UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

STEVEN A. AVERY,

Plaintiff,

v. 04-C-00986

MANITOWOC COUNTY,
THOMAS H. KOCOUREK and
DENIS R. VOGEL,

Defendants.

**BRIEF OF GINGRAS, CATES & LUEBKE, S.C.
IN SUPPORT OF ORDER TO SHOW CAUSE FOR
ATTORNEY'S LIEN PURSUANT TO § 757.36, WIS. STATS.**

NOW COMES the law firm of Gingras, Cates & Luebke, S.C., by Robert J. Gingras, and hereby submits the following Brief in Support of Order to Show Cause for Attorney's Lien Pursuant to Sec. 757.36, Wis. Stats.

INTRODUCTION

The current dispute that is presently before this Court revolves around Steven Avery's signing two fee contracts with two separate law firms. The law in Wisconsin is clear, since Avery did not discharge Gingras, Cates & Luebke, S.C. for cause, the law firm has a continuing lien in the proceeds of this case.

FACTUAL BACKGROUND

On October 30, 2003, Steven Avery signed a fee contract with the law firm of Gingras, Cates & Luebke, S.C. (Affidavit of Robert J. Gingras, ¶ xx; Exhibit A). The fee contract was signed during a meeting at the offices of Gingras, Cates & Luebke, S.C., and Attorneys Robert J.

Gingras and Paul A. Kinne were present, along with Steven Avery and his parents. (Affidavit of Robert J. Gingras, ¶ xx; Affidavit of Paul A. Kinne, ¶ xx). During the meeting when the fee contract was signed, the contract was explained to Avery, he was allowed to ask questions about the contract and he was not pressured or induced to sign it. (Affidavit of Robert J. Gingras, ¶ xx; Affidavit of Paul A. Kinne, ¶ xx; Exhibit G). Based on the observations of Attorneys Gingras and Kinne, Avery understood the contract and signed it of his own free will. (Affidavit of Robert J. Gingras, ¶ xx; Affidavit of Paul A. Kinne, ¶ xx).

During the course of the meeting, Avery told Attorneys Gingras and Kinne that he was going to meet with the Innocence Project lawyers later that same day. (Affidavit of Robert J. Gingras, ¶ xx; Affidavit of Paul A. Kinne, ¶ xx). Avery never told Attorneys Gingras or Kinne that he was going to meet with Attorney Walt Kelly or any other civil rights attorney that same day. (Affidavit of Robert J. Gingras, ¶ xx; Affidavit of Paul A. Kinne, ¶ xx). Neither attorney Gingras nor Kinne never told Avery that he could just sign the fee contract in order to save him from having to travel back to Gingras' office in the future. (Affidavit of Robert J. Gingras, ¶ xx; Affidavit of Paul A. Kinne, ¶ xx). At the conclusion of the meeting, Attorneys Gingras and Kinne were ready willing and able to prosecute Avery's case on his behalf and were both of the belief that they were Avery's attorneys without any qualification or condition. (Affidavit of Robert J. Gingras, ¶ xx; Affidavit of Paul A. Kinne, ¶ xx; Exhibit G). And, in the days following Avery's signing the fee contract, he did not call Attorneys Gingras or Kinne to tell them that he had signed a fee contract with Attorney Kelly. (Affidavit of Robert J. Gingras, ¶ xx; Affidavit of Paul A. Kinne, ¶ xx).

On November 3, 2003, Attorney Kinne wrote a letter to Attorney Tracey Wood, who practices criminal defense, inquiring if she wanted to be involved in the representation of Avery. (Affidavit of Paul A. Kinne, ¶ xx; Exhibit B). This letter was written because Gingras, Kinne and Avery discussed Wood's potential involvement at the meeting on October 30, 2003. (Exhibit B).

On November 4, 2003, Attorney Kinne wrote a letter to Avery regarding a phone conversation that Avery and Kinne had that same day. (Affidavit of Paul A. Kinne, ¶ xx; Exhibit C). During that conversation, Avery asked Attorney Kinne to hold off filing a complaint in federal court, but gave Kinne permission to speak with Attorney Keith Findley from the Innocence Project. (Exhibit C). Attorney Kinne spoke with Attorney Findley in the afternoon of November 4, 2003, in an effort to secure copies of the documents that the Innocence Project had relative to Avery's criminal case and subsequent release. (Affidavit of Paul A. Kinne, ¶ xx). During that conversation, Attorney Findley told Attorney Kinne that he thought that Avery had also signed a fee contract with the law firm of Attorney Walt Kelly. (Affidavit of Paul A. Kinne, ¶ xx). Gingras, Cates & Luebke, S.C. has never been provided a copy of that fee contract. (Affidavit of Robert J. Gingras, ¶ xx).

On November 10, 2003, Attorneys Gingras and Kelly spoke about the representation of Avery. (Affidavit of Robert J. Gingras, ¶ xx). During that conversation, Attorney Kelly told Attorney Gingras that Avery had fired Gingras, Cates & Luebke, S.C. (Affidavit of Robert J. Gingras, ¶ xx). Attorney Kelly also told Attorney Gingras that prior to Avery's signing the second fee contract with Kelly's firm, Attorney Kelly knew that Avery had already signed a fee contract with Gingras, Cates & Luebke, S.C. (Affidavit of Robert J. Gingras, ¶ xx; Exhibit H).

Attorney Kelly further told Attorney Gingras that he thought that Avery could shop around for other lawyers even though he had signed a fee contract with Gingras, Cates & Luebke, S.C. (Affidavit of Robert J. Gingras, ¶ xx; Exhibit H). Attorney Gingras disagreed with Attorney Kelly, and further told him that he would seek enforcement of his lien. (Affidavit of Robert J. Gingras, ¶ xx). In addition, during that conversation, Attorney Gingras offered to co-counsel the case with Attorney Kelly. (Affidavit of Robert J. Gingras, ¶ xx; Exhibit H). Attorney Kelly refused the offer. (Affidavit of Robert J. Gingras, ¶ xx; Exhibit H).

Thereafter, on May 3, 2004, Attorney Richard Cayo (who was apparently hired by Attorney Kelly relative to the fee contract issue) wrote Attorney Gingras a letter, indicating that Avery did not fire Gingras, Cates & Luebke, S.C. for cause, but that the firm was never hired as Avery's attorney in the first place. (Exhibit D).

On January 18, 2005, Avery sent a letter to Attorney Gingras telling him that he was discharged as his attorney, and attempted to recount what Avery did in signing two fee contracts. (Exhibit E). Attorney Gingras responded with a letter dated February 24, 2005, disagreeing with Avery's recollection of the events surrounding the signing of the fee contracts, and reiterating the firm's lien interest in any recovery in the case. (Exhibit F).

The fee contract that was signed by Avery and accepted by Attorney Gingras states in pertinent part:

> 4. Attorney-Lien Agreement: My attorneys, GINGRAS, CATES & LUEBKE, S.C., are hereby given a continuing lien in my claim and the proceeds thereof for the amount of the contingent fee, pursuant ro [sic] Wis. Stats. § 757.36.

(Exhibit A).

ARGUMENT

I. This Court may lack jurisdiction to determine what amount of attorney's fees should be awarded to Gingras, Cates & Luebke, S.C.

The dispute about attorney's fees in this case resides in the area of contract law. Specifically, Avery signed a fee contract with Gingras, Cates & Luebke, S.C. to represent him in his case against Manitowoc County, et al. There is no question of federal law. There is no diversity of citizenship between the two law firms. The issue is about a fee contract, and fee contracts only involve issues of state law. *Hill v. Baxter Health*, 405 F.3d 572 (7th Cir. 2005).

In addition, Gingras, Cates & Luebke, S.C. has a potential claim against Attorney Kelly's law firm for intentional interference with contract. That, too, is a state law claim that, if brought, would have to be in state court.

Therefore, it appears that this Court may lack jurisdiction to resolve the fee dispute. Consequently, the fee dispute should be handled by Avery and the two law firms. However, if an agreement cannot be reached, Gingras, Cates & Luebke, S.C. would have to file claims in state court to include breach of contract and intentional interference with contract.

II. Gingras, Cates & Luebke, S.C. is entitled to attorney's fees in this case.

Assuming, *arguendo*, that this Court does have jurisdiction to resolve this dispute, then it is the position of this firm that it is entitled to attorney's fees in this case, pursuant to sec. 757.36, Wis. Stats. and based on the fee contract entered into between Avery and the firm.

A. Avery signed an enforceable fee contract with Gingras, Cates & Luebke, S.C.

It is undisputed that Avery signed a fee contract with Gingras, Cates & Luebke, S.C. It also cannot be disputed that Avery discharged Gingras, Cates & Luekbe, S.C. without cause

before allowing the firm to complete its representation of Avery. Moreover, Avery was not induced or otherwise forced to sign the fee contract.

While there may be differing versions of certain facts related to Avery's signing the fee contract, and what he thought it meant, since the contract is clear on its face and was signed by Avery without inducement, the contract stands. The contract must be definite in its terms, and, in this case, it was.

First, no technical "meeting of the minds" is required in Wisconsin.

> Courts often describe the definiteness requirement as mutual assent, or "meeting of the minds." ... Yet, this does not mean that parties must subjectively agree to the same interpretation at the time of contracting. Instead, mutual assent is judged by an objective standard, looking to the express words the parties used in the contract. *See Marion v. Orson's Camera Ctrs., Inc.*, 29 Wis.2d 339, 345, 138 N.W.2d 733 (1966) (indicating that the key is "not necessarily what [the parties] intended to agree to, but what, in a legal sense, they did agree to, as evidenced by the language they saw fit to use."

Management Computer Services, Inc. v. Hawkins, Ash, Baptie & Co., 206 Wis.2d 158, 178-79, 557 N.W.2d 67 (1996).

In this case, Avery claims that he was told that his signing the fee contract was for nothing more than to save him a return trip to Madison and that he was going to meet with another civil rights attorney for possible representation. While Attorneys Gingras and Kinne vehemently deny this account, the plain words of the contract do not include any mention of that. Even assuming that such statements were made, they are nothing more than parol evidence and must be disregarded in the determination of this fee contract dispute.

> The parol evidence rule can be stated as follows: "When the parties to a contract embody their agreement in writing and intend the

> writing to be the final expression of their agreement, the terms of the writing may not be varied or contradicted by evidence of any prior written or oral agreement in the absence of fraud, duress, or mutual mistake." ... "Therefore, even if, without objection, parol evidence of the intention of the parties to a written contract, which conflicts with the express provisions of such contract, gets in the record, the court must disregard it."

Spring Valley Meats, Inc. v. Bohen, 94 Wis.2d 600, 606-07, 288 N.W.2d 852 (1980); citations omitted. In this case, the plain words of the fee contract signed by Avery state in pertinent part:

> 4. Attorney-Lien Agreement: My attorneys, GINGRAS, CATES & LUEBKE, S.C., are hereby given a continuing lien in my claim and the proceeds thereof for the amount of the contingent fee, pursuant ro [sic] Wis. Stats. § 757.36.

(Exhibit A).

Avery signed the fee contract and its terms are definite and should not be contradicted by extraneous disputed facts.

B. Avery breached the fee contract and Gingras, Cates & Luebke, S.C. is entitled to attorney's fees.

Since Avery did sign an enforceable and clear fee contract with Gingras, Cates & Luekbe, S.C., the law in Wisconsin is clear that the firm is entitled to a remedy.

> [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.

Tonn v. Reuter, 6 Wis.2d 498, 503, 95 N.W.2d 261 (1959); *Knoll v. Klatt*, 43 Wis.2d 265, 269, 168 N.W.2d 555 (1969). Clearly, Avery breached the fee contract that he signed with Gingras, Cates & Luebke, S.C.

This begs the question: what is Gingras, Cates & Luebke's measure of damages, since it was employed on a contingent fee contract to undertake a specific task and was discharged without cause?

This firm is aware of the holding in *Tonn* relative to the measure of damages. But this firm is also aware of how the *Tonn* court reached its conclusion. In essence, the *Tonn* court adopted a hybrid approach that had not been adopted in any other state at that time. In fact, at the time of the decision, many states (including California, Kansas, Ohio, Oregon, Pennsylvania, Texas and Missouri) allowed an attorney who was discharged without cause to recover the full amount of the contingent fee contracted for. *Tonn v. Reuter*, 6 Wis.2d at 504-05.

The rationale for adopting that measure of damages is threefold: (1) the full contract price is the most logical measure of damages as it reflects the value placed on the services at the time of the contract's formation; (2) awarding damages prohibits a client from profiting from his own breach of contract; and, (3) it lessens the difficult task of valuing a lawyer's partially completed work.

Instead of following the traditional contract rule in determining the measure of damages in this scenario, the *Tonn* court looked to Arkansas for guidance. At the time of the *Tonn* decision, Arkansas allowed for the recovery of the full contingent fee less what expenses the discharged law firm would have reasonably expended in prosecuting the case. *Bockman v. Rorex*, 212 Ark. 948, 208 S.W.2d 991 (1948).

However, the *Tonn* court chose not to follow Arkansas either. It created a hybrid rule that was not founded on any contract principle, any primary authority nor any secondary authority.

> [T]he proper measure of damages to apply in a case like the present is the amount of the contingent fee based upon the amount of the settlement or judgment ultimately realized by the client, less a fair allowance for the services and expenses which would necessarily have been expended by the discharged attorney in performing the balance of the contract. However, any deduction for services yet to be performed in order to earn the contingent fee should not be made on the basis of deducting such fraction of the contingent fee as equals the fraction of the total work not performed at the time of discharge.

Tonn, 6 Wis.2d at 505; *Knoll,* 43 Wis.2d at 269-70.

In this case, Avery signed a fee contract that was plain on its face and definite on its terms. Then, in a complete disregard for his own signature, he signed another fee contract with Attorney Kelly's firm. Moreover, Attorney Kelly knew that Avery had already signed a fee contract with this firm, but, as evidenced by his comments to Attorney Gingras, he felt that Avery could continue to shop around. What good, then, was the fee contract that was bargained for in good faith by this law firm and accepted by Avery?

To follow the *Tonn* court's interpretation of the remedy that should be afforded to Gingras, Cates & Luebke, S.C. would mean that people could simply ignore contracts that they sign without any consequence. Avery should not be allowed to breach a contract without penalty, and Attorney Kelly should not be able to interfere with a contractual relationship without penalty.

Moreover, by signing two fee contracts, Avery may have obligated himself to pay more than a 40% contingent fee. *Id.* at 506.[1]

By all accounts, Gingras, Cates & Luebke, S.C. should be entitled to the full 40% contingent fee (40% of $400,000 equals $160,000) plus its costs that it contracted for with Avery on October 30, 2003.

s/ Robert J. Gingras
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[1]It is unclear from this Court's Order whether the entire amount of the settlement, $400,000, or only 40% thereof has been placed in the trust account of Attorney Kelly. If it is only 40%, $160,000, then an additional 40% should be re-placed into the trust account pending resolution of this dispute.