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

REPLY BRIEF OF APPELLANTS

Thomas A. Burns (FBN 12535)
BURNS, P.A.
301 West Platt Street, Suite 137
Tampa, FL 33606
(813) 642-6350 T
(813) 642-6350 F
tburns@burnslawpa.com

Counsel for Appellants

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ARGUMENT

I. CONTRARY TO MS. WAGNER-SIMPSON'S ARGUMENTS, THE TRIAL COURT ERRED WHEN IT RULED APPELLANTS' CHARGING LIEN WAS INVALID

Appellants and Ms. Wagner-Simpson still disagree about several things.

A. Ms. Wagner-Simpson Asks This Court To Apply An Incorrect Standard Of Review

First, Ms. Wagner-Simpson asks this Court to apply an incorrect standard of review. *See* Answer Br. 7. This appeal does not involve any disputed facts. Instead, the facts are those set out in the trial court papers and hearing. The only questions, therefore, concern the legal ramifications of those facts. And it is well established that the review of such questions of law is always de novo. *D'Angelo* v. *Fitzmaurice*, 863 So. 2d 311, 313 (Fla. 2003); *Santini* v. *Cleveland Clinic Fla.*, 65 So. 3d 22, 29 (Fla. 4th DCA 2011); *Robin Roshkind, P.A.* v. *Machiela*, 45 So. 3d 480, 481 (Fla. 4th DCA 2010).

B. Ms. Wagner-Simpson Repeatedly Injects Facts That Are Not Contained in The Record On Appeal

Second, Ms. Wagner-Simpson's brief repeatedly injects facts outside the record. For instance, Ms. Wagner-Simpson claims she and her son "have yet to receive their current settlement proceeds due to this current [charging lien] dispute," that her son still "was in a long leg cast and required her care" ten months after his accident in July 2010, and that "any silence was simply due to her focusing on the recovery of her son." Answer Br. 1, 3, 9. Those asserted facts are not contained in

the record on appeal, so this Court cannot consider them. *E.g.*, *Altchiler* v. *State, Dep't of Prof'l Regulation*, 442 So. 2d 349, 350 (Fla. 1st DCA 1983) ("an appellate court may not consider matters outside the record").[1]

Moreover, in reality, the first time Ms. Wagner-Simpson expressed any of these supposed concerns to Appellants was when she filed her answer brief. *Cf. Hayes* v. *State*, 94 So. 3d 452, 463 (Fla. 2012) ("'the appellate court is not a forum for conducting an after-the-fact . . . inquiry,' and where 'no inquiry is conducted, '[d]eference cannot be shown to a conclusion that was never made'"); *see also Powell* v. *State*, 120 So. 3d 577, 590 (Fla. 1st DCA 2013) (tipsy coachman doctrine applies only where "legal arguments are supported by the record"). Although some of those facts may have been part of Ms. Wagner-Simpson's subjective thought process, it is undisputed she did not share those reasons with Appellants as the reason for her delay in responding to Appellants' correspondence. Tr. 31 ("there's no evidence whatsoever as to the plaintiff's reasons for her conduct").

It also would not explain why Ms. Wagner-Simpson would require many months to review a three-page draft complaint. *See* R. 156-58. Had Ms. Wagner-Simpson raised these concerns at any time during her 12 months of almost complete silence, Appellants could have acted upon them, informed the lien holder she

[1] Although some appellate lawyers might move to strike these extra-record facts, *e.g.*, *Ransom* v. *State*, 601 So. 2d 279, 280 (Fla. 1st DCA 1992), it is unnecessary here because counsel trusts the Court knows how to excise them and read only the actual record on appeal.

was going to file suit but needed to wait for her son to recover, and proceeded as necessary. Ms. Wagner-Simpson's silence prevented Appellants from doing so.

C. Constructive Discharge Is Not Analogous To A Breakdown In Attorney-Client Communication

Third, Ms. Wagner-Simpson attempts to analogize a constructive discharge with a breakdown in attorney-client communication. *See* Answer Br. 12-13. But the analogy disintegrates upon close review. A constructive discharge occurs when an "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). In contrast, a breakdown in attorney-client communications occurs when the relationship has "deteriorated to a point where counsel can no longer give effective aid in the fair presentation of a [client's case]." *Sanborn* v. *State*, 474 So. 2d 309, 314 (Fla. 3d DCA 1985). In other words, if anything, a breakdown in attorney-client communications would occur based on lesser conduct and before a constructive discharge would occur. For that reason, cases that hold voluntary withdrawals based a breakdown in attorney-client communications are distinguishable. *E.g.*, *DePena* v. *Cruz*, 884 So. 2d 1062 (Fla. 2d DCA 2004); *Steven J. Kirschner, P.A.* v. *Biritz*, 843 So. 2d 349 (Fla. 5th DCA 2003); *Kocha & Jones* v. *Greenwald*, 660 So. 2d 1074 (Fla. 4th DCA 1995); *Kay* v. *Home Depot, Inc.*, 623 So. 2d 764 (Fla. 5th DCA 1993).

D. Allowing Attorney Compensation Based On A Constructive Discharge Would Not Frustrate The Policy Of Quantum Meruit Because The Test Is Objective, Not Subjective

Fourth, Ms. Wagner-Simpson's policy argument that allowing attorney compensation based on a constructive discharge theory would frustrate the policy of quantum meruit (Answer Br. 13-14) is misplaced. Contrary to Ms. Wagner-Simpson, allowing attorney compensation under a constructive discharge theory would never turn on the attorneys' "subjective beliefs" whether they had been discharged. Answer Br. 14. Instead, the test is objective. *Webb*, 804 So. 2d at 424 ("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" (emphasis added)).

In short, allowing attorney compensation under a constructive discharge theory would advance the twin policies that clients should have "freedom to substitute attorneys without economic penalty" while "attorneys should not be penalized either and should have the opportunity to recover for services performed." *Rosenberg* v. *Levin*, 409 So.2d 1016, 1021 (1982).

E. Ms. Wagner-Simpson Misplaces Her Reliance On Cases That Denied Attorney Compensation When The Attorney Was Responsible For The Ethical Problem That Required Withdrawal

Fifth, Ms. Wagner-Simpson misunderstands Appellants' argument that ethics required them to withdraw after she constructively discharged them. *See* An-

swer Br. 14-16. Specifically, Ms. Wagner-Simpson relies on two distinguishable cases for the proposition that attorneys who withdraw for ethical reasons "may not be entitled to compensation." Answer Br. 15. But *Santini* is distinguishable because the attorney's withdrawal "was not made necessary by [the client's] conduct." 65 So. 3d at 32 n.12 ("at best, an attorney who withdraws due to a professional association suspension should be treated no better than an attorney who is discharged for cause"). And *In re Naturally Beautiful Nails, Inc.* is likewise distinguishable because "the cause for the withdrawal was [the lawyer's] own doing." 2004 Bankr. LEXIS 1861, at *5 (Bankr. M.D. Fla. 2004) (denying compensation where law firm withdrew to avoid conflict of interest it created through merger with other law firm). The reality here is that, if Appellants are correct that Ms. Wagner-Simpson constructively discharged them, which would have occurred as a result of *her* decision and actions or inaction, then they would have had an ethical duty to withdraw: "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).

F. The Court Should Remand For Further Proceedings, Including An Evidentiary Hearing, Regarding The Amount Of Fees Recoverable Under The Charging Lien

Finally, Ms. Wagner-Simpson responds to an argument Appellants did not make when she contends the Court should not remand for an evidentiary hearing regarding entitlement to a charging lien. *See* Answer Br. 16-17. Instead, Appellants

contend the Court should reverse the order on appeal and remand for further proceedings, including an evidentiary hearing, regarding the amount of fees recoverable under the charging lien.

CONCLUSION

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

Respectfully submitted,

/s/ Thomas Burns
Thomas A. Burns (FBN 12535)
BURNS, P.A.
301 West Platt Street, Suite 137
Tampa, FL 33606
(813) 642-6350 T
(813) 642-6350 F
tburns@burnslawpa.com

Counsel for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 2, 2016, I electronically served the following via the Florida e-portal: Jody M. Valdes (service@wsvlegal.com and npservice@wsvlegal.com) and Jessica Dareneau (service@wsvlegal.com and npservice@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.

May 2, 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.

May 2, 2016

/s/ Thomas Burns
Thomas A. Burns