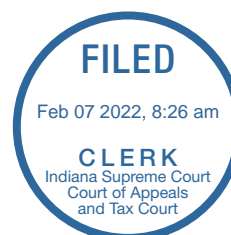


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Lori Della Valle and
Guy Della Valle,
Appellants-Plaintiffs,

v.

Andrew J. Thompson and
Thompson Law Office, LLC,
Appellees-Defendants.

February 7, 2022

Court of Appeals Case No.
21A-CT-1939

Appeal from the Marion Superior
Court, Civil Division

The Honorable Gary L. Miller,
Judge

Trial Court Cause No.
49D03-1903-CT-8688

Tavitas, Judge.

Case Summary

- [1] Lori Della Valle and Guy Della Valle appeal: (1) the trial court's grant of partial summary judgment regarding their claims against Andrew Thompson

(“Thompson”) and the Thompson Law Office, LLC (“Law Office”) (collectively, “Defendants”); and (2) the trial court’s denial of the Della Valles’ cross-motion for summary judgment regarding Defendants’ amended counterclaims. Defendants cross-appeal the trial court’s denial of their motion for summary judgment regarding the Della Valles’ fraud claim.

[2] Thompson represented Lori in a dissolution proceeding brought by Guy. The Della Valles’ claims stem from allegations that Thompson’s assistant told Lori to use debit cards associated with Guy’s personal bank accounts to pay Lori’s retainer fee to Thompson. The trial court granted summary judgment to Defendants on all but the Della Valles’ fraud claim against Defendants, and the trial court denied the Della Valles’ cross-motion for summary judgment on Defendants’ amended counterclaims.

[3] We conclude that the trial court erred when it granted Defendants’ motion for summary judgment regarding Counts I, III, IV, V, VI, VII, and VIII of the Della Valles’ amended complaint. The trial court properly denied Defendants’ motion for summary judgment regarding, Count II, the fraud claim. Additionally, the trial court properly denied the Della Valles’ cross-motion for summary judgment regarding Counts I and II of the amended counterclaim, but the trial court erred by denying the cross-motion for summary judgment regarding Count III of the amended counterclaim. Accordingly, we affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

Issues

[4] The Della Valles raise three issues, which we restate as:

- I. Whether the trial court erred by striking certain evidence designated by the Della Valles.
- II. Whether the trial court properly granted partial summary judgment to Defendants on Counts I, III, IV, V, VI, VII, and VIII of the Della Valles' amended complaint.
- III. Whether the trial court properly denied the Della Valles' cross-motion summary judgment on the Defendants' amended counterclaims.

On cross-appeal, Defendants argue that the trial court erred by denying their motion for summary judgment regarding Count II of the Della Valles' amended complaint.

Facts

[5] Lori and Guy were married, but they maintained separate property and finances. In February 2017, Guy filed a petition for dissolution of marriage. That same month, Lori sought to hire Thompson to represent her in the dissolution proceedings.¹ Thompson required Lori to submit an \$8,500.00 nonrefundable, general retainer. According to Lori, Thompson's assistant,

¹ There was no written fee agreement between Lori and the Defendants. Tr. Vol. II p. 6.

Amy Weber², instructed Lori to wait until Guy was asleep and then use his debit card to make the retainer payment. Lori provided account information to the Law Office for two of Guy's debit cards, and the Law Office withdrew \$8,500.00 from Guy's accounts. When Guy protested that Lori was not authorized to use the debit cards, Thompson refused to return the funds. Thompson deposited the \$8,500.00 into a non-attorney trust account, and he entered a "limited appearance" on Lori's behalf in the dissolution proceedings. Appellants' App. Vol. II pp. 158-59. Thompson then billed Lori an additional \$10,637.50 for legal work, and Thompson withdrew his appearance as Lori's attorney on March 17, 2017. The trial court dismissed the dissolution proceedings in May 2018 after the parties reconciled.³

[6] The Della Valles filed a complaint against Thompson on March 4, 2019, and Thompson filed an answer and counterclaim. The Della Valles filed an amended complaint against Defendants in January 2020. The amended complaint alleged claims of: (I) legal malpractice and breach of fiduciary duty by Defendants against Lori; (II) fraud by Defendants against Lori and Guy; (III) conversion and theft by Defendants against Guy; (IV) unjust enrichment and disgorgement by Defendants against Lori and Guy; (V) breach of contract by Defendants against Lori; (VI) constructive fraud by Defendants against Lori;

² Weber died in March 2019.

³ Guy later filed a second petition for dissolution of marriage, and the dissolution of marriage was ultimately granted in January 2021.

(VII) attorney deception by Thompson against Lori and Guy; and (VIII) rescission of the contract between Defendants and Lori.

[7] In February 2020, Defendants filed an amended counterclaim for: (I) unpaid account balance against Lori by the Law Firm in the amount of \$6,137.50; (II) unjust enrichment against Lori by the Law Firm; and (III) tortious interference against Guy by Defendants. Specifically, the Law Office alleged that it invoiced Lori on March 1, 2017, in the amount of \$2,887.50, and on March 8, 2017, in the amount of \$3,250.00. In the amended counterclaim, Defendants thus allege that Lori “has unpaid debts to Counter-Plaintiff in the sum of \$6,137.50 remaining due and outstanding to Counter-Plaintiff as of this date.”⁴ Appellants’ App. Vol. II p. 83.

[8] Defendants filed a motion for summary judgment regarding the Della Valles’ eight-count amended complaint and a designation of evidence, which included, among other things, Thompson’s affidavit. The Della Valles filed a cross-motion for summary judgment regarding the Defendants’ amended counterclaims, a statement of facts, and their designation of evidence, which included, among other things, Guy’s affidavit, Lori’s deposition, and Thompson’s deposition.

⁴ The source of the discrepancy between the \$10,637.50 that Thompson billed Lori in addition to the retainer and the \$6,137.50 alleged in the amended counterclaim to be owed is not clear from the record presented to us.

[9] In response to Defendants’ motion for summary judgment and in support of the Della Valles’ cross-motion for summary judgment, the Della Valles relied, in part, upon the following statement of facts:

6. Thompson instructed his assistant, Amy Weber, to tell Lori to wait until Guy was sleeping and take Guy’s debit cards to pay Thompson’s fee. (Ex. B 7:4-15, 9:9-16, 13:1-17, 14:23-25, 16:21-24, 17:1-18, 27:1-7, 28:2-21, 42:17-24).

7. Lori protested because it was not her money, but Thompson assured her (through his assistant) that it was perfectly legal for her to take money from Guy’s separate account. (Ex. B 13:1-12, 27:1-7, 28:2-21, 34:4-9, 37:17-25, 41:18-25).

* * * * *

9. Thompson then deposited those funds in a non-attorney trust account and refused to return the money to Guy who demanded the return of his funds. (Ex. A ¶ 13; Ex. C 119:3-7).

* * * * *

13. Thompson also further claims that he is entitled to an additional \$10,637.50 from Lori because the \$8,500 was only his fee to open the file and did not [sic] for legal work. (Ex. C 109:3-10).

* * * * *

Appellants’ App. Vol. II pp. 226-227; Appellants’ App. Vol. IV pp. 4-5.

Exhibit A refers to Guy’s affidavit; Exhibit B refers to Lori’s deposition; and

Exhibit C refers to Thompson’s deposition.

- [10] The Della Valles filed a motion to strike multiple paragraphs of Thompson’s affidavit, and Defendants filed a motion to strike paragraphs 6, 7, 9, and 13 of the Della Valles’ statement of facts along with the associated designated evidence cited by the statement of facts.
- [11] After a hearing, the trial court entered an order on July 16, 2021, denying—without explanation—the Della Valles’ motion to strike and granting Defendants’ motion to strike as to paragraphs 6, 7, 9, and 13 of the Della Valles’ statement of facts. The Della Valles filed a motion to reconsider, which the trial court denied.
- [12] On August 26, 2021, the trial court granted the Defendants’ motion for summary judgment as to Counts I, III, IV, V, VI, VII, and VIII of the Della Valles’ amended complaint. The trial court denied Defendants’ motion for summary judgment regarding Count II of the amended complaint for fraud. The trial court denied the Della Valles’ motion for summary judgment regarding the Defendants’ amended counterclaims. The trial court also found no just reason for delay and ordered final judgment as to Counts I, III, IV, V, VI, VII, and VIII. The Della Valles now appeal, and Defendants cross-appeal.

Analysis

- [13] “When this Court reviews a grant or denial of a motion for summary judgment, we ‘stand in the shoes of the trial court.’” *Burton v. Benner*, 140 N.E.3d 848, 851 (Ind. 2020) (quoting *Murray v. Indianapolis Public Schools*, 128 N.E.3d 450, 452 (Ind. 2019)). Summary judgment is appropriate “if the designated evidentiary

matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Murray*, 128 N.E.3d at 452; *see also* Ind. Trial Rule 56(C).

[14] The party moving for summary judgment bears the burden of making a prima facie showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Burton*, 140 N.E.3d at 851. The burden then shifts to the non-moving party to show the existence of a genuine issue. *Id.* On appellate review, we resolve “[a]ny doubt as to any facts or inferences to be drawn therefrom . . . in favor of the non-moving party.” *Id.*

[15] We review the trial court’s ruling on a motion for summary judgment de novo, and we take “care to ensure that no party is denied his day in court.” *Schoettmer v. Wright*, 992 N.E.2d 702, 706 (Ind. 2013). “We limit our review to the materials designated at the trial level.” *Gunderson v. State, Indiana Dep’t of Nat. Res.*, 90 N.E.3d 1171, 1175 (Ind. 2018), *cert. denied*.

I. Motion to Strike⁵

[16] Before addressing the propriety of the trial court’s summary judgment orders, we must first address the Della Valles’ assertion that the trial court abused its

⁵ Defendants contend that the trial court’s order on the motion to strike is an interlocutory order that is improperly appealed because only the order on the motions for summary judgment is a final appealable order. Our motions panel addressed this argument and denied Defendants’ partial motion to dismiss. “Though we have the inherent authority to reconsider any decision while an appeal remains pending, we are reluctant to overrule our motions panel.” *Haggerty v. Anonymous Party 1*, 998 N.E.2d 286, 293 (Ind. Ct. App. 2013). We decline to overrule our motions panel here. Accordingly, we will address the Della Valles’ arguments regarding the motion to strike.

discretion in granting Defendants’ motion to strike certain portions of the Della Valles’ statement of facts and designated evidence.⁶ A trial court has broad discretion in ruling on the admissibility of evidence. *Morris v. Crain*, 71 N.E.3d 871, 877 (Ind. Ct. App. 2017). “This discretion extends to rulings on motions to strike affidavits on the grounds that they fail to comply with the summary judgment rules.” *Id.* “We will determine that a trial court has abused its discretion when the trial court’s decision is clearly against the logic and effect of the facts and circumstances before it.” *Id.*

[17] We further note that Indiana Trial Rule 56, which governs summary judgment proceedings, provides, in part:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies not previously self-authenticated of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.

T.R. 56(E).

⁶ The Della Valles do not challenge the trial court’s denial of their motion to strike portions of Thompson’s affidavit.

A. Paragraphs 6 and 7

- [18] We begin by addressing paragraphs 6 and 7 of the Della Valles' statement of facts, which the trial court struck without explanation. In Defendants' motion to strike, they argued that paragraphs 6 and 7 and the cited portions of the designated evidence were hearsay and were not based upon personal knowledge.⁷
- [19] Paragraph 6 provided: "Thompson instructed his assistant, Amy Weber, to tell Lori to wait until Guy was sleeping and take Guy's debit cards to pay Thompson's fee." Appellants' App. Vol. II p. 226; Appellants' App. Vol. IV pp. 4-5. The statement of fact cites Lori's deposition testimony, in which she stated that Weber told Lori to wait until Guy was sleeping and use his debit cards to pay Thompson's retainer and that, according to Weber, Thompson said "it was okay." Appellants' App. Vol. III p. 33.
- [20] Paragraph 7 stated: "Lori protested because it was not her money, but Thompson assured her (through his assistant) that it was perfectly legal for her to take money from Guy's separate account." Appellants' App. Vol. II pp. 226-227; Appellants' App. Vol. IV p. 5. The statement of fact cites Lori's deposition

⁷ On appeal, Defendants also argue that the granting of the motion to strike can be sustained "on the basis of the self-contradictory nature of Lori Della Valle's accounting of events, which are internally inconsistent, widely varying, changed over time in discovery and deposition testimony, and the statements nor even Amy Weber were ever even mentioned in the allegations in the Della Valles' Amended Complaint." Appellees' Br. p. 23. Defendants, however, do not specify any inconsistencies, and we will not search the record to support Defendants' arguments. This contention is waived. *See* Ind. Appellate Rule 46(B) (requiring appellee's brief to conform which Rule 46(A), which requires cogent reasoning and support to the record and relevant authorities).

testimony, in which Lori stated that she asked Weber repeatedly if it was legal for her to use Guy's debit card, and Weber assured her that Thompson said it was legal because Guy and Lori were married.

[21] Thompson contends that the statements were not based upon Lori's personal knowledge because Lori had no knowledge of Thompson's conversations with Weber regarding the payment of the retainer. Lori's deposition testimony, however, is based upon Weber's statement to Lori, not Lori's speculation as to Thompson's thoughts.

[22] Thompson also contends that the statements are hearsay. Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted. Ind. Evidence Rule 801(c). We note Indiana Evidence Rule 801(d)(2)(D) provides that a statement is not hearsay if: "The statement is offered against an opposing party and . . . (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed." Weber's statements to Lori were offered against Defendants and were made by Defendants' employee on a matter within the scope of that relationship. Thus, Weber's statements do not constitute hearsay.

[23] In fact, Thompson's affidavit provides:

5. As a matter of office policy, I set amounts of retainers to be collected, but did not handle, process nor advise clients on if, how or when they would pay the retainers.

6. These matters were handled by my legal assistant, Amy Weber, who worked for me from November 2016 through February 2019.

7. Amy Weber was my sole, regular employee during that time.

Appellants' App. Vol. II p. 86. By Thompson's account, he authorized Weber to advise clients regarding how they would pay retainers. Accordingly, we conclude that Lori's deposition testimony regarding Weber's comments to Lori was admissible, and the trial court abused its discretion by striking paragraphs 6 and 7 of the statement of facts and the supporting deposition testimony. *See, e.g., Irmscher Suppliers, Inc. v. Schuler*, 909 N.E.2d 1040, 1046 (Ind. Ct. App. 2009) ("The statements that the windows were defective were admissible against Pella for the truth of the matter asserted because they were made by a Pella employee charged with investigating the Schulers' insect situation, offered at trial against Pella, and reported by Irmscher, who was acting as Pella's agent or intermediary in regard to fixing the problems with the Pella windows.").

B. Paragraphs 9 and 13

[24] The Della Valles also argue that the trial court abused its discretion by striking, without explanation, paragraphs 9 and 13 of the Della Valles' statement of facts. Defendants argued, in the motion to strike, that paragraphs 9 and 13: (1) were not based upon personal knowledge; (2) "are actually both false

statements”; and (3) do not match the cited designated evidence.⁸ Appellants’ App. Vol. V p. 134. On appeal, however, Defendants do not respond in their Appellees’ Brief to the Della Valles’ argument about paragraphs 9 and 13.

[25] Paragraph 9 stated: “Thompson then deposited those funds in a non-attorney trust account and refused to return the money to Guy who demanded the return of his funds.” Appellants’ App. Vol. II p. 227; Appellants’ App. Vol. IV p. 5. The statement referenced Guy’s affidavit, which averred that Thompson refused to return Guy’s funds, and Thompson’s deposition, in which Thompson stated that he did not deposit the funds into his trust account. We find that the statement of fact is supported by the designated evidence and is based on personal knowledge.

[26] Paragraph 13 provides: “Thompson also further claims that he is entitled to an additional \$10,637.50 from Lori because the \$8,500 was only his fee to open the file and did not [sic] for legal work.” Appellants’ App. Vol. II p. 227; Appellants’ App. Vol. IV p. 5. The statement referenced Thompson’s deposition, in which Thompson stated that he billed Lori \$10,637.50 in addition to the \$8,500.00 retainer. Although the cited portion of the deposition does not state that the \$8,500.00 fee was “only his fee to open the file,” Thompson stated in other portions of the deposition that the \$8,500.00 was a

⁸ To the extent that Defendants challenge the truthfulness of Lori’s and Guy’s statements, such matters are factual disputes that are not proper for resolution in summary judgment proceedings.

nonrefundable retainer. In fact, Defendants did not challenge these additional paragraphs in the Della Valles' statement of facts:

10. This litigation resulted, and Thompson now claims that he did not return the funds because the \$8,500 was a non-refundable general retainer. (Ex. C 56:11-15).

11. Thompson received the \$8,500 and thereafter billed a total of over \$19,000 to Lori for a few weeks of work in a divorce case. (Ex. C 11:27-9). In contrast, Guy's counsel's total bill for the same work was \$2,100. (Ex. C 110:10-12).

12. Thompson claims that he is entitled to keep the \$8,500, which he contends was a reasonable fee for him to open his file. (Ex. C 110:27-9).

Appellants' App. Vol. II p. 227. Although this phrase of the statement of fact—"only his fee to open the file and did not [sic] for legal work"—is poorly worded, we conclude that the remainder of the statement of fact is supported by the designated evidence and is based on personal knowledge. Further, Defendants did not challenge the contention that the retainer was nonrefundable. Under these circumstances, we conclude that the trial court also abused its discretion by striking paragraphs 9 and 13 of the Della Valles' statement of facts and the associated designated evidence.

II. Motion for Summary Judgment Regarding Della Valles' Amended Complaint

[27] Next, the Della Valles argue that the trial court erred by granting Defendants' motion for summary judgment regarding Counts I, III, IV, V, VI, VII, and VIII

of the Della Valles’ amended complaint.⁹ Defendants, however, contend that the Della Valles have raised no genuine issue of material fact, and Defendants had “no burden of negating any element of [the Della Valles’ claims], let alone elements of all seven (7) claims, because the Della Valles have failed to meet their burden of coming forward with any evidence that could establish any of their claims.” Appellees’ Br. p. 25. Defendants appear to misinterpret the summary judgment standard. We note that Defendants had the initial burden of demonstrating a prima facie showing that no issue of material fact exists and that they were entitled to judgment as a matter of law. *Burton*, 140 N.E.3d at 851. “In particular, while federal practice permits the moving party to merely show that the party carrying the burden of proof lacks evidence on a necessary element, we impose a more onerous burden: to affirmatively ‘negate an opponent’s claim.’” *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014) (quoting *Jarboe v. Landmark Cmty. Newspapers of Ind., Inc.*, 644 N.E.2d 118, 123 (Ind. 1994)). If Defendants met their burden, the burden then shifted to the Della Valles to show the existence of a genuine issue. *Burton*, 140 N.E.3d at 851. With this in mind, we will address the parties’ arguments.

A. Marital Property

[28] Defendants’ motion for summary judgment argued, in part, that they were entitled to summary judgment because Guy’s bank accounts were marital

⁹ The trial court denied Defendants’ motion for summary judgment regarding Count II for fraud. In Section IV, we address Defendants’ cross-appeal of the denial of this part of their motion for summary judgment.

property with a presumption of equal division.¹⁰ On appeal, Defendants argue that the funds in Guys' bank accounts were "presumptively marital property." Appellees' Br. p. 29. Defendants seem to contend that, because Guy's personal accounts could be considered marital property in a dissolution proceeding, Lori could legally use his debit cards without his permission to pay the retainer. Defendants cite no relevant authority for this proposition and, accordingly, the issue is waived. *See* Ind. Appellate Rule 46(B).

[29] Waiver notwithstanding, our research reveals no support for Defendants' argument. The accounts at issue were Guy's separate accounts, not joint accounts between Guy and Lori. Defendants cite no authority that would allow Lori to remove funds from Guy's separate accounts. As for Defendants' argument that the accounts were marital property, which Lori was, therefore, entitled to use, we direct Defendants' attention to *State v. Dively*, 431 N.E.2d 540, 543 (Ind. Ct. App. 1982), which rejected a similar argument and analyzed one hundred years of jurisprudence on the issue. The *Dively* court held: "We do not believe that the mere existence of the marriage relationship puts a spouse's separate property beyond the protection of the law and subject to the

¹⁰ Defendants also argued that: (1) Guy did not have standing to make a claim for the return of attorney fees paid by his wife during dissolution proceedings; and (2) laches prevents the Della Valles' action because Guy should have addressed the charges with his bank immediately after they were incurred. Defendants do not make these arguments on appeal.

On appeal, Defendants first argue that the Della Valles' claims are barred by the statute of limitations. Defendants, however, did not make this argument in their motion for summary judgment. "Issues not raised before the trial court on summary judgment cannot be argued for the first time on appeal and are waived." *Shenmei Yuan v. Wells Fargo Bank, N.A.*, 162 N.E.3d 481, 488 (Ind. Ct. App. 2020). Accordingly, Defendants' statute of limitations argument is waived.

degradation of the other spouse.” *Dively*, 431 N.E.2d at 543. Although Guy’s personal accounts were marital property for purposes of the dissolution proceeding, until the marital property was divided by order of the dissolution court, Lori was not entitled to take funds from Guy’s personal accounts without Guy’s permission.

[30] To the extent that Defendants argue the propriety of Lori’s withdrawal from Guy’s account had to be determined only by the dissolution court, we disagree. Defendants contend that collateral estoppel prevents all courts except the dissolution court from addressing these issues. The dissolution court was tasked with dividing marital property in the context of dissolution proceedings, and those dissolution proceedings were dismissed. The issue here is not the division of marital property, but rather the propriety of Defendants allegedly instructing Lori to use Guy’s personal debit cards to pay a retainer. Defendants’ arguments are unpersuasive and did not entitle them to summary judgment on the Della Valles’ claims.

B. Violations of the Rules of Professional Conduct

[31] Next, Defendants seem to argue that the Della Valles’ citation to the Rules of Professional Conduct in their Appellants’ Brief is improper. The Della Valles cite: (1) Indiana Rule of Professional Conduct 5.3(c)(1), for the proposition that Thompson failed to take remedial measures after his assistant violated the law or the Rules of Professional Conduct; (2) Rule 1.15(d) for the proposition that Thompson was required to immediately segregate the disputed funds into a trust account; and (3) Rule 1.5 for the proposition that the nonrefundable

retainer was an unreasonable fee under Rule 1.5 and violated our Supreme Court's opinions in *In re Earhart*, 957 N.E.2d 611 (Ind. 2011), and *In re O'Farrell*, 942 N.E.2d 799 (Ind. 2011).¹¹

[32] The Scope of the Rules of Professional Conduct provides:

Violation of a Rule should not itself give rise to a cause of action against a lawyer, nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability, but these Rules may be used as non-conclusive evidence that a lawyer has breached a duty owed to a client. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a

¹¹ In *O'Farrell*, our Supreme Court discussed the following three common types of attorney fees:

(1) a "flat fee" is a fixed charge for a particular representation, often paid in full at the beginning of the representation; (2) an "advance fee" is a payment made at the beginning of a representation against which charges for the representation are credited as they accrue, usually on an hourly basis; and (3) a "general retainer" is payment for an attorney's availability, which is earned in full when paid before any work is done.

942 N.E.2d at 803 (footnote omitted). With respect to retainers, the Court noted:

[W]hen the purpose is simply to pay for the lawyer's availability to provide legal services as needed during a period of time, as opposed to payment for work not yet done, the fee is a general retainer. A general retainer acts as an option on the lawyer's future services, often on a priority basis, and precludes the lawyer from undertaking representations that might conflict with representing the client. In some cases, the lawyer may need to turn down unrelated employment to ensure availability if the client calls for immediate assistance. Because this fee is not intended to pay for work, but merely for the lawyer's availability, it is earned on payment and the attorney is entitled to the money even if no services are actually performed for the client, so long as the lawyer provides the bargained-for availability.

Id. at 803-04. Although such "unrefundable retainers" are not "per se unenforceable," there must be "value received by the client or detriment incurred by the attorney in return for the nonrefundable provision, other than relatively routine legal services." *Id.* at 805. "[T]he basis for charging a nonrefundable general retainer in a particular case must be supported by the actual circumstances of that case." *Id.* at 805-06.

just basis for a lawyer’s self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer’s violation of a Rule may be evidence of breach of the applicable standard of conduct.

[33] Our Supreme Court has held that, “while civil liability in damages may not be predicated on a claimed violation of a specific professional conduct rule relating to fiduciary duties, a client nevertheless may seek damages if the attorney’s conduct constitutes . . . an independent common law basis, apart from violation of [the Rules of Professional Conduct], on which a client may seek recourse in damages.” *Liggett v. Young*, 877 N.E.2d 178, 183 (Ind. 2007). Accordingly, where the Della Valles have an independent common law basis to support their claims, they may use the Rules as non-conclusive evidence that a lawyer has breached a duty owed to a client. Our review of the Della Valles’ claims reveals an independent common law basis to support each claim. The Della Valles’ citation to the Rules, thus, was not improper and did not entitle Defendants to summary judgment.

C. Counts I, III, IV, V, VI, and VII

[34] Even if we assume that the Defendants met their initial burden in filing the motion for summary judgment, we conclude that the Della Valles established the existence of a genuine issue of material fact, which barred entry of summary judgment as to most of the counts in their amended complaint. A factual dispute exists here regarding whether Weber, with Thompson’s approval,

advised Lori to use Guy's debit cards to pay the \$8,500.00 retainer. The following claims: Counts I (legal malpractice and breach of fiduciary duty by Defendants against Lori); III (conversion and theft by Defendants against Guy); IV (unjust enrichment and disgorgement by Defendants against Lori and Guy); V (breach of contract by Defendants against Lori); VI (constructive fraud by Defendants against Lori); and VII (attorney deception by Thompson against Lori and Guy), each pertain directly to this genuine issue of material fact. Accordingly, because a genuine issue of material fact exists as to these counts, summary judgment was improper on Counts I, III, IV, V, VI, and VII.

D. Count VIII

[35] Count VIII requested the rescission of the oral contract between Lori and Defendants for the return of the \$8,500.00 retainer, which Lori contends was improper. Rescission of a contract is defined as “the annulling, abrogating, or unmaking of a contract.” *Van Bibber Homes Sales v. Marlow*, 778 N.E.2d 852, 857 (Ind. Ct. App. 2002), *trans. denied*. “The remedy of contract rescission functions to restore the parties to their precontract position, that is, the status quo.” *Id.* The party seeking rescission of a contract bears the burden of proving his right to rescind and his ability to return any property received under the contract. *Id.*

[36] “The party seeking rescission of a contract bears the burden of proving his right to rescind and his ability to return any property received under the contract.” *Id.* “Rescission of a contract is not automatically available,” but “if a breach of

the contract is a material one which goes to the heart of the contract, rescission may be the proper remedy.” *Id.* at 858.

[37] Because Lori argues that the nonrefundable retainer was improper under the Rules of Professional Conduct, we again note that, under *Liggett*, 877 N.E.2d 183, Lori may use the Rules as non-conclusive evidence that a lawyer has breached a duty owed to a client where she has an independent common law basis to support her claim. Rescission is an independent common law basis. There are genuine issues of material fact as to whether the nonrefundable retainer was supported by “value received by the client or detriment incurred by the attorney in return for the nonrefundable provision, other than relatively routine legal services” and, thus, whether Defendants’ nonrefundable retainer was proper under the circumstances. *See O’Farrell*, 942 N.E.2d at 803-06; *supra* n.11. Accordingly, we conclude that the trial court erred when it granted summary judgment to Defendants on Count VIII.

III. Cross-Motion for Summary Judgment Regarding Defendants’ Amended Counterclaims

[38] Next, the Della Valles argue that the trial court erred by denying their cross-motion for summary judgment regarding Defendants’ amended counterclaims. The Della Valles sought summary judgment regarding the following counterclaims: (I) account balance that Lori owes to the Law Office; (II) unjust enrichment against Lori by the Law Office; and (III) tortious interference with a business relationship against Guy by Defendants. The Della Valles argued that they were entitled to summary judgment because: (1) Counts I, II, and III are

brought by the Law Office, which is a dissolved limited liability company; and (2) Count III, which is also brought by Thompson, fails due to a lack of evidence to support tortious interference.

A. Counterclaims by a Dissolved LLC

[39] Counts I and II of the amended counterclaim were brought solely by the Law Office, and Count III was brought by both Thompson and the Law Office. The Della Valles argue that an administratively dissolved limited liability company (“LLC”) cannot maintain a lawsuit, and the Law Office was administratively dissolved in February 2021.¹² The Della Valles cite Indiana Code Section 23-0.5-6-2, which, at the time Defendants’ amended counterclaim was filed, provided that an administratively dissolved LLC “may not carry on any activities except” applying for reinstatement or activities “necessary to wind up its activities and affairs and liquidate its assets.”¹³

¹² See <https://bsd.sos.in.gov/PublicBusinessSearch/BusinessFilings> (last accessed January 26, 2022).

¹³ Indiana Code Section 23-0.5-6-2 was amended effective April 29, 2021. Prior to the amendment, the statute referenced Indiana Code Sections 23-18-9-4; 23-18-9-8; and 23-18-9-9. The amendment added a reference to Indiana Code Section 23-18-9-3, which provides:

(a) A dissolved limited liability company may only carry on business that is appropriate to wind up and liquidate its business and affairs, including the following:

- (1) Collecting its assets.
- (2) Disposing of properties that will not be distributed in kind to members.
- (3) Discharging or making provision for discharging liabilities.
- (4) Distributing the remaining property among the members.
- (5) Doing every other act necessary to wind up and liquidate its business and affairs.

(b) Dissolution of a limited liability company does not do the following:

[40] At the time of the February 2021 administrative dissolution, the Della Valles’ action was pending against the Law Office, and the Law Office had a pending amended counterclaim against the Della Valles. Participating in pending litigation is part of winding up the Law Office’s affairs. Despite the administrative dissolution, the Law Office’s already pending counterclaims may continue, just as the Della Valles’ claims against the Law Office may continue. Accordingly, the Della Valles’ argument fails, and the trial court properly denied the Della Valles’ motion for summary judgment on this basis. *See, e.g., In re Est. of Bender*, 806 N.E.2d 59, 64 (Ind. Ct. App. 2004) (concluding that a limited liability company’s post-dissolution exercise of an option to purchase land—an asset that was acquired but not exercised prior to the dissolution—is appropriate to wind up and liquidate its business and affairs).

B. Tortious Interference with a Business Relationship Claim

[41] The Della Valles next argue that the trial court erred by denying their motion for summary judgment regarding Count III of the amended counterclaim, which was brought by both Thompson and the Law Office against Guy for tortious interference with a business relationship. The elements of tortious

* * * * *

(5) *Prevent commencement of a proceeding by or against the limited liability company in its name.*

(6) Abate or suspend a proceeding pending by or against the limited liability company on the effective date of dissolution.

(7) Terminate the authority of the registered agent of the limited liability company.

(Emphasis added). Although this amendment makes it clear that the Law Office could maintain the amended counterclaim, the statutory amendment was not enacted until after the administrative dissolution of the Law Office.

inference with a business relationship are: (1) the existence of a valid relationship; (2) the defendant's knowledge of the existence of the relationship; (3) the defendant's intentional interference with that relationship; (4) the absence of justification; and (5) damages resulting from the defendant's wrongful interference with the relationship. *Morris*, 71 N.E.3d at 880 n.5. Further, our Supreme Court has held that tortious interference with a business relationship requires the additional showing that a defendant acted illegally in achieving his end. *Melton v. Ousley*, 925 N.E.2d 430, 436 (Ind. Ct. App. 2010) (citing *Brazaukas v. Fort Wayne-South Bend Diocese, Inc.*, 796 N.E.2d 286, 291 (Ind. 2003), *cert. denied*, 541 U.S. 902 , 124 S. Ct. 1602 (2004)).

[42] Count III of the amended counterclaim alleged:

23. As asserted elsewhere herein, an attorney-client, business relationship existed between Counter-Plaintiff and Wife in February and March 2017. The nature of the representation involved divorce litigation in the Plaintiffs' case, which continued through May 2018.

24. As the opposing party in the divorce, Husband knew of the relationship.

25. From its inception, Husband attempted to disrupt and interfere with the relationship, eventually succeeding in putting Counter-Plaintiff in the position it needed to withdraw from representation.

26. Wife was in need of counsel to represent her and Counter-Plaintiff was certainly competent to provide the presentation

[sic], thus Husband was unjustified in interfering in the relationship.

27. Counter-Plaintiff and Defendant have both suffered damages resulting from Husband's tortious interference, in terms of lost work, lost fees, lost opportunity to pursue and work other business, harm to reputation and other damages recognized under Indiana law.

28. Husband has engaged in illegal actions in misusing the court system, as well as the banking system, and publicly and privately, and falsely, defaming Defendant and Counter-Plaintiff's character and reputation.

Appellants' App. Vol. II p. 48. Defendants claim that that they have suffered one million dollars in damages as a result of Guy's alleged interference.

[43] The Della Valles argue, in part, that the designated evidence shows: (1) Guy did not engage in illegal conduct; (2) Guy's conduct was justified; and (3) the Defendants have failed to demonstrate a genuine issue of material fact. The designated evidence demonstrates that Guy contacted Defendants and asked for the return of his \$8,500.00, which was withdrawn from Guy's personal accounts, and that Defendants refused to do so. Thompson entered a limited appearance on behalf of Lori and later withdrew his appearance a short time later. Guy and Lori eventually reconciled, and the dissolution proceedings at issue were dismissed.

[44] Defendants contend that Guy's illegal conduct is "the ongoing malicious prosecution and abusive nature of this case, coupled with Guy's actions to

inhibit Lori’s ability to retain the counsel of her own choosing.” Appellees’ Br. pp. 40-41.¹⁴ Defendants failed to designate any evidence to demonstrate that Guy prevented Lori from choosing her own counsel or that Guy has engaged in illegal conduct that resulted in tortious interference with Defendants’ business relationship with Lori. Further, Defendants failed to designate any evidence to demonstrate that Guy’s request to get his funds back was unjustified.

Defendants have simply failed to establish a genuine issue of material fact regarding any tortious interference with a business relationship by Guy. We conclude that the trial court erred by denying the Della Valles’ motion for summary judgment as to Count III of the amended counterclaim.

IV. Cross-Appeal Regarding Count II of Della Valles’ Amended Complaint

[45] Finally, on cross-appeal, Defendants argue that the trial court erred by denying their motion for summary judgment regarding Count II of the Della Valles’ amended complaint. Count II alleged fraud. Specifically, the Della Valles alleged that Defendants “misrepresented to Lori that taking Guy’s banking information was legal and that she was authorized to transfer funds from his account.” Appellants’ App. Vol. II p. 36.

[46] The elements of common-law fraud are:

¹⁴ Defendants also cite Guy’s later use of the Rules of Professional Conduct in this litigation. Guy’s citation to the Rules of Professional Conduct took place long after the alleged interference with Defendants’ business relationship and cannot be used to establish “illegal conduct” necessary to sustain this action.

(1) a material misrepresentation of past or existing fact which (2) was untrue, (3) was made with knowledge of or in reckless ignorance of its falsity, (4) was made with the intent to deceive, (5) was rightfully relied upon by the complaining party, and (6) which proximately caused the injury or damage complained of.

Kesling v. Hubler Nissan, Inc., 997 N.E.2d 327, 335 (Ind. 2013). Indiana Trial Rule 9(B) requires that, “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be specifically averred.” “In order to allege fraud sufficiently, the pleadings must state the time, the place, the substance of the false representations, the facts misrepresented, and identification of what was procured by fraud.” *Kapoor v. Dybwad*, 49 N.E.3d 108, 120 (Ind. Ct. App. 2015), *trans. denied*.

[47] Defendants contend that the Della Valles failed to plead the fraud claim with sufficient specificity. The amended complaint, however, alleges that, in February 2018, Lori engaged Defendants as counsel in dissolution proceedings instituted by Guy; Defendants knew that Lori was not an authorized user on Guy’s account, but instructed Lori to obtain Guy’s debit card information for the unauthorized purpose of funding her legal retainer; and Defendants misrepresented to Lori that the transaction was legal. The amended complaint adequately pleads the circumstances of the fraud, and we conclude that Defendants’ argument fails. Defendants have failed to demonstrate that the trial court erred by denying their motion for summary judgment regarding Count II of the Della Valles’ amended complaint.

Conclusion

[48] The trial court erred when it granted Defendants' motion for summary judgment regarding Counts I, III, IV, V, VI, VII, and VIII of the Della Valles' amended complaint. The trial court properly denied Defendants' motion for summary judgment regarding Count II of the amended complaint. The trial court properly denied the Della Valles' cross-motion for summary judgment regarding Counts I and II of the amended counterclaim, but the trial court erred by denying the cross-motion for summary judgment regarding Count III of the amended counterclaim. Accordingly, we affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

[49] Affirmed in part, reversed in part, and remanded.

Bradford, C.J., and Crone, J., concur.