IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JILL OSWALT, M.D.; AND MICHAEL GERBER, Appellants, vs. GLADE L. HALL, Respondent.	No. 75434-COA
JILL OSWALT, M.D.; AND MICHAEL GERBER, Appellants, vs. GLADE L. HALL, Respondent.	✓No. 76637-COA

FILED

DEC 18 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART AND REVERSING IN PART

Jill Oswalt, M.D., and Michael Gerber appeal a district court order adjudicating an attorney lien (case number 75434-COA) and a district court order awarding attorney fees incurred to enforce the attorney lien (case number 76637-COA). Second Judicial District Court, Washoe County; David A. Hardy, Judge.

Oswalt and Gerber (collectively Oswalt) were involved in extensive litigation against their neighboring landowner (neighbor).[1] Oswalt brought two cases against the neighbor; one involved a road that ran across Oswalt's and the neighbor's land, and the other involved a personal injury claim. Oswalt hired respondent Glade L. Hall to work on both cases. Hall was initially hired to be the primary attorney on the personal injury case and a supporting attorney in the road case. However,

[1]We do not recount the facts except as necessary for our disposition.

19-51217

Hall eventually became the lead attorney on the road case, and the fee arrangement changed at that time from hourly charges to a 33 percent contingency fee. Hall scheduled multiple settlement conferences pertaining to both cases, but each time the efforts failed.

Eventually, Hall brought the personal injury case to trial. Oswalt, however, was disappointed in the amount of the jury's verdict. Oswalt hired a new firm to work on the two cases, and Hall filed an attorney fee lien on both cases, seeking his 33 percent contingency fee rate, pursuant to his retainer agreement with Oswalt. The new firm scheduled a settlement conference and was able to settle both cases for $1.2 million. The settlement did not apportion the total award between the road and personal injury cases.

The lien case went to trial and the district court found Hall's contingency fee valid and applied it to $1 million of the settlement. However, the district court reduced Hall's award from $333,333 to $180,035, due to payments made to Oswalt's new attorney and an additional offset. While the district court did not apply quantum meruit, the district court noted that quantum meruit would produce the same result. Oswalt appealed.

Hall then moved, under NRCP 68, for attorney fees and costs related to the work performed in adjudicating the lien. The district court awarded Hall attorney fees, but denied costs because he did not submit supporting documentation. Oswalt appealed the district court's award of attorney fees.

On appeal 75434-COA, Oswalt argues that the district court erred by (1) not limiting Hall's attorney fees to a percentage of the jury verdict issued in the personal injury case, (2) allowing Hall to recover

attorney fees when there was a legal malpractice settlement involving his actions in these cases, (3) awarding Hall fees because under the facts of this case the award violates public policy, (4) awarding Hall fees based on Hall's contingency fee retainer agreement because there was no consideration for the parties to change the fee agreement from an hourly rate to a contingency fee, and (5) awarding attorney fees to Hall would be inequitable because Hall did not pursue fees from the Oswalt's neighbors after the personal injury case.[2]

Regarding appeal 76637-COA, Oswalt argues that the district court erred in awarding Hall attorney fees associated in Hall's enforcement of the attorney lien when Hall's offer of judgment was lower than the district court's judgment in the lien case.

The district court did not err when it did not limit Hall's attorney lien award to a percentage of the jury verdict in the personal injury case

Oswalt argues that Hall's recovery should be limited to a percentage of the jury's verdict in the personal injury case. We disagree.

Appellate courts review the district court's application of caselaw de novo. *Liu v. Christopher Homes, LLC*, 130 Nev. 147, 151, 321 P.3d 875, 877 (2014). Oswalt cites to *Peoples v. Consol. Freightways, Inc.*, 486 S.E.2d 604 (Ga. Ct. App. 1997) for support. *Peoples*, however, is distinguishable from this case because Hall's contract specifically stated that he would recover on a settlement or jury verdict. Thus, the district court did not err by basing its award on the settlement.

The district court did not err by allowing Hall to recover on his attorney lien even though there was a malpractice settlement

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[2]Hall's argument that this court lacks jurisdiction to hear these appeals is without merit and we reject it because the appeals had not been dismissed prior to the entry of the orders on appeal. *See* NRAP 4(a)(6).

Oswalt argues that Hall should not be allowed to recover on his attorney lien because Hall's law firm entered into a malpractice settlement, which thereby bars Hall from recovering attorney fees. We disagree. Appellate courts review the district court's application of caselaw de novo. *Liu*, 130 Nev. at 151, 321 P.3d at 877.

Oswalt argues the supreme court has held that when an attorney settles a malpractice claim with a client, the attorney may be barred from pursuing an attorney's lien against that client. *See Van Cleave v. Osborne, Jenkins & Gamboa*, 108 Nev. 885, 887, 840 P.2d 589, 591 (1992). In *Van Cleave*, a law firm and client entered into a settlement, which stated that all claims between the parties were settled as part of the agreement. *Id.* The court reasoned that, because the law firm did not except the attorney's lien claim from the other claims being settled, all the claims were resolved per the language of the settlement. *Id.* at 887-88, 840 P.2d at 591-92.

Here, Hall and Oswalt entered into a settlement regarding legal malpractice. However, Hall's claim for the attorney lien was explicitly excluded as part of the settlement. As a result, under *Van Cleave*, Hall may still pursue his lien because the lien was explicitly excluded from the settlement. Thus, the district court did not err.[3]

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[3]Oswalt next argues that Hall's fee agreement violated public policy because the contract began with an hourly arrangement and then the parties changed it to a contingency fee arrangement. We disagree. Contingency fees serve public policy because "contingency fees allow those who cannot afford an attorney who bills at an hourly rate to secure legal representation." *O'Connell v. Wynn*, 134 Nev. 550, 559, 429 P.3d 664, 671 (Ct. App. 2018). And while, "as a general proposition, lawyer-client agreements are necessarily subject to greater scrutiny and stricter rules than transactions occurring between parties on an equal footing," *Williams*

Awarding attorney fees through the attorney lien to Hall is not inequitable

Oswalt argues that it would be inequitable for Hall to obtain attorney fees in the personal injury case because Hall could have requested fees under NRS 18.010(2)(a)—as the personal injury verdict was not more than $20,000—but he did not do so. Hall contends that he could not have filed the attorney fees motion pursuant to NRS 18.010(2)(a) after the jury verdict in the personal injury case because no judgment had been entered by the district court. Moreover, Hall argues that he is seeking fees from the global settlement, not the personal injury case. Because Oswalt failed to address the impact of a lack of a judgment in the opening brief and did not respond to Hall's argument in their reply brief, Oswalt conceded that Hall's argument has merit and waived the issue. *See Colton v. Murphy*, 71 Nev. 71, 72, 279 P.2d 1036, 1036 (1955) (concluding that when respondents' argument was not addressed in appellants' opening brief, and appellants declined to address the argument in a reply brief, "such lack of challenge cannot be regarded as unwitting and in our view constitutes a clear concession by appellants that there is merit in respondents' position").[4]

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v. Waldman, 108 Nev. 466, 472, 836 P.2d 614, 618 (1992), here, the district court determined both Oswalt and Gerber had extensive litigation experience and were sophisticated in business. Moreover, prior to Hall becoming the lead attorney in the road litigation, Oswalt and Gerber rejected a contingency fee agreement and understood how such agreements worked. Thus, in this case, the parties' agreement to change the fee structure did not violate public policy.

[4]In passing, Oswalt mentions that the change in fee arrangement did not have sufficient consideration despite the fact that the lead attorney withdrew from the case and Hall assumed those duties. We disagree. "Consideration is the exchange of a promise or performance, bargained for by the parties." *See, e.g., Jones v. SunTrust Mortg., Inc.*, 128 Nev. 188, 191,

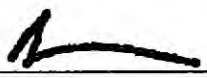
Attorney fees and costs incurred to enforce the attorney lien

For appeal No. 76637-COA, Oswalt contends that the district court erred by including the costs Hall incurred in his lien enforcement action when determining whether to award attorney fees under NRCP 68 because without adding the costs, the amount of the judgment was less than the offer to settle. Oswalt points out that the district court ultimately denied the entire cost request since it was not supported with adequate documentation. Hall did not file an answering brief addressing these arguments. Appellate courts "may, in [their] discretion, treat the failure of a respondent to file his brief as a confession of error, and reverse the judgment without consideration of the merits of the appeal." *State of R.I. v. Prins*, 96 Nev. 565, 566, 613 P.2d 408, 409 (1980); NRAP 31(d). We do so here, and thus, reverse the award of attorney fees incurred to enforce the attorney lien.

Accordingly we,

ORDER the district court's order regarding appeal 75434-COA AFFIRMED and REVERSE the district court's order regarding appeal 76637-COA.


_____, C.J.
Gibbons


_____, J.
Bulla

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274 P.3d 762, 764 (2012). Thus, Hall's acceptance of additional responsibilities constitutes consideration.

TAO, J., concurring:

I concur in the result only.

_____, J.
Tao

cc: Hon. David A. Hardy, District Judge
Carl M. Hebert
Glade L. Hall
Hutchison & Steffen, LLC/Las Vegas
Washoe District Court Clerk