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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| DAVID ZWEIG et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>YUNA KWON et al.,<br><br>Defendants and Respondents. | B153064<br><br>(Super. Ct. No. BC220708) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Reginald A. Dunn, Judge. Affirmed.

Law Office of Irwin M. Friedman and Irwin M. Friedman, in pro. per., for Plaintiffs and Appellants.

Pivo, Halbreich, Cahill & Yim, B. Casey Yim; Law Office of Bruce Adelstein and Bruce Adelstein for Defendants and Respondents.

## INTRODUCTION

Attorneys sued former clients to enforce an oral contingency fee agreement. Because that agreement did not comply with Business and Professions Code section 6147,[1] the statute entitled the former clients to void the oral contingency fee agreement and entitled the attorneys "to collect a reasonable fee." The trial court correctly interpreted this "reasonable fee" to be quantum meruit recovery at an hourly rate. We reject the argument that, under these circumstances, the fee in quantum meruit should be calculated as 40 to 50 percent of the former clients' recovery, the amount of the contingency fee plaintiffs would have received under the invalid agreement. We affirm the judgment.

## FACTUAL AND PROCEDURAL HISTORY

In 1990, Yung Kwon and her husband were clients of Melvin Rogow, whose firm defended them in a suit brought against them by Mr. and Mrs. Kim. Zweig was an attorney at the Rogow firm and did some legal work for the Kwons. The Kwons had a written agreement with the Rogow firm. When Zweig stopped working at the Rogow firm, the Kwons agreed to have him represent them. The Kwons and Zweig had no written agreement, but orally agreed that the Kwons would pay Zweig $150 per hour. Zweig represented them through the trial and appeal of the Kim suit against the Kwons, and periodically sent the Kwons billing statements based on the hourly rate. Zweig later

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[1] Unless otherwise specified, statutes in this opinion will refer to the Business and Professions Code.

represented Mrs. Kwon in her suit for harassment against Mr. Rhee and on a creditor's claim made by Triache. They had no discussions about the fee arrangement in those cases. Zweig billed his work for Mrs. Kwon on the Rhee and Triache matters at the hourly rate.

The Kwons filed bankruptcy in June 1996. In January 1997, Mrs. Kwon asked Zweig to represent her in a suit against Mrs. Kim for slandering the Kwons. The witnesses differed concerning the fee arrangement for the defamation suit against Mrs. Kim. Zweig testified that he told Mrs. Kwon he would take the case on a contingent fee basis, that the fee would be one-third if the case settled before trial and 40 percent after trial, that the fee did not include any appeal, and that the fee would be a lien on any judgment. Zweig testified that Mrs. Kwon agreed to those terms. He sent a retainer agreement for signature by Mr. Kwon and Mrs. Kwon, but neither ever signed it. By contrast, Mrs. Kwon testified that when she first talked to Zweig about a defamation suit against Mrs. Kim, they did not discuss legal fees and Zweig did not ask Mrs. Kwon to sign a retainer agreement. Zweig billed her at an hourly rate for representing her in the appeal in Kim's suit against the Kwons. She understood Zweig would continue to charge his hourly rate in her suit against Kim. Mrs. Kwon testified that Zweig said nothing to her in January 1997 that Kwons' case against Kim would have a different fee arrangement and she understood that Zweig would bill her at an hourly rate. From that time until the trial in August 1998, Zweig said nothing about the billing arrangement for the Kwons' case against Kim.

Zweig admitted that he did not comply with section 6147. He admitted that no signed attorney fee contract existed and that he did not give the Kwons a copy of the contract signed by the attorney and the plaintiffs. Zweig also understood that if he did not obtain a signed written retainer agreement providing for a contingency fee, subdivision (b) gave the client the right to void the contingency fee agreement. Friedman stipulated that there was no written contingency agreement to which the Kwons agreed, that the oral contingency fee agreement he and Zweig alleged did not comply with section 6147, and that the parties had no valid oral or written contingency fee agreements.

On January 23 or 24, 1997, Zweig billed the Kwons $450 as a retainer in their new case against Kim. Otherwise Zweig did not bill the Kwons for his work on their case against Kim.

Zweig filed the complaint against Kim on January 23, 1997. In April or May of 1998, Zweig associated Friedman as co-counsel to handle the trial. Friedman testified that Mrs. Kwon asked if an additional attorney would cost more. Zweig told her he and Friedman would share fees and it would not cost her any more. Mrs. Kwon, by contrast, testified that when Friedman associated into the case as co-counsel, there were no discussions of the fee arrangement for Zweig and Friedman to handle the Kwons' case against Kim, and the attorneys did not present her with any written contingency free contract for her signature.

Neither Zweig nor Friedman kept time records of their work on the Kwons' case against Kim.

In October or November 1998, Zweig told Mrs. Kwon they had a judgment. Mrs. Kwon testified that they did not discuss legal fees in that conversation. A few days later, Zweig asked Mrs. Kwon to sign a retainer agreement for 40 percent of the judgment. She refused, saying that was not fair. Zweig said other attorneys commonly charged 40 percent and asked her what percentage she thought would be fair. Mrs. Kwon said she thought he was charging her an hourly rate.

They did not talk again until January 1999, when Zweig again asked Mrs. Kwon to sign a document to hire an appellate attorney to respond to an appeal filed by Mrs. Kim. Mrs. Kwon went to Zweig's office; Friedman was present. The parties testified differently about events at that meeting.

Zweig testified that he explained to Mrs. Kwon that because Kim had hired Horvitz and Levy, the foremost appellate law firm in California, Mrs. Kwon needed a strong appellate counsel. Zweig knew the Kwons were in trouble financially, and still owed Zweig $20,000. Zweig knew of a firm in San Francisco that bought judgments on a percentage basis, and in the office he showed Mrs. Kwon a loan application and told her she needed to think about it as a way of funding the appellate counsel. Zweig raised the issue of the retainer agreement, told Mrs. Kwon she had never signed the original retainer agreement, and said a copy was needed for the loan application. Mrs. Kwon said she would discuss it with Mr. Kwon, but could not sign a retainer agreement at that time, without Mr. Kwon.

Mrs. Kwon testified that Zweig told her that the Kwons would need a loan because they did not have $70,000 to hire an appellate attorney to oppose the Kim appeal. Zweig asked her to come to his office to sign a Judgment Purchase Corporation loan application that Zweig had prepared. Zweig also told her she had to sign a retainer fee agreement in order to fill out the loan application. She refused to sign. She believed her arrangement with Zweig was for an hourly fee. Zweig said people signed a contingency fee agreement every day. Friedman banged the table. Mrs. Kwon asked for, and received, a copy of the credit application and the retainer agreement. She then left.

After discharging Zweig and Friedman as their attorneys, the Kwons accepted $1,080,495.46 as a partial settlement of the appeal. They hired two attorneys to represent them in the Kim appeal, who charged $170 per hour and billed monthly. The total fee was $22,000. The amount of the final judgment was $2,280,459. Friedman and Zweig received $170,000 in a negotiated partial distribution pending further order of the court establishing their actual fee.

Zweig and Friedman sued the Kwons. The operative complaint alleged a cause of action for attorney fees pursuant to a contingency fee agreement, or if the Kwons properly disavowed the retainer agreement as voidable because it was not in writing, for a reasonable attorney fee pursuant to section 6147, and to establish and enforce an attorneys' lien on the judgment in the related case of Kwon v. Kim.

At the close of plaintiffs' case, the trial court granted defendants' motion for judgment (Code Civ. Proc., § 631.8). The trial court found that plaintiffs could not

enforce a contingency fee agreement because they did not comply with section 6147. The trial court's order stated, in relevant part: "Counsel for Plaintiffs admit that there was no written contingency fee that was agreed upon by both attorney and client. It follows, therefore, that the only claim for recovery for services rendered must be on a quantum meruit basis for time and the cost of materials. . . . Plaintiffs have already received $170,000.00 for their services in the underlying action [and] . . . have failed to establish that they are entitled to additional payment for services rendered. Accordingly, the lien for attorneys' fees is ordered dismissed."

Judgment in favor of the Kwons was filed on August 3, 2001. Notice of entry of judgment was served on August 10, 2001. Plaintiffs Zweig and Friedman filed a timely notice of appeal on September 12, 2001.

## ISSUES

Plaintiffs claim on appeal that:

1. The judgment is based on findings that are contrary to law, to defendants' judicial admissions, and to other concessions of the truth of the oral contingent fee;

2. The finding that the agreement must be in writing and is void is contrary to the trial court's previous ruling and to the correct interpretation of section 6147;

3. A reasonable fee is determined by the amount recovered, and this court should award a fee of 40 percent to 50 percent of the Kwons' judgment, plus prejudgment interest.

## STANDARD OF REVIEW

A motion for judgment pursuant to Code of Civil Procedure section 631.8 is intended to eliminate the necessity of defense evidence. (*Rodde v. Continental Ins. Companies* (1979) 89 Cal.App.3d 420, 423-424; *Pettus v. Cole* (1996) 49 Cal.App.4th 402, 424.) Code of Civil Procedure section 631.8 authorizes the court to weigh evidence. This court will affirm the judgment if substantial evidence supports the trial court's findings. (*Jordan v. City of Santa Barbara* (1996) 46 Cal.App.4th 1245, 1255.)

## DISCUSSION

### A. *The Statute*

The issues in this appeal arise from section 6147, which states, in relevant part:

"(a) An attorney who contracts to represent a client on a contingency fee basis shall, at the time the contract is entered into, provide a duplicate copy of the contract, signed by both the attorney and the client, or the client's guardian or representative, to the plaintiff, or to the client's guardian or representative. The contract shall be in writing and shall include, but is not limited to, all of the following:

"(1) A statement of the contingency fee rate that the client and the attorney have agreed upon.

"(2) A statement as to how disbursements and costs incurred in connection with the prosecution or settlement of the claim will affect the contingency fee and the client's recovery. [¶] . . . [¶]

"(5) If the claim is subject to the provisions of Section 6146, a statement that the rates set forth in that section are the maximum limits for the contingency fee agreement, and that the attorney and client may negotiate a lower rate.

"(b) Failure to comply with any provision of this section renders the agreement voidable at the option of the plaintiff, and the attorney shall thereupon be entitled to collect a reasonable fee."

B. *Even if an Oral Contingency Fee Contract Existed, It Was Not Enforceable*

Plaintiffs first refer to the thirteenth affirmative defense in defendants' answer, which stated: "Plaintiffs' claims based on the alleged oral contingency fee contract, including the attorney's lien, are impossible as a matter of law when defendants voided the oral contingency fee contract pursuant to Section 6147 of the Business & Professions Code." Plaintiffs claim that this affirmative defense admitted that an oral contingent fee agreement existed, and that defendants voided it pursuant to section 6147. They argue that this admission binds the defendants, and constitutes a factual finding which the trial court cannot later contradict.

The quoted affirmative defense is not a clear admission that an oral contingency fee contract existed. It refers to the impossibility of plaintiffs' claims "based on the *alleged* oral contingency fee contract." (Italics added.) Plaintiffs' own authorities state that the answer must distinctly and unqualifiedly admit the fact alleged in the complaint for that admission to be conclusive. (*Back v. Hook* (1951) 107 Cal.App.2d 250, 252.)

More importantly, even if an oral contingency fee agreement did exist, it cannot be enforced. Plaintiffs admitted, and the trial court found, that a purported oral contingency fee agreement did not comply with section 6147. Subdivision (b) allowed the Kwons to void the contract and entitled Zweig and Friedman only "to collect a reasonable fee."

C. *Judicial Estoppel Does Not Apply*

Plaintiffs claim the Kwons should be estopped from relying on section 6148 (requiring a written contract for attorney fee agreements not coming within section 6147) because until shortly before trial the Kwons argued that section 6147 controlled.

For judicial estoppel to operate, plaintiffs must show: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake. (*Thomas v. Gordon* (2000) 85 Cal.App.4th 113, 118.)

Plaintiffs have not shown that the Kwons took a first position in a prior proceeding that the tribunal adopted or accepted as true. "At the most, the doctrine of judicial estoppel precludes a party from taking one position in one action and an inconsistent position in another action." (*Loube v. Loube* (1998) 64 Cal.App.4th 421, 428, italics omitted; but see *Thomas v. Gordon, supra*, 85 Cal.App.4th at p. 119.) Moreover, the two positions are not totally inconsistent; sections 6147 and 6148 both require a written fee agreement, in the absence of which the plaintiff-attorney is entitled only to a reasonable

fee. Finally, the estoppel operates to restrict the party to the first, earlier position taken (here, § 6147) and to bar the party from arguing the second, later position (§ 6148). (See, e.g., *Michelson v. Camp* (1999) 72 Cal.App.4th 955, 970-971.) Here the trial court expressly relied on section 6147. Estopping the Kwons from relying on section 6148 would not alter the result.

D. *The Trial Court Did Not Erroneously "Rewrite" Section 6147*

Zweig and Friedman claim that the trial court ruled, in sustaining the demurrer, that the oral contingency fee contract was valid until plaintiffs exercised their right to void it, but later "rewrote" section 6147 in three ways.

We are unable to see how the section 6147, subdivision (a) requirement that a contingency fee contract "shall be in writing" differs from the court's statement that the statute "requires that an agreement by an attorney to represent a client on a contingency fee basis must . . . be in writing[.]" This does not "re-write" section 6147.

Plaintiffs claim that the trial court changed section 6147 to read that lack of compliance with section 6147 renders a contract "void" rather than "voidable." No such statement appears in the court's July 2, 2001, order granting the motion for judgment or in the judgment itself. The Kwons' refusal to accept plaintiffs' contingency fee agreement, moreover, ended any question whether the oral contract was valid but voidable. Their refusal, pursuant to subdivision (b), made the contract void.

Third, plaintiffs claim the trial court changed section 6147 to read that the attorney "shall collect no fee" rather than the attorney is entitled to a reasonable fee. The trial

court's July 2, 2001, order, however, stated that because the parties had no written contingency fee agreement, "[i]t follows, therefore, that the only claim for recovery for services rendered must be on a quantum meruit basis for time and the cost of materials." The trial court did not rule that plaintiffs "shall collect no fee."

E. *Plaintiffs Have Not Shown That a "Reasonable Fee" Is a Contingency Fee*

Plaintiffs' real claim is that "a reasonable fee" means a fee of 40 to 50 percent of the judgment. Despite their failure to comply with section 6147, despite their clients' having voided the oral contingency fee agreement as the statute permits them to do, and despite their statutory entitlement only to "a reasonable fee," plaintiffs argue that this court should award them their contingent fee anyway. We disagree.

Plaintiffs rely on *Franklin v. Appel* (1992) 8 Cal.App.4th 875. *Franklin* held that section 6147 applied only to contingency fee agreements between clients and an attorney representing them in litigation. Therefore section 6147 did not entitle clients to void an agreement for legal services in real property transactions which did not involve litigation, and the trial court should have awarded fees pursuant to the attorney fee contract. The error was harmless, however, because quantum meruit damages approximated the contractual fee and fully compensated the attorney. (8 Cal.App.4th at pp. 892-893.) Thus *Franklin* does not address Zweig and Friedman's claim in this appeal. It provides neither authority nor guidance to determine the correctness of the ruling on attorney fees due them.

Plaintiffs argue that a "reasonable fee" pursuant to section 6147 is not a fee based on an hourly rate, but is instead a fee of 40 to 50 percent of the Kwons' judgment. Plaintiffs cite *Cazares v. Saenz* (1989) 208 Cal.App.3d 279, 289 and *Fracasse v. Brent* (1972) 6 Cal.3d 784, 791.) Neither *Fracasse* nor *Cazares* involve an oral contingency fee contract voided by a client pursuant to section 6147.

*Fracasse* held that when a valid contingency fee agreement exists and the client exercises its right to discharge the attorney before the contingency occurs, the attorney may recover the reasonable value of his services rendered to the time of discharge if and when that contingency occurs, i.e., if plaintiffs obtain a judgment. A trial court may look to a *valid* contingency fee agreement in assessing a reasonable fee due an attorney discharged by plaintiffs before they obtained a judgment. (*Fracasse v. Brent, supra,* Cal.3d at pp. 791-792.) By contrast, this appeal involves the determination of what "reasonable fee" the client owes after voiding an *invalid* oral contingency fee agreement.

*Cazares* also differs from this appeal. It involved a written fee-splitting agreement between an attorney and a law firm. Such an agreement, if the client has not provided written consent after full disclosure, is prohibited by the Rules of Professional Conduct. (*Cazares v. Saenz, supra*, 208 Cal.App.3d at p. 283, fn. 5, citing former Rules Prof. Conduct, rule 2-108; *Chambers v. Kay* (2002) 29 Cal.4th 142, 145, 147, citing current rule 2-200(A)(1).) Not only does *Cazares* appear to have been overruled by *Chambers*, but *Cazares* did not involve the factual or legal issues presented in this appeal and specifically did not involve a former attorney's suit against a former client to enforce an

oral contingency fee contract which did not comply with section 6147. *Cazares* therefore provides no basis for this court to adapt the remedy *Cazares* employed.

*Chambers*, moreover, specifically rejected a claim made by an attorney-appellant which sought to predicate a quantum meruit award on a contingent fee. Despite failing to comply with Rules of Professional Conduct, rule 2-200(A)(1), attorney Chambers argued that he should be allowed to accomplish a division of fees under the guise of a quantum meruit claim. *Chambers* rejected this claim, stating: "We perceive no legal or policy justification for finding that the fee the parties negotiated without the client's consent furnishes a proper basis for a quantum meruit award in this case." (*Chambers v. Kay, supra*, 29 Cal.4th at p. 162.)

Zweig and Friedman similarly argue that despite their failure to comply with section 6147, this court should disregard the violation and award them, as a reasonable fee in quantum meruit, 40 to 50 percent of the amount the Kwons recovered. Like *Chambers*, we reject this claim. No authority supports such an award under these circumstances, and such an award would contradict the policies underlying section 6147. This statute exists to protect clients, to assure that fee agreements are fair, and to assure that clients understand them. (*Alderman v. Hamilton* (1988) 205 Cal.App.3d 1033, 1037.) Indeed, an attorney's professional responsibility to make sure clients understand billing procedures and rates predated the statute. (*Severson & Werson v. Bolinger* (1991) 235 Cal.App.3d 1569, 1572.) To provide a remedy that compensates an attorney who violates section 6147 at the same rate that the invalid, unenforceable contract would have

provided would make section 6147 meaningless and would frustrate the public policy it expresses. It would ignore the statutory right of clients to know and understand how they must compensate their attorneys. The refusal to award a contingency fee under the guise of quantum meruit "reasonable value" recovery also has deterrence value: if an attorney expects to enforce a contingency fee agreement, the attorney must comply with section 6147, and failure to do so may result in lower compensation at an hourly rate. Zweig and Friedman provide no authority to justify disregarding section 6147, and for these reasons we decline to do so.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondents.

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KITCHING, J.

We concur:

KLEIN, P.J.

CROSKEY, J.