IN THE COURT OF APPEALS OF TENNESSEE

AT KNOXVILLE

IN THE ESTATE OF	) C/A NO. 03A01-9810-PB00335
MAX CHRISTIAN CARPENTER,	)
GRACE CARPENTER, Administratrix,	) SCOTT COUNTY PROBATE
	)
Plaintiff-Appellee/Cross	) HON. JAMES L. COTTON, JR.,
Appellant,	) JUDGE
	)
v.	)
	)
IN RE: SULLIVAN,	)
	)
Appellee/Cross-Appellant,	)
	)
and	)
	)
LUCCHESI,	) AFFIRMED
	) AND
Appellant/Cross-Appellee.	) REMANDED

DAVID M. SULLIVAN, Memphis, *pro se*.

THOMAS E. HANSOM, Memphis, for Appellant/Cross-Appellee, Ronald Lucchesi.

O P I N I O N

Franks, J.

This action is based on a dispute between two attorneys over the division of attorneys' fees.

The attorneys' fees were generated by representation of the Estate in a civil rights action, which was settled, and the law firm which was to distribute the

attorneys' fees filed a Complaint for Interpleader and Declaratory Relief. Both Sullivan, appellee, and Lucchesi, appellant, answered the Interpleader. Lucchesi requested the court divide the fees equally between the two attorneys, and Sullivan requested that he be awarded 90% of the fees. The Estate filed an Answer to the Complaint, asserting that Lucchesi's request for one-half of the fee is in violation of DR 2-106, and that his portion of the fee should be awarded to the Estate.

The Trial Court awarded 83% of the fee to Sullivan and 17% of the fee to Lucchesi. Lucchesi has appealed.

The family of the deceased contacted Lucchesi for representation, who advised that he did not have the expertise to handle cases of this nature, and recommended Sullivan. The Administratrix of the of the Estate, entered into a contingency fee contract with both Sullivan and Lucchesi. There was no discussion between Lucchesi and Sullivan as to how they would divide their share of the fee.

After hearing the proof in this case, the Trial Judge issued its Opinion and Ruling, and we quote in pertinent part:

> Although Sullivan and Lucchesi were friends, worked out of the same law building in Memphis with internal offices in close proximity of each other, shared a receptionist and "associated" together by representing their client in the Lawsuit, in what Lucchesi characterized in his testimony as a "joint venture", even more importantly and controlling, Sullivan and Lucchesi were sole practitioners of law, operating out of segregated and exclusive offices, and having separate and distinct letterhead containing only their individual names, wherefrom the Court finds that Sullivan and Lucchesi were not an association of attorneys or partners in a law firm as defined under the rules of professional ethics governing the practice of law in this state . . .

First, Lucchesi insists that the Trial Court applied incorrect law in determining a division of the fees between the parties.

The standard of review in this case is *de novo* upon the record of the Trial Court, accompanied by a presumption of the correctness of the findings of fact

by the Trial Court, unless the evidence preponderates otherwise. T.R.A.P. Rule 13(d); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993).

Disciplinary Rule 2-107 provides:

> **DR 2-107. Division of Fees Among**
>
> **Lawyers**
>
> **(A)** A lawyer shall not divide a fee for legal services with another lawyer who is not the lawyer's partner in or associate of the lawyer's law firm or law office, unless:
>
> (1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.
>
> (2) *The division is made in proportion to the services performed and responsibility assumed by each. (*Emphasis added).
>
> (3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.
>
> **(B)** This Disciplinary Rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

Sup. Ct. Rule 8, Code of Prof. Resp. DR 2-107.

Contracts in violation of public policy are not enforceable, *Newton v. Cox*, 878 S.W.2d 105, 108 (Tenn. 1994), *cert. denied*, 115 S. Ct. 189 (1994); *Spiegel v. Thomas, Mann & Smith, P.C.*, 811 S.W.2d 528, 530-531 (Tenn. 1991); *Alexander v. Inman*, 903 S.W.2d 686, 694 (Tenn. App. 1995), *appeal denied, appeal after remand* 974 S.W.2d 689 (Tenn. 1998). A contract provision which violates the Disciplinary Rules of the Code of Professional Responsibility violates public policy, thus it is unenforceable. *See Spiegel*, 811 S.W.2d at 531.

In this case, the facts as found by the Trial Judge are supported by the testimony of both Lucchesi and Sullivan. The evidence does not preponderate against the Trial Court's determination that the two attorneys were not partners or associates, as contemplated by the Disciplinary Rule.

Since Lucchesi and Sullivan were not partners or associates, the Rule

prohibits them from dividing a fee for legal services unless the client consents to the employment of the other lawyer, the division is made in proportion to the services performed and responsibilities assumed by each, and the total fee is not clearly excessive. Here, there is no dispute that the client consented to the employment of both attorneys and the total fee charged to the client is reasonable, but Lucchesi is attempting to claim a fee that is not in proportion to the services he performed and responsibilities assumed.

Lucchesi attempts to get around the Rule by arguing that he and Sullivan were engaged in a "joint venture," which should be considered as an association between two lawyers to represent a party in a single specific lawsuit. He is correct that this is not a case where one attorney refers the case to another, does nothing, and expects a fee. However, that is not the only situation where the Rule applies. By including the provision that the fee is to be made in proportion to services performed and responsibilities assumed, the rule contemplates the situation where two attorneys from different law firms or law offices work jointly on a case. Calling such a situation a "joint venture" does not take the case out of the province of the Rule.

Lucchesi's reliance on the case of *Haynes v. Dalton*, 848 S.W.2d 664 (Tenn. App. 1992) as support for his position is misplaced. In that case, Dalton began working in Haynes' law office, with the agreement that Haynes would provide office space and overhead to Dalton in exchange for forty percent of Dalton's fees. Dalton admitted that he was an associate of Haynes, working in Haynes' law office. Since Dalton was an associate of Haynes, the agreement to share attorney fees did not violate DR 2-107. *Id.* at 665. Unlike the case of *Haynes,* in this case both attorneys asserted that they were sole practitioners and neither was an associate of the other, thus DR 2-107 explicitly applies.

Having determined that DR 2-107 applies to this case, and that the fee

may not be divided between the attorneys except in proportion to the services performed and responsibility assumed by each, the evidence at trial does not preponderate against the Trial Court's decision to award 83% of the fees to Sullivan and 17% to Lucchesi. T.R.A.P. Rule 13(d).

Neither party disputes that Sullivan did the lion's share of the work in this case. Sullivan logged 1031 hours of legal services, while Lucchesi only logged 269.50 hours.

Both Sullivan and the Estate argue that Lucchesi is not entitled to any fee because of his attempt to collect 50% of the fee, in violation of the Disciplinary rule.

Disciplinary Rule 2-106 of the Code of Professional Responsibility provides in relevant part: "(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." The case of *White v. McBride*, 937 S.W.2d 796 (Tenn. 1996) recognizes that in many cases an attorney may be able to collect a fee from a client under the theory of *quantum meruit* when the fee contract itself is unenforceable, but then holds that a fee may not be collected when the attorney attempts to collect a fee that is clearly excessive under DR 2-106. The Supreme Court stated:

> We agree that attorneys should not be penalized for innocent snafus, such as an oversight in drafting that might render their fee contracts unenforceable. To do so would be unfair to the lawyer who had otherwise diligently pursued the client's interest, and it would result in a windfall to the client who had benefitted from these services. Thus a recovery under a theory of *quantum meruit* is warranted in these situations.
>
> We are of the opinion however, that an attorney who enters into a fee contract, or attempts to collect a fee, that is clearly excessive under DR 2-106 should not be permitted to take advantage of the *Cummings* rule. A violation of DR 2-106 is an ethical transgression of a most flagrant sort as it goes directly to the heart of the fiduciary relationship that exists between attorney and client. To permit an attorney to fall back on the theory of *quantum meruit* when he unsuccessfully fails to collect a clearly excessive fee does absolutely nothing to promote ethical

> behavior. On the contrary, this interpretation would encourage attorneys to enter exorbitant fee contracts, secure that the safety net of *quantum meruit* is there in case of a subsequent fall.

Id. at 803.

While this Rule and the case applying it indicate that an attorney may not receive a fee if he or she attempts to collect a clearly excessive fee, the language limits this rule to a situation where the attorney is attempting to collect a clearly excessive fee from the client. In this case, no one disputes that the total fee charged the client is reasonable. Thus, Lucchesi is not attempting to collect an unreasonable fee from the client. Instead, he is attempting to collect one-half of the reasonable fee which had been established. We believe this is not the type of situation which, under the Rule, would deny Lucchesi any fee, and accordingly, we affirm the Trial Court's decision awarding Lucchesi 17% of the total fee.

Finally, we find no error in the Trial Court's ruling on the evidence relating to the payment of some of Sullivan's expenses. Lucchesi insists the Trial Court should have allowed him to introduce evidence of pre-trial expenses paid for by Lucchesi. Lucchesi was allowed to testify that he incurred $5,000.00 in expenses which were reimbursed prior to the hearing. The Trial Court explicitly considered these expenses in evaluating Lucchesi's contributions to the case, by finding Lucchesi "brought needed financial resources to the case by carrying the load of a significant amount of Lawsuit expenses."

Trial Courts are given broad discretion in the admission of evidence, and absent an abuse of that discretion, their decision will be upheld. *Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 442 (Tenn. 1992). We find no abuse of discretion, and it appears that any payment of Sullivan's expenses that are not related to the case has no relevance in determining Lucchesi's contribution to the case, especially in light of the fact that he was not asked to pay such expenses as a condition

of maintaining the case.

For the foregoing reasons, we affirm the judgment of the Trial Court and remand with cost of the appeal assessed to the appellant.

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Herschel P. Franks, J.

CONCUR:

_____
Houston M. Goddard, P.J.

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H. David Cate, Sp.J.