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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0515**

William D. Paul,
Appellant,

vs.

Gerald J. Brown, as Trustee for the Heirs of Mairead Kenney, deceased,
Respondent,
Rosemary Kenney,
Respondent,

vs.

A Plus Enterprises, Inc., et al.,
Defendants,
Keith Byron Levings, et al.,
Third-Party Defendants,

vs.

Allstate Insurance Company,
Intervenor.

**Filed January 6, 2009
Affirmed
Stoneburner, Judge**

St. Louis County District Court
File Nos. 69DUCV051279 & 69DUCV051280

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(for appellant)

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Considered and decided by Halbrooks, Presiding Judge; Kalitowski, Judge; and Stoneburner, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

Appellant challenges the district court's denial of his motion to establish and enforce an attorney's lien on settlement proceeds received by respondents, his former clients. Because the district court did not abuse its discretion in permitting discovery and did not err in its application of Minn. Stat. § 481.13 (2008), to the facts, we affirm.

FACTS

In January 2005, a multi-vehicle collision on the Bong Bridge in Duluth caused serious injuries to Rosemary Kenney, a driver of an involved vehicle, including the death of her nearly full-term unborn child, Mairead Kenney. In March 2005, Rosemary Kenney retained appellant William D. Paul to represent her on a contingency-fee agreement. Under the agreement, Rosemary Kenney agreed to pay Paul one-third of whatever proceeds she recovered by way of suit or settlement. Patrick Kenney, who was married to Rosemary Kenney and was Mairead Kenney's father, simultaneously retained Paul to pursue a wrongful-death claim on behalf of the heirs of Mairead Kenney. Paul had Patrick Kenney appointed as the trustee for the heirs of Mairead Kenney. Despite Paul's later testimony that Rosemary Kenney's injuries left her unable to understand the proceedings, Paul asserts that he explained to Rosemary and Patrick Kenney that there

was an inherent conflict of interest in his representation of both of them because Patrick Kenney had a potential claim against Rosemary Kenney for the death of Mairead Kenney. Paul represented that he would not, under any circumstances, sue Rosemary Kenney, and both Rosemary and Patrick Kenney signed waivers of the conflict.

Paul then negotiated a \$93,000 settlement with Rosemary Kenney's insurer, asserting her negligence in the death of Mairead Kenney. Paul received \$31,000 in attorney fees from this settlement and an additional \$7,500 was placed in his trust account for future costs of litigation. Before the November 2005 court approval of this settlement, Rosemary and Patrick Kenney separated. A petition for dissolution of marriage was filed in September 2005.

On January 31, 2006, Keith Levings, one of the other drivers in the Bong Bridge collision, retained Paul to represent him in a dissolution-of-marriage proceeding. Paul never asserted a claim against Levings for Rosemary Kenney's injuries or the wrongful death of Mairead Kenney, even though an accident reconstructionist's report implicated Levings's negligence as causally related to the Kenneys' injuries.

In August 2006, Paul received an offer from another party involved in the collision to settle the Kenneys' lawsuits for \$250,000. Paul communicated that offer to Patrick Kenney and to Rosemary Kenney's siblings,¹ advising them not to accept the offer because he was certain the offer would increase, although he also opined that the

¹ Paul testified in his deposition that he discussed the case with Rosemary Kenney's family because Rosemary Kenney was not capable of discussing her lawsuit or making decisions. Nonetheless, he neither sought appointment of a guardian for her nor obtained her permission to discuss the case with her family.

wrongful-death claim would not settle for more than \$100,000. The \$250,000 offer was not accepted and expired.

Subsequently, Rosemary Kenney discharged Paul and retained Chris Messerly of Robins, Kaplan, Miller & Ciresi, L.L.P., to represent her. Paul continued settlement negotiations to resolve the wrongful-death claim and made a demand for \$75,000 from the insurer of one of the involved drivers. Messerly then moved to remove Patrick Kenney as the trustee in the wrongful-death action. The district court granted the motion, concluding that the adversarial nature of the Kenneys' dissolution made Patrick Kenney unlikely to be able to adequately represent the interests of all of Mairead Kenney's heirs, consisting of Patrick Kenney, Rosemary Kenney, and their five minor children. The district court appointed Gerald Brown as trustee of Mairead Kenney's heirs.

In May 2007, Paul Schweiger of Sieben, Grose, VonHoltum & Carey, Ltd., was substituted for Paul as counsel for Brown as trustee for Mairead's heirs in the wrongful-death action. At the hearing on Paul's motion to establish and enforce an attorney lien on ultimate settlement proceeds, Schweiger told the district court that when he received the case, it was scheduled for trial but was far from trial ready, requiring him to work with Messerly, who agreed to have the cases consolidated.

In October 2007, Messerly and Schweiger obtained a confidential global settlement of the claims of Rosemary Kenney and the claims of the trustee for Mairead Kenney's heirs. Because the wrongful-death claim was subject to court approval, it is known that the wrongful-death claim settled for \$225,000. In November 2007, Paul filed notice of an attorney's lien in the amount of \$83,333.33, representing one-third of the

unaccepted \$250,000 settlement offer made during his representation. Paul moved for establishment and enforcement of the lien.

While the hearing on Paul's motion was pending, counsel for respondents noticed Paul's deposition. Paul sought a protective order to prevent his deposition. The district court ordered Paul to cooperate with "depositions pertaining to the value of his services in this matter." The district court directed that Paul's deposition would be used in lieu of cross-examination at the December 2007 hearing on Paul's attorney lien claim.

At the hearing, Paul argued that, in fairness, he should have been allowed to depose Messerly and Schweiger to obtain information regarding the factors that the district court should consider in connection with his claim for attorney fees. But Paul never formally sought those depositions. After the hearing, the district court issued extensive findings of fact and conclusions of law. The district court concluded that Paul had not been denied due process; the contingency fee agreement was not the appropriate basis for computation of fees in this case; Paul had been adequately compensated for all of his services with the fees that he received from the \$93,000 settlement he achieved prior to his discharge; and Paul's claims for additional costs were not credible. The district court denied Paul's motion for an attorney's lien and ordered him to relinquish money retained in his trust account for costs that he had failed to establish. This appeal followed.

DECISION

Paul argues that the district court (1) erred by ordering him to give a deposition at which respondent's attorneys could develop a malpractice claim for use as a defense to

his lien claim; (2) erred by failing to consider the factors necessary to evaluate his claim under applicable caselaw; (3) abused its discretion by concluding that he was not entitled to fees for having obtained a \$250,000 settlement offer; and (4) abused its discretion by ordering him to relinquish the funds in this trust account to respondents' counsel.

Application of the attorney-lien statute is a question of law, reviewed de novo. *Thomas A. Foster & Assocs. v. Paulson*, 699 N.W.2d 1, 4 (Minn. App. 2005). “Although the reasonable value of attorney fees is a question of fact, . . . when considering whether the district court employed the proper method to calculate the amount of an attorney lien, we undertake a de novo review” *Id.* (citing *Ashford v. Interstate Trucking Corp. of Am.*, 524 N.W.2d 500, 502 (Minn. App. 1994), and *In re L-tryptophan Cases*, 518 N.W.2d 616, 619 (Minn. App. 1994)). We review the district court’s findings on this issue for clear error. *Amerman v. Lakeland Dev. Corp.*, 295 Minn. 536, 537, 203 N.W.2d 400, 400–01 (1973). A finding is “clearly erroneous” where it is manifestly contrary to the weight of evidence or not reasonably supported by the record as a whole. *N. States Power Co. v. Lyon Food Prods., Inc.*, 304 Minn. 196, 201, 229 N.W.2d 521, 524, (1975). When an attorney is discharged, a contingency-fee agreement between the attorney and the client is terminated. *Trenti, Saxhaug, Berger, Roche, Stephenson, Richards & Aluni, Ltd. v. Nartnik*, 439 N.W.2d 418, 420 (Minn. App. 1989), *review denied* (Minn. July 12, 1989). A discharged attorney may recover fees for services provided based on the reasonable value of services rendered by the attorney. *Lawler v. Dunn*, 145 Minn. 281, 285, 176 N.W. 989, 990 (1920).

I. The district court did not err by allowing Paul's deposition

Paul appears to argue that because evidence of malpractice might have been developed at his deposition, the district court erred by requiring him to submit to a deposition. He also implies that discovery is inappropriate in a summary proceeding. We apply an abuse-of-discretion standard of review to a district court's discovery decisions. *Kielley v. Kielley*, 674 N.W.2d 770, 780 (Minn. App. 2004), *review denied* (Minn. Sept. 28, 2005).

“If a client recovers money as a result of an attorney's services, the attorney has a lien on the recovery as security for fees owed by the client.” *Foster*, 699 N.W.2d at 5. An attorney's lien may be established, and the amount of the lien determined, summarily by the court on the application of the lien claimant. Minn. Stat. § 481.13, subd. 1(c).

We have determined that “the practicalities of a summary proceeding do not support the notion that a district court must transform an attorney-lien proceeding into a legal-malpractice trial.” *Foster*, 699 N.W.2d at 7–8 (holding that “the district court did not err when it declined to entertain the legal-malpractice and breach-of-fiduciary-duty claims [in an attorney-lien proceeding] and instead determined the amount of the attorney lien based on [an] uncontested retainer agreement”). But, in the same case, we agreed that an attorney's alleged misconduct may be relevant to calculating attorney fees. *Id.* at 7 (citing *Rice v. Perl*, 320 N.W.2d 407, 411 (Minn. 1982), for the proposition that an attorney who is unfaithful in the performance of his duties forfeits his right to compensation). And the holding of *Foster* does not support an argument that discovery is never appropriate in a summary attorney-lien proceeding. *See Foster*, 699 N.W.2d at 9.

In this case, the district court, citing *Boline v. Doty*, 345 N.W.2d 285, 289 (Minn. App. 1984),² allowed discovery, including Paul’s deposition, to give respondents an opportunity to discover facts regarding Paul’s lien claim and cross-examine Paul. *See Gaughan v. Gaughan*, 450 N.W.2d 338, 343 (Minn. App. 1990), *review denied* (Minn. Mar. 16, 1990) (stating that the ability of clients to contest facts relating to the amount of attorney fees includes the ability to cross-examine the attorney about the amount of time spent on the case and the validity of the charges). The district court directed that Paul’s deposition would take the place of cross-examination in the proceeding.

Furthermore, in this case, unlike *Foster*, we find nothing in the record suggesting that malpractice litigation had been initiated at the time of the summary proceeding, and the district court specifically allowed the deposition to be taken “as to matters concerning the value of [Paul’s] services.” The deposition was used for that purpose. The district court did not abuse its discretion by allowing respondents to depose Paul.

At the hearing on Paul’s motion to establish and enforce an attorney’s lien, Paul, for the first time, argued that he should have been allowed to depose respondents’ attorneys. But Paul, who had previously agreed to the scheduling of his deposition and the hearing date, did not notice depositions or request a continuance to pursue depositions. The district court was not asked to rule on his right to depose respondents’

² The primary holding in *Boline*, was superseded by Minn. Stat. § 481.13, subd. 1(c), which eradicated the distinction between establishment and enforcement of an attorney’s lien. *Foster*, 699 N.W.2d at 6. But the case remains authority for the proposition that a client must be given adequate opportunity to contest the facts regarding attorney fees.

attorneys and did not address this argument. We conclude that this issue is not properly before us in this appeal and decline to address it.

II. The district court did not err in its analysis of factors relating to the value of Paul's services

To calculate the amount of an attorney's lien in a case involving representation by more than one law firm, this court has concluded that it is appropriate for the district court to consider several factors including (1) the length of time each firm spent on the case; (2) the proportion of funds invested by each firm; (3) the quality of representation; (4) the result of each firm's efforts; (5) the viability of the claim at transfer; and (6) the amount of recovery realized. *Ashford*, 524 N.W.2d at 503 (citing *L-tryptophan*, 518 N.W.2d at 621 (developing multi-factor approach where two law firms claimed a share of same client's recovery)). The parties agree that Paul's claim should be evaluated using these factors. Paul argues that the district court only considered some of these factors and that its consideration of those factors was faulty. We disagree.

a. Time spent by each firm on the case

Schweiger focused his argument on the quality of services provided and did not provide an estimate or documentation for the time he worked on the wrongful-death claim over the approximately five months that he represented the trustee. Messerly, however, presented documentation that he and his firm worked on Rosemary Kenney's case more than 1,250 hours during their approximately four months of representation. Paul "estimate[d]," based on "[a] quick recollection of how long [he] was on [the] file and how much [he] worked on it," that he spent 600 hours on the combined cases of

Rosemary Kenney and the wrongful-death case over the more than seventeen months that he represented both Rosemary and Patrick Kenney. Paul has no documentation of actual time spent on either file and no documentation of how those hours were spent. The district court specifically contrasted the detailed documentation provided by Messerly regarding time spent, with Paul's estimate of time spent and failure to specify how the time was used. The district court found that although there was no evidence of the hours spent on the file by Schweiger, Schweiger achieved a settlement in five months that was twice as large as Paul's assessment of the settlement value of the wrongful-death case. We conclude that the district court adequately considered the factor of time spent on the file by each firm, and the factor did not weigh in favor of Paul's claim.

b. Proportion of funds invested by each firm

Paul argues that there is nothing in the record concerning funds expended by Messerly's firm on Rosemary Kenney's claim. But the district court concluded that due to poor documentation and inconsistent claims, Paul did not credibly prove any investment (costs) associated with his representation. Based on the record, we conclude that this finding is not clearly erroneous; at best this factor is neutral.

c. The quality of representation

As Paul acknowledges, "[t]he district court plainly concluded that [Paul] did not provide quality representation" while he represented Rosemary Kenney and the trustee. Paul argues that because there is no evidence in the record of the total amount of the combined settlement, the record does not support a finding that the other firms provided a higher quality of representation. Paul asserts that the fact that his representation resulted

in an initial global settlement offer of \$250,000 is evidence that his representation was not inadequate.

But the district court's findings regarding Paul's representation were not based on settlement amounts. The district court made numerous findings, supported by the record, of the shortcomings of Paul's representation of Rosemary Kenney that jeopardized her claim, Paul's underestimation of the settlement value of the wrongful-death claim, and the status of the files when they were turned over to new counsel. The district court's conclusion about the quality of Paul's representation is supported by the findings.

d. The result of each firm's efforts

Paul argues that the district court could not have considered this factor because of the lack of evidence about the total settlement amount. We agree that this factor could not be fully considered because of the confidentiality of a portion of the settlement. The district court's focus, with regard to this factor, was on the known wrongful-death settlement of \$225,000 within a relatively short time after Schweiger began representing the trustee. Given the evidence in the record, the district court gave this factor adequate consideration.

e. Viability of claim at transfer

Paul argues that the district court did not consider this factor. But the district court found that the files were not "trial-ready" or "settlement-ready" at the time of transfer. The district court found that at the time of transfer, Paul had not received a report from his accident reconstructionist; he had only limited medical records in his file and had not spoken with any of Rosemary Kenney's treating doctors; Paul had yet to make a claim

for Rosemary Kenney’s lost wages; he had failed to respond to overdue discovery; and he had not sued Keith Levings or his employers or any other potentially culpable parties, despite his belief that there were such additional parties. These findings, which are supported by the record, demonstrate that the district court thoroughly considered the status of the claim at transfer.

f. Amount of recovery

Paul reiterates that the district court could not have considered this factor due to the confidentiality of the total settlement. But the district court compared the amount of recovery in the wrongful-death case to Paul’s estimate of the value of that case, noted that the amount of recovery achieved was greater than Paul had thought possible with regard to the wrongful-death settlement. Given this record, the district court adequately considered this factor.

Because the district court addressed each of the *Ashford* factors based on evidence in the record, we find no merit in Paul’s assertion that the district court erred by failing to properly apply the *Ashford* factors.

III. The district court did not err by concluding that Paul was not entitled to attorney fees in connection with obtaining an unaccepted settlement offer

Paul’s brief statement on this issue, which contains no authority, amounts to an assignment of error based on a “mere assertion.” Such an argument is generally considered waived. *See State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (states that “[a]n assignment of error based on mere assertion and not supported by any argument or authorities in appellant’s brief is waived and will not be

considered on appeal unless prejudicial error is obvious on mere inspection. *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519–20, 187 N.W.2d 133, 135 (1971). Even if the issue is not waived, the record in this case shows that the district court properly considered the factors used to establish the value of an attorney’s services and concluded that, under the doctrine of quantum meruit, Paul is not entitled to compensation beyond the \$31,000 that he already received. The district court did not err by failing to find that Paul is entitled to attorney fees based on a rejected settlement offer.

IV. The district court did not abuse its discretion by ordering Paul to turn over funds retained in his trust account for “future costs” after Paul failed to prove such costs

Paul challenges the order requiring him to give up funds retained in his trust account for future costs, arguing only that “the record contains evidence of the costs incurred.” He ignores the district court’s conclusion that Paul’s claims for costs are not credible and that lack of documentation and obvious errors in the scant documentation provided made it impossible for the district court to award additional costs. Because the district court’s conclusion is supported by the findings, which are supported by the record, we conclude that the district court did not abuse its discretion by ordering Paul to provide the retained funds to Messerly and Schweiger for appropriate distribution.

Affirmed.