STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL WHITE and DAVID WHITE TRUST,

Plaintiffs-Appellants,

v

CHAKLOS, JUNGERHELD, HAHN, & WASHBURN, P.C., and JACK A. WEINSTEIN,

Defendants-Appellees.

UNPUBLISHED
January 19, 2006

No. 257635
Saginaw Circuit Court
LC No. 03-050220-PZ

Before: Bandstra, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendants' motion for summary disposition under MCR. 2.116(C)(10) and dismissing plaintiffs' declaratory judgment action. The trial court ruled that defendants' attorney lien was valid because plaintiffs agreed in a signed writing to the contingency fee, because plaintiffs' claim that defendants wrongfully withdrew was without merit, and because the total fee was not clearly excessive. We affirm.

This litigation concerns the validity of a thirty-percent attorney's lien against a verdict for plaintiffs in a settlement enforcement proceeding. Plaintiffs sought legal counsel in 1991 because they were being sued (*Republic I*) and defendants agreed to defend plaintiffs and prosecute a counterclaim. The parties agreed to a contingent fee of thirty percent of any recovery on the counterclaim. *Republic I* was settled in 1993 and plaintiffs signed a settlement statement that expressly acknowledged the contingency-fee agreement and recited the material terms.[1] The parties acted as if the agreement was in place, and all payments from the settlement were distributed according to the contingency-fee structure. Between the time the settlement was executed and the enforcement proceeding was brought, attorney/defendant Hahn sent the obligor under the settlement at least eight default notices at various times and corresponded with plaintiffs concerning the defaults. Although defendants did not represent plaintiffs in the enforcement proceeding (*Republic II*), defendant Hahn was a witness in the proceeding to

[1] Although plaintiffs' counsel made a number of oral arguments about the construction and implementation of the parties' contingency agreement, those issues are not before us and may be addressed in the proceedings to enforce defendants' lien.

enforce the settlement. Defendants also filed liens in *Republic II* before trial commenced, and plaintiffs did not object to these liens until after the jury returned a verdict in plaintiffs' favor.

A grant of summary disposition is reviewed de novo. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 357; 597 NW2d 250 (1999). In reviewing a decision under MCR 2.116(C)(10), we consider all documentary evidence in the light most favorable to the non-moving party, affording all reasonable inferences to the nonmovant, to determine whether there is any genuine issue of material fact that would entitle the non-moving party to judgment as a matter of law. *Knauff v Oscoda Co Drain Comm'r*, 240 Mich App 485, 488; 618 NW2d 1 (2000); *Wilcoxon, supra* at 357-358. "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 pleadings, but must . . . set forth specific facts showing that a genuine issue of material fact exists." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Mere speculation and conjecture are not sufficient to establish a genuine issue of material fact. *Detroit v GMC*, 233 Mich App 132, 139; 592 NW2d 732 (1998). "[T]he law creates a lien of an attorney upon the judgment or fund resulting from his services." *Reynolds v Polen*, 222 Mich App 20, 23; 564 NW2d 467 (1997). Also, if an attorney withdraws from a case and is justified in doing so, the attorney lien is enforceable only in quantum meruit. *Id.* at 23-24. However, if the attorney wrongfully withdraws, then he or she loses any claim to a lien. *Id.*

Plaintiffs first argue that the contingency-fee agreement was not valid because plaintiffs do not recall having signed the agreement and defendants cannot locate a signed copy. However, plaintiffs' complaint admits that even though plaintiffs agreed to the thirty-percent contingency, they did not recall having signed the contingency agreement. Plaintiffs first cite MCR 8.121 for the proposition that a contingency agreement must be in writing. The rule does not state that a contingency-fee agreement is invalid if not signed, but merely requires that the agreement "must be in writing and a copy provided to the client." MCR 8.121(F). Here, it is undisputed that the agreement was in writing, and plaintiffs do not allege that they were not provided with a copy.[2]

Additionally, plaintiffs' reliance on *Morris v Detroit*, 189 Mich App 271; 472 NW2d 43 (1991), is misplaced as *Morris* does not hold that a contingency fee arrangement must be signed in order to be valid. Plaintiffs have cited no authority for the proposition that an acknowledged contingency-fee agreement must be signed. Furthermore, because the contingency-fee agreement was "in writing . . . stat[ing] the method by which the fee was to be determined" and defendants "[u]pon conclusion of a contingent-fee matter, provide[d] the client with a written statement of the outcome of the matter and, . . . show[ed] the remittance to the client and the

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[2] Because defendants complied with subsection (F), we need not address their argument (based on the catch line of the rule "Contingent fees in claims or actions for personal injury and wrongful death") that all of MCR 8.121 applies exclusively to personal injury or wrongful death actions, except to observe that MCR 1.106 provides, "The catch lines of a rule are not part of the rule and may not be used to construe the rule more broadly or more narrowly." Additionally, although subsection (A) of MCR 8.121 applies only to wrongful death or personal injury matters according to its express terms, there is no indication that such a qualification would extend to subsection (F).

method of its determination" the contingency-fee agreement complied with MRPC 1.5, which similarly does not require a signed writing.[3] But even assuming that MRPC 1.5 required a signed agreement, plaintiffs acknowledged the material terms of the contingency agreement in a signed writing when they signed the settlement statement that referred to the allegedly unsigned agreement and recited its material terms. See *Berkel & Co Contractors v Christman Co*, 210 Mich App 416, 419; 533 NW2d 838 (1995) ("Where one writing references another instrument for additional contract terms, the two writings should be read together.")[4]

Plaintiffs next argue that defendants wrongfully withdrew from representing plaintiffs by not enforcing the settlement agreement. However, defendants did not withdraw from representing plaintiffs. The contingency-fee agreement provided that defendants would represent plaintiffs in *Republic I*, an action that was dismissed with prejudice and settled in plaintiffs' favor. Plaintiffs assert that defendants' representation was ongoing because defendant Hahn continued to notify the obligor of its defaults under the settlement and to correspond with Michael White concerning these defaults. Plaintiffs have cited no authority for the proposition that an attorney somehow undertakes to enforce an obligation in court simply by drafting the original contract and sending default notices.[5]

Plaintiffs next argue that *Reynolds*, *supra* at 23 expressly limited an attorney's lien "to a judgment or fund resulting from his services" and that the *Republic II* judgment did not result from defendants' services. While the language quoted by plaintiffs appears in *Reynolds*, nothing in *Reynolds* expressly considered a limitation based on an allegation that the relevant fund did not result from the attorney's services. Moreover, plaintiffs' argument that the fund did not result from defendants' services is cursory and circular at best, and plaintiffs have cited no authority that would support any argument that this fund somehow did not result from defendants' earlier rendered legal services. Plaintiffs merely claim that the *Republic II* judgment did not result from defendants' services because defendants did not render legal services in *Republic II*. However, this argument ignores that the entire goal of *Republic II* was to enforce an agreement negotiated and created by defendants. Further, it demonstrates that defendants could not have withdrawn from the enforcement proceedings because they simply were never involved

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[3] We are not suggesting that an unsigned contingency-fee agreement would always be valid. Here, however, plaintiffs acknowledged the agreement in a separately signed writing, accepted the benefit of defendants' services under the agreement without protest, acquiesced to the contingent payments for over a decade, and did not protest defendants' liens when filed in *Republic II* until after winning a sizeable verdict.

[4] Although a broad reading of plaintiffs' affidavit alleges that plaintiff Michael White signed the statement under protest, plaintiffs have not argued on appeal that this agreement should somehow be rescinded for this reason. Also, after the original protest allegedly made at the signing on July 28, 1993, Michael White first claimed in writing that he signed the statement under protest on June, 14, 2004, nearly eleven years later.

[5] Notably, plaintiffs do not claim that because of defendants' enforcement efforts they somehow detrimentally relied on defendants' efforts as an assertion that defendants would enforce the matter.

in them. All of the cases cited by plaintiffs on the withdrawal issue concern cases in which suit was actually pending. Thus, all are distinguishable and inapplicable.

Additionally, even if defendants somehow withdrew, their withdrawal was not wrongful because defendant Hahn could not represent plaintiffs in the enforcement proceeding according to MRPC 3.7 because he was undoubtedly a potential witness in the enforcement proceeding. Plaintiffs do not argue that any of the enumerated exceptions under MRPC 3.7 apply to this case, and it is undisputed that defendant Hahn was a material witness in *Republic II*.

Plaintiffs next argue that because MRPC 3.7(b) would have allowed another attorney in the defendant firm to represent plaintiffs in *Republic II*, defendants' alleged withdrawal was wrongful.[6] However, it is axiomatic that "the term 'may' designates a permissive provision." *Jordan v Jarvis*, 200 Mich App 445, 451; 505 NW2d 279 (1993) (citation omitted). Thus, plaintiffs' argument that MRPC 3.7(b) somehow obligated other attorneys in the defendant firm to represent plaintiffs in *Republic II* is clearly without merit.

Plaintiffs next argue that defendants' alleged withdrawal somehow increased plaintiffs' legal costs, and that enforcement of defendants' lien would cause plaintiffs to be double billed for legal services in *Republic II*. Plaintiffs' argument is without merit. The jury verdict included $52,479.76 in attorney fees, which were not reduced by the *Republic II* trial court. Further, defendants concede that they are only entitled to a fee on the net recovery in *Republic II*. Additionally, the circuit court simply recognized the validity of the agreement. Issues concerning its application to the actual recovery in *Republic II* have yet to be decided. Moreover, plaintiffs do not challenge defendants' claims that the *Republic I* case and settlement were relatively complex and spanned a couple of years, MRPC 1.5(a)(1), that plaintiffs' obtained a favorable result and a large settlement, *id.* at (a)(4), and, here, the fee was contingent. *Id.* at (a)(8).

Instead, plaintiffs essentially argue that awarding defendants a fee from the *Republic II* judgment would be clearly excessive because defendants would have received far less had they agreed to take the case on an hourly basis. Plaintiffs' argument in this regard ignores the basic principle that "more liberal compensation is allowable in successful cases, where none is to be received in case of failure." *Babcock v Public Bank*, 366 Mich 124, 133; 114 NW2d 159 (1962) (citation and internal quotations omitted).

Although plaintiffs' in their statement of questions presented raise the issue that defendants' liens should be enforceable only in quantum meruit, plaintiffs have not separately briefed this issue, and the argument section of plaintiffs' appellate brief mentions quantum meruit only in four separate sentences on three different pages. Accordingly, plaintiffs have abandoned the issue. *Peterson Novelties*, *supra* at 14. Moreover, because defendants were not representing plaintiffs when they allegedly withdrew by refusing to represent plaintiffs,

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[6] MRPC 3.7(b) provides in pertinent part that, "A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9."

defendants' attorney liens are enforceable under the terms of the contract rather than in quantum meruit. See *Reynolds, supra* at 23.

Finally, although plaintiffs argue that genuine issues of material fact exist, any issues that are in fact genuine are not material for the reasons considered above. Also, plaintiffs' suggestion that the trial court erred in granting summary disposition under MCR 2.116(C)(8) is misplaced as the trial court expressly granted summary disposition under MCR 2.116(C)(10).

Affirmed.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Helene N. White