

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 5, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

**Nos. 97-3054
98-0589**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

No. 97-3054

RONALD W. MORTERS,

PLAINTIFF-APPELLANT,

**ANN MARIE MORTERS, AND SHANNON L. MORTERS,
A MINOR, BY VINCENT MORTERS AND ROBIN MASLAKOW,
HER GENERAL GUARDIANS,**

PLAINTIFFS,

V.

**JOSEPH R. KUENZLI AND SHILA A. KUENZLI,
HUSBAND AND WIFE, USAA CASUALTY INSURANCE
COMPANY, A FLORIDA CORPORATION, AND
WISCONSIN HEALTH ORGANIZATION INSURANCE
CORPORATION, A WISCONSIN CORPORATION,**

DEFENDANTS,

CROEN & BARR AND AIKEN & SCOPTUR, S.C.,

RESPONDENTS.

No. 98-0589

RONALD W. MORTERS,

PLAINTIFF-APPELLANT,

**ANN MARIE MORTERS, HUSBAND AND WIFE,
AND SHANNON L. MORTERS, A MINOR, BY
VINCENT MORTERS AND ROBIN MASLAKOW,
HER GENERAL GUARDIANS,**

PLAINTIFFS,

**CROEN & BARR, AIKEN & SCOPTUR, S.C.,
AND WILLIS J. ZICK,**

RESPONDENTS,

V.

**JOSEPH R. KUENZLI AND SHILA A. KUENZLI,
HUSBAND AND WIFE, USAA CASUALTY INSURANCE
COMPANY, A FLORIDA CORPORATION, AND
WISCONSIN HEALTH ORGANIZATION INSURANCE
CORPORATION, A WISCONSIN CORPORATION,**

DEFENDANTS.

APPEALS from orders of the circuit court for Waukesha County:
JAMES R. KIEFFER, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. Robert W. Morters has appealed from an order entered in the trial court on September 19, 1997, determining that the law firms of Croen & Barr and Aiken & Scoptur, S.C., have valid attorneys' liens for one-third of the gross recovery awarded Morters and the other plaintiffs in this litigation. This appeal constitutes court of appeals case no. 97-3054. It is consolidated with

court of appeals case no. 98-0589, which constitutes Morters' appeal from an "Order Allocating Fees and Expenses Among Counsel" entered in the trial court on December 30, 1997.¹ We affirm the orders of the trial court.

This action arose from a motor vehicle accident in which Morters, his wife and his granddaughter were injured. Morters was originally represented by Attorney Charles H. Barr, but alleges that he discharged him for cause and retained the law firm of Aiken & Sceptur. Morters alleges that he then discharged that firm for cause and retained Attorney Willis J. Zick. The personal injury claims were subsequently settled through arbitration. After arbitration, Attorney Zick retained one third of the settlement proceeds paid to the Morterses, plus an amount representing expenses incurred by the various attorneys, pending an allocation of fees and expenses between counsel. A motion for an order allocating fees and expenses was then filed by Attorney Barr.

On August 29, 1997, the trial court conducted an evidentiary hearing on the issue of whether Attorney Barr and Aiken & Sceptur had valid, enforceable liens for attorneys' fees or whether Morters discharged them for cause. At the conclusion of the hearing, the trial court made findings of fact determining that Morters did not discharge Attorney Barr or Aiken & Sceptur for just cause, and that their fee agreements with the Morterses were valid and enforceable. Based on these findings, the trial court determined that Aiken & Sceptur and Attorney Barr's law firm, Croen & Barr, had valid attorneys' liens for one-third of the gross recovery made by the Morterses in the arbitration of their claims.

¹ In his brief-in-chief in case no. 98-0589, Morters states that his appeal is from an order entered in the trial court on January 9, 1998, denying his motion for reconsideration of the December 1997 order. However, he withdrew this representation in his reply brief, reiterating that the appeal was from the December 1997 order allocating fees and expenses among counsel.

In challenging this order, Morters argues that the trial court lacked jurisdiction to determine whether he and his family properly discharged Attorney Barr and Aiken & Sceptur. He further contends that if the trial court had jurisdiction to address this matter, he was entitled to a jury trial on it.

We reject Morters' arguments for several reasons. Initially, we note that at the August 29, 1997 hearing, Morters conceded that he was not disputing that he was required to pay one-third of the settlement proceeds as attorneys' fees. His claim was simply that Attorney Zick, as opposed to Attorney Barr or Aiken & Sceptur, was entitled to more of the fees.

A party must be aggrieved by an order to have standing to appeal it. *See Mutual Serv. Cas. Ins. Co. v. Koenigs*, 110 Wis.2d 522, 526, 329 N.W.2d 157, 159 (1983). A person is aggrieved if an order bears directly and injuriously upon his or her interests. *See Ford Motor Credit Co. v. Mills*, 142 Wis.2d 215, 217, 418 N.W.2d 14, 15 (Ct. App. 1987). The person must be adversely affected in some appreciable way. *See id.* at 217-18, 418 N.W.2d at 15. Because no basis exists to conclude that Morters' interests were adversely affected by the trial court's determination that Attorney Barr and Aiken & Sceptur were entitled to share with Attorney Zick in one-third of the settlement proceeds, we are not persuaded that Morters has standing to challenge the September 19, 1997 order.²

² We recognize that an issue was also raised at the August 29, 1997 hearing as to whether the amount paid in settlement to the Morterses' subrogated carrier, Wisconsin Health Organization Insurance Corporation (WHO), should have been included by Attorney Zick when calculating one-third of the settlement proceeds. However, the trial court did not address or resolve that issue at the August 29, 1997 hearing or in the September 19, 1997 order, and specifically limited the issues which could be addressed at the hearing to the issues of whether Attorney Barr and Aiken & Sceptur had valid, enforceable liens for attorneys' fees, or whether Morters discharged them for cause. The issue of whether amounts paid to WHO should have been considered in calculating attorneys' fees therefore provides no basis for determining that Morters was aggrieved by the September 19, 1997 order.

Even assuming *arguendo* that standing exists, we reject Morters' claim that the trial court lacked jurisdiction to address the attorneys' fees issue. Circuit courts have the inherent power to determine the reasonableness of attorney's fees. See ***Herro, McAndrews & Porter, S.C. v. Gerhardt***, 62 Wis.2d 179, 182, 214 N.W.2d 401, 402 (1974). This inherent power may be exercised either during the action from which the attorney's fees claim arises or in a subsequent action on that contract for attorney's services. See *id.* at 182, 214 N.W.2d at 402-03. "The trial court's inherent power does extend to cases where there is a direct attorney-client conflict regarding the attorney's right to a portion of a judgment." ***Estate of Boyle v. Wickhem, Buell, Meier, Wickhem & Southworth, S.C.***, 134 Wis.2d 214, 220, 397 N.W.2d 124, 127 (Ct. App. 1986).³ It also has been exercised in situations where a dispute exists between successive attorneys as to the amount of their respective fees and the allocation of settlement proceeds to pay those fees. See ***Knoll v. Klatt***, 43 Wis.2d 265, 268-69, 168 N.W.2d 555, 557 (1969), *overruled in part on other grounds by Herro*, 62 Wis.2d at 183-84, 214 N.W.2d at 403-04.

Contrary to Morters' contention, a trial court's inherent power to resolve an attorneys' fees issue between successive attorneys is not limited to situations where an attorney brings an independent action to recover fees. As already stated, the trial court's inherent authority may be exercised either during the action from which the attorney's fees claim arises or in a subsequent action on the contract for attorney's services. See ***Herro***, 62 Wis.2d at 182, 214 N.W.2d at

³ In his brief-in-chief, Morters quotes this statement from ***Estate of Boyle v. Wickhem, Buell, Meier, Wickhem & Southworth, S.C.***, 134 Wis.2d 214, 220, 397 N.W.2d 124, 127 (Ct. App. 1986), but inserts the word "not" into the quotation and completely alters its meaning. This misstatement did not go unnoticed when the briefs were reviewed. However, in the reply brief in case no. 98-0589, Morters' counsel asserts that the misquotation was inadvertent, and we will say no more on the matter.

402-03. Although the court in *Boyle* mandated that an independent action be brought, *Boyle* is distinguishable because it involved neither an attorney-client dispute nor a dispute between successive attorneys in an action. See *Boyle*, 134 Wis.2d at 220-21, 397 N.W.2d at 127. Rather, it involved a situation where the attorney hired by the litigants in an action contracted with another law firm for assistance in the case. See *id.* at 216, 397 N.W.2d at 125. Upon the death of the original attorney, a dispute arose between his estate and joint counsel as to the allocation of fees. See *id.* at 217, 397 N.W.2d at 125. Because the dispute did not involve either the client and counsel or successive attorneys retained by the client, but was instead a dispute between joint contracting attorneys, this court concluded that the trial court did not have jurisdiction to resolve the dispute within the context of the underlying action. See *id.* at 220-22, 397 N.W.2d at 127. In contrast, this case involves a dispute between successive attorneys as to the allocation of fees generated in a case where all counsel were retained by Morters, and a claim by Morters that he owes no fees or limited fees to some of the attorneys. As such, the trial court had authority to resolve the dispute. See *id.* at 220-21, 397 N.W.2d at 127.

In making this determination, we conclude that Morters' reliance on *McBride v. Wausau Ins. Cos.*, 176 Wis.2d 382, 500 N.W.2d 387 (Ct. App. 1993), is misplaced. In *McBride*, an attorney commenced an independent action to recover attorney's fees from the settlement proceeds of an action in which she initially represented the injured plaintiff. See *id.* at 385-86, 500 N.W.2d at 388-89. Her action was dismissed on the grounds that she was not entitled to fees in accordance with the retainer agreement because she breached her contract with the plaintiff by providing deficient representation. See *id.* at 388, 500 N.W.2d at 390. Nothing in the case provides a basis to conclude that if counsel had sought to

recover the fees by filing a motion in the underlying action rather than commencing a separate action, the trial court would have lacked authority to address that motion. Similarly, nothing in *McBride* or any of the other cases cited by Morters supports his contention that when a client alleges that he or she discharged one or more of his or her attorneys for cause, the fee claims of the respective attorneys may be resolved only in an independent action by the attorneys, not as part of the underlying litigation for which they were retained.

Morters contends that if the trial court was entitled to address the attorneys' fees issue, then he was entitled to have a jury determine whether he discharged Attorney Barr and Aiken & Sceptur for cause. We disagree. As already noted, Morters did not dispute that he was required to pay one-third of the settlement as attorneys' fees and therefore has no standing to object to the trial court's determination that all of the attorneys must share in that fee. It follows that he also lacks standing to object to the trial court's refusal to grant a jury trial on that issue. Moreover, as already discussed, trial courts have inherent power to determine whether an attorney is entitled to fees and to apportion fees between successive attorneys within the context of the underlying litigation in which the fees arose. See *Boyle*, 134 Wis.2d at 220-21, 397 N.W.2d at 127. Such powers appear to have been uniformly exercised by the trial court without a jury.

Although he cites no statutory or case law indicating that a right to a jury trial exists under these circumstances, Morters contends that he was entitled to a jury trial under Article I, § 5 of the Wisconsin Constitution. However, the Wisconsin Constitution guarantees the right to a jury only as it existed at the time the constitution was adopted. See *Powers v. Allstate Ins. Co.*, 10 Wis.2d 78, 89, 102 N.W.2d 393, 399 (1960). Morters cites nothing to indicate that at the time the Wisconsin Constitution was adopted state law entitled a party to a jury trial when

his or her counsel sought to collect attorneys' fees within the context of the action in which the attorney was retained. No basis therefore exists to conclude that the trial court's refusal to permit a jury trial deprived Morters of a constitutional right, and its order of September 19, 1997 is affirmed.⁴

We similarly reject Morters' challenge to the December 30, 1997 order. In that order, the trial court allocated attorneys' fees between the three attorneys who had represented Morters during the course of this litigation. It awarded Attorney Zick \$22,216.22 as fees and expenses. Based upon its finding that Attorney Barr and Aiken & Scoptur were entitled to one-third of the gross settlement in the action plus costs and disbursements, it jointly awarded them \$163,578.84, which represented the amount withheld by Attorney Zick from the settlement proceeds and retained in a trust account. In determining what constituted the gross settlement in the action, it included the amount paid by settlement to Wisconsin Health Organization Insurance Corporation (WHO), the subrogated carrier in this case. Because Attorney Zick had not withheld any money arising from the payment to WHO, the trial court directed him to collect his \$22,216.22 from the Morterses.

In his brief challenging the December 30, 1997 order, Morters reiterates the arguments which we have already rejected regarding the trial court's lack of jurisdiction to address the attorneys' fees issue and his right to a jury trial. The only variation in Morters' argument in case no. 98-0589 is his claim that the trial court lacked authority to address the amount of the fees owed.

⁴ In his brief in case no. 97-3054, Morters also contends that he was entitled to a jury trial on the issue of whether payments made to the subrogated carrier should have been included in calculating the amount of attorneys' fees which constituted one-third of the gross settlement. However, because this issue was not before the trial court at the August 29, 1997 hearing, he was not entitled to a jury trial on it.

Morters was represented by his present counsel at the time of the November 10, 1997 hearing at which the trial court heard argument and issued the rulings which were incorporated in the written order entered on December 30, 1997. Although Morters was aware that an issue had been raised at the August 29, 1997 hearing as to whether the payment to WHO should be considered in calculating the amount of attorneys' fees and he was served with the "Motion for Order Allocating Attorney's Fees and Expenses" prior to the November 10, 1997 hearing, he failed to appear at the hearing and thus failed to timely object to the trial court's determination that the settlement payment to WHO had to be included when calculating one-third of the gross settlement. Because he did not appear and object to the trial court's decision calculating attorneys' fees based on payments to WHO, Morters has waived his right to challenge that decision on appeal. *See State v. Washington*, 142 Wis.2d 630, 635, 419 N.W.2d 275, 277 (Ct. App. 1987). Therefore, the December 30, 1997 order is also affirmed.

By the Court.—Orders affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

