# STATE OF MICHIGAN

# COURT OF APPEALS

DIETRICH & ASSOCIATES, P.L.C., DIETRICH & CASSAVAUGH, P.C., and EDGAR J. DIETRICH,

Plaintiffs-Appellants,

v

GEOFFREY FIEGER and FIEGER, FIEGER & SCHWARTZ, P.C.,

Defendants-Appellees.

UNPUBLISHED
December 28, 2001

No. 224870
Wayne Circuit Court
LC No. 98-837522-CK

Before: Cavanagh, P.J., and Doctoroff and Jansen, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting summary disposition under MCR 2.116(C)(7) and (10) in favor of defendants. We affirm.

This case involves a dispute regarding an alleged referral fee between plaintiff Edgar J. Dietrich and his law firm and Geoffrey Fieger and his law firm. Fieger represented Carol Rogers, the widow of John Rogers, who has been an attorney with plaintiff Dietrich & Cassavaugh, P.C. (the predecessor to Dietrich & Associates, P.L.C.) in a wrongful death suit arising out of John Rogers' death in an automobile accident (involving a high-speed police chase) as he was traveling to the Wayne County Circuit Court. Plaintiffs contend that they are owed a substantial referral fee following the jury's verdict, which exceeded six million dollars.[1]

Following defendants' motion for summary disposition, the trial court granted summary disposition in favor of defendants, ruling that plaintiffs failed to prove the existence of a valid referral fee. More specifically, the trial court ruled that there was no showing, pursuant to the requirements of MRPC 1.5(e), that Carol Rogers was advised of and did not object to the division of the attorney fee between plaintiffs and defendants. On appeal, plaintiffs argue that the trial court erred in granting summary disposition for defendants because the motion was not properly before the trial court, the trial court applied the wrong standard of review, and there was no evidence supporting the position taken by defendant as a matter of fact and law. Plaintiffs

[1] Our Supreme Court ultimately upheld the jury's verdict in *Rogers v Detroit*, 457 Mich 125; 579 NW2d 840 (1998).

also argue that the trial court failed to properly rule on their claim that a settlement agreement was breached and failed to rule on their quantum meruit claim.

The trial court granted summary disposition under MCR 2.116(C)(7) (invalid contract) and (10) (no genuine issue as to any material fact and defendants entitled to judgment as a matter of law). A trial court's ruling on a motion for summary disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Under both MCR 2.116(C)(7) and (10), the pleadings, affidavits, admissions, depositions, and other documentary evidence filed in the action or submitted by the parties must be considered by the court. MCR 2.116(G)(5). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint and the evidence must be evaluated in a light most favorable to the nonmoving party. *Maiden*, *supra*, p 120. Where the proffered evidence fails to establish a genuine issue of any material fact, the moving party is entitled to judgment as a matter of law. *Id.*

Plaintiffs first contend that the trial court erred in granting summary disposition because a default had been entered against defendants on February 18, 1999, and defendants filed their motion for summary disposition (on May 12, 1999) before the default was set aside (in an order entered on May 18, 1999). Plaintiffs, therefore, argue that the motion for summary disposition was not properly before the trial court. This issue is actually waived for appellate review because plaintiffs never raised this issue before the trial court. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). Moreover, we do not believe that this issue compels reversal because defendants moved to set aside the default on April 22, 1999, the hearing was held on May 5, 1999, at which time the trial court orally ruled that it was setting aside the default, and the order memorializing this ruling was entered on May 18, 1999, six days after defendants filed their motion for summary disposition. Additionally, the hearing on defendants' motion for summary disposition was held on December 14, 1999, and plaintiffs never argued that this motion was not properly before the trial court.

Plaintiffs also argue that the trial court applied the wrong standard of review in ruling on the motion and that defendants failed to come forward with admissible evidence to support the motion. Plaintiffs' argument is meritless. The trial court did not apply the wrong standard of review. Moreover, the evidentiary burden to prove the existence of a valid contract is on plaintiffs, not on defendants. MCR 2.116(G)(4) "plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial." *Maiden*, *supra*, p 121. As stated in *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996):

> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. . . . The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. . . . Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in the pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. . . . If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.

The trial court's ruling was premised on MRPC 1.5(e), which states:

> A division of a fee between lawyers who are not in the same firm may be made only if:
>
> (1) the client is advised of and does not object to the participation of all lawyers involved; and
>
> (2) the total fee is reasonable.

The comment to MRPC 1.5 states that "[p]aragraph (e) permits the lawyers to divide a fee on agreement between the participating lawyers if the client is advised and does not object." The trial court specifically ruled that there was no evidence that Carol Rogers, the client, was advised of and did not object to the division of fees.

Upon review of the record, we agree with the trial court that plaintiffs presented no evidence that Carol Rogers was advised of, and consequently did not object to, any division of the attorney fee. Although there is some indication that there was an agreement or understanding between the lawyers regarding a division of the fee, there is simply no evidence that Carol Rogers was advised of this division as required by MRPC 1.5(e). In fact, Carol Rogers, in a letter dated November 30, 1998, specifically stated that Dietrich did not advise her of any attempt to obtain a division of the fee. Therefore, plaintiffs have failed to meet their evidentiary burden of proving a genuine issue of a material fact regarding the division of the attorney fee.

Plaintiffs also argue that the trial court erred by failing to enforce a settlement agreement. However, no settlement agreement was actually entered into in this case. Although there were settlement discussions or negotiations, the parties never entered into any settlement agreement. Under MCR 2.507(H), to be binding, an agreement between the parties must be made in open court or in writing. Because no settlement agreement was made in open court or in writing, there was no settlement agreement for the trial court to enforce.

Lastly, plaintiffs contend that the trial court erred in failing to rule on their quantum meruit claim. The trial court's specific ruling was that "the lack of [a] contract for the referral fee is outcome determinative" and did not believe that it was necessary to rule more specifically on the quantum meruit claim. The trial court further stated, "Mr. Dietrich did nothing with respect to [Mr. Fieger's] prosecution of the wrongful death case."

Plaintiffs argue that should this Court find that there was no referral fee contract, then the quantum meruit claim should be addressed, acknowledging that a quantum meruit claim normally arises where there is no referral fee agreement. An attorney may be entitled to compensation for the reasonable value of services rendered on the basis of quantum meruit, provided that the attorney's discharge was wrongful or the withdrawal was with cause. *Morris v Detroit*, 189 Mich App 271, 278; 472 NW2d 43 (1991). Although plaintiffs maintain that they acted as co-counsel in the underlying *Rogers* case and "did considerable and valuable work for Mrs. Rogers," plaintiffs do not state exactly what work they performed on the *Rogers* case.

We affirm the trial court for the reason it stated: plaintiffs performed no work on the *Rogers* case. After judgment had been entered in the *Rogers* case, plaintiffs moved to intervene as co-counsel and the trial court denied the motion. Plaintiffs' subsequent motion for recognition of lien on the judgment proceeds on the underlying *Rogers* case was also denied by the trial

court. There is no evidence that plaintiffs ever represented Carol Rogers in the underlying wrongful death case and there is no evidence that plaintiffs performed any work on that case. Consequently, plaintiffs have not shown that they are entitled to a fee under a theory of quantum meruit.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Martin M. Doctoroff
/s/ Kathleen Jansen