COURT OF APPEALS
DECISION
DATED AND FILED

February 24, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP657 **Cir. Ct. No. 2009CV16113**

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

HUPY & ABRAHAM, S.C.,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

MITCHELL BARROCK,

DEFENDANT-APPELLANT-CROSS-RESPONDENT,

BARROCK & BARROCK AND JOHN FOLEY,

DEFENDANTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM W. BRASH, Judge. *Affirmed.*

Before Kessler, Brennan, JJ., and Thomas Cane, Reserve Judge.

¶1 KESSLER, J. Mitchell Barrock, the law firm Barrock & Barrock, and John Foley (collectively, "Barrock"),[1] appeal a judgment of the circuit court, following a bench trial. The circuit court allocated attorneys fees between Barrock and the law firm of Hupy & Abraham, S.C. ("Hupy") as a result of their sequential representation of the same client. Hupy cross-appeals the judgment, contending that the circuit court erred in allowing Barrock relief from a contract between Hupy and Barrock regarding fee division in a specific personal injury case. We affirm.

BACKGROUND

¶2 This appeal is a dispute over attorneys fees stemming from a personal injury case in which, at various times, both Hupy and Barrock sequentially represented the same client. In May 2004, Colleen Olson was involved in a motorcycle accident and sustained severe injuries. While in the hospital, a member of Olson's family contacted Mitchell Barrock to represent Olson. That same day, a different member of Olson's family contacted the law firm Hupy & Abraham, S.C., to represent Olson. Olson executed contingent fee retainer contracts with both law firms.

The 2004 Contract and Order.

¶3 Barrock and Hupy reached an agreement governing litigation of the Olson matter and division of the contingent fee, and also resolved Barrock and Hupy's fee dispute in another matter, "the Franklin case." The parties entered a

[1] Although the notice of appeal names the defendants as Mitchell Barrock and Barrock and Barrock, and the third-party defendant John Foley, the appellant's brief is signed only by Mitchell Barrock individually. None of the parties have requested a change in the caption. Accordingly, we construe the briefs as making arguments on behalf of all of the parties named in the notice of appeal.

contract under which Barrock would retain the entire contingent fee collected in the Franklin case and Hupy would litigate the Olson matter, retaining 85% to 95% of the contingent fee in the Olson case. The contract is memorialized in a stipulation and order signed by the circuit court (the 2004 order). The parties' agreed upon distribution of attorneys fees was as follows:

> the Olson case in which both the Hupy law firm and Attorney Mitchell J. Barrock claim an attorney's lien be resolved by payment of fifteen (15%) percent of the attorney's fee to the Barrock firm if this matter is settled without the commencement of litigation and five (5%) percent of the attorney's fee to the Barrock firm if the Olson matter is resolved after litigation is commenced.

¶4 Hupy represented Olson for approximately two years, filing suit on Olson's behalf in Washington County Circuit Court Case No. 2006CV000463. In July 2006, shortly after Hupy filed the Washington County suit, Olson discharged Hupy and again retained Barrock, along with another attorney, John Foley. Barrock and Foley represented Olson for the following three years. After a jury trial in September 2009, they settled the case.

Hupy's Motion for Judgment on the Pleadings.

¶5 After the resolution of Olson's case, Hupy filed an action in the Milwaukee County Circuit Court to enforce the 2004 contract with Barrock. Hupy argued that under the terms of the 2004 stipulated agreement[2] Hupy was entitled to 95% of the fee recovered in the Olson case. Barrock counterclaimed for a declaratory judgment pursuant to WIS. STAT. § 806.04 (2013-14),[3] asking that "the

[2] The 2004 Agreement had not been modified by either party.

[3] WISCONSIN STAT. § 806.04 provides, as relevant:

stipulated Agreement between [Barrock] and [Hupy] dated on or about August 30th, 2004, be set aside and that attorney fees be divided by the Court in a fair and reasonable fashion." Barrock argued that the 2004 stipulated agreement was "superseded by a subsequent intervening contract of July 12th, 2006." (Underlining omitted.) The 2004 agreement was between Barrock and Hupy; the 2006 "intervening contract" was between Barrock, Foley, and Olson.

¶6 Hupy responded with a motion for judgment on the pleadings arguing that the 2004 order controlled the outcome and Hupy was entitled to the fees described in the order. Hupy also argued that Barrock's counterclaim was untimely under WIS. STAT. § 806.07(2). Barrock countered that "extraordinary circumstances" under WIS. STAT. § 806.07(1)(h) existed—namely, that Hupy was terminated by Olson for cause, and attorneys fees should be "divided by the Court in a fair and reasonable fashion."

¶7 The circuit court denied Hupy's motion for judgment on the pleadings because material questions of fact existed. The circuit court found that the 2004 agreement did not contemplate the manner in which the Olson settlement was obtained, *i.e.*, that Barrock tried and settled the case rather than Hupy. The circuit court also denied Hupy's motion to dismiss Barrock's counterclaim as an

---

> **(1)** SCOPE. Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.…
>
> **(2)** POWER TO CONSTRUE, ETC. Any person interested under a … written contract or other writings constituting a contract, … may have determined any question of construction or validity arising under the instrument … and obtain a declaration of rights, status or other legal relations thereunder….

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

untimely request for modification of a judgment under WIS. STAT. § 806.07, finding that the circumstances under which the settlement was obtained were extraordinary under WIS. STAT. § 806.07(1)(h) and that Barrock's "counterclaim is a viable claim."

Hupy's Motion for Summary Judgment.

¶8 Following discovery, Hupy moved for summary judgment. Hupy again argued that pursuant to WIS. STAT. § 806.07(2), Barrock failed to bring a motion for relief from the 2004 order within "a reasonable time." Specifically, Hupy argued that Barrock did not request relief from the order until Hupy commenced the action for attorneys fees—three years after Barrock took over Olson's case. Alternatively, Hupy argued that "Barrock's 'extraordinary circumstances' argument" falsely "rests on the assertion that … Hupy breached its representation agreement and injured Olson by failing to reasonably perform the legal services consistent with the standard of care required of the profession."

¶9 In its opposition motion, Barrock argued that the 2004 stipulation and agreement no longer entitled Hupy to 95% of the fees recovered from the Olson settlement because Hupy failed to properly litigate Olson's case. Barrock argued that Hupy neglected Olson's case and failed to conduct adequate discovery. Barrock asserted that he worked on Olson's case for three years because he essentially had to develop the case from scratch. Barrock argued that because the 2004 agreement did not contemplate Barrock settling the Olson matter, the stipulation should be set aside pursuant to WIS. STAT. § 806.07(1)(h).

¶10 The circuit court denied Hupy's summary judgment motion. As to Hupy's contention that Barrock's request for relief from the 2004 order was untimely, the circuit court stated:

> [A]t the time the [2004] order was issued by [the circuit court], Miss Olson was represented by [Hupy]. When the case was actually settled, Miss Olson was represented by [Barrock]. The Court finds that these are the relevant factors upon which the determination of timeliness … should be based.
>
> ….
>
> [I]n considering those extraordinary circumstances in the context of this case, the Court finds that, in the interest of justice, relief from the [2004] order … as permitted under Statute Section 806.07(h) is justified. To put it simply, the circumstances on which the order was issued were completely different at the time of the settlement. As such, the Court finds that it is not in the interest of justice to enforce the terms of the [2004] order.

¶11 The circuit court, however, did not vacate the 2004 order; nor did the court vacate the contract between Hupy and Barrock underlying the order. The court concluded that "the 2004 Order … is a valid contract between Hupy and Barrock relative [to] the original representation … after the initial retainer agreements were executed by both parties. The … terms of that Order are still valid as they pertain to that aspect of the relationship and dispute between these parties." The court relied on the methodology described in ***Tonn v. Reuter***, 6 Wis. 2d 498, 95 N.W.2d 261 (1959), which held that where an attorney retained on a contingent fee contract is discharged without cause, the proper measure of damages "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." ***Id.*** at 505. Applying the methodology of ***Tonn*** to the facts of this case, the court explained the concept and limitations of a subsequent intervening or superseding contract:

> Attorney A executes an agreement with Attorney B relative [to] the division of fees in a particular case, where the expectation is that Attorney B will resolve the case.

> However, Attorney B is subsequently discharged by the client, and Attorney C takes over the case, and ultimately resolves it. Any dispute between Attorney B and Attorney C over the fee would be resolved by a ***Tonn*** analysis, assuming Attorney B was discharged without cause. Attorney A would then get a portion of the fee awarded to Attorney B, according to the contract between Attorney A and Attorney B. Conversely, if Attorney B is found to have been discharged with cause, and collects nothing, Attorney A collects nothing as well, because his contract is with Attorney B, not Attorney C….
>
> [T]he contract between Attorney A and Attorney B cannot be rendered invalid due to a dispute between Attorney B and a different party, Attorney C. *Accordingly, the terms of the 2004 Order remain valid as they pertain to the division of fees between Barrock (i[.]e. Attorney A) and Hupy (i[.]e. Attorney B), regardless of the application of* ***Tonn*** *to the dispute between Hupy (i[.]e. Attorney B) and Barrock and Foley (i[.]e. Attorney C).*

(Emphasis added.) Consequently, the court concluded that a just division of attorneys fees under ***Tonn*** turned on whether Hupy was discharged by Olson for cause, which was a question of fact not appropriate for summary judgment.

Bench Trial Before the Circuit Court.

¶12 Hupy and Barrock proceeded to a bench trial on the question of whether Hupy was terminated for cause. The circuit court found that Hupy was terminated without cause and that Hupy, Barrock, and Foley all were to be equitably compensated for the services they provided.

¶13 The circuit court held the facts of the case akin to ***Tonn*** and found the contingent fee distribution arrangement outlined in ***Tonn*** determinative. In essence, the circuit court found that Olson breached her contract with Hupy when she discharged Hupy without cause. The court also found that under the 2004 contract with Barrock, Hupy was in the position of the first attorney handling Olson's case. Thus, under the ***Tonn*** methodology, Hupy was entitled to the full

amount of the contingent fee, less the fees reasonably earned by Barrock and Foley for their efforts.

¶14 The circuit court's findings were supported by the testimony of multiple witnesses, including Attorney Jason Abraham, a shareholder at the Hupy firm, who testified that his legal team obtained medical reports, helped Olson obtain disability benefits, retained an engineering expert and examined Olson's motorcycle thoroughly. Abraham told the court that he oversaw Olson's case, analyzed records, and made all major decisions pertaining to the case. Abraham's legal assistant, Kelly Jaeckel, testified that she had more communication with Olson "than [with] a normal client." Jaeckel testified that she never had any indication that Olson was displeased with the firm.

¶15 Mitchell Barrock told the court that in late June 2006, Olson contacted him asking him to take over representation of her case because "she was very unhappy with Hupy's office and feeling like she was being neglected." Barrock testified about the amount of work he put into the case, including the considerable amount of discovery he conducted.

¶16 Olson testified about her discontent with Hupy's firm, but also admitted that her memory was greatly affected by her accident. When asked about her deposition testimony in which she stated that, because of her multiple pain medications, it was possible she had more frequent communication with Hupy than she remembered, Olson told the court that she "[doesn't] have any reason to believe that wasn't my answer."

¶17 The circuit court calculated what it determined to be a "reasonable allowance for the necessary services performed by Barrock and Foley." The court also determined that Barrock, individually, was entitled to an additional five

percent of the contingency fee, based on the 2004 Barrock-Hupy contract, resulting in an award for Barrock in the amount of $48,350. The circuit court's division of the contingent fees, based on the amount of work performed by Barrock and Foley, resulted in an award for Barrock and Foley in the amount of $257,656.

¶18 Barrock now appeals the circuit court's ruling that Hupy receive the contingent fee, less the reasonable allowance for Barrock and Foley's services. Hupy cross-appeals, again contending that Barrock's motion for relief from the 2004 order was untimely under WIS. STAT. § 806.07(2) and that the circuit court erroneously found that extraordinary circumstances justified altering the fee distribution scheme in the 2004 order. We disagree with both parties and affirm the circuit court.

DISCUSSION

Barrock's Appeal.

¶19 On appeal, Barrock argues that: (1) ***Tonn*** should be reversed; (2) even if ***Tonn*** is not reversed, the circuit court erred when it determined that Hupy was the "first" attorney in the Olson case; (3) the circuit court erroneously found that Hupy was discharged without cause; and (4) the circuit court erroneously found that Hupy was entitled to the contingent fee, minus service costs awarded to Barrock.

A. Standard of Review.

¶20 The standard of review in a bench trial is whether the court's findings of fact are clearly erroneous. *See* WIS. STAT. § 805.17(2); *see also*

Ozaukee Cnty. v. Flessas, 140 Wis. 2d 122, 130-31, 409 N.W.2d 408 (Ct. App. 1987).

¶21 As to a circuit court's determination of attorneys fees, we also apply a deferential standard of review:

> Our review of the circuit court's value of reasonable attorney fees and costs is limited to whether the circuit court properly exercised its discretion. A proper exercise of discretion requires the circuit court to employ a logical rationale based on the appropriate legal principles and facts of record. As this court recently recognized, [w]e give deference to the circuit court's decision because the circuit court is familiar with local billing norms and will likely have witnessed first-hand the quality of the service rendered by counsel. We will uphold the circuit court's determination unless it erroneously exercised its discretion. If the circuit court proceeds on an erroneous interpretation of the law, the exercise of discretion is erroneous.

Anderson v. MSI Preferred Ins. Co., 2005 WI 62, ¶19, 281 Wis. 2d 66, 697 N.W.2d 73 (internal citations, quoted sources and quotation marks omitted).

B. The *Tonn* Case.

¶22 Ultimately, all of Barrock's arguments turn on whether the circuit court misapplied ***Tonn*** to the facts of this case.[4] In ***Tonn***, the client discharged, without cause, an attorney with whom she had a contingency fee agreement. ***Id.***, 6 Wis. 2d at 499-501, 503. The circuit court permitted the client to substitute a successor attorney, but ordered an equitable distribution of fees between the two attorneys, eventually determining the amount of money that each

[4] Barrock's request that we reverse ***Tonn v. Reuter***, 6 Wis. 2d 498, 95 N.W.2d 261 (1959), is disingenuous and we decline to discuss it. The court of appeals has no power to reverse or modify a Wisconsin Supreme Court decision. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

attorney would receive. *See* ***id.*** at 501-02. The discharged attorney appealed. ***Id.*** at 502.

¶23 The ***Tonn*** court adopted what it characterized as the "majority rule": that a discharge without cause is a breach of contract. ***Id.*** at 503. Specifically, the ***Tonn*** court concluded 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." ***Id.***

¶24 In determining the proper division of a contingent fee in a situation involving the termination of one attorney in favor of a successor attorney, the ***Tonn*** court concluded that the measure of damages is "the amount of the contingent fee ... 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." ***Id.*** at 505. The court noted, however, that "[a] contingent fee contract is always subject to the supervision of the court as to its reasonableness." ***Id.*** at 504.

¶25 The facts of this case are similar to those in ***Tonn***, except here, Olson initially retained both Hupy and Barrock almost simultaneously. The circuit court found ***Tonn*** applicable and determined that the division of the contingent fee turned on whether, under the circumstances here, Hupy became the first attorney actually retained by Olson and whether Hupy was dismissed for cause.

¶26 The circuit court found that Hupy was in the position of the first attorney to represent Olson because the undisputed agreement underlying the 2004 order states that Barrock received consideration (the Franklin fee) for limiting his interest in the Olson fee and for ceding responsibility of the Olson case to Hupy.

Barrock argues that the circumstances contemplated by the contract changed, but he does not challenge the terms of the underlying contract, nor did he seek to modify the contract after he was retained for the second time. Accordingly, Barrock and Foley's retainer agreement with Olson does not supersede the 2004 contract between Hupy and Barrock. *See* ***Mortimore v. Merge Tech. Inc.***, 2012 WI App 109, 344 Wis. 2d 459, 824 N.W.2d 155 (where parties entered a written contract and stated that the terms of the contract could only be amended in writing, but later orally agreed to amend the terms of the contract, we could not conclude that the oral agreement superseded the written contract). The court here appropriately determined that Barrock negotiated away his "first position" in the Olson matter and Hupy became the first attorney retained to perform "specific legal services." *See* ***Tonn***, 6 Wis. 2d at 505.

¶27 The circuit court relied on the testimony from multiple members of Hupy's staff, as well as from Olson herself, when it found that Hupy was terminated without cause. The court did not find Olson's testimony "to be very credible" due to Olson's admitted memory loss, "her family and financial pressures, as well as personal sentiments and allegiances as a result of the outcome of this matter." The court stated that Olson's testimony directly contradicted that of Abraham and Jaeckel, both of whom testified as to their communications with Olson and the work involved in Olson's case. The circuit court concluded that there was insufficient credible evidence to establish that Hupy breached the requisite standard of care.

¶28 It is clear that Barrock's complaint about the court's ***Tonn*** application is based on Barrock's dissatisfaction with the circuit court's findings of fact. The circuit court, acting as the fact finder, is to determine the weight of the evidence and the credibility of the witnesses, and we will not overturn those

findings unless they are clearly erroneous. ***Micro-Managers, Inc. v. Gregory***, 147 Wis. 2d 500, 512, 434 N.W.2d 97 (Ct. App. 1988). We conclude that the record supports the circuit court's findings and that the circuit court properly exercised its discretion when it distributed the contingent fee in accordance with the methodology of ***Tonn***.

Hupy's Cross Appeal.

¶29 Hupy cross-appeals, arguing that Barrock's request for relief from the 2004 order was untimely. Hupy also argues that the circuit court "misapplied the concept of 'extraordinary circumstances' to erroneously render timeliness irrelevant for relief to requests brought pursuant to [WIS. STAT.] § 806.07(1)(h)."

A. Standard of Review.

¶30 A circuit court has wide discretion in deciding whether to grant relief under WIS. STAT. § 806.07; ***Price v. Hart***, 166 Wis. 2d 182, 195, 480 N.W.2d 249 (Ct. App. 1991). Reversal is not appropriate in this context unless the court erroneously exercises its discretion. ***Sukala v. Heritage Mut. Ins. Co.***, 2005 WI 83, ¶8, 282 Wis. 2d 46, 698 N.W.2d 610. A court properly exercises its discretion when it uses a process of reasoning that depends on facts that are in the record or are reasonably derived by inference from record facts, and bases its conclusion on the application of the correct legal standard. ***Id.***

B. Barrock's Motion to Set Aside the 2004 Order and the Extraordinary Circumstances Test.

¶31 Hupy argues that Barrock's motion to set aside the 2004 order was untimely and should have been dismissed either when Hupy filed its motion for judgment on the pleadings or its motion for summary judgment. Hupy also argues

that the circuit court misapplied the concept of "extraordinary circumstances" to erroneously render timeliness irrelevant to its WIS. STAT. § 806.07(1)(h) analysis. Hupy's arguments are based on its contention that at the time Barrock took over Olson's case, in July 2006, Barrock was aware of the 2004 order, yet did not move for relief from the order until three years later.

¶32 We do not address Hupy's arguments regarding timeliness under WIS. STAT. § 806.07 because, as discussed, the circuit court's decision was based on the existence of a valid contract between Hupy and Barrock. Therefore, whether Barrock brought his motion within a "reasonable" amount of time is irrelevant to the facts of this case because the parties were both bound by the terms of the contract—terms which were never modified. Accordingly, the circuit court properly applied the terms of the contract to the facts of this case and used the methodology put forth by ***Tonn***.

¶33 For the forgoing reasons we affirm the circuit court.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.