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APPELLANT PRO SE:

JOHN C. COLE, JR.
Carlisle, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JOHN C. COLE, JR.,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A02-0910-CV-960
	)	
PATRICK V. BAKER,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patrick L. McCarty, Judge
Cause No. 49D03-0606-PL-25559

July 13, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

John Cole brought an action against attorney Patrick Baker after Baker refused to return money Cole had paid him as a retainer. Baker was awarded summary judgment. We reverse.

FACTS AND PROCEDURAL HISTORY

The facts most favorable to Cole, the non-moving party, are that Cole wrote to Baker requesting representation in a petition to modify Cole's sentence. About two and one-half months later, Baker visited Cole in prison. They agreed that Baker would represent Cole and Cole would pay Baker a $10,000 retainer in advance. Baker would not commence work on the case until the $10,000 was paid in full.[1]

In May or June of 2004 an associate of Cole's gave Baker $5,000 toward the retainer and in March of 2005 another associate gave Baker $2,500. About ten days later, Baker visited Cole in prison a second time. Baker urged Cole to provide the rest of the retainer so he could begin work on Cole's case. At this meeting Cole "began to receive suspicious vibes, and clues that [Baker] was conning and stringing him along." (App. at 165.) On May 12, 2005, Cole called and wrote to tell Baker he no longer wanted Baker's representation. He asked Baker to return $6,500 of the $7,500 already paid and "instructed [Baker] to keep a [sic] $1,000 for his troubles." (*Id*. at 166.)

[1] This was presumably an oral agreement. No written contract is included in the record, and Cole does not allege there was a written agreement. Indiana Professional Rule of Conduct 1.5 requires that a contingent fee agreement must be in writing, but does not require that an attorney who charges an hourly rate--as the parties seem to have contemplated in this case--must execute a written fee agreement with his clients. *Hanson v. Valma M. Hanson Revocable Trust*, 855 N.E.2d 655, 669 (Ind. Ct. App. 2006).

Baker responded he had been to visit Cole twice, he charges his clients $250 per hour, he had spent over 118 hours studying Cole's case, and "technically [Cole] owed [Baker] $20,000." (*Id*.) Baker asserted he was now working on Cole's case *pro bono*, and was working on motions and memoranda to present to the court. (*Id*.) Cole asked for copies of the motions and memoranda, but Baker would not provide them. Cole then sued Baker for return of the $6,500.[2]

DISCUSSION AND DECISION

Baker did not file an appellee's brief. When an appellee does not submit a brief, an appellant may prevail by making a *prima facie* case of error, as we do not undertake the burden of developing arguments for the appellee. *Integon v. Singleton*, 795 N.E.2d 511, 513 (Ind. Ct. App. 2003). The *prima facie* error rule protects this court and relieves it from the burden of controverting arguments advanced for reversal, as that duty properly remains with the appellee. *Id*.

Our standard of review of a summary judgment is the same as that used in the trial court: summary judgment is appropriate only where the designated evidence shows there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Id*. The moving party must designate sufficient evidence to eliminate any genuine factual issues, and once the moving party has done so, the burden shifts to the non-moving

[2] Cole also asserts he made two motions to compel discovery, with which Baker did not comply. He asserts Baker moved for summary judgment before the discovery issues were resolved.

party to come forth with contrary evidence. *Id*. at 513-14. The court must accept as true those facts alleged by the non-moving party, construe the evidence in favor of the non-moving party, and resolve all doubts against the moving party. *Id*. at 514.

Cole has made a *prima facie* case that summary judgment was improper. The designated evidence includes Cole's statements that the parties agreed no work was to commence on Cole's case until Baker had been paid $10,000; one of Baker's visits with Cole was before Cole hired him; Baker would not allow Cole to review the memoranda and motions Baker claimed he had prepared; and Baker told Cole he had not read the trial record Cole sent him or done any legal research on Cole's case.

In his memorandum in support of his summary judgment motion, Baker did not explicitly address Cole's statement that the parties agreed Baker would not commence work on Cole's case until the entire $10,000 retainer was paid. Instead, Baker said the "promise to pay an initial payment in the amount of ten thousand dollars" was to pay for "the initial costs associated with the complex nature of the legal issues presented." (App. at 120.) During the time between his first and second visits, Baker said, he "expended considerable time in pursuing the legal issues of Mr. Cole." (*Id*.)

For a valid oral contract to come into being, the parties must agree to all terms of the contract. *Lakes and Rivers Transfer, a Div. of Jack Gray Transport, Inc. v. Rudolph Robinson Steel Co.*, 691 N.E.2d 1294, 1296 (Ind. Ct. App. 1998). Cole has demonstrated a genuine issue of fact as to whether the parties formed an oral contract and, if so, whether that

contract provided Baker was not to perform the services on which he apparently later relied as the justification for withholding Cole's partial payment of the retainer.

In his memorandum in support of his summary judgment motion, Baker argued Cole was estopped by his conduct from arguing "payment in full of the contract was a condition precedent to his being charged for legal services." (App. at 120.) We cannot affirm the summary judgment on that ground as Baker has not established undisputed facts that would entitle him to assert estoppel as a matter of law. A party seeking to establish estoppel must show:

> 1) a representation or concealment of a material fact; 2) made by a person with knowledge of the fact and with the intention that the other party act upon it; 3) to a party ignorant of the matter; and 4) which induces the other party to act upon it to his or her detriment.

Lakes and Rivers, 691 N.E.2d at 1296. As Cole asserts the parties agreed no legal work would be completed until the $10,000 advance payment was made, we cannot find the evidence undisputed regarding whether Baker was "ignorant" of the terms of his oral contract with Cole or the work he was doing pursuant to it. We therefore cannot hold as a matter of law that Cole is estopped to argue he is entitled to the return of some of the money he paid Baker.

As there are genuine issues of material fact about the existence and terms of the agreement Cole alleges he entered with Baker, summary judgment was inappropriate and we must accordingly reverse.

Reversed.

BAILEY, J., and BARNES, J., concur.