S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

RICHARD DUMAS, LYNN MCBRIDE, EUGENE PASKO, HAROLD COUNTS, JOHN MAUS, KENNETH KWASNIK, RICHARD BENNETT, PATRICK CHAPMAN, CHARLES DAPPRICH, JAMES DZIADZIOLA, Estate of GERALD FITZGERALD, Estate of VERNON MANUS, Estate of GEORGE MASSAB, LAWRWENCE MYLNAREK, Estate of ROBERT SINCLAIR, CHARLES OSTERDALE, ROBERT J. SONGER, ROBERT DECKERS, ELIZABETH ZINNER, RICHARD STIMPSON, DONALD DURECKI, and RONALD RIEUS,

UNPUBLISHED
March 30, 2010

Plaintiffs,

and

WAYNE ALARIE, and RICHARD MARTIN,

Plaintiffs-Appellants,

and

THEODORE S. ANDRIS,

Appellant,

v

No. 279149
Wayne Circuit Court
LC No. 83-316603-CK

SHELDON L. MILLER,

Appellee,

and

AUTO CLUB INSURANCE ASSOCIATION,

Defendant.

GERALD NYLAND, ANITA NYLUND, JOHN HOUSE, MARY ELLEN HOUSE, DAVID REMER, DONNA MARGARET REMER, LEONARD RAKOWICZ, RITA RAKOWICZ, STANLEY ELZINGA, MARILYN ELZINGA, JAMES HALLER, JOAN HALLER, JOHN JACKSON, WILLIE JOHNSON, EDWARD BARTZ, BETTY BARTZ, FRANK DOLINSHEK, MARY DOLINSHEK, MICHAEL DUNGEY, WINIFRED DUNGEY, FRANCES STOCKER, ARTHUR SHEWCHUK, PATRICIA SHEWCHUK, DAVID ALBRECHT, LINDA ALBRECHT, WILLIAM T MEDLIN, and SHIRLEY MEDLIN,

Plaintiffs-Appellants,

v

No. 286342
Wayne Circuit Court
LC No. 94-420311-CZ

LOPATIN, MILLER, FREEDMAN, BLUESTONE, ERLICH, ROSEN & BARTNICK, P.C., and SHELDON MILLER,

Defendants-Appellees.

WAYNE ALARIE and RICHARD MARTIN,

Plaintiffs-Appellants,

v

No. 286343
Wayne Circuit Court
LC No. 92-215259-CZ

LOPATIN, MILLER, FREEDMAN, BLUESTONE, ERLICH, ROSEN & BARTNICK, P.C., and SHELDON MILLER,

Defendants-Appellees.

ROBERT DECKERS, ELIZABETH ZINNER, RICHARD STIMPSON, and DONALD DURECKI,

Plaintiffs-Appellants,

and

HAROLD COUNTS, ROBERT IVAN, and
RICHARD ZICKEL,

Plaintiffs,

v

SHELDON MILLER, and LOPATIN, MILLER,
FREEDMAN, BLUESTONE, ERLICH, ROSEN
& BARTNICK,

Defendants-Appellees,

and

DAVID RAVID,

Defendant.

No. 286344
Wayne Circuit Court
LC No. 93-321648-NM

JAMES K. DZIADZIOLA, MARGARET
DZIADZIOLA, LAWRENCE R. MLYNAREK,
JOSEPHINE MLYNAREK, MARTHA
CHAPMAN, Personal Representative of the
ESTATE of PATRICK CHAPMAN, LYNETTE
MASSAB, Personal Representative of the
ESTATE of GEORGE MASSAB,

Plaintiffs-Appellees,

v

SHELDON MILLER, LOPATIN, MILLER,
FREEDMAN, BLUESTONE, ERLICH, ROSEN
& BARTNICK, and SHELDON L. MILLER &
ACCOCIATES, P.C.,

Defendants-Appellants.

No. 287143
Wayne Circuit Court
LC No. 04-418373-NM

Before: BECKERING, P.J., and MARKEY and Borrello, JJ.

PER CURIAM.

These consolidated appeals have a lengthy history. Plaintiffs were commission sales representatives (CSR's), of the Auto Club Insurance Association (AAA). Plaintiffs objected to

changes AAA implemented on January 1, 1978, regarding how commissions paid on new and renewed business would be calculated and to AAA's implementing minimum production standards (quotas) in 1981. Attorney Sheldon Miller originally filed a complaint in Wayne Circuit Court for about 180 plaintiffs in 1983. That case is Docket No. 279149.[1] The sole remaining issue in this case is a dispute over contingent attorney fees between Miller and attorney Theodore S. Andrus, who later substituted for Miller, for some of the original plaintiffs. We conclude with the respect to this dispute that the trial court did not clearly err in its findings of underlying facts and did not abuse its discretion in apportioning the contingent fee at issue between Miller and Andrus. We therefore affirm in Docket No. 279149.

The remaining consolidated cases are all legal malpractice actions arising either out of Miller's representation regarding the 1983 litigation (Docket Nos. 286343, 286344, and 287143), or out of Miller's representation of a smaller group of the original plaintiffs, bringing an action alleging intentional infliction of emotional distress regarding AAA relocating the CSR's to two central offices in buildings that had once served as warehouses (Docket No. 286342). The trial court granted defendants' motion for summary disposition in Docket Nos. 286343, 286344, and 286342, which we affirm. The trial court denied defendants' motion for summary disposition in Docket No. 287143. For the reasons discussed below, we reverse.

I. SUMMARY OF PROCEEDINGS

We briefly provide some historical context for our analysis of the legal issues presented in these appeals. This summary is not intended to completely detail all the facts and proceedings leading to the lower court decisions at issue but only to provide historical background.

The original *Dumas* plaintiffs, represented by Miller, filed a complaint in May 1983 (Docket No. 279149), alleging breach of contract, age discrimination, intentional infliction of emotional distress, violation of a criminal misdemeanor statute, fraud and misrepresentation, and unjust enrichment; wrongful discharge does not appear to be alleged in a separate count but that claim is asserted in the common allegations. The underlying bases for these claims is that in 1978 AAA changed its method of computing commissions for the CSR's from 7% or 7½% on policy premiums paid for new and renewal business to a specific dollar amount per policy—the "unit" system. Then, in 1981, AAA implemented minimum production standards (quotas). AAA also began phasing out the position of CSR in favor of lower-paid member advisers (MA's) performing essentially the same function.

The *Dumas* case was assigned to Judge John Hausner, who in January 1984 dismissed a portion of the plaintiffs' complaint. Some AAA employees continued to join the lawsuit after that, including plaintiffs Wayne Alarie and Richard Martin. In early 1985, the parties' lawyers appeared before Judge Michael Stacey, apparently skilled in managing complex litigation, and

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[1] The long history of Docket No. 279149 is documented in *Dumas v Auto Club Ins Ass'n*, unpublished opinion per curiam of the Court of Appeals issued April 14, 2000 (Docket No. 208617), lv den 464 Mich 874 (2001). This decision led to trial or settlement of the remaining *Dumas* plaintiffs' claims, and to the present consolidated appeals.

agreed to the entry of an order on May 8, 1985, to "establish parameters for complex litigation"—the "stay." The order directed bifurcated trials on issues of liability and damages for the claims pertaining to the changes in the commission system, which included claims for breach of contract and unjust enrichment under *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579; 292 NW2d 880 (1980). Significantly, the order also stayed the plaintiffs' claims relating to the quota production standards, which included claims of age discrimination and wrongful discharge.

The case returned to Judge Hauser to hear motions for summary disposition. Judge Hauser dismissed all plaintiffs' claims related to the change in compensation. Although part of the case was stayed, the order was titled "final judgment" and also included language that the order was subject to appeal under then existing MCR 2.604(A).[2] Thus, a six-year appellate odyssey began. Plaintiffs initially were successful in this Court in obtaining reversal of the *Dumas* plaintiffs' contract claims under *Toussaint* and their claims regarding unjust enrichment. *Dumas v Auto Club Ins Ass'n*, 168 Mich App 619; 425 NW2d 480 (1988). This Court affirmed the trial court's dismissal, however, of plaintiffs' fraud and misrepresentation, promissory estoppel, and age discrimination claims regarding the change in compensation. Regarding the age discrimination claim, this Court observed that AAA had presented uncontroverted evidence that "showed that the change in the compensation system was a business decision made for the purpose of bringing compensation in line with productivity." *Id*. at 639. AAA applied for leave to appeal and our Supreme Court stayed the application pending it deciding *In re Certified Question*, 432 Mich 472; 444 NW2d 112 (1989), and *Bullock v Automobile Club of Michigan,* 432 Mich 472, 444 NW2d 114 (1989).

While the original appeals in *Dumas* were pending, in 1988 and 1989 AAA relocated the CSR's to central offices located in two buildings that had once served as warehouses. AAA's action was the impetus for the "warehouse" litigation from which arose the appeal in Docket No. 286342. In that litigation, attorney Miller represented a group of *Dumas* plaintiffs by filing a lawsuit in Wayne Circuit Court on March 3, 1989, alleging intentional infliction of emotional distress. The trial court granted AAA summary disposition on September 28, 1990, and this Court affirmed. *Finlay v ACIA*, unpublished opinion per curiam of the Court of Appeals issued July 29, 1992 (Docket No. 134011) (*Finlay I)*. While that case was still pending appeal, on June 4, 1991, attorney Miller filed another action for the same plaintiffs that alleged breach of contract. The trial court also granted AAA summary disposition and this Court affirmed. *Finlay v ACIA*, unpublished opinion per curiam of the Court of Appeals issued February 23, 1994 (Docket No. 145465) (*Finlay II)*. Neither of the *Finlay* complaints alleged age discrimination.

Our Supreme Court reversed this Court in *Dumas v Auto Club Ins Ass'n*, 437 Mich 521; 473 NW2d 652 (1991). The Court held "that the Court of Appeals improperly determined that plaintiffs could maintain actions against defendant for breach of contract and unjust enrichment."

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[2] Apparently, because this order was labeled "final," the clerk's office considered the file "closed" and never generated "no progress" notices through the years to the parties or the trial court regarding the stayed, but unresolved, quota claims.

Dumas, 437 Mich at 525. Justice Riley opined in her plurality opinion that "we conclude that *Toussaint* should not be extended to create legitimate expectations of a permanent compensation plan." *Dumas*, 437 Mich at 532. Further, "we would hold that defendant was not unjustly enriched by virtue of changing its compensation scheme." *Id*. at 549. Justice Riley further opined that the trial "court also dismissed plaintiffs' claims of fraud, misrepresentation, promissory estoppel, age discrimination, and unjust enrichment," and that "[t]his appeal only concerns the claims of breach of contract and unjust enrichment." *Id*. at 527, n 2. As a result of this Court's and our Supreme Court's decisions, all plaintiffs' claims pertaining to the change in compensation were dismissed, including age discrimination.

In August 1991, attorney Miller held a "closure" meeting with the *Dumas* plaintiffs. This meeting also included some discussion about the then pending *Finlay* suits. One might infer from a tape recording of the meeting that at the time of the meeting, Miller did not recall the production quota claims stayed in Wayne Circuit Court. A group of *Dumas* plaintiffs, including Alarie, Martin, and the *Finlay* plaintiffs, then sought advice from attorney Theodore Andris. In November 1991, Andris telephoned Miller regarding the *Dumas* age discrimination claims. On December 6, 1991, Andris wrote to Miller advising that he represented Alarie and Martin in a malpractice claim against Miller for having abandoned their wrongful discharge and age discrimination claims. Miller responded in a February 25, 1992, letter, that while the *Dumas* plaintiffs claims related to the compensation change were gone, some claims remained viable in the 1983 complaint and might be revived. Miller suggested Andris substitute for Miller regarding Alarie and Martin and that revival of the stayed claims would have the advantage of years of prejudgment interest. On March 2, 1992, Andris wrote to Miller stating he would not consider substituting for Miller in the *Dumas* stayed claims unless Miller were successful in reviving the plaintiffs' wrongful discharge and age discrimination claims. In June 1992, Andris filed a malpractice action against Miller in Wayne Circuit Court on behalf of Alarie and Martin.

Miller retained outside counsel, Roger Wardle, who attempted to revive the dormant quota-based claims in *Dumas* by filing a motion in February, 1993, requesting Judge Hausner to set a "scheduling order." Andris filed a limited appearance for the purpose of determining the status of the case. Judge Hausner ruled that the plaintiffs had abandoned their claims. On appeal, our Supreme Court remanded for an evidentiary hearing "on the question whether the plaintiffs in this matter have abandoned their age discrimination claims." *Dumas v Auto Club Ins Ass'n*, 446 Mich 864; 522 NW2d 629 (1994). The Court directed the trial court to clarify whether its order contemplated disposition of the 'quota' age discrimination claim as well as the 'method of compensation' age discrimination claim." On remand, Judge Hausner entered an order on September 20, 1994, that the plaintiffs had abandoned their quota-based claims. This Court dismissed plaintiffs' appeal of this order. *Dumas v Auto Club Ins Ass'n*, unpublished order of the Court of Appeals issued August 23, 1995 (Docket No. 186479).

In 1996, the *Dumas* case was reassigned the Wayne Circuit Court Judge William Giovan, who undertook a reexamination of Judge Hausner's abandonment ruling. Judge Giovan concluded that although counsel and the trial court might have forgotten the quota-based claims, no one intended to abandon them. Therefore, Judge Giovan entered a scheduling order and dissolved the May 8, 1985, stay. This Court denied leave to appeal this order, but our Supreme Court, in lieu of granting defendants' leave to appeal, remanded the case for plenary consideration as on leave granted. *Dumas v Auto Club Ins Ass'n*, 456 Mich 902 (1997). This

Court affirmed the trial court and remanded for further proceedings. *Dumas v Auto Club Ins Ass'n*, unpublished opinion per curiam of the Court of Appeals issued April 14, 2000 (Docket No. 208617), lv den 464 Mich 874 (2001), setting the stage for trial or settlement of the remaining *Dumas* plaintiffs' quota-based claims.

During pretrial proceedings in late 2001, attorney John Mason substituted for a small group of the *Dumas* plaintiffs, including plaintiffs Deckers, Zinner, Stimpson, and Durecki. Mason had filed a malpractice complaint against Miller on July 30, 1993, concerning the lengthy delay in prosecuting their claims, which is the subject of the appeal in Docket 286344. On January 3, 2002, attorney Andris substituted for Miller on behalf plaintiffs Alarie and Martin. Miller continued to represent 18 remaining *Dumas* plaintiffs. Judge Giovan ruled he would not try all the plaintiffs' cases at once. Therefore, the smaller groups of plaintiffs represented by Andris and Mason were consolidated for the purpose of a first trial. According to later testimony, AAA's defense counsel considered the age discrimination case of Mason's clients very winnable because the plaintiffs were relatively young in the early 1980's, but that Alarie and Martin were older and would make a sympathetic impression with the jury. So, after failing to convince Judge Giovan to schedule a separate trial for Mason's clients, defense counsel developed a strategy of settling with Andris' clients and then proceeding to trial with Mason's clients. Defense counsel believed AAA would "get a quick verdict" as to Mason's clients, which would set the table to negotiate settlements with the remaining plaintiffs.

The defense strategy worked well. AAA settled with Alarie and Martin for $300,000 each. And, in April 2002, after a two-week trial, a jury returned a verdict of no-cause of action as to Mason's clients. In May 2002, Miller advised his clients of the verdict entered in favor of AAA and that AAA was seeking to impose costs against Mason's clients. Miller also advised his clients that AAA thought it would win at trial because the quota system was not imposed as a method of discriminating on the basis of age. Miller further advised his clients that AAA ran the risk that plaintiffs would be successful and had extended settlement offers. At least four of Miller's clients accepted AAA's settlement offers: James Dziadziola ($30,000); Lawrence Mlynarek ($20,000); Estate of Patrick Chapman ($20,000); and Estate of George Massab ($12,500). These plaintiffs, represented by Andris, sued Miller for malpractice on June 12, 2004, alleging they were forced to settle for less than their claims were worth by Miller's negligent handling of their claims. That case is Docket No. 287143, and defendants appeal by leave granted the trial court's order denying them summary disposition.

On May 10, 2002, Judge Giovan heard defendants' motion for summary disposition regarding the consolidated malpractice cases in Docket No. 286342 (*Nylund v Lopatin*), Docket No. 286343 (*Alarie and Martin v Lopatin*), and Docket No. 286344 (*Deckers v Miller*). The trial court deferred ruling in Docket No. 286342 but granted defendants summary disposition regarding Docket Nos. 286343 and 286344. The trial court reasoned Miller's actions had not lessened the settlements Docket No. 286343, or caused the outcome in the *Deckers* case, stating:

> The jury decided that those causes of action did not exist. That eliminates a necessary element of the claim against the attorney, regardless of whether he committed negligence.

> Against—it is said that this was not—this is not res judicata because of—there's no mutuality. Mutuality is not required when res judicata is used defensively, as is the case here.
>
> And to make that argument, those plaintiffs have to say well, as against the legal certainty of a jury deciding that there's no cause of action, we should listen instead, I guess, to a lawyer who's going to take the stand and say, oh, I know that the jury decided that they never had a claim for age discrimination, but in my opinion, they did. Not a chance.
>
> Against that, Mr. Alarie and Mr. Martin voluntarily terminated their cause of action. They had the perfect—they were on the brink of going to trial. Nothing required them to settle their case. They put their case to rest voluntarily knowing all of the circumstances. They cannot be heard to say now that they would have got more.
>
> All they had to do is try the case and they would have got what they deserved, which I suspect would have been nothing, if anyone wants to ask me, because I heard this case tried vigorously—tried vigorously by this man here for how long?
>
> Okay. Now, against all this is offered well, evidence was lost, memories dimmed. No. I haven't heard the name of the first witness whose memory was lost, whose testimony would have made one iota of difference. Not one. Not one.
>
> I didn't even hear, and I know that competent counsel would have made the argument while the case was being tried, ladies and gentlemen of the jury, we've been [harmed?] by the passage of time that's gone by that's not our fault, you know, and I'm sorry we couldn't have made it any better—I'm not saying that he had to make that argument, but that argument was not made.
>
> It wasn't made because there were no memories lost, the case was well presented against a dirth of evidence that there was any motivation at all that this obvious economic undertaking—obvious to me and apparently—to the jury—was done for purposes of economics, not because Triple A had some animus against people, they didn't like older people.

Consequently, the trial court granted defendants' motion for summary disposition in Docket Nos. 286343 and 286344, which plaintiffs appeal by right.

After Miller asserted an attorney's lien as to the Alarie-Martin settlement proceeds, Andris moved to disqualify Judge Giovan, who granted the motion.[3] The *Dumas* and related cases were then assigned to Judge Robert Ziolkowski, who held evidentiary hearings on Miller's

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[3] Apparently, Miller had co-hosted a fundraiser for several judges, including Judge Giovan.

claim to a portion the Alarie-Martin settlement as an attorney fee. Judge Ziolkowski, rendered an opinion from the bench that Miller had not engaged in disciplinable conduct that might disqualify him from a quantum meruit claim to an attorney fee. The trial court entered an order on August 2, 2005 that Andris was entitled to 75% and Miller was entitled to 25% of the contingent fee. Andris appeals this order in Docket No. 279149.

On January 23, 2008, the trial court heard defendants' motion for summary disposition in Docket No. 286342 (*Nylund v Lopatin*). This case was a malpractice claim that Andris filed on July 1, 1994, on behalf of the *Dumas* plaintiffs Miller represented in *Finlay I*. The essence of the plaintiffs' malpractice claim was that Miller had not included an age discrimination claim regarding AAA's conduct during 1988-1989 (the warehouse claims) in the *Finlay I* complaint. After our Supreme Court decided *Dumas*, 437 Mich 521, unhappy *Finlay* plaintiffs sought out attorney Andris. Unknown to Miller, on January 16, 1992, Andris filed a complaint on behalf of 12 *Finlay* plaintiffs in Oakland Circuit Court that alleged age discrimination (*House v ACIA*, Docket No. 92-426022).[4] Andris also filed an identical complaint for three other *Finlay* plaintiffs in Macomb Circuit Court on March 25, 1992 (*Albrecht v ACIA*, Docket No. 92-000186-CK).[5] Judge Ziolkowski ruled that the *Finlay* plaintiffs who were asserting the malpractice claim in *Nylund v Lopatin* had, by retaining Andris and filing their age discrimination complaints, effectively discharged Miller from representing them on such a claim within the meaning of MCL 600.5838(1). Thus, the trial court ruled, their malpractice claims against Miller regarding age discrimination claims accrued on the date that Andris filed the *House* and *Albrecht* complaints. Judge Ziolkowski granted Miller's motion for summary disposition on the basis of the two-year statute of limitations.

II. DOCKET 279149

Andris argues that Miller was negligent in handling the claims of Alarie and Martin, and engaged in unprofessional conduct, which disqualifies him from recovering any fee under the theory of quantum meruit. We conclude this argument fails because the trial court after conducting evidentiary hearings did not clearly err in making two critical findings: (1) Miller did not engage in disciplinable conduct, and (2) Miller put considerable work into handling the case.

We review for clear error a trial court's findings of fact regarding an award of attorney fees. *Taylor v Currie*, 277 Mich App 85, 99; 743 NW2d 571 (2007). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 296; 769 NW2d 234 (2009). We review a trial court's decision whether to award attorney fees and the reasonableness of the fee award for an abuse of discretion. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748

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[4] See *House v ACIA*, unpublished opinion per curiam of the Court of Appeals issued June 27, 1995 (Docket No. 165249).

[5] See *Albrecht v ACIA*, unpublished opinion per curiam of the Court of Appeals issued September 29, 1965 (Docket No. 154692).

NW2d 265 (2008). The trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *Id*.

In *Rippey v Wilson*, 280 Mich 233, 245; 273 NW 552 (1937), our Supreme Court recognized that "[a]n attorney may lose his right to fees for unprofessional conduct or abandonment of his client's case." Still, the Court noted that misconduct as to one phase of service would not forfeit compensation for services rendered in another phase. *Id*.

The phrase "quantum meruit" means "'as much as deserved.'" *Keywell & Rosenfeld v Bithell,* 254 Mich App 300, 359; 657 NW2d 759 (2002), quoting Black's Law Dictionary (6th ed, 1990), p 1243. It is "an equitable principle that measures recovery under an implied contract to pay compensation as reasonable value of services rendered." *Id*. at 358 (quotation marks omitted). This Court held in *Reynolds v Polen,* 222 Mich App 20, 27; 564 NW2d 467 (1997), that an attorney who has been discharged has a claim to compensation for services rendered before discharge under this equitable doctrine. The *Reynolds* Court held that "as long as a discharged attorney does not engage in disciplinable misconduct prejudicial to the client's case or conduct contrary to public policy that would disqualify any quantum meruit award, a trial court should take into consideration the nature of the services rendered by an attorney before his discharge and award attorney fees on a quantum meruit basis." *Id*. at 27.

In this case, the trial court conducted hearings regarding whether Miller engaged in disciplinable conduct with respect to his representation of the *Dumas* plaintiffs. The trial court found that he had not. We note that essentially the same allegations of misconduct Andris asserted in the trial court were presented to the Attorney Discipline Board. See Report of Tri-County Hearing Panel #64 on Findings Regarding Misconduct, *Grievance Administrator v Sheldon L. Miller*, (Docket No. 06-186-GA, April 8, 2008). This report has been incorporated into the record on appeal by Order of this Court issued September 15, 2008. The hearing panel found that only one allegation of misconduct was proved: that Miller failed to adequately advise the *Dumas* plaintiffs of the ramifications of participating in "large group" litigation. *Id*. at p 8, ¶ h. An order of reprimand issued on the basis of this finding was, however, later vacated because MRPC 1.4(b) did not become effective until after the alleged misconduct occurred. See Order Vacating Hearing Panel Order of Reprimand, *Grievance Administrator v Sheldon L. Miller*, (Docket No. 06-186-GA, October 30, 2009).

On the basis of our review of the record, we are not left with a definite and firm conviction that the trial court clearly erred in its factual findings, particularly in light of the subsequent findings of the Attorney Discipline Board. *Taylor*, 277 Mich App at 99. Further, the trial court's determination to award a portion of the attorney fee to Miller and the amount awarded were within the range of principled outcomes. *Id*. We affirm in Docket No. 279149.

III. DOCKET NO. 286342

We conclude the trial court correctly ruled that the *Nylund-Finlay* plaintiffs had, by retaining Andris to represent them and file a lawsuit on their behalf for age discrimination, discharged Miller from representing them "as to the matters out of which the claim for malpractice arose." MCL 600.5838(1). The *Nylund-Finlay* plaintiffs filed *House v ACIA* on January 16, 1992, and filed *Albrecht v ACIA* on March 25, 1992. Because the malpractice

complaint in this case was not filed until July 1, 1994, more than two years after March 25, 1992, the two-year malpractice statute of limitations had expired. MCL 600.5805(6). We affirm.

We review de novo motions for summary disposition. *Kloian v Schwartz*, 272 Mich App 232, 235; 725 NW2d 671 (2006). "In the absence of a disputed fact, whether a cause of action is barred by the statute of limitations is a question of law subject to review de novo." *Id*.

In general, an action charging malpractice is subject to a two-year limitations period. MCL 600.5805(6); *Kloian*, 272 Mich App at 237. A legal malpractice claim "accrues at the time that person discontinues serving the plaintiff in a professional or pseudoprofessional capacity *as to the matters out of which the claim for malpractice arose*, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." MCL 600.5838(1) (emphasis added). Thus, when no issue regarding discovery of the claim exists, as here, the plaintiffs "action for malpractice is time-barred unless it is brought within two years from the date the claim accrued or arose (i.e., the date that services were discontinued)." *Wright v Rinaldo*, 279 Mich App 526, 529; 761 NW2d 114 (2008).

The critical issue here is to identify "the matters out of which the claim for malpractice arose," MCL 600.5838(1), to determine when Miller's service as to those matters ended and any malpractice claim accrued. An attorney may represent a client on many matters and end representation as to some matters but not others. See *Chapman v Sullivan*, 161 Mich App 558, 561-562; 411 NW2d 754 (1987) (attorney retained to represent the client regarding sale of tavern); see also *Kloian*, 272 Mich App at 238 ("We once again recognize that a plaintiff's legal malpractice claim accrues on the day that the attorney last provides professional service in the specific matter out of which the malpractice claim arose."). We agree with the trial court that the matter out of which plaintiffs' claim for malpractice arose was plaintiffs' claim against AAA for age discrimination.

A client that retains a new lawyer to proceed on a claim may effectively discharge a prior lawyer as to that particular claim. "[N]o formal discharge by the client is required, and the termination of an attorney-client relationship can be implied by the actions or inactions of the client. . . . [T]he retention of alternate counsel is sufficient proof of the client's intent to terminate the attorney's representation." *Mitchell v Dougherty*, 249 Mich App 668, 684; 644 NW2d 391 (2002) (citations omitted). This Court has continued to apply this rule: "Retention of an alternate attorney effectively terminates the attorney-client relationship." *Wright v Rinaldo*, 279 Mich App 526, 534-535; 761 NW2d 114 (2008), citing *Kloian*, 272 Mich App at 237.

In the present case, even though Miller did not end his representation of the *Finlay I* plaintiffs as to that litigation until at least July 29, 1992, when this Court affirmed the trial court's grant of summary disposition to defendant, Miller never initiated a claim on behalf of plaintiffs regarding an age discrimination arising out of the 1988-1989 "warehouse" situation. As to plaintiffs' age discrimination claim, the *Nylund-Finlay* plaintiffs effectively discharged Miller when they retained Andris to represent them as evidenced by filing lawsuits asserting age discrimination in *House v ACIA* on January 16, 1992, and *Albrecht v ACIA* on March 25, 1992. Because plaintiffs' malpractice complaint was filed on July 1, 1994, more than two years after March 25, 1992, the two-year malpractice statute of limitations had expired. MCL 600.5805(6). Consequently, we affirm the trial court in Docket No. 286342.

IV. DOCKET NO. 286343

We affirm the trial court because plaintiffs Alarie and Martin offer only speculative arguments that Miller's alleged malpractice was a cause-in-fact and legal or proximate cause of obtaining an inadequate settlement, or that the settlement was less than plaintiffs' true damages.

To prove a legal malpractice claim, a plaintiff must establish the following elements: "(1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was a proximate cause of an injury; and (4) the fact and extent of the injury alleged." *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). With respect to claims of negligent acts, moreover, "mere errors in judgment by a lawyer are generally not grounds for a malpractice action where the attorney acts in good faith and exercises reasonable care, skill, and diligence." *Id*. at 658. The most troublesome element to prove in a legal malpractice case is proximate causation. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994). This includes proving both cause-in-fact, but for the negligent conduct, and also legal or proximate cause. *Id*. n 13, n 14. Proof of these elements must consist of more than speculation and conjecture. *Id*. at 586-587; See also *Basic Food Industries, Inc v Grant*, 107 Mich App 685, 693; 310 NW2d 26 (1981). "A claim of malpractice further requires a showing of actual injury caused by the malpractice, not just the potential for injury." *Colbert v Conybeare Law Office*, 239 Mich App 608, 620; 609 NW2d 208 (2000).

Here, assuming for the sake of analysis that Miller's conduct was not just good faith legal judgment but culpable neglect, plaintiffs offer only speculative arguments that they would have received a greater award for their age discrimination claim but for such conduct. The general principle that with the passage of time memories may fade or evidence might be lost is unavailing. What matters were forgotten and what evidence was lost that would have affected the outcome of the claim? As Judge Giovan observed, plaintiffs point to none. Comparisons to settlements or judgments for different claimants at different times, in different forums, and with different circumstances do not provide proof that but for Miller's conduct plaintiffs would have received a larger jury award or settlement. Further, plaintiffs offer no authority for the proposition that a lawyer may be held legally responsible for changes in law during the course of litigation, whether as to taxable consequence of a judgment or settlement, or regarding the law of liability. The failure to cite any supporting legal authority for a position constitutes abandonment of the issue. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

Plaintiffs' also assert that they may recover non-economic damages, such as damages for anxiety, shame, mortification, and humiliation, caused by delay in prosecuting their age discrimination case. See *Gore v Rains & Block*, 189 Mich 729, 740-741; 473 NW2d 813 (1991). But in *Gore*, "there was evidence on the record from which the jury could determine that mental anguish damages were a legal and natural consequence of defendants' negligence." *Id*. at 741. Here, plaintiffs offer no evidence at all to support such a claim, or that compensation for such injury was not included in the settlement plaintiffs received. Claims for damages must be based on more than speculation. *Colbert*, 239 Mich App at 620. We affirm.

V. DOCKET NO. 286344

Similar to Alarie and Martin in Docket No. 286343, plaintiffs in this case offer no more than speculation and conjecture that but for Miller's alleged negligence they would have obtained a more favorable result on their age discrimination claim. We, therefore, affirm the trial court's grant of summary disposition to defendants.

Contrary to plaintiffs' argument, the concept of a "suit-within-a-suit" is fully applicable to plaintiffs' malpractice claim because, like missing a statute of limitations, the jury's no cause verdict precluded plaintiffs from recovering any damages on their underlying claim of age discrimination. Plaintiffs may only prevail on their claim of malpractice if they prove all the elements their claim, including causation, but for the negligent conduct their age discrimination claim would have had a better outcome. *Charles Reinhart Co*, 444 Mich at 586; *Basic Food Industries*, 107 Mich App at 692-694. But as discussed in Docket No. 286343, plaintiffs offer no more than speculative arguments as proof that but for Miller's conduct a better outcome might have been attained.

Moreover, even if plaintiffs proved Miller was negligent, they must still offer proof that Miller's negligence proximately caused their loss and also prove the "fact and extent" of their damages on their underlying age discrimination claim. *Colbert*, 239 Mich App at 620; *Basic Food Industries*, 107 Mich App at 690, 693. Here, plaintiffs do not point to evidence that would prove the third and fourth elements of their legal malpractice claim. *Basic Food Industries*, 107 Mich App at 690; *Colbert*, 239 Mich App at 620. We affirm in Docket No. 286344.

VI. DOCKET NO. 287143

For much the same reasons discussed in Docket Nos. 286343 and 286344, we conclude that plaintiffs cannot prove their claim of legal malpractice. We therefore reverse and remand to the trial court for entry of summary disposition in defendants' favor.

Plaintiffs voluntarily settled their age discrimination claims against AAA on the eve of trial after another group of plaintiffs had lost similar claims at trial. The record indicates Miller advised plaintiffs truthfully regarding the pros and cons of settlement or trial. Plaintiffs have not produced any evidence that but for Miller's alleged negligence they would have received a more favorable outcome than settlements they received. Indeed, even assuming plaintiffs had a viable claim of age discrimination claim against AAA and assuming that Miller was negligent in handling the claim, plaintiffs have simply not produced any evidence that the damages they suffered as a result of the alleged discriminatory conduct exceeded the amounts of their settlements. Plaintiffs Chapman and Mlynarek produced no evidence of damages. Mrs. Massab testified her husband found his job stressful and took a normal, albeit early retirement at age 55. The quota system had a de minimus effect on plaintiff Dziadziola; he resigned from his job at AAA in 1982 to pursue a lucrative career as a stockbroker. Thus, plaintiffs produced no evidence to establish the fact and extent of an injury in their malpractice action because they could not establish damages in their age discrimination claim. *Colbert*, 239 Mich App at 620. For these reasons and for the reasons discussed in Docket No. 286343, we conclude the trial court erred in not granting defendants summary disposition.

We reverse in Docket No. 287143 and remand to the trial court for entry of summary disposition in defendants' favor. We do not retain jurisdiction. Defendants as the prevailing parties may tax costs.

/s/ Jane M. Beckering
/s/ Jane E. Markey
/s/ Stephen L. Borrello