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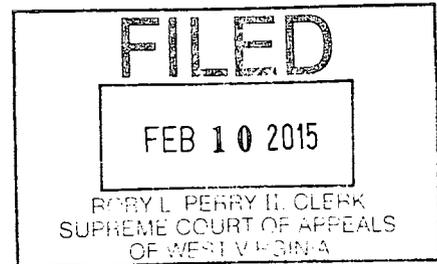
IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Gary W. Rich and
Law Office of Gary W. Rich, L.C.,
Plaintiffs/Counter-Defendants/
Third-Party Plaintiffs below,
Petitioners,

No. 14-0998

v.

Joseph Simoni,
Defendant/Counter-Claimant below,
Respondent,



v.

Cochran, Cherry, Givens, Smith,
Lane & Taylor, P.C.,
Levin, Papantonio, Thomas, Mitchell,
Rafferty & Proctor, P.A., and
Baron and Budd, P.C.,
Third-Party Defendants/
Counter-Claimants below,
Respondents.

THIRD-PARTY RESPONDENTS' REPLY BRIEF

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I. INTRODUCTION

Simoni's brief reveals his continuing willingness to flaunt the Rules of Professional Conduct and disregard the law. He makes several arguments, but nothing is more telling than this single sentence:

The objective of the professional relationship between Dr. Simoni and Mr. Rich was legal and proper

(Simoni's Br. 15.)

The Third-Party Law Firms could not disagree more. From the beginning, the "objective" of this relationship was to split attorney fees on a straight percentage basis. This relationship—characterized by meetings in alleys and parks, accusations and threats, tears and anger, and outright paranoia—was assuredly *not* legal and *not* proper. Rather, it was an outlandish enterprise both men wanted kept secret.

Each man was either a lawyer or wanted to be one. Each man knew the ethics rules. Each man pledged to uphold those rules. Each man violated them. Each man now claims to be in the right, but neither is.

From the outset, Simoni attempts to refocus the Court's attention away from his own intentional rule violations and onto what he calls the "relatively unsavory issue" of *Rich's* bad conduct. (Simoni's Br. 1.) Simoni

reframes the question to ask whether it is right to allow Rich to keep Simoni's share of Rich's fees.

The real question is this: **Should a lawyer who swore to uphold the law, and a state employee who sought to become a lawyer on four separate occasions, be permitted to conspire together to violate rules—rules the Constitution says “have the force and effect of law”?** The answer is manifest.

As the Third-Party Law Firms anticipated, Simoni complains his adversary Rich will receive a windfall if Simoni is not permitted to pursue his claims. Simoni claims he was “enticed” by Rich to keep furthering their illegal, unethical objective. (Simoni's Br. 4.) We have no doubt that money was among the reasons motivating his conduct. That does not make it right.

II. ARGUMENT

A. Simoni's brief confirms he is not a deserving equity plaintiff.

Simoni continues to claim that certain activities entitle him to compensation. Among these include “discovering” the suits that he brought to Rich. (Simoni's Br. 3.) But a lawyer cannot charge his clients for the privilege of having located them, and a lawyer may not pay anyone a

finder's fee. W. Va. RPC 7.2(b) ("A lawyer shall not give anything of value to a person for recommending the lawyer's services"); *see also Alderson v. Homolka*, No. A06-395, 2007 WL 968740, at *7, (Minn. Ct. App. Apr. 3, 2007) (unreported case attached to this brief) ("improper finder's fee").

Simoni also claims, as he did previously, that he was the "major liaison" to clients, their "prima[r]y contact." (Simoni's Br. 3.) He says he performed "other activities" that "required skills" including his law degree. *Id.* at 4 (emphasis added). As the lawyers and law firms who actually pulled most of the weight in the subject litigations, we can deny that. But even if it were true, it just confirms that Simoni wants money to act as an attorney in this case. As we have already shown, if Simoni really did what he says he did, then he committed the unauthorized practice of law.

Simoni says that in an equity case, the courts should consider the relative culpability of the parties and determine if they stand *in pari delicto*—in equal parts wrong. (Simoni Br. 13-14.) But as the record amply shows, *both* parties committed significant wrongs. By his own claims and admissions, Simoni simply is not a deserving plaintiff in equity. If there were ever a case to reject a conspiring non-lawyer's claims for lenity, this would be it.

B. Simoni's reliance on *McIntosh v. Mills* is seriously misplaced, and that case is extremely relevant to the certified question.

One case in Simoni's brief, *McIntosh v. Mills*, 17 Cal. Rptr. 3d 66 (Cal. Ct. App. 2004), bears extremely close reading. The court there found the circumstances of the illegal fee-splitting deal "an appalling abuse of this state's civil justice system." *Id.* at 79. That court refused to give any effect to the agreement, which it expressly found was against public policy. *Id.* at 75. This case, which Simoni cites and relies on, is strikingly on point with the facts of the case at bar.

Mills was an attorney, and McIntosh was a non-attorney consultant. *Id.* at 67-68. McIntosh alleged a fee-split deal where he would receive 15% of all Mills' attorney fees in two class actions in exchange for providing consulting services. *Id.* at 68. After the class actions settled, Mills received his fees. McIntosh sought his share—about \$3.2 million under their agreement—but Mills refused to pay. *Id.* Suit was filed.

Like in the case at bar, McIntosh claimed to have "valuable information" about matters that could be the subject of a suit. *Id.* at 70. Like in the case at bar, the target of McIntosh's suit was his own employer, Bank of America (Simoni claims he assisted Rich in suing WVU). *Id.* at 68-70. Like in the case at bar, the parties to the agreement sought to keep it

secret, and neither Mills nor McIntosh's attorney made any formal writings regarding the agreement. *Id.* at 70-71. Like in the case at bar, the non-lawyer expected his compensation would be directly based on the lawyer's fee ("if they did well, he would do well"). *Id.* at 72.

The facts of *McIntosh* are strikingly similar to the case at bar for yet another reason. McIntosh was deposed by defendants in the underlying case and asked whether he expected to "receive any money whatsoever" as result of the case against Bank of America. McIntosh denied any expectation of compensation from Mills. *Id.* at 72-73. As Rich points out in his own brief here, Rich's Br. 6, Simoni was also deposed in the underlying Spelter case and similarly denied any expectation of compensation.

JA550:19-51:10.

The California Court of Appeal, reviewing these facts, raised "the unwholesome spectre of attorneys soliciting professional liaisons with laypersons." *Id.* at 74. It noted that "courts have consistently upheld the prohibition" on fee-splitting with non-lawyers "based on a number of legitimate concerns." *Id.* Those concerns included unreasonable control over litigation by non-lawyers, interference with a lawyer's professional ethical obligations, and the risk that a non-lawyer would refer a case to the

lawyer offering the best fee rather than the best services. *Id.* at 74 & n.15. The court held that the agreement “clearly violate[d]” the relevant ethics rules *and* public policy. *Id.* at 75.

The court also turned to the “subsidiary argument” made by McIntosh, the non-lawyer, that there could be “harsh results . . . visited on innocent parties” to an illegal agreement. *Id.* at 75-76. The court found that McIntosh was *in pari delicto* with Mills, *id.* at 78, and thus not entitled to taste the ill-gotten fruits of an illegal agreement.

One basis for finding McIntosh equally blameworthy as Mills was McIntosh’s knowledge that the fee-splitting agreement was illegal. *Id.* at 78-79. McIntosh had used the services of an attorney, Anton, in negotiating his fee-split deal, and Anton knew such a deal was illegal. *Id.* The court had no qualms in imputing Anton’s knowledge of the ethics rules to McIntosh, his principal. *Id.* Of course, here, Simoni had *direct* knowledge of the rules.

The other reason the court found McIntosh *in pari delicto* with Mills was his deposition testimony given to Bank of America—where he had testified he had not been promised anything of value. And here, again, the facts are strikingly similar.

McIntosh's deposition

Simoni's deposition

Q. Have you been promised any payment in connection with this litigation?

A. No.

Q. Were there any promises of any money or gifts made to you concerning this litigation prior to the late summer of 2003?

A. No.

McIntosh, 17 Cal. Rptr. 3d at 79.

JA551:7-10.

The California court found that “McIntosh’s dogged determination to stop the existence of the agreement from being revealed to Bank of America apparently led him to lie in his deposition.” *Id.* at 79.

Because McIntosh knew his agreement was illegal, and testified so as to hide the existence of that illegal agreement, the California court found McIntosh *in pari delicto* with the attorney who conspired with him, found him undeserving to escape the consequences of violating public policy, and held he was not entitled to benefit from his own illegal conduct. *McIntosh*, Simoni’s case, is highly instructive here.

C. Not only does Simoni fail to cite a single West Virginia case approving his alleged deal, he misreads two West Virginia cases that do discuss such conduct.

Simoni also cites a dozen West Virginia cases in his brief. Despite his grand pronouncement that the Court is now “compelled by its prior

decisions,” Simoni’s Br. 15, Simoni cites *not a single case* where this Court affirmed a fee split between a lawyer and a non-lawyer. That is because it has never happened.

As we predicted, Simoni relies on *Watson v. Pietraton* and *Gaddy Engineering* for support, but as we showed, his reliance is misplaced.

As for *Watson v. Pietraton*, he vaguely admits that certain facts “are dissimilar.” (Simoni’s Br. 11.) This includes the *key* fact that the fees in that case were split between two law firms, not a law firm and a non-lawyer. *Watson*, 178 W. Va. at 800, 364 S.E.2d at 813. That fact makes the entire case irrelevant for the reasons we have already shown. At all times, the clients in *Watson* were represented by no one other than an attorney. The public policy rationale—including deterring people from trying to act as “the face of the lawyers” when they are *not* lawyers—simply was not present in *Watson*, but it is here.

As for *Gaddy Engineering*, Simoni reads it as if that case was about the quantum of evidence a plaintiff needs to defeat summary judgment. He says “this Court agreed with the trial court that no verifiable proof of Gaddy Engineering Company’s work existed,” whereas Simoni’s own contributions “constitute a figurative treasure trove of verifiable proof.”

(Simoni's Br. 16.) Simoni does not mention the actual holding, which was that the contract was found impracticable to perform by the defendant.

Gaddy Engineering, 231 W. Va. at 583-84, 746 S.E.2d at 574-75.

His reading of *Gaddy Engineering* is tortured at best. But his argument raises new questions: If Simoni had this "treasure trove" of proof of all the work he did in the Fairmont and Spelter cases, **where was it** when those cases were being settled? Both cases were class actions and a circuit judge in each case had to sign off on the apportionment of the class's award, the fees to class counsel, and the costs of resolving the litigation. Hearings in open court were held and Simoni knew when these cases settled. E.g., JA1762:12-63:8 (informed of Spelter verdict in 2007). If the objective of his professional relationship was "legal and proper," then **where was the treasure trove?** Also, **why didn't Simoni sue Rich** or step up to claim his compensation on the WVU case when it settled in 2005? **Why didn't Simoni respond** to the Cochran Firm's e-mail in 2007 asking if he had any outstanding invoices or other bills to be paid on the Spelter case? JA2141 (federal court), 1766:8-67:16 (Simoni Dep.).¹ **Why didn't Simoni** make any

¹ For that matter, **why didn't Rich tell** the Cochran Firm about his arrangement with Simoni?

claims against Rich on the Fairmont litigation when that case settled in 2008? ***Why didn't Simoni document***, or share with anyone else, any of his hours as he incurred them—and why didn't he put any part of this “legal and proper” arrangement with Rich into a formal writing—during *any* of the decade he says he was working?

Simoni has no answers to these questions.

D. Simoni's own brief supports the Third-Party Law Firms' Constitutional argument.

Simoni urges the Court to refrain from saying what the public policy of West Virginia is. He cites *State ex rel. Pinson v. Varney*, 142 W. Va. 105, 112, 96 S.E.2d 72, 76 (1956), and several other cases, to argue that the Court's role is limited. (Simoni Br. 9-11.) *Pinson* in particular says, “it is not the function of the judiciary” to declare public policy **“respecting matters on which the legislature has spoken.”** *Pinson*, 142 W. Va. at 112, 96 S.E.2d at 76 (emphasis added). From there, Simoni tells the Court to remain silent.

But the Legislature *hasn't* spoken on matters of attorney ethics or misconduct. As we showed, the Constitution's Separation of Powers Clause bars the Legislature from doing so because *only* the Judiciary has that power, which the Judiciary has carefully guarded. See *Hinchman v. Gillette*,

217 W. Va. 378, 389, 618 S.E.2d 387, 398 (2005) (collecting cases where the Judiciary rejected Legislative enactments encroaching on rules). *Pinson*, and the other cases Simoni relies on, only show that declarations of public policy on attorney ethics are not for the Legislature to make.

The Legislature *can*, however, regulate matters governing non-attorney actors. As we noted in our principal brief, the Legislature *has* spoken as to whether non-attorneys may run cases for attorneys, or may hold themselves out to be attorneys—as Simoni yet again claims he did. What the Legislature said is that these acts are a crime. W. Va. Code § 30-2-4. If the Court needs a Legislative pronouncement of public policy to guide its hand in this case, it need look no further.

E. The Court should reject Simoni’s invitation to “reform the question.”

In a final, weak conclusion and under the guise of “reform[ing] the question,” Simoni asks the Court to give an incorrect answer to a new question. The new question is: even if the Court holds that Rich and Simoni’s arrangement violated public policy, couldn’t Simoni nevertheless get paid? Citing Rich, he says the answer is not known. (Simoni’s Br. 18-22

(“some question will remain as to Dr. Simoni’s entitlement to compensation”).)

The Third-Party Law Firms are stunned by this final request. Simoni is asking the Court to state that, even though his deal may actually violate public policy, it should still be enforced. Simoni does not—*cannot*—cite a single case where an American court reviewed an arrangement between two parties who knowingly violated public policy, and approved it anyway. “[N]o person can lawfully do that which has a tendency to be injurious to the public or against public good” *Cordle v. General Hugh Mercer Corp.*, 174 W.Va. 321, 325, 325 S.E.2d 111, 114 (1984).

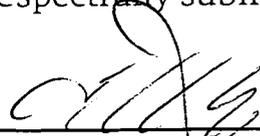
Simoni’s purported confusion over this issue piggybacks on Rich’s faux-innocuous request for the Court to just “provide clarity” as to hypothetical circumstances under which this unethical deal might be enforced. (Rich’s Br. 17.) Of course it is to both parties’ advantage to collusively trump up a false question and then seek “clarity” from the Court as to the answer. This is because Simoni will accept compensation from any source he can get it, and Rich wrongly believes it should come from the Third-Party Law Firms rather than from the person who promised it.

The Court should not be swayed by Simoni's invitation any more than Rich's. For the same reasons we objected to Rich's request, Third-Party Law Firms' Br. 12, n.2, we object to Simoni's. Each party seeks an answer that turns on facts not before the Court, which is why the federal court limited the scope of its certified question. No party has had a chance to provide the full briefing necessary to determine the ultimate answer, which the federal court reserved as a task for itself. This Court should abstain from going outside the certified question.

III. CONCLUSION

Simoni's brief only confirms what we have said: that he seeks compensation for unethical, impermissible purposes, contrary to the Rules and the public policy of this State. He should be denied the answer he seeks to the certified question. The Court should hold that the answer is Yes, the Rules of Professional Conduct are expressions of public policy that have the same weight and force of law as the State's statutory law.

Respectfully submitted,



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Exhibit

Alderson v. Homolka,

No. A06-395, 2007 WL 96840, (Minn. Ct. App. Apr. 3, 2007)

2007 WL 968740

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY
NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

Roger C. ALDERSON, Respondent,

v.

Daniel M. HOMOLKA, et al., Appellants.

No. A06-395. | April 3, 2007. | Review Denied June 19, 2007.

Hennepin County District Court, File No. CT 03-1283.

Attorneys and Law Firms

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Kay Nord Hunt, Barry A. O'Neil, Valerie Sims, Lommen, Abdo, Cole, King & Stageberg, P.A., Minneapolis, MN, for appellants.

Considered and decided by KALITOWSKI, Presiding Judge; HALBROOKS, Judge; and ROSS, Judge.

UNPUBLISHED OPINION

ROSS, Judge.

*1 This case concerns a contest between attorneys over fees in a personal-injury action that settled for over \$3.4 million. On appeal from a judgment finding attorney Daniel Homolka and his law firm liable to attorney Roger Alderson on a quantum-meruit basis for failing to pay Alderson for services he performed for Homolka, Homolka argues that rule 1.5(e) of the Minnesota Rules of Professional Conduct bars the recovery and that the district court erred by overvaluing Alderson's services, by denying his motion to dismiss him as an improper party, and by finding his law firm liable. By notice of review, Alderson challenges the district court's entry of summary judgment on his breach-of-contract claim, limitation of prejudgment interest, and denial of his motion to amend his complaint. Because we find that the record and law support the district court's findings and conclusions, we affirm.

FACTS

This dispute between Minnesota attorneys Roger Alderson and Daniel Homolka arises from uncompensated services Alderson provided to Homolka in 1998 and 1999 in connection with litigation of a personal-injury case. Alderson and Homolka are solo practitioners who met in 1992. Alderson works primarily on cases he receives on a referral basis, such as workers' compensation and contract claims. Homolka has been the sole shareholder of Daniel M. Homolka, P.A., since 1998 and focuses his practice on personal-injury cases. In the course of their friendship Alderson routinely referred work to Homolka but would continue to work with Homolka on the cases he referred. Alderson generally received one-third of the legal fees in these cases.

In August 1998, Alderson learned of a motorcycle accident from his friend Sandra Harrison, who lived in Colorado. Harrison had been on a motorcycle trip with Gordon Thomas when Thomas was seriously injured on a Wyoming highway. Harrison told Alderson that the accident occurred in a construction zone when the construction company misdirected traffic. Thomas sustained severe and permanent head injuries, and a court eventually appointed his parents as his guardians and conservators. Alderson called Homolka and relayed the information Harrison had given him. Alderson testified that Homolka replied, "there is a case, get out there and sign it up."

Alderson left Minnesota the next day and drove to Wyoming, where he met with Harrison. They then drove to the Idaho hospital where Thomas had been transported and met Thomas's parents. Thomas's father raised the subject of finding an attorney several times. Alderson identified himself as an attorney, but he conceded that he was unable to handle such a substantial case. He told them that he knew someone who could, and, with the permission of Thomas's father, Alderson called Homolka. Homolka flew to Idaho immediately and met Thomas's parents, who agreed to hire him.

Three days after the accident, Thomas's father retained Homolka and signed a contingency-fee agreement under which Homolka would receive one-third of any amount recovered because of the accident, plus expenses. The agreement did not mention Alderson. Alderson testified that Homolka asked him whether he wanted to be named and he replied, "We have done this before. I will leave it up to you. It's your call." Homolka, however, testified that Alderson insisted they exclude his name because the Thomases would otherwise refuse to sign the agreement.

*2 In the days following the accident Alderson photographed the accident site and Thomas's injuries, and he transported Thomas's motorcycle from Wyoming to Colorado. He testified that he undertook these activities at Homolka's request, and he gave Homolka all of the photographs. Alderson testified that in September and October 1998, after he returned to Minnesota, Homolka asked him to research "anything ... relating to Wyoming law" on a variety of legal issues concerning the case, including the statute of limitations, whether the state could be a party, the applicable negligence standard, and whether the state required motorcycle riders to wear helmets. He completed this research and also surveyed other states' statutes and caselaw. Alderson gave his research to Homolka.

In October 1998, Alderson returned to Colorado because Homolka asked him to inventory the motorcycle-repair business that Thomas owned. The inventory was part of an effort to secure Medicare assistance for Thomas. Before going to Colorado, Alderson consulted with a client who owns a similar business. Several members of the Thomas family assisted Alderson with the inventory. After documenting the business's inventory in writing, with photography, and by videotape, Alderson gave the documents and videotape to Homolka.

Between October 1998 and November 1999, Alderson and Homolka spoke weekly on average. According to Alderson, they regularly discussed the Thomas case, including confidential information about Thomas's medical condition. Homolka asked Alderson to complete additional research on loss of consortium and then on harassment when a woman sought access to Thomas in December 1998.

Several other law firms became part of Thomas's affairs as the case developed. Homolka associated with another Minnesota law firm, Lommen Nelson Cole & Stageberg, P.A., and a Wyoming law firm, Meyer & Williams, P.C. Alderson testified that he did not know until shortly before the trial date that Meyer & Williams was involved. Homolka had spoken with the firm in the fall of 1998, but told Alderson he would not work with the firm because it wanted to cap Alderson's fees at \$100,000. The Thomases also hired a Colorado firm, Goff & Goff, LLC, to assist with probate and other matters.

In October 1999, lawyers deposed Harrison in relation to Thomas's case. Before the deposition, Alderson participated in a meeting in Minnesota with Harrison, Homolka, and an attorney from Lommen Nelson. Alderson testified that Homolka also asked him to go to Colorado one week before the deposition to prepare Harrison. Alderson did so by posing questions to her over several days and helping her "hon[e] her answer[s] down." Alderson did not attend the deposition, but he met with Harrison, Homolka, and the Lommen Nelson attorney afterward. Alderson testified that, at Homolka's request, he reviewed the transcript of Harrison's deposition.

Alderson continued to conduct legal research in November 1999, and Homolka told him that the parties were moving toward a settlement. But after this conversation, communications between Homolka and Alderson decreased. Alderson was concerned and called Homolka in early December 1999 to ask how the settlement was progressing.

*3 This conversation was the last time they spoke. Alderson testified that the conversation was brief, and that Homolka gave "sketchy" answers and appeared to want to end the call quickly. Homolka told Alderson that the Thomases did not want Alderson working on the case, and then said he had to take another call but would call Alderson back. He never called.

Five days after this conversation, Goff & Goff petitioned a Colorado district court to distribute funds to reimburse Homolka for incurred expenses after Thomas settled with two of the allegedly responsible parties. In February 2000, Goff & Goff petitioned for approval of a final settlement agreement with all four defendants. The court approved the agreement in March 2000. The settlement totaled over \$3.4 million, including \$1,087,429 in attorneys' fees. Homolka received about \$791,393 in fees. Lommen Nelson and Meyer & Williams also received fees. Thomas's parents testified that they consented to the fee payments and that they were unaware of any work Alderson performed other than taking pictures of Thomas at the hospital and assisting with the inventory. Homolka neither paid Alderson for his work nor notified him of the settlement.

The present litigation began in December 2002 when Alderson served a complaint on Homolka and his law firm, alleging claims based on breach of contract and quantum meruit. Homolka moved the district court to dismiss the case for lack of subject-matter jurisdiction and for failure to state a claim, or alternatively, to enter summary judgment in his favor. The district court denied the motion. In November 2004, Homolka again moved for summary judgment and Alderson moved to amend his complaint to allege fraud and punitive damages. The district court granted Homolka's motion in part and dismissed Alderson's breach-of-contract claim, holding that because Thomas's parents did not consent to fee-splitting with Alderson, the claimed contract was unenforceable. The court, however, denied summary judgment on the quantum-meruit claim and also denied Alderson's motion to amend.

After a three-day bench trial in June 2005, Homolka moved the court to dismiss him as an improper party. In September 2005, the district court found that Alderson was entitled to about \$101,511 for his work on the case, plus prejudgment interest. The court held that Homolka waived his improper-party defense and denied his motion. The court also held Homolka and his law firm jointly and severally liable to Alderson. The district court later issued amended findings and limited the amount of prejudgment interest. The court denied Alderson's request for reconsideration of its prejudgment-interest findings. This appeal follows.

DECISION

Homolka argues that allowing Alderson to recover on a quantum-meruit basis violates rule 1.5(e) of the Minnesota Rules of Professional Conduct, that the court overvalued Alderson's services, and that the court erred by denying his motion to dismiss and finding he and his firm jointly and severally liable to Alderson. By notice of review,

Alderson challenges the district court's dismissal of his breach-of-contract claim, limitation of prejudgment interest, and denial of his motion to amend his complaint.

*4 On appeal from a judgment following a bench trial, we review whether the district court's findings are clearly erroneous and whether the court erred as a matter of law. *Birch Publ'ns, Inc. v. RMZ of St. Cloud, Inc.*, 683 N.W.2d 869, 872 (Minn.App.2004), *review denied* (Minn. Oct. 19, 2004). A finding is clearly erroneous when we are left with a definite and firm conviction that the court made a mistake. *Id.* We give the district court's credibility determinations due regard. Minn. R. Civ. P. 52.01. But we exercise our independent judgment when reviewing questions of law. *Birch Publ'ns*, 683 N.W.2d at 872.

I

We first address Homolka's contention that allowing Alderson to recover any amount on a quantum-meruit basis would violate rule 1.5(e) of the Minnesota Rules of Professional Conduct and Alderson's parry, which urges that rule 1.5(e) permits recovery on his breach-of-contract claim and that the district court erred by dismissing it. These competing assertions concerning application of rule 1.5(e) implicate the supreme court's interpretation of the rule and its effect on fee-splitting arrangements, as held by *Christensen v. Eggen*, 577 N.W.2d 221, 225 (Minn.1998). Rule 1.5(e) provides that

[a] division of a fee between lawyers who are not in the same firm may be made only if (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation; (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (3) the total fee is reasonable.

Minn. R. Prof. Conduct 1.5(e). The purpose of limiting fee-splitting is to protect the interests of a client. *Christensen*, 577 N.W.2d at 225. Clients have the right to choose their preferred attorney and to be aware of the details related to the payment of fees. *Id.* In *Christensen*, one attorney referred a case to another, but he died before performing any work. He had, however, entered a fee-splitting agreement. When his widow sought to enforce the attorneys' agreement, the supreme court held that it was unenforceable because it did not comply with the three requirements of rule 1.5(e). *Id.* The clients in *Christensen* neither consented to split the fees nor knew how the fees would be divided. *Id.*

Alderson urges that *Christensen* is limited by its facts to cases where a referring attorney performs no work on the referred case. But *Christensen* does not suggest that limitation, and it instead articulates a bright-line rule. After discussing Minnesota's history of limiting fee-splitting arrangements, the court held, "[T]he fee-splitting agreement between [the attorneys] violates public policy because it does not comply with Minn. R. Prof. Conduct 1.5(e) and is therefore unenforceable." *Id.* The rule acts not only as an ethical principle but also as a substantive bar to agreements that do not satisfy its three requirements. The district court correctly held that, because the Thomases did not consent to any fee-splitting that included Alderson, the requirements of rule 1.5(e) were not satisfied and Alderson therefore could not pursue a breach-of-contract claim for a share of the fees.

*5 Homolka argues that Alderson's attempt to recover on a quantum-meruit basis must fail for the same reasons. We conclude otherwise. Quantum meruit is an equitable doctrine that allows a party to recover when the party has conferred a benefit to another without reasonable compensation. *Busch v. Model Corp.*, 708 N.W.2d 546, 551 (Minn.App.2006). Alderson's two claims are distinct. His breach-of-contract claim sought a proportionate share of the total attorneys' fees received in the settlement. But his quantum-meruit claim asserts that Homolka benefited from Alderson's services and that Alderson has not been compensated. He seeks not a share of the total attorneys' fees, but compensation from Homolka for valuable services rendered to Homolka. Although Homolka

might choose to use the attorneys' fees he received to fulfill his obligation to Alderson, we do not read rule 1.5(e) so broadly as to require client consent regarding how an attorney later distributes funds received as attorneys' fees. A comment to the rule defines a "division of fee" as "a single billing to a client covering the fee of two or more lawyers who are not in the same firm." Minn. R. Prof. Conduct 1.5(e) cmt. 7. The clients in this case received a single billing, and the attorneys' fees were split with their consent among Homolka, Lommen Nelson, and Meyer & Williams. The distribution Alderson seeks through quantum meruit is downstream from the billing. More important, his equitable claim depends on services actually provided, not on the existence of the settlement. Homolka originally represented or implied that Alderson would be paid at the close of the case for Alderson's various services toward Homolka's benefit, and we cannot construe this ethical rule to bar equitable recovery for services provided. Under these circumstances, we hold that the district court correctly determined that the rules of professional conduct do not bar an attorney from recovering on a quantum-meruit basis.

II

We next consider Homolka's dispute over the value of Alderson's services. Quantum meruit allows recovery when a person benefited from another's services and retaining the benefit without compensation is unjust. *Ylijarvi v. Brockphaler*, 213 Minn. 385, 393, 7 N.W.2d 314, 319 (1942). The amount recovered in quantum meruit must be reasonable. *Busch*, 708 N.W.2d at 552. When assessing the reasonable value of an attorneys' services in non-quantum-meruit cases, courts have considered the attorney's hourly rate, experience, and reputation, the time spent on a case, the relative amount invested in a case, the quality of representation and difficulty of the responsibility assumed, the result of the attorney's efforts, the viability of the claim, the amount of recovery realized, and the existence of a fee arrangement. See *State by Head v. Paulson*, 290 Minn. 371, 373, 188 N.W.2d 424, 426 (1971) (considering reasonableness of attorneys' fees); *Ashford v. Interstate Trucking Corp. of Am.*, 524 N.W.2d 500, 503 (Minn.App.1994) (considering value of attorney's services before attorney withdrew from case).

*6 Homolka opined that Alderson should be paid as a nonlawyer and receive between \$10,000 and \$20,000. Alderson testified that his services were worth more than \$250,000. The district court found Alderson entitled to \$101,511.23. This amount comprises \$100,000 for his services and \$1,511.23 for expenses he incurred. The court assessed the hours Alderson claimed to have spent performing various tasks for Homolka, including discussing the case with Homolka on a weekly basis, completing legal research, conducting the inventory, and preparing Harrison for her deposition. The court discounted some of the claimed hours and found that, using Alderson's usual billing rate, the value of these services was \$29,200. The court additionally concluded that "there is value in recognizing and obtaining a case" and valued Alderson's services in securing the case at \$70,800. The court also considered Homolka's testimony admitting that he told Alderson he would not hire Meyer & Williams because it wanted to cap Alderson's share of the fees at \$100,000, as well as Homolka's repeated assurances to Alderson that he would make a lot of money. Homolka moved for amended findings, arguing that the \$70,800 represented an improper "finder's fee." The court clarified that its finding of \$70,800 was "part of the quantum meruit claim, based on the court's findings that Alderson provided that value to [d]efendants, along with the other value found, through his overall services to [d]efendants." The court added that it "never stated or meant to imply that the \$70,800 was an award for a 'finder's fee.'" On appeal, Homolka disputes that he benefited from any of Alderson's services, which, he asserts, the district court overvalued. While there is room in the record to have come to a different amount, the district court's valuation is not clearly erroneous.

Homolka argues that he derived no benefit from Alderson's services because Homolka never actually used any of Alderson's work product in the litigation. Homolka notes that he hired other investigators and an accident reconstructionist and asserts that Alderson's photographs were worthless. But, at the time of Alderson's work, Homolka had not hired anyone else and he specifically asked Alderson to take the pictures. Alderson testified that photographing the accident scene was particularly an urgent matter because the construction crew was resealing the

highway and presented a potential threat to preserving evidence. And many of Alderson's actions were undertaken early in the case when it was unclear how it would proceed. Although the work product was not used in the litigation, the evidence did not require the district court to agree that the services were worthless.

Homolka also asserts that the inventory and some of Alderson's research related to the probate and harassment matters rather than the personal-injury action. He notes that Goff & Goff was hired independent of the personal-injury matter. But the record supports the district court's finding that additional work was "part and parcel" of the same action. Goff & Goff submitted the petition to approve the settlement for the personal-injury case. Homolka acknowledged that Alderson prepared a draft letter on the harassment issue to be put on Homolka's letterhead. He does not explain why, if the various other Thomas affairs were not somewhat intertwined with the personal-injury representation, he would have asked Alderson to complete these tasks. Homolka asked Alderson to perform this work. Homolka's testimony supports the district court's conclusion that the peripheral services were offered as "part and parcel" to satisfying the clients with Homolka's representation in the central personal-injury case. When asked why he would devote time to matters outside the scope of the personal-injury claim, Homolka responded, "as part of the service for my client in a case of this nature, I try to service them properly. [This side issue] still needed to be attended to for them." Further, Alderson's action is against Homolka and his law firm, and while this case originated with Alderson's assistance in securing Homolka's representation in the personal-injury case, Alderson seeks compensation for all of the services he provided to Homolka. The district court's finding that Homolka benefited is not clearly erroneous.

*7 In valuing Alderson's services, the district court considered the amount of time Alderson spent, his usual hourly rate, his out-of-pocket expenses, and the amount recovered in the Thomas case. As he argued to the district court, Homolka asserts that the majority of the district court's valuation is simply an improper finder's fee. *See* Minn. R. Prof. Conduct 7.2(b) (generally prohibiting lawyer from giving "anything of value to a person for recommending the lawyer's services").

The argument on these facts presents a close question. We acknowledge that the district court originally referred to the "value in recognizing and obtaining a case" in making the award. But when challenged, the court clarified that it did not intend to include any amount as a finder's fee. We agree with Homolka that if the district court's award were a finder's fee designed to compensate for the value in securing the case, reversal would be appropriate. Notwithstanding the district court's original characterization, however, we credit its later clarification and we conclude that the court appropriately based its finding on quantum meruit.

Quantum-meruit recovery rests on the value of one party's services and the benefit conferred to the other party. Essential to our conclusion, Alderson completed other work not reflected in the court's preliminary \$29,200 calculation. He drove immediately to Wyoming and then Idaho, met with the Thomases, secured Thomas's motorcycle and transported it to Colorado, and he photographed Thomas, the accident scene, and the motorcycle. Alderson exerted effort and provided services of value to Homolka. Because this is a quantum-meruit claim and the focus is on value, the district court properly considered the total amount recovered when valuing the services Alderson provided. The court also considered Homolka's conversations with Meyer & Williams and his assurances to Alderson, finding the statements to be an admission that Alderson's work added substantial value to the case. Although a different factfinder might have evaluated the evidence differently and reached a different amount, we do not reweigh the evidence or disregard the factfinder's credibility determinations. These considerations are relevant to the overall value of Alderson's work and, according to the district court, the award was expressly determined to be distinct from a payment for simply referring a case. The district court's valuation of Alderson's services is not clearly erroneous.

III

We also affirm the district court's determination regarding interest. When a court enters judgment for recovery of money, the judgment includes interest unless otherwise provided by contract or law. Minn.Stat. § 549.09, subd. 1 (2006). A statutory method exists for calculating prejudgment interest when a party makes a written settlement offer. If the prevailing party's offer is closer to the final judgment entered than the opposing party's offer, the prevailing party receives interest from the commencement of the action to the time of recovery. *Id.*, subd. 1(b). If the losing party's offer is closer, however, prejudgment interest accrues on the lesser of the amount offered and the amount recovered, and interest accrues only after commencement of the action to the time of the offer. *Id.*

*8 The district court initially ordered prejudgment interest on the entire judgment beginning April 12, 2000, when Homolka received attorney fees. The court later limited the accrual of interest to the period from December 26, 2002, to September 30, 2005, and allowed interest only on \$30,000. The record supports the district court's amendment. Alderson served his complaint on December 26, 2002. On September 30, 2005, Homolka offered to settle for \$30,000. Alderson rejected the offer and did not make a counter demand. Alderson's offer was therefore \$0. *See Trapp v. Hancuh*, 587 N.W.2d 61, 65 (Minn.App.1998) (noting that statute does not require party to respond to offer and that “[w]hen a plaintiff prevails on a claim, a defendant's offer that is closer to the award than a plaintiff's offer, if any, terminates the accrual of the prejudgment interest”). Because Homolka's offer of \$30,000 was closer to the amount recovered, interest may accrue on the \$30,000 from December 26, 2002, to September 30, 2005.

Alderson asserts that he is entitled to prejudgment interest, on a common-law basis, from the time his cause of action accrued because damages were reasonably ascertainable to Homolka. But the district court expressly declined to find that the damages were reasonably ascertainable. Alderson's argument that this court should infer the finding on appeal is therefore without support.

IV

The district court found Homolka and his law firm jointly and severally liable. Homolka contends that the court erred by denying his motion to dismiss him as an improper party and by holding his firm liable. We discern no error by the district court.

A defendant's assertion that he is an improper party to an action is an affirmative defense. *Buysse v. Baumann-Furrie & Co.*, 428 N.W.2d 419, 426 n. 7 (Minn.App.1988), *rev'd and remanded on other grounds*, 448 N.W.2d 865 (Minn.1989). Failure to plead an affirmative defense waives the defense. Minn. R. Civ. P. 8.03 (requiring party to plead affirmative defense); *Bradley v. First Nat'l Bank*, 711 N.W.2d 121, 128 (Minn.App.2006) (stating that failure to plead defense results in waiver). We agree with the district court that Homolka waived his improper-party defense. Homolka first moved to dismiss himself after the trial in June 2005, nearly two-and-one-half years after Alderson served his complaint. Homolka asserts that he could not have pleaded the defense earlier because the complaint did not assert any claims against him personally. But Alderson's complaint names both Homolka and his law firm as defendants. When stating his specific causes of actions, Alderson alleged that “[d]efendants have breached their contract with [Alderson],” and he realleged the statement when asserting his quantum-meruit claim. The plural “defendants” and the separate inclusion of Homolka in the caption gave Homolka notice that Alderson sought to recover from him personally. Homolka waived the personal defense by failing to plead it and we will not address its merits.

*9 In addition to his argument that he should not be personally liable to Alderson, Homolka argues that the district court improperly found his law firm liable. Piercing the corporate veil is equitable in nature. *Roepke v. Western Nat'l Mut. Ins. Co.*, 302 N.W.2d 350, 352 (Minn.1981). When an individual owns all, or practically all, of a corporation's stock, "the corporation and such individual will be regarded as one and the same if the equities of a case so require." *Erickson-Hellekson-Vye Co. v. A. Wells Co.*, 217 Minn. 361, 381-82, 15 N.W.2d 162, 173 (1944). The district court's finding that equity requires that Homolka's law firm be liable is not clearly erroneous. The court examined the relationship between Alderson and Homolka and found it impossible to differentiate between Homolka as an individual and his law firm. As it regards Alderson's uncompensated services, Homolka personally directed the work to be done on behalf of the firm and then personally benefited by passing the fees through his firm to himself. The basis of Alderson's equitable recovery is quantum meruit and Homolka's unjust receipt of services without compensating Alderson for the benefit conferred, and the record supports the district court's finding. See *West Concord Conservation Club, Inc. v. Chilson*, 306 N.W.2d 893, 898 (Minn.1981) (upholding piercing of corporate veil when corporation's sole shareholder received proceeds from sale of disputed property).

V

Alderson challenges the district court's denial of his motion to amend his complaint to allege fraud and punitive damages. A party may amend a pleading once as a matter of course before a responsive pleading is served, but only by leave of the court or by consent of the opposing party after service of a responsive pleading. Minn. R. Civ. P. 15.01. The district court has broad discretion to grant or deny a motion to amend a pleading, and we will not reverse its decision absent an abuse of discretion. *Doe v. F.P.*, 667 N.W.2d 493, 500 (Minn.App.2003), review denied (Minn. Oct. 21, 2003).

The district court did not abuse its discretion by denying Alderson's motion. We recognize that the record suggests some evidence of fraud, but the late timing of Alderson's attempt to plead the cause of action supports the district court's decision. On appeal, Alderson cites trial testimony to support his fraud claim. But the trial occurred almost six months after the district court denied his motion, and our review is limited to the time at which the motion was made. See *Wall v. Fairview Hosp. & Healthcare Servs.*, 584 N.W.2d 395, 404 (Minn.1998) (holding that appellate review is limited to record when district court heard and decided motion).

Alderson waited nearly two-and-one-half years to bring his motion to amend, and he then alleged the same damages on this new claim as he stated for his quantum-meruit claim: uncompensated work. Although tort and contract provide separate causes of action, a party may recover under both theories only on proof that the damages under each cause of action are separate and distinct. *Brooks v. Doherty, Rumble & Butler*, 481 N.W.2d 120, 128 (Minn.App.1992). Contract and tort claims are distinct when a breach of duty exists independent of the breach of contract. *Hanks v. Hubbard Broadcasting, Inc.*, 493 N.W.2d 302, 307-08 (Minn.App.1992). The district court held that these principles of recovery also apply to quasi-contract claims. We agree, because the rationale of preventing duplicative recovery applies with equal force. See *Brooks*, 481 N.W.2d at 128 (stating rationale for requiring separate and distinct damages). Although the district court may have had a basis to grant Alderson's motion to amend, we hold that it acted within its broad discretion by denying the motion. Because Alderson's motion to add a claim for punitive damages is based on his fraud claim, the district court also did not abuse its discretion by denying his motion to amend on this ground.

***10 Affirmed.**

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Gary W. Rich and
Law Office of Gary W. Rich, L.C.,
Plaintiffs/Counter-Defendants/
Third-Party Plaintiffs below,
Petitioners,

No. 14-0998

v.

Joseph Simoni,
Defendant/Counter-Claimant below,
Respondent,

v.

Cochran, Cherry, Givens, Smith,
Lane & Taylor, P.C.,
Levin, Papantonio, Thomas, Mitchell,
Rafferty & Proctor, P.A., and
Baron and Budd, P.C.,
Third-Party Defendants/
Counter-Claimants below,
Respondents.

CERTIFICATE OF SERVICE

I certify that I have served a copy of the following filings on counsel
for all other parties:

- *Third-Party Respondents' Motion for Leave to Reply to Simoni's Brief*
- *Third-Party Respondents' Reply Brief*
- *Motion for Pro Hac Admission of William F. Cash III*
- *William F. Cash III's Verified Statement in Support of Motion for Pro Hac Admission*
- *Third-Party Respondents' Motion Regarding Oral Argument*

Service is being made by U.S. mail and e-mail pursuant to consent,
today, February 10, 2015.



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