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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

KEVIN E. O’GORMAN and LAURA)	Appeal from the Circuit Court
O’GORMAN,)	of Cook County.
)	
Plaintiffs-Appellants,)	
)	No. 15 L 012517
v.)	
)	
F.H. PASCHEN/S.N. NEILSEN, INC. and OLD)	The Honorable
VETERAN CONSTRUCITON, INC.,)	Kathy M. Flanagan,
)	Judge Presiding.
Defendants)	
)	
(Edward T. Joyce and The Law Offices of Edward)	
T. Joyce & Associates, Movants-Appellees).)	

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Neville and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court’s grant of attorney’s motion to compel payment of fees affirmed where waiver of workers’ compensation lien constituted a benefit under the contingency fee agreement, the plaintiffs did not seek contribution to the payment of attorney’s fees from the employer, and the plaintiffs waived the contention that the attorney’s fees violated the Illinois Rules of Professional Conduct.

¶ 2 Movants, Edward T. Joyce and The Law Offices of Edward T. Joyce & Associates (collectively, “Joyce”), filed in the trial court a “Motion to Compel Plaintiffs to Authorize Disbursement of Settlement Proceeds” (“Motion to Compel”), which the trial court granted. Following an unsuccessful motion to reconsider by the plaintiffs, Kevin E. O’Gorman and Laura O’Gorman, the plaintiffs filed this appeal, arguing that the trial court erred in concluding that Joyce was entitled to attorney’s fees on the waiver of a workers’ compensation lien that was part of the underlying settlement. For the reasons that follow, we affirm.

¶ 3 **BACKGROUND**

¶ 4 Kevin was injured in a construction accident in 2005 and filed suit against the named defendants. Following the grant of summary judgment in favor of defendant F.H. Paschen/S.N. Nielsen, the plaintiffs retained Joyce as substitute counsel to continue the pursuit of their claims against defendant Old Veteran Construction, Inc. (“OVC”). Pursuant to the contingency agreement entered into by the plaintiffs and Joyce, the plaintiffs agreed to pay Joyce “a fee equal to 40 (forty) percent of any and all money or other benefits recovered *** on the Claims.”

¶ 5 During the pendency of the plaintiffs’ claims against OVC, OVC purchased a workers’ compensation lien in the amount of \$172,651.34 from Kevin’s employer, the City of Chicago (“City”), which the City held as a result of paying workers’ compensation benefits to Kevin following his accident. In October 2016, the plaintiffs and OVC settled. Pursuant to that settlement, in exchange for the plaintiffs’ dismissal of their claims against OVC, OVC agreed to pay the plaintiffs \$305,000.00 and to waive the outstanding workers’ compensation lien it had purchased from the City.

¶ 6 The following month, Joyce filed his Motion to Compel. In it, Joyce alleged that, pursuant to the contingency agreement, he was entitled to receive attorney’s fees equal to 40% of

both components of the settlement with OVC—the \$305,000.00 cash payment and the \$172,651.34 lien waiver. Joyce further alleged that the plaintiffs refused to authorize the disbursement of these funds, because they believed that Joyce was only entitled to 40% of the \$305,000.00 cash payment. Joyce requested that the trial court enter an order compelling the plaintiffs to authorize the disbursement of \$243,370.44 to Joyce, representing attorney’s fees and costs on the total settlement.

¶ 7 Citing to statutes and case law governing the reimbursement of workers’ compensation liens, the plaintiffs argued in response that attorney’s fees could not be calculated prior to the reduction of the settlement proceeds by an amount equal to the workers’ compensation lien and that by allowing Joyce to recover attorney’s fees on the cash payment and the lien waiver, Joyce was essentially obtaining double recovery. According to the plaintiffs, the lien waiver did not increase the economic benefit to them by \$172,651.34, but instead merely allowed them to appreciate the full value of the \$305,000.00 cash payment, because they no longer were required to reimburse the lien. The plaintiffs also argued that allowing Joyce to calculate his fees based on the total amount of the settlement package, without first reducing it for reimbursement of the lien, could result in the plaintiffs recovering nothing in the settlement. Finally, the plaintiffs argued that a 40% contingency fee on the lien waiver violated Illinois Rule of Professional Conduct 1.5, because such fees are not customary in Illinois and have been explicitly disallowed under existing Illinois Supreme Court case law.

¶ 8 The trial court ultimately granted the Motion to Compel, reasoning that the lien waiver provided a valuable benefit to the plaintiffs, because if it had not been waived, the amount that the plaintiffs recovered would have been significantly less. As a benefit to the plaintiffs, the lien waiver was, under the terms of the contingency agreement, subject to attorney’s fees. In

addition, because OVC had already negotiated and reimbursed the City for the lien, the amount of the lien did not need to be deducted from the settlement prior to attorney's fees calculation. Accordingly, the trial court concluded that the total settlement value was \$477,651.34 (\$305,000.00 + \$172,651.34). After deducting Joyce's contingency fee of \$191,060.54 (40% of \$477,651.34) and litigation fees of (\$52,309.53), the plaintiffs netted \$243,370.04, an amount the trial court concluded was neither contrary to Illinois law or unreasonable under the Illinois Rules of Professional Conduct.

¶ 9 The plaintiffs filed a motion to supplement the record and to reconsider, in which they sought to supplement the record with a copy of the settlement statement from Joyce and their agreement with their workers' compensation attorney. With respect to their motion to reconsider, they argued that the value of the lien waiver was only \$15,000.00 because that is what OVC paid to purchase the lien from the City, attorney's fees on the lien waiver should be limited to 25% of \$15,000.00, the disbursement of the settlement funds as proposed by Joyce would result in the plaintiffs receiving nothing from the settlement, and the plaintiffs already paid their workers' compensation attorney 20% for his work on initially obtaining the worker's compensation benefits from the City.

¶ 10 The trial court found the plaintiffs' motion to reconsider to be without merit, as it did not raise either a change in the law or an error in the trial court's previous application of the law. In addition, the evidence with which the plaintiffs sought to supplement the record was not newly discovered, as the plaintiffs were in possession of the documents long before Joyce filed the Motion to Compel. The trial court also noted that to the extent that the motion to reconsider raised new arguments for the first time, those contentions were waived. To the extent that the plaintiffs' contentions were to be considered, the trial court referred to its previous findings and

conclusions and noted that any prior attorney's fees paid were paid upon the settlement of OVC's third-party claim against the City and that the City paid those attorney's fees pursuant to statute.

¶ 11 Following this adverse ruling, the plaintiffs brought this timely appeal.

¶ 12 ANALYSIS

¶ 13 The plaintiffs' contentions on appeal are convoluted and difficult to decipher, but they appear to boil down to three main arguments: (1) Joyce should not be allowed to collect attorney's fees on the value of the lien waiver; (2) to the extent that Joyce is permitted to collect attorney's fees on the value of the lien waiver, Kevin's employer is responsible for payment of said fees; and (3) the collection of 40% attorney's fees on the lien waiver would violate Illinois Rule of Professional Conduct 1.5. None of these contentions has any merit, and we affirm the trial court's order granting Joyce's Motion to Compel.

¶ 14 Lien Waiver Value

¶ 15 The plaintiffs first dispute the trial court's conclusion that, under the parties' contingency agreement, the lien waiver constituted a benefit—in addition to the \$305,000.00 cash payment—on which attorney's fees were to be calculated. According to the trial court, the lien waiver provided the plaintiffs with a benefit of value under the plain language of the contingency agreement, because absent the lien waiver, the plaintiffs' recovery would have been significantly reduced. The plaintiffs, on the other hand, argue that the value of the lien waiver can only be determined by comparing the portion of the \$305,000.00 cash payment the plaintiffs would receive with and without the lien waiver.

¶ 16 According to the plaintiffs, section 5(b) of the Workers' Compensation Act ("WCA") (820 ILCS 305/5(b) (West 2016)) requires that where a workers' compensation lien exists, the

workers' compensation lien must be reimbursed from any settlement proceeds before attorney's fees are calculated. So, for example, in the present case, the plaintiffs argue that, had there been no lien waiver, the \$305,000.00 cash payment would have first been reduced by the lien reimbursement (\$172,651.34), leaving \$132,348.66 on which Joyce could then calculate his 40% contingency fee. The plaintiffs further argue that, in contrast, the existence of the lien waiver allows Joyce to calculate his fee based on the entire \$305,000.00 cash payment because the lien does not need to be reimbursed. Thus, under the plaintiffs' reasoning, the "economic benefit" of the lien waiver is not to add \$172,651.34 in value to the total settlement package, but instead to simply maintain the full value of the \$305,000.00 cash payment component of the settlement package. In other words, according to the plaintiffs, they received no additional economic benefit from the lien waiver, because "the cash recovery would not have been more than \$305,000.00 at any point." This contention fails for a number of reasons.

¶ 17 First and foremost, section 5(b) does not require that the amount of the workers' compensation lien reimbursement be subtracted from the settlement proceeds before attorney's fees are calculated and, thus, the plaintiffs' analysis of the "economic benefit" of the lien waiver is flawed from the start. The parties agree that because this question calls for an interpretation of the WCA and the parties' contingency agreement, our review is *de novo*. *Choi v. Industrial Comm'n*, 182 Ill. 2d 387, 392 (1998); *Village of Palatine v. Palatine Associates, LLC*, 2012 IL App (1st) 102707, ¶ 44. The portion of section 5(b) relied upon by the plaintiffs provides as follows:

"Where the injury or death for which compensation is payable under this Act was caused under circumstances creating a legal liability for damages on the part of some person other than his employer to pay damages, then legal proceedings may be taken

against such other person to recover damages notwithstanding such employer's payment of or liability to pay compensation under this Act. In such case, however, if the action against such other person is brought by the injured employee or his personal representative and judgment is obtained and paid, or settlement is made with such other person, either with or without suit, then from the amount received by such employee or personal representative there shall be paid to the employer the amount of compensation paid or to be paid by him to such employee or personal representative including amounts paid or to be paid pursuant to paragraph (a) of Section 8 of this Act.

Out of any reimbursement received by the employer pursuant to this Section the employer shall pay his pro rata share of all costs and reasonably necessary expenses in connection with such third-party claim, action or suit and where the services of an attorney at law of the employee or dependents have resulted in or substantially contributed to the procurement by suit, settlement or otherwise of the proceeds out of which the employer is reimbursed, then, in the absence of other agreement, the employer shall pay such attorney 25% of the gross amount of such reimbursement.” 820 ILCS 305/5(b).

¶ 18 Nowhere in this language of section 5(b) is there any directive that attorney's fees only be calculated on the settlement proceeds that remain after the reimbursement of any existing workers' compensation lien. Rather, the first paragraph simply permits an injured employee to seek compensation from a third-party who is legally responsible for the injury, despite the fact that the employee might have already received workers' compensation benefits from his or her employer. It also creates a lien right in the employer to be reimbursed for any compensation it paid to the employee in the situation that the employee recovers from the legally liable third

party. The second paragraph is equally unsupportive of the plaintiffs' claim in the present case. That paragraph makes the employer responsible for its pro rata share of litigation costs and attorney's fees equal to 25% of the gross recovery, where the employer receives reimbursement for its lien as a result of the employee's action against the legally liable third party.

¶ 19 We find it telling that the plaintiffs do not quote or cite to any specific language in section 5(b) that they claim establishes the rule that attorney's fees may only be collected on any settlement proceeds that remain after the reimbursement of any workers' compensation lien. Instead, the plaintiffs rely on the cases of *In re Estate of Dierkes*, 191 Ill. 2d 326 (2000), and *Evans v. Doherty*, 382 Ill. App. 3d 115 (2006), claiming that they interpret section 5(b) in such a manner. The plaintiffs, however, misread the holdings of these cases. Neither of these cases addressed the calculation of the attorney's fees owed by the employee to his or her private attorney. Instead, they addressed only the employer's obligations to contribute to the payment of the employee's attorney's fees. See *Dierkes*, 191 Ill. 2d at 335 (holding that section 5(b) "requires the *employer* to pay as the employee's attorney fees 25% of the gross amount of the reimbursement" (emphasis added)); *Evans*, 382 Ill. App. 3d at 123 (holding that an employer was required to contribute to the employee's attorney's fees where the employer received any sort of reimbursement, including proceeds from the sale of the lien).

¶ 20 Even the portions of these cases quoted by the plaintiffs in their briefs make this clear. See *Dierkes*, 191 Ill. 2d at 333 (in referring to the second paragraph of section 5(b), "The plain purpose of this provision *** [is] to require an employer to contribute to the necessary costs of the employee's recovery against a negligent third party where the employer is to receive reimbursement from the recovery for workmen's compensation payments made or to be made to the employee." (quoting *Reno v. Maryland Casualty Co.*, 27 Ill. 2d 245, 247 (1962))); *Evans*,

382 Ill. App. 3d at 120 (“We agree with defendants that, according to the plain and ordinary meaning of the words used in section 5(b), the employer is required to contribute to the costs of the employee’s recovery against a third party where the employer has received reimbursement for the workers’ compensation payments made to the employee.”).

¶ 21 Although these cases and their progeny make clear that an employer, under section 5(b), can only be required to contribute up to 25% of the total recovery to the employee’s attorney’s fees no matter what agreement is reached between the employee and the attorney, they and section 5(b) do not limit *the attorney’s right* to recover the attorney’s fees contracted for in his or her contract with the employee. In fact, our Supreme Court specifically stated in *Dierkes*, “[S]ection 5(b) of the Act requires the employer to pay as the employee’s attorney fees 25% of the gross amount of the reimbursement. ‘If this does not satisfy the amount owed the attorney under an attorney-client agreement, *then the attorney must seek any additional amounts from the client*. The employer can not be expected to pay more than the statutorily required amount.’ ” (Emphasis added.) *Dierkes*, 191 Ill. 2d at 335, quoting *Mounce v. Tri-State Motor Transit Co.*, 150 Ill. App. 3d 806, 811 (1986). This makes abundantly clear that the operation of section 5(b) is not intended to have any effect on the method of calculating the total amount of attorney’s fees owed to the employee’s attorney.

¶ 22 Second, given that section 5(b) does not govern the calculation of the fees owed by the plaintiffs to Joyce, the only other basis for calculation of those fees is the parties’ contingency agreement, which provided that Joyce “shall receive a fee equal to 40 (forty) percent of any and all money or other benefits recovered *** on the claims.” However, the plaintiffs’ apparent interpretation of what constitutes a benefit on which attorney’s fees may be calculated pursuant to the contingency agreement is inconsistent with the plain language of the contingency

agreement and violates well established canons of contract interpretation. The plaintiffs' position—that the lien waiver has no value other than to allow them to appreciate the full \$305,000.00 cash payment—equates a “benefit” under the contingency agreement to what they term an “economic benefit,” but really is nothing more than the amount of cash realized by the plaintiffs. The plaintiffs, however, offer no analysis of the contingency fee agreement language or any case law to support this interpretation. Moreover, we cannot agree with this interpretation of the contingency agreement, because the plain language of the agreement states that Joyce is entitled to 40% of “*any and all money or other benefits recovered.*” (Emphasis added.) Nowhere in the contingency fee agreement is the term benefit defined as an increase in the amount of cash realized by the plaintiffs. Rather, the agreement clearly includes “any and all” cash and other forms of benefits in the pot on which attorney’s fees are to be calculated. To read the language of the contingency agreement in any other way would be to read into it a limitation not expressed by the parties; this we cannot do. *Century Parlor Furniture Co. v. Harty Bros.*, 141 Ill. App. 17, 20 (1908) (“We have no right to enlarge the contract which the parties have made for themselves by a forced construction, or, as defendant invites us to do, to read into the contract conditions which are not found there.”). Given that the plaintiffs went into settlement negotiations with no cash payment and an existing lien, but came out with a \$305,000.00 cash payment plus the elimination of their lien debt, it is readily apparent that the lien waiver provided a benefit to the plaintiffs in addition to the cash payment.

¶ 23 We also observe that the contingency fee agreement specifically provides that “[w]hen a Recovery is received, any unpaid or unreimbursed expenses and any liens against the Recovery shall be subtracted from the Client’s share of the Recovery after calculating the Law Firm’s fee.” An interpretation of the term benefit as only cash realized by the plaintiffs would be inconsistent

with this provision. After all, if all outstanding liens (workers' compensation, hospitals, doctors, etc.) have already been subtracted from the gross settlement proceeds to determine the amount on which attorney's fees can be calculated, then it impossible to calculate attorney's fees prior to the subtraction of those liens, as required in this provision. It is well established that a contract should be interpreted in such a way that all provisions operate harmoniously. *Manor Healthcare Corp. v. Soiltest, Inc.*, 192 Ill. App. 3d 934, 723-24 (1989) ("In determining the intent of the parties, the contract must be interpreted as a whole, giving meaning and effect to every provision thereof [citation]; its various terms should be construed harmoniously throughout the document.").

¶ 24 Third, the hypothetical used by the plaintiffs to assess their position absent the lien waiver assumes that the plaintiffs would have settled their claims against OVC for just the cash payment of \$305,000.00, rather than demanding an increase in cash or other benefits to make up for the absence of the lien waiver. Perhaps the plaintiffs would have settled for just \$305,000.00 and perhaps OVC paid more than necessary to settle the case, but that is just speculation, and we cannot assess the value of the settlement package based on what the plaintiffs might or might not have done under different facts unsupported by the record.

¶ 25 In sum, section 5(b) of the WCA has no application to the instant case, because there is no need to reimburse a workers' compensation lien and because the sole issue is the calculation of the total fees owed to the employee's attorney under the contingency agreement with the employee, not what portion of that total is the responsibility of the employer. The trial court was correct in concluding that the lien waiver conveyed a benefit of \$172,651.34 to the plaintiffs in addition to the \$305,000.00 cash payment, bringing the total value of the settlement package to \$477,651.34. Pursuant to the contingency agreement between Joyce and the plaintiffs, Joyce is

entitled to 40% of all benefits recovered, *i.e.*, \$477,651.34. As properly calculated by Joyce and the trial court, the total amount of attorney's fees owed to Joyce is \$191,060.54.

¶ 26 The plaintiffs argue that to allow Joyce to collect attorney's fees on the value of the lien waiver (\$172,651.34) is to permit him double recovery. Again, the plaintiffs' contention in this respect is confusing, as they do not explain in what manner Joyce is recovering twice, and we cannot conceive of any way that this is so under the above calculation. Attorney's fees on each component of the settlement—the lien waiver and the cash payment—are assessed only once. Forty percent of the lien waiver is \$69,060.54, and 40% of the cash payment is \$122,000.00. Together, they total \$191,060.54, the amount of attorney's fees found by the trial court to be due to Joyce.

¶ 27 The plaintiffs also argue that allowing attorneys to calculate their fees prior to the reduction of the settlement proceeds for the reimbursement of the workers' compensation lien leads to situations where the injured employee might not pocket anything from the settlement. In fact, the plaintiffs go so far as to say in their reply brief that, under Joyce's fee calculation, they net zero. First, plaintiffs are never guaranteed to walk away from a settlement or judgment with money in their pocket, regardless of when the attorney's fees are calculated. As stated in *Dierkes*, "If an employer has made workers' compensation payments, the obligation of reimbursement exists regardless of the amount that the employee recovers. [Citation.] Thus, if the amount of compensation paid by the employer exceeds the employee's third-party recovery, then the employer is entitled to the entire recovery, less fees and costs." *Dierkes*, 191 Ill. 2d at 332-33.

¶ 28 Second, the claim that the plaintiffs' net recovery is zero if Joyce's calculation is utilized is simply false. As discussed above, the amount of attorney's fees owed on the settlement is

\$191,060.54. The litigation costs, which the plaintiffs do not contest that they owe, totaled \$52,309.53. After deducting the attorney's fees and litigation costs from the total settlement of \$477,651.34 (\$305,000.00 cash payment + the \$172,651.34 in workers' compensation benefits they get to keep free and clear as a result of the lien waiver), the plaintiffs net \$234,281.27, an amount far greater than zero.

¶ 29 We also observe that this amount is far greater than what the plaintiffs would have realized had there been no lien waiver. Under the plaintiffs' calculations, absent the lien waiver, the \$305,000.00 would have been reduced by the amount of the lien, leaving \$132,348.66 on which Joyce could calculate his 40% contingency fee. After subtracting that contingency fee (\$52,939.46) and litigation costs (\$52,309.53), the plaintiffs would have been left with \$27,099.67, far less than what they realized under the trial court's calculations. Looking at it in this manner, it is difficult to comprehend how the lien waiver did not provide any benefit to the plaintiffs, as they try to contend.

¶ 30 Payment of Attorney's Fees

¶ 31 The plaintiffs' second contention is not entirely clear and certainly is not well developed. Nevertheless, giving the plaintiffs the benefit of the doubt, it appears that the plaintiffs also argue that if Joyce is entitled to attorney's fees on the value of the lien waiver, then those fees should be paid by the City, pursuant to section 5(b). To the extent that this is an accurate reflection of the plaintiffs' argument in subsection B of their appellate brief, we find it to be without merit.

¶ 32 First, although the plaintiffs are correct that the court in *Evans* held that an employer remains responsible for its statutory share of attorney's fees, even when it sells the lien prior to settlement, the plaintiffs fail to recognize that the plaintiff in *Evans* sought to compel payment of attorney's fees by the employer. *Evans*, 382 Ill. App. 3d at 118. Nothing in the record provided

to us on appeal indicates that the plaintiffs have made any effort to seek to enforce any obligation on the part of the City to contribute to the payment of Joyce's attorney's fees.

¶ 33 Second, the orders entered by the trial court granting Joyce's Motion to Compel and denying the plaintiffs' motion to reconsider reference prior payment of statutory attorney's fees by the City. The precise nature of these attorney's fees paid by the City is unclear from the record currently before us, and the plaintiffs have provided us with a very small portion of the trial record, making it impossible for us to ascertain the nature of the attorney's fees paid by the City. It is the plaintiffs' burden, as appellants, to demonstrate error by the trial court and to provide us a sufficient record to establish that error. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92. Here, the plaintiffs have not offered any argument or record that suggests that the trial court is referring to payment of attorney's fees by the City pursuant to a statute other than section 5(b).

¶ 34 Illinois Rule of Professional Conduct 1.5

¶ 35 Finally, the plaintiffs argue that Joyce should not be permitted to recover 40% attorney's fees on the value of the lien waiver, because to do so would violate Illinois Rule of Professional Conduct 1.5(a). Under this rule:

“(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.”

According to the plaintiffs, Joyce’s collection of a 40% contingency fee on the value of the lien waiver would violate this rule because such a fee is not customarily charged in Illinois and such charges have been disallowed by the Illinois Supreme Court. The plaintiffs cite no authority for either of these propositions; accordingly, they are waived. *People v. Hood*, 210 Ill. App. 3d 743, 746 (1991) (“The well-established rule is that mere contentions, without argument or citation of authority, do not merit consideration on appeal.”); see also Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2017) (stating that the appellants brief must include “[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on.”). To the extent that the plaintiffs are referring to *Dierkes* as the Illinois Supreme Court case disallowing such fees, the contention is without merit for all the reasons discussed above.

¶ 36

CONCLUSION

¶ 37

For the foregoing reasons, the judgment of the Circuit Court of Cook County is affirmed.

¶ 38

Affirmed.