2000

Bonnie Loffredo and Donald A. Westenskow v. Scott W. Holt : Reply Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

BONNIE LOFFREDO and DONALD A. WESTENSKOW,	:	
Plaintiff/Appellees,	:	
vs.	:	
SCOTT W. HOLT,	:	Case No. 20000170
Defendant/Appellant.	:	Priority 15

REPLY BRIEF OF APPELLANT
(Oral Argument Requested)

Appeal from the Judgment of the
First District Court of
Box Elder County, State of Utah
THE HONORABLE THOMAS L. WILMORE
DISTRICT COURT JUDGE

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REPLY BRIEF OF APPELLANT

The Appellant, Scott W. Holt, pursuant to Rule 24 of the Utah Rules of Appellate Procedure, submits this Reply to the Brief of Appellee.

ARGUMENT

POINT I

THE RULES OF PROFESSIONAL CONDUCT DO NOT ESTABLISH CIVIL LIABILITY IN THIS CASE

Under Point II of the Appellees' Brief, they argue that in order to be enforceable, a contingent fee agreement must be in writing, (Appellees' Brief, pp 9-13) Then, under Point V of their Brief, the Appellees argue that it was proper for the court to tax interest on the Appellant because "an attorney-client relationship is contractual in nature". (Appellees' Brief, p. 19.)

If an attorney-client relationship is contractual in nature, certainly an oral agreement on the nature of the fee payment can be made between the parties. This is especially so where the parties, as in this case, ratify that oral agreement with other writings. The only thing that the Rules of Professional Conduct regulate is attorney actions and subsequent discipline for failing to act within the rules. If Holt and Westenskow in this case agreed that there would be a contingent fee, that is up to them to decide to make such an agreement. If the contingent fee agreement was not in writing, that does not abrogate the agreement - all that such an oversight in not having a written fee agreement creates is perhaps some professional disciplinary consequences for Holt, not a requirement that he disgorge the fees.

It is clear in reading the trial court's memorandum decision in this case that the trial court was basing its ruling against Holt on the existence of the rule in the Rules of Professional Conduct requiring a written contingent fee agreement. Such a reliance on the Rules of Professional Conduct by the trial court was misplaced in this case.

In Point VI, the Appellees argue that the Rules of Professional Conduct does not create any civil liability, but that, absent a written contingent fee agreement, an attorney cannot take a contingent fee. However, an attorney and his client can agree,

orally or otherwise, to a fee. The argument made by Appellees' under Point VI is circular and non-sensical.

POINT II

INTEREST SHOULD NOT HAVE BEEN TAXED AGAINST THE APPELLANT

The Appellees cannot on one hand argue that there was not a valid contract and so the fees must be returned to Westenskow and then, on the other hand, argue that there was a contract and so interest should be taxed against Holt. It is either one or the other. If there was a valid fee agreement - oral or otherwise - then Holt should be able to retain the fees and face whatever disciplinary consequences (if any) that may flow from an alleged breach of the Rules of Professional Conduct in not having a written contingent fee agreement.

Either there was a contract and in such an event, Holt's retention of the fees was lawful and he does not owe anything to Westenskow. Or, on the other hand, there was not a contract, and Holt owes money, but not contractual interest. In either event, interest should not be taxed.

CONCLUSION

The trial court based its determination that Holt was not entitled to be paid the amount of the contingent fee on the Rules of Professional Conduct - which is clearly not allowed under the

rules themselves. Interest should not have been taxed because Holt did nothing wrongful.

DATED this 6th day of December, 2000.

LEONARD E. McGEE
Attorney for Defendant

CERTIFICATE OF MAILING

I certify that I mailed two true and correct copies of the REPLY BRIEF OF APPELLANT to the following individuals at the address shown, via first-class mail, postage prepaid on this 6th day of December, 2000:

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