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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-002074-MR

JAMES W. CHAMBERS,
successor counsel for plaintiff
TRAVIS UNDERWOOD — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KEN HOWARD, JUDGE
ACTION NO. 13-CI-00166

HUGHES AND COLEMAN, PLLC,
who were the original attorneys for
plaintiff TRAVIS UNDERWOOD — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: KRAMER, D. LAMBERT, AND STUMBO, JUDGES.

KRAMER, JUDGE: James Chambers appeals a judgment of the Hardin Circuit Court resolving an attorney's fee dispute between himself and Hughes and Coleman, PLLC ("H&C"). The total amount in controversy is $66,666.66, representing one third of a $200,000.00 settlement Travis Underwood received

from Global Polymers, LLC ("Global"), following tort litigation in which H&C initially represented Underwood and Chambers succeeded H&C as Underwood's legal counsel. The circuit court determined that Underwood had not terminated H&C for cause; that H&C was entitled to $49,995.00 of the $66,666.66 representing the *quantum meruit* value of its services to Underwood; and, that Chambers was entitled to the remainder. On appeal, Chambers argues H&C was terminated for cause and was therefore entitled to no fee due to its conduct regarding Underwood's no-fault benefits. We agree and therefore reverse.

FACTUAL AND PROCEDURAL HISTORY

On or about October 1, 2012, Travis Underwood was injured in Hardin County, Kentucky, when his vehicle was struck by a commercial truck driven by a Global employee. At the time, Underwood maintained a policy of automobile insurance with Progressive that included $10,000 in basic reparations benefits ("BRB") and $10,000 in added reparations benefits ("ARB").[1] On October 9, 2012, Underwood received his first disbursement of reparation benefits from Progressive in an amount of $200[2] representing payment for work loss. On October 18, 2012, Underwood's reparation benefits were also used to pay a

[1] BRB and ARB are "benefits providing reimbursement for net loss suffered through injury arising out of the operation, maintenance, or use of a motor vehicle[.]" Kentucky Revised Statutes (KRS) 304.39–020(2). While BRB coverage is mandatory, ARB coverage is optional and subject to contractual limitations. *Stevenson ex rel. Stevenson v. Anthem Cas. Ins. Group*, 15 S.W.3d 720, 722-724 (Ky.1999).

[2] This payment was based upon the amount required by KRS 304.39-130.

$975.30 bill from Hardin County EMS and a $14.76 bill from Hardin Professional Services.

On October 23, 2012, Underwood contracted with H&C on a contingency fee basis for legal representation regarding his accident with Global. His contract with H&C provided in relevant part:

> **LEGAL REPRESENTATION.** The Client hereby hires Hughes & Coleman (H&C) to pursue available sources of recovery, as lawyers deem necessary to recover compensation from any persons or entities legally responsible to pay for Client's injuries or damages. If a settlement or recovery is made **before a lawsuit is filed, H&C's attorney fee will be 33 1/3% of any and all amounts recovered** on behalf of the client, before deduction of expenses. H&C will not file a lawsuit without the Client's permission. If a recovery is obtained after a lawsuit is filed (this means the time a Complaint is filed in the Courthouse, not the completion of a Trial) then **H&C's attorney fee will be 40% of any and all amounts recovered on behalf of the client, before deduction of expenses. If Client does not receive a settlement then they will not owe any attorney fee or expenses.**
>
> . . . .
>
> **MEDICAL BILLS.** H&C will assist the Client in submitting medical bills for payment to any responsible insurance carrier or agency. At the conclusion of the case if there are any unpaid medical expenses not covered by insurance then those medical bills are the responsibility of the client and will be paid by the client out of their share of the recovery. Client may also be required by law or by contract to reimburse an insurance carrier, Medicare, Medicaid or government agency for payment of medical or wage expenses. If reimbursement is required it will be paid out of the Client's share of their recovery.

On October 25, 2012, the attorney H&C assigned to Underwood's case, Judy Brown, wrote to Progressive directing it to "reserve all benefits pursuant to KRS 304.39-241 and pay bills or lost wages only as directed by Hughes and Coleman." Consequently, Progressive made no further payments to Underwood[3] and paid no further bills on his behalf[4] from the remaining $18,809.94 in reparation benefits. Attorney Brown's letter to Progressive also indicated that it had been "cc'd" (a copy of it had been sent) to Underwood. But, nothing of record indicates Underwood directed or authorized H&C to reserve or otherwise manage his reparation benefits.[5]

On October 31, 2012, H&C received a medical bill from University of Louisville Hospital (the "U of L bill") reflecting that Underwood owed $71,812.40 for services relating to his post-accident emergency care. The U of L bill also indicated that it had been presented for payment to Underwood's health insurance provider, Anthem, and to Progressive. Two days later, according to a "timeline of events" document ("timeline") H&C submitted as an exhibit in this matter,

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[3] A summary of the no-fault payments Progressive made, introduced as evidence in this matter, states that Underwood was due to be paid, but was not paid, BRBs in an amount of $8,809.94 on November 20, 2012.

[4] After October 25, 2012, and until at least March 25, 2013, Progressive continued to receive bills from entities that had provided Underwood accident-related medical services.

[5] H&C does not argue that Underwood ratified what appears to have been its unilateral enlargement of authority in this regard. Moreover, as explained further below, nothing demonstrates that Underwood received some form of benefit as a result. *See Energy Home, Div. of Southern Energy Homes, Inc. v. Peay*, 406 S.W.3d 828, 837 (Ky. 2013) ("[I]t is an established principle of law that where one with knowledge of material facts accepts or retains the benefits of the efforts or acts of another acting for him, he is deemed to have ratified the methods employed for he may not, though innocent himself, receive the benefits and at the same time disclaim responsibility for the measures by which they were acquired." (Citations omitted)).

attorney Brown "reviewed [the] U of L medical bill and directed that it be used as the basis for a request to the PIP[6] carrier that Mr. Underwood's PIP be released to [Underwood], care of the firm, to address bills, lost wages and other statutorily appropriate uses." To that end, attorney Brown's assistant drafted and faxed a letter to Progressive on November 6, 2012, providing in relevant part:

> Please release PIP, made payable to Client (Travis Lynn Underwood) and Hughes and Coleman per attorney Judy S Brown so we may negotiate bills.

At the bottom of the November 6, 2012 letter were the words, "Enclosure: Copy of U of L Hospital bill." Thus, while the timeline H&C generated reflects that H&C intended to use Underwood's remaining reparation benefits to "address bills, lost wages and other statutorily appropriate uses," the only reason or evidence H&C offered to Progressive for paying out the entire remaining balance of Underwood's reparation benefits was the U of L bill.

Before moving on, a number of points warrant further discussion. As noted earlier, H&C's contract with Underwood authorized it to "assist [him] in submitting medical bills for payment to any responsible insurance carrier or agency." Nothing of record demonstrates Underwood also authorized H&C to "negotiate" his bills with medical service providers; to withdraw the entirety of his reparation benefits, much less for any reason relating to the U of L bill; or to direct Progressive to issue a check for his reparation benefits payable to both himself *and*

[6] PIP, or "personal injury protection," is also referred to as basic reparations benefits (BRB) and courts have used the terms interchangeably. *Samons v. Kentucky Farm Bureau Mut. Ins. Co.*, 399 S.W.3d 425, 428 (Ky. 2013).

H&C. Nothing of record demonstrates Underwood was even aware of H&C's previously described November 6, 2012 letter.[7]

Also, unless Underwood had already paid some (or all) of the U of L bill, the U of L bill could not have provided a valid statutory basis for requiring Progressive to directly pay reparation benefits to Underwood or anyone acting on his behalf.[8] And, at the time of H&C's November 6, 2012 letter, neither Underwood, nor Anthem, had paid any portion of the U of L bill.[9] Thus, H&C's November 6, 2012 letter reflects, contrary to the "legal representation" section of

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[7] The November 6, 2012 letter does not state that it was "cc'd" to Underwood.

[8] The applicable statute is KRS 304.39-241. In full, it provides:

> An insured may direct the payment of benefits among the different elements of loss, if the direction is provided in writing to the reparation obligor. A reparation obligor shall honor the written direction of benefits provided by an insured on a prospective basis. The insured may also explicitly direct the payment of benefits for related medical expenses already paid arising from a covered loss to reimburse:
>
> (1) A health benefit plan as defined by KRS 304.17A-005(22);
>
> (2) A limited health service benefit plan as defined by KRS 304.17C-010;
>
> (3) Medicaid;
>
> (4) Medicare; or
>
> (5) A Medicare supplement provider.

[9] Anthem eventually asserted a subrogation lien against Underwood's ultimate monetary settlement relating to his accident. If Anthem had paid any portion of the U of L bill and had reimbursement rights as of November 6, 2012, nothing in KRS 304.39-241 would have entitled Underwood to receive reparations benefits by virtue of the U of L bill, but KRS 304.39-241(1) would have allowed him or his authorized representative to direct Progressive to make payments directly to Anthem. However, as reflected in H&C's "timeline of events," H&C was not advised of Anthem's eventual payment of the U of L bill (which left a remaining outstanding balance of $3,492.88) until February 18, 2013.

the contingency fee contract, H&C was attempting to recover compensation from an entity that was not, on the basis cited by H&C, legally responsible for providing compensation.[10]

Lastly, it is unclear why H&C believed it was imperative to request the entire remaining balance of Underwood's reparation benefits at this time. Unpaid claims for ARBs and BRBs may be asserted two or more years after the date of loss,[11] and November 6, 2012, was little over one month after Underwood's accident. Moreover, while U of L Hospital may have presented its bill to Progressive for payment, it had no direct right to satisfy any part of its bill from Underwood's remaining balance of reparation benefits or otherwise deprive

[10] H&C points out that in *Medlin v. Progressive Direct Ins. Co.*, 419 S.W.3d 60, 64 (Ky. App. 2013), a panel of this Court indicated that a reparation benefits provider may, by agreement, provide its insured with reparation benefits through a method not provided by the Motor Vehicle Reparations Act (MVRA). However, H&C does not argue that any such agreement actually existed in the context of this case, and no such agreement is otherwise of record. H&C's November 6, 2012 letter, the U of L bill, and the November 27, 2012 check Progressive issued to H&C (discussed further below) are the only indications of why Progressive disbursed the remaining balance of Underwood's reparation benefits to H&C.

H&C also argues that in disbursing Underwood's benefits via a check payable to both H&C and Underwood, Progressive also intended to delegate, to H&C, discretion to determine whether Underwood had a valid basis for receiving reparation benefits. Again, no such agreement is of record. Moreover, it is difficult to imagine how such a "delegation" would not constitute a conflict of interest; if H&C acted on behalf of Progressive, H&C would be acting on behalf of a party with interests adverse to Underwood.

[11] KRS 304.39–230(1), the Motor Vehicle Reparations Act's statute of limitations relating to unpaid claims for BRBs and ARBs provides:

> If no basic or added reparation benefits have been paid for loss arising otherwise than from death, an action therefor may be commenced not later than two (2) years after the injured person suffers the loss and either knows, or in the exercise of reasonable diligence should know, that the loss was caused by the accident, or not later than four (4) years after the accident, whichever is earlier. If basic or added reparation benefits have been paid for loss arising otherwise than from death, an action for further benefits, other than survivor's benefits, by either the same or another claimant, may be commenced not later than two (2) years after the last payment of benefits.

Underwood of those funds. *See Neurodiagnostics, Inc. v. Kentucky Farm Bureau Mut. Ins. Co.*, 250 S.W.3d 321, 325 (Ky. 2008) (explaining "the MVRA no longer affords a direct right of action by assignment to medical providers against reparation obligors. Instead, the control rests with the insured to direct payment of his or her benefits among the different elements of loss.").

Nevertheless, Progressive did mail a check for the remaining $18,809.94 to H&C on November 27, 2012. The check was made payable to the order of H&C and Underwood. The check also indicated, as of that date, that Underwood's reparation benefits had been exhausted. To that effect, the face of the check recited "In Payment Of PIP, EXHAUST, TRAVIS UNDERWOOD."

A few days later, H&C then required Underwood to execute a power of attorney. It provided:

> I, Travis Underwood, do hereby authorize my attorney of Hughes and Coleman, Attorneys at Law, to endorse my name to a settlement draft for the purpose of depositing said funds in Hughes & Coleman escrow account pending final distribution. This Power of Attorney is limited to the endorsement of the referenced settlement check and extends no authority beyond the express terms and conditions hereof.[[12]]

Through affidavits, Underwood and his mother (Tonia Underwood, who signed the power of attorney as a witness) averred that he executed the power of attorney and authorized the funds to be deposited into his client escrow account because attorney Brown's assistant, Ann Willis, had represented it was required so

[12] Throughout its appellate brief, H&C insinuates that this power of attorney, in and of itself, provided it with discretionary authority over the disposition of Underwood's reparation benefits. Under a plain reading, however, this document provides no such authority.

H&C "could release" monies to Underwood representing lost wage reparation benefits. This is not contested by H&C. This reason also differs from the reason H&C offered to persuade Progressive to release the entirety of Underwood's reparation benefits into its care (*i.e.*, for payment of the U of L bill).

Irrespective of the manner in which H&C represented the reparation benefit funds would be spent, however, H&C subjected the funds to its discretion after they were deposited into Underwood's client escrow account. According to its timeline, for example, H&C disbursed some of the funds to Underwood on December 6, 2012, in what it deemed a "PIP-based lost wage reimbursement." Before doing so, H&C required Underwood to prove—to H&C—the full amount of work that he had missed due to the October 1, 2012 accident. Based upon Underwood's proof, H&C unilaterally determined Underwood was entitled to $973. As an aside, this was the first and last occasion H&C would make any payment to Underwood from his reparation benefits during its tenure as his counsel.

H&C's timeline also includes the following entry dated January 22, 2013:

> Ms. Brown asked that Ms. Willis check with Mr. Underwood for any further out-of-pocket, mileage, caregiver services, replacement services, etc., that might be reimbursable through PIP so that the maximum amount of PIP that was statutorily defensible could be made available to Mr. Underwood from his PIP benefits.

Stated differently, H&C acknowledged it had already received Underwood's reparation benefits on Underwood's behalf; it could make Underwood's reparation benefits "available" to him; but, that it would not make Underwood's reparation benefits available to him unless he proved he was legally entitled to receive them (*e.g.*, that any amount of PIP Underwood would receive would be "statutorily defensible"). This entry could be taken one of two ways: (1) as an acknowledgement that, as of January 22, 2013, no "statutorily defensible" reason justified Underwood's receipt from Progressive, by and through counsel, of the reparation benefits that remained in his escrow account; or (2) if Underwood had been legally entitled to receive those benefits from Progressive at the time his counsel received them on his behalf, he was now required to prove his entitlement to those benefits a second time, on a basis other than the U of L bill, to his own counsel.

H&C's timeline also provides that on February 18, 2013, Christina Martin, the H&C legal assistant responsible for overseeing Underwood's escrow account,

> discussed with Mr. [Brent] Travelsted [another attorney H&C had assigned to Underwood's case] what usage of Mr. Underwood's PIP benefits would be most advantageous to Mr. Underwood. Mr. Travelsted directed Ms. Martin to have Mr. Underwood's medical providers bill health insurance first and then use Mr. Underwood's PIP benefits to address any remaining balances.

As before, nothing about this entry or otherwise of record reflects Underwood authorized or was consulted regarding how H&C, through Travelsted, had directed payment of his reparation benefits. But, this entry illustrates H&C believed it was not obligated to spend the entirety of the reparation benefits toward the purpose it had represented to Progressive, and that it could instead retain the funds as a form of "preimbursement"[13] for medical bills it intended to pay at a later date. Indeed, H&C would eventually pay only $3,492.88 of the reparation benefit funds toward the U of L bill (*i.e.*, the balance of the bill that remained after Anthem paid most of it).

However, in spite of what it apparently believed it was allowed to do with Underwood's remaining $14,344.06 in unspent reparation benefits, H&C took measures to ensure Progressive and several of Underwood's creditors understood the entirety of Underwood's reparation benefits had been exhausted. For example, H&C faxed Progressive two separate requests (respectively on February 18 and 27 of 2013) for a "final exhaustion statement in writing." On March 8, 2013, after receiving an exhaustion statement from Progressive (consistent with what Progressive had already noted on the aforementioned November 27, 2012 check), H&C then mailed letters to several entities that had billed Underwood for medical services, stating in relevant part:

To Whom It May Concern:

[13] *See Medlin v. Progressive Direct Ins. Co.*, 419 S.W.3d 60, 62 (Ky. App. 2013) (explaining "preimbursement"—that is, an insured's obtaining reimbursement in reparations benefits for bills it has not yet paid—"is not contemplated by the MVRA.")

> Please be advised Travis Underwood's PIP benefits through Progressive Insurance Company have exhausted (see attached exhaustion letter). Therefore, please submit your charges to his health insurance carrier, Anthem BlueCross BlueShield, for payment. I have attached a copy of the health insurance card for your convenience.

With that said, on or about March 14, 2013, Underwood terminated H&C's employment as his legal counsel. On that date, Tonia Underwood explained why in an email to Christina Martin:

> Hi Christina! Travis spoke with Brent [Travelsted] earlier. I called both of you and got a voicemail after that. I would like his case file and escrow check along with details of the escrow along with the current bill with details sent to your Elizabethtown Office immediately so we can pick them up. One of the reasons that we are letting you go is, the escrow money could have been given to Travis when he needed the money but we were not told that, we were told that you all had to take it and put it into Escrow. We have found out that this was not required like we were made to think it was. His wages were supposed to be paid at $400 a week for lost wages due to have [sic] a double pip insurance and he was only paid $200.00. I will be filing a complaint with the[[14]] Please let me know as soon as this is done, so we can get it to another lawyer who will be taking the case for us. I expect a reply as soon as possible. Thank you, Tonia Underwood.

Approximately one hour later, Christina Martin responded to Tonia via email stating in relevant part:

> Tonia,
>
> Per our conversation, I will request a check for Travis' PIP funds and get it to the Etown office asap. PIP sent us

[14] In her affidavit filed in this matter, Tonia averred that she meant for her email to state she and Underwood would be "filing a complaint with the Kentucky Bar Association," but that this was inadvertently omitted.

> a check for $18,809.94. Of that amount, $973.00 was paid to Travis and $3,492.88 was paid to U of L Hospital leaving a balance of $14,344.06. I have written the following medical providers and requested they submit their charges to health insurance as well:
>
> . . . .
>
> I've been watching Travis' bills closely since his file was reassigned to me. Had I known at any time that he was struggling to get by, I would have gladly sent him some (or all) of the PIP money.
>
> I've been doing this job for 17 years now and I treat each case as if it's the only one I have. I use the client's money as if it were my own (and I am pretty conservative when it comes to money). I'm sorry you and Travis are dissatisfied with our services.

Thereafter, H&C issued a check payable to Underwood for $14,344.06. Contrary to Martin's statement that she would have given Underwood "some (or all) of the PIP money" if she had "known at any time that he was struggling to get by," however, attorney Brown would later testify, and H&C would later represent in its several pleadings and appellee brief filed in this matter, that if it had not been terminated by Underwood, Underwood's reparation benefit funds would not have been paid to him at all "absent the necessary documentation to confirm that the distribution was pursuant to the statutory lost wages/medical expense purposes." In other words, H&C has clarified that if Underwood ever wanted his reparation benefits, he was required to either prove to H&C that he was entitled to them, or terminate the services of H&C to get his benefits, which is what he ultimately did.

Subsequently, Underwood retained the appellant, James Chambers, to succeed H&C as his legal counsel. Chambers continued to prosecute a tort action Underwood had previously authorized H&C to file against Global in Hardin Circuit Court on February 28, 2013. Chambers eventually settled Underwood's suit against Global for $200,000. H&C then asserted an attorney's lien against the $200,000 settlement amount for the *quantum meruit* value of the services it had provided Underwood prior to its termination. And, Chambers opposed H&C's lien on several bases including what he and Underwood characterized as H&C's unauthorized receipt and disposition of Underwood's reparation benefits.

Following a period of motion practice and an evidentiary hearing, the Hardin Circuit Court determined that H&C had not been terminated for cause. The circuit court therefore divided the attorney's fees in the manner previously described in this opinion. This appeal followed.

STANDARD OF REVIEW

It is well-established that a trial court's findings of fact are reviewed for clear error, while its conclusions of law are reviewed *de novo*. *Commonwealth v. Coffey*, 247 S.W.3d 908, 910 (Ky. 2008). Under CR 52.01, in an action tried without a jury, "[f]indings of fact, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." A factual finding is not clearly erroneous if it is supported by substantial evidence. *Owens–Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Substantial evidence is evidence, when taken

alone or in light of all the evidence, which has sufficient probative value to induce conviction in the mind of a reasonable person. *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky. App. 2002). An appellate court, however, reviews legal issues *de novo*. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001).

ANALYSIS

Attorneys employed under a contingency fee contract, who are discharged without cause before completion of the contract, are entitled to fee recovery on a *quantum meruit* basis. *See Baker v. Shapero*, 203 S.W.3d 697, 699 (Ky. 2006). Conversely, if they are discharged for cause before completion of the contract, their right to recover any fee is forfeited. *B. Dahlenburg Bonar, P.S.C. v. Waite, Schneider, Bayless & Chesley Co., L.P.A.*, 373 S.W.3d 419, 423 (Ky. 2012). "Whether good cause exists must be determined on a case-by-case basis." *Id*. (citation omitted). On appeal, Chambers' sole argument is that H&C was fired as a direct result of improper conduct regarding Underwood's reparation benefits, and was therefore fired for cause. In light of what has been previously discussed, we agree.

To the extent that the circuit court addressed H&C's conduct relating to Underwood's reparation benefits, its judgment provided:

> Injured plaintiffs do not receive PIP benefits to use for just any reason. The benefits provide reimbursement for net loss suffered from a motor vehicle injury. KRS 304.39-020(2). Loss is intended to mean economic losses consisting of medical expenses, work loss, and replacement services. KRS 304.39-020(5). Any PIP benefits received must fit one of these categories.

> [Underwood] was receiving his statutory $200 per week in lost wages PIP benefits pursuant to KRS 304.39-130. Any lost wages PIP benefits above the $200 per week limit was based on contract with Progressive. Progressive required wage verification from [Underwood] to support continuing lost wage payments. [Underwood] did not provide H&C sufficient documentation indicating that he was entitled to these payments.
>
> Progressive eventually released the remaining balance of the PIP benefits to H&C in the form of a personal check payable to [Underwood]. A Limited Power of Attorney document was executed between [Underwood] and H&C, depositing the funds into an escrow account. H&C immediately sent a check to [Underwood] in the amount of $973, an amount based on the same $200 per week statutory amount. Chambers argues that such an agreement violates KRS 304.39-010. This type of agreement does not violate KRS 304.39-010. The insured may delegate the responsibility of direction of PIP benefits. Furthermore, Coleman[[15]] testified that this type of agreement is common. As a whole, the evidence reflects that H&C was not improper in its handling of the PIP benefits.

To begin, the circuit court's judgment assumes Underwood agreed to allow H&C to direct his reparation benefits. There was no such agreement.

The circuit court's judgment asserts "Progressive eventually released the remaining balance of the PIP benefits . . . in the form of a personal check payable to [Underwood]." This is only partially correct. Progressive released those funds in the form of a personal check payable to Underwood *and* H&C.

The circuit court's judgment also emphasizes that "Injured plaintiffs do not receive PIP benefits for just any reason." While this statement is legally

[15] Redford H. Coleman, the individual referred to in the circuit court's order and judgment, was retained by H&C and testified that in his opinion H&C had not been terminated by Underwood for cause.

correct, it does not address the issues presented in this matter. An injured plaintiff's *counsel* does not receive PIP benefits on behalf of its client for just any reason, *either*. Accordingly, the issues presented in this matter to determine whether H&C was fired for cause are: (1) what authority enabled H&C to effectively act as the legal owner or trustee of the funds once they were deposited into Underwood's client escrow account; and (2) what the proper disposition of those funds should have been, had H&C *not* been fired.

As to the first of these points, per their agreement Underwood merely authorized H&C to "assist [him] in *submitting medical bills for payment to any responsible insurance carrier or agency*." (Emphasis added.) H&C cites no case law, statute, or contractual provision that authorized it to receive and assert discretion and control over the disposition of Underwood's reparation benefits. H&C cites nothing demonstrating that Progressive attached any condition at all upon the use of the reparation benefit funds once the funds were disbursed into H&C's care. It appears the only reason Underwood's benefits were ever placed in his client escrow account, and thus within H&C's control, is that H&C told him this was required by law.

As to the second point, H&C's conduct demonstrates it believed Underwood ultimately had an unqualified right to the balance of the reparation benefits it received on his behalf. If any rule of law or contractual provision required Underwood to refund the unused portion of his reparation benefits (which apparently had yet to be "statutorily defensible" from H&C's point of view) to

Progressive, it did not prevent H&C from representing to Progressive and several of Underwood's creditors that Underwood had exhausted his benefits; and, it did not prevent H&C, upon being terminated, from issuing Underwood a check representing the balance of his benefits that had not been exhausted. Moreover, while H&C placed Underwood's benefits in his client escrow account—presumably the same location where any other monies Underwood might have recovered over the course of his litigation with Global would have been deposited—H&C does not assert that any amount of those benefits would have been properly subject to its contingent fee.[16]

With the above in mind, we are left to guess at why H&C led Underwood to believe that while it functioned as his counsel it could not give him all of the reparation benefit funds it had received for him from Progressive, but rather placed those funds into an escrow account that appears to have been used more like a discretionary trust.[17] In any event, we are aware of no legal authority

[16] In the absence of any real risk, an attorney's purportedly contingent fee which is grossly disproportionate to the amount of work required has been held to be an excessive fee within the meaning of attorney disciplinary rules. For example, in *Attorney Grievance Com'n v. Kemp*, 303 Md. 664, 496 A.2d 672 (1985), the attorney signed a one-third contingency fee agreement with a client who was injured in an automobile accident. The attorney then wrote a letter to the client's insurer, requesting "personal injury protection (PIP) forms." *Id*. at 674. In Maryland, as in Kentucky, PIP is a mandatory, no-fault insurance coverage; payment normally follows automatically once the forms are filled out correctly, assuming an otherwise valid claim. After the attorney kept one third of the PIP payments from the insurer, the Attorney Grievance Commission charged him with violating ethical rules for having charged an excessive fee.

[17] During his deposition, Coleman (H&C's legal expert, *see supra* Note 15) explained his understanding of assignments to medical providers of reparation benefits:

> Well, there's—there's—there's a procedure for obtaining PIP. Many times what happens is the providers will take assignments from the patient when they go in there. They simply submit their bill to the PIP carrier. Whoever gets there first gets paid first. Now, and—and let's say, for instance, Mr. Underwood was taken to Hardin Memorial Hospital, and if Mr. Underwood had only $10,000 in PIP and

—and H&C cites none—supporting that Underwood was required to either prove his entitlement to his reparation benefits to the satisfaction of his own legal counsel, or fire his own legal counsel, in order to receive those funds. In short, H&C was terminated because it maintained a position unsupported by law and adverse to its client. That, in turn, constituted valid cause for Underwood's termination of the services of H&C.

CONCLUSION

In light of the foregoing, the Hardin Circuit Court's judgment is REVERSED, with directions to vacate any fee in favor of H&C, and to direct payment of the entire $66,666.66 fee amount to the appellant.

ALL CONCUR.

> they got their bill to the PIP carrier first that bill would have been satisfied and his PIP would have been gone, no matter what other PIP or other submissions he may have made[.]

As illustrated in *Neurodiagnostics*, 250 S.W.3d 321, Coleman's understanding of the MVRA is incorrect and is actually consistent with law that had been repealed and invalidated several years before the relevant facts of this matter. While it is no longer the case, the MVRA previously allowed medical providers to obtain assignments of a patient's reparation benefits; and, as the Supreme Court explained in *Neurodiagnostics*, 250 S.W.3d at 327, "If each and every medical provider obtained an assignment—as a matter of course—of any right to benefits under the MVRA, the insured's benefits could be exhausted after an accident, leaving the insured no ability to decide at a later date that he or she would be better served by directing reparation benefits to cover some other element of loss, such as economic loss."

If H&C believed (as its legal expert did) that assignments of reparation benefits to medical providers remained viable under Kentucky law, that may explain why H&C thought it was necessary to "exhaust" Underwood's benefits in such a short amount of time, place them in an escrow account, and represent to several of Underwood's medical providers that Underwood's reparations benefits had been exhausted. Regardless, this course of action was not in accord to the well-settled law on the issue.

BRIEF FOR APPELLANT:

James W. Chambers
Glasgow, Kentucky

BRIEF FOR APPELLEE:

Peter L. Ostermiller
Louisville, Kentucky