COURT OF APPEALS DECISION DATED AND FILED

May 15, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2006AP801
2006AP802

Cir. Ct. Nos. 2005CV5511
2003CV10726

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

GENET RILEY,

PLAINTIFF-APPELLANT,

V.

KYLE GIOMBI,

DEFENDANT,

CANNON AND DUNPHY, S.C.,

THIRD PARTY-INTERVENOR-RESPONDENT.

JOSEPHINE M. LACAP,

PLAINTIFF-APPELLANT,

FIRST HEALTH GROUP CORP., A FOREIGN CORPORATION,

INVOLUNTARY-PLAINTIFF,

V.

SOCIETY INSURANCE, A MUTUAL COMPANY, A WISCONSIN INSURANCE CORPORATION, METROPOLITAN ASSOCIATES LIMITED PARTNERSHIP, A WISCONSIN LIMITED PARTNERSHIP, AND SOUTHGATE APARTMENTS,

DEFENDANTS,

CANNON & DUNPHY, S.C.,

THIRD PARTY-INTERVENOR-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed*.

APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed*.

Before Fine, Curley and Kessler, JJ.

¶1 KESSLER, J. Attorney James J. Gende, trial counsel for Genet Riley and Josephine M. Lacap, appeals from: (1) trial court orders in their cases which allowed Cannon & Dunphy, S.C. to intervene; and (2) summary judgment in favor of Cannon & Dunphy enforcing an attorney lien on settlement proceeds in

both Riley's and Lacap's cases, including allocation of the fees from those cases between Gende and Cannon & Dunphy according to the terms of Gende's Separation Agreement with Cannon & Dunphy. Because we conclude that the trial courts properly exercised discretion in allowing Cannon & Dunphy to intervene, and properly granted summary judgment in each instance, we affirm.

¶2 We note that in both of these cases, the Retainer Contracts Riley and Lacap first signed with Cannon & Dunphy, and the Employment Contract and Separation Agreement between Cannon & Dunphy and Gende, are identical to those involved in the consolidated cases of other prior Cannon & Dunphy clients later represented by Gende. The real dispute here, as in our prior decision, ***Markwardt v. Zurich American Insurance Co.***, 2006 WI App 200, 296 Wis. 2d 512, 724 N.W.2d 669, is between Gende and Cannon & Dunphy, his former employer. The named clients here, as in ***Markwardt***, have no economic or other discernable interest in the outcome of this proceeding.

I. BACKGROUND

A. Introductory information

¶3 We have previously described in detail the nature of Gende's contracts with Cannon & Dunphy during the time he was employed by that firm. *See* ***id.***, ¶¶1-7. We see no reason to repeat that description here.

¶4 Gende has challenged the validity of the Separation Agreement in a separate action venued in Waukesha County. The trial court upheld the Agreement. Gende's appeal is now pending in District II before the Wisconsin Court of Appeals (***Gende v. Cannon & Dunphy, S.C.***, No. 2006AP1323).

¶5 While Gende was employed by Cannon & Dunphy, Riley and Lacap each signed a Retainer Contract in which they retained "Cannon & Dunphy, S.C.," not Gende, to handle specified personal injury claims. With the exception of the name of the client, the date, and the description of the injury, the Retainer Contracts signed by both Riley and Lacap are identical to the Retainer Contract previously discussed in detail in ***Markwardt***, 296 Wis. 2d 512, ¶¶12-16. Our previous analysis is equally applicable here and need not be repeated. When Gende left Cannon & Dunphy, Riley and Lacap did also and signed a new Retainer Contract with Gende. As in ***Markwardt***, there is no evidence that either of these clients discharged Cannon & Dunphy for cause. We discuss each client's case separately.

B. Riley personal injury case

¶6 Riley was injured in an automobile accident on January 22, 2003. On November 21, 2003, Riley signed a Retainer Contract with Cannon & Dunphy. After Gende left Cannon & Dunphy, Riley signed a new Retainer Contract with Gende Law Offices, S.C. Cannon & Dunphy transferred Riley's file to Gende and on May 26, 2004, notified the insurer, Badger Mutual Insurance Company, that it maintained a lien on any settlement proceeds relating to the January 22, 2003 accident between Riley and Badger Mutual's insured, and requested that Cannon & Dunphy be named on any settlement check.

¶7 On April 14, 2005, Riley, through her counsel Gende, settled with Badger Mutual for $50,000. On May 10, 2005, Gende asked Cannon & Dunphy whether they intended to assert a lien against the settlement proceeds, and if so, in what amount and to provide supporting documentation. On May 18, 2005,

Cannon & Dunphy hand-delivered to Gende its assertion of its lien pursuant to WIS. STAT. § 757.36 (2005-06).[1]

¶8 After learning that Cannon & Dunphy intended to enforce its attorney lien, on June 23, 2005, Gende filed a complaint on Riley's behalf against Kyle Giombi, the individual who was driving the automobile which caused Riley's injury underlying the present action. On August 2, 2005, Giombi answered, denying all the allegations and asserting that he was subject to a pending Chapter 7 Bankruptcy proceeding. On September 14, 2005, Cannon & Dunphy moved to intervene "to protect, enforce and recover its share of attorney fees and costs out of the settlement and any other recovery in this case." Gende (in Riley's name)[2] filed an answer and asserted what were described as affirmative defenses to Cannon & Dunphy's motion to intervene. In addition, Gende moved to strike Cannon & Dunphy's pleadings. Cannon & Dunphy responded with a motion to strike Gende's answer and affirmative defenses. The trial court granted Cannon & Dunphy's motion to intervene on October 28, 2005.

¶9 At a hearing on December 19, 2005, the trial court denied Gende's motion to consolidate this case with ***Gende v. Cannon & Dunphy, S.C.***, No. 2006AP1323, and awarded Cannon & Dunphy its portion of fees and costs from the settlement proceeds according to the terms of the Separation Agreement.

---

[1] All references to the Wisconsin statutes are to the 2005-06 version unless otherwise noted.

[2] Because Gende and Cannon & Dunphy are the only parties with an economic interest in the outcome of the disputes involved in these proceedings, unless otherwise specifically required by the factual context, we will refer to specific court proceedings as between Gende and Cannon & Dunphy.

Gende moved for reconsideration, which the trial court denied. This appeal followed.[3]

C. Lacap personal injury case

¶10 On January 5, 2001, Lacap was injured when she slipped and fell. On May 5, 2001, she signed a Retainer Contract with Cannon & Dunphy. On December 4, 2003, Lacap filed a complaint against the owner and insurer, Society Insurance, of the location where she fell. Cannon & Dunphy, on behalf of Lacap, made a settlement offer of $200,000 on February 10, 2004. After Gende left Cannon & Dunphy, Lacap signed a new Retainer Contract with Gende Law Offices. Cannon & Dunphy transferred Lacap's file to Gende and on May 14, 2004, notified Society Insurance of its lien on any settlement proceeds relating to Lacap's January 5, 2001 fall. The letter specifically noted that "[w]e have reached an agreement with Mr. Gende and do not anticipate the need to place Cannon & Dunphy's name on any checks you might issue." On October 6, 2005, Society Insurance informed the trial court that the parties had settled the matter. A subsequent dispute between Gende and Cannon & Dunphy about apportionment of the costs and fees between them resulted in Society Insurance paying the disputed amount into the clerk of court's office.

¶11 The ***Lacap*** matter was settled for $100,000. Cannon & Dunphy and Gende agreed that the total amount of fees from the settlement would be thirty percent (a reduction from the thirty-three and one-third percent contingency fee

[3] Gende did not address on appeal the trial court's denial of the motion to consolidate. Accordingly, we do not address this issue. ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (issues not argued or briefed are deemed abandoned).

agreed to by Lacap in both her Retainer Contract with Cannon & Dunphy and her subsequent Retainer Contract with Gende). Cannon & Dunphy's counsel informed the court in writing on November 8, 2005, about the fee dispute regarding the settlement funds in the ***Lacap*** matter and about Cannon & Dunphy's intent to move to intervene. On November 9, 2005, the trial court signed a stipulation (between Lacap and the insurance company) and an order for dismissal of the matter with prejudice. Cannon & Dunphy filed its motion to intervene "to protect, enforce and recover its share of attorney fees and costs out of the settlement of this case" on November 15, 2005.

¶12 Thereafter, Gende opposed Cannon & Dunphy's motion to intervene, moved to consolidate this action with his then-pending appeal, ***Gende v. Cannon & Dunphy, S.C.***, No. 2006AP1323, and moved to strike Cannon & Dunphy's motion for summary judgment as untimely. At a hearing on November 28, 2005, the trial court *sua sponte* reopened the case, granted Cannon & Dunphy's motion to intervene, denied Gende's motions to consolidate and to strike, and ordered that, pursuant to the Separation Agreement, Cannon & Dunphy receive eighty percent of the settlement proceeds which were allocated to attorney fees (total fees of $30,000) and Cannon & Dunphy's costs ($1,585.97) also be paid. The costs were described and documented in the affidavit of Attorney William M. Cannon. Gende moved for reconsideration, which the trial court denied. This appeal followed.[4]

---

[4] Gende did not address on appeal the trial court's denial of the motion to consolidate. Accordingly, we do not address this issue. *See* ***Reiman Assocs.***, 102 Wis. 2d at 306 n.1.

II. ANALYSIS

A. Intervention as a matter of right

¶13 "Intervention is '[t]he entry into a lawsuit by a third party who, despite not being named a party to the action, has a personal stake in the outcome.'" ***Olivarez v. Unitrin Prop. & Cas. Ins. Co.***, 2006 WI App 189, ¶11, 296 Wis. 2d 337, 723 N.W.2d 131 (quoting ***City of Madison v. WERC***, 2000 WI 39, ¶11 n.7, 234 Wis. 2d 550, 610 N.W.2d 94). "The effect of intervention is to make the intervenor a full participant in the lawsuit." ***Id.***

¶14 The first question we must decide is whether the trial court erred in permitting Cannon & Dunphy to intervene in these actions as a matter of right. Intervention as of right is governed by WIS. STAT. § 803.09,[5] and has been

[5] WISCONSIN STAT. § 803.09, entitled "Intervention," states:

> **(1)** Upon timely motion anyone shall be permitted to intervene in an action when the movant claims an interest relating to the property or transaction which is the subject of the action and the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest, unless the movant's interest is adequately represented by existing parties.
>
> **(2)** Upon timely motion anyone may be permitted to intervene in an action when a movant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order or rule administered by a federal or state governmental officer or agency or upon any regulation, order, rule, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely motion may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(continued)

interpreted by our supreme court as creating a four-part, conjunctive test, consisting of:

> (1) timely application for intervention; (2) an interest relating to the property or transaction which is the subject of the action; (3) that the disposition of the action may as a practical matter impair or impede the proposed intervenor's ability to protect that interest; and (4) that the proposed intervenor's interest is not adequately represented by existing parties.

Olivarez, 296 Wis. 2d 337, ¶12. All elements must be established or the motion must be denied. ***Id.*** The burden is on the movant to prove that all of the above-listed factors have been established and to demonstrate that circumstances exist which justify intervention, if such intervention is requested at a later stage of the litigation. ***Id.*** Application of the intervention statute to a given set of facts is a question of law which we review *de novo*. ***Id.***, ¶13.

¶15 Gende argues that Cannon & Dunphy failed to establish the factors required for intervention as a matter of right because: (1) Cannon & Dunphy's lien claim does not arise out of the client tort injuries; (2) Cannon & Dunphy's lien claim is really just a "disguised legal claim on a contract against another attorney who was not named to the suit"; and (3) Cannon & Dunphy has "alternative remedies [available]." The trial court found that Cannon & Dunphy established all of the requirements for intervention as a matter of right. We agree.

> **(3)** A person desiring to intervene shall serve a motion to intervene upon the parties as provided in s. 801.14. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene.

1. Timeliness

¶16 Whether a motion to intervene is timely is left to the discretion of the trial court. ***Armada Broad., Inc. v. Stirn***, 183 Wis. 2d 463, 471, 516 N.W.2d 357 (1994). "Our review of a trial court's discretionary decision is highly deferential." ***Olivarez***, 296 Wis. 2d 337, ¶16. "[T]he determination will stand 'unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion.'" ***Id.*** (citations omitted). "Because the exercise of discretion is so essential to a [trial] court's functioning, we will search the record for reasons to sustain its exercise of discretion." ***Id.***, ¶17 (citations omitted).

¶17 "[T]imeliness turns on whether, under all the circumstances, a proposed intervenor acted promptly and whether intervention will prejudice the original parties." ***Id.***, ¶20; *see also* ***State ex rel. Bilder v. Delvan Twp.***, 112 Wis. 2d 539, 550, 334 N.W.2d 252 (1983) (A "critical factor" in determining whether a motion for intervention is timely is "whether in view of all the circumstances the proposed intervenor acted promptly. A second factor is whether the intervention will prejudice the original parties to the lawsuit.") (citation omitted). Wisconsin courts have looked at a number of factors in determining whether a motion to intervene has been timely brought, including: (1) when the risk to the proposed intervenor's interest was discovered; (2) how far litigation has proceeded; and (3) to what extent the original parties are prejudiced by the new party's intervention in the lawsuit. ***Roth v. LaFarge Sch. Dist. Bd. of Canvassers***, 2001 WI App 221, ¶17, 247 Wis. 2d 708, 634 N.W.2d 882.

¶18 Gende does not argue on appeal that Cannon & Dunphy's intervention was untimely in the ***Riley*** case. Consequently, we conclude that the

trial court properly found Cannon & Dunphy's intervention in the ***Riley*** case was timely.

¶19 Gende does argue in the ***Lacap*** case that the trial court erred when it allowed Cannon & Dunphy to intervene after the case had been dismissed. Cannon & Dunphy moved to intervene seven days after it told the trial court it was going to do so, and six days after the stipulation and order dismissing the case were signed. In addition, the insurer's letter to the trial court describes clearly the fee dispute, advises the court that the attorney fees portion of the settlement will be paid to the clerk of courts, and confirms that the insurance company is transmitting the stipulation and order for dismissal. The trial court's decision on Gende's motion for reconsideration reflects the trial court's finding that, at the time the stipulation and order for dismissal was submitted, both the original parties and the trial court were aware that Cannon & Dunphy was asserting a lien on the settlement proceeds in the case and that the attorney fees portion of the settlement had been paid to the clerk of court. The trial court specifically noted:

> I think the record in this matter establishes beyond any question that everybody understood that when the stip and order was submitted to this Court for dismissal of this case with prejudice … it was submitted with a glaring contingency…. [T]here remains a very significant dispute between Mr. Gende and Cannon & Dunphy as to the fees that—the fees from this lawsuit, and you're going to have to resolve that because we're [the insurer who paid the settlement] giving [that portion of the settlement proceeds] to the Clerk of Courts Office and we're out of here.

¶20 No prejudice to the original parties resulted because Cannon & Dunphy was allowed to intervene. First, because of Cannon & Dunphy's asserted lien, Cannon & Dunphy and Gende agreed to lower the percentage of settlement

proceeds constituting attorney fees from thirty-three and one-third percent to thirty percent, which gave Lacap an additional $3,300.[6] Second, if Cannon & Dunphy had not been allowed to intervene in the existing case, it might have commenced a separate lawsuit against Lacap to recover its fees. By allowing Cannon & Dunphy to intervene, Lacap was protected from the risk to which Gende's objections exposed her, that is having to defend a new lawsuit about the Retainer Contract she signed with Cannon & Dunphy.

¶21 The record amply supports the trial court's determination that Cannon & Dunphy timely moved to intervene in the ***Lacap*** matter.

2. Sufficiently related interest

¶22 The second requirement under WIS. STAT. § 803.09(1) is that the intervenor have "an interest relating to the property or transaction which is the subject of the action." ***Bilder***, 112 Wis. 2d at 545. This determination is a question of law which we review *de novo*. ***Id.*** at 549. The question is to be analyzed pragmatically rather than technically. ***Armada Broad.***, 183 Wis. 2d at 472 (citing ***Bilder***, 112 Wis. 2d at 548). We seek to balance the two conflicting public policies of allowing: (1) the original parties "to conduct and conclude their own lawsuit"; and (2) "persons to join in the interest of the speedy and economical resolution of controversies." ***Id.*** These considerations are "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons

[6] This outcome demonstrates clearly the lack of economic interest Lacap has in this appeal. It would be contrary to her interests to prevail in the attack on the lien, and potentially lose the benefit of the fee reduction agreed upon between Cannon & Dunphy and Gende.

as is compatible with efficiency and due process." ***Id.*** (citation and internal quotation marks omitted).

¶23 Applying the provisions of WIS. STAT. § 803.09(1), as explained in ***Armada Broadcasting***, we conclude that Cannon & Dunphy had a sufficiently related interest in the pending litigation to properly intervene. Cannon & Dunphy had an attorney lien on the settlement proceeds in both the ***Riley*** and the ***Lacap*** matters. *See* ***Markwardt***, 296 Wis. 2d 512, ¶16. These liens arose as a direct result of the Retainer Contracts that both Riley and Lacap signed with Cannon & Dunphy. *See* ***id.*** Wisconsin law allows a trial court to determine the allocation of fees between original and successor counsel. *See* ***id.***, ¶10. The trial court properly allowed intervention to enforce the attorney lien and so that it could allocate fees between original and successor counsel. *See* ***id.***, ¶16.

3. Impairment of Cannon & Dunphy's ability to protect its interest

¶24 Cannon & Dunphy had no assurance that its lien interests would be protected by the existing parties if it did not intervene. Indeed, from Gende's consistent and repeated attempts to defeat Cannon & Dunphy's motions to intervene,[7] in multiple cases involving identical Retainer Contracts, in an attempt to invalidate Cannon & Dunphy's attorney lien with their former clients, and from Gende's repeated attempts to consolidate his personal action against Cannon & Dunphy with clients' cases pending in other counties, it is apparent that Gende is

---

[7] *See* ***Markwardt v. Zurich Am. Ins. Co.***, 2003CV8352; ***Rodriguez v. Allstate Ins. Co.***, 2003CV3470; ***Tucek v. State Farm Mut. Auto. Ins. Co.***, 2004CV2876; ***Draskovich v. McCauley***, 2004CV737, as well as the two instant cases.

doing everything he can think of to impair Cannon & Dunphy's ability to protect its interest.

¶25 Gende's breach of his Separation Agreement has forced Cannon & Dunphy to court to enforce its liens in each of these successor counsel matters. Gende's objection to Cannon & Dunphy's intervention rings particularly hollow when Gende's actions are the cause of the need for the intervention. We conclude that the trial court properly found that Cannon & Dunphy's ability to protect its interest would be impaired if it was not allowed to intervene in these matters.

¶26 Allowing Cannon & Dunphy to intervene in these matters to protect its interest is speedier and more economical for all concerned (including the courts) than to require a separate lawsuit for each lien. *See* ***Armada Broad.***, 183 Wis. 2d at 472. If Cannon & Dunphy is not allowed to intervene on its lien, which required enforcement action only because of Gende's obvious breach of the Separation Agreement, *see* ***Markwardt***, 296 Wis. 2d 512, ¶16 n.8, not only is Cannon & Dunphy's ability to protect its interest impaired, but Gende likely receives a windfall in the form of the portion of the fees to which Cannon & Dunphy is entitled.

4. Interest not adequately represented by existing parties

¶27 Gende, on behalf of Riley and Lacap, opposed Cannon & Dunphy's lien rights and right to intervene. In the ***Lacap*** case, the settling insurer avoided further litigation by depositing the stipulated attorney fees and costs portion of the settlement with the clerk of court. In the ***Riley*** case, Gende kept all of the settlement funds designated as attorney fees and costs. As we described above, Gende has demonstrated by his conduct that he will do everything possible to defeat Cannon & Dunphy's interest. Clearly, neither the original parties to these

actions (who have no financial interest in the outcome of the fee allocation dispute) nor Gende protect Cannon & Dunphy's interest.

¶28 Cannon & Dunphy is entitled under WIS. STAT. § 803.09(1) to intervene. We affirm the trial courts' conclusions to allow Cannon & Dunphy to intervene in both the ***Riley*** and the ***Lacap*** matters.

B. Reopening of the ***Lacap*** *matter to permit intervention*

¶29 Gende argues that the trial court improperly reopened the ***Lacap*** case because it failed to make factual findings required under WIS. STAT. § 806.07(1)(h) as explained by ***Johnson v. Johnson***, 157 Wis. 2d 490, 494, 460 N.W.2d 166 (Ct. App. 1990). It is in the context of a request to reopen a year-old divorce judgment and a belated request to declare a child born during the marriage to be a non-marital child, not in the context of a request seven days after dismissal to intervene in a civil tort case, that the ***Johnson*** court discussed criteria to consider when determining whether to reopen a judgment under § 806.07(1)(h) for "other reasons justifying relief from the operation of the judgment." ***Id.*** at 497. Those criteria are described in ***Johnson*** as "extraordinary circumstances."[8]

> [8] In determining whether extraordinary circumstances exist, the trial court should consider "whether the judgment was the result of a conscientious, deliberate and well-informed choice of the claimant; whether the claimant received the effective assistance of counsel; whether relief is sought from a judgment in which there has been no judicial consideration of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments; whether there is a meritorious defense to the claim; and whether there are intervening circumstances making it inequitable to grant relief."

Johnson v. Johnson, 157 Wis. 2d 490, 500, 460 N.W.2d 166 (Ct. App. 1990) (quoting ***State ex rel. MLB v. DGH***, 122 Wis. 2d 536, 552-53, 363 N.W.2d 419 (1985)).

¶30 The ***Lacap*** trial court found:

> The one piece of this that I would characterize as, I think, totally without merit is this argument that I don't have jurisdiction because this is a closed case. I think the record in this matter establishes beyond any question that everybody understood that when the stip and order was submitted to this Court for dismissal of this case with prejudice … it was submitted with a glaring contingency…. [T]here remains a very significant dispute between Mr. Gende and Cannon & Dunphy as to the fees that—the fees from this lawsuit, and you're going to have to resolve that because we're [the insurer who paid the settlement] giving to the Clerk of Courts Office and we're out of here.
>
> So, yes, I did on my own motion reopen the matter, but first of all, I don't think that was necessary. If it was necessary, I think it was appropriate, and from my view, it was done more to clarify the record or to clarify an entry in the record that I don't believe accurately reflected the status of the case.

The facts cited by the trial court may provide grounds for reopening under WIS. STAT. § 806.07(1)(a) (mistake) or (c) (fraud or other misconduct). However, we hold that the facts do provide grounds for reopening the judgment under § 806.07(1)(h).

¶31 The trial court noted in ***Lacap*** that under WIS. STAT. § 757.01(3),[9] it has "the jurisdiction to conduct proceedings that may be necessary to carry into effect [its] jurisdiction" and pursuant to that power, the trial court was reopening

---

[9] WISCONSIN STAT. § 757.01, entitled, "Powers of courts," states in pertinent part:

> The several courts of record of this state shall have power:
>
> ….
>
> **(3)** To devise and make such writs and proceedings as may be necessary to carry into effect the powers and jurisdiction possessed by them.

the case. Correspondence from the insurer to the trial court at about the time it submitted the stipulation and order for dismissal[10] fully discloses the Gende-Cannon & Dunphy fee dispute and the insurer's payment of the disputed sum to the clerk of courts. The insurance letter supports the trial court's conclusion that the dismissal of the case was conditioned upon resolution of the attorney fee dispute between Cannon & Dunphy and Gende from the settlement proceeds paid to the clerk of courts.

¶32 The trial court appropriately articulated its reasons for reopening the case. The facts satisfy the requirements of WIS. STAT. § 806.07(1)(h), and additionally justify use of the court's express authority under WIS. STAT. § 757.01(3). The trial court properly reopened the ***Lacap*** case.

---

[10] In a letter dated November 3, 2005, from counsel for Society Insurance to Judge Foley, Attorney Arthur Simpson stated:

> The parties have reached a settlement in this case. However, there appears to be a disagreement between Cannon & Dunphy and Attorney Gende concerning the precise apportionment of the fees. Cannon & Dunphy did provide Society of the notice that they have a lien on the fees.
>
> The parties further agreed that the remaining portion of the settlement of $31,585.97 should be paid to Milwaukee County Clerk of Courts and submitted to the court. The original check in that amount is submitted with this letter.
>
> My further understanding is that Ms. Lacap will execute a release in return for the check that has been provided and that both Attorney Gende and Attorney Delury will be signing a Stipulation and Order for Dismissal which I will forward to the court concluding all claims against my clients in this case.
>
> The court may become involved in some further hearing regarding distribution of the attorneys fees as between the two law firms.

C. Summary judgment

¶33 "We review an order for summary judgment de novo, applying the same standards as the trial court." ***Piaskoski & Assocs. v. Ricciardi***, 2004 WI App 152, ¶6, 275 Wis. 2d 650, 686 N.W.2d 675. "Summary judgment is proper when the pleadings, answers, admissions and affidavits show no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." ***Id.*** "We will reverse a decision granting summary judgment if the trial court incorrectly decided legal issues or if material facts are in dispute." ***Id.*** "Even if certain facts are in dispute, the dispute will not prevent the granting of summary judgment if the facts at issue are 'not material to the legal issue on which summary judgment is sought.'" ***Id.*** (citation omitted).

¶34 Our decision in ***Markwardt*** is dispositive of the issues raised here on summary judgment. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997); ***Lofthus v. Lofthus***, 2004 WI App 65, ¶14, 270 Wis. 2d 515, 678 N.W.2d 393. ***Markwardt*** was a consolidated action of four Milwaukee County cases[11] involving the same successor counsel issues arising from the same Retainer Contract and same Employment and Separation Agreements with Cannon & Dunphy which Gende disputes again in this consolidated action. We have previously resolved: (1) the validity of the lien established by the Retainer Contract; ***id.***, 724 N.W.2d 669, ¶16; (2) the reasonableness of the method of calculating costs claimed by Cannon & Dunphy; ***id.***, ¶¶17-18; and (3) the reasonableness of the fee allocation as set forth in the Separation Agreement and

[11] *See* note 7, *supra*; ***Markwardt***, 2003CV8352; ***Rodriguez***, 2003CV3470; ***Tucek***, 2004CV2876; ***Draskovich***, 2004CV737.

the Employment Agreement, as it is incorporated into the Separation Agreement; ***id.***, ¶¶28-31. Accordingly, we will discuss the remaining issues on this appeal under our analysis in ***Markwardt***.

1. Validity of the lien

¶35 We review the validity of attorney liens *de novo*. ***Id.***, ¶10. In ***Markwardt***, we concluded that under the Retainer Contract, Gende was the successor counsel to Cannon & Dunphy. ***Id.***, ¶14 ("As can be seen from the express language of the Retainer Contract, Cannon & Dunphy was the original retained counsel."). The ***Markwardt*** Retainer Contract is identical to the Retainer Contracts here, except for the name of the client, the date of signing, and the tort described. As a consequence, the lien is established by contract, and is valid under WIS. STAT. § 757.36.[12] ***Markwardt***, 296 Wis. 2d 512, ¶11.

¶36 There is no evidence that either Riley or Lacap terminated Cannon & Dunphy's representation for cause. As a consequence, Riley and Lacap, while free to retain other counsel, breached their Retainer Contracts with Cannon &

[12] WISCONSIN STAT. § 757.36, entitled, "Lien on proceeds of action to enforce cause of action," states:

> Any person having or claiming a right of action, sounding in tort or for unliquidated damages on contract, may contract with any attorney to prosecute the action and give the attorney a lien upon the cause of action and upon the proceeds or damages derived in any action brought for the enforcement of the cause of action, as security for fees in the conduct of the litigation; when such agreement is made and notice thereof given to the opposite party or his or her attorney, no settlement or adjustment of the action may be valid as against the lien so created, provided the agreement for fees is fair and reasonable. This section shall not be construed as changing the law in respect to champertous contracts.

Dunphy. ***Id.***, ¶15 (citing ***Tonn v. Reuter***, 6 Wis. 2d 498, 503, 95 N.W.2d 261 (1959) ("[W]here 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 trial courts correctly enforced Cannon & Dunphy's statutory lien as set forth in its Retainer Contracts with Riley and Lacap.

2. Reasonableness of costs

¶37 Under the Retainer Contract, Cannon & Dunphy is entitled to its costs incurred in prosecuting the subject client's claims. Gende argues, as he did in ***Markwardt***, that he is entitled to additional discovery on the details of Cannon & Dunphy's costs (even if he authorized them while he was employed by Cannon & Dunphy) and that the trial court should have had a separate evidentiary hearing on the reasonableness of these costs. We have previously determined that Gende's challenge to the method Cannon & Dunphy uses to calculate costs to clients is without merit. ***Id.***, 296 Wis. 2d 512, ¶¶17-24. Both trial courts denied the request for additional discovery. Our review of a trial court's order or prohibition of discovery is whether the court erroneously exercised its discretion. ***Frankard v. Amoco Oil Co.***, 116 Wis. 2d 254, 267, 342 N.W.2d 247 (Ct. App. 1983).

¶38 Cannon & Dunphy provided specific documentation as to what charges were attributed to what specific cost, such as photocopies, telephone calls, fax transmissions and postage, as well as for third-party charges such as for medical record copies. In the ***Riley*** case, Cannon & Dunphy sought

reimbursement for $199.63 in costs,[13] or 0.4 percent of the $50,000 settlement. This is equal to or a smaller percentage of the total settlement than what we approved as reasonable in three of the four cases consolidated in ***Markwardt***. *See **id.***, 296 Wis. 2d 512, ¶¶20-23. The ***Lacap*** trial court acknowledged that both parties provided voluminous briefing and affidavits which the trial court had reviewed. The court explained that after review of all of the materials, it concluded that the costs claimed by Cannon & Dunphy were reasonable, and that it did not see what material information would be added if additional discovery was ordered. Essentially, that is a determination that additional discovery, or further hearing on that subject, was unlikely to provide more information that would be useful to the court, which we consider a discretionary discovery determination, and affirm. *See **Frankard***, 116 Wis. 2d at 267.

3. Reasonableness of fees

¶39 Original counsel and successor counsel may enter into a binding contract dividing contingency fees in specific cases and we will uphold a trial court's finding of reasonable attorney fees absent a finding that the trial court erroneously exercised its discretion. ***Markwardt***, 296 Wis. 2d 512, ¶28. Courts have found one-third contingency fee agreements to be reasonable. ***Id.*** (citing ***Klabacka v. Schott***, 23 Wis. 2d 213, 218, 127 N.W.2d 19 (1964)). Gende does not claim that one-third contingency fee contracts are unreasonable. As we noted in ***Markwardt***, public policy is not violated when a law firm and a departing attorney

---

[13] These include: $163.93 for medical records copies charged by outside vendors, $8.23 for postage, $14.50 for printed page charges and telephone charges of $2.97 for the time period February 2003 through May 2004. It is apparent that the cost for attorney time in preparation of documentation of, or objection to, these costs exceeded the total costs involved.

agree on how to allocate between them fees on cases that have not been completed. ***Id.***, ¶28; *see also* ***Piaskoski***, 275 Wis. 2d 650, ¶¶1, 5, 10.

¶40 Here, Gende claims, essentially, that successor counsel should not be forced to share the fee with prior counsel. This is the identical argument Gende made and we resolved in ***Markwardt***. For the reasons already explained in ***Markwardt***, the Separation Agreement governs the distribution of the attorney fees, and the fees were reasonable. ***Id.***, 296 Wis. 2d 512, ¶31.

D. Contracts violate public policy

¶41 As we noted in ***Markwardt***, public policy is not violated when a law firm and a departing attorney agree on how to allocate between them fees on cases that have not been completed. ***Id.***, ¶28; *see also* ***Piaskoski***, 275 Wis. 2d 650, ¶¶1, 5, 10. "A fee dispute between original counsel and successor counsel may properly be resolved on summary judgment." ***Markwardt***, 296 Wis. 2d 512, ¶10 .

¶42 Gende argues, as he did in ***Markwardt*** and in his Waukesha litigation, that Cannon & Dunphy's Employment Contract violates Wisconsin public policy. Here, the trial courts each determined that Gende's contract claim is already (and more appropriately) addressed in Gende's Waukesha County litigation. We agree.

¶43 We have now reviewed six cases in which, based upon identical documents,[14] Gende has made identical attempts to defeat Cannon & Dunphy's attorney lien, and has claimed his own Employment Contract and/or Separation

---

[14] Only the names, dates, specific injury and signatures on the Retainer Contracts with clients differ.

Agreement with Cannon & Dunphy violated public policy. We recognize that criminal case decisions are not generally helpful in civil cases. However, as our supreme court pointed out in ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994), "[w]e need finality in our litigation." Reasonable allocation of judicial resources requires that the same arguments, based upon the same documents, involving substantially identical facts, should not be repeated *ad infinitum* in the hope of a more favorable outcome before a different judge. In addition, Gende raises an argument[15] in this appeal that could properly have been raised in his first consolidated appeal of Cannon & Dunphy interventions. We will not review the same dispute innumerable times just because it comes to us with a different caption. Nor do we consider it appropriate for a litigant to raise new arguments in a subsequent dispute about the same contract, involving the same parties, simply because another opportunity presents itself to appeal an unfavorable decision on that contract. The need for finality in litigation is as applicable to civil cases as it is to criminal cases.

¶44 For all of the foregoing reasons, we affirm the trial court orders allowing Cannon & Dunphy to intervene in the ***Riley*** and ***Lacap*** matters and for summary judgment as to the allocation of costs and fees.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.

---

[15] Here Gende argues that the trial court was wrong as a matter of law under applicable Wisconsin statutes to grant the motion to intervene. There is no explanation for failing to raise this purely legal issue previously in ***Markwardt***. Timely resolution of the intervention orders in ***Markwardt*** would have avoided the additional costs to clients in this appeal and would have been a more efficient use of judicial resources.

Nos. 2006AP801(C)
2006AP802(C)

¶45 FINE, J. (*concurring*). Although, for the reasons I set out in my dissent in ***Markwardt v. Zurich American Insurance Co.***, 2006 WI App 200, ¶¶34–37, 296 Wis. 2d 512, ___, 724 N.W.2d 669, 683–684, I believe that the Majority is wrong, I am bound by ***Markwardt***. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246, 256 (1997) (Court of appeals may not "overrule, modify or withdraw language from a published opinion of the court of appeals.").

¶46 As I read the Majority decision, the key to the result they reach is that, according to the Majority, the lien agreement here is valid, as determined by ***Markwardt***, which evaluated the same lien agreement. Accordingly, I set out in full my dissent in ***Markwardt***, which explains why I believe the lien agreement does not apply to any of these cases:

> The core issue presented by this appeal is whether Cannon & Dunphy, S.C., has an enforceable lien in each of the cases. I respectfully submit that it does not.
>
> Unless a client recovers a judgment on his or her tort claim, and, accordingly, the lawyer has an equitable lien for fees, ***Wurtzinger v. Jacobs***, 33 Wis. 2d 703, 712, 148 N.W.2d 86, 91 (1967), an attorney's lien for fees must be granted by contract with the client in order to be enforceable, ***Weigel v. Grimmett***, 173 Wis. 2d 263, 267–271, 496 N.W.2d 206, 208–210 (Ct. App. 1992). The Majority recognizes this when it writes: "Wisconsin does not recognize a common law attorney lien for fees before judgment, in the absence of a written contract." Majority, ¶11. As the Majority also recognizes, WIS. STAT. § 757.36 permits the client to give his or her lawyer a fee-lien by contract. It provides:
>
> > Any person having or claiming a right of action, sounding in tort or for unliquidated damages on contract, may contract with any

> attorney to prosecute the action and give the attorney a lien upon the cause of action and upon the proceeds or damages derived in any action brought for the enforcement of the cause of action, as security for fees in the conduct of the litigation; when such agreement is made and notice thereof given to the opposite party or his or her attorney, no settlement or adjustment of the action may be valid as against the lien so created, provided the agreement for fees is fair and reasonable. This section shall not be construed as changing the law in respect to champertous contracts.

The extent of the agreed-to lien is controlled by the lien contract between the client and the lawyer. *See* ***McBride v. Wausau Ins. Cos.***, 176 Wis. 2d 382, 391, 500 N.W.2d 387, 390 (Ct. App. 1993). Neither Cannon & Dunphy nor the Majority contends that the firm has an equitable lien on the settlements in these cases. Rather, they focus on Cannon & Dunphy's retention/lien-agreements with the firm's former clients. In my view, the lien agreements do not give Cannon & Dunphy liens on the settlement proceeds.

As the Majority notes, the lien agreements in these cases are identical. They provide:

> [Client] having sustained personal injuries on or about [date], through the negligence and carelessness of all responsible parties and in consideration of the services agreed to be rendered and furnished do hereby employ CANNON & DUNPHY, S.C. as my attorneys to, with my consent, settle my claim or bring suit thereon for damages and out of the proceeds of said settlement, judgment, monies, etc. agree to give them one third (1/3) thereof as their compensation, and in the meantime, I give them a valid lien in said amount pursuant to sec. 757.36, Wis. Stats. In return, CANNON & DUNPHY, S.C. will make every effort, consistent with the Rules of Professional Responsibility to provide me with all reasonable and necessary legal services in connection with the investigation and prosecution of my claim. Additionally,

CANNON & DUNPHY, S.C. hereby agrees to advance reasonable and necessary costs, expenses and disbursements for the prosecution of my claim which I will repay in addition to the legal fees. I understand that there will be no charge for services nor reimbursement for costs, expenses or disbursements advanced unless there is a recovery on my claim.

I have been advised that services could be rendered on an hourly basis, but I hereby elect to be bound by the contingent fee contract.

I have been advised that at any time during the handling of my case, CANNON & DUNPHY, S.C. may recommend that the case not be continued for good and sufficient reasons, including, but not limited to, little or no likelihood of success on the claim's merits or a lack of available funds to satisfy the claim should it be successful. In the event they make such a recommendation to discontinue which I reject, I hereby agree that they may withdraw as my attorneys in consideration of their agreement to give me due notice of their withdrawal. CANNON & DUNPHY, S.C. agrees that they will comply with all the applicable provisions of the Code of Professional Responsibility. I have been advised by CANNON & DUNPHY, S.C. that they will undertake every reasonable effort to bring my claim to a successful conclusion prior to trial. If they negotiate a settlement prior to trial which they recommend I accept, I have the right to reject such recommendation. If I choose to reject their recommendation, then I agree that I will not object to them withdrawing as my attorneys upon their giving due notice and otherwise complying with the Code of Professional Responsibility. In the event CANNON & DUNPHY, S.C. withdraw as my attorneys after I have received a settlement offer which I reject, then I give them a valid lien in the amount of the settlement offer on the date of withdrawal or

> such lower amount as may be required by the Code of Professional Responsibility.
>
> As can be seen from this retention/fee-lien contract, which Cannon & Dunphy drafted, the firm was granted a lien under the following circumstances:
>
> (1) Cannon & Dunphy either settles or gets a favorable judgment on the client's claim; or
>
> (2) Cannon & Dunphy procures a settlement offer that is presented to the client and the client rejects the settlement offer, and Cannon & Dunphy then, as a result of that rejection, withdraws as the client's lawyers.
>
> None of these things happened in any of the cases. Although Cannon & Dunphy might *wish* it had drafted its form retention/fee-lien contracts to secure a fee-lien if the client leaves the firm before settlement, it did not do so.
>
> Cannon & Dunphy is a Wisconsin firm with a superb reputation for legal acumen, and all ambiguities in the contract it wrote must be interpreted against it and in favor of its clients (none of whom, insofar as the Record reveals, is a lawyer). *See* ***DeWitt Ross & Stevens*, *S.C. v. Galaxy Gaming & Racing Ltd. P'ship***, 2004 WI 92, ¶66, 273 Wis. 2d 577, 605–606, 682 N.W.2d 839, 853–854. But Cannon & Dunphy's retention/fee-lien contract is *not* ambiguous-it plainly does not provide for its survival under the circumstances. Thus, no "interpretation" is necessary. *See* ***McBride***, 176 Wis. 2d at 391, 500 N.W.2d at 390 (fee-lien agreement must "still be in force at the time the settlement is procured."). Accordingly, I respectfully dissent from the Majority's conclusion that Cannon & Dunphy has valid statute-based contractual liens in these cases.

(Emphasis in Dissent.) Based on the foregoing, I respectfully but unhappily concur in the result the Majority reaches in these cases.