



## Case Summary and Issues

Following a bench trial, the law firm of Wernle Ristine & Ayers (the “Firm”) received a judgment in its favor and against Scott French in the amount of \$9,1164.63 based on a debt for legal services rendered. At trial, Scott argued he was entitled to equitable relief in the form of fee disgorgement based on the Firm’s alleged breach of fiduciary duty. The trial court, however, rejected that argument on the ground that Scott had waived his right to challenge the Firm’s alleged breach. On cross-appeal by Scott, we conclude the trial court’s conclusion regarding Scott’s waiver was clearly erroneous and remand for the trial court to address Scott’s claim for equitable relief on its merits. We also address the issues raised by the Firm in its appeal, which concern the trial court’s failure to award the Firm prejudgment interest, and conclude the trial court’s decision was not clearly erroneous because the Firm waived its right to request such interest. Accordingly, we affirm in part, reverse in part, and remand with instructions.

## Facts and Procedural History

In approximately June of 1999, Scott and his wife, Diane, retained James Ayers, an attorney with the Firm, to represent them in a litigation matter concerning the construction of their home. Over the next several months, the Frenches’ marriage deteriorated to the point that Diane asked Ayers if he would help her obtain emergency custody of her and Scott’s two children. Although the construction litigation was ongoing, Ayers agreed and filed a petition for emergency custody on October 8, 1999. After the emergency custody issue was resolved, Ayers filed a petition for dissolution of marriage on Diane’s behalf on February 18, 2000.

Ayers then sent the Frenches a letter dated February 28, 2000, informing them the construction litigation was scheduled for mediation on March 30, 2000, and requesting the following from Scott: “Scott: Since I have filed the dissolution action for Diane, I need your written consent if you want me to keep representing you” in the construction litigation. Appellant’s Appendix at 153. The letter went on to provide a signature block for Scott to aver to the following: “Mr. Ayers: I desire that you continue to represent me” in the construction litigation. Id. Scott signed the letter on March 30, 2000, before the mediation commenced.

The mediation resulted in a settlement agreement. According to Ayers, the settlement agreement was favorable to the Frenches because it released them from substantial damages claims by various contractors and required them only to pay legal expenses they had incurred. In that respect, on July 17, 2000, Ayers sent the Frenches a bill stating a balance due of \$9,114.63 for legal services rendered in the construction litigation matter. Several months later, the bill was admitted into evidence at the final hearing for the Frenches’ marriage dissolution. Although Scott and Diane apparently stated during the hearing that they were willing to split the balance evenly, the dissolution court allocated the entire debt to Scott, but failed to state the amount of the debt in its decree:

IT IS FURTHER ORDERED ADJUDGED AND DECREED that Scott French pay . . . the attorney for the civil case the parties had before and that he save and hold harmless Diane French from any claim or demand that may be made on account of any of those debts or obligations.

Id. at 210. A divided panel of this court affirmed the dissolution court’s decree, though the debt to the Firm was not an issue addressed on appeal. French v. French, No. 54A01-0104-

CV-151, slip op. at 12 (Ind. Ct. App., Dec. 27, 2001). Thus, faced with a debt that was owing to the Firm, albeit in an amount yet to be determined, Diane sought to enforce Scott's obligation through the dissolution proceeding by filing a contempt petition. The dissolution court, however, dismissed the petition on the ground that Diane lacked authority under the decree to coerce payment of the debt. On appeal by Diane, a panel of this court unanimously affirmed the dissolution court, reasoning that "[i]n the absence of a fixed amount in attorney's fees due, we fail to see how Diane would enforce Scott's payment of this debt to Attorney Ayers" and that even if the amount of the debt had been judicially determined, "only Attorney Ayers, as creditor of a joint debt of the marriage, can enforce payment of his invoice." French v. French, 821 N.E.2d 891, 897 (Ind. Ct. App. 2005).

Seizing on this latter remark by the French panel, on March 2, 2005, the Firm filed a complaint against Scott seeking payment of the debt plus prejudgment interest at a monthly rate of 1.5 percent as specified in the July 17, 2000, bill. On October 30, 2007, the trial court conducted a hearing, at which it heard testimony from Ayers and Scott and admitted several documents into evidence. On January 23, 2008, the trial court entered findings of facts and conclusions of law. The relevant findings included several of the facts mentioned above, namely, that on March 30, 2000, Scott signed the letter expressing his desire for Ayers to continue representing him in the construction litigation and that on July 17, 2000, the Firm sent the Frenches a bill stating a balance due of \$9,114.63 for legal services rendered in the construction litigation matter. Based on these findings, the trial court concluded Scott waived his claim for equitable relief based on Ayers's alleged breach of fiduciary duty and

that the Firm was entitled to recover \$9,114.63 from Scott. The trial court, however, refused to award the Firm prejudgment interest, reasoning that the rate specified in the July 17, 2000, bill was invalid in the absence of truth-in-lending disclosures and that Firm had made no such disclosures to Scott. Accordingly, the trial court entered judgment in favor of the Firm and against Scott in the amount of \$9,114.63. On February 22, 2008, the Firm filed a motion to correct error, which the trial court denied on March 5, 2008. The Firm now appeals the trial court's refusal to award prejudgment interest, and Scott cross-appeals the trial court's conclusion that he waived his claim for equitable relief.

### Discussion and Decision

#### I. Standard of Review

In cases such as this one where the trial court enters findings of fact and conclusions of law pursuant to the parties' request, we apply a two-tiered standard of review. Mueller v. Karns, 873 N.E.2d 652, 657 (Ind. Ct. App. 2007). We determine first whether the evidence supports the findings and then determine whether the findings support the judgment. Id. We will not reverse the trial court's findings or the judgment unless clearly erroneous. Ind. Trial Rule 52(A); Mueller, 873 N.E.2d at 657. A finding is clearly erroneous when the record lacks any evidence or reasonable inferences from the evidence to support it. Mueller, 873 N.E.2d at 657. The judgment is clearly erroneous when it is unsupported by the findings and the conclusions. Id. In conducting this review, we neither reweigh evidence nor judge witness credibility, and consider the evidence in a light that is most favorable to the judgment. Id. To conclusions of law, however, we owe no deference and therefore apply a

de novo standard of review. Id.

## II. Propriety of Trial Court's Decision

### A. Waiver of Conflict of Interest

Scott argues on cross-appeal that the trial court improperly concluded he waived his claim for equitable relief. Although it did not state so explicitly in its findings of fact and conclusions of law, the trial court's conclusion regarding Scott's waiver apparently was based on the February 28, 2000, letter Ayers sent to the Frenches, specifically the portion of the letter informing Scott of his representation of Diane in the dissolution proceeding and requesting Scott's "written consent" if he wanted Ayers to continue to represent him in the construction litigation. Appellant's App. at 153. Scott signed the letter on March 30, 2000, thereby expressing his "desire that [Ayers] continue to represent [him]" in the construction litigation. Id. The trial court apparently concluded this disclosure by Ayers and averment by Scott was sufficient to preclude Scott's claim for equitable relief because it constituted a waiver of any conflict of interest that might have existed as a result of Ayers's simultaneous representation of the Frenches in the construction litigation and of Diane in the dissolution proceeding.

This court's opinion in Van Kirk v. Miller, 869 N.E.2d 534, 543-44 (Ind. Ct. App. 2007), trans. denied, instructs that a valid conflict-of-interest waiver turns on whether the client gave "informed consent" that was "confirmed in writing" within the meaning of Rule 1.7 of the Indiana Rules of Professional Conduct. Comment 18 to Rule 1.7 states, "Informed consent requires that each affected client be aware of the relevant circumstances and of the

material and reasonably foreseeable ways that the conflict could have adverse effects on the interest of that client.” See also Prof. Cond. R. 1.0(e) (“‘Informed consent’ denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”). Comment 20 explains that the purpose of having informed consent confirmed in writing is “to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.”

The record indicates that Ayers did not discuss the purpose of the letter with Scott in any significant detail, if at all, which means we are left with an expression of Scott’s desire that Ayers continue to represent him in the construction litigation. We fail to see how, by merely expressing a desire for continued representation, Scott gave “informed consent” within the meaning of Rule 1.7. Notably absent from the letter Scott signed is any indication that he was apprised of the risks accompanying Ayers’s simultaneous representation of Scott and Diane in the construction litigation and of Diane in the dissolution proceeding. We also note that Scott’s decision to sign the letter is hardly surprising, as he signed it on the eve of the March 30, 2000, mediation session, having been told that he would need to get another lawyer to represent him if he did not sign. See Transcript at 49 (Ayers’s testimony: “Q. . . . Did you ever discuss with Scott the fact that there was a conflict? A. I didn’t tell him there was a conflict, I said, I’m representing Diane, period, and I’m going to continue to represent her. You, you can go get someone else if you want, if you want me to do it, you have to tell

me explicitly that you want me to do, to continue to represent you. There was no . . . Q. Did you . . . A. There was no conflict as in any interest.”); *id.* at 50-51 (Ayers’s testimony: “Q. Did you advise Mr. French then of the alternatives if he did not sign the document? A. That he’d have to get his own lawyer. Q. Pardon me? A. He’d have to get another lawyer.”). Under such circumstances, we conclude that by signing the letter, Scott did not give informed consent to Ayers’s representation of Diane in the dissolution proceeding. Accordingly, the letter did not constitute a waiver of any possible conflict of interest as a matter of law, and it follows that the trial court’s conclusion to the contrary was clearly erroneous.

#### B. Scott’s Claim for Equitable Relief on Remand

The foregoing conclusion requires the trial court to address Scott’s claim for equitable relief on remand. Before remanding, however, we seek to provide the trial court with some guidance in resolving Scott’s claim, particularly in light of several arguments made by the parties in their briefs. First, as our discussion in Part II.A. above indicates, the parties argue on appeal whether Ayers’s representation of Diane in the dissolution proceeding constituted a conflict of interest, as the trial court never made a conclusion in this regard. Instead, the trial court appears to have assumed there was a conflict of interest for purposes of addressing whether the letter constituted a waiver of such conflict. Accordingly, the trial court must first determine whether Ayers’s representation of the Frenches in the construction litigation and of Diane in the dissolution proceeding created a conflict of interest. Rule 1.7 and authority interpreting that rule is instructive in this regard.

If the trial court concludes there was a conflict of interest, the question then becomes

whether such conflict warrants equitable relief in the form of fee disgorgement. In addressing this question, we note Scott implies that Woods v. City National Bank & Trust Company of Chicago, 312 U.S. 262, 268 (1941), stands for the proposition that disgorgement is mandated where there is a conflict of interest. Scott’s reliance on Woods, however, is misplaced because that case addressed what constituted “reasonable compensation for services rendered” for an attorney within the meaning of a federal bankruptcy statute. 312 U.S. at 268. Scott’s claim involves no such federal statute – to the contrary, it is an equitable claim under Indiana law – and we therefore fail to see how Woods is controlling.

Instead, this court’s decisions Carr v. Pearman, 860 N.E.2d 863, 874 (Ind. Ct. App. 2007), trans. denied, and Major v. OEC-Diasonics, Inc., 743 N.E.2d 276, 283 (Ind. Ct. App. 2001), trans. denied, indicate that equitable relief may be warranted for violations of the Rules of Professional Conduct. As is the case with most claims for equitable relief, however, the decision to grant or deny such relief does not turn on a bright-line rule, but on the particular facts and circumstances of the case. Cf. Bank of New York v. Nally, 820 N.E.2d 644, 654 (Ind. 2005) (describing the doctrine of equitable subrogation as “depend[ing] on the equities and attending facts and circumstances of each case”). As such, we hesitate to discuss Scott’s claim in further detail, as such a fact-sensitive inquiry must be addressed by the trial court in the first instance, but summarize that on remand, the trial court must resolve 1) whether there was a conflict of interest and, if so, 2) whether such conflict warrants equitable relief in the form of fee disgorgement. In resolving these issues, the trial court should enter findings and conclusions thereon, but need not conduct a hearing if it so

chooses.

### III. Issues Raised by the Firm on Appeal<sup>1</sup>

The Firm does not challenge the trial court's conclusion that it was not entitled to recover prejudgment interest at a monthly rate of 1.5 percent as specified in the July 17, 2000, bill. Instead, the Firm argues it is entitled to prejudgment interest at an annual rate of 8 percent, either based on the theory that it proved an "account stated" or that the amount of the Firm's claim and the due date were readily ascertainable.

The Firm is correct that prejudgment interest at an annual rate of eight percent is appropriate under either theory. Indiana Code section 24-4.6-1-103 states, "Interest at the rate of eight percent (8%) per annum shall be allowed . . . from the date an itemized bill shall have been rendered and payment demanded on an account stated," and this court has observed that "prejudgment interest is appropriate [if] the damages are complete and may be ascertained as of a particular time." Noble Roman's, Inc. v. Ward, 760 N.E.2d 1132, 1140 (Ind. Ct. App. 2002). The problem for the Firm, however, is that the record indicates it first requested the trial court to award prejudgment interest under either theory in its motion to correct error. The Firm's request therefore came too late because "[a] party may not raise an issue for the first time in a motion to correct error . . . ." Edwards v. Neace, 898 N.E.2d 343, 348 (Ind. Ct. App. 2008). Although we recognize Indiana Code section 24-4.6-1-103 and the rule expressed in Ward employ rather strong language suggesting that prejudgment interest is

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<sup>1</sup> Although we remand for the trial court to resolve Scott's claim for equitable relief on its merits, we also choose to resolve the issues raised by the Firm in its appeal. Such an approach will spare the parties the time and expense of re-litigating these issues through another appeal in the event the trial court concludes Scott's equitable claim is without merit.

a matter of right, see Ind. Code § 24-4.6-1-103 (stating that prejudgment interest on an account stated “shall be allowed”); Ward, 760 N.E.2d at 1140 (“[A]n award of prejudgment interest is generally not considered a matter of discretion.”), we do not read such language as abolishing the general rule that a party must first timely request relief before the trial court is in a position to grant it, cf. Wenzel v. Hopper & Galliher, P.C., 779 N.E.2d 30, 44 (Ind. Ct. App. 2002) (observing that a plaintiff “may not ask this court to grant relief he failed to request from the trial court”), trans. denied. Thus, because the Firm’s request for prejudgment interest under either Indiana Code section 24-4.6-1-103 or the rule expressed in Ward was untimely, it follows that the trial court’s refusal to award such interest was not clearly erroneous.

#### Conclusion

The trial court’s conclusion that Scott waived his right to challenge the Firm’s alleged breach was clearly erroneous, and the Firm waived its right to challenge the trial court’s denial of prejudgment interest.

Affirmed in part, reversed in part, and remanded with instructions.

CRONE, J. and BROWN, J., concur.