

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 5, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP2917

Cir. Ct. No. 2006CV1

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**IN THE MATTER OF ATTORNEY FEES IN: JOY AND MAHUYA DAS,
HUSBAND AND WIFE AND ATTORNEY MARY JO JENSEN-CARTER V. STATE
FARM MUTUAL AUTOMOBILE INSURANCE COMPANY AND BRYAN GUENTHER:**

ATTORNEY MARK N. STAGEBERG,

APPELLANT,

v.

ATTORNEY GREGORY J. EGAN,

RESPONDENT.

APPEAL from a judgment of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Attorney Mark Stageberg appeals a judgment dividing a contingency fee between himself and attorney Gregory Egan.

Stageberg contends Egan was not entitled to compensation under Egan's fee contract with Joy Dip Das, Egan's former client. Stageberg argues Das discharged Egan for cause and that Egan breached his contract with Das. We reject Stageberg's arguments and affirm the judgment.

BACKGROUND

¶2 Joy Dip Das was injured in a motor vehicle accident on August 19, 2003, in Arcadia, Wisconsin. Das retained Egan to pursue personal injury claims, signing a contingency fee contract entitling Egan to one-third of any settlement or judgment.

¶3 In December 2004, Das filed for bankruptcy, and his claims for past medical expenses and lost wages were transferred to a bankruptcy trustee. In March 2005, Egan agreed to represent the bankruptcy trustee in addition to representing Das. Egan informed Das of the dual representation and Das did not object.

¶4 In April 2005, Das discharged Egan and hired Stageberg, a Minnesota attorney, to pursue his claims. Das signed a contingency fee agreement entitling Stageberg to one-third of any recovery. Stageberg sought to represent the bankruptcy trustee as well, but the trustee kept Egan as its attorney. Thus, Stageberg represented Das, while Egan continued representing the bankruptcy trustee.

¶5 However, Egan remained involved in Das's case by rendering assistance to Stageberg. For example, because Stageberg was not licensed to practice law in Wisconsin, Egan drafted the complaint and signed it as attorney for not only the bankruptcy trustee, but also for Das. Stageberg was subsequently

admitted to practice in Wisconsin pro hoc vice utilizing a motion and affidavit drafted by Egan.

¶6 Both Das's and the bankruptcy trustee's claims were ultimately settled with the tortfeasor's insurance company for a total of \$300,000, which was apportioned \$265,000 to Das and \$35,000 to the bankruptcy trustee. This settlement was below the policy limits of \$500,000.

¶7 Egan and Stageberg then disputed whether Egan was entitled to a fee for representing Das. Stageberg filed a motion asking the court to determine an equitable division of attorney fees between himself and Egan. Stageberg and Egan stipulated to the court's jurisdiction to resolve the dispute.

¶8 Egan asserted he was discharged without cause and was therefore entitled to the contingency fee under his contract with Das, less a fair allowance for Stageberg's services. Stageberg asserted Egan was discharged for cause because Das had a good faith basis for the discharge. Stageberg also argued that Egan breached his contract with Das by violating the Rules of Professional Responsibility, which Egan was required to follow under the terms of his contract. Specifically, Stageberg contended Egan violated SCR 20:1.7 because he created a conflict of interest by representing both Das and the bankruptcy trustee without obtaining Das's informed written consent to the conflict.

¶9 Both attorneys submitted affidavits, and the court heard testimony from Das. Das's testimony focused more on his own frustrations than on Egan's conduct. Das was frustrated about the progress of his case in light of his accumulating medical bills, lost job, and eventual bankruptcy. He felt he should be receiving more attention and assurances from Egan and was dissatisfied that Egan could not tell him what his claim was worth. However, Das admitted that

Egan informed him it was difficult to file suit while Das was still receiving treatment and before his condition had stabilized. Das also admitted that, every time he called Egan's office, someone was available to assist him.

¶10 The circuit court concluded Egan was not discharged for cause because “[t]here’s no evidence provided that [Egan] did something that wasn’t within the standard practice or within the standards of the profession in representing [Das].” The court also concluded there was no conflict of interest resulting from his dual representation of Das and the bankruptcy trustee because Stageberg conceded Das would not have been harmed by the alleged conflict. This concession was based on the fact that both claims were settled for \$300,000, well under the policy limits of \$500,000.

¶11 Thus, the court concluded that Egan was entitled to compensation under his contract with Das. The contingency fee from Das’s recovery was \$83,333.33. The court awarded this fee to Egan, less \$22,500 for the time Stageberg spent on the case. This left Egan with \$65,833.33.

DISCUSSION

¶12 We first address Stageberg’s argument that Egan was discharged for cause. A client may freely discharge an attorney. *Markwardt v. Zurich Am. Ins. Co.*, 2006 WI App 200, ¶15, 296 Wis. 2d 512, 724 N.W.2d 669. However, if an attorney is discharged “without cause or fault on his part” before performing services specified in a contract, the client has breached the contract. *Tonn v. Reuter*, 6 Wis. 2d 498, 503, 95 N.W.2d 261 (1959). When the contract provides for a contingent fee, the proper measure of the attorney’s damages “is the amount of the contingent fee based upon the amount of the settlement or judgment ultimately realized by the client, less a fair allowance for the services and expenses

which would necessarily have been expended by the discharged attorney in performing the balance of the contract.” *Id.* at 505. However, the allowance for services to complete the contract may not be computed as a percentage of the contingent fee using a fraction of the total work not performed.¹ *Id.*

¶13 Wisconsin case law does not specifically define what constitutes “cause or fault on [the attorney’s] part” under *Tonn*. See *id.* at 503. However, we have addressed when an attorney’s conduct rises to the level of a breach of contract barring the attorney from recovering under the contract. *McBride v. Wausau Ins. Cos.*, 176 Wis. 2d 382, 388, 500 N.W.2d 387 (Ct. App. 1993). In *McBride*, we concluded an attorney breached a contract with the client when the attorney injured the client by failing to reasonably perform legal services consistent with the standard of care required of the profession. *Id.*

¶14 Reading *McBride* in conjunction with *Tonn*, we conclude an attorney is discharged for cause when the attorney breaches the contract with the client. Thus, cause or fault on the attorney’s part exists under *Tonn* when the attorney fails to reasonably perform services consistent with the standard of care required of attorneys. See *McBride*, 176 Wis. 2d at 388.

¶15 Stageberg does not contend that Egan was discharged because he failed to reasonably perform consistent with the standard of care required of attorneys. Instead, Stageberg argues that a purely subjective standard for cause should be applied, resting solely on the client’s state of mind. He argues that cause to discharge an attorney should exist when the client has a good faith basis

¹ Stageberg does not contest the court’s application of this formula.

for the discharge, regardless of whether the attorney acted competently, citing *Somuah v. Flachs*, 721 A.2d 680, 687 (Md. App. 1998). However, the *Somuah* court derived the “good faith basis” standard from principles of Maryland contract law. *See id.* at 686. Stageberg points to no principles of Wisconsin contract law supporting the use of that standard here.

¶16 By contrast, our decision in *McBride* was based on principles of Wisconsin contract law. We applied those principles to determine when an attorney’s conduct constituted a breach of contract that barred the attorney from recovering fees under a contract. *See McBride*, 176 Wis. 2d at 388. Because Egan was not discharged due to any failure to perform consistent with the standard of care required of attorneys, he was not discharged for cause, and he was not barred from recovering a fee under his contract with Das. *See id.*

¶17 We next address Stageberg’s argument that Egan is entitled to no fee because he breached his contract with Das.² *See id.* at 388. The contract between Egan and Das states that Egan “agrees that he will comply with all the applicable provisions of the Code of Professional Responsibility.” Stageberg contends Egan violated the rules of professional responsibility by representing both Das and the

² This analysis is independent of the analysis above because the alleged breach was not a basis for Das discharging Egan.

bankruptcy trustee, which Stageberg contends was a conflict of interest, without obtaining Das's written consent, contrary to SCR 20:1.7.³

¶18 Supreme Court Rule 20:1.7(a) (2008), provides in part:

(a) Except as provided in par. (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

If a concurrent conflict of interests exists, a lawyer may still represent a client if, among other things, "each affected client gives informed consent, confirmed in a writing signed by the client." SCR 20:1.7(b)(4).

¶19 We need not decide whether Egan was required to obtain Das's written informed consent to the dual representation of Das and the bankruptcy trustee because we conclude that any resulting breach of contract was not a

³ Within his argument that Egan breached the contract, Stageberg also argues that Egan's fees must be forfeited because he breached his duties as a fiduciary. However, this argument is based on Egan's alleged violation of SCR 20:1.7. As explained in *Peck v. Medi-Care Ambulance Corp.*, 156 Wis. 2d 662, 673, 457 N.W.2d 538 (Ct. App. 1990), the Rules of Professional Conduct for Attorneys, formerly called the Code of Professional Responsibility, cannot be used to define standards of care for the purpose of civil liability. As a result, a breach of fiduciary duty claim cannot rest solely on a violation of these rules. *Id.* at 674. Because Stageberg's assertion that Egan breached a fiduciary duty is based on the alleged violation of SCR 20:1.7, his breach of fiduciary duty argument is undeveloped and we need not address it. See *Kristi L.M. v. Dennis E.M.*, 2007 WI 85, ¶20 n.7, 302 Wis. 2d 185, 734 N.W.2d 375 (undeveloped arguments need not be addressed).

material breach. We further conclude that Das waived any claim that the breach was material.

¶20 To be a material breach of contract, the breach must be so serious as to “destroy the essential objects of the contract.” *Management Computer Servs. v. Hawkins*, 206 Wis. 2d 158, 183, 557 N.W.2d 67 (1996). The materiality of a breach may be waived by the non-breaching party’s actions. *Id.* at 183-84.

¶21 Regarding the materiality of the alleged breach, Stageberg conceded that Das would not have been harmed by the breach. *See McBride*, 176 Wis. 2d at 388. Notably, in *McBride*, we relied on the fact that the attorney’s conduct caused harm to the client. *See id.*

¶22 Further, during the time when Egan was performing the contract, Das did not raise concern about a conflict of interest, nor did he communicate that he considered Egan to have breached their contract. Instead, the issue only arose after Egan’s discharge, when Stageberg sought to prevent Egan from collecting a fee for working on Das’s case. Under the circumstances, there is no basis for concluding the alleged breach destroyed an essential object of the contract. *See Management Computer Servs.*, 206 Wis. 2d at 183.

¶23 Das also waived the materiality of the alleged breach by his actions. *See id.* at 183-84. As stated above, the alleged breach was not raised during Egan’s performance of the contract. Instead, it is an after-the-fact issue created by Stageberg for the purpose of this fee dispute. Further, Stageberg and Das continued to take advantage of Egan’s services after the alleged conflict arose and after Egan’s discharge.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

