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**Argentina Consol. Mining Co. v. Jolley Urga Wirth Woodbury & Standish,
125 Nev. Adv. Op. No. 40 (September 24, 2009)¹**

ATTORNEY LIENS – ATTORNEY FEE DISPUTES

Summary

Appeal of district court judgment on attorneys' lien.

Disposition/Outcome

The Court reversed the district court's order granting attorneys fees reasoning that the district court abused its discretion in exercising jurisdiction over the fee dispute.²

Factual and Procedural History

Jolley Urga Wirth Woodbury & Standish ("JUWWS") represented Argentina, the owner of an abandoned mine, who was sued for personal injuries allegedly sustained in the abandoned mine. The case proceeded to trial and before a verdict was reached, the parties settled. JUWWS negotiated the settlement, which included Argentina's waiver of the right to recover costs and fees from the plaintiff. Argentina contended that it never authorized JUWWS to include this provision in the settlement agreement, and thus JUWWS actions constituted legal malpractice. As a result, Argentina withheld \$213,990.62 in attorneys' fees owed to JUWWS. JUWWS disagreed, withheld Argentina's files as a retaining lien pending payment of its fees and brought a motion to adjudicate the retaining lien. The district court granted JUWWS's motion and entered judgment in the amount of \$213,990.62.

Argentina appeals contending that since JUWWS had no charging lien and Argentina did not consent to the court resolving the disposition of the retaining lien the court did not have jurisdiction over the fee dispute. In addition, Argentina claims that JUWWS committed legal malpractice and therefore is not entitled to recovery of its legal fees. The court framed the issues on appeal in three questions. First, did the court have jurisdiction based on a charging lien? Second, did the court have jurisdiction to resolve the retaining lien? Third, did the district court have jurisdiction to adjudicate a fee dispute in the underlying lawsuit?

Discussion

Two Lien Structure

In Nevada, there are two types of recognized attorney liens:³ one created by statute⁴ and one based in common law, known as a retaining lien.⁵ The statutory lien, known as a charging

¹ By Tenesa S. Scaturro

² The Court stated that even if there had been jurisdiction they would have reversed because the district court abused its discretion when it summarily granted the motion without making express findings as required by *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349-50, 455 P.2d 31, 33-34 (1969). See section "Summary Proceedings," *infra*.

lien, is a lien on the judgment or settlement that the attorney has obtained for the client.⁶ A court has in personam jurisdiction over a charging lien based on the client already submitting to jurisdiction in the case and the court having personal jurisdiction over the attorney due to the attorney's appearance as the client's counsel of record.⁷ Further, the court has of the in rem jurisdiction to resolve a fee dispute because attorney's fees are "recovered on account of the suit or other action."⁸

As it pertains to retaining liens, a client needs to seek to compel its files from the attorney before the court has jurisdiction over the lien.⁹ Where the client does not seek to compel the return of its files, and thus the court does not have jurisdiction to adjudicate the fee dispute, an attorney may retain the client's files and file a lawsuit to recover legal fees.¹⁰

Charging Lien

The Court stated that by its very nature, a charging lien involves recovery by settlement or judgment.¹¹ Since JUWWS did not obtain a judgment or settlement that included any recovery, no enforceable charging lien existed.

Retaining Lien

Although the parties agree JUWWS had a retaining lien on the client files, Argentina did not seek to compel the return of its files nor consented to the court's adjudication of the retaining lien. As such, the Court concluded that the district court did not have jurisdiction to extinguish the retaining lien.

*Clarification of Sarman v. Goldwater, Taber and Hill*¹²

JUWWS argued that even if the court found no enforceable charging lien or retaining lien, under the court's ruling in *Sarman*, the court had "incidental powers" to adjudicate disputes over fees in the underlying action. The court rejected this argument on two bases.

First, the Court noted that the statements in *Sarman* constituted dicta, which was not binding on the court. Second, the Court stated that the cases were "factually inapposite," including the case on which the *Sarman* court based its ruling, *Gordon v. Stewart*.¹³ The Court rejected both *Sarman* and *Gordon* "to the extent that those opinions indicate the court has the power to resolve a fee dispute in the underlying action irrespective of whether the attorney sought adjudication of a lien."

³ Figliuzzi v. Dist. Court, 111 Nev. 338, 342, 890 P.2d 798, 801 (1995).

⁴ NEV. REV. STAT § 18.015 (2007).

⁵ Figliuzzi, 111 Nev. at 342, 890 P.2d at 801.

⁶ *Id.*

⁷ Earl v. Las Vegas Auto Parts, 73 Nev. 58, 307 P.2d 781, 783 (1957).

⁸ NEV. REV. STAT § 18.015(3).

⁹ Figliuzzi, 111 Nev. at 343-44, 890 P.2d at 801-02.

¹⁰ Don C. Smith, Jr., *Cause of Action by Attorney for Recovery of a Fee Under Contingent Fee Contract*, in 5 CAUSES OF ACTION 259, 299 (1st ed. 1983); see also 7A C.J.S. *Attorney & Client* §§ 419, 422 (2004).

¹¹ NEV. REV. STAT § 18.105; Figliuzzi, 111 Nev. at 342, 890 P.2d 798, 801.

¹² *Sarman v. Goldwater, Taber and Hill*, 80 Nev. 536, 540-41, 396 P.2d 847, 849 (1964).

¹³ 74 Nev. 115, 324 P.2d 234 (1958).

The Court thus clarified *Sarman* by holding that where there is an enforceable charging lien or the client requests disposition of the lien, the district court will have jurisdiction in the underlying lawsuit relative to fee disputes.

Summary Proceedings

The Court noted its earlier holding that when a client asserts that the attorney committed legal malpractice, it is proper for the district court to refuse to decide those issues in a summary proceeding in the pending case.¹⁴ In this case, the district court decided the issue in such a summary proceeding. JUWWS argued, however, that the summary proceedings were proper because Argentina's legal malpractice claim lacked merit. The Court rejected this argument and took the chance to reiterate its holding in *Morse*.

Conclusion

The Court concluded that the district court does not have jurisdiction over an attorney fee dispute where 1) there is no enforceable charging lien or 2) in the case of a retaining lien, where the client has not consented to the court's jurisdiction nor filed a motion to compel production of client files. When the court does not have jurisdiction for the foregoing reasons, an attorney's remedy is to file a separate lawsuit for unpaid fees. The Court further concluded that even where the district court has jurisdiction to adjudicate the fee dispute, summary proceedings are inappropriate where the client objects to the proceedings based on its legal malpractice allegations. Accordingly, the Court reversed the district court's order.

¹⁴ *Morse v. Dist. Court*, 65 Nev. 275, 287-88, 195 P.2d 199, 204-05 (1948).