NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 0037

JAN P. JUMONVILLE

VERSUS

LEONARD CARDENAS III

Judgment Rendered: DEC 10 2013

* * * * *

On Appeal from the
22nd Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Trial Court No. 2011-11273

The Honorable August J. Hand, Judge Presiding

* * * * *

Jan P. Jumonville
Covington, Louisiana

In Proper Person/Appellant

Leonard Cardenas III
Baton Rouge, Louisiana

In Proper Person/Appellee

* * * * *

BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

DRAKE, J.

Attorney Jan P. Jumonville appeals a judgment dismissing her petition and awarding her former co-counsel, Leonard Cardenas III, forty percent (40%) of the attorney fees awarded in connection with the settlement of two related matters in federal district court and bankruptcy court (underlying litigation).

FACTS

Jumonville represented one of two plaintiffs against two defendants in a lawsuit in state court arising out of an automobile accident. The judgment in that case imposed damages on both individual defendants in excess of their liability insurance policy limits. One of the defendants filed for Chapter Seven bankruptcy protection after this judgment was rendered against him. Jumonville's pursuit of her client's claims in the bankruptcy court and in federal district court aligned her with the interests of the bankruptcy trustee, Dwayne Murray (Trustee Murray), who was also seeking recovery of funds on behalf of the bankruptcy estate. Consequently, Trustee Murray petitioned the bankruptcy court to allow Jumonville to represent him in connection with these matters. The court approved this representation, and Jumonville agreed to represent Trustee Murray for a contingency fee of one-third of any amounts recovered, plus costs.

Eventually, it became clear that Jumonville was likely to be called as a witness in the federal district court litigation, and she was disqualified from continuing as trial counsel for Trustee Murray in that case, but was allowed to remain as co-counsel. After engaging two attorneys to function as trial counsel, both of whom withdrew, she employed Cardenas to assist as trial counsel, offering to split her fee with him. In a letter drafted by Cardenas, it was stated that she would retain sixty percent (60%) of any attorney fee generated by the case, and he would be paid forty percent (40%) of such a fee. The case did not go to trial, but was settled for $250,000. Trustee Murray sent the agreed one-third contingency

fee to Jumonville, who refused to share any portion of it with Cardenas, because there had not been a trial.

Jumonville then filed a petition for concursus or, in the alternative, for a declaratory judgment, seeking resolution of the fee dispute. Cardenas filed a reconventional demand. Following a trial, the court found that the parties had a valid and enforceable oral agreement and that Cardenas was entitled to 40% of the contingency fee, as agreed. A judgment to this effect was signed December 13, 2011, and Jumonville appeals that judgment to this court.

ASSIGNMENTS OF ERROR

Jumonville assigns seven errors, which are summarized as follows:

(1) There was no valid and enforceable contingency fee contract;

(2) Cardenas was not entitled to a contingency fee;

(3) Cardenas failed to carry his burden to prove an oral contract;

(4) Cardenas is limited to quantum merit;

(5) Alternatively, Cardenas breached his oral contract for lack of services;

(6) Cardenas breached his oral contract by failing to disclose that a criminal matter and disciplinary matter were pending against him;

(7) All costs of litigation should not have been assessed against Jumonville.

LAW AND ANAYLSIS

Valid and Enforceable Oral Contract

The trial court found that there was a valid and enforceable oral contract between Cardenas and Jumonville for attorney's fees. It is well settled that an appellate court cannot set aside a trial court's findings of fact in the absence of manifest error or unless those findings are clearly wrong. *Rosell v. ESCO,* 549 So. 2d 840, 844 (La. 1989); *Boyd v. Boyd,* 10-1369 (La. App. 1 Cir. 2/11/11), 57 So. 3d 1169, 1174. In order to reverse a fact finder's determination of fact, an appellate

court must find from the record that a reasonable factual basis does not exist for the finding and that the record establishes that the finding is clearly wrong. *Stobart v. State through Dept. of Transp. and Development,* 617 So. 2d 880, 882 (La. 1993); *Denton v. Vidrine,* 06-0141 (La. App. 1 Cir. 12/28/06), 951 So. 2d 274, 287, *writ denied,* 07-0172 (La. 5/18/07), 957 So. 2d 152.

After hearing all of the testimony and observing the demeanor of the witnesses, the trial court recognized the conflict in the testimony concerning the terms of the division of fees between Jumonville and Cardenas. The trial court clearly believed the testimony of Cardenas and his witnesses. Even though an appellate court may feel its own evaluations and inferences are more reasonable than the fact finder's, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony. *Rosell,* 549 So. 2d at 844.

The testimony at trial was that Jumonville sought out Cardenas to be a trial attorney in the federal court case since she had been disqualified to act as trial counsel. After speaking to Cardenas on the phone, Jumonville and Cardenas met in his office, where she delivered several big boxes of files to him. Jumonville and Cardenas discussed the representation to be provided by Cardenas and the terms of the fee sharing. The evidence presented at trial was that Cardenas's paralegal was called into the room, where Cardenas dictated a letter to her in front of Jumonville, evidencing the terms of the agreement. The letter, dated April 4, 2006, confirmed the fee-splitting arrangement between the parties for the underlying litigation. The letter stated, "As we agreed, you [Jumonville] will receive 60% of any attorney's fee recovered in either case, and I will collect 40% of any attorney's fee recovered in either case." The letter was hand delivered to Jumonville immediately while she was still in Cardenas's office. Jumonville claims that the letter was given to her in an envelope and that she did not read it until she returned to her office. Cardenas's

paralegal testified that Jumonville read the letter and discussed it with Cardenas while in his office.

Jumonville claims that Cardenas did not satisfy his burden of proof as to an oral contract. Louisiana Civil Code article 1846 states that an oral contract over $500 must be proved by "at least one witness and other corroborating circumstances." In *Peter Vicari General Contractor, Inc. v. St. Pierre,* 02-250 (La. App. 5 Cir. 10/16/02), 831 So. 2d 296, 301, the fifth circuit states:

> Under La. C.C. art. 1846, one witness and other corroborating circumstances must prove an oral contract for a price in excess of $500. Only general corroboration is required. *Gulf Container Repair Services, Inc. v. FIC Business & Financial Centers, Inc.,* 98-1144 at p. 6 (La. App. 5th Cir. 3/10/99), 735 So. 2d 41, 43. It is not necessary that plaintiff offer independent proof of every detail. *Id.* The manifest error standard of review applies to a factual finding by the trier of fact in this regard and will not be overturned unless it is clearly wrong. *Gulf Container Repair Services, Inc.,* 98-1144 at p. 6, 735 So. 2d at 43.

To meet the burden of proof of an oral contract by a witness and other corroborating circumstances, a party may serve as his own witness and the "other corroborating circumstances" may be general and need not prove every detail of the plaintiff's case. *Pennington Const., Inc. v. R A Eagle Corp.*, 94-0575 (La. App. 1 Cir. 3/3/95), 652 So. 2d 637, 639. However, the corroborating circumstances that are required must come from a source other than the plaintiff. *Id.*

Cardenas offered not only his own testimony, but also that of his paralegal, and the written document confirming the oral contingency fee contract. Jumonville admitted that it was only after the settlement of the case that she contested the validity of the oral contract. Jumonville claimed that she only agreed to sharing the fee with Cardenas if he tried the federal case. Since the federal case settled at the mediation, Jumonville claimed that Cardenas was owed nothing, even though he was enrolled as lead trial counsel from April 5, 2006, until the approval of the settlement by the bankruptcy court on November 5, 2010.

We agree with the trial court that Cardenas carried his burden of proving an oral contract existed. Jumonville argues that the April 4, 2006 letter is deficient, since it does not set forth any consideration. Jumonville claims that her agreement with Cardenas was the same as oral agreements she had made with two previous attorneys to act as trial counsel in the federal case. However, Jumonville offered no evidence of what those agreements were, other than her own testimony with no corroboration. Therefore, she failed to prove what those oral contracts were, according to La. C.C. art. 1846, or that Cardenas was aware of those oral contracts and made the same agreement. Given the fact that this court concludes that a valid oral contract between Jumonville and Cardenas was evidenced by the April 4, 2006 letter, Jumonville's argument as to the deficiencies of the letter is without merit. The trial court did not hold that the April 4, 2006 letter was a written contract, only that it was evidence of an oral agreement. Based on our review of the record before us, and mindful of the great deference we must afford the trier of fact, we find no manifest error in the trial court's judgment that a valid and enforceable oral contract existed between Jumonville and Cardenas.

Jumonville also argues that Cardenas did not have a valid contract, because he did not comply with the Federal Bankruptcy Code, 11 U.S.C. § 327(a), which requires court approval to represent a United States Bankruptcy Trustee. However, a review of the relevant law, including 11 U.S.C. § 327(a), Federal Rules of Bankruptcy Procedure Rule 2014, Employment of Professional Persons, and U.S. Bankruptcy Court, Middle District of Louisiana, Local Rule 2014-1, Employment of Professionals, reveals that it is the **trustee** who must file an application to employ an attorney such as Cardenas, not the attorney to be employed. Furthermore, the procedural rules of bankruptcy court have no bearing on the validity of a contract between two Louisiana attorneys contracting to split a contingency fee.

A bankruptcy court must abstain from hearing state law claims which are non-core proceedings, that is, claims that are related to the bankruptcy, but do not arise under the bankruptcy. *See Sewell v. MDM Services Corp.*, ___F.Supp. ___ (E.D. La. 2013), 2013 WL 2100526. While the contract dispute between Jumonville and Cardenas is related to the bankruptcy action, the dispute does not arise under the bankruptcy action. The bankruptcy court did not pay Cardenas, but Trustee Murray assumed Cardenas would be paid from the check issued to Jumonville, since he knew Cardenas was co-counsel. Trustee Murray testified that the bankruptcy court had no jurisdiction over the contractual dispute between Jumonville and Cardenas.

In the matter before this court, Cardenas sought his share of the fee from Jumonville, with whom he directly contracted. The oral contract entered into between Jumonville and Cardenas was valid, even though the bankruptcy court never approved Cardenas to represent Trustee Murray. The bankruptcy court paid only Jumonville. The issue before this court is the agreement between Jumonville and Cardenas, not the validity of the contingency fee agreement between Trustee Murray and Jumonville. Therefore, the procedural rules of bankruptcy court have no bearing on the contractual issue before this court.

Breach of Contract and Rules of Professional Conduct Rule 1.5

Jumonville claims that the contract between her and Cardenas is invalid and violates Louisiana State Bar article 16, Louisiana Rules of Professional Conduct Rule 1.5(e), which provides:

> A division of fee between lawyers who are not in the same firm may be made only if:
>
> (1) the client agrees in writing to the representation by all of the lawyers involved, and is advised in writing as to the share of the fee that each lawyer will receive;
>
> (2) the total fee is reasonable; and

(3) each lawyer renders meaningful legal services for the client in the matter.

Jumonville claims that there is no written contract between Cardenas and the client, Trustee Murray, that Cardenas did not advise the client in writing as to the fee sharing, that the fee Cardenas seeks is unreasonable, and that there is no evidence of any meaningful legal services provided by Cardenas.

Prior to March 1, 2004, Rule 1.5(e) stated:

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 responsibilities 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.

Fox v. Heisler, 03-1964 (La. App. 4 Cir. 5/12/04), 874 So. 2d 932, *writ denied,* 04-1748 (La. 10/29/04), 885 So. 2d 588, was based on the law in effect prior to the amendment to Rule 1.5 in 2004. In *Fox*, plaintiff, an attorney, left defendant's employment, and both parties orally agreed to split an attorney fee in a large case on a 50/50 basis. Once the fee was paid in its entirety, the defendant refused to honor the 50/50 agreement. The court noted that the matter was "neither a suit for recovery of attorney's fees nor a suit over the terms of the settlement agreement." *Id.* at 938. The plaintiff argued that the oral agreement to share in the fee was unenforceable and against public policy, because the agreement did not comply with Rule 1.5. The court in *Fox* relied upon *Scurto v. Siegrist,* 598 So. 2d 507 (La. App. 1st Cir.), *writ denied,* 600 So. 2d 683 (La. 1992), in which the court stated that "the suit by an attorney to recover pursuant to that agreement is a suit to recover for breach of the agreement to share in the fund resulting from payment of the fee. It is not a suit for recovery of attorney's fees." *Id.* at 510. The court in

Fox agreed with *Scurto* that when two attorneys, not of the same firm, jointly represent a client, the Rules of Professional Conduct do not prohibit the enforcement of an agreement between the attorneys and do not require an apportionment of the fee on a quantum meruit basis. *Fox,* 874 So. 2d at 938; *See also Barham & Arceneaux v. Kozak,* 02-2325 (La. App. 1 Cir. 3/12/04), 874 So. 2d 228, 237, *writ denied,* 04-0930 (La. 6/04/04), 876 So. 2d 87. The court in *Fox* held that under the circumstances, the oral contract to share fees was valid and should be enforced as agreed upon.

This court finds that the circumstances before it are similar to those of *Fox.* This is neither a suit for recovery of attorney's fees, nor a suit over the terms of the settlement agreement. Even though Rule 1.5 was amended in 2004 to require the client to agree in writing to an attorney fee-sharing agreement between attorneys not of the same firm, the Rules of Professional Conduct do not regulate or prohibit the enforcement of an agreement between attorneys. This is a suit for a breach of the agreement. Therefore, this court agrees that the oral contract between Jumonville and Cardenas is valid and enforceable.

Breach of Agreement and Joint Involvement in Case

Alternatively, Jumonville claims Cardenas breached his agreement with her by not being jointly involved in the underlying litigation. Therefore, she claims that he is only entitled to quantum meruit, based on meaningful services rendered. Generally, when more than one attorney from different law firms assist each other in a contingency fee case, a joint venture is formed and the attorneys divide the fee equally. *Scurto,* 598 So. 2d at 510; *McCann v. Todd,* 203 La. 631, 14 So. 2d 469 (1943). If the attorneys have entered into an agreement as to how the fee will be divided, that agreement governs the division of fees, unless there was a breach of that agreement due to a party's failure to fulfill his obligations in representing the client. *Barham,* 874 So. 2d at 237 When professional contracts between attorneys

who agree to share legal fees are at issue, Louisiana courts have generally refrained from examining them to determine whether one attorney performed more work than the other. *Id.* at 236. In the present case, the parties did have a valid oral agreement. In addition, the parties were in relatively the same position to bargain throughout the representation, that is, both parties were professionally trained in agreements, communication, and the articulation of intent. There was ample time and opportunity to alter, modify, explain, or supplement the original oral contract as to the fee agreement, but neither party felt it necessary to do so. Both attorneys were retained through the settlement of the underlying litigation.

Jumonville relies on numerous cases that are distinguishable from the present situation, such as *Dukes v. Matheny,* 02-0652 (La. App. 1 Cir. 2/23/04), 878 So. 2d 517, 520-21, *writ denied,* 04-1920 (La. 11/8/04), 885 So. 2d 1182, which noted that courts decline to apply the joint venture theory to support an equal division of the fee when the attorneys have not been jointly involved in the representation of the client. In *Dukes,* the two attorneys entered into a 50/50 referral agreement. This court held that the law does not allow for recovering a fee for the referral of a legal matter from one attorney to another. *Id.* at 521. The referring attorney must participate in the representation of the client. *Id.* The present situation does not involve a referral situation. Instead, it involves a valid and enforceable oral contract for two attorneys to jointly represent one client. The record evidences that Cardenas did participate in representing Trustee Murray. Therefore, *Dukes* is not applicable.

Jumonville also relies on *Sewell v. Hanover Ins. Co.,* 517 So. 2d 413 (La. App. 1st Cir. 1987), *writ denied,* 519 So. 2d 147 (La. 1988), which involved one client hiring successive attorneys after terminating two different attorneys. The court then had to determine how to divide the contingency fee and did so based on quantum meruit. The present case does not involve successive attorneys, but two

attorneys representing the same client at the same time until the conclusion of the case. As the court in *Scurto* held, an attorney who agrees to share a fee with another who is actively and continually involved in the case is entitled to the fee split agreed upon by the two attorneys. *Scurto,* 598 So. 2d at 510.

Jumonville argues that Cardenas breached the agreement, because he did not provide any meaningful legal services. However, the record reveals that Cardenas met with Jumonville and obtained some files, his paralegal spoke to Jumonville several times, he filed two motions to enroll as counsel, had a telephone conference with the Federal magistrate attended a chambers status conference with the Federal magistrate, attended the deposition of Jumonville and the mediation where the parties reached a settlement, and was copied on numerous correspondence between the various litigants from his enrollment through the conclusion of the underlying litigation. Furthermore, the agreement between Jumonville and Cardenas was one between two professionals and this court will not, in this instance, assume the position of dictating to attorneys exactly how much work they need to perform to entitle them to a certain fee. *See Scurto,* 598 So. 2d at 510.

There is no evidence that Cardenas refused to give assistance to Jumonville. *See Murray v. Harang,* 12-0384 (La. App. 4 Cir. 11/28/12), 104 So. 3d 694, 698. There is no evidence of any specific duties for each attorney to perform. It is not this court's duty to weigh each attorney's contribution to the handling of the case. *Id.* at 699. "[T]he Courts cannot, and must not, assume the role of telling attorneys that they must work "X" amount of hours, take "X" amount of depositions, read "X" amount of cases, etc. before they are entitled to a certain fee." *Defrancesch v. Hardin,* 510 So. 2d 42, 46 (La. App. 1st Cir.), *writ denied,* 513 So. 2d 819 (La. 1987).

Jumonville also claims that *Scurto* is distinguishable, because it was decided before the Rules of Professional Conduct were in effect on January 1, 1987. As

stated above, the Rules of Professional Conduct do not prohibit a claim for breach of contract between two attorneys. *Fox* was decided after the Rules of Professional Conduct became effective. The *Fox* court determined that the Rules of Professional Conduct do not prohibit such a claim. Even though *Fox* was decided prior to the 2004 amendment to Rule 1.5, requiring a client consent in writing to an attorney fee-sharing agreement, the previous law also placed certain restrictions on attorney fee-sharing agreements. However, *Fox* held that Rule 1.5 did not prohibit an agreement among attorneys from being enforced, even if the agreement did not comport with Rule 1.5. Jumonville offers no cases which require Rule 1.5 to prohibit enforcing an agreement between attorneys even after the amendment in 2004.

Breach of Fiduciary Duty

Jumonville claims Cardenas breached his fiduciary duty to his client and breached his oral contract with her by failing to notify Jumonville or the Trustee Murray that he had been arrested for domestic abuse. Jumonville offers no legal reasoning as to how a breach of fiduciary duty to the client affected the agreement between her and Cardenas or that she has standing to assert a claim on behalf of the client. Therefore, we address only the argument that Cardenas breached a fiduciary duty to Jumonville, co-counsel in this matter. A fiduciary relationship has been described as one that exists when confidence is reposed on one side and there is resulting superiority and influence on the other. *Plaquemines Parish Commission Council v. Delta Development Company, Inc.*, 502 So.2d 1034, 1040 (La. 1987), *superceded by statute on other grounds; Jenkins v. Starns,* 11-1170 (La. 1/24/12), 85 So. 3d 612. One is said to act in a fiduciary capacity "when the business which he transacts, or the money or property which he handles, is not his own or for his own benefit, but for the benefit of another person, as to whom he stands in a relation implying and necessitating great confidence and trust on the

one part and a high degree of good faith on the other." *Scheffler v. Adams & Reese, LLP*, 06-1774 (La. 2/22/07), 950 So. 2d 641, 647 (citing *State v. Hagerty*, 251 La. 477, 492, 205 So. 2d 369, 374 (1967)).

In the instant case, there was no special fiduciary relationship between Jumonville and Cardenas as co-counsel. The Louisiana Supreme Court held in *Scheffler* that there is no cause of action between co-counsel based on a theory that co-counsel have a fiduciary duty to one another to protect each other's interests in a fee. *Id.* at 652. In *Scheffler*, the Louisiana Supreme Court considered whether a fiduciary obligation was owed between co-counsel who were not in an "adversarial" position, and the court reaffirmed its decision in *Penalber v. Blount*, 550 So. 2d 577, 581 (La. 1989) that the attorney's paramount duty is to the client:

> [W]e conclude that it is fundamental to the attorney-client relationship that an attorney have an undivided loyalty to his or her client. *This duty should not be diluted by a fiduciary duty owed to some other person, such as co-counsel, to protect that person's interest in a prospective fee.*

Scheffler, 950 So.2d at 652 (emphasis added).

Jumonville presents absolutely no evidence that the outcome of the underlying litigation would have been any different had Cardenas divulged his domestic abuse arrest. The Louisiana Supreme Court did not temporarily suspend Cardenas from the practice of law until June 24, 2011, after the underlying litigation was settled and dismissed. Although Jumonville claims that she would have immediately removed Cardenas as trial counsel had she known about his recommendation for suspension by the Louisiana Disciplinary Board two days before the mediation, she presented no evidence that the underlying litigation would have been mediated or settled more advantageously for the client without Cardenas's presence and involvement. Jumonville has not presented any evidence that she was damaged in any manner. Therefore, there can be no recovery for the alleged breach of fiduciary duty.

Costs

Jumonville assigns as error the fact that the trial court's judgment signed December 13, 2011, incorrectly cast her with all costs. She claims that the costs should be proportionately divided, and that the trial court erred in casting her with all costs, since the trial court previously cast Cardenas with all costs of several exceptions that he filed.

The party cast in judgment is generally taxed with costs; however, pursuant to Louisiana Code of Civil Procedure article 1920, the trial court has discretion to assess costs of a suit in any equitable manner. On appellate review, only a showing of an abuse of discretion warrants a reversal of the trial court's cost allocation. *Kozak,* 847 So. 2d at 246. We find no abuse of discretion in this case. The trial court found that Cardenas was liable for the costs of his exceptions. The judgment of December 13, 2011, did not address or alter the judgment of June 26, 2011, assessing costs to Cardenas for the exceptions. All costs after the judgment of June 26, 2011, are assessed against Jumonville pursuant to the December 13, 2011 judgment.

We note that there is a discrepancy in the judgment between the written amount and the numerical amount shown as the attorney's fee paid in the bankruptcy matter. The written amount shows "Eighty-Eight Thousand, Three Hundred, Thirty-Three and 33/100ths" Dollars, whereas the numerical amount shown is $83,333.33. The agreement between Jumonville and Trustee Murray was that she would receive a contingency fee of one-third of the settlement amount. The record reveals that the settlement amount paid to Trustee Murray was $250,000, one-third of which is Eighty-Three Thousand, Three Hundred, Thirty-Three and 33/100 Dollars ($83,333.33). Therefore, the correct figure, as shown in the judgment, is $83,333.33.

CONCLUSION

For the foregoing reasons, and considering this court's observation of the correct amount of the judgment, we affirm the judgment of the trial court. Costs of the appeal are assessed to appellant, Jan P. Jumonville.

AFFIRMED.