STATE OF MICHIGAN

COURT OF APPEALS

LEE M. O'BRIEN,

Plaintiff-Appellant,

v

GEOFFREY N. FIEGER,

Defendant,

and

FIEGER & FIEGER, PC, doing business as FIEGER LAW, doing business as FIEGER FIRM,

Defendant-Appellee.

UNPUBLISHED
November 18, 2021

No. 354678
Wayne Circuit Court
LC No. 17-002004-CB

Before: BORRELLO, P.J., and JANSEN and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting summary disposition in favor of defendant Fieger & Fieger, PC (defendant).[1] We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiff is a licensed attorney. Plaintiff testified at his deposition that, for years, he referred cases to defendant, and also provided "client development services," such as meeting with prospective clients and trying to convince them to retain defendant, or arranging meetings between prospective clients and defendant. Plaintiff testified that he was generally paid one third of the attorney fees earned by defendant for cases in which plaintiff referred the client or otherwise

[1] Defendant Geoffrey N. Fieger (Fieger) was dismissed from this action by the trial court on February 11, 2019. Plaintiff has not appealed that dismissal. We will therefore refer to the remaining law firm defendant simply as "defendant."

assisted in retaining the client. Plaintiff used defendant's facilities regularly to conduct meetings, type documents, and receive phone calls, and attended events that were otherwise employee-only. The majority of plaintiff's income came from defendant's payments for referrals, although plaintiff also represented clients.

Plaintiff further testified regarding his attempts to convince two particular clients to retain defendant in their separate personal injury cases, the "Shoemaker case" and the "LaMay case." Defendant did not pay plaintiff for his involvement in these two cases.

In January 2017, plaintiff filed suit for breach of contract, claiming that he was entitled to payment under the longstanding agreement between the parties. Plaintiff argued, and provided supporting evidence, that his efforts—including seeking out and meeting with the prospective clients' relatives, addressing concerns of the prospective clients, and strategizing what to say to the prospective clients—were instrumental in causing the clients to retain defendant. However, plaintiff also testified that he never met or spoke with the clients in either case, and that the clients in both cases were not informed of any agreement to divide the attorney fees earned in their cases.

Defendants filed two motions for summary disposition under MCR 2.116(C)(8), in March and May 2017, arguing that plaintiff had not pleaded the elements of a claim for breach of contract, that the Michigan Rules of Professional Conduct (MRPC), specifically MRPC 1.5(e), barred any "arrangement to share any attorney fee before an attorney-client relationship is formed," and that the contract plaintiff alleged was an illegal and unenforceable fee-splitting agreement. The trial court denied the first motion and never explicitly ruled on the second.

The parties conducted extensive discovery, overseen by a special discovery master, throughout the remainder of 2017 and most of 2018. In October 2018, defendants again moved for summary disposition under MCR 2.116(C)(8) and (10), raising substantially the same arguments as it had in its previous motions, and also arguing for Fieger's dismissal from the case. In February 2019, the trial court granted the motion with regard to Fieger's dismissal, but did not rule on the motion with respect to defendant. In January 2020, defendant filed another motion for summary disposition under MCR 2.116(C)(8) and (10), arguing that, after the completion of discovery and the trial court's dismissal of Fieger, there could be no question that plaintiff had failed to prove the existence of an explicit contract or an agency relationship between plaintiff and defendant. Defendant also reiterated its argument that the contract alleged by plaintiff would be illegal and unenforceable under the MRPC.

In his responses to defendant's motions in the trial court, plaintiff's theory of relief shifted repeatedly. At times, plaintiff argued that the payments at issue were not referral fees and were not governed by MRPC 1.5(e). In fact, plaintiff admitted at least once that he could not show compliance with MRPC 1.5(e). At other times, plaintiff argued that one or both of the payments at issue were referral fees and did comply with MRPC 1.5(e).

The trial court eventually granted summary disposition in favor of defendant, stating:

> [P]laintiff is only entitled to a referral fee under MRPC 1.5(e) or Michigan law if plaintiff had an attorney-client relationship with the client when the cases were

referred to defendant. When the evidence is viewed in a light most favorable to plaintiff the court concludes there is no genuine issue of material fact:

> 1. that plaintiff was not an employee of defendant firm at the time he recruited the cases, so the rule governing referral fees applies; and
>
> 2. the plaintiff did not have an attorney-client relationship with either of those two clients when they were recruited. MRPC 1.5 cannot serve as a basis for relief.
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> Plaintiff alternatively seeks compensation for his services for breach of contract established by course of performance or quantum meruit. However, the law does not recognize a cause of action to enforce payment of a referral fee outside of the rules of professional responsibility for attorneys not in the same firm.

The trial court cited *Sherbow, PC v Fieger & Fieger, PC*, 326 Mich App 684; 930 NW2d 416 (2019) (*Sherbow I*),[2] in support of its decision.

This appeal followed.

II. STANDARD OF REVIEW

Defendant's final motion for summary disposition was brought under both MCR 2.116(C)(8) and (C)(10). Because "the trial court considered documentary evidence in granting the motion," we review the trial court's grant of summary disposition as being made under MCR 2.116(C)(10). *Home-Owners Ins Co v Andriacchi*, 320 Mich App 52, 61; 903 NW2d 197 (2017).

> "This Court . . . reviews de novo decisions on motions for summary disposition brought under MCR 2.116(C)(10)." *Pace v Edel-Harrelson*, 499 Mich 1, 5; 878 NW2d 784 (2016). A motion for summary disposition pursuant to MCR 2.116(C)(10) "tests the factual sufficiency of the complaint . . . ." *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). "In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Summary disposition is proper when there is no "genuine issue regarding any material fact." *Id.* . . . Similarly, a trial court's "construction of the rules of professional conduct" is a legal issue that this Court reviews de novo. *Grievance Administrator v Fieger*, 476 Mich 231, 240; 719 NW2d 123 (2006). A trial court's decision regarding the existence of a contract is a question of law that we review

[2] Our Supreme Court overruled *Sherbow I*, in part, after the trial court's ruling, and after the parties briefed this appeal. *Sherbow, PC v Fieger & Fieger*, ___ Mich ___; ___ NW2d ___ (2021) (Docket No. 159450) (*Sherbow II*).

> de novo. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006). "When there is a disputed question of agency, if there is any testimony, either direct or inferential, tending to establish it, it becomes a question of fact . . . ." *St Clair Intermediate Sch Dist v Intermediate Ed Ass'n/Mich Ed Ass'n*, 458 Mich 540, 556-557; 581 NW2d 707 (1998) (quotation marks and citation omitted). [*Sherbow I*, 326 Mich App at 694-695.]

"There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

III. ANALYSIS

On appeal, plaintiff argues that the trial court erred by granting summary disposition in favor of defendant, because plaintiff raised genuine issues of material fact regarding the existence of an agency relationship and a contract under which plaintiff should have been paid for his assistance in securing the Shoemaker and LaMay clients for defendant.[3] Moreover, plaintiff argues that the divisions of attorney fees in those cases would not violate MRPC 1.5(e). We hold that the trial court correctly determined that the alleged agreement was unenforceable under the MRPC.

MRPC 1.5(e) states:

> (e) A division of a fee between lawyers who are not in the same firm may be made only if:
>
> (1) the client is advised of and does not object to the participation of all the lawyers involved; and
>
> (2) the total fee is reasonable. [MRPC 1.5(e).][4]

Contracts that violate the MRPC are against public policy and are unenforceable. See *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 58; 672 NW2d 884 (2003); *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 196; 650 NW2d 364 (2002).

In this case, plaintiff argues that he is owed "a fee which is calculated between 20-30% percent [sic] (up to 1/3) of the attorney fees received" by defendant in the Shoemaker and LaMay cases—a clear division of fees. Plaintiff does not argue, and the record does not support an inference, that his alleged agency relationship with defendant caused him to be "in the same firm" for the purposes of MRPC 1.5(e), nor does plaintiff give any other reason why MRPC 1.5(e) should

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[3] The parties dispute whether plaintiff may properly characterize the alleged contract as a "referral fee contract," given certain statements by plaintiff's counsel and actions by the trial court below. We need not address this issue, because it is clear that MRPC 1.5(e) bars recovery by plaintiff for breach of contract in these circumstances regardless of how the agreement is labeled.

[4] This version of the rule was adopted in 1988. *Sherbow II*, ___ Mich at ___; slip op at 9-10.

not apply in this case.[5] Instead, plaintiff argues that the trial court erred by holding that the rule required an attorney-client relationship between plaintiff and the Shoemaker and LaMay clients, and that there can be no violation of MRPC 1.5(e) when defendant never informed the clients of the agreement. We disagree.

Although the trial court's statement that plaintiff was "only entitled to a referral fee under MRPC 1.5(e) or Michigan law if plaintiff had an attorney-client relationship with the client when the cases were referred to defendant" was correct, it does appear to reflect a misunderstanding of *Sherbow I*, 326 Mich App at 712, on which the trial court relied. *Sherbow I* held that "MRPC 1.5(e) does not require that [the referring attorney] have an attorney-client relationship" with the referred clients. However, after the appellate briefs were submitted in this case, our Supreme Court overruled *Sherbow I* in part, holding that "MRPC 1.5(e) requires the attorney to participate as an attorney, which in turn requires him or her to establish a professional relationship with the client, which can be accomplished by a direct or indirect (i.e., through the client's agent) consultation." *Sherbow, PC v Fieger & Fieger*, ___ Mich ___; ___ NW2d ___ (2021) (Docket No. 159450); slip op at 12 (*Sherbow II*). The Court explained that the attorney-client relationship need not be longstanding or broad in scope, but did require the intentional formation of such a relationship by the client:

> [T]he entire attorney-client relationship can begin and end with the consultation and referral itself, provided that the parties have expressly or impliedly demonstrated their intent to enter into such a relationship. In these circumstances, the referring attorney is under no obligation to do anything other than refer the client to another attorney and comply with the other requirements in MRPC 1.5(e) if the fee is to be split. [*Id*. at 13.]

Defendant submitted affidavits by the clients in both the Shoemaker and LaMay cases, in which the clients swore that, when they retained defendant, they had never heard of or met plaintiff, and that they were not informed of any division of legal fees between plaintiff and defendant. Plaintiff offered no evidence contradicting these affidavits. In fact, plaintiff himself testified that he had no attorney-client relationship, or any relationship, with the client in the LaMay case, and never spoke to him at all. Plaintiff testified that he saw the Shoemaker client once, in her hospital bed, but did not talk to her. Plaintiff also never met the Shoemaker client's mother, who was involved in the search for legal counsel because of her daughter's extensive injuries. Plaintiff further testified that he never talked to "anyone in the Shoemaker family" about "getting a percentage of the fee." Plaintiff's counsel admitted on the record that plaintiff had no evidence that the clients were informed of a division of fees.

There was evidence on the record that plaintiff had communicated with relatives of the clients in both cases in an attempt to encourage the clients to retain defendant. There was also evidence that plaintiff had worked to arrange a solution to the Shoemaker client's child custody dispute concerns, and had advised one of defendant's attorneys regarding how to convince the LaMay client to retain defendant. However, none of this evidence suggests that either of the clients

[5] "Failure to brief a question on appeal is tantamount to abandoning it." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

intended to enter an attorney-client relationship with plaintiff, even if limited to recommending that the clients retain defendant. See *Sherbow II*, ___ Mich at ___; slip op at 12-13.

In sum, there is no evidence in the record that would allow a reasonable fact-finder to conclude that plaintiff established an attorney-client relationship with either the Shoemaker or LaMay clients. See *Allison*, 481 Mich at 425. Although the trial court made statements that were incorrect at the time under *Sherbow I*, its ruling that an attorney-client relationship is required under MRPC 1.5(e) was ultimately correct under *Sherbow II*, ___ Mich at ___; slip op at 12-13. Because dividing fees when the referring attorney has no attorney-client relationship with the client violates MRPC 1.5(e), the alleged contract is therefore unenforceable.

Additionally, there is no evidence in the record from which a reasonable fact-finder could conclude that the clients in either case were informed of any fee-splitting agreement. Consequently, regardless of the existence of an attorney-client relationship, a division of fees in these cases would independently violate MRPC 1.5(e)(1), which states that "[a] division of a fee between lawyers who are not in the same firm may be made only if . . . the client is advised of and does not object to the participation of all the lawyers involved . . . ." See *Sherbow I*, 326 Mich App at 696.

Plaintiff tries to avoid this conclusion by arguing that it was defendant's duty to inform the clients of the division, and that, because defendant failed to do so, there can be no violation of MRPC 1.5(e). Plaintiff cites *Sherbow I*, 326 Mich App at 704-705, for the proposition that "the clients must have objected at the time they were informed of the agreement in order for there to be a violation of MRPC 1.5(e)." However, this Court made that statement while discussing when a client, *who had been informed of a fee-splitting agreement*, would have to object in order to block the division of fees. This Court held that objections made at the time of trial were relevant because they tended to make it more likely that the clients had never been informed in the first place—a fact of consequence to the outcome of the action. *Sherbow I*, 326 Mich App. at 705-706. This Court further noted that it was the defendant's burden to prove *either* "that the clients were not informed *or* did object," in order to invalidate the agreement in that case. *Id*. at 715 (emphasis added). But at no point in *Sherbow I* did this Court establish that the duty to inform clients rested with one particular party to a fee-splitting agreement, or hold that such an agreement could be enforced despite a client's ignorance of its existence. In fact, a party's failure to inform clients of a fee-splitting agreement is itself a clear violation of the language of MRPC 1.5(e). And the rule clearly states that the consequence of failing to abide by MRPC 1.5(e) is that the division of fees may not be made. See also *Sherbow II*, ___ Mich at ____; slip op at 5, 15 (stating that a violation of MRPC 1.5(e) is grounds for challenging a referral fee contract "as void.").

Because there is no genuine issue of material fact regarding whether plaintiff had attorney-client relationships with the clients, or whether the clients were informed of the alleged fee-splitting agreement, the alleged fee-splitting agreement is unenforceable under MRPC 1.5(e), and the trial court correctly granted defendant's motion for summary disposition under MCR 2.116(C)(10). *Sherbow I*, 326 Mich App at 694-695; *Sherbow II*, ___ Mich at ____; slip op at 5, 15.

Affirmed. As the prevailing party, defendant may tax costs. MCR 7.219(A)(1).

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Mark T. Boonstra