STATE OF MICHIGAN

COURT OF APPEALS

RUBY & ASSOCIATES, P.C. and DAVID I. RUBY,

Plaintiffs/Counter-Defendants/Respondents-Appellants,

V

GEORGE W. SMITH & COMPANY, P.C., GEORGE W. SMITH, and JOYCE W. MILLER,

Defendants/Counter-Plaintiffs,

and

THE GILES LAW FIRM,

Petitioner-Appellee.

UNPUBLISHED
October 4, 2011

No. 297266
Oakland Circuit Court
LC No. 2003-054535-NM

Before: SAWYER, P.J., and JANSEN and DONOFRIO, JJ.

Per Curiam

Respondents appeal as of right the trial court order awarding attorney fees to petitioner. Because we conclude that the trial court properly determined that Giles did not commit any disciplinable misconduct, and did not clearly err in finding that Ruby impliedly and wrongfully discharged petitioner, we affirm in part. Because the trial court abused its discretion in awarding petitioner attorney fees in an amount greater than that which he would have been entitled to under the contingency fee agreement, we reverse in part. Because respondents do not contest that petitioner is entitled to attorney fees in an amount equal to one-third the settlement amount, we remand and instruct the trial court to enter an order awarding petitioner $70,000 in attorney fees. Thus, we affirm in part, reverse in part, and remand with instructions.

I

The parties' relationship began in 1984 when David Ruby hired Thomas Giles of The Giles Law Firm to be the corporate attorney for Ruby's firm, Ruby & Associates. In 2001, respondents discovered that an employee of Ruby's firm had embezzled approximately $1

million. In addition to pursuing civil and criminal sanctions against the embezzler, respondents sued their accountant, George Smith, for malpractice resulting from failing to uncover the embezzlement (Smith litigation).[1] The financial impact of the embezzlement and subsequent tax liens filed against Ruby's firm left the firm essentially insolvent. In October 2003, petitioner agreed to represent respondents in the Smith litigation on a contingent fee basis.

In connection with the Smith litigation, Giles hired Harry Cendrowski of Cendrowski Selecky Professional Corporation (CSPC) as respondents' accounting expert witness. Subsequently, on Giles's recommendation and with Ruby's authorization, Cendrowski's services were terminated. Giles hired Peter Burgher to replace Cendrowski. The trial court denied defendants' motion to strike Burgher finding that he qualified as an expert under MRE 702. Yet, at trial in June 2005, the presiding visiting judge disqualified Burgher and entered a directed verdict in favor of defendants.

Respondents hired Sullivan, Ward, Asher, & Patton, PC, in particular attorneys Kevin Gleeson and Ronald Lederman, to assist in their appeal of the trial court's decision to disqualify Burgher and dismiss their case. A panel of this Court determined that the trial court erred in disqualifying Burgher as an expert and that the error was not harmless because it was the basis for the trial court's directed verdict decision. Thus, this Court remanded the matter for a new trial. *Ruby & Assoc v Smith*, unpublished opinion per curiam of the Court of Appeals, issued March 18, 2008 (Docket Nos. 274348, 275770), at 5. Our Supreme Court denied defendants' application for leave. *Ruby & Assoc v Smith*, 482 Mich 896; 753 NW2d 178 (2008). After the appeals process, respondents retained Gleeson and Lederman as co-counsel to assist in settlement negotiations, which Ruby and Giles agreed Gleeson should lead, although Gleeson was not listed as an attorney of record in the Smith litigation until May 29, 2009. Ultimately, respondents settled the Smith litigation for $210,000 and the suit was dismissed.

Approximately one week before the settlement, petitioner filed a motion to withdraw as respondents' counsel based on its alleged breach of contract for, *inter alia*, failing to cooperate and communicate, which would allow petitioner to pursue attorney fees outside the contract.[2] Respondents agreed that there had been a breakdown in the attorney-client relationship and did not object to Giles withdrawing as counsel. At the motion hearing, the parties argued whether petitioner was entitled to attorney fees as outlined in the parties' contingency fee contract. The trial court determined that petitioner was allowed to seek the reasonable value of its services, relying on *Ambrose v Detroit Edison Co*, 65 Mich App 484; 237 NW2d 520 (1975), and was

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[1] Giles conducted the investigatory work necessary for the civil litigation and also handled a related matter (Shore litigation) on a contingency fee basis. Respondents were unsuccessful in the Shore litigation for which Giles expended approximately $145,000.

[2] Respondents filed, and the trial court entered, the stipulated order to dismiss the Smith litigation the day before petitioner's motion to withdraw was noticed to be and actually was heard.

entitled to a lien against respondents' settlement. The trial court granted petitioner's motion to withdraw.

On September 2, 2009, petitioner filed a petition requesting that the court determine the reasonable amount of its attorney fees. It requested to be reimbursed only for attorney fees incurred through the trial, October 2003 to October 2006. Respondents argued that petitioner was not entitled to quantum meruit recovery because Giles engaged in professional misconduct. While respondents alleged four main MRPC violations, only three are at issue on appeal. Respondents argued that: 1) Giles violated MRPC 1.2 when he interfered with Ruby's right to settle the Smith litigation, conduct that also violated MRPC 1.7 and MRPC 2.1; 2) Giles violated MRPC 1.4 when he failed to disclose to Ruby a report Cendrowski prepared and misstated the substance of Cendrowski's opinion; and 3) Giles violated MRPC 1.15 when he deposited client funds into a general business account and misappropriated the funds. The trial court ordered an evidentiary hearing to resolve respondents' claims that petitioner violated the Michigan Rules of Professional Conduct (MRPC). The trial court heard extensive testimony from the parties, and two expert witnesses, Professor Lawrence Dubin, respondents' expert, and Donald Campbell, petitioner's expert.

On March 15, 2010, the trial court entered an opinion and order granting petitioner the attorney fees it sought for services provided from October 2003 to October 2006. The trial court first addressed Giles's alleged violation of MRPC 1.2(a) by refusing to abide by Ruby's decision to accept the settlement offer. It found that Giles's written communications on which respondents relied occurred after the terms of the settlement were agreed on and there was no evidence that these communications, or any act of petitioner, actually interfered with the settlement. It also found that because respondents settled, they suffered no prejudice as a result of any of petitioner's actions. Additionally, the trial court found that although petitioner exercised its right to argue, even strenuously, against the settlement, it clearly acknowledged Ruby was the ultimate decision maker. Thus, it found that Giles had a right under MRPC 2.1 to put forth economic and moral considerations.

Moreover, the trial court found that petitioner did not have a conflict of interest under MRPC 1.7 based on his reimbursement claim for the Cendrowski litigation[3] and interest in respondents' recovery in the Smith litigation. It stated that these sorts of conflicts arose whenever a client failed to pay an invoice for litigation expenses and in every contingent fee situation. However, they were not the type of conflicts prohibited by the MRPC.

With regard to respondents' allegations involving petitioner's handling of the nearly $15,000 in advanced payments, the trial court found that petitioner did not violate MRPC 1.15 because the version of the rule on which respondents relied was not enacted until several months after the funds were deposited. It also found that Giles's acknowledgment that respondents were

[3] This lawsuit is discussed in detail later in the opinion. In sum, Cendrowski sued Giles for unpaid expert witness fees.

entitled to a credit for the funds precluded finding respondents were prejudiced as a result of petitioner's handling of the funds.

Finally, the trial court addressed respondents' allegation that Giles violated MRPC 1.4. Regarding Giles's failure to disclose Cendrowski's May 4 report to Ruby, the trial court found that there was no evidence that Giles acted other than in good faith in the exercise of his independent professional judgment. Giles communicated his difficulties with Cendrowski to Ruby and had ample reason to believe that Ruby would not have been interested in reading the report based on their long relationship and Ruby's own concession that he was a "hands-off" type of client. Also, Gleeson received Cendrowski's report in January 2007, spoke to Cendrowski's attorneys regarding the unpaid expert witness fees, and filed a complaint against Cendrowski in June 2009, yet never raised a question regarding Cendrowski's termination until petitioner filed its petition for attorney fees. Moreover, despite their long relationship, Ruby chose to deal exclusively with Gleeson after 2008 and never directly responded to Giles's requests for assistance in the Cendrowski litigation.

Hence, the trial court concluded that petitioner was given permission to withdraw in August 2009 because respondents failed to assist and cooperate with petitioner in its efforts to prepare for trial and failed to pay or assume responsibility for litigation expenses associated with the Cendrowski litigation. It also concluded that petitioner was constructively and wrongfully discharged when respondents obtained another law firm without notice to petitioner. Thus, it determined that petitioner was entitled to the reasonable value of its attorney fees based on quantum meruit recovery.

The trial court noted that respondents did not contest the reasonableness of petitioner's hourly rates or the time expended on the Smith litigation. Instead, they asserted that the exception stated in *Reynolds v Polen*, 222 Mich App 20, 24; 564 NW2d 467 (1997), precluded petitioner's recovery. The trial court stated that the *Reynolds* exception required respondents prove petitioner committed disciplinable misconduct and prejudice to their case. It concluded that petitioner did not commit any disciplinable misconduct nor did its conduct prejudice respondents with respect to the Smith litigation.

With regard to the allegation that Giles's did not give Ruby Cendrowski's May 4 report, the trial court stated that respondents did not contend that Giles's conduct was prejudicial to the Smith litigation, but rather attempted to show that had Ruby known of the report he would not have consented to Cendrowski's termination. The trial court concluded that because the new expert, Burgher, was allowed to testify at retrial, Giles's "lack of communication" did not prejudice respondents. Regarding the propriety of terminating Cendrowski, the trial court stated that the parties presented conflicting evidence. However, it concluded that petitioner's decision to terminate Cendrowski's services "was sufficiently well-grounded and adequately considered to be in the client's best interests." Therefore, it found that petitioner committed no misconduct.

Next, with regard to Giles's failure to keep respondents' advance expense payments in a bank account separate from petitioner's account, the trial court stated that the uncontroverted evidence established that before October 2005, an attorney had no obligation to segregate advance expense payments or maintain them in a client trust account. It also stated that respondents presented no evidence that petitioner's handling of these funds was prejudicial to its

case. Therefore, the trial court concluded that petitioner did not commit misconduct when it deposited respondents' funds into its general account.

With respect to respondents' allegation that petitioner attempted to intimidate them and interfere with the Smith litigation settlement, the trial court concluded that petitioner's communications could not have dissuaded respondents from settling because they occurred after the Smith litigation was settled. It additionally noted that competent attorneys other than Giles represented respondents during this time. The trial court also concluded that, based on Giles's credible and uncontroverted testimony, any information petitioner communicated to respondents regarding the IRS liens was initially obtained from respondents, who were represented by independent tax attorneys. Thus, respondents failed to establish that they were improperly misled by petitioner's information.

Accordingly, after considering numerous factors, the trial court found that petitioner was entitled to the full amount of its requested attorney fees, $205,932.50. It is from this order that respondents now appeal.

II

This Court reviews a trial court's findings of fact for clear error and its conclusions of law de novo. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004). "A finding is clearly erroneous where, although there is evidence to support the finding, the reviewing court is left with the definite and firm conviction that a mistake has been made." *Id*. (citation omitted). Also, this Court gives deference to the trial court's superior ability to judge the credibility of the witnesses who appeared before it. *Id*.; MCR 2.613(C).

"[A]n attorney on a contingent fee arrangement who is wrongfully discharged, or who rightfully withdraws, is entitled to compensation for the reasonable value of his services based upon quantum meruit, and not the contingent fee contract." *Reynolds*, 222 Mich App at 24, quoting *Ambrose*, 65 Mich App at 491. "[R]ecovery in such circumstances is based on quantum meruit rather than the amount provided for in a contingent fee agreement because a client has an absolute right to discharge an attorney and is therefore not liable under the contract for exercising that right." *Reynolds*, 222 Mich App at 25. However, "quantum meruit recovery of attorney fees is barred when an attorney engages in misconduct that results in representation that falls below the standard required of an attorney (e.g., disciplinable misconduct under the Michigan Rules of Professional Conduct) or when such recovery would otherwise be contrary to public policy." *Id*. at 26.[4]

[4] Petitioner contends that our Supreme Court's descriptions in *Hightower v Detroit Edison*, 262 Mich 1, 13; 247 NW 97 (1933), and *Kukla v Perry*, 361 Mich 311, 324; 105 NW2d 176 (1960), of the attorney's breach of duty to the client as "gross" and "serious," respectively, defines the level of misconduct that must be found before quantum meruit recovery is not allowed.

III

A.

Respondents first argue that the trial court erred when it determined that Giles did not commit any disciplinable misconduct. Respondents specifically contend that Giles violated MRPC 1.2 when he attempted to interfere with Ruby's right to settle the Smith litigation by trying to intimidate Ruby into not accepting the $210,000 settlement amount. MRPC 1.2(a) provides in part: "A lawyer should seek the lawful objectives of a client . . . . A lawyer shall abide by a client's decision whether to accept an offer of settlement or mediation evaluation of a matter." A lawyer's attempt to violate the MRPC is professional misconduct. MRPC 8.4. The trial court found that because petitioner acknowledged that Ruby remained the ultimate decision maker, it could, under MRPC 2.1, present moral and economic considerations to him. Indeed, MRPC 2.1 provides:

> In representing a client, a lawyer shall exercise independent professional judgment and shall render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.

Thus, it concluded that petitioner's arguments against the settlement did not violate MRPC 1.2(a).

Respondents assert that the trial court clearly erred in finding that the economic and moral considerations at issue in this case are not the type contemplated by MRPC 2.1 because they pertained to Giles's interests and not Ruby's situation. Under the circumstances, the moral considerations Giles raised were relevant to Ruby's situation. Based on their nearly 25-year relationship, his losses in the Shore litigation, and potential losses in the Smith litigation, Giles appealed to Ruby's sense of morality and fairness to uphold his apparent promise that he would not, himself, suffer losses. Thus, the trial court did not clearly err in finding that Giles could ethically raise this moral consideration with Ruby that encompassed the economic consideration of the settlement.

Next, Giles's communications to Ruby on which respondents rely (those sent after April 1, 2009) clearly indicated a concern that any settlement amount be sufficient to cover his attorney fees given their significant amount. The question is whether Giles's statements against the settlement rise to the level of an attempted violation of MRPC 1.2(a). In an April 15, 2009, letter Giles set forth the reason for his opposition to a low settlement amount. Ruby promised him that he "wouldn't get hurt" by agreeing to represent Ruby in the Smith and Shore litigation on a contingency fee basis. Giles recovered nothing from the Shore litigation and sought to lose

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However, each description referred to the facts of the case not the general rule. *Hightower*, 262 Mich at 13 ("[W]e lay denial upon the broader ground that the judgment of the court will not be given in aid of or to encourage unprofessional conduct infringing the integrity of judicial proceedings."); *Kukla*, 361 Mich at 326 (the defendant "did not measure up to the standard required of an attorney toward his client").

a significant amount of money on the Smith litigation unless the proposed settlement covered his fees.

We recognize that Giles seems to argue against the settlement even after Gleeson told him that Ruby was intent on settling and notified him of the accepted amount. But it appears that a two-sided communication problem existed. Ruby never directly informed Giles that his decision was final and Giles did not view Gleeson as his co-counsel such that Gleeson could speak on behalf of Ruby. Even though Giles should have been aware of Gleeson's representation of Ruby as of May 29, 2009, when Gleeson entered his appearance on behalf of Ruby in the Smith litigation, there was no evidence that Gleeson thereafter informed Giles that Ruby's decision was final. Giles clearly stated in his April 15, 2009, letter that Ruby was the ultimate decision maker and also testified that if he had been involved in the settlement negotiations and Ruby insisted on accepting $210,000, he would have abided by Ruby's decision. The trial court found Giles credible. Giving deference to the trial court's credibility determination, we conclude that the trial court did not err in determining that Giles did not attempt to violate MRPC 1.2(a).

Respondents also argue that Giles's communications that asserted his economic interests in any settlement created a conflict of interest that violated MRPC 1.7(b). MRPC 1.7(b) states in relevant part:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
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> (2) the client consents after consultation.

The trial court found that there was no violation because the "conflict" involving settlement negotiations and the lawyer's own economic interests arose in every contingency fee situation and was not the type of conflict contemplated by MRPC 1.7. It reasoned that if it was, the MRPC would prohibit contingency fee agreements.

Giles's own economic interests could certainly be viewed as an interest that conflicted with Ruby's desire to settle the case for $210,000. However, we agree with the trial court that in this case these conflicting interests are not of the sort the MRPC 1.7(b) prohibits. The rule only prohibits a lawyer from representing a client where he believes that his own interests would materially limit his representation. Here, the evidence did not show Giles's representation of Ruby was materially limited by his own economic interests. Giles acknowledged Ruby's ultimate authority regarding accepting a settlement and informed Ruby of his intent to withdraw when he believed he could no longer represent him. Also, the evidence showed that Giles did not personally represent Ruby at the settlement negotiation table and objected to the settlement only after the verbal agreement was reached. Thus, it cannot be said that Giles's economic interests materially limited his representation of Ruby before the verbal settlement was reached by April 1, 2009.

After this time, Giles's only direct representation of Ruby in the Smith litigation was preparing for retrial. As late as February 2009, Gleeson spoke to Giles about hiring a new expert witness. However, it appears that the only actual preparation Giles did was to have the case assigned to a judge. Consequently, the evidence did not show Giles's own economic interests were the driving force behind any preparation.

Communications sent by Giles after April 1, 2009, also did not represent an impermissible conflict of interest because his economic interest in having Ruby settle for a greater amount did not materially limit his representation. Giles strenuously disagreed that Ruby should settle for $210,000 and he made passionate arguments against it, but in the end he abided by Ruby's decision. He did not contact defendants' attorney in the Smith litigation or otherwise interfere with Ruby's ability to finalize the settlement. Therefore, we conclude that the trial court did not err in determining that Giles did not violate MRPC 1.7(b).

Next, respondents argue that Giles violated MRPC 1.4 when he misstated the status and effect of the IRS liens in his July 28, 2009, letter. MRPC 1.4(a) provides in pertinent part: "A lawyer shall keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information." MRPC 1.4(b) provides: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Ruby testified that he shared with Giles the information he obtained from his tax attorneys regarding the IRS liens. He also testified that the last time he spoke to Giles regarding the liens was in December 2008. Tricia Huneke, the COO/CFO of Ruby's firm conceded that Giles's information regarding the liens could have only come from her or Ruby. Giles testified that any information he knew about the liens since 2003 or 2004 he obtained directly from conversations with Ruby. Giles acknowledged that based on the testimony at the evidentiary hearing the information he had was inaccurate, but stated that he believed it to be true at the time of his July 2009 letter based solely on Ruby's representations.

Respondents assert that there was nothing in the record to support the contention that Ruby falsely advised Giles regarding the liens' status and effect on his firm's losses. However, the trial court found Giles's testimony credible. It found that Giles's information regarding the liens came from Ruby. Implicit in this determination is a finding that Ruby conveyed inaccurate information to Giles. There need not have been any other record evidence of this conveyance beyond Giles's testimony. By virtue of Ruby, Giles, and Huneke's testimony, the evidence established that Giles obtained from Ruby the information he had regarding the IRS liens, which Giles later reiterated to Ruby in his July 28, 2009, letter. Giving deference to the trial court's credibility determinations, we conclude that the trial court did not clearly err in finding that Giles merely repeated in this letter that which Ruby had told him. Thus, Giles did not knowingly make any false representations to Ruby. Further, as the trial court pointed out, separate tax counsel who was handling the matter independently advised Ruby about the IRS liens. Under these facts we agree with the trial court that Giles had no duty of communication under MRPC 1.4 with regard to the IRS liens and accordingly conclude that the trial court did not err in finding that Giles's conduct did not violate MRPC 1.4.

Respondents also argue that Giles violated MRPC 1.4 when he allegedly misstated that Cendrowski needed to be terminated because he was unable and/or unwilling to testify to the proper standard of care. The trial court made no specific factual finding regarding this question. Its focus was on whether Giles's termination of Cendrowski was based on reasonable professional judgment. MCL 600.2962(a) provides a cause of action for professional malpractice against a certified public accountant (CPA) for "[a] negligent act, omission, decision, or other conduct or the certified public accountant if the claimant is the certified public accountant's client." In order to establish professional malpractice, the plaintiff must prove:

> The defendant, if a general practitioner, failed to provide the plaintiff the recognized standard of acceptable professional practice or care in the community in which the defendant practices or in a similar community, and that as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury. [MCL 600.2912a(1)(a).]

Hence, an accountant breaches the standard of care if he fails to do something which an accountant of ordinary learning, judgment, or skill in the field of accounting would do, or the doing of something which an accountant of ordinary learning, judgment, or skill would not do, under the same or similar circumstances. M Civ JI 30.01[5] Cendrowski opined in his May 4 report: "It is our opinion that the Defendants failed to do what another Certified Public Accountant of ordinary learning, judgment or skill in the community would do in the same or similar circumstances." Because these two statements are linguistically consistent, respondents contend that Cendrowski properly stated Michigan's standard of care. After a careful reading, it is clear that respondents' focus is misplaced.

The standard of care refers only to what the professional must do or must not do. See *Moning v Alfono*, 400 Mich 425, 437-438; 254 NW2d 759 (1977). Ruby actually testified that Giles told him Cendrowski was unable or unwilling to testify to the breaches of the standard of care. In section II, Summary of Conclusion, Cendrowski's report states:

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[5] The parties relied on this instruction. Unmodified, M Civ JI 30.01 reads:

> When I use the words "professional negligence" or "malpractice" with respect to the defendant's conduct, I mean the failure to do something which a [name profession] of ordinary learning, judgment or skill in [this community or a similar/ name particular specialty] would do, or the doing of something which a [name profession] of ordinary learning, judgment or skill would not do, under the same or similar circumstances you find to exist in this case. It is for you to decide, based upon the evidence, what the ordinary [name profession] of ordinary learning, judgment or skill would do or not do under the same or similar circumstances.

> It is our opinion that Defendants failed to do what another Certified Public Accountant of ordinary learning, judgment or skill in the community would do in the same or similar circumstances. Specifically:
>
> - It is our opinion that the unpaid employee and employer payroll taxes constituted an error, fraud, or illegal act of which, as required by the standards published by the American Institute of Certified Public Accountants, the Defendants had an affirmative obligation to inform Mr. David Ruby.
>
> - It is also our opinion that the Defendants did not have the requisite understanding of Ruby's business transactions and qualifications of its accounting personnel.
>
> - If the Defendants did have this requisite understanding, it failed to perform other accounting services or consulting services required by the compilation standards.
>
> - The Defendants, except for Miller, also violated the quality control standard imposed on all certified public accounting firms performing accounting services by failing to properly supervise the management and review the workpapers generated during their engagements.

When we scrutinize these four bullet point we can understand Giles's hesitance to continue to employ Cendrowski as an expert. Giles wanted Cendrowski to state the applicable standard under the AICPA,[6] instead of merely citing "the requisite understanding" or "the quality control standard." Although Cendrowski cited to the AICPA in the first bullet point, he failed to do so in the remaining points. Thus, generally speaking, Cendrowski failed to cite to the applicable standard of care. The record reveals that Giles did not misrepresent to Ruby that Cendrowski's opinion was deficient regarding the proper standard of care.

Respondents further argue that Giles violated MRPC 1.4 when he failed to provide Ruby with a copy of Cendrowski's May 4 report. Ruby testified he would not have agreed to terminate Cendrowski had he seen the report because it provided the expert opinion he wanted. Respondents further contend that the trial court's focus on Giles's professional judgment was misplaced. A lawyer has a duty to use professional judgment and render candid advice. MRPC 2.1. As pertinent to this case, MRPC 1.4 only requires that Giles kept Ruby "reasonably informed about the status of a matter" and "explain a matter to the extent reasonably necessary to permit" Ruby to make an informed decision. Ruby and Giles actually agreed that Giles kept Ruby updated about his ongoing concerns regarding Cendrowski and, it appears that Giles's criticisms of Cendrowski's report were warranted. Additionally, Ruby and Giles testified that

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[6] Michigan has adopted the AICPA standards for accountant malpractice. 2010 AC, R 338.5102(1)(a); R 338.5103(1)(a). .

Ruby was a "hands off" type of client. He was not the type of person who wanted to be apprised of technical or legal details outside his own professional expertise. Thus, based on their long-term relationship, Giles made the decision not to give Ruby the report, instead relaying the substance of his concerns. Further, Ruby had been an expert witness before and was aware reports were often created. It was not necessary for Giles to physically give Cendrowski's report to Ruby in order for him to make an informed decision. Giles appropriately used his professional judgment in determining what information to share with Ruby regarding his misgivings about Cendrowski's work. Therefore, we conclude that the trial court did not err in determining that Giles's conduct did not violate his duties under MRPC 1.4.

Finally, respondents argue that Giles violated MRPC 1.15 in two instances. First, he deposited two $6,000 checks that Ruby's firm sent him for future payment of Cendrowski's fees into his general business account in violation of MRPC 1.15(d) and (g). MRPC 1.15(d) provides in part: "A lawyer shall hold property of clients or third persons in connection with a representation separate from the lawyer's own property. All client or third person funds shall be deposited in an IOLTA or non-IOLTA account." MRPC 1.15(g) provides: "Legal fees and expenses that have been paid in advance shall be deposited in a client trust account and may be withdrawn only as fees are earned or expenses incurred."

However, in April and June 2005 when Giles deposited the funds, MRPC 1.15 did not require that expense funds advanced by a client be placed in a client trust account or IOLTA. At the time, MRPC 1.15(a) stated in part: "All funds of the client paid to a lawyer's firm, other than advances for costs and expenses, shall be deposited in an interest-bearing account . . . ." Amendment of Michigan Rules of Professional Conduct, 434 Mich clix (1990). Advanced expense funds were not required to be segregated until the rule was substantially amended on October 18, 2005. Amendment of Michigan Rules of Professional Conduct, 474 Mich cclxx (2005). Thus, the trial court did not clearly err when it found that Giles was permitted to deposit the advanced funds into his general business account. See *Grievance Administrator v Miller*, ABD 06-186-GA (October 30, 2009) (order of reprimand later vacated because MRPC 1.4(b) did not become effective until after the alleged misconduct occurred). The trial court did not err in determining that Giles's conduct did not violate MRPC 1.15(d) or (g).

Respondents baldly assert that because Giles kept the money for years, he violated the MRPC 1.15 by not segregating the funds after the rule was amended. However, they cite no authority for their proposition and it is not for this Court to search for it and accordingly, we consider the argument abandoned. *DeGeorge v Warheit*, 276 Mich App 587, 596; 741 NW2d 384 (2007).

Respondents also argue that Giles violated MRPC 1.15(g) when he allegedly used client funds to pay for his defense of the Cendrowski litigation without approval. Giles testified that he did not spend the funds, but rather only redesignated them on his separate ledger as funds applicable to the Cendrowski litigation. The trial court found that the amendment's effective date was conclusive. Essentially, the trial court found that because the funds were originally deposited before the amendment was effective Giles's redesignation of the funds was immaterial. Because Giles did not withdraw the funds after the amendment went into effect, but rather merely performed a ministerial act of labeling them differently, we conclude that the propriety of the fund's existence in Giles's general business account was governed by the rule in effect before

the amendment. Therefore, the trial court did not err in concluding that Giles did not violate MRPC 1.15(g).

In sum we conclude that the trial court did not err in determining that Giles did not commit any disciplinable misconduct.

B.

Respondents next assert that the trial court committed clear legal error when it held that there was no prejudice arising from any alleged misconduct on the part of petitioner. We cannot address this issue because there is no question before us as a result of the fact that we have already concluded that Giles did not commit any professional misconduct and thus, no misconduct exists from which prejudice could result.

C.

Respondents next contend that the trial court clearly erred when it concluded that Giles was constructively discharged without cause due to Ruby's lack of communication regarding the settlement negotiations and the Cendrowski issues. A contingent fee agreement is only set aside when the attorney is wrongfully discharged or rightfully withdraws before completing 100 percent of the contracted services. *Morris v Detroit*, 189 Mich App 271, 278; 472 NW2d 43 (1991).

In *Mourad v Auto Club Ins Ass'n*, 186 Mich App 715, 721; 465 NW2d 395 (1991), which involved an attorney's breach of contract claim, this Court applied the definition of "constructive discharge" used in labor law cases to the attorney-client context: "A constructive discharge occurs when an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation or, stated differently, when working conditions become so difficult or unpleasant that a reasonable person in the employee's shoes would feel compelled to resign."

In *Mitchell v Dougherty*, 249 Mich App 668, 684; 644 NW2d 391 (2002)., this Court recognized that an attorney-client relationship can be terminated by implication.

> [N]o formal discharge by the client is required, and the termination of an attorney-client relationship can be implied by the actions or inactions of the client. As stated above, the retention of alternate counsel is sufficient proof of the client's intent to terminate the attorney's representation. This Court has also held that a client terminated his attorney's representation by sending a letter stating that the attorney did not have the authority to act on his behalf. Further, where a client obtained legal advice from an attorney, then had no further contact with that attorney until filing a complaint for legal malpractice, we held that the client relieved the attorney of his obligations on the date the attorney last advised the client. [*Id*. at 684-685 (citations omitted).]

The *Mitchell* Court's finding of termination by implication in its case was based on a showing that the plaintiffs' intent was to in fact terminate their relationship with the defendant law firm.

Id. at 685-686. By contrast, no implied termination occurs if the client does not intend to replace the attorney. Consultation with other counsel does not necessarily terminate the original attorney-client relationship where the consultation is in addition to, rather than in place of, the original counsel. *Maddox v Burlingame*, 205 Mich App 446, 450; 517 NW2d 816 (1994).

While the *Mitchell* Court did not mention the term "constructive discharge," its decision is more applicable to the instant case than mere reference to the definition in *Mourad*. To answer whether petitioner was constructively discharged, it must be determined if and when respondents relieved petitioner of its representation obligation. "Constructive" is defined as "inferred, implied, or made out by legal interpretation." Black's Law Dictionary (6th ed), p 313. "Discharge" is defined as "[t]o extinguish an obligation" or "terminate employment of person." *Id*. at 463. The facts and circumstances under which this Court has found an implied termination of representation support a finding of constructive discharge in this case.

Here, Ruby testified that his retention of Gleeson and his firm after the appeals process was completed was as co-counsel to Giles. On Giles's part, he believed that he was respondents' sole attorney and continued to attempt to prepare for retrial through the first part of 2009. There is no dispute that during the time Ruby was not in contact with Giles, Gleeson was in contact with Giles. He gave Giles status updates on the Smith litigation and discussed generally the Cendrowski litigation. Thus, there is some evidence to support a finding that Ruby intended for Gleeson's representation to be in addition to Giles's representation.

On the other hand, there was also substantial evidence of Giles's implied termination based on Ruby's actions and inactions. Ruby testified that after a September 2008 meeting regarding the status of the Smith litigation, he thought that the Smith litigation was, for practicable purposes, over. Gleeson was handling the settlement and, in Ruby's mind, Giles had no reason to prepare for retrial. The evidence also showed that after December 2008, Ruby stopped communicating with Giles, despite Giles's repeated attempts to contact Ruby and requests for Ruby to contact him. Ruby simply forwarded all Giles's communications to Gleeson to handle, which included the Cendrowski litigation and attendant issues.[7] He turned solely to Gleeson for advice and only communicated with Gleeson. In addition, Gleeson negotiated the verbal settlement without Giles's participation or notice, save for the status update in February 2009. Although Gleeson had communications with Giles, they were limited and by April 2009, the tone of the communications appears adversarial. Moreover, Giles was not made aware of the verbal settlement agreement until the beginning of May 2009, and even then the communication was not initiated by Ruby or Gleeson.

A strong argument can be made that Ruby effectively severed ties with Giles after December 2008 without reason. Although Ruby asserted that he did not intend to terminate

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[7] We reject respondents' assertion that Ruby's lack of response to Giles was understandable based on his stroke. Ruby admitted that he received Giles's communications and forwarded them to Gleeson based on their content. Thus, his testimony demonstrated that he affirmatively chose not to respond.

Giles, his actions speak otherwise and in fact indicate that he considered Gleeson his only counsel. Considering the evidence as a whole and giving deference to the trial court's credibility determinations, we are not left with a definite and firm conviction that Ruby did not impliedly terminate petitioner's representation. Therefore, we conclude that the trial court did not clearly err in finding that Ruby constructively and wrongfully discharged petitioner.

While we conclude that the trial court did not clearly err when it determined that Ruby impliedly terminated petitioner's representation, on these facts we could come to the conclusion that a finding of rightful withdrawal is more appropriate. Approximately one week before the settlement, petitioner filed a motion to withdraw as respondents' counsel. Petitioner based its motion on respondents' failure to cooperate and communicate. Respondents agreed that there had been a breakdown in the attorney-client relationship and did not object to Giles withdrawing as counsel and the motion was granted. This obvious lack of communication as well as respondents failure to pay or assume responsibility for litigation expenses that might be awarded in the Cendrowski litigation were the bases on which the trial court allowed petitioner to withdraw. The breakdown of the attorney-client relationship was more than evident by the manner in which the parties were communicating, rather, not communicating. Both parties acknowledged that there had been a break-down in their relationship—in fact respondents had hired another law firm without notifying petitioner. Generally, an attorney's representation of a client "continues until the attorney is relieved of the obligation by the client or the court." *Mitchell*, 249 Mich App at 683; see also MCR 2.117C(1) and (2). The contracted service in this case was representation in the Smith litigation. When respondents completely failed to cooperate with petitioner during his representation of them in the Smith litigation and were instead working with alternative counsel, petitioner sought to withdraw as respondents' counsel and respondents did not object. From these facts we could alternatively conclude that the record evidence demonstrates rightful withdrawal in this case, but because we must give deference to the trial court's credibility determinations, we do not disturb the trial court's conclusion that Ruby impliedly terminated petitioner's representation.

D.

Finally, respondents argue that the trial court abused its discretion when it awarded petitioner compensation in an amount three times the contingent fee. This Court reviews for an abuse of discretion the trial court's decision whether to award attorney fees and the reasonableness of the fee award. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). The trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *Id.*

Respondents maintain that even if petitioner is entitled to quantum meruit recovery, the maximum amount of attorney fees recoverable should be limited to that which it would have recovered under the contingency fee agreement. This presents an issue of first impression. The method by which quantum meruit recovery of attorney fees is determined in Michigan where there exists a contingency fee agreement and the attorney was wrongfully discharged or rightfully withdrew was outlined in *Morris*, 189 Mich App at 278-279:

> We recognize that there is no precise formula for assessing the reasonableness of an attorney's fee. Nevertheless, in *Crawley v Schick*, 48 Mich App 728, 737; 211

NW2d 217 (1973), this Court enumerated several nonexclusive factors appropriately considered for such a determination, including:

> (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client.

While the trial court should consider these factors, its decision need not be limited to these guidelines. *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982)[, mod by *Smith v Khouri*, 481 Mich 519, 522; 751 NW2d 472 (2008)]; *Smolen v Dahlmann Apartments, Ltd*, 186 Mich App 292, 296; 463 NW2d 261 (1990). We believe that the trial court may also properly consider that the attorney originally agreed to render services on a contingency basis. Such a consideration would allow the court to consider the degree of risk undertaken by an attorney who was prematurely discharged. Accordingly, it would be appropriate for the court to award the attorney a larger fee, provided that the fee was not in excess of that permitted under MCR 8.121.

A trial court may also consider the factors listed in MRPC 1.5(a), which overlap the *Crawley* factors. *Smith*, 481 Mich at 529.

In *Reynolds*, 222 Mich App at 30, this Court added:

> We believe that a trial court is in the best position to assess an attorney's contribution to a case because trial courts are aware of the strengths and weaknesses of cases before them, the time and effort expended by the attorneys, and changes in the parties' leverage resulting from changes in counsel (e.g., due to attorneys' skill or reputation). We believe that the *Morris* approach to quantum meruit-one compensates an attorney for completed work on the basis of evaluating as closely as possible the actual deal struck between the client and the attorney rather than an assessment of reasonable compensation in the abstract-is also the proper means of evaluating quantum meruit in cases such as the instant one.

Respondents assert that *Morris* and *Reynolds* seem to presume that an attorney cannot recover more fees under quantum meruit than the contingency fee agreement provided. The Courts in both cases determined that the contingency fee agreements were governed by MCR 8.121, which provides that attorney fees under a contingency fee agreement pertaining to personal injury or wrongful death claims or actions cannot be more than one-third the amount recovered. MCR 8.121(A), (B). A greater amount is considered an excessive fee in these cases, which is prohibited by MRPC 1.5(a). MCR 8.121(A).

However, each court determined that the attorney was entitled to reasonable fees based on quantum meruit recovery. Thus, the contingency fee agreement no longer provided the basis

for recovery. *Morris*, 189 Mich App at 278; *Reynolds*, 222 Mich App at 28. Nevertheless, the Court limited the quantum meruit recovery by the amount recoverable under the contingency fee agreement. *Morris*, 189 Mich App at 279; *Reynolds*, 222 Mich App at 30-31. The *Reynolds* Court interpreted the decision in *Morris* as "attempting to refine the process of determining quantum meruit recovery by referring to the terms of the contract" and approved of the approach. *Reynolds*, 222 Mich App at 28, 30.

Morris offered no explanation for its provision that quantum meruit attorney fees could be awarded up to the amount permitted under MCR 8.121. However, the decision is logical given that recovery under quantum meruit is for reasonable fees and MCR 8.121 expressly provides that fees pursuant to a contingency fee agreement up to one-third the amount recovered are reasonable, while fees greater than this amount are clearly excessive. The court rule reflects Michigan's public policy and is aimed at protecting the injured plaintiffs' awards. See *Dupree v Malpractice Research, Inc*, 179 Mich App 254, 262-265; 445 NW2d 498 (1989). Therefore, it follows that even in quantum meruit recovery public policy might mandate protecting the class of litigants to which MCR 8.121 applies.

The *Reynolds* Court was clear, though, that its decision adopting the *Morris* approach to determining attorney fees in quantum meruit was limited to the facts of its case—where the attorney was discharged, but not wrongfully so (i.e., the client had some justification), and he did not commit misconduct. *Reynolds*, 222 Mich App at 28 n 5, 30. Thus, it actually did not preclude the possibility that in some cases, such as those not involving wrongful death or personal injury or where the attorney has been wrongfully discharged or has rightfully withdrawn, it would be reasonable for the trial court to award quantum meruit recovery in an amount greater than the attorney would have been entitled to under the contingency agreement.

In advocating for a limit on quantum meruit awards in cases such as this one, respondents rely on *Rosenberg v Levin*, 409 S2d 1016 (Fla, 1982).[8] *Rosenberg* directly addressed the issue at bar: "The issue to be decided concerns the proper basis for compensating an attorney discharged without cause by his client after he has performed substantial legal services under a valid contract of employment." *Id*. at 1017. The Court recognized:

> There are two conflicting interests involved in the determination of the issue presented in this type of attorney-client dispute. The first is the need of the client to have confidence in the integrity and ability of his attorney and, therefore, the need for the client to have the ability to discharge his attorney when he loses that necessary confidence in the attorney. The second is the attorney's right to adequate compensation for work performed. [*Id*. at 1019.]

[8] We recognize that while not binding precedent, cases from foreign jurisdictions can be persuasive. *Hiner v Mojica*, 271 Mich App 604, 612; 722 NW2d 914 (2006).

In holding that an attorney who is wrongfully discharged is limited in quantum meruit recovery to the maximum amount of attorney fees provided in the contingency fee agreement,[9] the Florida Supreme Court explained:

> The attorney-client relationship is one of special trust and confidence. The client must rely entirely on the good faith efforts of the attorney in representing his interests. This reliance requires that the client have complete confidence in the integrity and ability of the attorney and that absolute fairness and candor characterize all dealings between them. These considerations dictate that clients be given greater freedom to change legal representatives than might be tolerated in other employment relationships. We approve the philosophy that there is an overriding need to allow clients freedom to substitute attorneys without economic penalty as a means of accomplishing the broad objective of fostering public confidence in the legal profession. Failure to limit quantum meruit recovery defeats the policy against penalizing the client for exercising his right to discharge. However, attorneys should not be penalized either and should have the opportunity to recover for services performed. [*Id*. at 1021.]

Other jurisdictions have held similarly emphasizing that the limitation is necessary to protect the client's absolute right to discharge his or her attorney. In *Plaza Shoe Store, Inc v Hermel, Inc*, 636 SW2d 53, 59 (Mo, 1982), the Missouri Supreme Court stated:

> To allow the attorney unlimited recovery under quantum meruit loses sight of the rationale of the modern rule favoring a client's freedom to discharge his attorney without unreasonable burden.
>
> The better rule, undoubtedly, would be to use the contract price as an upper limit or ceiling on the amount the discharged attorney could recover.

In *Chambliss, Bahner & Crawford v Luther*, 531 SW2d 108, 113 (Tenn App, 1975), the Tennessee Court of Appeals reasoned: "It seems to us that a necessary corollary to the rule that a client has the unqualified right to discharge an attorney, must be that the exercise of this legal right does not subject the client to additional penalties requiring him to pay an amount above the contract price." See also *Somuah v Flachs*, 352 Md 241, 268; 721 A2d 680 (1998) (where contingency occurs, maximum quantum meruit recovery is the appropriate portion of the total fee generated by the recovery); *Reid, Johnson, Downes, Andrachik & Webster v Lansberry*, 68 Ohio St 3d 570, 576; 629 NE2d 431 (Ohio, 1994) (limiting discharged attorney's quantum meruit recovery to amount provided in contingency fee agreement).

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[9] The rule also applied to fixed fee contracts. *Id*. at 1021.

Jurisdictions that limit quantum meruit recovery as the *Rosenberg* Court did, generally also hold that an attorney's action for fees accrues only on the successful occurrence of the contingency. *Rosenberg*, 409 S2d at 1022; *Plaza Shoe Store*, 636 SW2d at 60; *Reid*, 68 Ohio St 3d at 575. Thus, the attorney is entitled to a lien on any future settlement or judgment. See *Plaza Shoe Store*, 636 SW2d at 60. Consequently, if there is no recovery by the client, the attorney recovers nothing. *Rosenberg*, 409 S2d at 1022. Conversely, New York allows an attorney who is discharged without cause to recover in quantum meruit for his services immediately upon the termination of the attorney-client contract, an award for which is rendered irrespective of the contingency contract and thus, may exceed the client's recovered award if any. *Finkelstein v Kins*, 124 AD2d 92, 93-95; 511 NYS2d 285 (1987), amended 131 AD2d 351 (1987) (cases cited therein). The justification for this is that "[a] client cannot terminate the agreement and then resurrect the contingency term when the discharged attorney files a fee claim." *In re Estate of Callahan*, 144 Ill 2d 32, 40; 578 NE2d 985 (1991).

While there is merit in both positions, limiting an attorney's quantum meruit recovery of attorney fees to the maximum recoverable under the contingency fee agreement is most in line with existing Michigan law. In this state, an attorney who is wrongfully discharged or rightfully withdraws is entitled to a lien on the ultimate judgment or settlement. *Reynolds*, 222 Mich App at 23. Thus, the attorney's ability to recover is dependent on whether the client recovers, which is the risk the attorney assumes under the contingency fee agreement. Therefore, to hold that simply because the client recovers, the attorney's quantum meruit award can be more than he would have recovered had he still been subject to the contingency fee agreement for which he bargained defies logic. Importantly, a limitation is consistent with the directives in *Reynolds* and *Morris* not to exceed the amount recoverable under MCR 8.121 even though the attorneys were recovering in quantum meruit and not on their contracts. Therefore, under the circumstances in this case, , we cap quantum meruit recovery to the maximum the attorney would have received under the contingency fee agreement. Accordingly, we conclude that the trial court abused its discretion in awarding quantum meruit attorney fees in an amount more than petitioner would have recovered under the contingency fee agreement.

IV

In sum, we conclude that the trial court properly determined that Giles did not commit any disciplinable misconduct. The trial court did not clearly err in finding that Ruby impliedly and wrongfully discharged petitioner. The trial court abused its discretion in awarding petitioner attorney fees in an amount greater than that which he would have been entitled to under the contingency fee agreement. Because respondents do not contest that petitioner is entitled to attorney fees in an amount equal to one-third the settlement amount, we instruct the trial court on remand to enter an order awarding petitioner $70,000 in attorney fees.

Affirmed in part, reversed in part, and remanded with instructions. We do not retain jurisdiction.

Because neither party prevailed in full, we do not award costs.

/s/ David H. Sawyer
/s/ Pat M. Donofrio