IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JESSICA TURBIN, a single woman,	)	**No. 28552-9-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
AARON LOWE P.S., and AARON LOWE, a single man,	)	
	)	
	)	
Appellants.	)	**UNPUBLISHED OPINION**

Korsmo, A.C.J. — Attorney Aaron Lowe appeals an order awarding him fees and prejudgment interest. He believes the trial court erred in its calculation of both. We disagree and affirm.

FACTS

Fifteen-year-old Jessica Turbin was injured in a 2004 automobile accident. Through her parents, she retained Aaron Lowe to represent her in negotiations with Travelers Insurance (Travelers). On her behalf, Ms. Turbin's parents signed substantially

identical contingency fee agreement forms drafted by Mr. Lowe. The forms stated that the attorney fee was 25 percent of the total amount of recovery for representation of a minor, and 33 percent for an adult. Mr. Lowe proceeded to negotiate multiple settlement offers between Ms. Turbin and Travelers. Ms. Turbin continued to work with Mr. Lowe after she became an adult.[1] However, the parties did not enter into a new agreement and there was no modification of the existing agreement.

In April 2007, Mr. Lowe accepted an offer from Travelers. Ms. Turbin disputed authorizing Mr. Lowe to accept. She discharged him and retained new counsel. In April 2009, Ms. Turbin settled for the same amount as that previously secured by Mr. Lowe. Mr. Lowe then filed an attorney's lien for fees and costs, which Ms. Turbin opposed. The trial court determined that Mr. Lowe had substantially performed and was entitled to attorney fees calculated at 25 percent of the total settlement amount. The court also determined that he was entitled to prejudgment interest beginning on the date of the 2009 settlement. Mr. Lowe appeals.

ANALYSIS

Contingency Percentage

Contract construction is a matter of law this court reviews *de novo*. *Tacoma Northpark, LLC v. NW, LLC*, 123 Wn. App. 73, 80, 96 P.3d 454 (2004). The intent of

[1] The parties agree this behavior ratified their contract.

the parties is controlling. *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 424 n.9, 191 P.3d 866 (2008). We determine the parties' intent by looking to the contract as a whole, its objective, the parties' conduct, and the reasonableness of the parties' interpretations. *Id.* Ambiguities are construed against the drafting party. *Rouse v. Glascam Builders, Inc.*, 101 Wn.2d 127, 135, 677 P.2d 125 (1984).

Mr. Lowe argues that because the language in the contingency fee agreement specifically states that the fee for the representation of an adult is 33 percent, Ms. Turbin's ratification of their agreement constitutes an acceptance of that term.

The provision at issue reads, in relevant part:

> Client shall pay attorney . . . a sum equal to thirty-three percent (33.3%) of the total amount of recovery, whether by negotiation or suit. . . . The fee shall be twenty-five percent (25%) for minor children and workman's compensation claims.

Clerk's Papers (CP) 19. The agreement contains no language regarding attorney fees if a minor client should reach the age of majority during the representation. Further, there is no evidence that Mr. Lowe ever communicated such a fee increase, or that Ms. Turbin understood such an increase would occur.

As noted by the trial court, "[i]n the absence of an express provision, it is unreasonable that a [minor] client should expect the 25% rate would increase to 33% should the case not settle before the minor reaches the age of majority." CP 66. If an

increase was to occur, the contract should have stated as much. At best, the contract is ambiguous concerning whether the contingency fee would change if the case settled after Ms. Turbin became an adult. The trial court correctly construed the ambiguity against Mr. Lowe in awarding him attorney fees calculated at 25 percent.

We agree with the trial court that this contract entitled Mr. Lowe to a 25 percent contingency fee.

Prejudgment Interest Start Date

This court reviews a prejudgment interest order for abuse of discretion. *Crest Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 775, 115 P.3d 349 (2005). An abuse of discretion occurs where the court's decision is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Grant*, 83 Wn. App. 98, 105, 920 P.2d 609 (1996). In civil litigation, prejudgment interest is permitted at a maximum rate of 12 percent per annum where a party to litigation retains liquidated funds that rightfully belong to another. RCW 19.52.010; *Crest Inc.*, 128 Wn. App. at 775. Funds are liquidated where the amount at issue can be objectively calculated with exactness. *Hansen v. Rothaus*, 107 Wn.2d 468, 472, 730 P.2d 662 (1986). A dispute regarding the amount owed does not change the liquidated nature of the funds unless the amount is dependent upon a discretionary decision of a judge or jury. *Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25,

33, 442 P.2d 621 (1968) (quoting authorities). Prejudgment interest is an equitable remedy grounded in the principle that a party who wrongfully withholds money from the party to whom it is due should pay for the lost "use value." *Colonial Imports v. Carlton Nw., Inc.*, 83 Wn. App. 229, 241-242, 921 P.2d 575 (1996).

Mr. Lowe assigns error to the trial court's determination that the start date of prejudgment interest was the date of the settlement. He relies primarily upon *Taylor v. Shigaki*, 84 Wn. App. 723, 930 P.2d 340, *review denied*, 132 Wn.2d 1009 (1997), to suggest that his firing date was the appropriate start date because his fee amount was known and therefore liquidated.

In *Taylor*, an attorney was fired by his client after negotiating a settlement. 84 Wn. App. at 727. The client subsequently negotiated a larger settlement that same day, hoping to avoid payment of the contingency fee. *Id.* at 731. Nevertheless, the attorney was deemed to have substantially performed and was awarded contingency fees and prejudgment interest. *Id.* at 729. Both awards were affirmed on appeal. *Id.* at 731-732. We read nothing in *Taylor* to suggest that where an attorney substantially performs prior to termination, he or she is entitled to prejudgment interest beginning on the date of termination. Rather, it is the act of settlement that liquidates the damages; until there is a settlement, the amount to which the contingency fee can be applied is unknown.

Accordingly, Mr. Lowe's reliance upon *Taylor* is misplaced.

Mr. Lowe's timing argument also fails for a second reason. As noted above, prejudgment interest may be awarded where a party withholds liquidated funds that rightfully belong to another. RCW 19.52.010; *Crest Inc.*, 128 Wn. App. at 775. Ms. Turbin could not withhold funds she did not have, and she was certainly not obligated to accept an offer simply to pay Mr. Lowe. *Taylor*, 84 Wn. App. at 729; RPC 1.2(a). Thus, interest could not begin to run until there was an actual settlement. That occurred in 2009, not 2007.

The trial court did not abuse its discretion in finding that the 2009 settlement date was the appropriate start date for prejudgment interest.

Attorney Fees

Both parties seek attorney fees on appeal. Mr. Lowe's request is denied because he has not prevailed and no contract provision requires fees for him. Ms. Turbin requests attorney fees because she believes Mr. Lowe's appeal is frivolous. An appeal is frivolous where no debatable issues exist upon which reasonable minds could differ, and the appeal is so totally devoid of merit that there was no reasonable probability of success. *Streater v. White*, 26 Wn. App. 430, 435, 613 P.2d 187, *review denied*, 94 Wn.2d 1014 (1980). While Mr. Lowe's appeal was without merit, it was not frivolous. We likewise deny her

request. As prevailing party, Ms. Turbin is entitled to her costs.

CONCLUSION

The trial court did not err, nor abuse its discretion. Affirmed.[2]

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

_____
Korsmo, A.C.J.

WE CONCUR:

_____
Brown, J.

_____
Sweeney, J.

[2] Because of our disposition of the case, we need not reach Ms. Turbin's alternative argument regarding attorney fees. Accordingly, we deny Mr. Lowe's motion to strike that portion of her brief as moot.