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IN THE COURT OF APPEALS OF INDIANA

IN RE THE MARRIAGE OF: DENISE MARIE BENJAMIN,	)	
Appellee-Petitioner,	)	
vs.	)	No. 64A05-0901-CV-39
PETER BENJAMIN,	)	
Respondent,	)	
SAUL I. RUMAN, individually, and RUMAN, CLEMENTS & HOLUB, P.C.,	)	
Appellants-Garnishee Defendants.	)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Jeffrey L. Thode, Judge
Cause No. 64D02-0107-DR-6113

December 17, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Saul I. Ruman and Ruman, Clements & Holub, P.C. (collectively "Ruman") appeal the trial court's grant of Denise Benjamin's motion to correct error in which the trial court vacated its earlier entry of summary judgment for Ruman. Ruman raises one issue, which we revise and restate as whether the trial court abused its discretion by granting Denise's motion to correct error. We affirm.

The relevant facts follow. Denise and Peter Benjamin married in May 1980, and Peter worked as an attorney. Benjamin v. Benjamin, 798 N.E.2d 881, 883-884 (Ind. Ct. App. 2003) (Benjamin I). In April 1999, Peter retained the services of Ruman to represent him in proceedings initiated by the Indiana Supreme Court Disciplinary Commission. On March 3, 2001, Peter entered into an Assignment Agreement with Ruman because he did not have the funds to pay for the legal services. The Assignment Agreement stated:

> The undersigned, Peter L. Benjamin, a resident of Lake County, Indiana (Assignor) for good and valuable consideration, the receipt of which is hereby acknowledged, hereby grants, conveys, assigns, transfers and sets over unto Ruman, Clements, Tobin & Holub, P.C., a professional corporation duly incorporated in the State of Indiana, (Assignee) and the successors and assigns of Assignee, so much of the right, title, and interest of the Assignor in and to any and all distributions of money or property, payments or returns of capital of any kind or nature whatsoever which Assignor is entitled to receive from time to time pursuant to the following legal services contracts or agreements as may be necessary to pay fees for legal services rendered to Assignor by Assignee:
>
> Michael Briggs
> Richard Concialdi, Jr.
> Linda Elwell
> Tina M. and Joseph Fleming
> Dana Ginn

> Thuu-Thi Osborn
> Sheila Sluis
> Tameka Warren
> Brandi Wheeler
> Jason White
>
> In no event is this Assignment intended as a release of Assignor's obligations to Assignee. Assignor agrees that, to the extent the distributions of money or property, payments or returns of capital referenced above are not sufficient to pay for legal fees rendered by Assignee to Assignor, Assignor shall pay Assignee the balance of all sums not satisfied by this Assignment. In the event that the distributions of money or property, payments or returns of capital referenced above shall exceed the sums due to Assignee for fees for legal services rendered to Assignor, Assignor shall be entitled to an amount of the excess to be determined on a case-by case basis, consistent with the particular legal services fee contract involved and the Indiana Rules of Professional Conduct.

Appellants' Appendix at 33 (file numbers omitted). An amendment to the Assignment Agreement later added the case of Deanna Raderstorf. On October 22, 2001, the Indiana Supreme Court accepted the resignation of Peter Benjamin from the bar. See In re Benjamin, 756 N.E.2d 967 (Ind. 2001).

On July 26, 2001, Denise filed a petition for dissolution of marriage. Benjamin I, 798 N.E.2d at 883. With respect to the Assignment Agreement, Denise claimed Peter assigned a marital asset when he assigned his portion of the fees to Ruman. Id. at 885. Denise also argued that she was entitled to one-half of the fees that Peter assigned to Ruman. Id. On May 3, 2002, the trial court issued a dissolution decree dissolving the marriage and dividing the marital estate. Id. The trial court awarded Denise one-half of any and all entitlements for costs or any other expenses that Peter had or may have had in

or resulting from all such cases. Id. On appeal, Peter argued that it was error for the trial court to designate as a marital asset the legal fees to be earned from particular legal cases which he had assigned to Ruman. Id. at 886. This court held that the trial court properly awarded Denise one-half of any amount Peter was entitled to receive under the terms of the Assignment Agreement. Id. at 887.

During 2001, 2002, and 2003, settlement statements were signed by Saul Ruman and the clients in some of the cases mentioned in the Assignment Agreement and in the case of *Sharp v. NIPSCO*. The settlement statements indicated that Ruman and Peter received fees.

In February 2003, Denise filed a petition for proceedings supplemental against Ruman, seeking to collect a share of the legal fees that Ruman had received on the cases that Peter had previously assigned to them. See Benjamin v. Benjamin, 849 N.E.2d 719, 722 (Ind. Ct. App. 2006) ("Benjamin II"). In November 2004, the trial court issued an order that found: (1) Ruman had credited the sum of $235,143.91 to Peter's outstanding attorney fees; and (2) Denise was entitled to one-half of that sum, pursuant to the dissolution decree. Id. The trial court therefore ordered Ruman to turn over half of that sum to Denise. Id. Ruman filed a motion to correct error, arguing that "because the outstanding legal fees that Peter owed to Ruman ($327,313.11) exceeded his 'hypothetical one-third share' ($235,143.91) [of the total legal fees collected by Ruman] by $92,169.20, Peter was not entitled to any fees, and, by extension, neither was Denise." Id. at 722-723. The trial court denied Ruman's motion. Id. at 723.

On appeal, in Benjamin II, this court cited Ind. Professional Conduct Rule 1.5(e), which provided:

> A division of 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, by written agreement with the client, each lawyer assumes joint responsibility for the representation;
>
> (2) the client is advised of and does not object to the participation of all the lawyers involved; and
>
> (3) the total fee is reasonable.

Id.[1] This court found "far too many outstanding issues prevent a decision regarding the appropriateness of any fee sharing between Peter and Ruman," and held that the trial court abused its discretion when it denied Ruman's motion to correct error and ordered Ruman to pay Denise certain sums. Id. at 724. The court remanded for "evidentiary hearing(s)" for the parties to present evidence on these issues and any related matters necessary for trial court resolution. Id. at 724-726.

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[1] Ind. Professional Conduct Rule 1.5(e) was amended effective January 1, 2005 to read:

> 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.

The court also stated: "[i]f, on remand, it is determined that fee sharing with Peter is permissible, the next inquiry is whether and when Denise may collect her marital share of Peter's share." Id. at 724. The court held that "the terms of the Assignment provide Ruman with a contractual right of set-off; that is, the outstanding obligation to Ruman (fees Peter incurred in the disciplinary action) must be satisfied before the remainder of the marital asset (if any) is available and subject to division between Peter and Denise." Id. at 725. The court also stated:

> We hold that Ruman is entitled to all fees collected on the assigned cases, with the limitation that Peter may be entitled to have some fees credited to his outstanding account with Ruman, but only to the extent as provided by, and in compliance with, Prof. Cond. R. 1.5(e). If, after set-off, excess funds exist, then Peter becomes entitled to receipt of any fees determined to be properly shared with him, and Denise immediately is entitled to one-half of those, as her marital portion of those fees.

Id.

In Benjamin II, Denise cross-appealed and argued that the *Sharp v. NIPSCO* case was not part of the Assignment Agreement, that the $507,839.44 collected on that case was outside the scope of that agreement, and that Ruman was not entitled to any portion of those fees. Id. at 723. The court acknowledged that *Sharp v. NIPSCO* was not subject to the Assignment Agreement, but the court stated that "the analysis does not end there." Id. at 725. The court noted that "although Sharp v. NIPSCO is exempt from the Assignment, and thus a contractual right of set-off does not exist, Ruman has a corresponding right to do so under common law." Id. at 726. The court concluded that

"as with the contractually assigned cases, Ruman may retain fees in satisfaction of Peter's debt to them, before they are required to pay any sums to Peter or Denise." Id.

After remand, in June 2007, Ruman moved for summary judgment and argued that the Assignment Agreement between Ruman and Peter did not meet the requirements of Ind. Professional Conduct Rule 1.5(e), and therefore the Assignment Agreement was not enforceable pursuant to Indiana law. Thus, Ruman argued that Peter was not entitled to any portion of the recovered fees. Ruman also argued that even if the Assignment Agreement were enforceable, Peter was not entitled to recover any of the fees because his debt to Ruman exceeded the maximum amount of fees attributable to Peter. Denise argued that there were several issues of material fact with regard to the evidence or lack thereof used to determine the dollar amounts in dispute that were generated by assigned cases subject to the Assignment Agreement and the *Sharp v. NIPSCO* case.

On April 22, 2008, the trial court granted Ruman's motion for summary judgment. On May 21, 2008, Denise filed a motion to correct error and argued that Ruman's counsel had stated earlier that a motion for summary judgment would be limited to whether the Assignment Agreement was valid under Ind. Professional Conduct Rule 1.5(e). Denise also argued that that there were genuine issues of fact concerning the fees. Lastly, Denise argued that either the Assignment Agreement complied with Rule 1.5(e) or Ruman waived any argument that the Assignment Agreement did not comply with Rule 1.5(e) because Saul Ruman filed an affidavit indicating that he paid Peter by

applying receipts from the assigned cases to Peter's bill and because Ruman reflected payments to Peter on all of the settlement statements.

After a hearing, the trial court granted Denise's motion to correct error and denied Ruman's motion for summary judgment. Specifically, the trial court found "that while the holding by the Indiana Court of Appeals clearly sets forth the 'law of the case' as argued by [Ruman], there remains a genuine issue of fact." Appellants' Appendix at 5.

The issue is whether the trial court abused its discretion by granting Denise's motion to correct error. We review the trial court's decision to grant or deny a motion to correct error for abuse of discretion. Paragon Family Restaurant v. Bartolini, 799 N.E.2d 1048, 1055 (Ind. 2003). An abuse of discretion occurs if the trial court's decision is against the logic and effect of the facts and circumstances before it or if the trial court misapplied the law. Walker v. Kelley, 819 N.E.2d 832, 836 (Ind. Ct. App. 2004). By granting Denise's motion to correct error, the trial court set aside summary judgment in favor of Ruman. Thus, in determining whether the trial court abused its discretion in granting Denise's motion to correct error, we must also determine whether Ruman was entitled to summary judgment.

Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(c); Mangold ex rel. Mangold v. Ind. Dep't of Natural Res., 756 N.E.2d 970, 973 (Ind. 2001). All facts and reasonable inferences drawn from those facts are construed in favor of the nonmovant. Mangold, 756 N.E.2d at 973. Our review of a summary judgment

motion is limited to those materials designated to the trial court. Id. We must carefully review a decision on summary judgment to ensure that a party was not improperly denied its day in court. Id. at 974. A party moving for summary judgment bears the initial burden of showing no genuine issue of material fact and the appropriateness of judgment as a matter of law. Monroe Guar. Ins. Co. v. Magwerks Corp., 829 N.E.2d 968, 975 (Ind. 2005). If the movant fails to make this prima facie showing, then summary judgment is precluded regardless of whether the non-movant designates facts and evidence in response to the movant's motion. Id.

Ruman argues that: (A) the Assignment Agreement violated Ind. Professional Conduct Rule 1.5(e);[2] and (B) even assuming that the Assignment Agreement did not violate Rule 1.5(e), the fees owed by Peter to Ruman exceeded the total fees collected by Ruman from the cases assigned to Ruman.

A. Rule 1.5(e)

Ind. Professional Conduct Rule 1.5(e) provided:

> A division of 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, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

[2] We note that Benjamin II established the law of the case in holding that "Ruman is entitled to all fees collected on the assigned cases, with the limitation that Peter may be entitled to have some fees credited to his outstanding account with Ruman, but only to the extent as provided by, and in compliance with, Prof. Cond. R. 1.5(e)." Benjamin II, 849 N.E.2d at 725.

(2) the client is advised of and does not object to the participation of all the lawyers involved; and

(3) the total fee is reasonable.[3]

The parties disagree as to whether Ind. Professional Conduct Rule 1.5(e)(1) required a written agreement. Denise points out that Rule 1.5(e)(1) was written in the disjunctive and argues that "[a] written agreement signed by the client is only required where there is joint representation." Appellee's Brief at 17. Ruman argues that "[a] more reasonable reading based on the plain language of Rule 1.5(e) is that a writing signed by the client is required in the case of any division of a fee between lawyers who are not members of the same firm . . . ." Appellants' Reply Brief at 8.

Ruman relies upon the Minnesota Supreme Court's decision in Christensen v. Eggen, 577 N.W.2d 221 (Minn. 1998). In Christensen, Fred Hollender, an attorney, referred a potential medical malpractice claim to Brad Eggen. 577 N.W.2d at 222. Hollender sent a letter to Eggen and attempted to put their fee agreement in writing by stating that his understanding was that he was entitled to "a 1/3 referral fee." Id. at 223. Hollender died before the majority of the pretrial work was done and two years prior to the actual trial. Id. Hollender's widow, Christine Hollender Christensen, filed an attorney's lien in an attempt to recover a third of Eggen's fees. Id. All parties acknowledged that Hollender performed no actual work on the case, other than making

[3] As previously mentioned, Ind. Professional Conduct Rule 1.5(e) was subsequently amended. Both parties cite the version of the rule in effect at the time of the Assignment Agreement, which we rely upon. See In re Strutz, 652 N.E.2d 41, 43 n.1 (Ind. 1995) (holding that the rule in effect at the time of the conduct governs).

the referral. Id. The Supreme Court of Minnesota addressed whether a fee-splitting agreement between attorneys from different firms violated public policy when it did not strictly comply with Minn. Rule of Professional Conduct 1.5(e).[4] Id. at 224.

The court noted that the client did not give written consent to any dual representation or splitting of fees between Hollender and Eggen and was never told of the particular amount that Hollender was to receive under the fee-splitting agreement. Id. at 225. The court held that the fee-splitting agreement failed to comply with two of the three requirements of Rule 1.5(e). Id. The court also held that "[t]o allow attorneys to proceed with fee-splitting arrangements without the client's written agreement or knowledge would put the client at a severe disadvantage in the lawyer-client relationship." Id. The court also noted that an agreement to pay a referral fee is often viewed as unenforceable as against public policy. Id. The court ultimately concluded

[4] Ruman states that Minn. Professional Conduct Rule 1.5(e) "is identical" to Ind. Professional Conduct Rule 1.5(e). Appellants' Brief at 21 n.8. However, the Rules are somewhat different. Minn. Professional Conduct Rule 1.5(e) provided:

> A division of 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, by written agreement with the client, each lawyer assumes joint responsibility for the representation;
>
> (2) *the client is advised of the share that each lawyer is to receive* and does not object to the participation of all the lawyers involved; and
>
> (3) the total fee is reasonable.

(Emphasis added). However, Ind. Professional Conduct Rule 1.5(e)(2) provided that a division may be made only if "the client is advised of and does not object to the participation of all the lawyers involved . . . ."

that the fee-splitting agreement violated public policy because it did not comply with Minn. Professional Conduct Rule 1.5(e) and was therefore unenforceable. Id.

The Supreme Court of Minnesota based its decision in part upon the fact that the client was never told of the particular amount that Hollender was to receive under the fee-splitting agreement, which was required under Minn. Professional Conduct Rule 1.5(e). The court did not explicitly hold that a written agreement was required where a division of fee is in proportion to the services performed by each lawyer. To the extent that the court in Christensen suggested that a division of fee in proportion to the services performed by each lawyer must be in writing to be enforceable, we do not find Christensen persuasive.

As previously mentioned, Ind. Professional Conduct Rule 1.5(e) was amended in 2005. Before the amendment, Rule 1.5(e)(1) provided that "[a] division of fee between lawyers who are not in the same firm may be made only if . . . the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation . . . ." The language in effect before the amendment required a written agreement only where the division of fee was not in proportion to each lawyer's services. See Donald R. Lundberg, *The Amended Indiana Rules of Professional Conduct: The Client-Lawyer Relationship – The Rest of the Story*, 48 RES GESTAE 16, 18 (Jan./Feb. 2005) (addressing the amendment to Rule 1.5(e) and stating that "[p]reviously, a written agreement was only required in cases where the division of fee was not in proportion to each lawyer's services"). Based

upon the language in Ind. Professional Conduct Rule 1.5(e) in effect at the time of the Assignment Agreement, we conclude that any agreement for division of fee in proportion to the services performed by each lawyer was not required to be in writing to be enforceable. See id.; see also In re Hailey, 792 N.E.2d 851, 862 (Ind. 2003) (holding that "*[a]bsent proportionality*, the fee division would nevertheless have been permissible if . . . the respondent and the Alabama attorney, by written agreement with the client, each assumed joint responsibility for the representation . . . .") (emphasis added).

The designated evidence reveals that the clients signed settlement statements, which indicated that Ruman and Peter received fees. The designated evidence also reveals that members of Ruman's staff personally met with each of the individuals referred by Peter and that Peter also spoke to each client personally or the executor of the estate. However, the designated evidence does not reveal and we conclude that a question of fact exists regarding whether the division of fee was in proportion to the services performed by each lawyer or whether each lawyer assumed joint responsibility for the representation. Consequently, we cannot say that Ruman carried its initial burden of showing no genuine issue of material fact and the appropriateness of judgment as a matter of law.

B. Amount of Fees

Ruman argues that even assuming that the Assignment Agreement did not violate Rule 1.5(e), the fees owed by Peter to Ruman exceeded the total fees collected by Ruman from the cases assigned to Ruman. According to the designated evidence, Peter owed

Ruman $327,313.11. According to the settlement statements, Peter was entitled to $238,600.61 in fees and $33,017.14 in expenses for a total of $271,617.75 for the cases subject to the Assignment Agreement and *Sharp v. NIPSCO*.[5]

The designated evidence reveals a question of fact regarding the resolution of the *Sluis* case, one of the cases contained in the Assignment Agreement. Ruman designated evidence that it did not accept the *Sluis* case.[6] However, Denise designated evidence that Ruman informed her attorney that the *Sluis* case was pending with a demand of $45,000.

The designated evidence also reveals a question of fact as to the proper fees that were allocated to Peter. Denise argues that "the actual fee split contemplated by the parties when the Assignment Agreement was entered into was an equal share of one-half (50%) of the fees generated by the assigned cases." Appellee's Brief at 21. Denise cites to a letter from Peter to Saul Ruman that states, "Enclosed please find a copy of a worksheet of cases that I have referred to your office as of June, 2000." Appellants' Appendix at 75. The accompanying documents appear to indicate that Peter was to receive fifty percent for five cases. We conclude that the designated evidence presents a

[5] Ruman argues that the designated evidence reveals that Peter's theoretical share of attorney fees collected in the cases subject to the Assignment Agreement and *Sharp v. NIPSCO* was $235,143.91. It appears that Ruman added the fees and multiplied the total fees by one-third to arrive at $235,143.91. According to the settlement statements, Peter was entitled to one-half of the fees in some cases and one-third of the fees in other cases. Specifically, Peter was entitled to fees of $1,166.66 for Briggs, $47,083.33 for Concialdi, $4,166.66 for Elwell, $4,200.67 for Fleming, $8,333.33 for White, $4,370.15 for Raderstorf, and $169,279.81 for Sharp. These amounts total $238,600.61. This amount does not include the $33,017.14 in expenses assigned to Peter in the settlement statements.

[6] The affidavit designated by Ruman refers to the case as the *Sulis* case which is spelled differently than the case referred to in the Assignment Agreement.

question of fact as to whether Peter was entitled to one-third or fifty percent of the fees related to the *Sharp* case.[7]

The designated evidence demonstrates genuine issues of material fact regarding the amount of fees and expenses that belonged to Peter. Therefore, summary judgment in favor of Ruman was not warranted. We conclude that the trial court did not abuse its discretion in granting Denise's motion to correct error and vacating the summary judgment previously entered.

For the foregoing reasons, we affirm the trial court's grant of Denise's motion to correct error.

Affirmed.

CRONE, J., and MAY, J., concur.

[7] We note that if Peter was entitled to fifty percent of the fees in *Sharp*, then the amount of fees and expenses for *Sharp* and the other cases exceeds the amount of fees that Ruman claimed Peter owed them.