Practice Note for November 2024:

Recently, in the case of ***The Johns Law Firm, LLC v. Angela Pawlik.***, No. 24-20147, the Fifth Circuit informatively considered Angela Pawlik's appeal of a contingency fee award to a law firm that she discharged prior to the resolution of her lawsuit.

On May 8, 2020, Pawlik hired The Johns Law Firm, LLC ("TJLF") to represent her in an interpleader suit involving the proceeds of a life insurance policy. The parties entered into a contingency fee agreement that granted TJLF 40% of Pawlik's recovery if the suit was resolved more than 151 days from the agreement's execution. The agreement also provided that TJLF would be entitled to the contingency fee if Pawlik "discharge[d]" or "obtain[ed] a substitution for" it before the case was resolved, but not if it withdrew from the representation. TJLF member Jeremiah Johns and TJLF associate Blair Brogan both worked on the case. After the relationship between Johns and TJLF began deteriorating, on November 20, 2020, Johns requested that Brogan withdraw from all of their "joint matters" and cease all communications with clients that he signed or actively represented. A TJLF partner responded that Brogan was authorized "to communicate with any [TJLF] client or opposing counsel on any [TJLF] matter" and to withdraw from any matter on which she preferred to stop working with Johns; he also asked Brogan if there were cases in which it would "make sense" that she "assume the lead counsel role."

On November 30, 2020, Brogan moved to withdraw as counsel of record in Pawlik's interpleader suit, stating that she was counsel of record alongside Johns of TJLF, she was leaving the firm, and her withdrawal would "not affect [Johns's] ongoing status as counsel of record for [Pawlik]." That same day, Johns asked Pawlik to sign a document that would "allow [him] to continue to represent her." The next day, Pawlik requested that her case file be transferred to Johns's new law firm. On December 7, 2020, Johns sent a letter officially withdrawing from TJLF "effective immediately"; the letter was backdated to November 30, 2020. Pawlik obtained a favorable ruling in the interpleader suit and was awarded $1,000,000, but while an appeal was pending, the parties settled the case. Pawlik received $850,000. TJLF then sought leave to intervene to assert its claim for fees, but the District Court denied the request as untimely. The Court directed that the $850,000 be disbursed to Pawlik and sent to Johns's new firm.

TJLF sued Pawlik for breach of contract and, alternatively, quantum meruit.1 It claimed it was entitled to a 40% contingency fee because Pawlik discharged it without good cause. Pawlik argued that TJLF was not entitled to the contingency fee because it had withdrawn from her representation and because she discharged it for cause. She asserted

several affirmative defenses and counterclaims. TJLF moved to dismiss her counterclaims, and the District Court granted the motion. The parties subsequently filed cross-motions for summary judgment. Pawlik supported her motion with a sworn declaration averring that she "learned" about conflicts within TJLF. The Magistrate Judge found that Pawlik's statements regarding the conflicts were inadmissible because they were not based on personal knowledge. Concluding that Pawlik had failed to identify a genuine fact issue regarding whether she discharged TJLF without good cause and regarding her affirmative defenses, the Magistrate Judge recommended that summary judgment be granted in favor of TJLF. The District Court adopted the recommendation in full and awarded TJLF $340,000, or 40% of Pawlik's recovery. Pawlik's appeal followed.

On appeal, Pawlik first argued that TJLF affirmatively withdrew from representing her when Brogan withdrew as counsel of record in her interpleader case. She also claimed that TJLF forfeited the contingency under the fee agreement because it withdrew from representing her by "forcing" Johns out of the firm, "authorizing" Brogan to remove him as lead counsel, failing to assert a fee claim for over ten months, and failing to communicate with her about her case.

In Texas, "whether and how to compensate an attorney when a contingent fee contract is prematurely terminated depends on whether the attorney was discharged, withdrew with the consent of the client, or withdrew voluntarily without consent." *Augustson v. Linea Aerea Nacionale-Chile S.A. (LAN-Chile)*, 76 F.3d 658, 662 (5th Cir. 1996). Texas courts generally treat an attorney's withdrawal as the abandonment of a contract. *See Staples v. McKnight*, 763 S.W.2d 914, 916 (Tex. App.—Dallas 1988, writ denied) ("[A]n attorney who abandons a case without just cause before completing the task for which his client hired him breaches his contract of employment and forfeits all right to compensation."). "For the acts of a party to a contract to constitute abandonment, the acts must be positive, unequivocal, and inconsistent with the existence of the contract." *Law Offices of Windle Turley, P.C. v. French*, 140 S.W.3d 407, 411 (Tex. App.—Fort Worth 2004, no pet.). The District Court held that TJLF did not abandon the representation. Agreeing, the Fifth Circuit noted that Brogan only sought to remove herself—not TJLF or Johns—as counsel in the interpleader action because she was leaving the firm. Nor did Pawlik show that TJLF took actions inconsistent with the existence of a contract between Pawlik and TJLF. Pawlik failed to identify evidence showing that TJLF unequivocally withdrew from her representation. The District Court did not err.

Pawlik argued in the alternative that the parties mutually abandoned the representation. Because she failed to identify any evidence creating a genuine issue of

material fact regarding whether TJLF withdrew, she likewise failed to show a genuine issue regarding whether the parties mutually abandoned the representation. *Compare Holt v. Manley*, 146 S.W.2d 773, 775 (Tex. App.—Amarillo 1940, no writ) (declining to find mutual abandonment where there was no evidence of "any mutual agreement between the parties to abandon the contract, nor . . . a meeting of the minds" on the issue), with *Sachs v. Goldberg*, 159 S.W. 92, 95 (Tex. App.—Galveston 1913, writ ref'd) (finding mutual abandonment of an agreement to jointly purchase a property where one party "unequivocal[ly] and absolute[ly]" repudiated the agreement and the other party subsequently attacked the repudiator and told him "he could have the lot"). The District Court did not err in rejecting this argument.

Pawlik next contended that the District Court erred in finding that she failed to identify a genuine issue of material fact regarding whether she discharged TJLF without good cause. In Texas, a client may discharge an attorney with or without good cause. An attorney discharged with good cause is only entitled to compensation in quantum meruit. *Rocha v. Ahmad*, 676 S.W.2d 149, 156 (Tex. App.—San Antonio 1984, writ dism'd w.o.j.). A discharge without good cause entitles the attorney to "seek compensation in quantum meruit or in a suit to enforce the contract by collecting the fee from any damages the client subsequently recovers." *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 561 (Tex. 2006) (citing *Mandell & Wright v. Thomas*, 441 S.W.2d 841, 847 (Tex. 1969)). Whether a former client had good cause to discharge an attorney is a fact issue on which the client bears the burden of proof. *French*, 140 S.W.3d at 413 (citing *Howell v. Kelly*, 534 S.W.2d 737, 739–40 (Tex. App.—Houston [1st Dist.] 1976, no writ)).

Pawlik first argued that a good cause inquiry was inappropriate for summary judgment because it is fact intensive and "not susceptible to a bright-line rule." The Fifth Circuit easily rejected this argument, recalling that a fact-intensive test may be applied at the summary judgment stage. *Dean v. Akal Sec., Inc.,* 3 F.4th 137, 144 (5th Cir. 2021). Pawlik next argued that the District Court erroneously disregarded the portion of her sworn declaration detailing the basis for the discharge. "Plenary review requires that [the Court] first settle the record by resolving issues of evidence." *Salas v. Carpenter*, 980 F.2d 299, 304 (5th Cir. 1992). "[The Court] review[s] a district court's exclusion of evidence submitted in a summary judgment proceeding for abuse of discretion." *Meadaa v. K.A.P. Enters., L.L.C.*, 756 F.3d 875, 880 (5th Cir. 2014). A declaration used to support a motion for summary judgment "must be made on personal knowledge." Fed. R. Civ. P. 56(c)(4). Such a declaration need not affirmatively state that it is based on personal knowledge. *DIRECTV, Inc. v. Budden*, 420 F.3d 521, 530 (5th Cir. 2005). Nevertheless, the declaration must provide sufficient information to infer personal knowledge therefrom. *Meadaa*, 756 F.3d at 881. According to Pawlik's declaration, she was "told" or "informed" of several incidents at TJLF that she found

"unsettling," but she did not say how she became "aware" of them. The declaration did not reflect that she had personal knowledge about TJLF's internal strife, so "it was incumbent upon [Pawlik] to explain how [she] acquired such knowledge." *Id.* Although summary judgment evidence "need not be presented in admissible form," it was Pawlik's burden to show the statements were "capable of being 'presented in a form that would be admissible in evidence.'" *D'Onofrio v. Vacation Publ'ns, Inc.*, 888 F.3d 197, 208 (5th Cir. 2018) (citations omitted); *see* Fed. R. Civ. P. 56(c)(2). Because she did not meet her burden, the District Court did not abuse its discretion in disregarding the portions of Pawlik's declaration regarding the discord within TJLF. Pawlik also argued that the District Court applied an erroneous and unworkable good cause standard that is contrary to Texas law. Because the Supreme Court of Texas has not articulated what constitutes good cause to discharge an attorney, the District Court ventured an *Erie* guess. It found that, under Texas law, "good cause for discharging an attorney requires evidence that the attorney either failed to or cannot adequately represent the client, or otherwise failed to fulfill the attorney's legal duties to the client." The Fifth Circuit declined to address the District Court's standard. Under the *Erie* doctrine, the Court needed only to decide whether the Supreme Court of Texas would find good cause under these facts. *Ironshore Europe DAC v. Schiff Hardin, L.L.P.*, 912 F.3d 759, 764 (5th Cir. 2019).

To that end, the Fifth Circuit recounted that Texas appellate courts have generally found good cause to discharge an attorney where the attorney behaved unethically or failed to fulfill legal duties to the client. *See Rocha*, 676 S.W.2d at 155 (upholding a finding of just cause where the attorney was "impatient and rude," proposed a settlement without consulting the client, failed to request the names of potential witnesses or contact expert witnesses, postponed trial without the client's knowledge or consent, regularly cancelled client appointments, and refused to try the case). Conversely, Texas appellate courts have declined to find good cause to discharge an attorney where a client refused to pay the agreed-upon fee, or where the law firm presented evidence that it could adequately represent the client. *See Crye v. O'Neal & Allday*, 135 S.W. 253, 254 (Tex. App. 1911, no writ) (finding dismissal of attorneys "wrongful" where the client demanded they represent him for $250 after agreeing to pay $500 for their services). Based on Texas jurisprudence, the Fifth Circuit concluded that the Supreme Court of Texas would not find good cause under these facts. Thus, the District Court did not err in granting summary judgment in favor of TJLF.

Finally, Pawlik challenged the District Court's finding that she failed to identify genuine fact issues concerning her affirmative defenses of waiver, equitable estoppel, laches, and prior material breach. The Fifth Circuit found no error. As for waiver, the Fifth Circuit held that TJLF's failure to contact her after the discharge was not unequivocal evidence of

its intent to relinquish its right to the contingency fee. According to Pawlik, equitable estoppel barred TJLF's fee claim because the firm knew that she relied on its withdrawal and its failure to communicate with her after she "transferred" her matter to Johns's firm. This argument failed for the same reason as her waiver argument—she discharged TJLF. Laches is an equitable defense and therefore inapplicable to a breach of contract claim, thus the District Court correctly held that Pawlik's reliance on laches was barred.

The material breach of a contract by one party excuses the other from any further performance. *Bartush-Schnitzius Foods Co. v. Cimco Refrigeration, Inc.*, 518 S.W.3d 432, 436 (Tex. 2017). To show TJLF breached its contractual obligations, Pawlik reiterated the same allegations as above, that it withdrew from the representation, authorized Brogan to remove Johns as lead counsel, and failed to communicate its desire to represent her. As the District Court correctly concluded, these allegations did not evince a material breach by TJLF. And the evidence showed that Brogan's work in the interpleader suit led to a favorable ruling for Pawlik, at least in part. Accordingly, Pawlik failed to carry her summary judgment burden with respect to a material breach, and the District Court did not err.