

CASE NO. A-22-0622

IN THE NEBRASKA COURT OF APPEALS
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**BRUCE LAVALLEUR, P.C., a Nebraska Professional Corporation, and
BRUCE LAVALLEUR, individually,**

Third Party Plaintiffs/Appellants,

v.

THE GUARANTEE GROUP, L.L.C.,

Third Party Defendant/Appellee.
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**APPEAL FROM THE HALL COUNTY DISTRICT COURT
HONORABLE PATRICK M. LEE, DISTRICT JUDGE**
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APPELLEE'S REPLY BRIEF ON CROSS APPEAL
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APPELLEE’S REPLY BRIEF

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Statement of Jurisdiction

Appellee incorporates the “Statement of Jurisdiction” section from its Brief on Cross-Appeal. Appellee’s Brief on Cross-Appeal, 25.

Statement of the Case

Appellee incorporates the “Statement of the Case” section from its Brief on Cross-Appeal. Appellee’s Brief on Cross-Appeal, 26-27.

Propositions of Law

1. “Statutory language must be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.” *Chatterjee v. Chatterjee*, 313 Neb. 710, 722 (2023).

2. “[A] contingent fee is a fee established for the performance of any service pursuant to an arrangement in which no fee will be charged unless a specified finding or result is attained, or in which the amount of the fee is otherwise dependent upon the finding or result of such service. Solely for purposes of this rule, fees are not regarded as being contingent if fixed by courts or other public authorities, or, in tax matters, if determined based on the results of judicial proceedings or the findings of governmental agencies. Any licensee who accepts a contingent fee or expects to be paid a contingent fee shall provide written disclosure of such acceptance or payment and the basis for determining such fee to the client.” 288 Neb. Admin. Code Ch. 5, § 005.03

Statement of Facts

Guarantee Group restates the facts as set forth in its “Statement of Facts” in its initial brief. Appellee’s Brief, 7-13. Additional facts as relevant to the individual arguments are set forth below.

Summary of the Argument

Because the alleged oral contract between Lavalleur P.C. and Guarantee Group was a contingent fee arrangement, the contract is void as a matter of law because Lavalleur P.C. did not provide any written disclosure of the fee arrangement.

Argument

I. UNDER THE PLAIN AND ORDINARY MEANING OF THE RULES OF PROFESSIONAL CONDUCT, THE AGREEMENT BETWEEN THE PARTIES WAS A CONTINGENCY FEE AGREEMENT.

Appellant argues that the agreement between Bruce Lavalleur P.C. and the Guarantee Group was not a contingency fee agreement. Appellant’s contention that the agreement between the parties was not a contingency fee agreement presents a straightforward question of statutory construction. Under the Nebraska Administrative Code, the proper focus is not on *when* Lavalleur received payment for services, but, rather, on whether its ultimate fee entitlement was contingent. “Statutory language must be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.” *Chatterjee v. Chatterjee*, 313 Neb. 710, 722 (2023).

The Nebraska State Board of Public Accountancy has promulgated Rules of Professional Conduct applicable to certified public

accountants. The Rules of Professional Conduct provide the following regarding contingent fee arrangements:

[A] contingent fee is a fee established for the performance of any service pursuant to an arrangement in which no fee will be charged unless a specified finding or result is attained, or in which the amount of the fee is otherwise dependent upon the finding or result of such service. Solely for purposes of this rule, fees are not regarded as being contingent if fixed by courts or other public authorities, or, in tax matters, if determined based on the results of judicial proceedings or the findings of governmental agencies.

Any licensee who accepts a contingent fee or expects to be paid a contingent fee shall provide written disclosure of such acceptance or payment and the basis for determining such fee to the client.

288 Neb. Admin. Code Ch. 5, § 005.03. First, the Code provision provides that the section is applicable to “any service.” Black’s Law Dictionary defines “service” in part as “labor performed in the interest or under the direction of others; specif., the performance of some useful act or series of acts for the benefit of another, usu. for a fee... In this sense, *service* denotes an intangible commodity in the form of human effort, such as labor, skill, or advice” SERVICE, Black’s Law Dictionary (11th ed. 2019). According to Mr. Lavalleur, in late 2013 or early 2014, he was contacted by Sean O’Connor to look at the numbers to see if Guarantee Group was going to earn a profit. (52:21-53:6). In other words, to provide a service. Second, given the grammatical use of a comma and the disjunctive “or” there are two different types of contingency fee agreements:

- When no fee will be charged unless a specified finding or result is attained; or
- When the amount of the fee is otherwise dependent upon the finding or result of such service.

“Finding” is defined as “the results of an investigation.” FINDING, Merriam-Webster Online Dictionary accessed at <https://www.merriam-webster.com/dictionary/finding>. “Result” is defined as “something obtained by calculation or investigation.” RESULT, Merriam-Webster Online Dictionary accessed at <https://www.merriam-webster.com/dictionary/result>.

It is clear from the testimony at trial that no fee was going to be charged unless Lavalleur P.C. was able to find a way to make the Copper Creek Project profitable.

Mr. Lavalleur testified:

- “I proposed to him if I could find a solution, it would be \$800 an hour.” (60:14-15).
- “I said, I’m going to hold to it, and if I am not finding anything, if I am not able to do you any help, we’re not going to do 800, I will shake your hand and go on.” (60:19-22).

On Cross Examination the following exchange occurred:

Q. You intended to get paid more than the other people who were assisting; is that correct?

A. That’s correct.

Q. But you were only going to be paid if you had produced results; is that correct?

A. That’s correct.

Q. So if you did not assist, you were to get zero?

A. Yes.

Q. Your payment was contingent upon you producing something?

A. If I couldn't produce, I was to stop work.

Q. So you would agree with me that there was a contingent fee?

A. It was contingent upon me finding something, yes.

(199:22-200:12).

II. THE AGREEMENT BETWEEN LAVALLEUR P.C. AND GUARANTEE GROUP WAS NOT A BUSINESS TRANSACTION AS IN *BAUERMEISTER*.

In this case Appellant is using the Court's reasoning in *Bauermeister*, to conveniently recast the clearly contingent agreement as a business transaction. The relationship between the attorneys and clients in *Bauermeister* and the relationship between Lavalleur P.C. and Guarantee Group are clearly distinguishable. In *Bauermeister*, "Fred H. Bauermeister and Dorothy L. Bauermeister and their son, Robert A. Bauermeister, filed a suit in equity against attorney Timothy J. McReynolds; Clara E. Deaver and Richard P. Deaver, Fred's sister and her husband; Resource Recycling, Inc., the Bauermeisters' joint venture business entity; and Ronald B. Roots, their joint venture partner." *Bauermeister v. McReynolds*, 253 Neb. 554, 555–56, 571 N.W.2d 79, 82 (1997). Fred and Robert Bauermeister entered into an agreement with Roots to form a joint venture for the purpose of bidding a private landfill contract with Douglas County, which ultimately failed. A couple of years later, Roots asked Attorney McReynolds to assist with a second attempt to obtain a contract with Douglas County. Ultimately, McReynolds and the joint venture entered into a "lean forward" fee agreement by which McReynolds would get a "fee of 30 cents per ton for county waste and 50 cents per ton for Omaha waste" if the joint venture obtained the contract. *Id.* at 558, 571 N.W.2d at 83. Thereafter, Waste Management approached the joint venture to work with it on obtaining the contract. As part of this, the Bauermeisters,

the Deavers, McReynolds, and the joint venture entered into an Assignment and Allocation of Various Provisions Contained in Agreement for Lease of Real Estate which “allocate[d] the \$3,000 monthly rental income in proportion to the contribution of land: \$2,250 for the Bauermeisters and \$750 for the Deavers. Consistent with the August 5, 1988, fee agreement, the assignment allocated to McReynolds 30 cents per ton of the gate fee royalty for non-Omaha waste and 50 cents per ton for Omaha waste.” *Id.* at 560–61, 571 N.W.2d at 85.

One of the distinguishing characteristics for this Court in *Bauermeister*, was that the “recovery was not pursuant to litigation or settlement of a disputed claim.” *Id.* at 569, 571 N.W.2d at 89. The relationship between Lavalleur P.C. and Guarantee Group could not be in the context litigation or the settlement of a disputed claim due rules surrounding the unauthorized practice of law. The Nebraska State Board of Public Accountancy sought to regulate contingency agreements in the accountant-client relationship. To find that a contingency fee agreement must be “pursuant to litigation or settlement of a disputed claim” would render the rule meaningless.

Second, in *Bauermeister*, the Court focused on the work done by McReynolds:

Over the years, McReynolds and Huck had established a close working relationship with members of the Douglas County Board of County Commissioners and other governmental officials. There was no question that these relationships greatly benefited the joint venture. Further, the only way that the joint venture could possibly take advantage of these relationships was to convince McReynolds and Huck to provide their services on a “lean forward” basis, as Roots and the Bauermeisters were

unwilling and unable to pay hourly attorney fees which, in this case, eventually reached in excess of \$250,000.

Bauermeister, at 573, 571 N.W.2d at 91–92. In the case at hand, Guarantee Group had already been awarded Tax Increment Financing for the Copper Creek Project. Whereas, in *Bauermeister* the attorney had to advocate on behalf of his client to obtain the contract. Here, at best, Lavalleur P.C. was to provide an accounting analysis of the profitability of the project.

Finally, in *Bauermeister*, the attorney was a party to the Assignment and Allocation of Various Provisions Contained in Agreement for Lease of Real Estate under which McReynolds received 30 cents per ton of the gate fee royalty for non-Omaha waste and 50 cents per ton for Omaha waste. *Id.* at 560–61, 571 N.W.2d at 85. Here, Lavalleur P.C. was not a party to any contract that would make his fee contingent on the number of homes built, nor was it in perpetuity for the life of the project as in *Bauermeister*. Instead, he would receive \$800 per hour worked in the event he found the way to make the Copper Creek Project profitable.

In this case, Lavalleur P.C. owed a duty to Guarantee Group to put the contingency fee agreement in writing. Lavalleur must not be allowed to use the fact that there was no litigation or settlement agreement involved as a defense. Lavalleur P.C. is charged with knowing and following the rules of professional conduct for accountants.

Conclusion

For the reasons set forth in the initial brief on Cross Appeal as well as above, the arrangement alleged by Appellants is an unwritten contingency fee agreement in violation of the Rules of Professional Conduct applicable to certified public accountants.

THE GUARANTEE GROUP, L.L.C.,
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CERTIFICATE OF COMPLIANCE

This submission complies with the requirements of Neb. Ct. R. § 2-103(C)(3), specifically its typeface and maximum word limits. Relying on the word-count function of Microsoft Word, Version 19 this document contains 2,120 words, including this certificate.

By s/ Tanya J. Hansen
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Certificate of Service

I hereby certify that on Monday, March 13, 2023 I provided a true and correct copy of this *Appellee Reply Brief on Cross-Appeal* to the following:

Bruce Lavalleur represented by Siegfried Herman Brauer III (18532) service method: Electronic Service to **sbrauer@frontiernet.net**

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Signature: /s/ Hansen, Tanya Jo (23306)