

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO

ROGER R. BAUER, ESQ.,	:	O P I N I O N
Plaintiff-Appellant,	:	
- vs -	:	CASE NO. 2011-T-0071
MARTIN F. WHITE, ESQ., et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2010 CV 2846.

Judgment: Affirmed.

Michael D. Rossi, Guarnieri & Secrest, P.L.L., 151 East Market Street, P.O. Box 4270, Warren, OH 44482 (For Plaintiff-Appellant).

Charles L. Richards, Law Office of Charles L. Richards, Hunter's Square, 8600 East Market Street, Suite 1, Warren, OH 44484-2375; and *Martin F. White*, Martin F. White Co., L.P.A., 156 Park Avenue, N.E., P.O. Box 1150, Warren, OH 44482-1150 (For Defendants-Appellees).

MARY JANE TRAPP, J.

{¶1} Roger R. Bauer, Esq., appeals from a judgment of the Trumbull County Court of Common Pleas dismissing his complaint against Martin F. White, Esq. seeking to share in attorney fees resulting from a successful medical malpractice lawsuit. The law is well-established in Ohio that the sole avenue for resolution of legal fee disputes between lawyers in different firms is mediation and/or arbitration by a local bar association or the Ohio State Bar Association. Therefore, we affirm the trial court.

{¶2} Substantive Facts and Procedural History

{¶3} In 2000, Debra Cobb's baby was born with brain damage at the Trumbull Memorial Hospital. The Cobbs settled their medical malpractice claim with some of the defendants and later obtained a substantial jury award against the remaining defendants. The sole issue in the instant appeal is whether Attorney Bauer is entitled to a portion of the legal fees resulting from the successful litigation.

{¶4} The facts surrounding Attorney Bauer's involvement in the medical malpractice suit are disputed. However, it undisputed that there was no written fee agreement between Attorney Bauer and the Cobbs, or written disclosure signed by either attorney or the Cobbs disclosing the terms of the fee split and the identity of all attorneys who would share in the contingent fee.

{¶5} On October 28, 2011, Attorney Bauer filed a complaint against Attorney White and his firm, claiming breach of contract, unjust enrichment, joint venture, and promissory estoppel, and seeking an enforcement of his claim to a 50/50 fee split.

{¶6} In response, Attorney White filed a "Motion to Stay Proceedings Pending Mediation or Arbitration/Motion for Stay of Discovery." He requested the court stay the proceedings of the case, pending referral to the Trumbull County Bar Association or the Ohio State Bar Association, citing Ohio Rules of Professional Conduct 1.5(f). In the alternative, Attorney White asked the court to stay discovery pending an appeal, should the court deny the motion.

{¶7} The trial court, citing the seminal case from the Supreme Court of Ohio on disputes as to fee sharing between attorneys in different firms, *Shimko v. Lobe*, 103 Ohio St.3d 59, 2004-Ohio-4202, referred the case for arbitration or mediation, and dismissed the case, sua sponte.

{¶8} Attorney Bauer now appeals, raising the following assignment of error:

{¶9} “The trial court erred in dismissing the action.”

{¶10} The sole issue presented for our review is whether the trial court improperly dismissed Attorney Bauer’s complaint seeking a portion of the attorney fees generated as a result of the successful malpractice action.

{¶11} The Applicable Ethics Rules

{¶12} DR 2-107 of the Code of Professional Responsibility, in effect until 2007, required that disputes over the division of fees between lawyers who are not in the same firm be resolved in accordance with mediation or arbitration proceedings provided by the bar association. The rule stated:

{¶13} “(A) Division of fees by lawyers who are not in the same firm may be made only with the prior consent of the client and if all of the following apply:

{¶14} “***

{¶15} “(B) In cases of dispute between lawyers arising under this rule, fees shall be divided in accordance with mediation or arbitration provided by a local bar association. Disputes that cannot be resolved by a local bar association shall be referred to the Ohio State Bar Association for mediation or arbitration.”

{¶16} In *Shimko*, the Supreme of Ohio addressed the constitutionality of DR 2-107(B). It upheld the rule, holding that “DR 2-107(B) does not infringe upon the right of trial by jury as guaranteed by Section 5, Article I of the Ohio Constitution.” *Id.* at paragraph two of the syllabus. In addition, the court held that “[a]n arbitration award rendered pursuant to DR 2-107(B) is final, binding upon the parties, and unappealable.” *Id.* at paragraph one of the syllabus.

{¶17} As the Supreme Court of Ohio explained, DR 2-107(B) is designed “to preserve public confidence in our system of justice. * * * [T]he rule is one of various Disciplinary Rules designed to allow for remuneration of legal services without compromising the integrity of the legal profession.” *Id.* at ¶59. “[W]hen the judicial machinery is used to resolve a simple fee dispute between lawyers, and when clients, perhaps exhausted by litigation, are once again summoned to court in a public battle between their attorneys, compelled to publicly reveal the terms of their fee arrangement and other secrets and confidences, then this court’s failure to remedy that situation with a dignified and expedient dispute-resolution mechanism would directly reflect upon its ability to control the conduct of its officers, and the public confidence in the judiciary would most assuredly be affected.” *Id.*

{¶18} In 2007, the Supreme Court of Ohio adopted R. 1.5 of the Ohio Rules of Professional Conduct, replacing DR 2-107. The requirement that fee disputes between attorneys be arbitrated by the bar association remained intact when the court moved from the code-format to the rules-format as a part of an overall review and revision of the ethics rules governing Ohio lawyers. Prof.Cond.R. 1.5(f) states:

{¶19} “In cases of a dispute between lawyers arising under this rule, fees shall be divided in accordance with the mediation or arbitration provided by a local bar association. When a local bar association is not available or does not have procedures to resolve fee disputes between lawyers, the dispute shall be referred to the Ohio State Bar Association for mediation or arbitration.”

{¶20} Attorney Bauer’s Attempt to Avoid the Rule - A Distinction Without a Difference

{¶21} To bypass the mandatory arbitration requirement, Attorney Bauer argues that a distinction should be drawn between “Shall we divide fees” and “How shall we

divide fees.” He argues the instant dispute involves the former question, and therefore, DR 2-107(B) and Prof.Cond.R.1.5(f) are inapplicable. This is a distinction without a difference. A fee-sharing agreement, as a matter of practice, necessarily includes the percentage of the split. Therefore, there is only one issue in a typical fee dispute case, that is: what was agreed to by the attorneys regarding the fee splitting.¹

{¶22} In *Shimko*, the court characterized the dispute before it as one regarding “the terms of an oral agreement with regard to the division of legal fees for litigation.” We fail to see why the *Shimko* rule of mandatory arbitration does not apply to the instant case, and our review of the pertinent law indicates the trial court properly dismissed the case and referred the dispute to arbitration by the Trumbull County Bar Association. *Shimko*; see also *Southard*, *supra*, (the Disciplinary Rules and the Ohio Rules of Professional Conduct specify fee-sharing disputes between attorneys arising under the rules must be submitted to arbitration or mediation and therefore the trial court properly concluded it lacked jurisdiction over the fee dispute and referred the dispute for mediation or arbitration).

{¶23} Attorney Bauer cites a pre-*Shimko* case in support of his claim, *Schulman v. Wolske & Blue Co., L.P.A.*, 125 Ohio App. 3d 365 (10th Dist.1998). In that case, the attorney entered into an agreement with a law firm to assist in cases as an independent contractor, and, after that arrangement ceased, entered into an oral arrangement to co-counsel one case in exchange for 40% of the fees. The law firm refused to share the

1. After oral argument, appellant submitted supplemental authorities to support the distinction he claims exists. Although *Schroeder v. Devito*, 136 Ohio App.3d 610 (8th Dist.2000), appeared to make the distinction, its validity is called into question post *Shimko*. In *In re Estate of Southard*, 192 Ohio App.3d 590, 2011-Ohio-836 (10th Dist.), the court held that “the Disciplinary Rules and the Ohio Rules of Professional Conduct specify fee-sharing disputes between attorneys arising under the rules must be submitted to arbitration or mediation before the appropriate bar association. The probate court properly concluded that it lacked jurisdiction over the fee dispute and referred the dispute to the OSBA for mediation or arbitration.” Nothing in this holding suggests the distinction claimed by appellant.

fees, claiming the attorney committed fraud in the inducement of the agreement. The trial court granted summary judgment in favor of the attorney regarding the fraudulent inducement claim and awarded him 40% of the fees.

{¶24} On appeal, the law firm argued the trial court did not have jurisdiction to entertain the fee dispute. The Tenth District disagreed. As the court explained, neither the existence of an agreement nor its terms was at issue. The issue in the case was solely whether the agreement was enforceable in light of the alleged fraud in the inducement. Because the case involved issues to be resolved by applying general principles of contract law, and “[did] not involve simply a fee dispute,” the Tenth District held that the trial court did not err in exercising its jurisdiction.

{¶25} In light of *Shimko*, *Schulman* must be narrowly construed. Nothing in the instant record before us suggests that this is anything other than a fee dispute governed by Prof.Cond.R. 1.5(f) and its predecessor DR 2-107(B), requiring mandatory arbitration pursuant to *Shimko*. Attorney Bauer’s argument that this fee dispute matter should be bifurcated for an initial adjudication of his right to the fees followed by arbitration by the bar association of the proper division has no support from *Shimko* or any other case law authority.

{¶26} The assignment of error is without merit.

{¶27} The judgment of the Trumbull County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDALL, J.,

concur.