

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.

**REPLY 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 Reply Brief in Support of Order to Show Cause for Attorney's Lien Pursuant to Sec. 757.36, Wis. Stats.

INTRODUCTION

The dispute that is presently before this Court is about the sanctity of contracts. Steven Avery signed a fee contract with GCL, and it should be honored. Avery should not be allowed to benefit monetarily from shirking his signing of a fee contract with GCL and thereafter signing a fee contract with Attorney Kelly's firm at a discounted rate.

Contrary to recent assertions in various media outlets, GCL is not looking for a free payday. In a March 14, 2006 JOnline article by columnists Cary Spivak and Dan Bice, Attorney Kelly's counsel, Attorney Mike Fox, is attributed various comments, including the following:

Legally, Fox said, Gingras is not out of line by raising the fee issue. But he questioned the wisdom of his ex-partner's money grab. [Fox is then quoted as saying,] "It [attempting to validate a lien] is not something that I would do. Whether or not you have the right to enforce a contract of that nature that we have here, I wouldn't do it."

When GCL was able to respond to the article, the AP put a story on its wire service which was also published on JSONline. That story states:

Gingras told The Associated Press his firm decided to give any money he recovers to Halbach's family. "We're doing it for the principle of the thing. We thought we were treated very unfairly," he said. "When two people sign a contract it should be honored. That's what our country is built on. To simply act in such a cavalier way towards it, is in our view wrong."

GCL is simply looking to prove the point that a person's signature on a contract should mean something in Wisconsin. It should not be allowed to be simply disregarded. Moreover, to further illustrate that GCL is not doing this for the money, GCL has stated in those same media outlets that any monies recovered in this dispute by GCL will be donated to the Teresa Halbach family (the family of the woman who was allegedly murdered by Steven Avery in the Fall of 2005). In fact, GCL hereby requests that this Court enter an order to that effect.

FACTUAL BACKGROUND

GCL hereby incorporates by reference the facts that it set forth in its principal brief. The only essential fact is that Avery signed the fee contract that was provided to him by GCL. He was not forced to sign it, and there was no undue influence. (Gingras Affidavit ¶ 6).

The fee contract that Avery signed contained no right to rescission and further provided that it created a lien in favor of GCL pursuant to sec. 757.36, Stats. (Exhibit A to Gingras Affidavit).

ARGUMENT

I. The fee contract signed by Avery with GCL was a valid attorney fee contract in Wisconsin.

First, and foremost, “a lawyer’s fee shall be reasonable.” *See* SCR 20:1.5 Fees. (a).

There clearly is no dispute in this instance that GCL’s 40% contingency fee is reasonable. In fact, Attorney Jeff Scott Olson, who submitted an affidavit on behalf of Attorney Kelly, indicated in his affidavit that he charges 40%. (Olson Affidavit ¶ 20).

The first issue that is raised by counsel for Attorney Kelly is that the GCL fee contract that was signed by Avery was fatally flawed, because it was not a joint responsibility contract with Attorney Tracey Wood’s name on it.

At the time that Avery signed the fee contract, Wood was not yet his counsel, and there certainly was no requirement that she be on the fee contract. In fact, when the dispute about the representation of Avery began to unfold, GCL was in the process of conferring with Wood to determine if she indeed was going to be a part of the litigation team. Had she chosen to do so, and had Avery consented to that joint representation, the fee contract would have been supplemented to include that provision. However, GCL was discharged prior to actually obtaining the services of Wood, so there was no joint responsibility agreement necessary.¹

¹It should be noted that Attorney Glynn was not on any fee agreement until April 26, 2004, even though he apparently agreed to be involved in the representation on November 3, 2003 and worked 21.15 hours between November, 2003 and April 25, 2004. And, on the very day that the actual fee agreement was signed by Attorneys Kelly and Glynn and Avery, Attorney Glynn has no time recorded on that day. (Exhibit H to Attorney Kelly’s Affidavit).

Counsel for Attorney Kelly goes on to argue that the GCL fee contract is ambiguous as to how the fee was to be calculated, and that it is silent as to when the costs would be taken out – either before or after the contingent fee was calculated.

While the Rules of Professional Conduct indicate that certain items need to be in a fee contract for it to be reasonable and enforceable, the comments to those rules are illustrative. The comments state in pertinent part:

When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding.

See SCR 20:1.5 Fees. (a). Comment: Basis or Rate of Fee.

In this case, not only is GCL's fee contract reasonable, but, when coupled with the information provided to Avery at the time he signed the contract, it is clear that it is valid and unambiguous and comports with the Rules of Professional Conduct.

At and prior to the time Avery signed the fee contract, he was allowed to ask any questions that he had. He did not ask if he could simply unilaterally rescind the contract, and sign a fee contract with a different law firm for reduced rate. There was a clear understanding about the meaning of the fee contract when Avery signed the fee contract.

Attorney Gingras explained to Avery that the contingent fee would be the greater of either 40% of a settlement or verdict, or, in the alternative, the actual attorney's fees that would be awarded by a court after a trial. (Second Gingras Affidavit, ¶ 2). Moreover, it was also explained to Avery that the costs of litigation would be taken out after the fee was calculated. (Second Gingras Affidavit, ¶ 3). Again, this is clearly a reasonable manner in which to enter into a fee contract with a potential client. There was a prompt understanding of what the fee contract meant.

The fact that counsel for Attorney Kelly takes umbrage with the fee contract drafted by GCL is curious given the manner in which Attorney Kelly secured Avery's representation. By the time Avery met with Attorney Kelly on October 30, 2003, he had already signed a fee contract with GCL for 40%.

Curiously, Attorney Kelly wrote a letter to Avery on October 31, 2003. (Exhibit B to Attorney Kelly's Affidavit). Under even the most liberal standard, the letter is not close to being a fee contract. Attorney Kelly simply wrote Avery a letter to confirm some oral agreement that the two made for Attorney Kelly to investigate Avery's potential claims. He then had Avery sign the letter (which Avery did on November 4, 2003) and send it back to him.

Avery did not sign a fee agreement with Attorney Kelly until April 26, 2004. (Exhibit C to Attorney Kelly's Affidavit). The fee agreement was such that Avery would only pay a 33 1/3% contingent fee, if the case was settled prior to trial, like it was.

The clear inference is that Attorney Kelly knew full well that Avery had signed a fee contract with GCL when he first met with Avery. He did not have Avery sign any sort of contract on the day that he met him. The day after he met with him, he sent him a letter stating

that he and Avery agreed that Attorney Kelly's "representation is exclusive". Unless Attorney Kelly knew that Avery had already signed a fee contract with GCL, there would be no reason for him to send Avery a quasi agreement letter with the provision that his representation was exclusive, and tell Avery to sign it. He certainly was not going to represent Avery on a *pro bono* basis. According to his Affidavit, Attorney Kelly spent 104.4 hours between November, 2003 and April 25, 2004 – without a valid fee agreement in place.

It is also a fair inference that he spent that time ascertaining the merit and value of Avery's claims.² And, when he came to the conclusion that there was a significant possibility of a substantial recovery, he had Avery sign a fee agreement at a rate less than the one Avery signed with GCL.

Even more curious is the fact that Attorney Kelly apparently hired another attorney, Richard Cayo, to argue that GCL had no lien rights. Attorney Cayo had Avery and his parents sign affidavits that predate Avery's actually entering into a fee agreement with Attorneys Kelly and Glynn. (Exhibit D to Attorney Gingras' Affidavit). Avery and his parents signed their respective affidavits on April 20, 2004 (Exhibits A, B, C to Fox' Affidavit). Avery signed the fee agreement with Attorneys Kelly and Glynn on April 26, 2004. (Exhibit C to Attorney Kelly's Affidavit). In his May 3, 2004 letter to Attorney Gingras, Attorney Cayo admitted on behalf of Attorney Kelly and Avery that GCL was qualified to undertake Avery's representation, and that GCL was not discharged for cause. (Exhibit D to Attorney Gingras' Affidavit).

Moreover, in Avery's affidavit, he states that he told Attorney Gingras that he was going to meet with another lawyer regarding his civil claims and that Attorney Gingras told him that if

²Ultimately, Attorney Kelly filed a claim on Avery's behalf in the amount of \$36 million.

he decided to go with another attorney to just call. Avery's recollection is in clear conflict with the recollections of Attorneys Gingras and Kinne.

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, ¶ 7; Affidavit of Paul A. Kinne, ¶ 6). 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, ¶ 8; Affidavit of Paul A. Kinne, ¶ 7). Neither attorney Gingras nor Kinne ever 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, ¶ 9; Affidavit of Paul A. Kinne, ¶ 8). 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, ¶ 10; Affidavit of Paul A. Kinne, ¶ 9; Exhibit G).

In order to defeat GCL's lien rights, counsel for Attorney Kelly has to insert provisions into the fee contract that never existed. There was no right to rescission. Avery signed the fee contract and accepted a 40% contingent fee.

Counsel for Attorney Kelly further argues that this Court has equitable oversight regarding the awarding of attorney's fees in this matter. GCL agrees. This Court has the power to enforce the fee contract that was signed by Avery. This Court should simply not allow Avery to benefit from his breaching of a contract that he signed. This Court should send a message – the signing of a contract means something. This is not about a person's being allowed to choose

who represents him. This is about someone signing a contract, and then completely ignoring it to get a better price.

There is no doubt that GCL's fee contract was reasonable and enforceable. The only issue for this Court to decide, then, is the remedy that GCL should be afforded for Avery's breach of the contract.

GCL is aware of the *Tonn* decision, and the manner in which remedies are sometimes fashioned when a breach of a fee contract occurs. If this Court were to follow *Tonn* to the letter, the result would be that Avery would actually benefit from his breaching a contract. Clearly that cannot and should not be the law in Wisconsin.

However, assuming *arguendo* that this Court does not award GCL the full 40% fee, there is an alternative and equitable approach to this situation. This Court's enforcing the fee contract that Avery signed would have no detrimental effect on Attorneys Kelly or Glynn. They contracted for 33 1/3% ($\$400,000 \times 33 \frac{1}{3}\% = \$133,333.33$). Avery should have to pay the entirety of the fee for which he originally contracted – 40% ($\$400,000 \times 40\% = \$160,000$). Therefore, at the very minimum, GCL is entitled to 6 2/3% of the total amount of the settlement – ($\$400,000 \times 6 \frac{2}{3}\% = \$26,666.67$). Moreover, GCL would ask this Court to include in its Order that GCL make the necessary arrangements to donate this amount to the family of Teresa Halbach.

s/ Robert J. Gingras
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SECOND AFFIDAVIT OF ROBERT J. GINGRAS

STATE OF WISCONSIN)
)§
COUNTY OF DANE)

Robert J. Gingras, being first duly sworn, hereby testifies and avers as follows:

1. I am an attorney with the firm of Gingras, Cates & Luebke, S.C.
2. When I met with Steven Avery on October 30, 2003, I explained to Avery that the contingent fee would be the greater of either 40% of a settlement or verdict, or, in the alternative, the actual attorney's fees that would be awarded by a court after a trial.
3. I also explained to Avery that the costs of litigation would be taken out after the fee was calculated.

The above statements are true and accurate to the best of my recollection.

s/ Robert J. Gingras

Subscribed and sworn to before me
this 23rd day of March, 2006.

s/ Heath P. Straka
Heath P. Straka, Notary Public
State of Wisconsin
My commission is permanent