2000

Bonnie Loffredo and Donald Westenskow v. Scott W. Holt : Brief of Appellee

Utah Supreme Court

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Leonard E. McGee; Attorney for appellant.

IN THE SUPREME COURT OF THE STATE OF UTAH

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

BRIEF OF APPELLEES
(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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Plaintiff/Appellees,	}	
vs.	}	
	}	Case No. 20000170
SCOTT W. HOLT,	}	
	}	Priority 15
Defendant/Appellant.	}	

The Appellees, Bonnie Loffredo and Donald Westenskow, pursuant to Rule 24 of Utah Rules of Appellate Procedure, submit this Appellees' Brief.

JURISDICTIONAL STATEMENT

The Utah Supreme Court does not have jurisdiction over this appeal since the appeal is not from a final order or judgment.

DETERMINATIVE AUTHORITY

Utah Supreme Court Rules of Professional Conduct, Rule 1.5(c).

In determining that Plaintiff Westenskow was not bound to pay a contingent fee to Defendant Holt because Mr. Westenskow did not sign a contingent fee agreement, the trial court relied upon Rule 1.5(c) of the Utah Supreme Court Rules of Professional Conduct, which provides:

> A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

Utah Code Annotated § 15-1-1(2).

In determining that Plaintiff Westenskow was entitled to pre-judgment interest at the rate of 10% per annum on the fees Defendent Holt wrongfully kept, the trial court relied upon UCA § 15-1-1(2), which provides:

> Unless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be 10% per annum.

STATEMENT OF FACTS

1. Plaintiffs filed suit against the Defendant, Scott Holt, on December 29, 1997, seeking to recover excess attorney's fees Defendant Holt had retained and kept from Plaintiffs after settling a wrongful death claim. The Plaintiffs' Complaint sounded in conversion and fraud (Record on Appeal, hereinafter "R." 1-8)

2. Each of the three insurance companies providing coverage in the wrongful death action settled with Plaintiffs and tendered payment via three separate checks totaling $135,000. (R. 302)

3. Defendant Holt took a contingent fee of 33 1/3% from Plaintiff Westenskow's share of the settlement proceeds. (R. 302)

4. The trial court found that Plaintiff Westenskow never signed a written contingent fee agreement with Defendant Holt and, therefore, was not bound to pay a contingent fee to Defendant. (R. 302)

5. Although not entitled to a contingent fee, the trial court nonetheless concluded that Defendant Holt was entitled to a reasonable fee. (R. 302-303)

6. Accordingly, the trial court ordered Defendant Holt to prepare an accounting of time and costs expended in his representation of Plaintiff Westenskow within 20 days of its June 29, 1999 decision. (R. 303)

7. The accounting was due on July 19, 1999, but Defendant Holt did not file one until October 18, 1999, approximately three months after its due date. The trial court found that Defendant Holt's explanation for the delay was unsupported by the facts. (R. 354-355)

8. The trial court noted that the affidavit of accounting clearly showed that it was "estimated time." (R. 355)

9. The trial court also observed that Defendant had admitted under oath in signed interrogatories that no time records had been kept in the case. (R. 355)

10. Accordingly, the trial court ruled that the Defendant would not receive any credit for the alleged hours he spent on behalf of Plaintiff Westenskow. (R. 355)

11. The trial court held that Plaintiff Westenskow was entitled to pre-judgment interest because Defendant Holt owed a sum certain to Plaintiff Westenskow from the date of the personal injury settlement to the date of Judgment. (R. 356)

12. Plaintiff Loffredo executed a contingent fee agreement with Defendant Holt which provided that Defendant would receive 25% of any recovery or 33 1/3% "if suit is filed." (R. 301)

13. The trial court found that Plaintiff Loffredo was bound to pay a contingent fee of 33 1/3% since one of the insurance companies filed a declaratory

action against Plaintiffs and Defendant Holt represented Plaintiffs in that matter. (R. 302)

14. Defendant Holt sought additional payment of attorney fees and costs from Plaintiff Loffredo for having to defend himself with regard to the construction of their contingent fee agreement. (R. 338)

15. The trial court never ruled on this claim. (R. 354-361)

16. Plaintiffs Loffredo and Westenskow signed Settlement Statements with Defendant Holt. (R. 302)

SUMMARY OF ARGUMENT

This appeal should be dismissed since a claim is still pending before the trial court and the appeal is not, therefore, from a final order.

The trial court properly determined that Plaintiff Westenskow was not bound to pay Defendant Holt a contingent fee since Plaintiff Westenskow did not sign a contingent fee agreement. The trial court afforded Defendant Holt an opportunity to prove the reasonable value of the services he rendered but Defendant Holt failed, without justification, to submit an accurate and timely accounting. The trial court's rejection of Defendant Holt's application for fees was well within its discretion.

Defendant Holt failed to advise Mr. Westenskow that there was no enforceable contingent fee agreement, that Defendant Holt was not entitled to a contingent fee, that

the fee Defendant Holt was entitled to was far less than a contingent fee, and that Defendant Holt believed that signing the settlement statements would alter Plaintiff Westenskow's legal obligations. Because Mr. Westenskow did not have knowledge of all the material facts, there was no ratification of an unsigned contingent fee form as a matter of law.

Since there was no enforceable contingent fee agreement, the contingent fees Defendant Holt took from Plaintiff Westenskow's settlements did not belong to him. The wrongful retention of money which properly belonged to Plaintiff Westenskow was the basis upon which Defendant Holt's civil liability arose. Because Defendant Holt owed Plaintiff Westenskow a sum certain as of the settlement dates, the award of prejudgment interest was proper.

ARGUMENT

POINT I

THIS COURT LACKS JURISDICTION BECAUSE THE DEFENDANT HAS NOT APPEALED FROM A FINAL ORDER AND NO EXCEPTION TO THE FINAL JUDGMENT RULE HAS BEEN MET

There has never been a ruling by the trial court regarding the Defendant's entitlement to attorney fees and costs from Plaintiff Loffredo for having to defend himself with regard to the construction of their contingent fee agreement. As acknowledged by Defendant Holt in his brief:

> The trial court granted Defendant's Motion for Summary Judgment, but did not rule whether or not Loffredo owed Defendant/Appellant attorney's fees as set forth in the contingent fee agreement.
>
> Appellant's Brief, p. 6.

Neither the Memorandum Decision issued by the trial court on December 15, 1999, nor the Order and Judgment of January 26, 2000, makes reference to this issue. Absent a ruling by the trial court, this Court does not have jurisdiction over the entire appeal under the final judgment rule.

Recently, in Promax Dev. Corp. v. Raile, 2000 UT 4, ¶15, 998 P.2d 254, the Utah Supreme Court held that a trial court must determine the amount of attorney fees awardable to a party before the judgment becomes final for appeal purposes.

> We therefore hold that, in the interest of judicial economy, a trial court must determine the amount of attorney fees awardable to a party before the judgment becomes final for the purposes of an appeal under Utah Rule of Appellate Procedure 3. This holding will serve both litigants and this court well, by "enabling an appellant to appeal all issues, including an award of attorney fees, in a single notice of appeal." (citation omitted).

The application of the final judgment rule to appeals where claims are still pending before the trial court was examined even more recently in Bradbury v. Valencia, 2000 UT 50, 397 Utah Adv. Rep. 7. In Bradbury, the trial court granted plaintiffs' motion for summary judgment; however, it did not address either the defendant's counterclaim or the claim of an intervening party. The Utah Supreme Court, in dismissing the appeal, observed that for an order or judgment to be final, the trial court's order or judgment must dispose of all the parties and claims to an action. Id. at ¶10.

The Court, citing Promax Dev. Corp. v. Raile, stated that a trial court must even determine attorney fee awards before a judgment is final. Id. at ¶10. Accordingly, the Court concluded that the order granting summary judgment was not a final order because of the pending claims. Id. at ¶11.

The Court then pointed out that no exception to the final judgment rule was applicable. There was no statutory exception, the defendants had not appealed an interlocutory order by following the steps outlined in Rule 5 of the Utah Rules of Appellate Procedure, and the trial court had not certified the appeal pursuant to Rule 54(b) of the Utah Rules of Civil Procedure.

Here, an issue of attorney fees remains pending before the trial court and that is an issue which, under Promax Dev. Corp. v. Raile, must be addressed before the judgment becomes final. Since the judgment is not final, the Court lacks jurisdiction over the appeal. No exception to the final judgment rule applies since no statutory exception is applicable, the Defendant did not appeal pursuant to Rule 5 of the Utah Rules of Appellate Procedure, and the trial court did not certify the appeal pursuant to Rule 54(b) of the Utah Rules of Civil Procedure. Accordingly, this appeal must be dismissed.

Even if this Court were to determine the question of entitlement, a remand would be necessary to permit the trial court to review any evidence submitted on the issue. Accordingly, it serves no purpose for this Court to rule on the question of entitlement before affording the trial court the opportunity to make a determination.

POINT II

THE TRIAL COURT PROPERLY FOUND THAT THE UNSIGNED RETAINER AGREEMENT DID NOT BIND PLAINTIFF WESTENSKOW TO PAY DEFENDANT A CONTINGENT FEE

To be enforceable, a contingent fee agreement must be in writing. Rule 1.5(c) of the Utah Supreme Court Rules of Professional Conduct provides, in pertinent part:

> A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery and whether such expenses are to be deducted before or after the contingent fee is calculated.

The requirement of a written agreement is to ensure that the client fully comprehends the exact nature of the fee to be charged and its calculation, and to prevent an attorney from taking advantage of the unwary client.

> Because contingent fees have never been enthusiastically accepted within the legal profession and because of concern with overreaching, courts have employed limits on the extent to which lawyers may employ them.
>
> Charles W. Wolfram, Modern Legal Ethics, § 9.4.2 (1986).

The Utah Supreme Court has recognized that the purpose of the rule is to ensure that the client fully understands the terms of the contingent fee agreement. In Phillips v. Smith, 768 P.2d 449 (Utah 1989), the Court observed:

> The present Rules of Professional Conduct of the Utah State Bar require that all contingent fee agreements be in writing. That requirement, which does not apply to other types of fee agreements, reflects in part a concern that contingent fee arrangements are particularly likely to be misunderstood by clients. That

> concern is enhanced where the clients are unsophisticated with respect to legal matters as in the present case. The rule is meant to ensure that clients will be fully informed as to the terms and consequences of the contingent fee agreement.
>
> Id. at 451.

That it is inappropriate to permit contingent fees in the absence of a clearly expressed and understood agreement has been recognized by other authorities.

> Contingent fee contracts are much too complex and unusual in the experience of nonlawyers to permit a court to infer that a contingent fee contract is implied in fact from the parties' course of dealings.
>
> Charles W. Wolfram, Modern Legal Ethics, § 9.4.1 (1986).

Similarly, it has been stated that:

> An agreement for a contingent fee can never be implied, but must be a matter expressly contracted for by the attorney and the client.
>
> 7 Am. Jur. 2d, Attorneys at Law, § 273.

It is necessarily a part of the writing requirement of Rule 1.5(c) that the client actually sign the agreement. The signature is not a mere formality which may be casually dispensed with or overlooked; it is at the very core of the Rule's purpose and manifests the client's understanding and assent. It would be pointless to require that the terms of the agreement be in writing without also requiring that the client acknowledge his or her understanding and assent through signing the document.

Accordingly, because Plaintiff Westenskow never signed a written contingent fee agreement and never entered into a valid, binding contingent fee arrangement, the trial court properly concluded that there was no enforceable agreement for a contingent fee.

Courts in other states which have addressed this issue have concluded likewise that unsigned contingent fee agreements are not enforceable. In Pannell v. Guess, 671 So.2d 1310 (Miss. 1996), the father of a girl who died in an automobile accident signed a contingent fee agreement and commenced a wrongful death action. A settlement of $150,000 was obtained and the other wrongful death beneficiaries asserted claims against the settlement. The Mississippi Supreme Court observed that none of the other wrongful death beneficiaries signed the contingency fee contract and that the father's signature alone on the contingent fee contract did not bind them to its terms. However, noting that the other beneficiaries derived benefit from the attorney's efforts and acquiesced to the settlement amount, the court concluded that the attorney was entitled to a hearing to attempt to prove his right to some compensation from them in negotiating the settlement. This is exactly the opportunity the trial court afforded Defendant Holt in this case.

Similarly, in Fasing v. LaFond, 944 P.2d 608 (Colo. Ct. App. 1997), the court refused to enforce an unsigned and invalid contingent fee agreement. The client, an attorney, sought legal help and orally agreed to pay $100 per hour for her attorney's services. Based upon an asserted change in the fee arrangement, the attorney drafted a contingent fee agreement, gave it to the client, and ceased hourly billing. The client, however, did not sign the agreement, nor, consequently, did the attorney forward a

duplicate copy of the signed agreement to her within ten days. The court noted that, among other things, the Colorado Rules require that each contingent fee agreement be in writing in duplicate, that each duplicate copy be signed both by the attorney and client, and that a copy be mailed to the client. The court observed that the rules reflect that it is the attorney's obligation, not the client's, to ensure a proper contingent fee agreement has been made.

> By these rules, the burden to ensure the validity of a contingent fee agreement is placed squarely and solely upon the attorney. Placing this burden on the lawyer clearly reflects the overriding policy in attorney-client relations to hold the attorney responsible for advising the client of the nature of the relationship.
>
> * * *
>
> The rules' strict requirements for the creation of a valid contingent fee agreement and the provision for the unenforceability of invalid contingent fee arrangements similarly reflect the recognition that contingent fee agreements, while necessary, are to be carefully regulated.
>
> Id. at 611.

The attorney contended that because the public policy underlying the rules is to protect unsophisticated clients, the rules did not apply since the client was a knowledgeable attorney. Rejecting that argument, the court stated that the rules impose an absolute burden on an attorney to ensure that a proper contingent fee agreement is in place. Accordingly, the court rejected the attorney's promissory estoppel claim since it would, in effect, allow the terms of the contingent fee agreement to be enforced against the client despite the fact the attorney failed to secure a proper agreement.

In the present case, Plaintiff Westenskow is a layperson and no colorable argument can be made that he should have known and understood the terms and conditions of a contingent fee agreement. He did not sign a contingent fee agreement and did not manifest assent to such an agreement. It was Defendant Holt's responsibility to ensure that a valid contingent fee agreement was in place and that his client understood and agreed to the terms of the agreement. He failed to do so and the trial court correctly applied the law in finding that Plaintiff Westenskow was not bound to pay a contingent fee.

POINT III

THE TRIAL COURT PROPERLY REFUSED TO GRANT DEFENDANT SUMMARY JUDGMENT ON THE RATIFICATION ISSUE

Defendant argues that Plaintiff Westenskow ratified an oral contingent fee agreement. However, none of the cases cited by the Defendant in support of this argument address whether an invalid contingent fee agreement can be ratified by an uninformed client. Instead, the cases cited by Defendant address ratification within the context of a principal ratifying an agent's conduct. The one rule that can be derived from those cases, however, is that knowledge of all the material facts and an intent to ratify is prerequisite to a finding of ratification.

> However, we will not infer ratification of a contract unless we conclude that the principal knowingly assented to the material terms of the contract. Thus, "ratification requires the principal to have knowledge of all material facts and an intent to ratify." (citations omitted).

Bullock v. State Dept. of Transportation, 966 P.2d 1215, at 1219 (Utah Ct. App. 1998).

Mr. Westenskow did not have knowledge of several material facts, including the fact that there was no enforceable contingent fee agreement, the fact that Defendant Holt was not entitled to a contingent fee, the fact that the fee Defendant Holt was entitled to was far less than a contingent fee, and the fact that Defendant Holt believed that signing the settlement statements altered Plaintiff Westenskow's legal obligations.

The concept of ratification finds no application under the circumstances of the present case. Mr. Westenskow was not a principal charged with overseeing the actions of an agent. He was a layperson relying on the advice of his attorney. Furthermore, he could not have intended to ratify anything by signing the settlement statements because he did not have knowledge of the material facts.

To permit Defendant Holt to assert a ratification claim would, in effect, sanction unethical conduct and Defendant Holt's failure to secure a proper agreement. Defendant Holt had a duty to act in the utmost good faith, to avoid taking any action against his client's interest to further his own self-interest, and to advise his client to seek independent advice before taking action which might be against the client's interest.

> It is unprofessional for an attorney to act toward a client otherwise than with the utmost good faith; therefore, any advice given by an attorney which the attorney does not believe to be correct, and any action taken by the attorney with a view of affecting his or her client injuriously, or of obtaining some advantage for himself or herself, to the prejudice of the client, justifies disciplinary action.
>
> 7 Am. Jur. 2d, Attorneys at Law, § 56.

> The attorney is bound to discharge his or her duties to a client with the strictest fidelity, to observe the highest and utmost good faith toward the client, and to inform the client promptly of any known information important to him or her. An attorney's breach of fidelity to a client's interest constitutes constructive fraud.
>
> 7 Am. Jur. 2d, Attorneys at Law, § 138

> An attorney may not take any personal advantage of, or derive any benefit from, the client without first advising the client to seek independent advice.
>
> 7 Am. Jur. 2d, Attorneys at Law, § 139.

Defendant Holt never advised Mr. Westenskow that he was not obligated to pay a contingent fee. To the extent Defendant Holt was unsure of the law and whether an enforceable agreement existed, he was obligated to advise Mr. Westenskow of that fact and suggest that Mr. Westenskow seek independent advice since Defendant Holt's interpretation of the law would be affected by his financial self-interest. Defendant Holt never advised Mr. Westenskow regarding the legal concept of ratification. He never advised Mr. Westenskow that if Mr. Westenskow signed the settlement statements, the unenforceable contingent fee agreement would somehow be legitimized. Here again, Defendant Holt should have advised Mr. Westenskow to seek independent legal advice since Defendant Holt's financial self-interest was at odds with his client's interests.

Based on the foregoing, the trial court's denial of Defendant's motion for summary judgment based on a ratification argument should be affirmed.

POINT IV

THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S CLAIM FOR FEES BASED UPON DEFENDANT'S FAILURE TO FILE A TIMELY AND ACCURATE ACCOUNTING OF TIME

After concluding that there was no contingent fee agreement, the trial court nonetheless recognized that Plaintiff Westenskow benefitted from the services provided by Defendant Holt. Accordingly, the trial court ordered Defendant to submit an accounting of time and costs within twenty days of its decision. Defendant did not. At the hearing on October 20, 1999, the trial court noted that Defendant filed his accounting on October 18, 1999, approximately three months after it was due. The trial court also noted that the affidavit of accounting clearly showed that it was "estimated time" and that Defendant had admitted in signed interrogatories that no time records had been kept in the case. Accordingly, the trial court ruled that the Defendant would not receive any credit for the alleged hours he spent on behalf of Plaintiff Westenskow.

When a court issues an order to be met by a party, it is incumbent upon the party to comply fully with the order. A trial court has broad discretion to fashion an appropriate response to a party's failure to obey a court order. Within the context of the failure to obey orders pertaining to discovery, Rule 37(b)(2) of the Utah Rules of Civil Procedure allows the trial court to go so far as to strike a party's pleading and dismiss the action or enter default. The same breadth of discretion is afforded the trial court with regard to a party's failure to obey scheduling or pretrial orders under Rule 16(d).

The simple facts in this case are that on June 29, 1999, the trial court ordered Defendant to submit an accounting of his time and costs expended in the representation of Plaintiff Westenskow by July 19, 1999. Defendant failed to file the affidavit of time and costs until three months after it was due.

The trial court, pursuant to its inherent authority, was entitled to reject Defendant Holt's claim for fees in light of Defendant Holt's failure to timely comply with the order and in light of the inadequate accounting eventually provided.

> [I]t has always been held, regardless of express statutory authority, that courts of general jurisdiction have the inherent power to make and enforce all necessary rules and orders calculated to enforce the orderly conduct of their business and secure justice between parties litigant.
>
> Peterson v. Evans, 55 Utah 505, 188 P. 152, at 153 (Utah 1920).

The trial court acted well within its discretion in refusing to accept Defendant Holt's untimely and inadequate submission.

POINT V

PREJUDGMENT INTEREST WAS PROPERLY AWARDED TO PLAINTIFF

Noting that the Defendant's attorney's fees were not proper pursuant to an unsigned contingent fee agreement and that defendant should return the unearned portion of the fees to Mr. Westenskow, the trial court explained that Defendant Holt owed a sum certain from the date of settlement. On that basis, the trial court properly awarded prejudgment interest. As has been stated by the Utah Supreme Court:

> [The] interest issue is injected by law into every action for the payment of past due money.
>
> Lignell v. Berg, 593 P.2d 800, at 809 (Utah 1979).

In Canyon Country Store v. Bracey, 781 P.2d 414, 422 (Utah 1989), the Utah Supreme Court observed:

> [W]here the damage is complete and the amount of the loss is fixed as of a particular time, and that loss can be measured by facts and figures, interest should be allowed from that time and not from the date of judgment.

Similarly, in Fitzgerald v. Critchfield, 744 P.2d 301, 304 (Ct. App. 1987), a case involving prejudgment interest on unpaid cattle feeding charges, the Utah Court of Appeals noted:

> The trial court found that appellant owed but did not pay respondent a sum certain from April 19, 1983, the date the last of appellant's cattle were removed from respondent's premises. The law is clear that respondent is entitled to prejudgment interest on this overdue debt from that date until entry of judgment.

Since Defendant Holt owed Plaintiff Westenskow a sum certain from the date of settlement, Mr. Westenskow was entitled to prejudgment interest on the overdue debt.

In determining the amount of interest to be paid, the trial court looked to UCA § 15-1-1. UCA § 15-1-1(2) provides:

> Unless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be 10% per annum.

An attorney-client relationship is contractual in nature and can be formed without an agreement on fees.

> The authority of an attorney begins with his or her retainer, but the relationship of attorney and client is not dependent on the payment of a fee, nor is a formal contract necessary to create this relationship. The contract may be implied from the conduct of the parties.
>
> 7 Am. Jur. 2d, Attorneys at Law, § 136.

> The creation of an attorney-client relationship is essentially contractual, and it is not necessary that any particular formalities be observed in the formation of the relationship or that a retainer be demanded or paid.
>
> 7 Am. Jur. 2d, Attorneys at Law, § 263.

Accordingly, even though there was no valid contingent fee agreement, a contract still existed between Plaintiff Westenskow and Defendant Holt and the trial court properly invoked UCA § 15-1-1 to supply the appropriate rate of interest. Defendant Holt deprived Mr. Westenskow of his money for over four years and Mr. Westenskow was entitled to interest on the money owed.

POINT VI

DEFENDANT'S CIVIL LIABILITY AROSE FROM HIS WRONGFUL RETENTION OF PLAINTIFF'S MONEY

Plaintiffs' cause of action against defendant sounded in conversion and fraud. Plaintiff Westenskow sought to recover the funds which defendant wrongfully retained and defendant's civil liability arose from keeping that which did not belong to him.

Plaintiff did not seek money damages for Defendant's failure to have a written contingent fee agreement in place, and the cases relied upon by Defendant are inapposite. Rule 1.5(c) of the Utah Supreme Court Rules of Professional Conduct simply sets forth the requirements for creating a valid contingent fee agreement. If an attorney fails to meet those requirements, the attorney faces no civil liability for that failure. However, the attorney cannot take a contingent fee. Taking a contingent fee without a valid contingent fee agreement amounts to a conversion, and that is the wrongful conduct which gave rise to defendant's civil liability.

CONCLUSION

This appeal is not from a final order and should be dismissed. In the event the appeal is heard, the trial court's Order and Judgment dated January 26, 2000, should be affirmed.

DATED this 5th day of October, 2000.

R. Scott Waterfall
Attorney for Plaintiffs/Appellees

CERTIFICATE OF MAILING

I hereby certify that on this 6th day of October, 2000, I sent two true and correct copies of the foregoing Brief of Appellees by US Mail, postage prepaid, to:

Leonard McGee
380 North 200 West, Suite 260
Bountiful, Utah 84010

R. Scott Waterfall