IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DANIEL E. BELSVIG, Appellant, v. RANDY JOE KARR, LAUREN W. BELSVIG, Defendants, PETER KRAM, Respondent.	No. 42216-6-II UNPUBLISHED OPINION

Johanson, J. — Daniel E. Belsvig appeals the trial court's judgment and order on his former attorney Peter Kram's motion to pay his attorney's lien. Belsvig argues that the trial court erred when it (1) found that Kram had not waived his claim for fees by voluntarily withdrawing from the case before the contingency was realized solely over a disagreement over the value of the case, and (2) awarded Kram his hourly rate for time expended. Because Belsvig has not provided us with an adequate record for review, we decline to address these issues and affirm the trial

court's order. We also award Kram attorney fees and expenses on appeal.

FACTS

On December 8, 2006, Randy Joe Karr assaulted Belsvig.[1] In March 2008, Belsvig retained the services of Kram's law firm to pursue a personal injury claim against Karr. Kram took the case on a contingency basis. Kram and Belsvig signed a "Contingency Agreement," that included the following terms:[2]

> 1. No settlement without my consent;
>
> . . . .
>
> 5. I agree not to substitute attorneys without the consent of Leggett & Kram, except for misconduct or incapacity of said attorney to act; if substitution is effected in violation hereof it shall be entitled to the fee hereinabove stated or a reasonable fee as set by the Court;[3]
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> . . . .
>
> 7. Should the terms of this Agreement require enforcement, I agree to pay all costs and expenses, including a reasonable attorney's fee, for such enforcement, plus tax thereon, if any, and agree that venue of any such action will be Pierce County, State of Washington.

Clerk's Papers (CP) at 13.

In November 2008, shortly before the two-year statute of limitations for some of the

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[1] Karr is not a party to this appeal.

[2] Belsvig later agreed to amend the contingency agreement to substitute Kram's new firm, Kram, Johnson, Wooster & McLaughlin, P.S., for his former firm, Leggett and Kram. The remaining terms and conditions of the original agreement remained in effect.

[3] In his reply, Belsvig argues, for the first time, that this paragraph of the contingency agreement is not enforceable under *Barr v. Day*, 124 Wn.2d 318, 329, 879 P.2d 912 (1994), and *Kimball v. Public Utility District No. 1 of Douglas County*, 64 Wn.2d 252, 257, 391 P.2d 205 (1964). We do not consider arguments raised for the first time in a reply. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

claims expired,[4] Kram filed a complaint against Karr alleging assault and battery and intentional

[4] *See* RCW 4.16.100(1) (statute of limitations on assault and battery is two years).

and/or negligent infliction of emotional distress. About six months later, the trial court entered an order dismissing three of Karr's affirmative defenses. Kram was representing Belsvig at that time.

At some point, apparently after Belsvig expressed a desire to also sue his ex-wife, Lauren Belsvig, for her alleged role in the assault, Kram and Belsvig's professional relationship deteriorated. On November 30, 2009, Kram wrote a letter to Belsvig advising him that Kram had deposed Lauren Belsvig; her version of the incident was different than Belsvig's; and her deposition "reinforced [Kram's] belief that [he had] acted appropriately in not including her as a defendant in this case," noting that doing so would have "detract[ed] from the central issue of Mr. Karr's assault on [Belsvig] and simply [made Belsvig] appear to be a bully in the eyes of a jury," which could have had a significant impact on the case. CP at 24. Kram also noted several instances in which Belsvig had been uncooperative. Specifically he stated that (1) although Belsvig asked him to talk to "Erika Belsvig about family law matters," Belsvig had failed, despite Kram's request to do so, to "identify the areas where [he thought] her additional testimony would be helpful"; (2) Belsvig had "declined to make [himself] available" to "wrap up [his] deposition" despite having no reason for his unavailability; and (3) Belsvig had "declined" to provide a reasonable settlement figure despite Kram's request that he provide this information so they could select a mediator. CP at 24.

Kram told Belsvig to supply a "reasonable settlement figure" and some possible deposition dates by December 2, 2009, or he (Kram) would have "no choice but to withdraw" and stated that if Belsvig would not provide this information, it might "be more appropriate for [Belsvig] to find another lawyer whose view of the value and nature of this case are more closely aligned with

[his]." CP at 24-25. Kram pointed out that if Belsvig hired another attorney, he (Kram) would "be entitled to and will retain a lien on this case for [his firm's] time and the outstanding expenses." CP at 25.

Belsvig did not comply with Kram's requests. Instead, on December 7, Belsvig, acting through another attorney, C. Nelson Berry, III, filed a separate complaint against Lauren Belsvig for damages related to her alleged involvement in the December 2006 assault.

On December 8, 2009, Kram filed a notice of intent to withdraw as Belsvig's counsel and a notice of claim of attorney's lien "for services and costs advanced rendered from November 14, 2008 through December 7, 2009." CP at 3. Kram claimed various "[o]utstanding [c]osts," interest on those costs, and the "[r]easonable value of time expended in this matter at a rate of $240 an hour" for 84.1 hours of work through December 4, 2009. CP at 3-4. On December 15,[5] Berry filed a notice of withdrawal and substitution of counsel signed by both Berry and Kram.

At some point, the trial court consolidated Belsvig's claims against Karr and Lauren Belsvig. In February 2011, the trial court granted Lauren Belsvig's summary judgment motion and dismissed Belsvig's claims against her. In April, the parties apparently settled the remaining claims for $300,000.

Kram filed a motion to pay the attorney's lien. In his supporting declaration, Kram described his early relationship with Belsvig and the contingency agreement. Kram then described his attempts to accommodate Belsvig and the work he performed on the case before withdrawing, which included ordering "numerous medical records" at the firm's expense,

[5] Although this document was filed December 15, it was apparently signed on December 9.

interviewing witnesses, deposing Belsvig, and reviewing "voluminous" medical records. CP at 8. Kram stated that after he became aware that Karr's insurance limits were $300,000, he suggested that Belsvig attempt to mediate a settlement—which Belsvig apparently refused to do. Kram also described Belsvig's desire to sue Lauren Belsvig and stated that he (Kram) did not think this was a "very good idea for a number of reasons" and that his later deposition of Lauren Belsvig "reinforced" this belief. CP at 8. He also indicated that he and Belsvig had disagreed "as to the potential value of the case in light of Mr. Belsvig's subsequent driving after consuming alcohol and taking prescription medications." CP at 8.

Belsvig responded that Kram was not entitled to fees because his withdrawal was not for good cause and was based on a disagreement over the value of the case, Kram's desire to mediate the case rather than "litigate" it, and his (Belsvig's) unwillingness to give Kram the authority to settle the case "for about one tenth" of what it ultimately settled for. CP at 21. Belsvig contended that once Kram told him to "seek other counsel when [they] could not agree on a 'reasonable settlement figure' for [the] case, that [Kram] waived any claim he might have for fees." CP at 22. He also asserted that Kram's work on the case, other than obtaining medical records, "added little, if any value," to the case. CP at 22.

Kram replied that Berry had relied on the "theory of the claims asserted in the complaint" Kram had drafted and that no one had amended that complaint. CP at 62. Implying that Belsvig had violated paragraph 5 of the contingency agreement, Kram also alleged that Belsvig had contacted Berry about representation before Kram withdrew as demonstrated by the fact Berry signed the complaint against Lauren Belsvig on December 4, 2009, and a phone message from

Belsvig from December 3.

The trial court heard this matter on May 27, 2011, and awarded Kram $22,584 and interest. Although we do not have a transcript of these proceedings before us, the trial court's written order indicates that Kram and Berry were present when the trial court considered the matter and that Belsvig "appeared by and through" Berry. CP at 83. The trial court's order also states, "The court reviewed the files and records herein, the declarations of [Belsvig] and counsel *and heard remarks of counsel*" before making its decision. CP at 83 (emphasis added). Our record contains no written findings of fact and conclusions of law, and there is no indication in our record that the trial court has filed any written findings of fact and conclusions of law supporting its order.

Belsvig appealed the trial court's order. He later filed a statement of arrangements in this court citing RAP 9.2(a) and stating that he did not intend to file a verbatim report of proceedings, "since there were no evidentiary hearings on the issues before the Court of Appeals." Statement of Arrangements, No. 42216-6-II, filed June 27, 2011.

ANALYSIS

Belsvig argues that the trial court erred when it (1) found that Kram had not waived his claim for fees by voluntarily withdrawing from the case before the contingency was realized solely over a disagreement over the value of the case; and (2) awarded Kram his hourly rate for time expended. Because Belsvig has not provided us with an adequate record for review, we decline to address these issues.

I. Standard of Review

We review a trial court's decision on an attorney fee award for abuse of discretion. *Ausler v. Ramsey*, 73 Wn. App. 231, 234, 868 P.2d 877 (1994) (citing *Wheeler v. Catholic Archdiocese of Seattle*, 65 Wn. App. 552, 574, 829 P.2d 196 (1992), *rev'd on other grounds*, 124 Wn.2d 634, 880 P.2d 29 (1994)). A trial court abuses its discretion when its decision is manifestly unreasonable, or is based on untenable grounds or for untenable reasons. *Ausler*, 73 Wn. App. at 234-35. "A decision based on a misapplication of law rests on untenable grounds." *Ausler*, 73 Wn. App. at 235 (citing *In re Marriage of Bralley*, 70 Wn. App. 646, 651, 855 P.2d 1174 (1993)). We review issues of law de novo. *Wachovia SBA Lending Inc. v. Kraft*, 165 Wn.2d 481, 488, 200 P.3d 683 (2009).

It is a long-standing premise in this state that an attorney who withdraws from a case with good cause may recover fees in quantum meruit. *Cavers v. Old Nat'l Bank & Union Trust Co.*, 166 Wash. 449, 452-53, 7 P.2d 23 (1932) (citing *Wright v. Johanson*, 132 Wash. 682, 233 P. 16 (1925); *Ramey v. Graves*, 112 Wash. 88, 89, 191 P. 801 (1920)); *see also Ausler*, 73 Wn. App. at 236. Good cause exists where, among other reasons, the client is uncooperative, the attorney and client suffer a breakdown in communication, the client degrades the attorney, or ethical rules require the attorney to withdraw. *Ausler*, 73 Wn. App. at 236 n.4. A client's refusal to accept a settlement offer is, however, not good cause. *Ausler*, 73 Wn. App. at 236 n.4.

We review a trial court's findings of fact for substantial evidence, evaluating whether the evidence was sufficient to persuade a rational, fair-minded person that the premise is true. *Diversified Wood Recycling, Inc. v. Johnson*, 161 Wn. App. 859, 869, 251 P.3d 293, *review denied*, 172 Wn.2d 1025 (2011); *Crane Co. v. Paul*, 15 Wn. App. 212, 214, 548 P.2d 337

(1976). We review conclusions of law de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). And we defer to the fact finder, here the trial court, on issues of conflicting evidence, witness credibility, and persuasiveness of the evidence. *City of University Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001).

II. Record Inadequate for Review

Relying on *Ausler*, Belsvig argues that the trial court erred when it found good cause and that it erred in awarding Kram fees based on his hourly rate and the time he spent on the case. Because Belsvig has failed to provide an adequate record for review of these contentions, these arguments fail. *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 574, 141 P.3d 1 (2006).

Kram essentially argued two grounds upon which the trial court could have awarded attorney fees: (1) that Belsvig was required to pay reasonable attorney fees under paragraph 5 of the contingency agreement because he substituted attorneys without Kram's consent before Kram withdrew from the matter; and (2) even if paragraph 5 did not apply, that he had good cause to withdraw from the case and was, therefore, entitled to fees under quantum meruit. The trial court's order does not state the basis of its decision to award attorney fees or indicate in any way whether it awarded attorney fees under quantum meruit or as reasonable attorney fees under the contingency agreement, and Belsvig has failed to supply us with a transcript of the proceedings or any written findings of fact and conclusions of law to clarify these issues. Additionally, without a transcript and/or written findings of fact and conclusions of law, we cannot determine what factual findings the trial court made, whether those findings were supported by substantial evidence, or whether these findings supported the trial court's legal conclusions. Furthermore,

although Belsvig asserts that the trial court did not take any evidence at the May 27, 2011 hearing, the trial court's order states that it heard the "remarks of counsel" at this hearing and we cannot determine, based on this statement, whether counsel presented additional facts related to Kram's withdrawal from the case or the basis for calculating the attorney fees award. CP at 83. Because the record is inadequate, we decline to review these issues further.

III. Fees and Costs on Appeal

Kram requests attorney fees on appeal under paragraph 7 of the contingency agreement and RAP 18.1. Belsvig appears to argue that Kram cannot seek fees on appeal under paragraph 7 of the contingency agreement because Kram waived these fees when he "voluntarily withdrew from his contingency agreement, before the contingency was realized because he disagreed with his client about the value of the case." Br. of Appellant at 10.

When a suit is based on a contract with an attorney fee provision, RCW 4.84.330 entitles the prevailing party to recover attorney fees. The prevailing party is entitled to contract fees whether or not the contract is invalidated or found to be unenforceable. *Labriola v. Pollard Grp., Inc.*, 152 Wn.2d 828, 839, 100 P.3d 791 (2004). This appeal arose out of the contingency agreement,[6] and Kram is the prevailing party. Accordingly, we award him attorney fees and expenses on appeal subject to his compliance with RAP 18.1.

[6] *See Seattle First Nat'l Bank v. Wash. Ins. Guar. Ass'n*, 116 Wn.2d 398, 413, 804 P.2d 1263 (1991) ("Under Washington law, for purposes of a contractual attorneys' fee provision, an action is on a contract if the action arose out of the contract and if the contract is central to the dispute.").

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Johanson, J.

We concur:

Armstrong, J.

Worswick, C.J.