

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2014 IL App (4th) 130356-U

NO. 4-13-0356

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

February 20, 2014
Carla Bender
4th District Appellate
Court, IL

DEBORAH LUTTERSCHMIDT, as Guardian of the)	Appeal from
Estate of SHANNON BURNS,)	Circuit Court of
Plaintiff-Appellee,)	Vermilion County
v.)	No. 05L70
TIMOTHY DAVIS, Special Representative of the Estate)	
of JAMES F. DAVIS, Deceased,)	
Defendant,)	
and)	Honorable
WARREN DANZ, P.C.,)	Nancy S. Fahey,
Claimant-Appellant.)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Harris and Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err by denying appellant, the plaintiff's former attorney, litigation costs where appellant provided no evidence on the reasonableness of \$7,242.79 in costs in a case that was eventually settled for \$15,000.

¶ 2 Warren Danz, P.C. (Danz), former attorney for plaintiff, Shannon Burns (before Deborah Lutterschmidt was appointed as guardian of Burns's estate), in a negligence action against Timothy Davis, as special representative of the estate of James F. Davis, deceased, appeals the Vermilion County circuit court's April 1, 2013, judgment that denied its request for expenses related to its representation of Burns before it withdrew as her counsel. On appeal, Danz argues its legal services were reasonable and necessary, and thus it should be allowed to recover attorney fees and costs based on *quantum meruit*. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On July 12, 2002, Burns was a passenger in a car driven by Alfred Gritton. Gritton was driving on Illinois Route 150 in Vermilion County near the intersection of Route 150 and 700 East Road. James was driving his vehicle on 700 East Road and failed to stop at the stop sign at the intersection of Route 150 and 700 East Road. The two vehicles collided at the intersection.

¶ 5 On July 12, 2004, Danz on behalf of both Burns and Gritton filed a two-count negligence complaint against James in Peoria County (No. 04-L-207). Count I sought damages for Burns's injuries, and count II sought damages for Gritton's injuries. In May 2005, the case was moved to Vermilion County.

¶ 6 On July 29, 2005, James filed an answer to the complaint and raised the affirmative defense of contributory negligence against Gritton's negligence count. James also filed a counterclaim against Gritton for contribution to any judgment entered on Burns's count. On August 17, 2005, Danz filed a response on Gritton's behalf to the affirmative defense. On September 9, 2005, the law firm of Torricelli and Limentato entered its appearance on behalf of Gritton as counterdefendant. In October 2005, the new firm filed Gritton's answer to the counterclaim.

¶ 7 On June 30, 2008, Danz filed the following: (1) a motion for substitution of judge as a matter of right on behalf of both Burns and Gritton, (2) a motion to clarify Danz's possible conflict of interest, and (3) a motion to withdraw as Gritton's attorney. On July 30, 2008, the trial court found Danz did have a conflict of interest in representing both Gritton and Burns and gave Gritton 60 days to hire new counsel. In June 2009, Danz filed a request for the admission of facts on Burns's behalf. In July 2009, the court dismissed without prejudice Gritton as a plaintiff in this case due to his refusal to continue with his discovery deposition.

¶ 8 In July 2010, James filed a petition for determination or the adjudication of Burns's disability, seeking, if necessary, the appointment of a guardian of the estate of Burns. On August 25, 2010, Burns through Danz filed a response to James's petition regarding her alleged disability. On November 15, 2010, Danz filed a motion to withdraw as Burns's attorney, noting the possible appointment of a guardian for Burns and the fact Danz had a potential conflict with Burns's family members. On November 18, 2010, the trial court granted Danz's request to withdraw as Burns's attorney and gave Burns 28 days to obtain new counsel. On December 20, 2010, James filed a motion to dismiss for want of prosecution.

¶ 9 On February 22, 2011, Andrew Kleczek entered his appearance on Burns's behalf. In June 2011, the trial court appointed Lutterschmidt, Burns's mother, as guardian of Burns's estate. In August 2011, on James's motion, the court dismissed James's counterclaim with prejudice. In September 2011, a notice of the James's death was filed. At some point, Timothy Davis was appointed as special representative of James's estate. On November 17, 2011, in court, Lutterschmidt accepted a \$15,000 settlement of this cause, which the court approved. Lutterschmidt also signed a release, releasing Burns's claim against James's estate.

¶ 10 In January 2013, James's estate filed a motion to dismiss the complaint, and Burns filed a motion to approve distribution of the settlement proceeds. That same month, Danz filed an affidavit of expenses, which totaled \$7,242.79. Attached to the affidavit were yearly transaction reports, which listed the expenses incurred that year and the amount of the expense. In February 2013, Kleczek filed a memorandum, asserting Danz failed to prove the costs it incurred were reasonable and necessary.

¶ 11 On April 1, 2013, the trial court held a hearing. Danz argued it was entitled to recover its costs under *quantum meruit* even if it did not provide a tangible benefit to Burns.

Kleczek argued Danz lacked standing and failed to prove its costs were reasonable and necessary. Danz responded the costs speak for themselves and asserted Kleczek had relied on the work Danz had done to obtain the \$15,000 settlement. The court found Danz had standing to make its request for costs but denied the request, finding no proof was presented showing the costs were reasonable and necessary. That same day, the court entered a written order, denying Danz's costs and ordering the settlement to be distributed to both Lutterschmidt, as guardian of Burns's estate, and Kleczek after a payment of \$53.93 to Medicare. Upon the parties' stipulation, the court also dismissed the complaint.

¶ 12 On April 30, 2013, Danz filed a timely appeal from the April 1, 2013, judgment in sufficient compliance with Illinois Supreme Court Rule 303 (eff. May 30, 2008). Thus, this court has jurisdiction under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994).

¶ 13 II. ANALYSIS

¶ 14 On appeal, Danz asserts it is entitled to attorney fees and costs under *quantum meruit*. However, Danz expressly waived its right to any attorney fees at the April 1, 2013, hearing. Accordingly, Danz is estopped from now arguing it is entitled to attorney fees. See *Dumke v. City of Chicago*, 2013 IL App (1st) 121668, ¶ 31, 994 N.E.2d 573 (noting "[t]he doctrine of judicial estoppel prohibits a party from assuming a position in a legal proceeding that is contrary to a position it held in a prior legal proceeding"). At oral arguments, Danz noted it again would no longer be seeking attorney fees. Thus, we will only address costs.

¶ 15 An award of attorney costs is a matter within the trial court's discretion, and this court will not reverse the trial court's judgment absent an abuse of that discretion. *Taghert v. Wesley*, 343 Ill. App. 3d 1140, 1148, 799 N.E.2d 377, 383 (2003). "A trial court abuses its discretion when its ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person

would take the view adopted by the trial court." *Patton v. Lee*, 406 Ill. App. 3d 195, 199, 940 N.E.2d 802, 806 (2010).

¶ 16 Generally, when an attorney-client relationship that was established under a contingent fee contract terminates, the contract no longer exists, and thus neither party can seek to enforce the terms of the nonexistent contract. See *Leoris & Cohen, P.C. v. McNiece*, 226 Ill. App. 3d 591, 595-96, 589 N.E.2d 1060, 1064 (1992). However, when the attorney has withdrawn and the court finds the attorney justifiably withdrew from the case, then the attorney can proceed on a claim to recover fees based on *quantum meruit*. *Leoris*, 226 Ill.App.3d at 597, 589 N.E.2d at 1065. A finding the attorney had good cause to withdraw is a necessary prerequisite to awarding attorney fees and costs in *quantum meruit*. *McGill v. Garza*, 378 Ill. App. 3d 73, 75, 881 N.E.2d 419, 422 (2007).

¶ 17 Even if the right to recover under *quantum meruit* is established, the determination of the amount of recovery rests within the trial court's broad discretion. See *Wegner v. Arnold*, 305 Ill. App. 3d 689, 693, 713 N.E.2d 247, 250 (1999). The trial court is entitled to such discretion because of its close observation of the attorney's work and its deeper understanding of the skill and time required in the underlying case. *Wegner*, 305 Ill. App. 3d at 693, 713 N.E.2d at 250. The attorney seeking the costs has the burden of proof to establish the value of his or her services. *In re Estate of Callahan*, 144 Ill. 2d 32, 43, 578 N.E.2d 985, 990 (1991). As the term suggests, with *quantum meruit*, a "trial court is literally to award the attorney as much as he deserves." (Internal quotation marks omitted.) *Wegner*, 305 Ill. App. 3d at 693, 713 N.E.2d at 250 (quoting *Kannewurf v. Johns*, 260 Ill. App. 3d 66, 74, 632 N.E.2d 711, 717 (1994)). "In making its determination, the trial court should assess all of the relevant factors, including the time and labor required, the attorney's skill and standing, the nature of the cause,

the novelty and difficulty of the subject matter, the attorney's degree of responsibility in managing the case, the usual and customary charge for that type of work in the community, and the benefits resulting to the client." *Wegner*, 305 Ill. App. 3d at 693, 713 N.E.2d at 250.

¶ 18 Here, Danz presented only an affidavit listing for each expense the following: (1) the date of the expense, (2) a name for the expense (for example, "Dr. Kale" and "Area Wide"), and (3) the amount of the expense. The affidavit also included a total for the expenses, which was \$7,242.79. Attached to the affidavit were yearly transaction reports for Burns's account with Danz that provided almost the exact same information as the affidavit. Danz appears to have filed a reply to Kleczek's memorandum challenging Danz's costs, but that reply is only included in the appendix to its appellant brief and not the record on appeal. We do not consider documents that are not part of the certified record on appeal. *Kensington's Wine Auctioneers & Brokers, Inc. v. John Hart Fine Wine, Ltd.*, 392 Ill. App. 3d 1, 14, 909 N.E.2d 848, 861 (2009). Additionally, we note "[a]ttachments to appellate briefs that are not contained in the certified record on appeal cannot be used to supplement the record and are not properly before a reviewing court." *Kensington's*, 392 Ill. App. 3d at 14, 909 N.E.2d at 861. Accordingly, we do not consider Danz's reply. Last, at the hearing on the distribution of the settlement proceeds, Danz argued the costs spoke for themselves and argued Kleczek must have relied on its work as no more depositions were done.

¶ 19 While brief descriptions of expenses may be sufficient in complex cases with large settlements, Danz's affidavit and attachment provided only a list of expenses without any description of why the expenses were incurred. Moreover, considering the proportionately large amount of expenses (\$7,242.79) compared to the settlement obtained (\$15,000), Danz's affidavit and attachment were woefully inadequate to establish the reasonableness of Danz's costs. Danz

was even aware before the hearing Kleczek was going to argue no evidence showed the costs were reasonable, and yet it chose to argue the expenses spoke for themselves at the hearing. Danz's more detailed explanation of the expenses (which it now asserts are only \$6,742.79) on appeal is too late. Since Danz, which bore the burden of proof, failed to provide the trial court with any explanation for the proportionately large amount of expenses, we find the trial court did not abuse its discretion by denying *in toto* Danz's request for costs.

¶ 20

III. CONCLUSION

¶ 21 For the reasons stated, we affirm the judgment of the Vermilion County circuit court, denying Danz's request for costs.

¶ 22 Affirmed.