COURT OF APPEALS
DECISION
DATED AND FILED

May 18, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-2953

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

ROBERT K. ROWE,

PLAINTIFF,

ROBERT E. SUTTON,

INTERVENOR-PLAINTIFF-APPELLANT,

V.

ATTORNEYS' LIABILITY ASSURANCE SOCIETY, INC., A FOREIGN INSURANCE CORPORATION,

DEFENDANT,

MICHAEL G. MACK,

DEFENDANT-RESPONDENT,

WHYTE & HIRSCHBOECK, S.C., JERARD J. JENSEN, PETER L. GARDON AND EDWARD J. HEISER, JR., INDIVIDUALLY AND AS SHAREHOLDERS OF WHYTE & HIRSCHBOECK, S.C.,

DEFENDANTS-THIRD-PARTY PLAINTIFFS,

V.

ROBERT K. ROWE,

THIRD-PARTY DEFENDANT.

APPEAL from orders of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Robert E. Sutton appeals from an order[1] dismissing his action to enforce what he claimed was an attorney's lien against proceeds in a settlement and granting him $4,000, less his $2,500 retainer, under his quantum meruit claim. Sutton contends that the circuit court erred: (1) in determining that he did not have an enforceable lien under §§ 757.36 and 757.37, STATS.; (2) in concluding that his retainer was "unconscionable"; and (3) in determining the amount owed to him under his quantum meruit claim. We affirm.

BACKGROUND

From August to November 1995, intervening plaintiff-appellant, Robert E. Sutton, represented the defendant-respondent, Michael G. Mack, in a dispute over commissions allegedly due Mack for the sale of an exotic automobile. The August 1, 1995 retainer agreement consisted of Sutton's letter to Mack, stating, in part:

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[1] As noted above, the appeal in this case, in a formal sense, comes from *two* final orders of the circuit court. In some ways, however, the parties' briefs seem to mix and match the substance of several orders and, at times, substantively treat them as one. Nevertheless, the parties do agree on the nature of the issues before this court.

> I will represent you through trial for attorney's fees as follows:
>
> 1. A retainer of Two Thousand Five Hundred Dollars ($2,500.00) paid this 1st day of August, 1995.
> 2. An additional Two Thousand Five Hundred Dollars ($2,500.00) payable one (1) week before trial.
> 3. A contingent fee of 40% of all monies recovered on your behalf by settlement or verdict.
>
> You will also be responsible for any costs incurred, such as additional depositions and/or expert witnesses.

In November 1995, Mack discharged Sutton as his counsel of record. Following his discharge, Sutton served a notice of intent to enforce what he claimed was his attorney's lien by notifying Mack, his new attorneys, the attorneys for the other parties in the litigation, and the circuit court that if Mack prevailed in the case then he, Sutton, was entitled to a share of the proceeds.

Sometime in 1996, the case was settled. Sutton demanded payment of attorney's fees pursuant to the retainer agreement. The circuit court held a hearing and ruled: (1) that Sutton had no enforceable lien under §§ 757.36 and 757.37, STATS.; and (2) that the retainer contract was unconscionable and, therefore, unenforceable. The circuit court did, however, grant Sutton $4,000, less his $2,500 retainer, under his quantum meruit claim, for his work in drafting settlement offers. Sutton appeals.

ANALYSIS

Sutton first claims that the circuit court erred in concluding that he had no enforceable lien under §§ 757.36 and 757.37, STATS. We disagree. Section 757.36, STATS., provides in relevant part:

> 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 … 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 ... may be valid as against the lien so created ….

Enforcement of such a statutory lien against a settlement requires proof of: (1) the agreement creating the lien; (2) notice to the other party, or to the other party's counsel; and (3) the amount of the settlement. *See* § 757.37, STATS.[2]

Although the parties contest whether Mack signed a retention agreement, excerpts from the depositions indicate that, although a signed copy was never produced, Mack did admit to signing the letter of retainer which Sutton produced. The letter by itself, however, does not by its terms give Sutton a lien on the cause of action. As this court noted in ***Weigel v. Grimmett***, 173 Wis.2d 263, 496 N.W.2d 206 (Ct. App. 1992):

> Even where a written retention agreement exists, there must be separate proof of the lien-agreement. *Cf.* ***In re Richland Building Systems***, 40 B.R. 156, 157 (Bankr. W.D. Wis. 1984) (denying an attorney lien under Wisconsin law

[2] Section 757.37, STATS., provides:

> **When action settled by parties, what proof to enforce lien.** If any such cause of action is settled by the parties thereto after judgment has been procured without notice to the attorney claiming the lien, the lien may be enforced and it shall only be required to prove the facts of the agreement by which the lien was given, notice to the opposite party or his or her attorney and the rendition of the judgment, and if any such settlement of the cause of action is had or effected before judgment therein, then it shall only be necessary to enforce the lien to prove the agreement creating the same, notice to the opposite party or his or her attorney and the amount for which the case was settled, which shall be the basis for the lien and it shall not be necessary to prove up the original cause of action in order to enforce the lien and suit.

> because "[a]lthough there was a written fee agreement … there is no specific written grant of a lien").

Weigel, 173 Wis.2d at 271, 496 N.W.2d at 210. Accordingly, we conclude that Sutton's failure to produce a written agreement specifically granting a lien precluded his claim under §§ 757.36 and 757.37, STATS.

Sutton also claims that the circuit court erred in concluding that the contract was "unenforceable and unconscionable." Whether a contract is unconscionable is a question of law, which this court reviews *de novo*. *See* ***Leasefirst v. Hartford Rexall Drugs, Inc.***, 168 Wis.2d 83, 89, 483 N.W.2d 585, 587 (Ct. App. 1992). In order to find unconscionability, a court must find both procedural and substantive unconscionability. *See* ***id.*** at 89-90, 483 N.W.2d at 587-88. Procedural unconscionability arises from inequalities between the parties as to age, intelligence, business acumen and relative bargaining power. *See* ***Discount Fabric House v. Wisconsin Tel. Co.***, 117 Wis.2d 587, 602, 345 N.W.2d 417, 425 (1984). Substantive unconscionability arises where the terms of the contract unreasonably favor one of the parties. *See* ***id.*** A contract is also "unconscionable when no decent, fair-minded person would view the result of its enforcement without being possessed of a profound sense of injustice." *See* ***Foursquare Properties Joint Venture I v. Johnny's Loaf & Stein, Ltd.***, 116 Wis.2d 679, 681, 343 N.W.2d 126, 127 (Ct. App. 1983). Applying these standards, we affirm the trial court's finding of unconscionability.

Reviewing the terms of the Sutton-Mack agreement, the circuit court provided three reasons for finding the contract unconscionable and unenforceable. First, the court noted that Sutton had structured the agreement to provide for fees without specifying when the expenses of litigation would be deducted (before or

after the contingent fee is calculated), in violation of Supreme Court Rule 20:1.5. [3] Second, the court found that because Sutton was not required to perform any work to receive the retainer, the fee he was attempting to charge was unfair. Third, the court concluded that allowing Sutton to receive his retainer of $2,500, plus forty percent of the settlement, for the minimal work he performed would be unconscionable. We agree.

[3] SCR 20:1.5 provides, in pertinent part:

> **Fees. (a)** A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.
>
> …
>
> (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and if there is a recovery, showing the remittance to the client and the method of its determination.

Finally, Sutton claims that the circuit court "disregarded [his] uncontroverted evidence supporting his quantum meruit claim and thereby engaged in an erroneous exercise of discretion." We disagree.

Appellate review of the adequacy of an attorney fee award is limited to the question of whether the circuit court properly exercised discretion. *See* ***Chmill v. Friendly Ford-Mercury***, 154 Wis.2d 407, 412, 453 N.W.2d 197, 199 (Ct. App. 1990). This court will uphold a circuit court's discretionary act as long as we conclude that the circuit court examined the relevant facts, applied the proper standard of law, and demonstrated a rational process to reach a conclusion that a reasonable court could reach. *See* ***Loy v. Bunderson***, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982). Moreover, this court will look for reasons to sustain a circuit court's discretionary decision, *see* ***Loomans v. Milwaukee Mut. Ins. Co.***, 38 Wis.2d 656, 662, 158 N.W.2d 318, 320 (1968), and, if a circuit court fails to adequately explain its reasoning, "we will independently review the record to determine whether it provides a reasonable basis for the [] court's discretionary ruling," *see* ***State v. Clark***, 179 Wis.2d 484, 490, 507 N.W.2d 172, 174 (Ct. App. 1993).

Quantum meruit means "as much as deserved." *See* ***Ramsey v. Ellis***, 168 Wis.2d 779, 784, 484 N.W.2d 331, 333 (1992). "Recovery in quantum meruit is allowed for services performed for another on the basis of a contract implied by law to pay the performer the reasonable value of the services." ***Id.*** "[W]here a party has rendered services to another, even though it is under an invalid and unenforceable contract, he may recover for those services upon *quantum meruit*, upon an implied promise of the defendant to pay the reasonable value of the services." ***Mead v. Ringling***, 266 Wis. 523, 528, 64 N.W.2d 222, 225 (1954).

Here, the circuit court complied with the law and came to a reasonable conclusion. Sutton, offering little evidence of his efforts and no specification of his hours, estimated that he devoted between twenty and five hundred hours to the case. The court considered this "a broad range" and noted that "it was extremely confusing to the court why [Sutton] would be so unsure of what he did within that four-month period." As the circuit court noted:

> If I look at what he has claimed here, which is a reconstruction based off his daybook without any itemization of how those hours are broken down according to the tasks he performed, then I have him working almost seven weeks out of seventeen weeks during the period[, w]hich is about a third of his total time.
>
> I can't believe that a person who spent a third of his time devoted to only one case, can produce only three items of correspondence. And can only put together the most general type of billing statement.

Although Sutton disputes these findings, he offers no basis for us to conclude that the court was in error. As Mack argues:

> Remarkably, Mr. Sutton filed an affidavit with the Court which claimed that he was able to reconstruct the 274 hour figure by consulting his daily planner. This is in direct contradiction to his deposition testimony. In his deposition[,] he conceded that there were only three references to the Mack case in his daily planner. He also testified in his deposition that his 20 hour estimate was arrived at by reviewing his daily planner among other things….
>
> Sutton argues that the Court should have given deference to the affidavit he filed after his deposition. In this affidavit he requests compensation for 274 hours of work. The Court was free to disregard the affidavit since it was controverted by Sutton's own deposition testimony…. [Moreover, as] the court noted … if Sutton had spent 274 hours working on Mack's file, one would expect to see notes in the file or memoranda that Sutton had prepared in connection with his review….

We agree. Sutton's affidavit, other than giving the date and the number of work hours expended, did not include any itemization of the work he allegedly performed. Thus, he provided the circuit court with no basis on which to conclude that he was entitled to any additional payment. Accordingly, we conclude that the circuit court properly exercised discretion in determining Sutton's fees.

By the Court.—Orders affirmed.

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