

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0898**

Merchant & Gould P.C.,
Respondent,

vs.

Larry Holmberg,
Appellant.

**Filed January 31, 2022
Affirmed in part, reversed in part, and remanded
Smith, Tracy M., Judge**

Isanti County District Court
File No. 30-CV-19-748

Jeffrey S. Nicolet, Wagner, Falconer & Judd, Ltd., Minneapolis, Minnesota (for respondent)

Edward E. Beckmann, Beckmann Law Firm, LLC, Bloomington, Minnesota (for appellant)

Considered and decided by Bryan, Presiding Judge; Smith, Tracy M., Judge; and Rodenberg, Judge.*

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

Appellant Larry Holmberg challenges the district court's grant of summary judgment in favor of respondent Merchant & Gould P.C. (M&G), a Minneapolis law firm,

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

in this dispute over legal fees owed by Holmberg to M&G. Holmberg does not challenge that he owed the legal fees, but he asserts that summary judgment against him was improper because (1) there are genuine issues of material fact regarding Holmberg's counterclaim against M&G for fee forfeiture based on fraud and bad faith and (2) he was entitled to a jury trial on M&G's claim for contract-based attorney fees incurred in this action.

We affirm summary judgment against Holmberg on his counterclaim for fee forfeiture because Holmberg failed to establish a genuine issue of material fact regarding his assertion that M&G engaged in fraud or acted in bad faith. But, because the district court erred by awarding M&G attorney fees without applying the proper analysis for summary judgment on a claim for contract-based attorney fees or holding a trial, we reverse the award of attorney fees and remand for further proceedings consistent with this opinion.

FACTS

Holmberg was a long-time client of M&G, a law firm specializing in intellectual property. Holmberg first hired M&G in 2003 and continued to intermittently employ the firm's services for a variety of projects until the time of this dispute. Until this dispute, Holmberg paid all his M&G bills.

This dispute arises out of legal work that M&G performed for Holmberg in September and October 2017. Several months earlier, Holmberg contacted M&G attorney Tony Zeuli about seeking M&G's advice regarding a lawsuit that Holmberg had brought using a law firm other than M&G. The parties refer to that case as "the Peel litigation." M&G provided an estimate of \$1.5 to \$3 million in legal fees to handle the Peel litigation through trial, and Holmberg decided to stay with his other attorneys. But Holmberg

continued to correspond with Zeuli about the case, and Zeuli informed Holmberg that his rate was \$650 per hour. Holmberg emailed Zeuli and asked what it would cost for M&G to represent Holmberg in settlement discussions in the Peel litigation. Zeuli replied that he could not take the matter himself but that M&G attorney Thomas Johnson could do so.

Holmberg met with attorney Johnson about the Peel litigation in October 2017. Johnson's rate was \$470 an hour—\$180 less than Zeuli's. In November, M&G sent an invoice to Holmberg for \$3,380 in legal fees. The invoice described the work that Zeuli performed in September and that Johnson performed in October. Holmberg claims that he did not receive the November invoice.

In December 2017, Holmberg contacted M&G, asking what it would cost for the firm to represent him in defending against a motion to dismiss in the Peel litigation set for January 2018, and M&G replied that it charged by the hour and would require a retainer fee for the limited engagement. The parties entered into a written engagement letter, and Holmberg paid M&G a \$17,000 retainer fee. After M&G successfully defended Holmberg against the motion to dismiss, Holmberg asked M&G to take over the Peel litigation. M&G agreed and asked that Holmberg pay a \$20,000 retainer for representation in the litigation. The parties again entered into a written engagement letter, and Holmberg paid the \$20,000 retainer fee.

With respect to the retainer fees, the retainer agreements stated, "Those funds will be deposited in our client trust account, and we will draw against those funds to satisfy our monthly statements, copies of which will be sent to you for your information."

M&G continued to perform legal services for Holmberg and sent him monthly invoices reflecting those services and the balance due after application of funds from the retainer fees. Holmberg did not make any additional payments beyond the \$37,000 in retainer fees.

M&G's work on the Peel litigation ended in March 2018. That month, M&G realized that the November 2017 invoice for \$3,380 remained unpaid and applied Holmberg's retainer funds to pay it. In March 2018, M&G sent Holmberg two documents entitled "Statement of Account," which listed each outstanding invoice, the amount billed, and the balance due. The first statement of account listed the November 2017 invoice for \$3,380 and a balance due for that amount. The second statement of account, sent after M&G determined to use the retainer to pay the \$3,380, no longer listed the November 2017 invoice or a balance due for that invoice.

As of May 2018, Holmberg's outstanding balance with M&G was \$95,003.54. In November 2018, in response to a collection letter, Holmberg emailed Zeuli and stated that he did not have the money to pay his outstanding balance. At some point, Holmberg objected to M&G's application of the retainer fees to pay the \$3,380 invoice, and M&G returned those funds to its client trust account.

Eventually, M&G filed this action to collect the \$95,003.54, plus interest, attorney fees, costs, and disbursements. Holmberg filed an amended answer and asserted counterclaims, including one for total fee forfeiture.

The district court granted M&G's motion for summary judgment and dismissed Holmberg's counterclaims. Thereafter, M&G submitted an affidavit of costs and

disbursements that included \$47,600 for attorney fees incurred in this action. The district court awarded M&G the principal amount of \$95,003.54, interest of \$41,697.44, attorney fees of \$47,600, and costs and disbursements of \$570.75 for a total judgment of \$184,871.73. Holmberg filed a memorandum objecting to, among other things, the award of attorney fees. The district court ordered a hearing and, following that hearing, reaffirmed its award to M&G of \$47,600 in attorney fees.

Holmberg appeals. He challenges only the summary-judgment dismissal of his counterclaim for total fee forfeiture and the award to M&G of attorney fees.

DECISION

A party is entitled to summary judgment when there is no genuine issue of material fact and the party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.01. Appellate courts review the grant of summary judgment de novo to determine “whether there are genuine issues of material fact and whether the district court erred in its application of the law.” *Montemayor v. Sebright Prods., Inc.*, 898 N.W. 2d 623, 628 (Minn. 2017) (quotation omitted). “[T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). To survive a motion for summary judgment, the nonmoving party must point to specific facts that show there is a genuine issue of material fact for trial. *See id.* at 70-71.

I. Holmberg has not demonstrated that there is a genuine issue of material fact regarding total fee forfeiture.

Holmberg argues that the district court erred in summarily denying his counterclaim for total fee forfeiture because a genuine issue of material fact exists with respect to that claim.

When an attorney commits actual fraud or acts in bad faith, an appropriate remedy may be total forfeiture of the legal fees that are otherwise due. *See Gilchrist v. Perl*, 387 N.W.2d 412, 417 (Minn. 1986). Fraud generally requires an intentional misrepresentation or omission. *See U.S. Bank N.A. v. Cold Spring Granite Co.*, 802 N.W.2d 363, 373 (Minn. 2011).

In seeking total fee forfeiture, Holmberg argues that the entirety of his balance with M&G—\$95,003.54—should be forfeited because M&G engaged in fraud and bad faith. Holmberg’s allegations of fraud and bad faith involve two categories of conduct: first, M&G’s use of Holmberg’s retainer fees to pay the \$3,380 balance due on the November 2017 invoice; and second, M&G’s failure to disclose all of its hourly rates. We examine each in turn.

A. Use of Retainer Fees

Holmberg claims that there is a genuine dispute of material fact as to whether M&G acted fraudulently or in bad faith when it applied \$3,380 of retainer funds to his outstanding balance from the November 2017 invoice.

Holmberg contends that evidence of fraud or bad faith exists because the retainer agreements he signed in December 2017 and January 2018 provided that the \$37,000 in

retainer fees would be used only for future work on the Peel litigation, and the \$3,380 was for past work. The argument is unpersuasive. It is true that the agreements used the future tense when they stated that copies of M&G's statements "will be sent" to Holmberg for his information. But the agreements permitted M&G to draw against the retainer "to satisfy [its] monthly statements." Considering that the agreements were for M&G's representation of Holmberg on the Peel litigation and that the \$3,380 was used to satisfy a monthly statement for work performed on the Peel litigation, M&G's use of the retainer fees to satisfy that statement is insufficient to create a genuine issue of material fact regarding fraud or bad faith.

Holmberg also contends, though, that there is evidence of fraud or bad faith in M&G's conduct regarding its invoicing. He asserts that there is a factual dispute regarding fraud or bad faith because he never received the November 2017 invoice and that document, when later produced, did not include the same type of information as other invoices. Holmberg also contends that the final invoice that he received, dated April 1, 2018, could be found to be fraudulent or issued in bad faith because it showed the application of \$13,906 in retainer funds to his balance but did not reference the work that was performed in September or October 2017.

Holmberg's arguments are not persuasive. Regarding the November 2017 invoice, Holmberg does not dispute that M&G sent the November 2017 invoice, nor does he dispute that the work reflected on the invoice was completed at his request. As for the application of \$13,906 in retainer funds, that use of the retainer funds is distinct from the \$3,380 in funds that he claims were fraudulently applied. The record reflects that the \$13,906 in funds

were applied to Holmberg's balance for work performed in March 2018. Holmberg presents no evidence that could lead a reasonable trier of fact to conclude that M&G's application of the \$13,906 shown on the April 1, 2018 invoice was fraudulent or in bad faith.

Holmberg also alleges that M&G's actions in connection with the retainer fees violated Minn. R. Prof. Conduct 1.15(b) and 1.15(c), implying that such a violation would constitute fraud or bad faith. Rule 1.15(c), as relevant here, states that a lawyer shall withdraw fees from a trust account as earned. Rule 1.15(b) states that a lawyer must provide the client with "written notice of the time, amount, and purpose of the withdrawal." It further states that, if there is a dispute regarding the lawyer's right to the funds, the disputed funds "shall not be withdrawn until the dispute is finally resolved."

Holmberg is correct that M&G did not provide him with explicit notice that it had withdrawn \$3,380 of the retainer funds and applied those funds to his outstanding balance from the November 2017 invoice. M&G appears to argue that it gave notice to Holmberg when it sent him a statement of account showing a balance due of \$3,380 for the November 2017 invoice and followed it with a second statement of account in which the November 2017 invoice and balance due are no longer listed. But these two statements of account do not provide explicit notice that \$3,380 was withdrawn from the retainer balance to pay the November 2017 invoice.

Nevertheless, Holmberg fails to provide any evidence suggesting that M&G's failure to explicitly notify Holmberg of the withdrawal of funds to pay the November 2017 invoice was an intentional representation or omission or was done in bad faith. Holmberg

does not dispute that he requested that M&G perform the work that was billed in the November 2017 invoice or that that work related to the Peel litigation. Moreover, when Holmberg objected to M&G's application of the \$3,380 to his outstanding balance, M&G returned the funds to the trust account. These circumstances do not create a genuine issue of material fact regarding fraud or bad faith.

B. Hourly Rates

Holmberg argues that a genuine issue of material fact exists as to whether M&G acted fraudulently or in bad faith because M&G did not provide him with the hourly rate of attorney Johnson, which he claims violates Minn. R. Prof. Conduct 1.5. Holmberg's argument is unavailing.

Rule 1.5 requires that information regarding rates shall be communicated to a client, preferably in writing. Minn. R. Prof. Conduct 1.5(b). The rules also note that, in a long-term relationship between a firm and a client, "they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible." *Id.*, cmt. 2.

It is undisputed that Holmberg was a long-term client of M&G and was familiar with its rates. Additionally, it is not disputed that attorney Zeuli informed Holmberg of his rate—\$650 per hour—in fall 2017. Both client-representation letters M&G sent to Holmberg state, "[b]illing rates for persons assisting with matters we are handling on your behalf are generally reflected on invoices provided to you and may be adjusted annually (in October of each year)." Although the hourly rate for each individual attorney was not included on all invoices M&G sent to Holmberg, M&G sent him invoices on March 1 and

April 1, 2018, that included the hours its attorneys were spending on his case and the rate charged for those hours. It is thus not disputed that M&G provided Holmberg, a long-term client, with information regarding its rates and charges, including the hourly rate of attorney Johnson.

Moreover, attorney Johnson's rate was \$470 per hour—\$180 per hour less than that of attorney Zeuli. Thus, even if Holmberg was unaware of Johnson's rate in the fall of 2017, Holmberg was consistently quoted higher rates for the Peel litigation by attorney Zeuli. Holmberg has failed to show how he was harmed by the fact that M&G billed him for work completed by attorney Johnson at a lower rate than what he had been quoted by attorney Zeuli or how that could constitute bad faith or fraud.

In sum, Holmberg has not demonstrated genuine issues of material fact regarding whether M&G acted fraudulently or in bad faith, and the district court correctly granted summary judgment against Holmberg on his counterclaim for total fee forfeiture.

II. The district court erred by awarding M&G attorney fees.

Holmberg argues that the district court erred by awarding M&G attorney fees because he is entitled to a jury trial on the issue of contract-based attorney fees.

M&G's claim for attorney fees is founded on its agreements with Holmberg. A claim for attorney fees based on a contract is, like other contract claims, subject to determination by a jury, both as to liability and as to damages, unless there is no genuine dispute of material fact on those issues. *United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equip., LLC*, 813 N.W.2d 49, 52, 63 n.9 (Minn. 2012).

M&G does not dispute that this is the law but argues that the law was not followed here because Holmberg did not establish a genuine issue of material fact regarding attorney fees. M&G contends that the district court properly awarded attorney fees as part of its ruling on M&G's motion for summary judgment.

This argument, however, does not accurately reflect what happened. While M&G claimed entitlement to attorney fees in its motion for summary judgment, it did not include with its motion any evidence supporting the amount of the award (for example, hours spent, rates charged, reasonableness of the rates, etc.). Rather, only after obtaining summary judgment on its substantive claims did M&G submit a request for costs, including attorney fees, supported by affidavit evidence. It did so pursuant to Minn. R. Civ. P. 54, which governs applications for costs and disbursements, not pursuant to the rules governing motions for summary judgment. *See* Minn. R. Civ. P. 56; Minn. R. Gen. Prac. 115. Holmberg objected to the award.

The district court's reasoning in awarding attorney fees was not that summary judgment on the contractual claim for fees was warranted because of a lack of genuine issue of material fact but rather that the proper method for calculating attorney fees was the "lodestar method," which it cited in its affirmation of the fees following a motion hearing.¹ The "lodestar method" is appropriate for the award of attorney fees based on statute. *State*

¹ The district court stated that it "decline[d] to follow [Holmberg's] line of reasoning," commenting that doing so could result in "a perpetual number of jury trials." But this concern was considered and rejected by the supreme court. In *United Prairie*, the supreme court wrote, "The availability of a constitutionally-guaranteed right to trial by jury does not and should not turn on the practical difficulties of its implementation." 813 N.W.2d at 60.

by *Comm’r of Transp. v. Krause*, 925 N.W.2d 30, 31 (Minn. 2019) (“Minnesota has adopted and applied the ‘lodestar’ method for awarding statutory attorney fees.”). M&G’s claim for reasonable attorney fees was based on contract. Under *United Prairie*, its claim for attorney fees had to be treated like other contract claims. The district court therefore misapplied the law and erred by awarding M&G attorney fees in the context of a post-summary-judgment application for costs and disbursements.

We therefore reverse and remand to the district court for further proceedings with respect to the claim for attorney fees, including consideration of any properly brought dispositive motion or a jury trial.

Affirmed in part, reversed in part, and remanded.