COURT OF APPEALS
DECISION
DATED AND FILED

November 9, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1719-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

MICHAEL ABLAN LAW FIRM, S.C.,

PLAINTIFF-APPELLANT,

V.

ROBIN ADAMS AND VICKI ADAMS,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for La Crosse County: JOHN J. PERLICH, Judge. *Affirmed.*

¶1 DEININGER, J.[1] Michael Ablan Law Firm, S.C.,[2] appeals a small claims order dismissing a claim for attorney fees against Robin and Vicki Adams.

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1997-98) and is an expedited appeal under WIS. STAT. RULE 809.17 (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

Ablan claims the trial court erred in determining that no attorney fees were due because there was no recovery on the object of the parties' contingency fee agreement "within a reasonable time." We agree that Ablan was not entitled to receive any fees because the Adams had received no recovery by the time of trial. Accordingly, we affirm the appealed order.

BACKGROUND

¶2 The Adams retained Ablan to perform legal services involving the "copyright, publication, literature, movie, novel or other value and monetary remunerations" pertaining to the diary of a WWII German soldier which had come into the Adams' possession. Ablan specifically agreed to perform the following tasks:

> [L]ocate an interpreter, design confidentiality agreements, copyright to the extent provided by law, and promote the diary's publication. Also, we will assist in determining its literary value, the prospects for adaptation to television, movie, novel, or other medium that will protect or enhance its value and additionally obtain monetary remuneration. These efforts include negotiation and drafting of all necessary contracts, licenses, distributorship agreements, and other legal documents.

Under the parties' fee contract (which consisted of a form used for personal injury contingency fee agreements, to which handwritten modifications were made), the Adams agreed to pay Ablan one-third "of any amount recovered from any source," or forty percent "of any amount recovered if it is necessary to initiate collection proceedings for these fees."

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[2] Michael Ablan appeared and gave testimony at the trial in this matter. We refer to both him and his firm, interchangeably, as Ablan.

¶3 The fee agreement, executed in December 1994, also contained the following provision, which is at the heart of this dispute:

> I give my attorney above named a lien upon this and any related cause of action and upon the proceeds from any action taken that sells, licenses, or distributes and on all proceeds, as security for fees in the conduct of the litigation. The client maintains the right to discharge the attorney, in which event the attorney has a right to recover reasonable attorney's fees accrued.

The Adams were also obligated under the agreement to reimburse Ablan for "expenses" incurred on their behalf, including "court costs, deposition expenses, services and testimony of expert witnesses and investigators and other discovery procedures."

¶4 In January 1999, the Adams discharged Ablan and sought other counsel regarding the publication of the diary. Ablan sent them a bill for fees in the amount of $4,425.55, based on hourly rates of $130 for Ablan and $70 for another member of the firm, plus "additional charges" of $91.50, which consist of long distance phone calls, copies, and fees paid to the U.S. Copyright office. Ablan testified that due to problems in his firm's "time slips program," the original billing contained some duplicated entries, and that the actual amount due was "$3,223."[3] He also testified that the Adams had expressed "not a word" of disappointment to him regarding the services he had rendered them.

¶5 Vicki Adams testified that she and her husband "didn't want to hire the firm on an hourly basis," and opted for the contingency fee agreement instead:

[3] Ablan sued for $3,062.56. When questioned about the variance between the amount sued for and the amounts reflected on an "itemized billing," which Ablan had annotated to remove duplicated charges, he testified "I guess I don't know where that figure came from. 3,223 is the actual figure, but somewhere in there, around I would say $3,000."

> The way I understood is we didn't have to worry about anything. It was, you rolled the dice on the table and said it was a gamble, that if it goes, it goes, if it don't, it don't, but you would take care of everything, and it wouldn't cost us anything, and that's why you got your one-third after it was all, all done with.

Although Adams was not asked why she and her husband had discharged Ablan, she testified in response to a different question, "this here with the diary has, from '94 for five years has not had anything done, nothing." The parties stipulated that "this is a contingent fee case," that the Adams "terminated" Ablan and hired other counsel, and that "nothing has ever been recovered on this diary … to the present time."

¶6 At the conclusion of the testimony, the trial court informed Ablan that his proffered trial brief, as well as a motion from the Adams's counsel, were "not necessary." The court explained that it deemed ambiguous the contract provision calling for "a right to recover reasonable attorney's fees accrued" if the Adams discharged Ablan, and that the provision was not "sufficiently clear to turn this contract from a contingency fee one into an hourly basis." The court noted "that it is a contingency contract which gives [Ablan] a right to recover a percentage of anything recovered, but nothing has been recovered." It also concluded that, absent any durational terms in the contract, it would hold the "ambiguity … against" Ablan, and thus, "he is entitled to a portion of any recovery within a reasonable time." Finally, the court determined that "we're beyond the reasonable time built in[to] … the contract," and dismissed Ablan's claim.

¶7 Ablan appeals the subsequent order dismissing the claim.

ANALYSIS

¶8 Whether a contract is ambiguous presents a question of law, which we decide independently of the trial court. *See* ***Wausau Underwriters Ins. Co. v. Dane County***, 142 Wis. 2d 315, 322, 417 N.W.2d 914 (Ct. App. 1987). A contract is ambiguous if its terms are susceptible to more than one reasonable interpretation. *See* ***Wilke v. First Fed. Sav. & Loan Ass'n***, 108 Wis. 2d 650, 654, 323 N.W.2d 179 (Ct. App. 1982). If a contract is ambiguous, the court's duty is to determine the parties' intent at the time of making the contract, which is a question of fact. *See* ***Patti v. Western Mach. Co.***, 72 Wis. 2d 348, 353, 241 N.W.2d 158 (1976).

¶9 We agree with the trial court that the contract provision giving Ablan "a right to recover reasonable attorney's fees accrued" in the event of his discharge is ambiguous. The contract does not explain how "reasonable attorney's fees accrued" at the time of discharge are to be determined. There is no mention of fees being computed on an hourly basis, or of any hourly rate or rates, or of any other method of calculating the fees which might then be due. When a contract term is ambiguous, a court may look to extrinsic evidence to determine the intent of the parties. *See* ***id***. at 351.

¶10 Although the extrinsic evidence adduced at trial does not assist in determining what the parties may have intended with respect to how "reasonable attorney's fees accrued" were to be calculated in the event of Ablan's discharge, the record demonstrates that the Adams had clearly expressed their intent to not bind themselves to the payment of fees on an hourly basis. Ablan himself alleged in the complaint that the "[c]lient wanted to pay us on a basis of a percentage of

the proceeds and did not want to pay an hourly fee." His and Adams' testimony at trial support that allegation.

¶11 Like the trial court, we are unwilling to find an obligation on the part of a client to pay attorney's fees on an hourly basis where the form contract prepared by the attorney does not expressly provide for fees computed in that fashion, particularly when the attorney concedes that the client specifically rejected an engagement based on hourly fees. Supreme Court Rule 20:1.5 provides that, when an attorney "has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing." The contract between the Adams and Ablan met this requirement with respect to the contingency fee, but not with respect to the alternative "reasonable attorney's fees accrued" in the event of Ablan's discharge. Accordingly, we must look elsewhere to determine the amount of "reasonable attorney's fees accrued," if any, to which Ablan may be entitled.

¶12 Because the parties did not clearly express their intent as to how "reasonable attorney's fees accrued" were to be computed, we look to case law to determine the rights of an attorney and his or her former client under a contingency fee contract following the attorney's discharge prior to a recovery on the client's claim. The law in Wisconsin is well-settled:

> The majority rule is that, where the attorney has been employed to perform specific legal services, his discharge, without cause or fault on his part before he has fully performed the work he was employed to do, constitutes a breach of his contract of employment and makes the client liable to respond in damages.... The majority rule commends itself to this court and we adopt the same.
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> ….

> It seems to us that the proper measure of damages to apply in a case like the present is the amount of the contingent fee based upon the amount of the settlement or judgment ultimately realized by the client, less a fair allowance for the services and expenses which would necessarily have been expended by the discharged attorney in performing the balance of the contract.

Tonn v. Reuter, 6 Wis. 2d 498, 503-05, 95 N.W.2d 261 (1959); *see also* ***Knoll v. Klatt***, 43 Wis. 2d 265, 269, 168 N.W.2d 555 (1969).

¶13 We conclude that the "measure of damages" under ***Tonn*** is the appropriate standard by which to calculate the "reasonable attorney's fees accrued" at the time of Ablan's discharge. In short, Ablan is entitled to the agreed upon contingent fee applied to the amount recovered, less an amount representing the fair value of services and expenses necessarily expended following Ablan's discharge in order to accomplish the recovery. *See* ***Knoll***, 43 Wis. 2d at 270. Unlike Ablan's claim for hourly fees, under which Ablan would receive several thousand dollars in fees even though the Adams may never recover a penny, the ***Tonn*** approach preserves the contingent nature of the fee contract, while protecting Ablan's right to share in the Adams' recovery, as well as the Adams' right to discharge Ablan for any reason.

¶14 Accepting Ablan's claim that he is entitled to hourly fees under the contract would ill serve the purposes of contingent fee contracts. If a prospective client were told up front that he or she might become liable for fees on an hourly basis even if no recovery were obtained, we believe it is less likely that counsel would be engaged. (That outcome is certainly a fair inference from Adams' testimony in the present case.) And, if the contract were entered into with a client's full understanding that a premature discharge of counsel would result in the liability for hourly fees, the client's ability to substitute counsel would be

severely compromised. A change of counsel would effectively be limited to only those instances where the most egregious acts or omissions of counsel had occurred—i.e., those that could be deemed to justify a discharge "for cause." Much more subtle and personal factors can lead to a client's loss of trust or confidence in his or her attorney, and if that occurs, the client should not be dissuaded from substituting counsel by having to pay an hourly fees "penalty."[4]

¶15 Here, of course, there has been no recovery, and Ablan is as yet entitled to no fees under ***Tonn***. The trial court thus correctly dismissed Ablan's claim. We find it unnecessary to read into the contract a "reasonable time" provision as the trial court did. Quite simply, Ablan is entitled to no fees unless or until the Adams obtain a recovery on the matters for which they engaged Ablan under the contingency fee agreement. Recognizing this possible outcome, Ablan asks us, in the alternative, to instruct the trial court "to enter judgment in favor of the Law Firm in the amount of 1/3 of any future recovery." We decline to do so for a number of reasons.

¶16 First, as we have noted, under ***Tonn***, Ablan is not entitled to the full contingency fee agreed upon, but only that fee reduced by a fair allowance for the work remaining undone at the time of discharge. There is no way at the present time to even speculate on the amount of remaining work, given that there has been no recovery, and, presumably, some legal work remains to be done before one is obtained. Moreover, the record does not establish whether Ablan was discharged "for cause." The issue was not litigated, as it might have been if Ablan had

[4] By the same token, originally retained counsel should not be deprived of the benefit of his or her bargain, or of compensation for his or her efforts on behalf of the former client, merely because of a personal falling out with the client, not amounting to discharge "for cause." The ***Tonn*** measure of damages thus serves the interests of both attorney and client.

claimed an entitlement to his contingency fee under ***Tonn***. Finally, we note that the contingency fee agreement expressly grants Ablan a lien for his fees "upon the proceeds from any action taken that sells, licenses, or distributes" the diary. The Adams are aware of Ablan's claim for an entitlement to fees for his work on their behalf, as is the Adams' successor counsel, and no judgment is necessary at this time to protect whatever rights Ablan may have under the contract to share in a future recovery.

¶17 Thus, we conclude that any determination of what entitlement to fees Ablan may have is premature. The determination must await the receipt by the Adams of proceeds from the sale or distribution of the diary. We emphasize that nothing in this opinion should be interpreted as implying that Ablan is entitled to fees, or that he is not so entitled, if a recovery is forthcoming. We simply conclude that, on the present record, there is no entitlement to fees under the agreement.[5] Neither should anything in our opinion lead the Adams to conclude that they must continue to pursue the sale or distribution of the diary if they do not wish to do so. *See* ***Knoll***, 43 Wis. 2d at 271 ("'[T]he client has the right to compromise or even abandon his claim if he sees fit to do so.'" (citation omitted)).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

[5] We note that the fee agreement provides that the Adams are liable, in any event, for "all necessary expenses incurred" in the undertaking. We also note that the "itemized billing" submitted by Ablan includes $91.50 in "additional charges." Ablan, however, has not asked for a judgment in this or any other amount for his non-fee "expenses" (or "costs and disbursements," as the contract also refers to them). Accordingly, we do not address any obligation the Adams may have in this regard.