

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
(Green Bay Division)**

STEVEN A. AVERY

Plaintiff,

-vs-

Case No: 04-C-986

MANITOWOC COUNTY,
THOMAS H. KOCOUREK, individually
and in his official capacity as Sheriff
Sheriff of Manitowoc County,

-and-

DENNIS R. VOGEL, individually with
respect only to his executive, administrative
and advice and counsel functions and in his
official capacity as District Attorney of
Manitowoc County

Defendants.

BRIEF

INTRODUCTION

On October 30, 2003, Steven Avery, barely more than a month beyond his release after having served nearly eighteen years in prison for a crime he did not commit, traveled with his parents to Madison to meet with two different law firms to which he had been referred for possible representation in a civil case. At 11:00 A.M. that day he was scheduled to meet with Attorney Robert Gingras after which he had a noon meeting scheduled with Attorney Walter Kelly. Although he signed a

representation agreement with Attorney Gingras' firm, Gingras, Cates and Leubke, S.C. (hereafter GCL) at his meeting with attorney Gingras, he did not believe he had made a binding commitment to retain GCL as his counsel. He thus proceeded to the meeting with Attorney Kelly at the University of Wisconsin. After a discussion with Attorney Kelly, Avery agreed to have Kelly represent him and confirmed that agreement in writing the following day. Kelly was unaware that Avery had met with Gingras until November 4, when he learned that a member of the Gingras' firm had called Attorney Kieth Findlay, an attorney who had represented Avery in his efforts to be released from prison, to obtain information on Avery. A dispute arose between Kelly and Gingras regarding who Mr. Avery wanted as his counsel. Avery made it clear that he had chosen Attorney Kelly as his counsel and that he was satisfied with his choice.

Attorney Gingras asserted that he had a binding agreement with Avery to represent him and that, while he understood his firm would not be performing any legal services for Mr. Avery, he had a valid claim to 40 percent of any amount that was recovered on Mr. Avery's behalf. Having been rejected as Avery's counsel, Gingras filed an attorney's lien to recover the fees he believed were due and owing to him.

Consistent with Avery's authorization, Kelly incorporated Attorney Stephen Glynn into the representation of Avery and together they worked diligently for nearly two and one half years booking more than one thousand hours of attorney time on the Avery case. After Avery was arrested and charged with first degree murder in late

2005 the case was settled for \$400,000.00 out of which \$160,000.00 was placed in trust to cover fees and expenses by order of this court which explicitly retained jurisdiction to resolve the dispute over fees between GCL and attorneys Kelly and Glynn.

Attorney Gingras, while conceding that his firm performed no legal services on Avery's behalf in this matter, urges the Court to ignore a 47 year old Wisconsin precedent and award him a full 40 percent of the recovery obtained by Attorneys Kelly and Glynn.

The Court should deny the request of Gingras. The submissions of the parties demonstrate that the GCL contract was invalid on its face containing omissions and ambiguities that when construed in favor of Avery as they must be, defeat any claimed entitlement GCL has for fees in this matter. The contract, on its face, violated the requirements of SCR 20:1.5 in a number of significant respects, the most important of which was its failure to specify which of two alternative fees was to be charged to Avery. Further, not only did Avery understand that he had a right to rescission but he was told that an attorney from another law firm, Tracy Wood, was also to be involved in the representation of Avery. Wood was not named in the contract nor were the terms of her compensation set forth as required by SCR 20:1.5. The contract also failed to specify whether costs were to be deducted before or after a fee was calculated.

Further, GCL provided no service pursuant to its purported representation agreement with Avery. Were this Court to assume that the contract signed by Avery

was a complete and binding fee agreement that Avery terminated without cause, *Tonn v. Reuter*, 6 Wis.2nd 498, 95 N.W.2nd 261 (1959) directs that the proper measure of damages for breach of such an agreement would be a contingent fee based on the amount of the settlement realized by the client less a *fair allowance* for the services and expense which would necessarily have been expended by the discharged attorney in performing the balance of the contract. A fair allowance for the time and expense put in by Attorneys Kelly and Glynn, would more than negate the entire 40 percent claimed by Gingras pursuant to his fee agreement. Thus, at best, Attorney Gingras presents what would be fairly characterized as a contract violation with no demonstrable loss.

PROPOSED UNCONTESTED FACTS

The following are facts related to this matter which do not appear to be reasonably disputed:

Steven A. Avery spent 18 years in a Wisconsin state prison for a crime he did not commit.

Avery was released from prison on September 10, 2003 as a result of efforts by the University of Wisconsin affiliated Innocence Project and its director, attorney Kieth Findlay.

Following his release from prison Avery sought civil counsel to represent him in an action seeking damages for his wrongful conviction.

Among the names of civil counsel to which Avery was referred were Robert Gingras and Water Kelly.

Avery was referred to Kelly by Kieth Findlay as an attorney who could competently represent Avery in a court action seeking redress for his wrongful imprisonment.

Findlay planned to continue representing Avery with regard to a claim for compensation from the State of Wisconsin Board of Claims.

Following his release from prison Avery was residing in Two Rivers, Wisconsin.

On October 30, 2003, Mr. Avery and his parents traveled to Madison, Wisconsin, a distance of approximately 145 miles from his home to meet first with Attorney Gingras and then with Attorney Kelly.

Kelly had arranged to see Avery along with Attorney Findlay at the University of Wisconsin the same day as the scheduled meeting with Gingras.

Prior to meeting with Mr. Avery, Gingras was unaware of the meeting scheduled with Findlay and Kelly.

Prior to meeting with Avery that same day, neither Findlay nor Kelly were aware that Mr. Avery had scheduled a meeting with Gingras.

Avery met with Attorney Gingras and Attorney Paul Kinne at or about 11 AM on October 30.

During the course of the meeting with Gingras and Kinne, Avery informed the two attorneys that he was meeting with attorneys at the University of Wisconsin Law School after his meeting with Gingras and Kinne.

During their meeting with Avery, Gingras and Kinne informed asked him whether he would be agreeable to have an attorney who worked for another firm, Tracey Wood, involved in his representation to which he agreed.

Prior to leaving the meeting with Gingras and Kinne, Avery signed a contract presented to him by the attorneys, which provided that Gingras, Cates and Luebke (GCL) would represent him receiving as its fee, 40 percent of the recovery in addition to being reimbursed for the costs of prosecution. Neither attorney Wood nor her law firm were mentioned in the written agreement.

Immediately following his meeting with Gingras and Kinne, Avery met with Findlay and Kelly as planned.

At his meeting with Attorney Kelly, Avery orally agreed to be represented by Attorney Kelly, an agreement they confirmed in writing the following day.

During the course of his meeting with Attorney Kelly, Kelly informed Avery that he would likely involve Attorney Stephen M. Glynn in the representation of Avery as Mr. Glynn was a highly-regarded criminal attorney with expertise in the criminal system who would enhance the chances of winning a civil case.

Avery was enthusiastic about the idea of having attorney Glynn involved in his representation as Glynn had previously represented Mr. Avery in a post trial motion and appeal of his wrongful conviction.

On November 3, 2003 Attorney Paul Kinne wrote to Tracey Wood, of the law firm of Van Wagner & Wood, S.C. recounting that her name had been mentioned to Mr. Avery as a person who might also be taking part in his representation with

respect to any civil rights claims he might have arising out of his wrongful conviction. In his letter to Wood he asked her whether she wished to be involved and to contact him at her convenience.

No agreement was made between Mr. Avery and GCL concerning the involvement of Ms. Wood or her firm.

As a result of a contact between Paul Kinne and Kieth Findlay on November 4, 2003 in which Mr. Kinne requested information on Avery from the Innocence Project, Kelly learned that a meeting had occurred on October 30 during which Avery had signed a contingency fee agreement with GCL.

In discussions between the attorneys that occurred after November 4 and prior to the end of November, 2003, the law offices attempted to resolve the issue of who rightfully to represented Steven Avery.

From his first contact with Attorney Kelly, Mr. Avery made it clear to Kelly that he wanted Attorney Kelly to represent him.

Prior to the end of November, 2003, Mr. Avery communicated to Attorney Kelly that he did not believe he had made a final commitment to hire Mr. Gingras, that he did not want or need Mr. Gingras' services and that he wanted Attorneys Kelly and Glynn to represent him.

Steve Avery's 42 USC §1983 action, his principal vehicle for civil recovery, required him to show that some eighteen years ago identifiable state actors intentionally violated his then clearly-established constitutional rights. As such, counsel reasonably expected to encounter evidence that was predictably stale,

memories that were predictably impaired by time and the standard immunities that shield recovery against state agencies and state actors.

Following the signing of the contract at Attorney Gingras' office, neither Gingras nor his firm put in any appreciable time nor incurred any appreciable expense in the representation of Steven Avery.

From October 30, 2003 through the present, the team of Kelly and Glynn expended over 1,050 hours representing Mr. Avery and incurred \$28,607.56 in out-of-pocket expenses.

Kelly and Glynn's contract with Avery entitled them to a one-third contingency fee plus out-of-pocket expenses.

Kelly and Glynn's fees in this matter if calculated on the lodestar fee considerations commonly used in calculating fees in cases involving application of 42 USC §1988 is \$328,731.00.

Kelly and Glynn together with Glynn's associates worked extraordinarily hard to develop Mr. Avery's claims both factually and legally—the case was challenging by any professional standard in the field of affirmative damages litigation to enforce constitutional rights pursuant to 42 U.S.C. § 1983. The difficulty of the case increased during its development due to the necessity to obtain and analyze over 10,000 pages of records from multiple sources, including some reluctant sources, and to depose adversarially over 30 witnesses, many of them reluctant police witnesses. In addition, the case became complicated by issues concerning the politics of Wisconsin State Claims Board and legislative consideration of parallel claims by Mr.

Avery, as well as by issues concerning the investigation conducted by the Attorney General of Wisconsin and her staff in response to a request from the District Attorney of Manitowoc County. In addition to the issues outlined for Mr. Avery in Kelly and Glynn's letter of April 8, 2004, there developed issues concerning *res judicata*, collateral estoppel and indispensable parties affirmative defenses.

All of the time and expense put into Mr. Kelly and Mr. Glynn's representation of Mr. Avery was reasonable and necessary. (See affidavits of Kelly, Glynn and Jeff Scott Olson)

Avery's recovery was further complicated by his arrest on a first degree murder charge during the pendency of his civil case, a killing alleged to be so bizarre and so brutal that it all but totally negated the chances of a successful prosecution on his constitutional claim for wrongful conviction.

Following Mr. Avery's arrest for first degree murder, action on the civil case was suspended. The case then settled for the total amount of Four Hundred Thousand Dollars (\$400,000.00) out of which One Hundred and Sixty Thousand Dollars (\$160,000.00) was set aside and placed in the trust account of Attorney Kelly as a reasonable allowance for fees and costs to be paid out of the settlement.

ARGUMENT

I. JURISDICTION

In its previous order dismissing Avery's action against the named defendants, this Court explicitly retained jurisdiction to resolve the dispute over fees. The case would not have settled without this Court retaining jurisdiction as GCL had filed attorneys

fees liens with the named defendants as well as with plaintiff's counsel. Further, in a directive, as part of its order, that \$160,000.00 be set aside in trust and not disbursed before notifying the lien claimant, GCL, its right to be heard on the validity of its lien claim. Where a judgment explicitly incorporates a settlement agreement or reserves authority to enforce the settlement the Court possesses ancillary jurisdiction pursuant to 28 U.S.C. § 1367 to resolve disputes over the distribution of the settlement proceeds. *Baer v. First Options of Chicago, Inc.*, 72 F.3d 1294, 1298-1301 (7th Cir. 1995) *Hill v. Baxter*, 405 F.3d 572 at 576 (7th Cir. 2005), *Kokkonen v. Guardian Life Insurance Company*, 511 U.S. 375, 380, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994) and *Lucille v. City of Chicago*, 31 F3d 546, 548 (7th Cir. 1994). Since this Court has entered such an order this matter is properly before the Court for resolution.

II. CONTRACTS FOR ATTORNEYS FEES

While attorneys are accorded many of the rights available to non-attorney contracting parties, an attorneys fee contract is also not immune to the common law principles applied to the making and enforcement of contracts in general. The burden of proof is on the party asserting a breach of contract to show both liability and damages.

Over and above the rules applicable to non-attorney contracts, contracts for attorneys fees involve special rules in order to be valid. They must comply with the special requirements for lawyers set forth in the Code of Professional Responsibility and the Supreme Court rules. SCR 20:1.5 states in pertinent part as follows:

- (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee including 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;
- (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;

...

(b) 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.

- (e) A division of fee between lawyers who are not in the same firm may be made only if:
 - (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;
 - (2) the client is advised of and does not object to the participation of all the lawyers involved and is informed if the fee will increase as a result of their involvement; and
 - (3) the total fee is reasonable.

Courts construe contracts, particularly those between a lawyer and client in favor of the client particularly where they are drafted by the lawyer as was the contract that GCL seeks to enforce here. Given the reasonableness requirement of the Code of Professional Responsibility as well as the *juris prudencia* developed around fee shifting statutes, the Court exercises what could fairly be described as equitable oversight with regard to disputes over attorneys fees. For example, many of the Supreme Court rules quoted above are embodied in the considerations applicable to fee awards in 42 U.S.C. § 1983 cases pursuant to *Henseley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L. Ed. 2nd 40 (1983).

In this case, we have the extraordinary situation where an individual purportedly contracts with two attorneys on the same day believing he has the right to choose between those two attorneys with regard to his representation. We also have the rare situation where a firm that provided no legal services pursuant to its contract is requesting a windfall profit without showing that its fee agreement with the client prevented it from doing any other work. Moreover, upon the record in this case shows the ultimate fee recovery for the attorneys who actually did the work to be a loss over that amount which could have been earned by each had they provided their services to hourly fee paying clients. In short, the fee recovery in this case for Kelly and Glynn was a loss rather than a premium over hourly fees that attorneys reasonably expect for taking the risk of not being paid at all.

GCL's contract does not conform to the requirements of SCR 20: 1.5 in that it does not address the involvement of attorney Wood as an attorney from another firm

who the writing of Attorney Kinne confirms is to be working on the case. As such the contract is incomplete or inchoate as to the requirements for a valid contract under the Wisconsin rules governing contingency fee agreements where there is to be a split fee.

The GCL contract also does not conform to the requirement of SCR 20: 1.5 that mandates that clients be told whether costs will be deducted before the fee is calculated or after.

But the greatest infirmity of this particular contract is that it does not specify what fee will actually be charged and its wording in this regard is ambiguous on its face. The contract reads as follows:

1. Contingency Fee: In the event that there is recovered in the case a single sum of money, either by settlement or by litigation, the attorneys' fees shall be:

A. A contingency fee, which shall be defined as :
Forty percent (40%) of the recovery if it is recovered before an appeal is taken

B. A reasonable attorney's fee in a contingent case, which shall be defined as the attorneys' fees computed at their regular hourly rates, plus accrued interest at their regular rate.

Thus the contract provides that the fee to which GCL claims to be entitled can be calculated in two different ways, one of which is on an hourly basis, but does not specify what criteria triggers the alternative calculation. The contract is thus unlawfully ambiguous on its face because it does not specify the particular fee to be charged as required by rule. Moreover, as a client in whose favor the contract must

be construed Avery would be, at a minimum, entitled to choose the lesser fee as calculated per the terms of the contract. Using the calculation in paragraph B. Avery's fee to GCL would be zero.

We thus urge the court to rule that the contract is void and invalid for failure to conform to Supreme Court requirements or, in the alternative, find as a matter of law that the fee calculation to which Avery is entitled under the contract would result in no recovery for GCL.

Should the Court find otherwise and that Avery breached a valid contract for fees without cause *Tonn v. Reuter* would mandate the same result.

In its brief, GCL suggests that *Tonn* was wrongly decided back in 1959 and that the State of Wisconsin should apply a rule awarding a percentage fee to a lawyer merely for the signing of a contract. However, if there is a binding contract in this case, the Court is required to follow the rule of *Tonn*, which GCL realizes is greatly to its disadvantage. GCL simply cannot avoid the clear dictate of *Tonn* which is accurately quoted in its brief.

[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 the evidence before the Court, a fair allowance within the meaning of *Tonn* for the services and expenses which would necessarily have been expended by GCL to perform the contract (because not even a part of the contract was performed as was done in *Tonn*) would exceed the \$160,000.00 amount that has been set aside for fees and expenses.

Thus, Attorneys Kelly and Glynn urge this Court to find that the agreement signed by Mr. Avery with GCL does not entitle GCL to any portion of the amount recovered on behalf of Avery.

Dated at Monona, Wisconsin this 13th day of March, 2006.

Respectfully submitted:

FOX & FOX, S.C.

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