

IN THE COURT OF APPEALS OF MARYLAND

No. 33

September Term, 1997

DANNY SON

v.

MARGOLIUS, MALLIOS, DAVIS,
RIDER & TOMAR et al.

Bell, C.J.
Eldridge
Rodowsky
Chasanow
Raker
Wilner
Cathell,

JJ.

Concurring Opinion by Chasanow, J.
in which Cathell, J., joins

Filed: April 17, 1998

I concur in the judgment that there are material facts in dispute and that the case needs to be remanded to the trial court, and I concur in the portion of the Court's opinion headed "Barratry." For reasons explained in my dissent in *Post v. Bregman*, ___ Md. ___, ___ A.2d ___ (1998)(Slip Op. 15, 1997 Term), however, I disagree with the application of the holding in *Post* to the instant case. The majority remands this case for the trial judge to determine if there is an ethical violation by the defendant law firm and, if so, to apply an equitable test and reduce the fee by 5% unless the ethical violation is "technical, incidental, or [in]substantial'." ___ Md. ___, ___, ___ A.2d ___, ___ (1998)(Majority Op. at 24)(quoting *Post*, ___ Md. at ___, ___ A.2d at ___ (Slip Op. at 29)). There is no reason to reiterate my objections to the Court's vague, amorphous equitable weighing test to determine which ethical violations void fee contracts and which should be ignored. As I stated in *Post*, this Court should apply settled contract law to resolve fee contract disputes.

The issue is whether there was a valid fee agreement for a fee of 28.5% of any settlement, a valid agreement for a fee of 23.5% of any settlement, or a fraudulent misrepresentation that the agent agreed to a 28.5% fee when, in fact, Mr. Son's agent agreed to a 23.5% fee with a 5% concealed kickback. If the facts show the defendant law firm had a valid agreement with Mr. Son to represent him for a fee of 28.5% of the tort settlement, that agreement between Mr. Son and the law firm is not improper, and what the firm does with its validly earned fee is simply of no concern to Mr. Son. If the firm unethically used 5% of its earned fee to pay Ms. Park or unethically used some or even all of its fee to pay a bribe or illegal gambling debt, that should be between the firm and bar counsel and should

not constitute a windfall to Mr. Son. If the facts show that Mr. Son agreed to a 23.5% fee and also made a voluntary assignment of 5% of any settlement recovery to Ms. Park, the law firm should honor that assignment without inquiry into Mr. Son's motives and the adequacy of the consideration for the assignment. On the other hand, if Mr. Son could prove that the law firm, assisted by Ms. Son and Ms. Park, defrauded Mr. Son by claiming the contract negotiated by Mr. Son's wife on his behalf was for a fee of 28.5% as shown in a fraudulent fee agreement when the actual fee charged was only 23.5% as shown in a secret agreement, the attempt to defraud Mr. Son of 5% of his recovery could render the fee contract voidable. If the firm fraudulently exhibited to Mr. Son a false written fee agreement signed by his wife on Mr. Son's behalf for a fee of 28.5% and fraudulently concealed that part of the fee was really a 5% (\$242,500) "kickback" to Ms. Park, such fraud as to the negotiated attorney's fee might justify Mr. Son's request to repudiate the fraudulent fee contract. While it may be quite difficult for Mr. Son to prove a fraudulently concealed kickback, if he does, this Court should not simply reform the agreement and reduce it by the fraudulent 5%, it should permit Mr. Son to repudiate the fraudulent contract and limit the attorney to *quantum meruit* recovery. The instant case is a contractual dispute. Traditional contract law should be applied. Neither court created "public policy," nor any vague "equitable" balancing should be substituted for established contractual principles.

The majority concludes that Mr. Son has no cause of action against Mr. Stein if Mr. Son agreed that 5% of any settlement recovery would go to Ms. Park, and it was to be payable *out of his share of the recovery*. I am in full agreement with this part of the Court's

opinion. The majority then goes on to conclude that Mr. Son has a cause of action to apply the vague, amorphous equitable test devised in *Post* if the 5% paid to Ms. Park came out of Mr. Stein's share of the recovery. According to the majority, if Mr. Stein paid Ms. Park 5% from his fee instead of from Mr. Son's share of the recovery, then Mr. Son has a cause of action against his lawyer. This cause of action exists even if Mr. Son agreed to the 28.5% fee which the majority and I recognize is quite reasonable. This cause of action exists even if Mr. Son knew of and agreed that Ms. Park would get 5% of the attorney's fee or if the attorney paid Ms. Park out of his fee without saying anything to Mr. Son. The sole basis for this cause of action would be the lawyer's violation of the Maryland Lawyers' Rules of Professional Conduct (ethical rules).

What is most troubling about the majority opinion is that the Court has concluded that it should enforce ethical rules by flagrantly violating the same rules. The Court holds Mr. Son has a cause of action against Mr. Stein to recover back some portion of the 28.5% fee, even if he agreed to that fee, if the evidence shows the lawyer violated ethical rules § 5.4 or § 7.2 by paying an improper referral to Ms. Park. The sole basis for Mr. Son to recover part of the fee he agreed to is an implied cause of action for the client against the lawyer based solely on the lawyer's violation of the ethical rules. In creating this cause of action, this Court violates another provision of the rules that is expressly directed to courts. The scope provision of the ethical rules expressly provides in pertinent part:

“Preamble: A lawyer's responsibilities.

Scope

Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.” (Emphasis added).

This Court does not encourage respect for the rules by using parts of the ethical rules to imply a cause of action that violates an express provision of the ethical rules. The decision in the instant case is a further unwarranted extension of *Post, supra*. In that case, the Court said a violation of the ethical rules could void a contract between two attorneys. In the instant case, the Court goes much further and, in clear violation of the express language of the ethical rules, this Court creates a new civil cause of action for the client to recover back a part of the fee earned by the attorney and agreed to by the client. If Mr. Son agreed to and paid a 28.5% fee and if there was no fraud by the lawyer, Mr. Son should have no right to recover back any part of that fee solely because the lawyer spent it in an unethical manner. Although this Court adopted the ethical rules, we are not free to disregard them at will, and even absent the express language of the ethical rules, we should avoid creating new civil causes of action for violations of Court directives.

Judge Cathell has authorized me to state that he joins in the views expressed in this concurring opinion.