed damages as “the reasonable value of [his] labor and services”,¹¹ which had already been furnished. Nowhere does he allege a cause of action for breach of an oral agreement to pay a liquidated sum.

On April 26, 2005, Hoglund filed an Amended Complaint, the one that was operative at the time of trial. The fact allegations, including paragraph 7, were identical to those of the original Complaint, and the quantum meruit claim remained. The only change was to add a cause of action for “breach of contract”.¹² The contract relied upon was not then with Ms. Willingham for \$40,000.00 or even \$50,000.00, rather the Graf agreements.

In Paragraph 11, Hoglund alleges that Ms. Willingham and Mr. Goldstein “assumed the contractual obligations of Dan Graf, including the fee obligation of Mr. Hoglund”,¹³ and that the contract breach was in failing to compensate him according to those contracts, not any new oral “modification” agreement between them and Mr. Hoglund.

Hoglund was consistent in his deposition and trial testimony that no agreement was reached as to his compensation between him and

¹¹ CP 608.

¹² CP 20-21.

¹³ CP 21.

Sherelle Willingham on September 29, 2006 or in the December 2003 meetings among Hoglund, Willingham, and Meeks. Hoglund's deposition and trial testimony was extensively quoted in the opening brief of these respondents, and those quotes will not be repeated here. Hoglund was unequivocal that Sherelle Willingham agreed to no particular fee amount in their September 29, 2003 meeting: **"... she just couldn't agree to a definite fee amount that I would be paid. Q. She didn't agree to it, did she?" A. No."**¹⁴

At trial, Mr. Hoglund admitted that the parties never reached an agreement as to what his further scope of work, if any, would be.¹⁵ He admitted in his trial testimony that since the Graf firm had dissolved and since Willingham had taken Bostwick's file, Bostwick was being transferred to the Goldstein firm, that a new attorney-client fee agreement would have to be entered with Mr. Bostwick, and that a new written Association Agreement would have to be prepared and signed if Hoglund were to have a continued role in the case.¹⁶ He admitted that he considered the earlier Graf fee agreements "dead and superseded" by the October 2003 Goldstein-Bostwick contingent fee agreement.¹⁷

¹⁴ RP 66-67 (Emphasis added.)

¹⁵ Finding of Fact 11; CP 118.

¹⁶ RP 34.

¹⁷ RP 63. Although Hoglund argues for the first time on appeal that Respondent's Brief that the parties made an "oral modification" of the Graf association agreement, this argument is disposed of by his concession that the Graf-Bostwick contingent fee agreement (Exh. 1) was superseded, since the Association of Counsel Agreement (Exh. 2) is plainly integrated and tied by its own language to the contingent fee agreement. Once the contingent fee agreement became superseded, the Association of Counsel Agreement lost all force and effect by its very language.

Since the Graf Association Agreement and Graf-Bostwick Contingent Fee Agreement expressly created no role for Hoglund other than as lead trial counsel, and denied him any fee upon his voluntary withdrawal, Hoglund found himself mid-trial with no support for the breach of written contract theory pled in his Amended Complaint. He had performed all work on the file before October 23, 2003, during the time when he was still lead attorney operating under the Graf agreements. Therefore, with his decision to quit the Bostwick case being entirely voluntary, any quantum meruit theory was equally untenable. In the absence of any evidence that the parties agreed to his continued scope of work or amount of compensation, Hoglund could not support an alleged “oral assistance” agreement to stay on in some lesser capacity than lead trial lawyer. He clearly needed a different theory and different testimony to survive a defense motion for dismissal at the close of the plaintiff’s case.

So, after a noon recess during his cross-examination, Hoglund testified for the first time: “She agreed in September to a minimum of \$40,000.00 based on the value I had brought to the case in the mediation, and there was no disagreement that she was going to associate me as an attorney...”¹⁸ And, for the first time, he began to advance the idea that he “agreed” to step down as lead trial lawyer in exchange for such agreement. This is the testimony and theory that the trial court adopted to support

¹⁸ RP 69.

Finding of Fact No. 6 and Conclusions of Law 2 and 3. The trial court erred in these findings and conclusions in two major respects.

First, all reasonable inferences from the evidence corroborate and compel the conclusion that Hoglund's decision to withdraw as lead counsel was firm, irreversible, and totally voluntary, brought about by nothing other than his decision to shut down his practice. Hoglund had shut down his office, laid off his staff and delivered the physical file to Ms. Willingham. He signed a substitution of counsel and received reimbursement for all of his advanced costs. He testified in his deposition that under no circumstances was he going to continue as lead counsel:

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12 Q Because you've -- what I heard your testimony today is all
13 along you made it clear that you had decided that you
14 didn't want to be the lead trial lawyer. Okay?

15 A At trial.

16 Q Okay. And so you said if you had gotten this word you
17 would have put a lien claim on, or whatever.

18 **My question to you was if you had gotten that, what**
19 **I'm hearing you say you're thinking all along you're still**
20 **going to be involved in the case, and then all of a sudden**
21 **you find out that you're not. And you're saying if you**
22 **had known earlier you would have done something. Included**
23 **in what you would have done, would you have then said I**
24 **want to go back on as lead trial lawyer?**

25 A No.

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1 Q Why not?

2 A No. Because I had already made that decision and made

3 that communication completely clear to the client and to
4 Ms. Willingham and to you that I didn't have any interest
5 in being the actual lawyer at trial, but that I was
6 willing to bring my knowledge, expertise, and experience
7 with this case and this client to bear in terms of the
8 most successful resolution that could be afforded either
9 out of trial or at trial.

10 Q Okay.¹⁹

Under CR 52, as construed by several decisions of the Supreme Court, it is necessary for the trial court to make ultimate findings of fact concerning all of the material issues. *See, Bowman v. Webster*, 42 Wn.2d 129, 253 P.2d 934 (1953); *Gnash v. Saari*, 44 Wn.2d 312, 367 P.2d 674 (1954). The record in this case is devoid of sufficient evidence and of any particular finding that would support the notion that Hoglund detrimentally relied on any action or inaction on the parts of defendants Willingham and/or Goldstein affecting his decision to withdraw. His later changed testimony is insufficient and in fact is incompetent. “Substantial evidence” does not mean just any evidence. “Substantial evidence” is to be distinguished from a “mere scintilla” of evidence: It is “that character of evidence which would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed”. *Helman v. Sacred Heart Hosp.*, 62 Wn.2d 136, 149, 381 P.2d 605 (1963).

Moreover, this changing of testimony is so offensive to basic principles of candor to the tribunal and the orderly administration of justice that it cannot rationally support Finding of Fact No. 6 or

¹⁹ CP 681.

Conclusion of Law No. 3, regardless of what the trial court thought of the relative credibility of the parties.

Judicial estoppel is an equitable doctrine that precludes a party from taking a position in a court proceeding and later seeking an advantage by clearly taking an inconsistent position.²⁰ “The purposes of the doctrine are to preserve respect for judicial proceedings without the necessity of resort to the perjury statutes; to bar as evidence statements by a party which would be contrary to sworn testimony the party has given in prior judicial proceedings; and to avoid inconsistency, duplicity, and ... waste of time.”²¹

In deciding whether to apply judicial estoppel, a court considers three factors: (1) whether the party’s later position clearly conflicts with its earlier one, (2) whether the party persuaded a court to accept its early position such that its acceptance of an inconsistent position in a later proceeding creates the perception that the party misled either the first or the second court, and (3) whether the party derived an unfair advantage over or imposes an unfair detriment on the opposing party if not estopped.²²

²⁰ *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006).

²¹ *Id.*, quoting *Cunningham v. Reliable Concrete Pumping*, 126 Wn. App. 222, 225, 108 P.3d 147 (2005).

²² *Id.*, 127 Wn. App. at 379, citing *New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121 S. Ct. 1808 149 L. Ed. 2d 968 (2001).

The positions taken by the litigant in two different proceedings must be “not merely different, but so inconsistent that one necessarily excludes the other”.²³

Although judicial estoppel ordinarily applies to positions taken in prior litigation, this Court should find the purpose of the judicial estoppel doctrine applicable to contrary positions taken in the same lawsuit. This is consistent with the purpose of the doctrine, which is to “prevent a party from ‘playing fast and loose’ with the courts and to ‘protect the essential integrity of the judicial process.’”²⁴ This is also consistent with the rule of *Marshall v. A. C. & S, Inc.*, 56 Wn. App. 181, 782 P.2d 1107 (1989), which precludes parties from attempting to beat summary judgment by concocting facts that flatly contradict previous clear testimony to gain unfair advantage. A declaration “flatly contradicts” previous deposition testimony when it “presents a different account in the prior deposition” and “presents new information and a different recollection”.²⁵

In summary, this Court should hold that Finding of Fact No. 6 and Conclusions of Law 2 and 3 were not based on substantial evidence, based on the competent evidence that is in the record.

5. Issues Relating to Admission of Evidence of Settlement Offers, Prejudgment Interest and Service of Process.

Goldstein and Willingham adopt and rely on the authorities and arguments presented in the Appellants’ opening briefs on these issues.

²³ *Markley v. Markley*, 31 Wn.2d 605, 615, 198 P.2d 486 (1948).

²⁴ *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982).

²⁵ *McCormick v. Lake Wash. School Dist.*, 99 Wn. App. 107, 111-12, 992 P.2d 511 (1999).

III. CONCLUSION

Finding of Fact No. 2 regarding apparent authority is erroneous as unsupported by substantial evidence. Willingham had neither actual nor apparent authority to bind the Goldstein firm to the alleged fee-sharing agreement. Hoglund's position is negated by his own actual knowledge that Willingham did not have authority to so contract on Goldstein's behalf. Nor was there any evidence of objective manifestations by Jay Goldstein that would have reasonably created the appearance of such apparent authority in Willingham. By offering no rebuttal authority or argument, Hoglund concedes that as the agent of a disclosed principal, Willingham cannot be held individually liable on the alleged contract.

Goldstein did not "ratify" the alleged September 29, 2003 oral agreement because he did not know about it, and because he derived no tangible benefit to be gotten therefrom under circumstances meeting the legal definition of ratification. Acceptance of part of the fee from the completely separate Goldstein – Bostwick contingent fee agreement is immaterial.

Finding of Fact No. 6 and Conclusions of Law 2 and 3, holding that Hoglund stepped down as lead counsel in exchange for a liquidated fee of "at least" \$40,000.00 are unsupported by substantial evidence, and in fact contrary to the substantial evidence. After stepping down as lead trial counsel, any further proprietary interest by Hoglund in Mr. Bostwick's case could only have arising under a new written fee agreement with the client. By the plain operation of the Graf attorney

client fee contract and the Graf-Hoglund Association of Counsel agreements, Hoglund waived and forfeited any fee by voluntarily withdrawing. After pleading in his complaint and amended complaint, testifying at trial and in deposition that the parties never reached any agreement as to his compensation, Hoglund deliberately changed his testimony during trial in a manner that flatly contradicted his earlier testimony. It was error to give the contradictory testimony any weight. The changed testimony and newly concocted theory that he withdrew from the client's representation in exchange for or in reliance on the alleged fee-sharing agreement with the appellants is offensive to the notions of fairness and integrity of the justice system and should be deemed incompetent.

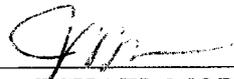
In summary, by the clear language of the operative attorney-client fee contracts and the law of Washington as stated in *Ausler v. Ramsey*²⁶ and similar cases, Hoglund's entitlement to a contingent attorney fee was dependent on his assumption of risk on the file and assumption of complete responsibility for the representation. During the time he retained his entitlement to a substantial fee, he retained the risk of a bad result and the responsibility for seeing the case through trial, which was only a few months away. He knew very well that once he withdrew, his action would force Sherelle Willingham and the client to find another lead attorney with the firepower to take the case to trial. Although now, disingenuously, he

²⁶ 73 Wn. App. 231 (1994).

attempts to create the facade that he withdrew in reliance on assurances of the defendants, his own testimony proves conclusively that his decision to withdraw was definite, irrevocable and completely voluntary. Once he stepped down as lead trial counsel, Hogle retained neither risk nor responsibility for Mr. Bostwick's representation, and his entitlement to a contingency fee became waived at that point.

In conclusion, Appellants Goldstein and Willingham request that this Court REVERSE the decision of the trial court, and remand with instructions for dismissal.

DATED this 6 day of March, 2007.

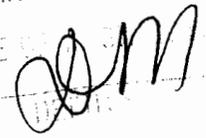


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I declare under penalty of perjury under Washington law that the foregoing is true and correct. Executed this 6th day of March, 2007.



J. Michael Morgan