No. 2D15-4713

IN THE SECOND DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

D. MICHAEL ELKINS, P.A. and WILLIAM H. MCANNALLY IV, P.A.,

Appellants,

v.

THERESA WAGNER-SIMPSON, Individually and as Mother and Natural Guardian of GABRIEL TATE WAGNER, a Minor,

Appellee.

On Appeal from the Circuit Court of the Thirteenth Judicial Circuit
in and for Hillsborough County, Florida
L.T. No. 13-CA-11403, Hon. Elizabeth G. Rice

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE AND FACTS

Statement Of The Case

On September 9, 2009, Gabriel Tate Wagner, a 13-year-old boy, tripped on a church's wooden step. Tr. 8. He fell down and broke his femur. Tr. 8. Because Mr. Wagner was hemophiliac, he suffered serious complications. R. 157-63.

To redress these serious injuries, Mr. Wagner's mother, Appellee Theresa Wagner-Simpson, retained Appellants D. Michael Elkins, P.A. and William H. McAnnally IV, P.A. to represent her son in personal injury litigation. R. 142-48. Specifically, in an agreement dated December 21, 2009, Appellants agreed to represent Ms. Wagner-Simpson and Mr. Wagner on a contingency basis. R. 142-48.

Initially, Ms. Wagner-Simpson and Appellants were in close communication. Tr. 19-22. But after three months of her silence, and before Appellants could file the lawsuit, Ms. Wagner-Simpson e-mailed Appellants and told them, "Do not initiate any further action in Gabe's case until I have had time to properly review your latest correspondence and the complaint." R. 175. After Ms. Wagner-Simpson failed to respond to several of Appellants' efforts to contact her, Appellants wrote Ms. Wagner-Simpson 9 months later to notify her that, by her 12 months of silence other than one e-mail, she had "constructively discharged" them. R. 185.

Thereafter, Ms. Wagner-Simpson retained new counsel, who filed the lawsuit. R. 10-13. Appellants filed a charging lien. App. A. Eventually, Ms. Wagner-Simpson settled the litigation for a confidential amount. *See* Tr. 10.

At that point, Ms. Wagner-Simpson moved to determine the validity of the charging lien. R. 114-22. In response, Appellants filed a motion to validate and enforce their charging lien. R. 130-95.

The trial court convened a hearing, which was transcribed. R. 210-55. At the conclusion of the hearing, the trial court orally ruled the charging lien was invalid, but awarded Appellants their costs. Tr. 32-35. The trial court reduced its oral ruling to a written order. R. 198-99. Appellants timely appealed. R. 200-03.

Statement Of The Facts

A. The Motions Regarding The Charging Lien

In her motion, Ms. Wagner-Simpson argued the charging lien was invalid because Appellants had voluntarily withdrawn from representing her. R. 114-15. Specifically, Ms. Wagner-Simpson relied on the Florida Supreme Court's decision in *Faro* v. *Romani*, 641 So. 2d 69 (Fla. 1994), for the proposition that a charging lien on a contingency arrangement is invalid when an attorney voluntarily withdraws unless the client's conduct makes the attorney's continued performance of the contract either legally impossible or would cause the attorney to violate an ethical rule. R. 115-17. Ms. Wagner-Simpson argued neither exception applied. R.

116-17. But Ms. Wagner-Simpson did not address whether she had already constructively discharged Appellants before they withdrew from representing her.

In response, Appellants argued that Ms. Wagner-Simpson had constructively discharged them before they so notified her. R. 131. Alternatively, Appellants also argued that even if Ms. Wagner-Simpson had not constructively discharged them, they still fell within *Faro*'s two exceptions because her conduct made their continued representation either legally impossible or unethical. R. 132. In making these arguments, Appellants attached the engagement letter, the original demand letter, correspondence with Ms. Wagner-Simpson, a draft of the complaint, correspondence with lienholders, cost records, and an affidavit. R. 142-195. In particular, the demand letter asked for the insurance policy limit of $1 million. R. 157-63.

B. The Hearing

At the hearing, Ms. Wagner-Simpson reiterated her arguments and placed her reliance primarily on the Florida Supreme Court's decision in *Faro*, this Court's decision in *DePena* v. *Cruz*, 884 So. 2d 1062 (Fla. 2d DCA 2004), and the Fourth District's decision in *Kocha & Jones* v. *Greenwald*, 660 So. 2d 1074 (Fla. 4th DCA 1995). Tr. 8-19.[1]

In response, Appellants also reiterated their arguments. Tr. 19-32. First, Appellants argued that Ms. Wagner-Simpson had constructively discharged them. Tr.

[1] In *DePena*, the lawyer conceded neither of *Faro*'s exceptions applied, and *Kocha & Jones* involved a difficult client, but not one who discharged his lawyer.

19-32. Second, Appellants argued that their charging lien would have fallen within one of *Faro*'s exceptions because continuing representation would have been unethical after Ms. Wagner-Simpson constructively discharged them. Tr. 29. Appellants did, however, concede that *Faro*'s other exception did not apply because continued representation would not have been impossible. Tr. 28 ("presumably, I guess, we could have held on to the day before the statute and then found out—told her again that you need to let us know").[2]

In making these arguments, Appellants emphasized the volume of contacts between them and Ms. Wagner-Simpson between the time she retained them and stopped interacting with them. Tr. 19. Specifically, between the time Ms. Wagner-Simpson retained Appellants on December 21, 2009 and until April 22, 2010, Ms. Wagner-Simpson sent Appellants 31 e-mails. Tr. 19. In response, Appellants sent Ms. Wagner-Simpson 45 e-mails. Tr. 19. "So, obviously, there was a lot of e-mail, a lot of contact going back and forth." Tr. 19. During that time, Appellants collected records, met with Ms. Wagner-Simpson, and prepared a demand letter and related correspondence. *See* R. 157-64.

Appellants also emphasized that, after Ms. Wagner-Simpson's e-mail of April 22, 2010, they continued to correspond with her extensively and repeatedly requested her to respond and to authorize them to proceed with the litigation. Tr.

[2] Appellants do not challenge the trial court's impossibility ruling on appeal. *See* R. 199 ¶ 3(d).

19-20. Specifically, Appellants sent e-mails and letters to Ms. Wagner-Simpson on April 22, May 4, May 11, June 10, and June 15, 2010. Tr. 19. On July 21, 2010, Appellants circulated a draft complaint to Ms. Wagner-Simpson. Tr. 20. On July 27, 2010, Ms. Wagner-Simpson responded and directed Appellants to take no further action. Tr. 20.

Thereafter, Appellants still continued to correspond with Ms. Wagner-Simpson on November 10 and December 1, 2010, notified her about lienholder claims, and asked for her to respond or authorize them to continue settlement discussions or commence litigation. Tr. 20-22. Ms. Wagner-Simpson never responded. Tr. 20-22. Eventually, Appellants wrote Ms. Wagner-Simpson again on April 26, 2011, explained to her that she had "constructively discharged" them by her 12 months of silence and inaction, and notified her that they would be filing a charging lien. Tr. 22. Even then, Ms. Wagner-Simpson still did not respond to Appellants. *See* Tr. 22-23.

SUMMARY OF ARGUMENT

The trial court erred when it determined the lien was invalid for two reasons:

First, the trial court mistakenly analyzed the question whether Ms. Wagner-Simpson constructively discharged Appellants under the rubric of *Faro* v. *Romani*, 641 So. 2d 69 (Fla. 1994). Instead, the trial court should have analyzed that question under the rubric of *Rosenberg* v. *Levin*, 409 So. 2d 1016, 1017 (Fla. 1982),

and other cases that address constructive discharge. Had it done so, it would have concluded that Ms. Wagner-Simpson constructively discharged Appellants and that Appellants were entitled to recover the quantum meruit value of their services, limited by the maximum fee set out in their contingency fee arrangement.

Second, the trial court erred when it concluded Appellants' withdrawal did not fall within *Faro*'s exceptions. It would have been unethical for Appellants to continue representing Ms. Wagner-Simpson after she constructively discharged them, because they were required to withdraw. Fla. R. Prof'l Conduct 4-1.16(a)(3).

ARGUMENT

I. ISSUE: DID THE TRIAL COURT ERR WHEN IT RULED THAT APPELLANTS' CHARGING LIEN WAS INVALID?

The trial court erred when it ruled that Appellants had voluntarily withdrawn instead of ruling that their charging lien was enforceable because Ms. Wagner-Simpson constructively discharged them. The trial court also erred when it ruled that Appellants did not fall within *Faro*'s exceptions because Ms. Wagner-Simpson's conduct made their continued representation unethical.

Standard Of Review

Whenever there are no factual disputes, this Court reviews pure questions of law de novo and gives no deference to a trial court's judgment. *D'Angelo* v. *Fitzmaurice*, 863 So. 2d 311, 313 (Fla. 2003); *accord Robin Roshkind, P.A.* v. *Machiela*, 45 So. 3d 480, 481 (Fla. 4th DCA 2010) ("We review trial court orders on

attorney's fees for an abuse of discretion. We have de novo review however of the trial court's interpretation of law." (citations omitted)).

Merits

A. Under *Rosenberg* v. *Levin*, The Charging Lien Was Valid Because Ms. Wagner-Simpson Constructively Discharged Appellants

The trial court erred when it ruled that Appellants had voluntarily withdrawn instead of ruling that their charging lien was enforceable because Ms. Wagner-Simpson had constructively discharged them.

In *Rosenberg* v. *Levin*, the Florida Supreme Court held that "a lawyer discharged without cause is entitled to the reasonable value of his services on the basis of quantum meruit, but recovery is limited to the maximum fee set in the contract entered into for those services." 409 So. 2d 1016, 1017 (Fla. 1982). In *Faro* v. *Romani*, however, the Florida Supreme Court clarified that "when an attorney withdraws from representation upon his own volition, and the contingency has not occurred, the attorney forfeits all rights to compensation." 641 So. 2d 69, 71 (Fla. 1994). Nevertheless, under *Faro*, there are two exceptions: when "the client's conduct makes the attorney's continued performance of the contract either legally impossible or would cause the attorney to violate an ethical rule of the Rules Regulating The Florida Bar." *Id.*

In light of *Rosenberg*'s and *Faro*'s legal frameworks, the first issue to resolve is whether Ms. Wagner-Simpson discharged Appellants without cause, or

whether Appellants voluntarily withdrew from representing her. Ordinarily, there is little question whether a client has in fact discharged his or her lawyer, because the client expressly informs the lawyer that he or she has been fired. *See id.* But sometimes, as here, the issue is not so clear.

The closest analog to this situation is employment law, where, "to prevail on a constructive discharge claim, an employee must show, under an objective standard, that the employer made working conditions so difficult that a reasonable person would feel compelled to resign." *Webb* v. *Fla. Health Care Mgmt. Corp.*, 804 So. 2d 422, 424 (Fla. 4th DCA 2001); *accord LeDew* v. *Unemployment Appeals Comm'n*, 456 So. 2d 1219, 1223-24 (Fla. 1st DCA 1984) ("Under federal case law appellant's resignation would be considered a constructive discharge, meaning that a person may be deemed discharged if the words and actions of the employer would logically lead a prudent person to believe his tenure had been terminated."). Under this standard, it is clear that Ms. Wagner-Simpson constructively discharged Appellants by remaining silent, except for one short e-mail directing Appellants to take no further action, for 12 consecutive months.

Under an objective standard, Ms. Wagner-Simpson's silence and inaction made Appellants' working conditions so difficult that they reasonably felt compelled to resign. Appellants had obligations to respond to lienholders and otherwise move forward with settlement discussions and litigation, if necessary. But Ms.

Wagner-Simpson put Appellants in a situation where they were powerless about whether and how to proceed. After 12 months of almost complete silence, despite repeatedly writing to her, Appellants reasonably felt they had already been constructively discharged, so they took the reasonable step of memorializing Ms. Wagner-Simpson's conduct in a letter. R. 185. Indeed, even after Ms. Wagner-Simpson received this final letter, it is notable that she still did not respond.

Because the situation was that Ms. Wagner-Simpson constructively discharged Appellants, rather than that Appellants voluntarily withdrew from representing Ms. Wagner-Simpson, the controlling legal authority is *Rosenberg*, not *Faro*. The trial court erred when it analyzed this situation under *Faro*'s prism rather than *Rosenberg*'s prism. Under *Rosenberg*, the charging lien was valid.

B. Even Under *Faro* v. *Romani*, The Charging Lien Was Still Valid Because Ms. Wagner-Simpson's Conduct Made Appellants' Continued Representation Unethical

Even under *Faro*, the trial court still erred when it ruled the charging lien was invalid because Appellants' continued representation would have fallen within *Faro*'s exception regarding ethical violations.

According to *Faro*, "when an attorney withdraws from representation upon his own volition, and the contingency has not occurred, the attorney forfeits all rights to compensation." 641 So. 2d at 71. Nevertheless, there is an exception when "the client's conduct . . . would cause the attorney to violate an ethical rule of the

Rules Regulating The Florida Bar." *Id.* Relevant here, Florida Rule of Professional Conduct 4-1.16(a)(3) provides that "a lawyer . . . *shall* withdraw from the representation of a client if: the lawyer is discharged." Fla. R. Prof'l Conduct 4-1.16(a)(3) (emphasis added). Accordingly, as soon as Ms. Wagner-Simpson constructively discharged Appellants, they had an ethical obligation to withdraw. Because withdrawal was ethically mandatory, not optional, Appellants fell squarely within *Faro*'s exception,[3] and the trial court erred when it ruled otherwise. *Cf. Collier* v. *Bohnet*, 966 So. 2d 1033, 1035 (Fla. 4th DCA 2007) (reversing and remanding for evidentiary hearing regarding whether withdrawal was mandatory).

CONCLUSION

For the foregoing reasons, the Court should reverse the order and remand for further proceedings.

Respectfully submitted,

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[3] This is why cases like *DePena* and *Kocha & Jones* are distinguishable: those cases did not involve clients who discharged their lawyers. *See supra* note 1.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 7, 2016, I electronically served the following via the Florida e-portal: Jody M. Valdes (service@wsvlegal.com and nps-ervice@wsvlegal.com) of Weekley Schulte Valdes, LLC, 1635 North Tampa Street, Suite 100, Tampa, FL 33602; D. Michael Elkins (dmichaelelkins@mac.com) of D. Michael Elkins, P.A., 1312 East Lumsden Road, Brandon, FL 33511; and William H. McAnnally, IV (menawa@aol.com), of William H. McAnnally, IV, P.A., P.O. Box 304, Valrico, FL 33595.

March 7, 2016 /s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

March 7, 2016 /s/ Thomas Burns
Thomas A. Burns