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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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42216-6-II
COURT OF APPEALS NO. ~~39483-9-II~~

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

DANIEL E. BELSVIG,

Appellant,

v.

RANDY JOE KARR AND LAUREN W. BELSVIG,

Respondents.

REPLY BRIEF OF APPELLANT

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

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

ORIGINAL

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Reply to Respondent's Statement of the Case.

On March 4, 2008, Daniel Belsvig retained Peter Kram, of the law firm of Leggett & Kram, pursuant to a Contingency Agreement (CP 13), to recover for injuries he sustained as a result of being assaulted by Randy Karr.¹ The Contingency Agreement provided in pertinent part:

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

This contract provision is not enforceable.² But neither is it applicable, since Kram consented to the substitution of new counsel after he told Belsvig he was going to withdraw if he did not get a "reasonable settlement figure" by December 2, 2009, and that

¹ On November 14, 2008, Belsvig agreed to amend the contingency fee agreement by substituting the law firm of Kram, Johnson, Wooster & McGlaughin, P.S. in place of Leggett and Kram. CP 12.

² *Kimball v. PUD 1*, 64 Wash.2d 252, 257, 391 P.2d 205 (1964); *Barr v. Day*, 124 Wash.2d 318, 329, 879 P.2d 912 (1994)(Unlike general contract law, under a contract between an attorney and a client, a client may discharge the attorney at any time with or without cause.)

it might be more appropriate for Belsvig to find another lawyer whose view of the value and nature of this case was more closely aligned with his. CP 24-25.

The Respondent now asserts in his Brief:

Defense counsel repeatedly sought a date on which to resume the deposition [of Mr. Belsvig]. Belsvig refused to provide any information regarding this matter or communicate with counsel. CP 7-14; 61-73. Belsvig also declined to provide a hard figure in response to defenses [sic] request for a settlement demand. Despite repeated efforts, Mr. Belsvig's attorney was unable to obtain a date for the resumption of the deposition and any authority to settle the matter.³

While Belsvig acknowledges that he and Kram disagreed about the value of the case, and that he was unwilling to give Kram the authority to settle his case for considerably less than what he believed his case to be worth, (CP 8, 20-21)⁴, there is no evidence in the record that he refused to communicate with Kram to obtain a date for the resumption of his deposition.

³ Brief of Respondent at 3-4.

⁴ Kram wanted Belsvig to give him the authority to settle his case for one-tenth of what he ultimately settled for, without having spoken to any of his doctors, and Belsvig was unwilling to do so. CP 21.

Significantly, Kram said nothing about *repeatedly* seeking a date from Belsvig for resuming his deposition, or Belsvig's alleged refusal "to provide any information regarding this matter or communicate with counsel" when he wrote Belsvig his letter on November 30, 2009, (CP 24-25). Kram refers to only one occasion when defense counsel sought one particular date for resuming Belsvig's deposition, and Belsvig had indicated that he was not available. While Belsvig had yet to provide Kram with other dates, there is no evidence Belsvig refused "to provide any information regarding this matter or communicate with counsel". Moreover, while Kram did chastise Belsvig for not making himself available on the one date requested by defense counsel, he made it clear that his chief concern was getting a "reasonable settlement figure" from him:

Ms. First [defense counsel] requested that she wrap up your deposition on Wednesday afternoon, November 25, 2009. You declined to make yourself available despite having no reason other than you would not be available. With no employment and no other appointments this is simply not acceptable.

More significantly, I requested a reasonable settlement figure from you and

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

This is the first reference in the record where Kram requests “some December, 2009, dates to finish” Belsvig’s deposition.

The only other reference to deposition dates is inadmissible hearsay, ER 802; namely a copy of a handwritten note purportedly written by “Stacey”, dated December 3, 2009, at CP 66, three days after Kram’s letter of November 30, 2009, in which she reports that she e-mailed Dan Belsvig the day before on December 2, 2009, to see if January 21, 2010 at 11 a.m. would be a good date for his deposition, that she had not yet heard back, but that the January

21, 2010 date was “the only date that works with Mr. Kram’s schedule”. No copy of any such e-mail was produced.

Yet, according to that same handwritten hearsay note, CP 66, Stacey reports that Daniel Belsvig called on December 3, 2009 to report that “he wants to get different counsel” and that “he has talked to some atty’s [sic]”.

Even if this handwritten note was admissible, it is hardly evidence that Belsvig refused to communicate or to cooperate with Mr. Kram, but rather is evidence that Belsvig is following through with what Mr. Kram told him to do, i.e. find another lawyer, CP 24-25:

Absent a reasonable settlement figure received from you by noon on Wednesday, December 2, 2009, I will have no choice but to withdraw. While I would be happy to continue this case with a reasonable settlement figure in hand and some December, 2009, dates to finish your deposition I do not now have them. It may be more appropriate for you to find another lawyer whose view of the value and nature of this case is more closely aligned with yours. These things happen in litigation.

Similarly, Belsvig did not retain Nelson Berry to take over his lawsuit until December 4, 2009, CP 71-73, four days after Kram’s

letter of November 30, 2009. Although Kram now contends that Belsvig must have retained Berry before December 4, 2009, there is no evidence which supports his speculation.

Kram filed his Notice of Intent to Withdraw (CP 1-2), and his Notice of Claim of Attorney's Lien on December 8, 2009 (CP 3-4).

A Notice of Withdrawal and Substitution of Counsel was filed a week later on December 15, 2008, identifying C. Nelson Berry III as Belsvig's new counsel. (CP 5-6). At no time did Kram object, or otherwise refuse to consent to this substitution.

Argument.

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

Like the attorney Blumenthal in *Ausler v. Ramsey*, 73 Wash.App. 231, 234, 238-239, 868 P.2d 877 (1994), Kram suggests, at least in the title of his Argument (though not much in the body), that his withdrawal was justified because "the client refused to co-operate in conducting discovery, refused to communicate with counsel and had already substituted counsel

without counsel's knowledge or consent as required by contract".⁵

But, as previously noted, there is no evidence in the record to support any of these allegations.⁶

And indeed, it is "unjustifiable for an attorney to withdraw from a case because the client has retained other counsel,"⁷ even though Belsvig did not do so, until after Kram told him "to find another lawyer whose view of the value and nature of this case is

⁵ Brief of Respondent at 5.

⁶ Nor as Kram suggests was it necessary to obtain a transcript of the hearing before the Honorable John McCarthy on his Motion to Pay Attorney's Lien, CP 15, since it was not an evidentiary hearing, but rather a ruling based on declarations. In this instance, the lower court made no findings of fact. But even if it had, a Court of Appeals is not bound by a superior court's findings of fact that are based on documentary, nontestimonial evidence. In such a situation the Court of Appeals is as competent as the Superior Court to weigh and consider the evidence. *In re Estate of Reilly*, 78 Wash.2d 623, 654, 479 P.2d 1 (1970) ("...where deposition testimony is before an appellate court and the witness did not testify orally at the trial court, the latter's findings with respect to such testimony may be disregarded....In such a situation the appellate court will determine from the deposition what findings should have been made."); *Smith v. Skagit County*, 75 Wash.2d 715, 718-719, 453 P.2d 832 (1969); *Danielson v. City of Seattle*, 45 Wash.App. 235, 240, 724 P.2d 1115 (1986).

⁷ *Ausler v. Ramsey*, 73 Wash.App. at 236-236 (after quoting this passage from 88 A.L.R.3d states: "We explicitly adopt this general rule.").

more closely aligned with yours.”

Instead, Kram spends the great bulk of his Argument⁸ arguing about the reasonableness of his fees...an argument that is completely irrelevant since Kram waived his right to fees when he told Belsvig to seek other counsel because they disagreed about the value of Belsvig’s case. The facts in this case are squarely on point with those found in *Ausler v. Ramsey*, 73 Wash.App. at 239:

The record shows that Ausler [Belsvig] and Blumenthal [Kram] disagreed both over the value of the suit and as to whether it should be arbitrated or tried. RPC 1.2(a) states that an attorney “shall abide” by the client’s decision whether to accept a settlement offer. *Compare Falco*, 233 Cal.Rptr. at 815. Blumenthal was not forced out of the case by Ausler’s recalcitrance. He was not constructively fired. Rather, without sufficient justification shown in this record, he voluntarily withdrew before the contingency was realized. On these facts Blumenthal waived his fee.

And so did Mr. Kram.⁹

⁸ Brief of Respondent at 5-10.

⁹ An attorney employed on a contingency 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”. *Hensel v. Cohen*, 155 Cal.App.3d 563, 564, 202 Cal.Rptr. 85 (1984).

2. Daniel Belsvig Is Entitled To Recover His Attorney Fees On This Appeal.

Mr. Kram asserts that he is entitled to an award of his attorney fees on appeal because the Contingency Agreement expressly provides for such fees, CP 13:

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

The Court in *Ausler v. Ramsey*, 73 Wash.App. at 235 addressed this issue in its discussion of *Ross v. Scannell*, 97 Wash.2d 598, 647 P.2d 1004 (1982):

In *Ross*, an attorney and his client became embroiled in a fee dispute concerning previous representation. As a result, the attorney did not complete representation in a second matter for the same client. The client was to pay a contingent fee for these services. *Ross*, 97 Wash.2d at 608, 647 P.2d 1004. The court considered whether an attorney who stopped providing legal services could recover based on a contingent fee contract "prior to full consideration of the contingency." *Ross*, 97 Wash.2d at 608, 647 P.2d 1004.

The court held that, "under the circumstances of this case an attorney may not recover on the

contract but must seek recovery of fees on the theory of quantum meruit." *Ross*, 97 Wash.2d at 608, 647 P.2d 1004. That holding does not establish that any attorney who withdraws from a contingent fee representation may always recover fees in quantum meruit. Rather, it establishes that the measure of recovery should be quantum meruit, as opposed to some portion of the contingent contract. The court concluded, "if *Ross* is entitled to attorney fees, the measure of those fees is not the contingent fee agreed upon but the reasonable value of the services rendered." (Italics ours.) *Ross*, 97 Wash.2d at 609, 647 P.2d 1004. We must determine whether or not Blumenthal is entitled to fees.

Thus, the Contingency Agreement between Kram and Belsvig, including its attorney fee provision, is no longer enforceable. Kram cannot recover on this contract.

This is also why both Mr. Kram and the court below erred in their belief that Mr. Kram's voluntary withdrawal before the contingency was realized somehow converted the Contingency Agreement into an hourly fee agreement.

Thus, even if Kram's withdrawal before the contingency had been realized had been for "good cause" or "justified", it would have been error for the court below to enter a judgment for his attorney fees, based on his normal hourly rate, as the court did here. Rather, "the measure of recovery should be quantum meruit, as

opposed to some portion of the contingent contract.”¹⁰

The cases relied upon by Kram do not support a different result. *Payette v. Willis*, 23 Wash. 299, 63 Pac. 254 (1900) involved a special proceeding where the attorney, after successfully prosecuting the case through an appeal, refused to permit his client to substitute new counsel until he was paid.

Unlike the present case, *Payette v. Willis, supra*, did not involve a contingency fee agreement, or a situation where the attorney refused to consent to the substitution of new counsel without first being paid. Nonetheless, the Court’s observations in that case are instructive as to why its holding does not apply in a contingency fee case, where the attorney voluntarily withdraws before the contingency has been met:

The substitution, however, of attorneys is a matter largely in the discretion of the court, and we do not say that there may not be a case in which attorneys may be discharged without paying or securing fees already earned. We do say that the rule of law is that fees or commissions *already earned* must be paid or secured before substitution can be had. If this is impossible in any given case, this fact must be shown by the party moving the discharge and substitution, and then it should

¹⁰ *Id.*

appear that justice to the client or attorney demands the change.¹¹ [emphasis added].

When Kram elected to withdraw in this case, before the contingency had been realized, no fees had yet been earned.

In any event, this case does not support Kram's contention that the fee shifting provision in the Contingency Agreement entitles him to an award of his attorney fees on this appeal, after he voluntarily withdrew from that Agreement before the contingency had been satisfied, and that agreement was no longer operable.

In *Ramey v. Graves*, 112 Wash. 88, 91, 191 P. 801 (1920), the Court held that where an attorney had been discharged or prevented from rendering the services he had contracted to perform, pursuant to a contingency fee agreement, he was not entitled to recover his contingency. Nor was he entitled to recover his hourly fees. Rather, he was only entitled to recover "reasonable compensation for the services actually rendered".¹²

But in this case, Kram was not discharged. Nor was he

¹¹ *Payette v. Willis*, 23 Wash. at 308.

¹² In *Ausler v. Ramsey*, 73 Wash.App. at 235 n.2, the Court explained that this meant in quantum meruit.

prevented from rendering the services he had contracted to perform. Rather, when he disagreed with his client about the value of his case, Kram told Belsvig, CP 24-25:

Absent a reasonable settlement figure received from you by noon on Wednesday, December 2, 2009, I will have no choice but to withdraw....It may be more appropriate for you to find another lawyer whose view of the value and nature of this case is more closely aligned with yours.

When Belsvig found another lawyer, as Kram had told him to do, Kram voluntarily withdrew, and consented to Nelson Berry substituting as Belsvig's counsel.

Once again, this case does not support Kram's contention that his Contingency Agreement remained enforceable following his voluntary withdrawal before the contingency was realized, much less, that he is entitled to an award of the attorney fees he has incurred on this appeal because his Contingency Agreement provided for an award of reasonable attorney fees, if he had to sue to enforce its terms.

In the first instance, Kram is not suing to enforce its terms. Rather, even if his withdrawal had been for "good cause" or "justified", which it was not, his measure of recovery would have

been based on quantum meruit, not the Contingency Agreement.¹³ Both the lower court and Kram erred in their belief that when Kram withdrew, the Contingency Agreement transformed into an hourly fee agreement.

However, since Mr. Kram is now contending that Belsvig is liable for the reasonable attorney fees he has incurred during the course of this appeal because the Contingency Agreement contains a fee-shifting provision----even though he voluntarily withdrew before the contingency was met, thereby rendering that Contingency Agreement unenforceable----Belsvig is entitled to an award of the reasonable attorney fees he has incurred on this appeal.¹⁴

CONCLUSION

The court below erred by awarding Peter Kram attorney fees when he voluntarily withdrew from the parties' Contingency Agreement, before the contingency was realized, because he disagreed with his client, Daniel Belsvig, about the value of his

¹³ *Ausler v. Ramsey*, 73 Wash.App. at 235.

¹⁴ *Herzog Aluminum, Inc. v. General American Window Corp.*, 39 Wn.App. 188, 197, 692 P.2d 867 (1984).

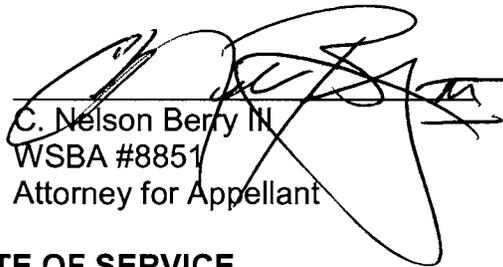
case. Under such a circumstance, Kram's withdrawal was not for "good cause" or "justified", and he thereby waived his right to a fee.

The court erred a second time by calculating that award based on Kram's normal hourly rate. When Kram withdrew, his Contingency Agreement did not become an hourly fee agreement. Even if Kram's withdrawal had been for "good cause" or "justified", which it was not, his recovery could only be based on a quantum meruit basis, not on an hourly fee basis.

Finally, since Kram contends he is entitled to an award of his reasonable attorney fees incurred on this appeal based on the fee-shifting provision in the Contingency Agreement, which is no longer enforceable, Belsvig is entitled to an award of his reasonable attorney fees incurred on this appeal.

The lower court should be reversed, the Judgment and Order on Motion to Pay Attorney's Lien should be vacated, and a judgment should be entered in favor of Daniel Belsvig and against Peter Kram for the reasonable attorney fees and costs Daniel Belsvig has incurred on this appeal.

Respectfully submitted this 10th day of October, 2011.

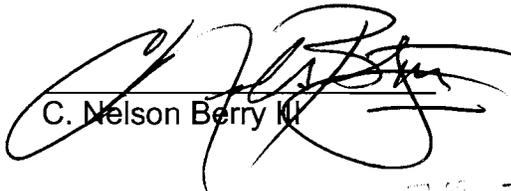

C. Nelson Berry III
WSBA #8851
Attorney for Appellant

CERTIFICATE OF SERVICE

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

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

Attorney for Respondent


C. Nelson Berry III

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STATE OF WASHINGTON
BY _____
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