UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0390

September Term, 2014

HILTON S. SILVER

v.

SILVERMAN, THOMPSON,
SLUTKIN & WHITE, LLC ET AL.

Kehoe,
Reed,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: January 27, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In this breach of contract litigation, Hilton S. Silver ("Silver") sued the law firm of Silverman, Thompson, Slutkin & White, LLC, ("STSW"), seeking a share of attorneys' fees awarded following STSW's successful prosecution of a medical malpractice lawsuit.

STSW obtained a favorable result for Silver's mother-in-law, Dorothy Chaney. Silver asserts his entitlement to a portion of the attorneys' fees because it was he who had referred Mrs. Chaney to STSW, and further because he struck a deal with STSW to take a 30 percent share of the fees. Aggrieved by STSW's breach of an oral accord, Silver also seeks punitive damages. He maintains that, in all, he is entitled to recover a total of $480,000.

The Circuit Court for Carroll County (Hon. Thomas F. Stansfield, J.) thought otherwise, and, following a three day bench trial, ruled in favor of STSW. On April 9, 2014, Judge Stansfield issued a "Final Judgment" and accompanying opinion. The judgment was enrolled in the circuit court docket on April 14, 2014. *See* Maryland Rules 2-601(a), (b); 8-201(a), 8-202(f). Silver appeals as of right from the adverse judgment, and presents three questions for our review, which we have recast as follows:

1. Whether the trial court erred in finding that there was no agreement for a referral fee.

2. Whether the trial court erred by ruling that any purported agreement would be unenforceable pursuant to Rule 1.5(e) of the Maryland Rules of Professional Conduct and equitable concerns.

3. Whether the trial court erred in permitting certain testimony.

We exercise jurisdiction over the circuit court's judgment pursuant to Md. Code (1974, 2013 Repl. Vol.), § 12-301 of the Courts and Judicial Proceedings Article, and shall affirm the judgment in all respects for the reasons set forth below.

Standard of Review

Where a case is tried by the court without a jury, the starting point for our review is dictated by Md. Rule 8-131(c). *See Davis v. Davis*, 280 Md. 119, 123-24 (discussing Md. Rule 886, a predecessor to Rule 8-131(c)), *cert. denied*, 434 U.S. 939 (1977). "In a non-jury action, we review the case on the law and the evidence, and we will not set aside the judgment on the evidence unless clearly erroneous, giving due regard to the opportunity of the trial court to judge the credibility of the witnesses." *Williams v. State*, 173 Md. App. 161, 167 (2007). Md. Rule 8-131(c). *See VEI Catonsville, LLC v. Einbinder Properties, LLC*, 212 Md. App. 286, 298, *cert. denied*, 435 Md. 270 (2013).

> Before a determination can be made that such a decision is clearly erroneous, the evidence must be viewed in a light most favorable to the prevailing party below. If, viewed in that light, there is substantial evidence to support the factual conclusion, then the appellate court should accept that conclusion.

Goodwin v. Lumbermens Mutual Casualty Co., 199 Md. 121, 129 (1952).

We exercise plenary review over questions of law. *See Muse v. State*, 146 Md. App. 395, 403 (2002) (citations omitted). More specifically, our review over the trial court's rulings, as to the applicability of the Maryland Rules of Professional Conduct, is "essentially de novo." *Attorney Grievance Commission v. Whitehead*, 405 Md. 240, 253 (2008). The

"interpretation of a contract [presents] a question of law." *VEI Catonsville, LLC v. Einbinder Properties, LLC*, 212 Md. App. at 297 (citations and internal quotation marks omitted).

BACKGROUND and ANALYSIS

In a well-crafted and thorough opinion, Judge Stansfield observed:

> This matter came before the Court on March 4, 2014, for a three-day trial regarding Plaintiff, Hilton H. Silver's lawsuit against the law firm of Silverman Thompson Slutkin & White (hereinafter STSW). Defendant is alleged to have breached a contractual agreement with Plaintiff regarding the division of fees from a medical malpractice lawsuit. Plaintiff seeks to recover $120,000 in compensatory damages and $360,000 in punitive damages from the Defendant law firm. At the trial's outset, this lawsuit also named Sharon Schaeffer, Plaintiff's sister-in-law, as a Defendant in this matter, and the suit made a claim against Mrs. Schaeffer for intentional interference with contract. During the trial, Plaintiff dismissed his claim against Mrs. Schaeffer, so the litigation ultimately concerns only the breach of contract action. For the reasons set forth below, the Court finds that STSW did not breach any contract with Plaintiff, and will enter a Judgment for the Defendant.
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> **BACKGROUND**
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> This litigation arose from a disputed fee-sharing agreement between lawyers who are unaffiliated with each other, namely, Mr. Silver and Silverman Thompson Slutkin & White, LLC. Plaintiff alleges he and STSW had reached an agreement by which Plaintiff was entitled to a share of STSW's contingency fee by virtue of referring a medical malpractice case to the firm. In June 2005, Dorothy Chaney underwent surgery at Sinai Hospital in Baltimore, where she suffered a debilitating stroke as the result of alleged medical negligence. In April 2007, Hilton Silver, a Maryland attorney and Mrs. Chaney's son-in-law, approached Steven D. Silverman, STSW's managing partner, to inquire about referring a potential medical malpractice case. Mr. Silverman referred Plaintiff to Andrew Slutkin, another partner in the firm, to discuss the potential case.
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> Plaintiff began to discuss his mother-in-law's potential case with Mr. Slutkin during an April 24, 2007 telephone call. During the call, Plaintiff

represented that his wife, Donna Silver, had been handling Ms. Chaney's affairs for years, and would be the best suited out of Ms. Chaney's six children to serve as Power of Attorney. Plaintiff also represented that Ms. Chaney's other children were in agreement with the appointment, and were aware that Plaintiff was seeking STSW to investigate a potential case on Ms. Chaney's behalf. Disputed testimony was offered as to whether, during this phone call, Mr. Slutkin orally agreed that STSW would share 30% of any attorney's fees the firm recovered from the potential litigation, but the parties agree that no written agreement was created. Ms. Chaney executed a Durable General Power of Attorney appointing Mrs. Silver on May 11, 2007. Mrs. Silver, on behalf of Ms. Chaney, signed a Contingent Fee Agreement on May 14, 2007, which listed Plaintiff and STSW as Ms. Cheney's attorneys. After discovering Ms. Chaney's name had been misspelled, Mrs. Silver, now as Ms. Chaney's limited attorney-in-fact, executed a Revised Contingent Fee Agreement on July 16, 2007, again listing both Mr. Silver and STSW as the attorneys.

A family dispute arose in September 2007; while Plaintiff's dismissal of his claim against Mrs. Schaeffer has rendered the family dynamics largely immaterial to the breach of contract dispute, it is worth stating that, after Mr. Slutkin and STSW consulted with Ms. Chaney and some of her children on September 18, 2007, as part of its investigation prior to filing suit, it became apparent that the family was not in agreement as to Plaintiff's and Mrs. Silver's involvement in the matter. Mrs. Silver was removed as power of attorney and Ms. Schaeffer was appointed. Plaintiff was copied on the letter Ms. Chaney's children signed regarding the appointment of Ms. Schaeffer as power of attorney.

Ms. Schaeffer executed a new Contingent Fee Agreement with STSW on behalf of her mother on February 14, 2008, with the new agreement listing only Mr. Slutkin and STSW as attorneys for Ms. Chaney. STSW filed Ms. Chaney's lawsuit on March 21, 2008. Plaintiff and the Defendant law firm were not in communication from March 2008 until January 11, 2010, when Mr. Slutkin wrote a letter to Plaintiff explaining that, given Ms. Schaeffer's instructions that no family member should share in the recovery, STSW's client did not consent to joint representation and division of attorneys' fees, so the firm was unable to share any division of fees in the case. The case was confidentially settled on May 27, 2010.

DISCUSSION

Plaintiff alleges that, by virtue of the agreement reached during his April 24, 2007 phone call with Mr. Slutkin, the May 14, 2007 Contingent Fee Agreement, and the July 16, 2007 Revised Contingent Fee Agreement, both of which listed both STSW and Plaintiff as Ms. Chaney's attorneys, STSW and Mr. Silver had reached an agreement regarding the division of attorneys' fees. Plaintiff further argues that, during the April 24, 2007 telephone conversation, STSW agreed to pay Plaintiff 30% of the attorneys' fees that the firm would receive from a successful resolution of the litigation. Plaintiff claims that, in failing to honor that agreement and share 30% of its attorneys' fees, Defendant has breached its 2007 contract. Defendant contends that Plaintiff is not entitled to recover for any breach of contract, because there was never an agreement as to a referral fee, and the division of fees agreement that Plaintiff alleges to have been breached would be invalid under the Maryland Rules of Professional Conduct.

Throughout multiple pleadings, motions hearings, and arguments presented at trial, a central issue in this case has concerned the validity of the fee-sharing arrangement in question. In 2013, the Court of Special Appeals considered the validity of fee-sharing arrangements in a scenario similar to the case at issue. Recognizing the importance of the client's wishes in matters related to representation and fee-sharing, the Court of Special Appeals has held, "When a client discharges his or her lawyer, any contingency fee contract ceases to exist, and generally, absent contractual language to the contrary, any fee-splitting agreement predicated on the initial contingency fee contract also ceases to exist." *Brault Graham, LLC v. Law Offices of Peter G. Angelos, P.C.*, 211 Md. App. 638, 674 (2013).

Plaintiff has argued that, unlike in *Brault Graham*, his discharge as counsel in the 2008 Contingent Fee Agreement did not negate the initial fee-sharing arrangement. If Mr. Silver and STSW reached an agreement as to fee-sharing during that April 24, 2007 telephone conversation, any contract formed related only to Mr. Silver's referral of his mother-in-law's potential case. While the parties do not agree as to whether a contractual relationship was created by this phone call, the parties do agree as to some of the obligations created under the alleged contract. Plaintiff and Defendant agree that Plaintiff was not to contribute to the investigation of the potential case. The parties agree that Plaintiff was not to contribute financially to the costs of the

litigation. The record makes clear—considering that for about two years from 2008 to 2010, Plaintiff and STSW had no communication with each other, and given that Plaintiff had been removed as attorney in the 2008 Contingent Fee Agreement—that Plaintiff did not contribute in any way to joint representation of Ms. Chaney. Plaintiff argues he completed full performance under the agreement when STSW brought a lawsuit that he had referred to them. Unlike the discharged counsel's relationship to the case in *Brault Graham*, where the discharged counsel was still entitled to recovery under *quantum meruit*, there can be no *quantum meruit* recovery in this case, because Plaintiff admits he did not perform any work aside from referring the case. This arrangement appears to have been a pure referral fee. The issue before the Court is whether such an arrangement is enforceable.

As the Court previously analyzed in its March 25, 2013 Order and Opinion, the case law in Maryland provides substantial authority for the proposition that pure referral fee agreements, like the one alleged to exist here, are unenforceable. A review of the case law does not reveal any instances in which Maryland courts have addressed the issue of a pure referral fee such as the one at issue here; however, the Court of Appeals has provided a useful context for analysis. After reviewing the historical roots of "the sharing or division of fees between lawyers," which stems from the English custom by which countryside solicitors would associate with London solicitors when litigation arose, and the solicitors would refer the matter to a barrister for a one-third share of the resulting fee, the Court explained,

> Although during that period, fee sharing between attorneys involving merely the referral of clients appears to have been accepted, by 1937 the American Bar Association expressly recognized that an attorney's payment of a 'referral or finder's fee' to another was problematic, unless there was a division of responsibility . . . The iteration of Rule 1.5(e) of the Maryland Rules of Professional Conduct . . . reflects the notion that fee splitting between attorneys must have been in proportion to the work performed by each attorney, or if consented to by the client, each lawyer could assume joint responsibility. *Blondell v. Littlepage*, 413 Md, 96, 111-12 (2010)(citations omitted).

Taking the view that "referral or finder's [fees]" were problematic, MRPC 1.5(e) allows for a division of fess [sic] between lawyers who are not in the same firm only if (1) the division is proportional to the services rendered, or each attorney assumes joint responsibility; (2) the client agrees to the joint representation, and the agreement is in writing; and (3) the total fee is reasonable. In this case, the alleged pure referral fee arrangement between Plaintiff and STSW was not in proportion to the services rendered, and, especially in light of the 2008 Contingent Fee Agreement that did not include Mr. Silver, there was no joint responsibility. Further, Plaintiff admits the agreement was not in writing. Given the agreement's noncompliance with MRPC 1.5(e)'s first two requirements, the Court need not consider the reasonableness of the total fee.

Despite these violations, however, the alleged fee-sharing agreement's noncompliance with MRPC 1.5(e) does not automatically render a fee-sharing agreement unenforceable. While acknowledging that Rule 1.5(e) "does constitute a supervening statement of public policy to which fee-sharing agreements by lawyers are subject . . . [and] it *may* extend to holding fee-sharing agreements in clear and flagrant violation of Rule 1.5(e) unenforceable," the Court of Appeals has explained, "[T]he rule is not a *per se* defense, rendering invalid or unenforceable otherwise valid fee-sharing agreements because of rule violations that are merely technical, incidental, or insubstantial or when it would be manifestly unfair and inequitable not to enforce the agreement." *Post v. Bregman*, 349 Md. 142, 168 (1998). When faced with a fee-sharing arrangement that does not meet the Rule 1.5(e) requirements, then, the Court must ultimately consider whether it would be manifestly unfair or inequitable not to enforce an "otherwise valid fee-sharing agreement."

The Court need not wade into such murky waters in this case, for the referral fee arrangement is not "otherwise valid." Indeed, Plaintiff has failed to meet his burden of showing evidence of a breach of contract, because Plaintiff has failed to show there was an actual agreement relating to a referral fee for Ms. Chaney's medical malpractice case. The alleged agreement, according to Plaintiff's case, can be put in simple contract terms. During the April 24, 2007 telephone call, Mr. Silver offered to refer Ms. Chaney's potential case in exchange for a referral fee. During the same call, Mr. Slutkin, on behalf of STSW, orally accepted the offer. And, because during this phone

call STSW agreed to share 30% of its attorneys' fees with Plaintiff, there was a meeting of the minds as to the essential terms of the contract.

Through the testimony and evidence presented at trial, Plaintiff has failed to meet his burden to show, by a preponderance of the evidence, both that STSW accepted his offer for a referral agreement, and that there was a meeting of the minds regarding the percentage of the fee to be shared. Plaintiff could not produce any written documentation of the fee-sharing agreement. The alleged fee-sharing contract was created through an oral agreement reached during the phone call, which, setting aside for the moment that an oral fee-sharing agreement would violate MRPC 1.5, could still evince that a contract was formed. But Mr. Slutkin's testimony as to his long-standing practices regarding fee-sharing agreements, as well as the conduct of both parties from early 2008-2012, strongly suggest that neither party believed that a referral fee agreement had been reached in 2007.

First, Mr. Slutkin's testimony as to his firm's usual practice in handling fee-sharing arrangements stands in stark contrast to how the firm handled this alleged agreement. Mr. Slutkin testified that his firm is less likely to agree to referral fees when dealing with attorneys with whom the firm has no standing relationship, and it is undisputed that Mr. Silver had no relationship with STSW's attorneys prior to referring Ms. Chaney's case. Mr. Slutkin also testified that STSW often will not engage in fee-sharing prior to completing the pre-suit investigation of the potential claim, and that one of the determining factors in agreeing to a fee percentage concerns how much investigation the referring attorney has completed. During the phone conversation, Plaintiff could not provide any meaningful details regarding his mother-in-law's potential case, so Mr. Slutkin was unable to determine whether the case was worth pursuing from the telephone conversation alone. This casts further doubt on the proposition that STSW would have agreed from this phone conversation alone to engage in fee-sharing with Plaintiff. Further, the evidence presented regarding STSW's prior referral fee agreements stands in stark contrast to what occurred in this case. The Defendant law firm produced sixty-six letters in which Mr. Slutkin memorialized the fee-sharing arrangement that had been reached. Mr. Slutkin testified that he always memorializes these agreements in writing, and has never entered into an oral agreement of this sort without subsequently memorializing the agreement in writing. The testimony and a review of the sixty-six letters in evidence show that the firm has never entered into a 30% referral fee agreement, which

Plaintiff alleges to have been the agreement here. In addition to the alleged oral agreement not being subsequently memorialized in writing, the parties did not during the conversation discuss which party would bear the cost of litigation expenses if the case proceeded to trial, which was included in every letter produced. Given STSW's long standing practices when engaging in fee-sharing arrangements, and the absence of any of those practices in this case, Plaintiff has failed to demonstrate that there was an agreement reached.

Plaintiff's behavior from 2008 until filing this suit in 2012 cast further doubt as to whether he believed there was a fee-sharing agreement in place. Plaintiff was copied on the January 16, 2008 letter in which Mr. Slutkin memorialized the family's decision that Sharon Schaeffer would appointed [sic] as Power of Attorney. He contacted Mr. Slutkin after receiving this letter, and was told he would not have further involvement in the case. He did not have any communication with STSW regarding the progress of the case from 2008 through its resolution in 2010. Considering the context of the family dynamics underscoring this case, in which Ms. Chaney's children clearly harbored some animosity toward Plaintiff's and his wife's involvement in the medical malpractice litigation, Plaintiff's failure to inquire about his possible referral fee arrangement makes it even more doubtful that he believed that an agreement had been reached.

The only evidence presented supporting the proposition that an agreement had been reached is a January 11, 2010 letter sent by STSW to Plaintiff, in which Mr. Slutkin advised that he would be unable to share any division of fees. In that letter Mr. Slutkin did acknowledge to Plaintiff that, "I agreed to share a portion of my office's attorneys' fee with you." Mr. Slutkin explained during testimony that this was simply a reference to the fact that, during the 2007 phone conversation, Plaintiff had inquired about fee-sharing, but stressed that no agreement as to a specific percentage to be shared had ever been reached. Considering that this reference is the only documentation that STSW had ever considered there to have been an agreement, and that there is no evidence that a 30% referral fee was specifically agreed upon, Plaintiff has failed to demonstrate by a preponderance of the evidence that there was a fee-sharing agreement, much less an agreement as to this essential term of a fee-sharing contract.

Even if the Court were to find that there had been an agreement reached between Plaintiff and Defendant, by which STSW would share 30% of its

> attorneys' fees with Plaintiff, the Court would still find that the agreement is invalid and unenforceable. As explained above, there is no dispute that the referral fee agreement at issue in this case is in violation of MRPC 1.5(e)'s requirements. Although, per *Post v. Bregman*, the rule is not a *per se* defense that should render unenforceable an otherwise valid fee-sharing agreement, the Court considers the pure referral arrangement Plaintiff alleges in this case to be invalid. The violations of 1.5(e) present in this alleged agreement are not "merely technical, incidental, or insubstantial." *Post*, 349 Md. at 168. As explained above, this pure referral arrangement substantially violates each requirement of the Rule. Further, it would not be manifestly unfair or inequitable to avoid enforcement of this agreement, because Plaintiff admits he performed no work and incurred no expenses in referring Ms. Chaney's case. The Court finds that the pure referral fee at issue in this case goes against both the literal requirements and the public policy behind MRPC 1.5(e), and that finding the agreement invalid would be neither manifestly unfair nor inequitable.
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> **CONCLUSION**
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> For the reasons set forth above, Defendant, Silverman Thompson Slutkin & White, LLC is entitled to judgment in its favor. The Court will enter a Judgment in conformance with the views expressed herein.

Having carefully considered the record before us, we conclude that the circuit court's thorough and cogent opinion, which we have reproduced in its entirety, is both factually and legally correct. Hence, we adopt Judge Stansfield's opinion as the opinion of this Court.

We affirm the judgment of the circuit court.

JUDGMENT OF THE CIRCUIT COURT FOR CARROLL COUNTY AFFIRMED;
COSTS ASSESSED TO APPELLANT.