NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CA 0975

MARY GRACE KNAPP AND LUCIO CANO

VERSUS

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Judgment Rendered: February 10, 2012

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On Appeal from the
19th Judicial District Court,
In and for the Parish of East Baton Rouge,
State of Louisiana
Trial Court No. 571,219

Honorable Timothy Kelley, Judge Presiding

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George R. Blue, Jr. Covington, LA	Plaintiff-In-Intervention/Appellee, In Proper Person
Jesse L. Wimberly, III Mandeville, LA	Attorney for Defendant-In-Intervention/Appellant, Lucio Cano
Henry G. Therhoeve Baton Rouge, LA	Attorney for Defendant-Appellee, State Farm Mutual Automobile Insurance Company

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BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

HIGGINBOTHAM, J.

Defendant-in-intervention, Lucio Cano, appeals the judgment of the trial court awarding a percentage of a contingency fee in favor of plaintiff-in-intervention, George Blue. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On December 5, 2006, Lucio Cano and his friend, Mary Grace Knapp, were injured in an automobile accident. Following the accident, Mr. Cano and Ms. Knapp retained Mr. Blue to represent them against the uninsured motorist ("UM") carrier, State Farm Mutual Automobile Insurance Company (State Farm). On November 30, 2007, Mr. Cano and Mr. Blue entered into a contract for legal representation. The contingency fee contract stated that the fees calculated on the entire amount recovered were 331/3percent (33.33%) if settled prior to filing suit; 40 percent (40%) if settled after the suit had been filed; and 45 percent (45%) if appealed.

Mr. Blue filed suit on behalf of Mr. Cano on October 1, 2008. On July 14, 2009, counsel for State Farm forwarded an unconditional tender in the form of a check payable to Mr. Cano to Mr. Blue's office. Upon receipt of the check, Mr. Blue forwarded the settlement statement to Mr. Cano and Ms. Knapp, indicating the 40% contingency fee per the contract. Ms. Knapp, who referred Mr. Cano to Mr. Blue, indicated through email that Mr. Cano should be charged only a 20% fee. After disagreement regarding the fee percentage, Mr. Cano faxed a letter in August 2009 terminating Mr. Blue. On October 26, 2009, Mr. Blue filed a "Petition for Intervention" seeking recovery of his fees and costs. Mr. Cano subsequently hired Mr. Wimberly and settled with State Farm in June of 2010 for $102,000.00.

The trial on Mr. Blue's petition for intervention was held on September 21, 2010, after which judgment was signed, finding that the contingency fee contract between Mr. Blue and Mr. Cano was enforceable as written. The trial court further found the fee was 40%, the receipt and release agreement signed by Mr. Blue and Mr. Cano did not release Mr. Blue's intervention rights, and there was no just cause for terminating Mr. Blue. The judgment also apportioned the fees between Mr. Blue and Mr. Cano's present attorney, Mr. Wimberly, finding Mr. Blue was entitled to 62 ½ % of the fee and Mr. Wimberly was entitled to 37 ½ % of the fee. It is from this judgment that Mr. Cano appeals, asserting the following assignments of error:

1. The [t]rial [c]ourt erred in not finding that the contract between Mr. Cano and Mr. Blue was terminated for cause.

2. The [t]rial [c]ourt erred in finding that the agreement between the parties provided for a 40% contingency fee.

3. The [t]rial [c]ourt erred in failing to find that the Receipt, Release and Hold Harmless Defense and Indemnity Agreement entered into between Mr. Blue and Mr. Cano did not release Mr. Cano from any further obligations to Mr. Blue.

4. The [t]rial [c]ourt erred in finding the efforts of Mr. Blue were more valuable than the efforts of the Wimberly Law Firm in concluding the case.

5. The [t]rial [c]ourt erred in the mathematical calculations used to determine the relative fees between Mr. Blue and the Wimberly Law Firm.

DISCUSSION

In his first assignment of error, Mr. Cano contends that the contract between himself and Mr. Blue was terminated for cause. Ascertaining whether an attorney was terminated with or without cause is a factual determination and will only be disturbed on appeal upon a finding of manifest error. **O'Rourke v. Cairns**, 95-3054 (La.11/25/96), 683 So.2d 697, 703. The reviewing court must do more than simply review the record for some evidence that supports or controverts the trial

court's findings; it must instead review the record in its entirety to determine whether the trial court's findings were clearly wrong. **Stobart v. State, Through DOTD**, 617 So.2d 880, 882 (La.1993). The issue to be resolved by a reviewing court is not whether the trier of fact was right or wrong, but whether the fact finder's conclusion was a reasonable one. **Id.** If the findings are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. **Id.** at 882-83. The manifest error standard demands great deference to the trier of fact's findings; for only the fact finder can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said. **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). Thus, where two permissible views of the evidence exist, the fact finder's choice between them cannot be manifestly erroneous. **Id.**

Mr. Cano asserts that Mr. Blue was fired for cause because he failed to honor their verbal agreement and attempted to hold additional funds back from plaintiff for third parties who were not protected by his lien. The trial court in oral reasons for judgment stated, "I find that there's not sufficient evidence to show termination for cause." Our review of the record in its entirety reveals that the trial court's finding of no cause for termination was not clearly wrong or manifestly erroneous, and the trial court's conclusion with regard to cause was reasonable.

In his second assignment of error, Mr. Cano argues that the trial court erred in finding that he and Mr. Blue agreed to a 40% contingency fee. There is no dispute that the written contract[1] provides for a fee of 40% after a suit is filed. However, Mr. Cano argues that the parties had a verbal agreement that Mr. Blue would charge him only 20%. As the party alleging a verbal alteration to the

[1] Louisiana Rules of Professional Conduct require a contingent fee agreement to be in writing. La. R. Prof. Cond. Rule 1.5(C).

written contract, Mr. Cano bears the burden of proving such alteration. See La. C.C. art. 1831; **L & A Contracting Company, Inc. v. Ram Industrial Coatings, Inc.**, 99-0354 (La. App. 1st Cir. 6/23/00), 762 So.2d 1223, 1233, writ denied, 2000-2232 (La.11/13/00), 775 So.2d 438. The only evidence Mr. Cano presented to prove there was a modification of the agreement was the testimony of himself and Ms. Knapp. Accordingly, we find no error in the trial court's determination that the "contract governs the matter" and that the agreement between the parties provided for a 40% contingency fee.

Thirdly, Mr. Cano assigns as error the trial court's finding that the Receipt, Release, and Hold Harmless Defense and Indemnity Agreement entered into by Mr. Blue and Mr. Cano did not release Mr. Cano from any further obligations to Mr. Blue. On September 9, 2009, Mr. Cano and Mr. Blue signed a receipt, release, and hold harmless agreement. Mr. Cano argues that the following language in the agreement released him from any further obligation to Mr. Blue, including Mr. Blue's intervention for his fees:

> For and in consideration of GEORGE R. BLUE, JR. Individually and GEORGE R. BLUE JR., L.L.C. (collectively hereinafter "**Releasees**") agreeing not to file a civil suit against **Releasor** for breach of the "Contract for Legal Representation" dated November 30, 2007 or any other cause(s) of action arising out of said "Contract for Legal Representation"[.]

Transactions and compromises regulate the differences which appear clearly to be comprehended in them by the parties and they do not extend to differences which the parties never intended to include in them. **Condoll v. Johns-Manville Sale Corp.**, 448 So.2d 169 (La. App. 5th Cir.1984); **Pat O'Brien's Bar, Inc. v. Franco's Cocktail Products, Inc.**, 615 So.2d 429, 423 (La. App. 4th Cir.) writ denied, 617 So.2d 909 (La. 1993). Even when valid, releases of future actions are narrowly construed by the courts to assure that the parties fully understand which rights have been released, and further, that they understand the resulting

consequences. **Brown v. Drillers, Inc.**, 93-1019 (La. 1994), 630 So.2d 741, 754. As a result, if the release instrument leaves any doubt as to whether a particular future action is covered by the compromise, it should be construed as not covering such future action. **Id.**

Mr. Cano testified that he did not remember signing the release. Mr. Blue testified that he had Mr. Cano sign the agreement to protect himself against third party medical providers and against the possibility of a complaint to the Louisiana State Bar Association. He stated he always planned on filing an intervention. There is nothing in the document pertaining specifically to Mr. Blue's cause of action for his fee. We conclude that given the language used by the parties in the release agreement, as well as the only testimony on the parties' intent in confecting the agreement, the parties did not intend to release Mr. Blue's right to intervene for his legal fee. Accordingly, the trial court correctly found that the release did not prevent Mr. Blue from intervening for his fee.

In his final two assignments of error, Mr. Cano complains about the percentage of fees allocated to Mr. Blue versus Mr. Wimberly, and the method of calculation the trial court applied in determining the fees. When an attorney is discharged without cause, the amount of the fee is to be determined according to the highest ethical contingency percentage to which the client contractually agreed in any of the contingency fee contracts which he executed. **Solar v. Griffin**, 554 So.2d 1324, 1327 (La. App. 1st Cir. 1989), writ denied, 558 So.2d 582 (La. 1990). The amount prescribed in the contingency fee contract, not quantum meruit, is the proper frame of reference for fixing compensation for the attorney prematurely dismissed without cause. A trial judge has great discretion in setting an attorney fee. This award should not be modified on appeal absent a showing of abuse of discretion. **Id.** at 1328. The fee should be apportioned between the attorneys according to the respective services and contributions of the attorneys for work

performed and other relevant factors which are set forth in the Code of Professional Responsibility. **Saucier v. Hayes Dairy Products, Inc.**, 373 So.2d 102, 118 (La. 1978).

Mr. Blue's fee in his contract with Mr. Cano was 40%, while Mr. Wimberly's was 33 1/3%. Because Mr. Blue's percentage was higher, 40% is the correct contingency percentage. See **Solar**, 554 So.2d at 1327. The trial court apportioned 62 ½ % of the total fee to Mr. Blue and 37 ½% to Mr. Wimberly. Mr. Blue and Mr. Wimberly each presented to the court a print-out of the work they had done on behalf of Mr. Cano's suit. They both testified specifically about what work they had done to further Mr. Cano's case. After review of the exhibits and considering the testimony of the lawyers, we are unable to find that the trial court abused its discretion in apportioning the fees between these two lawyers. Further, we find no error in the trial court's method of dividing the fee. Accordingly, we will not disturb the trial court's apportionment of the fee, which was well within its discretion.

CONCLUSION

For the foregoing reasons, we affirm the trial court's judgment in accordance with Uniform Rules – Courts of Appeal, Rule 2-16.1B. All costs of this appeal are assessed to Mr. Lucio Cano.

AFFIRMED.