DA 18-0334

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 66N

HOLLY LABAIR and ROBERT LABAIR,
individually and on behalf of DAWSON R. LABAIR,
deceased minor child,

Plaintiffs,

v.

STEVE CAREY, Esq., and CAREY LAW FIRM,
AND JANE DOES 1-4,

Defendants.

TINA MORIN,

Appellant,

v.

HOLLY LABAIR, ROBERT LABAIR, and PAUL WARREN,

Appellees.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause No. DV 10-254
Honorable Ed McLean, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Tina L. Morin, Self-Represented, Butte, Montana

For Appellees Labairs:

Cory R. Gangle, Gangle Law Firm, PC, Missoula, Montana

For Appellee Warren:

Jon Moyers, Moyers Law, PC, Billings, Montana

Submitted on Briefs: January 3, 2019

Decided: March 19, 2019

Filed:

Clerk

Justice Laurie McKinnon delivered the Opinionof the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Attorney Tina Morin (Morin) appeals from orders of the Fourth Judicial District Court, Missoula County, reopening the previously-dismissed case to permit attorney Paul Warren (Warren) to intervene and awarding Warren a percentage of Morin's contingency fee. We affirm.

¶3 This case is before the Court for the fourth time, and we accordingly recite the factual and procedural background only as necessary to address this appeal. *See Labair v. Carey*, 2012 MT 312, 367 Mont. 453, 291 P.3d 1160 (*Labair I*); *Labair v. Carey*, 2016 MT 272, 385 Mont. 233, 383 P.3d 226 (*Labair II*); *Labair v. Carey*, 2017 MT 286, 389 Mont. 366, 405 P.3d 1284 (*Labair III*). In 2004, Holly and Robert Labair (the Labairs) retained attorney Steve Carey (Carey) to represent them in a medical malpractice claim against their obstetrician regarding the death of their newborn son. *Labair I*, ¶ 4. The couple worked with Carey for years, but the District Court eventually dismissed the case with prejudice in May 2008. *Labair I*, ¶ 8.

¶4 In October 2008, Morin began representing the Labairs in a legal malpractice claim against Carey. At that time, they signed a retainer agreement entitled

"Attorney-Client Fee Contract" (2008 Contract). The 2008 Contract provided that the Labairs would pay Morin "a percentage of all settlement proceeds, judgment damages, and other valuable consideration recovered." The percentage varied depending on which stage of litigation the case terminated: 33.33% if resolved by negotiated settlement before filing the complaint; 40% if resolved by negotiated settlement after filing the complaint; 50% if resolved by summary judgment, negotiated settlement during trial, or judgment obtained after trial; and an additional 1% for each appeal and each new trial. The 2008 Contract also provided, "In addition to paying legal fees . . . [the Labairs] shall reimburse [Morin] for all costs and expenses incurred . . . ."

¶5 In 2010, Morin filed a complaint on behalf of the Labairs, alleging Carey committed legal malpractice. *Labair I*, ¶ 9. The District Court granted summary judgment in Carey's favor and dismissed the Labairs' complaint. *Labair I*, ¶¶ 13-14. The Labairs appealed; we reversed and remanded the case for trial. *Labair I*, ¶¶ 40, 47.

¶6 Morin subsequently retained Warren to assist her in representing the Labairs at trial. In March 2013, the two attorneys exchanged emails detailing their agreement (2013 Email Agreement). Morin sent Warren an email entitled "Attorneys' Agreement re Fees and Costs in Labair," which read, in pertinent part:

> First, this e-mail will establish that the Labairs have indicated to me that they will consent to you representing them as co-counsel with me. . . . Second, this e-mail will establish our agreement regarding how we will split the attorney fees and costs in this matter. I propose the following two scenarios: 1. My agreement with the Labairs is that I receive 40% in attorney fees of the total recovery and then all my costs. The percentage may be more at this stage of the litigation. I will check my agreement with the Labairs. If my firm continues to front the costs from here forward, in

> the event of a recovery, we would split the attorney fees 80% to 20% with my firm getting 80%. The percentages recognize my six years of getting this case where it is and the greater risk I am taking going forward, by fronting all of the costs. I would retain the final say on expenditures. If the case settles in the next 90 days . . . your percentage goes down to 15%. 2. If we split the fronting of costs going forward, the split would be 75% to 25% with my firm getting 75%. Finally, if the case settles in the next 90 days . . . your percentage goes down to 20% under this scenario.

Warren responded a few days later, stating, in pertinent part:

> I am willing to share some of the costs going forward. . . . I also recognize your concern that this might settle within the next 90 days. If this case settles within that time my share of your 40% fee agreement or if it is higher (50%) would be 15%. If this case does not settle within 90 days I propose our fee split be on a 1/3 (me) 2/3 basis (your [law firm]).

Morin replied, agreeing to Warren's counterproposal, "This sounds fine to me." Warren did not enter into a written agreement directly with the Labairs regarding his representation, but he did speak with the couple. Mr. Labair later testified that Warren represented that, if they did not win at trial, the couple would not receive a bill for Warren's costs.

¶7 The case proceeded to a six-day trial, the jury returned a verdict in Carey's favor, and the Labairs subsequently appealed. *Labair II*, ¶¶ 6, 12-13. Morin took the lead representing the Labairs on appeal—Warren was essentially uninvolved. On appeal, we found the District Court abused its discretion in instructing the jury; vacated the judgment; and remanded the case for a new, limited-scope trial. *Labair II*, ¶¶ 23, 28.[1]

[1] While not necessarily relevant to this appeal, we note that on remand, the Labairs moved to substitute District Court Judge McLean, who denied the motion as untimely. *Labair III*, ¶ 10. The Labairs appealed that decision in 2017. We affirmed the District Court's denial of the Labairs' substitution motion and remanded the case for further proceedings. *Labair III*, ¶ 25.

¶8 Following remand, the Labairs terminated Warren's representation at Morin's suggestion. The Labairs and Carey eventually reached a settlement in January 2018. Leading up to and at settlement, Morin represented that her costs totaled $35,790.36 and Warren represented that his costs totaled $53,785.54. The Labairs took those numbers into account in their negotiations with Carey. The District Court subsequently dismissed the case upon the parties' stipulation.

¶9 Post-settlement, Morin notified the Labairs that her costs totaled $81,038.76—an amount significantly higher than the $35,790.36 she represented before and during settlement negotiations. The Labairs eventually terminated Morin's representation and obtained new counsel. Morin also refused to share her contingency earnings with Warren, contending that Warren was not entitled to any of the settlement proceeds because the trial ended with a defense verdict. Warren, unable to obtain the costs or legal fees he believed he was owed, moved the District Court to reopen the case and allow him to intervene to resolve the dispute regarding attorney fees and costs. The District Court granted Warren's motion; allowed Warren to intervene as a party for that specific purpose; and confirmed its dismissal of Carey from the proceeding, noting that he was no longer a party based on the settlement.

¶10 After an evidentiary hearing, the District Court issued an order apportioning attorney fees and costs. The court concluded Morin was entitled to a cost reimbursement of $35,790.36; Warren was entitled to a cost reimbursement of $53,785.54; Warren was entitled to contingency earnings from the settlement proceeds; and Morin's and Warren's

costs needed to be paid from the Labairs' gross settlement recovery before calculating the attorneys' contingency fees. Morin appeals, raising four issues.

¶11 First, she argues the District Court abused its discretion by reopening the previously-dismissed case and permitting Warren to intervene. We review a district court's ruling on a motion to intervene for an abuse of discretion. *Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, ¶ 29, 356 Mont. 41, 230 P.3d 808. A court may discretionarily allow a party to intervene but, in exercising its discretion, "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." M. R. Civ. P. 24(b)(3); *see also In re C.C.L.B.*, 2001 MT 66, ¶ 24, 305 Mont. 22, 22 P.3d 646 (listing the four factors courts should consider in determining if a motion to intervene is timely). Review of the record demonstrates that the District Court appropriately considered the relevant authority and thoroughly analyzed the facts of this case in making its decision. The District Court did not act arbitrarily, fail to employ conscientious judgment, or exceed the bounds of reason resulting in substantial injustice when it reopened the case and permitted Warren to intervene. *See Aspen Trails Ranch, LLC*, ¶ 29. We accordingly affirm its decision.

¶12 Second, Morin argues the District Court erred when it deducted the attorneys' costs from the gross settlement recovery before calculating the contingency fee. M. R. Pro. Cond. 1.5(c) provides that a contingency fee agreement must clearly state whether litigation expenses will be deducted before or after the fee is calculated. The District Court specifically noted that the 2008 Contract was "no model of clarity" and

concluded the contract did not clearly state whether costs were to be deducted before or after calculation of the contingency fee. The court therefore found that the best interpretation of the 2008 Contract was that the attorneys' costs should be deducted before calculation of the contingency fee. We agree. Morin had an obligation to clearly explain the fee arrangement in the 2008 Contract and, absent a plain statement otherwise, we refuse to reverse the District Court's conclusion that the costs need to be subtracted before calculating the contingency fee.

¶13 Third, Morin argues the District Court erred by reducing her costs from $81,038.76 to $35,790.36. An attorney may only collect a reasonable amount for her expenses, and she owes her clients a fiduciary duty that includes accounting for her expenses. *See* M. R. Pro. Cond. 1.5. There are two main issues with calculating Morin's costs to be $81,038.76. First, she represented to the Labairs at the January 2018 settlement conference that her costs were only $35,790.36, and the Labairs justifiably relied on that amount in negotiating their settlement with Carey. Second, Morin poorly accounted for her costs. She submitted five separate invoices to the District Court explaining her costs, and multiple entries were suspicious. For example, Morin charged the Labairs for a parking ticket she received. She hired outside counsel to aid with legal work and then charged counsel's legal fees as her costs on the Labairs' invoices. Given the fact that Morin was already charging a contingency fee for legal work, it is inappropriate to additionally charge the Labairs for the cost of outside counsel's legal fees—Morin essentially forced the Labairs to pay twice for the same legal service. Given

this problematic accounting and because Morin represented that she had costs in the amount of $35,790.36 at the 2018 January settlement conference, we conclude the District Court did not abuse its discretion by calculating her costs in that amount.

¶14 Fourth, Morin argues the District Court erred by finding that Warren was entitled to a share of the contingency fee. She reasons that she alone is responsible for obtaining the settlement proceeds because she pursued the appeal in *Labair II* that resulted in a remand and resulting settlement. The Labairs do not take a position regarding whether Morin and Warren should split the contingency fee, but argue they should not be responsible for Warren's costs for the same reasons Morin contests splitting the contingency fee: Warren failed to receive a favorable outcome at trial. We review a district court's determination of attorney fees for an abuse of discretion. *Pumphrey v. Empire Lath & Plaster*, 2006 MT 255, ¶ 9, 334 Mont. 102, 144 P.3d 813. When a client discharges an attorney, whether with or without cause, that attorney is entitled to fees from the former client under a *quantum meruit* theory of recovery for the reasonable value of his services rendered. *Pumphrey*, ¶ 14. The District Court acknowledged that, while the trial resulted in a defense verdict, the subsequent settlement would not have occurred absent Warren's trial contributions. The District Court also recognized that, while the 2013 Email Agreement was "far from a model fee-splitting agreement under [M. R. Pro. Cond. 1.5(e)]," it did not limit Warren's compensation to only recovery after a successful trial. We conclude the District Court did not abuse its discretion, act arbitrarily without employment of conscientious judgment, or exceed the bounds of

reason resulting in substantial injustice when it determined that Morin needed to share the contingency fee with Warren pursuant to their 2013 Email Agreement or when it determined the Labairs were responsible for Warren's costs. Further, review of the record does not establish that Warren's share is disproportionate to his involvement. We accordingly affirm the District Court's decision.

¶15 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent.

¶16 Affirmed.

Justice

We concur:

Chief Justice

Justices