No. 121297

**IN THE SUPREME COURT OF ILLINOIS**

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| FERRIS, THOMPSON & ZWEIG, LTD., | ) On Petition for Leave to Appeal from the |
| | ) Appellate Court of Illinois, Second District |
| Plaintiff-Appellee, | ) No. 2-15-1148 |
| | ) There Heard on Appeal from the Circuit |
| v. | ) Court for the Nineteenth Judicial Circuit |
| | ) Lake County, Illinois |
| ANTHONY ESPOSITO, | ) No. 13 L 483 |
| | ) Honorable Thomas Schippers |
| Defendant-Appellant. | ) Judge Presiding |

# BRIEF OF DEFENDANT-APPELLANT

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ORAL ARGUMENT REQUESTED

## TABLE OF CONTENTS

## POINTS AND AUTHORITIES

**III. Rule 1.5 Should Be Applied Retroactively**

## NATURE OF THE ACTION AND JUDGMENT APPEALED FROM

This action was brought by Plaintiff Ferris, Thompson, and Zweig, Ltd., a law firm that claimed it was entitled to fees for referrals it made to Defendant Anthony Esposito for pursuing Workers Compensation claims on behalf of several individuals. (A000001; C0000267-316). Specifically, Plaintiff claimed it was entitled to receive 45% of Defendant's fees based upon written referral agreements; however, none of the agreements contain an express statement that Plaintiff and Defendant would assume "joint financial responsibility" for the representation. (C0000267-316).

On July 2, 2015 the trial court entered an Order granting Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint with prejudice based upon a finding that the "referral-only" fee agreements did not comply with Rule 1.5(e) of the Illinois Rules of Professional Conduct. (C0000413-418). Following the denial of a fully-briefed Motion to Reconsider, Plaintiff filed a Notice of Appeal. (C0000419-450). The Second District took the case under consideration without granting oral argument, and on August 10, 2016 issued its written opinion reversing the trial court's ruling on the Motion to Dismiss. (A000001-10). No petition for rehearing was filed in the Second District Appellate Court.

On September 13, 2016, Defendant filed his Petition for Leave to Appeal, noting the conflict between the First District and the Second District's Opinions interpreting Rule 1.5(e). Defendant's Petition was allowed by this Court on November 23, 2016.

## ISSUE PRESENTED FOR REVIEW

Whether the Second District Appellate Court erred in finding that Rule 1.5(e) of the Illinois Rules of Professional Conduct does not require a written referral agreement to contain an express statement that the attorneys assume "joint financial responsibility," and in creating a conflict in the law with the First District Appellate Court, which had correctly determined that Rule 1.5(e) of the Illinois Rules of Professional Conduct requires a written referral agreement to contain an express statement that the attorneys will assume "joint financial responsibility."

## STANDARD OF REVIEW

Supreme Court rules are interpreted in the same manner as statutes, and therefore a review of a lower court's interpretation of a Supreme Court Rule is *de novo*. *Vision Point of Sale, Inc. v. Haas,* 226 Ill.2d 334, 342 (2007).

## STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Illinois Supreme Court Rule 315, as Defendant timely filed his Petition for Leave to Appeal and this Court allowed that Petition on November 23, 2016.

## RULE INVOLVED

"RULE 1.5: FEES

...

(e) A division of a 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 if the primary service performed by one lawyer is the referral of the client to another lawyer and each lawyer assumes joint financial responsibility for the representation;
(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
(3) the total fee is reasonable."

Rule 1.5(e), Ill. R. of Prof. Cond.

## STATEMENT OF FACTS

### I. Introduction

The Plaintiff is Ferris, Thompson, and Zweig, Ltd., a law firm that claims it is entitled to fees for referrals it made to Defendant Anthony Esposito for pursuing Workers Compensation claims on behalf of several individuals. (A000001; C0000267-316). Specifically, Plaintiff claims it is entitled to receive 45% of Defendant's fees based upon written referral agreements; however, none of the agreements contain an express statement that Plaintiff and Defendant would assume "joint financial responsibility" for the representation. (C0000267-316).

The First District has determined that a "referral-only" contract must strictly comply with Rule 1.5(e) to be enforceable and that the agreement that the attorneys are assuming "joint financial responsibility" for the case must be in writing. *Donald W. Fohrman and Associates, Ltd. v. Marc D. Alberts, P.C.,* 2014 IL App (1st) 123351.

In this case, the Second District determined that a "referral-only" fee agreement strictly complies with Rule 1.5(e) even when there is no written statement that the parties are assuming "joint financial responsibility." (A000001-10).

As set forth below, Defendant contends that strict compliance with Rule 1.5(e) requires "referral-only" fee agreements to contain an express written statement regarding "joint financial responsibility," as correctly determined by the First District.

### II. Background Information and Procedural History

Between 2007 and 2010, Plaintiff and Defendant executed several written referral agreements purporting to memorialize their understanding for the sharing of fees received as a result of Worker's Compensation Claims made by various individuals. (C0000267-

316). Notably, these written agreements were "referral-only" agreements, as Defendant would be responsible for conducting investigations, obtaining records, preparing documents, representing the client before the Industrial Commission, and conducting all negotiations. (C0000277-316). While the "referral-only" agreements state that Plaintiff and Defendant agree that Plaintiff would receive "forty five percent (45%) of all attorney fees received as a result of this Worker's Compensation claim," the "referral-only" fee agreements do not contain any statement that both Plaintiff and Defendant would assume "joint financial responsibility" for the case. (C0000277-316).

Plaintiff first filed suit against Defendant in 2012, seeking referral fees from 2 Workers' Compensation cases. (A000002). Defendant initially moved to dismiss those claims on jurisdictional grounds, but the denial of his Motion to Dismiss was affirmed by the Second District in 2014 ("Ferris I").[1] (A000002). However, while *Ferris I* was pending before the Second District, Plaintiff filed this second lawsuit against Defendant, seeking referral fees from 10 other Workers' Compensation cases. (A000002).

Plaintiff's initial Complaint in this case was dismissed without prejudice. (C0000161). Plaintiff then filed a First Amended Complaint but obtained leave to file a Second Amended Complaint prior to any responsive pleading being filed. (C0000265). On March 2, 2015, Plaintiff filed its Second Amended Complaint. (C0000267-316).

On March 25, 2015 Defendant moved to dismiss Plaintiff's Second Amended Complaint, arguing that because the "referral-only" fee agreements did not contain an express statement that the parties would be assuming joint financial responsibility, they did

[1] The Court affirmed the Second District's findings of subject matter jurisdiction on January 23, 2015. 2015 IL 117443.

not comply with Rule 1.5(e) and were rendered unenforceable. (C0000317-321). In support of his argument, Defendant relied on *Donald W. Fohrman and Associates, Ltd. v. Marc D. Alberts, P.C.*, where the First District Appellate Court held that a referral agreement that did not strictly comply with Rule 1.5(e) (and contain an express statement that the parties would be assuming joint financial responsibility) was unenforceable. (C0000317-321). Plaintiff filed a Response, claiming, *inter alia,*[2] that *Forhman* was inapplicable and that Rule 1.5(e) did not require an express statement regarding joint financial responsibility be in writing. (C0000322-324). Defendant filed his Reply on April 30, 2015. (C0000326-333).

On June 22, 2015, the trial court issued a 6-page written opinion dismissing Plaintiff's Second Amended Complaint with prejudice. (C0000413-418). Specifically, the trial court stated, "The plain language of the Rule states that if the primary service performed by one lawyer is the referral, each lawyer must assume joint financial responsibility. The client must agree to this, and it must be confirmed in writing. A "referral-only" contract that does not contain this language runs afoul of Rule 1.5(e) and is unenforceable. *Donald W. Fohrman and Associates, Ltd. v. Mark D. Alberts, P.C.* mandates this result." (C0000417). The trial court concluded, "As the referral contracts at issue did not contain the language that Plaintiff and Defendant would maintain joint financial responsibility, the contracts did not strictly comply with Rule 1.5(e) and, therefore, are unenforceable." (C0000418).

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[2] Plaintiff was subsequently granted leave to file a Sur-Response and Defendant was granted leave to file a Sur-Reply on the issue of "collateral estoppel," whereby Plaintiff claimed that *Ferris I* collaterally estopped Defendant from disputing or defending the subsequent suit. (C0000334, C0000337-417).

On June 31, 2015, Plaintiff filed a Motion to Reconsider which was fully briefed. (C0000419-433; C0000435-440). On October 28, 2015, the trial court issued an Order denying Plaintiff's Motion to Reconsider. (C0000441-448).

On November 19, 2015, Plaintiff filed a Notice of Appeal to the Second District Appellate Court. (C0000449-450). On August 10, 2016, the Second District issued its Opinion reversing the trial court's dismissal of Plaintiff's Second Amended Complaint with prejudice on the basis of "*prima facie* reversible error" and stated that "it appears that a written referral agreement might not need to contain an express statement that the attorneys involved assume 'joint financial responsibility' for representing the client." (A000010). The Second District acknowledged that the First District in *Fohrman* had "determined that a written referral agreement must contain an express statement that the attorneys will assume 'joint financial responsibility'" but nevertheless stated that "that the plaintiff has presented a *prima facie* case of error" and reversed the judgment of the trial court. (A000010).

## ARGUMENT

Rule 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 division is in proportion to the services performed by each lawyer, or if the primary service performed by one lawyer is the referral of the client to another lawyer and each lawyer assumes joint financial responsibility for the representation; (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (3) the total fee is reasonable." Ill. R. of Prof. Cond. 1.5(e).

For the reasons set forth below, the Second District erred in finding Rule 1.5(e) of the Illinois Rules of Professional Conduct does not require that a written referral agreement contain an express statement that the attorneys assume "joint financial responsibility" for representing the client, and the First District correctly determined that Rule 1.5(e) requires that a written referral agreement contain an express statement that the attorneys will assume "joint financial responsibility." Defendant respectfully requests this Court reverse the finding of the Second District Appellate Court.

## I. The Last Antecedent Rule Does Not Support a Finding that the "Joint Financial Responsibility" Requirement may be Omitted from the Writing

The Second District erred in its interpretation of Rule 1.5(e) and in finding that the "last antecedent rule" supports a finding that the "joint financial responsibility" requirement is not required to be in a written referral agreement.

The lower court stated that "[P]ursuant to the last-antecedent rule, 'relative or qualifying words, phrases, or clauses are applied to the words or phrases or clauses immediately preceding them and are not construed as extending to or including other words, phrases, or clauses more remote' unless the language requires such an extension" and cites to *Department of Transportation v. Singh* and *In re E.B.* However, neither *Department of Transportation v. Singh* nor *In re E.B.* interpreted the Illinois Rules of Professional Conduct. 393 Ill.App.3d 458 (2d Dist. 2009); 231 Ill.2d 459 (2008). Likewise, neither case discussed the extent of the requirements intended by the term "the agreement is confirmed in writing." *Id.*

Rather, the Second District in *Singh* found that the last antecedent rule did not apply and/or was not necessary to the construction of the compensation portion of the Petroleum

Marketing Practices Act. *In re E.B.* is likewise distinguishable, as this Court applied the last antecedent rule merely to determine that the phrase "unless it is found to be in his or her best interest by the court" applied only to the phrase prohibiting a minor from being "removed from the custody of his or her parents for longer than 6 months" and not to the phrase "no order may be made terminating parental rights," which this Court deemed to be too remote. *In re E.B.*, 231 Ill.2d 459, 467 (2008).

In this case, the requirement that the attorneys assume "joint financial responsibility" is not remote from the requirement "the agreement is confirmed in writing," and the Second District erred in finding that the "confirmed in writing" requirement of Rule 1.5(e) applied only to 1.5(e)(2).

Rule 1.5(e)(1) plainly states that for "referral-only" agreements, each attorney **must** assume joint financial responsibility. Rule 1.5(e)(2) then states that the client must agree "to the arrangement" and that "the agreement is confirmed in writing." While Rule 1.5(e)(2) states that "the arrangement" includes "the share each lawyer will receive," nothing in Rule 1.5(e)(2) appears to limit or exclude the terms of Rule 1.5(e)(1), which may certainly be considered part of "the arrangement" and are necessarily part of "the agreement." Indeed, it would arguably be a violation of the Rules of Professional Conduct for two similarly-situated attorneys to enter into an "agreement" described in Rule 1.5(e)(2) without simultaneously assuming joint financial responsibility as described in Rule 1.5(e)(1). A logical conclusion is that which was reached by the First District in *Fohrman,* which is that strict compliance with Rule 1.5(e) requires that the referral agreement contain an express statement that the two attorneys/parties would assume joint financial

responsibility, in addition to stating the share each attorney would receive, and that the client confirm his/her agreement to the entire arrangement/agreement in writing.

Therefore, the Second District's reliance on the "last antecedent rule" is misplaced and its decision should be reversed by this Court.

## II. The Second District Erred in Finding that the "Joint Financial Responsibility" Provision "Does Not Concern the Client" - The Committee Comments, History, and Public Policy of Rule 1.5 Support the First District's Interpretation of Rule 1.5(e)

Additionally, the Second District erred in finding that the requirement that the referral agreement be in writing did not apply to the "joint financial responsibility" provision based upon its belief that the "joint financial responsibility" provision "does not concern the client and would apply regardless of whether it was provided for in the written referral agreement." Indeed, the Committee Comments, History, and public policy surrounding Rule 1.5(e) support the First District's interpretation that the "joint financial responsibility" provision must be put in writing.

As a preliminary matter, the Second District limited its analysis of "joint financial responsibility" as meaning "if one of them is sued by the client for legal malpractice, the other attorney is also liable." Nothing in the plain language of "joint financial responsibility" implies a limitation to only suits for legal malpractice. Rather, the Committee Comments state "joint financial responsibility for the representation entails financial responsibility for the representation as if the lawyers were associated in a general partnership." Ill. R. of Prof. Cond. 1.5(e), Comment 7. Certainly the "financial responsibility" shared by partners in a law firm is greater and/or more expansive than liability for malpractice actions and may extend to other costs associated with pursuing and/or defending a lawsuit on behalf of a client (including, for example, the payment of

Rule 137 sanctions). Further, the fact that the language of Rule 1.5(e) was amended in 2010 to require the attorneys to "assume joint financial responsibility" instead of the prior requirement that they "assume the same legal responsibility" is indicative of a broader interpretation than that promulgated by the Second District.

Nevertheless, even under the Second District's interpretation of "joint financial responsibility," as legal responsibility for malpractice cases, it does not follow that the term "does not concern the client." Indeed, a statement that both attorneys are assuming joint financial responsibility and/or liability for a client's case is of great concern to the client, as it informs the client of his/her rights and expressly states that each attorney owes that client a duty of care and may be held liable for damages. This term is therefore important to the client, and therefore important to be placed in writing for the client to review. Much less of a concern to the client is the "share [of attorney's fees] each lawyer will receive," which the Appellate Courts agree must be in writing, as each lawyer's "share" does not impact the ultimate amount received by the client.

Rule 1.5(e) "embodies this state's public policy of placing the rights of clients above and beyond any lawyers' remedies in seeking to enforce fee-sharing arrangements." *Fohrman*, 2014 IL App (1st) 123351 at ¶35. Indeed, requiring written client consent to the referral arrangement after full disclosure is designed to protect the client. *Richards v. SSM Health Care, Inc.*, 311 Ill.App.3d 560, 564 (1st Dist. 2000). The requirements of Rule 1.5 are "designed to protect the client," and "public policy embodies an understanding that 'the client's rights rather than the lawyers' remedies have always been this state's greatest concern.'" *Fohrman*, 2014 IL App (1st) 123351 at ¶35. (citations omitted).

Requiring an express statement that both attorneys are assuming "joint financial responsibility" for the client's representation be in writing and agreed to by the client is consistent with this State's history and public policy concerning "referral-only" fee agreements. This interpretation results in a more thorough disclosure of the attorneys' arrangement to the client and further informs the client of each attorney's shared responsibilities and obligations. Accordingly, the First District correctly held that Rule 1.5(e) requires this express statement, and the Second District erred in finding that it was not required.

### III. Rule 1.5 Should Be Applied Retroactively

Last, the Second District erred in finding that the "prior version" of Rule 1.5 might apply in this case. Although the Second District did not expressly determine which version of Rule 1.5 should be applied, Defendant nevertheless asks this Court to address this argument, which presents another split between the First and Second Districts.

The Second District stated, "it might well be that the August 1990 version [of Rule 1.5] applies to all the agreements except the ones executed in 2010." (A000009). The Second District then provided a citation comparing the First District case of *Paul B. Episcope, Ltd. v. Law Offices of Campbell & DiVincenzo* with the Second District case of *Naughton v. Pfaff.*

The First District has properly held that Rules governing referral fees should be applied retroactively. *Paul B. Episcope, Ltd. v. Law Offices of Campbell & DiVincenzo*, 373 Ill.App.3d 384 (1st Dist. 2007). In *Paul B. Episcope, Ltd.*, the referring law firm sued another law firm to recover fees pursuant to a fee-splitting agreement. The defendant law firm filed a motion for summary judgment, contending that the fee-splitting agreement was

void and unenforceable under the fee sharing requirements set forth in the 1990 version of Rule 1.5(f)(2), requiring the written disclosure of the basis for the division of fees and the economic benefit to each attorney as a result, and Rule 1.5(f)(3), requiring the written disclosure of the responsibility to be assumed by the attorney for the performance of legal services, and the trial court agreed. *Id.* at 386. On appeal, the plaintiff firm argued, *inter alia,* that because Rule 1.5 was not in effect at the time the contracts were entered into, the less stringent requirements of Rule 1.5's predecessor, Rule 2-107(a)(1), should apply. *Id.* at 394. The First District stated, "We disagree. This very argument was rejected in *Dowd & Dowd, Ltd. v. Gleason*, when our Illinois Supreme Court ruled that a Supreme Court rule is applied retroactively, even though it was different from its predecessor rule, in reliance on the maxim that the law cannot enforce a contract it prohibits based on public policy." *Id.* at 394.

The retroactive approach of Rule 1.5 was confirmed by the First District in *Donald W. Fohrman and Associates, Ltd. v. Marc D. Alberts, P.C.*, where the First District held that 2010 version of Rule 1.5(e) applied retroactively to contracts entered into in 2005. 2014 IL App (1st) 123351. The First District discussed the history of ethical rules pertaining to fee-sharing agreements, noting that "referral-only" fee-sharing agreements were formerly prohibited in their entirety as being contrary to public policy and disfavored. *Id.* at ¶31. The First District then stated, "We must consider the referral agreement and attorney-client agreements here under the applicable rules as they currently exist...Rule 1.5 governs the propriety of attorney-fee agreements. The provisions of Rule 1.5 operate with the force and effect of law. Contracts between lawyers that violate Rule 1.5 are against public policy and cannot be enforced." *Id.* at ¶32-33 (quotations and citations omitted).

Notwithstanding the logic underlying these decisions, the Second District has recently held that Rule 1.5 should not be applied retroactively, stating that it is a "substantive" rather than a "procedural" change. *Naughton v. Pfaff*, 2016 IL App (2d) 150360 at ¶59. Specifically, the Second District in *Naughton* stated, "The changes to Rule 1.5 from the 1990 version to the 2010 can be labeled as substantive, as they affect an attorney's professional obligations regarding fees, as opposed to the conduct of court proceedings. Further, the portion of the rule relevant here cannot be said to have significantly changed public policy to the extent that the prior version cannot be applied, as they both have the same basic disclosure requirements for attorney fee-sharing agreements. Accordingly, we apply the 1990 version of Rule 1.5 in this case." *Id.* at ¶59 (citations omitted). In making the distinction between procedural and substantive changes (and whether those changes should be applied retroactively), the Second District cited to another Second District case, *In re Marriage of Duggan*, a case that did not involve the interpretation of any Illinois Rules of Professional Conduct but rather determined whether the appellate court could properly exercise jurisdiction based upon a prior version of Illinois Supreme Court Rules 301, 303(a) and 304(a). *In re Marriage of Duggan*, 376 Ill.App.3d 725, 727 (2d Dist. 2007).

In *Episcope, Fohrman,* and *Naughton* decisions, both the First District and the Second District have cited to this Court's decision in *Dowd & Dowd, Ltd. v. Gleason* as support for their respective interpretations regarding retroactive application of Rule 1.5. In *Dowd*, this Court determined that Rule 5.6 of the Illinois Rules of Professional Conduct applied retroactively so as to invalidate and render unenforceable certain employment agreements entered into by attorneys which contained noncompetition covenants and

which were entered into prior to the effective date of the Rule. *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill.2d 460 (1998).

In so holding, this Court expressly stated, "We believe that Rule 5.6 may have retroactive effect and therefore bars the present enforcement of noncompetition covenants entered into prior to the effective date of the rule. Contrary to the plaintiff's argument, the prohibition of the rule is not expressed in the future tense and is not limited by its terms to contract provisions formed after its effective date. We recognize, of course, that Rule 2–108 of the Code of Professional Responsibility, the predecessor to Rule 5.6, did not contain a similar prohibition. Still, the law cannot enforce a contract which it prohibits, and we believe that enforcement of the provisions at issue would violate the important considerations of public policy that underlie the prohibition found in Rule 5.6. The rule is designed both to afford clients greater freedom in choosing counsel and to protect lawyers from onerous conditions that would unduly limit their mobility. Consistent with that rationale, we conclude that the noncompetition covenants in the employment agreements conflict with Rule 5.6 and may not be enforced." *Dowd & Dowd, Ltd.*, 181 Ill.2d at 481 (quotations and citations omitted).

In this case, the Second District erred in stating that "it might well be that the August 1990 version [of Rule 1.5] applies to all the agreements except the ones executed in 2010." The 2010 version of Rule 1.5 has public policy implications not unlike those discussed in *Dowd,* and failure to apply Rule 1.5 retroactively would result in the enforcement of contracts prohibited by law (for all the reasons discussed above in Parts I and II, *supra*). Accordingly, Rule 1.5 should be applied retroactively to all of the contracts at issue in the underlying case.

For all of these reasons, the Second District erred in finding that Rule 1.5(e) of the Illinois Rules of Professional Conduct does not require a written referral agreement to contain an express statement that the attorneys assume "joint financial responsibility," and in creating a conflict in the law with the First District Appellate Court, which had correctly determined that Rule 1.5(e) of the Illinois Rules of Professional Conduct requires a written referral agreement to contain an express statement that the attorneys will assume "joint financial responsibility." Furthermore, the First District correctly determined that Rule 1.5(e) applies retroactively, and the Second District was in error to suggest otherwise.

Moreover, in this specific instance, the trial court was correct to find that Rule 1.5(e) rendered the underlying "referral-only" fee-sharing contracts unenforceable and dismissing Plaintiff's Complaint with prejudice, and the Second District erred in reversing that decision.

## CONCLUSION

WHEREFORE Defendant ANTHONY ESPOSITO respectfully requests this Honorable Court REVERSE the Second District's August 10, 2015 published decision, and award him such other and further relief as this Court deems appropriate.

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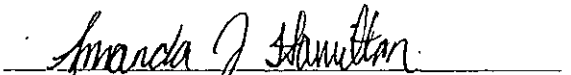
Respectfully Submitted,



Attorney for Anthony Esposito

No. 121297

IN THE SUPREME COURT OF ILLINOIS

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| ANTHONY ESPOSITO, | ) No. 13 L 483 |
| | ) Honorable Thomas Schippers |
| Defendant-Appellant. | ) Judge Presiding |

## CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is sixteen (16) pages.

Amanda J Hamilton

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## APPENDIX

## TABLE OF CONTENTS

2016 IL App (2d) 151148
No. 2-15-1148
Opinion filed August 10, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

| | | |
|---|---|---|
| FERRIS, THOMPSON, AND ZWEIG, LTD., | ) | Appeal from the Circuit Court |
| | ) | of Lake County. |
| Plaintiff-Appellant, | ) | |
| | ) | |
| v. | ) | No. 13-L-483 |
| | ) | |
| ANTHONY ESPOSITO, | ) | Honorable |
| | ) | Thomas M. Schippers, |
| Defendant-Appellee. | ) | Judge, Presiding. |

JUSTICE BIRKETT delivered the judgment of the court, with opinion.
Justices McLaren and Hudson concurred in the judgment and opinion.

**OPINION**

¶ 1 Plaintiff, Ferris, Thompson, & Zweig, Ltd., and defendant, Anthony Esposito, had a longstanding work relationship. During that relationship, plaintiff referred a number of workers' compensation clients to defendant in return for a portion of the attorney fees defendant received. Each such referral was evidenced by a written agreement that each of the parties and the clients signed. When defendant refused most recently to pay plaintiff pursuant to some of these agreements, plaintiff sued defendant. Defendant moved to dismiss, claiming that the agreements did not comply with Rule 1.5(e)(1) of the Illinois Rules of Professional Conduct of 2010 (eff. Jan. 1, 2010) in that they did not expressly state that the parties assumed "joint financial

responsibility" in representing the clients. The trial court granted the motion to dismiss. We reverse and remand.

¶ 2 The relationship between the parties began sometime around 2007. In 2012, before this appeal arose, defendant refused to pay plaintiff pursuant to two referral agreements, and plaintiff sued defendant in circuit court for breach of contract. Defendant moved to dismiss, arguing that the Worker's Compensation Commission, not the circuit court, had jurisdiction over the case. The trial court denied the motion, defendant appealed, and the trial court's decision was affirmed by this court (see *Ferris, Thompson, & Zweig, Ltd. v. Esposito*, 2014 IL App (2d) 130129) and our supreme court (*Ferris, Thompson, & Zweig Ltd. v. Esposito*, 2015 IL 117443) (*Ferris I*).

¶ 3 While *Ferris I* was pending in this court, defendant refused to pay plaintiff pursuant to 10 other referral agreements. As a result, plaintiff filed a 10-count complaint against defendant. Attached to the complaint were the referral agreements executed in each case. These agreements, which were executed between 2007 and 2010, provided, like the agreements in *Ferris I*, that the clients had retained plaintiff and that plaintiff had contracted with defendant for defendant to pursue the clients' workers' compensation cases on their behalf. The agreements also outlined which services each attorney would provide, and each agreement was signed by plaintiff, defendant, and the client. Nowhere did the agreements state that the attorneys assumed "joint financial responsibility" for representing the clients. Ill. R. Prof'l Conduct (2010) R. 1.5(e)(1) (eff. Jan. 1, 2010).

¶ 4 Defendant moved to dismiss pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2014)), arguing, among other things, that the agreements were unenforceable. Specifically, defendant claimed that the agreements did not comply with Rule 1.5(e)(1) in that the agreements did not state that plaintiff and defendant agreed to assume "joint

financial responsibility." Ill. R. Prof'l Conduct (2010) R. 1.5(e)(1) (eff. Jan. 1, 2010). Plaintiff responded, claiming, among other things, that Rule 1.5(e), which governs referral agreements, does not mandate that a written referral agreement contain such an express statement. Ill. R. Prof'l Conduct (2010) R. 1.5(e) (eff. Jan. 1, 2010).

¶ 5 The trial court granted defendant's motion. Plaintiff moved the court to reconsider, the court denied the motion, and this timely appeal followed.

¶ 6 At issue in this appeal is whether plaintiff's complaint should have been dismissed. A section 2-615 motion to dismiss attacks the legal sufficiency of a pleading. *Vernon v. Schuster*, 179 Ill. 2d 338, 344 (1997). We review *de novo* an order granting a motion to dismiss under section 2-615. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006).

¶ 7 Resolving whether defendant's motion to dismiss should have been granted is problematic, because, unfortunately, defendant has not filed a brief on appeal. While we may not reverse summarily on that basis alone, we need not serve as defendant's advocate or search the record for a basis upon which to affirm. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976); *Orava v. Plunkett Furniture Co.*, 297 Ill. App. 3d 635, 636 (1998). As relevant here, unless the record is simple and the issues can be easily decided without the aid of an appellee's brief, we may reverse "if the appellant's brief demonstrates *prima facie* reversible error and the contentions of the brief find support in the record." *Talandis*, 63 Ill. 2d at 133; see *Orava*, 297 Ill. App. 3d at 636. " 'Prima facie means, "at first sight, on the first appearance, on the face of it, so far as can be judged from the first disclosure; presumably; a fact presumed to be true unless disproved by some evidence to the contrary." [Citation.]' " *Talandis*, 63 Ill. 2d at 132 (quoting *Harrington v. Hartman*, 233 N.E.2d 189, 191 (Ind. App. 1968)).

¶ 8 We do not believe that the issue raised in this case can be easily decided. Therefore, we consider whether plaintiff's brief establishes *prima facie* reversible error. We hold that it does.

¶ 9 In so holding, we must examine Rule 1.5(e). In interpreting Rule 1.5(e), we apply the same principles that we employ in construing a statute. *In re Marriage of Nettleton*, 348 Ill. App. 3d 961, 967 (2004). Our primary goal in construing a rule is to ascertain and give effect to the drafters' intent. *Id.* The surest and most reliable indicator of the drafters' intent is the language used in the rule. *Macknin v. Macknin*, 404 Ill. App. 3d 520, 530 (2010). Accordingly, when the language in the rule is clear and unambiguous, we must apply it as written, giving the rule's language its plain and ordinary meaning. *Id.* However, if the rule is ambiguous, we may look beyond the rule's language to discern the drafters' intent, and we may consider the purpose of the rule and the evils that the rule was designed to remedy. *People v. King*, 349 Ill. App. 3d 877, 879 (2004). Moreover, when a rule is ambiguous, courts may look to the rule's committee comments to ascertain the drafters' intent. *In re Estate of Burd*, 354 Ill. App. 3d 434, 437 (2004). Regardless, whenever possible, we will avoid a construction that leads to absurd or unjust results, and we will presume that the drafters intended a sensible result rather than an absurd one. *In re Marriage of Nettleton*, 348 Ill. App. 3d at 967. Like a ruling on a motion to dismiss, we review *de novo* the construction of a rule. See *In re Marriage of Webb*, 333 Ill. App. 3d 1104, 1108 (2002).

¶ 10 Rule 1.5(e) provides:

> "*A division of a 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 if *the primary service performed by one lawyer is the referral of the client to*

*another lawyer and each lawyer assumes joint financial responsibility for the representation*;

(2) *the client agrees to the arrangement*, including the share each lawyer will receive, and *the agreement is confirmed in writing*; and

(3) the total fee is reasonable." (Emphases added.) Ill. R. Prof'l Conduct (2010) R. 1.5(e) (eff. Jan. 1, 2010).

¶ 11 In ascertaining the meaning of Rule 1.5(e), we note that, in order for any fee-sharing agreement to be enforceable, the attorneys involved in the agreement must strictly comply with Rule 1.5(e). See *Donald W. Fohrman & Associates, Ltd. v. Mark D. Alberts, P.C.*, 2014 IL App (1st) 123351, ¶ 41. For the purposes of this appeal, the question is whether strict compliance with Rule 1.5(e) occurs when a written referral agreement does not expressly state that the attorneys assume "joint financial responsibility" for representing the client. Ill. R. Prof'l Conduct (2010) R. 1.5(e)(1) (eff. Jan. 1, 2010).

¶ 12 At first sight, as plaintiff argues, the unambiguous language of Rule 1.5(e) does not provide that a written referral agreement must contain an express statement that the lawyers assume "joint financial responsibility" for representing the client. *Id.* Rather, Rule 1.5(e)(2), which mentions a writing, states that the writing must include only the client's agreement to the "arrangement, including the share each lawyer will receive." Ill. R. Prof'l Conduct (2010) R. 1.5(e)(2) (eff. Jan. 1, 2010). "[T]he share each lawyer will receive" (*id.*) seems to require the writing to show that "the division [of fees] is in proportion to the services performed by each lawyer," which is mentioned in Rule 1.5(e)(1) (Ill. R. Prof'l Conduct (2010) R. 1.5(e)(1) (eff. Jan. 1, 2010)). If the drafters had wanted the writing to expressly provide also that the attorneys assume "joint financial responsibility," as is provided also in Rule 1.5(e)(1) (*id.*), they could have

so stated in Rule 1.5(e)(2). Reading into Rule 1.5(e)(2) a requirement that the writing must expressly provide that the lawyers assume "joint financial responsibility" would violate a cardinal rule of construction. See *State Farm Mutual Automobile Insurance Co. v. Hayek*, 349 Ill. App. 3d 890, 892 (2004) (in construing a court rule, "courts may not alter the rule or read into it exceptions or limitations, no matter how beneficial or desirable the result").

¶ 13 Moreover, even if the language of Rule 1.5(e) is seen as ambiguous, we believe that the last-antecedent rule, which should be employed only when the language is ambiguous, helps to illustrate what is arguably the proper construction of Rule 1.5(e). Pursuant to the last-antecedent rule, " 'relative or qualifying words, phrases, or clauses are applied to the words or phrases or clauses immediately preceding them and are not construed as extending to or including other words, phrases, or clauses more remote,' " unless the language requires such an extension. *Department of Transportation v. Singh*, 393 Ill. App. 3d 458, 465 (2009) (quoting *In re E.B.*, 231 Ill. 2d 459, 467 (2008)). Applying that rule here shows that the only thing that the written referral agreement must contain is an express statement that the client agrees to the referral and the proportion of attorney fees that each attorney involved in the referral agreement will receive.

¶ 14 The committee comments to the rule seem to support this conclusion. The comments provide that "[j]oint financial responsibility for the representation entails financial responsibility for the representation as if the lawyers were associated in a general partnership." Ill. R. Prof'l Conduct (2010) Rule 1.5(e) cmt. 7 (eff. Jan. 1, 2010). That is, like lawyers in a general partnership, the attorneys involved in a referral agreement agree that, if one of them is sued by the client for legal malpractice, the other attorney is also liable. See *In re Storment*, 203 Ill. 2d 378, 392 (2002) (concluding that the term "[same] legal responsibility" (internal quotation marks omitted) in a prior version of Rule 1.5(e) "indicates that the rule is concerned with the financial

responsibility of the referring lawyer for potential malpractice actions against the receiving lawyer"); see also 805 ILCS 206/305(a) (West 2014) ("A partnership is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a partner acting in the ordinary course of business of the partnership or with authority of the partnership."). This "joint financial responsibility" does not concern the client and would apply regardless of whether it was provided for in the written referral agreement. Accordingly, it makes sense that the term "joint financial responsibility" would not need to be expressly included for in the written referral agreement the attorneys have with the client.

¶ 15 Finally, a review of the history of Rule 1.5(e) suggests that the written referral agreement need not contain an express statement that the attorneys agree to assume "joint financial responsibility" in representing the client. Rule 1.5(e) arose from section 2-107(a) of the Illinois Code of Professional Responsibility (Ill. S. Ct. Code of Prof'l Res., canon 2, R. 2-107 (eff. July 1, 1980)). That section provided in part:

> "(a) *A lawyer shall not divide a fee for legal services with another lawyer* who is not a partner in or associate of his law firm, *unless*
>
> (1) *the client consents in a writing signed by him to employment of the other lawyer, which writing shall fully disclose* (a) that a division of fees will be made, (b) the basis upon which the division will be made, including the economic benefit to be received by the other lawyer as a result of the division, and (c) the responsibility to be assumed by the other lawyer for performance of the legal services in question;

(2) *the division is made in proportion to the services performed and responsibility assumed by each, except where the primary service performed by one lawyer is the referral of the client to another lawyer and* (a) the receiving lawyer fully discloses that the referring lawyer has received or will receive economic benefit from the referral and the extent and basis of such economic benefit and (b) *the referring lawyer agrees to assume the same legal responsibility for the performance of the services in question as if he were a partner of the receiving lawyer*; and

(3) the total fee of the lawyers does not exceed reasonable compensation for all legal services they rendered to the client." (Emphases added.) *Id.*

¶ 16 Thereafter, in August 1990, the law was modified. The modification provided:

"(f) Except as provided in Rule 1.5(j), *a lawyer shall not divide a fee for legal services with another lawyer* who is not in the same firm, *unless the client consents to employment of the other lawyer by signing a writing which discloses*:

(1) that a division of fees will be made;

(2) the basis upon which the division will be made, including the economic benefit to be received by the other lawyer as a result of the division; and

(3) the responsibility to be assumed by the other lawyer for performance of the legal services in question.

(g) A division of fees shall be made in proportion to the services performed and responsibility assumed by each lawyer, except *where the primary service performed is the referral of the client to another lawyer* and

(1) the receiving lawyer discloses that the referring lawyer has received or will receive economic benefit from the referral and the extent and basis of such economic benefit, and

(2) *the referring lawyer agrees to assume the same legal responsibility for the performance of the services in question* as would a partner of the receiving lawyer.

(h) The total fee of the lawyers shall be reasonable." (Emphases added.) Ill. R. Prof'l Conduct (1990) R. 1.5(f)-(h) (eff. Aug. 1, 1990).

¶ 17 An examination of the history of Rule 1.5(e) reveals that, from the beginning, referral agreements had to be in writing. However, nothing in any of the prior versions of Rule 1.5(e) indicated that the attorneys involved in the referral agreement must expressly state that they will assume "joint financial responsibility" for representing the client. Given that the last-antecedent rule mandates that the term "writing" modify the clause immediately preceding it, and as the term "joint financial responsibility" does not immediately precede the term "writing" in any of the variations of Rule 1.5(e), it is arguable that the written referral agreement need not contain an express statement that the attorneys involved in the referral agreement assume "joint financial responsibility" for representing the client. See *Department of Transportation*, 393 Ill. App. 3d at 465.

¶ 18 The history of Rule 1.5(e) is also relevant for another reason. In contrast to what plaintiff suggests, a prior version of the rule might apply here. Given that the referral agreements were executed between 2007 and 2010, it might well be that the August 1990 version applies to all the agreements except the ones executed in 2010. Compare *Paul B. Episcope, Ltd. v. Law Offices of Campbell & Di Vincenzo*, 373 Ill. App. 3d 384, 394 (2007) (a "supreme court rule is applied

retroactively, even though it was different from its predecessor rule"), with *Naughton v. Pfaff*, 2016 IL App (2d) 150360, ¶¶ 58-59 (discussing when supreme court rules apply retroactively). However, that said, we observe that, regardless of which version of Rule 1.5(e) applies, it appears that a written referral agreement might not need to contain an express statement that the attorneys involved assume "joint financial responsibility" for representing the client.

¶ 19 In reaching our conclusion, we recognize that one court, in addressing a different issue under Rule 1.5(e), determined that a written referral agreement must contain an express statement that the attorneys will assume "joint financial responsibility." See *Fohram*, 2014 IL App (1st) 123351, ¶ 55 ("[W]e would not find there was substantial compliance with Rule 1.5(e) in this case where the attorney-client agreements did not inform the clients of the fee-sharing arrangement based on referrals, the exact split in fees, and that [the attorneys] had assumed equal financial responsibility."). The trial court here relied on *Fohram* in finding that the written referral agreements executed in this case were unenforceable.

¶ 20 Given *Fohram*, we see how an argument could be made that the term "joint financial responsibility" must be contained in a written referral agreement. However, as outlined above, we believe that plaintiff has presented a *prima facie* case of error. Because plaintiff has presented a *prima facie* error on this point, we will not address the other issues it raises on appeal in support of its claim that the trial court should have denied defendant's motion to dismiss.

¶ 21 Because we find that plaintiff's brief on appeal demonstrates *prima facie* error, we reverse the judgment of the circuit court of Lake County and remand the case.

¶ 22 Reversed and remanded.

STATE OF ILLINOIS )
) SS
COUNTY OF LAKE )

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS

| | | |
|---|---|---|
| FERRIS, THOMSON AND ZWIEG, LTD | ) | |
| -vs- | ) | GEN. NO. 13 L 483 |
| ANTHONY ESPISITO | ) | |

**ORDER**

This cause coming to be heard on Defendant's Motion to Dismiss, the Court makes the following findings:

I. **ISSUE PRECLUSION/ COLLATERAL ESTOPPEL**

The Plaintiff asserts that the issue before the Court was previously litigated by the parties in 12 SC 622, and therefore defendant is collaterally estopped from making the same argument in the instant matter. Defendant counters that the precise issue was never decided upon in the previous case.

Issue preclusion prevents "relitigation of one suit of an identical issue already resolved against the party against whom the bar is sought." *Kessinger v. Grefco, Inc,* 173 Ill.2d 447, 460 (1996). For the doctrine to apply, there must be: 1) identical issues presented; 2) with the same party; 3) and a final judgment on the merits. *Hurlbert v. Charles,* 238 Ill.2d 248, 255 (2010).

The only issue in the present case is whether the identical issue was previously litigated and decided. In determining whether an identical issue was previously decided, the court must find that the issue in the first suit was (i) identical to the issue in the second suit, (ii) actually litigated and decided in the first suit, and (iii) essential to the judgment in the first suit. *Talarico v. Dunlap,* 177 Ill.2d 185, 191 (1997). The party asserting the estoppel bears a "heavy burden of showing with certainty that the identical and precise issue sought to be precluded in the later adjudication was

decided in the previous adjudication." *Anderson v. Fin. Matters, Inc.* 285 Ill. App. 3d 123, 132 (2nd Dist. 1996). For example, in *Anderson*, issue preclusion did not apply even though a previous court dismissed the identical complaint because the court did not make specific findings, which left it uncertain as to what issue was actually determined. *Id.* "[I]n order for a former judgment to operate as an estoppel, there must have been a finding of a specific, material, and controlling fact in the former case, and it must conclusively appear that the issue of fact was so in issue that it was necessarily determined by the court rendering the judgment." *Id.* Issue preclusion applies equally to both earlier determinations of fact and earlier determinations of law. *Du Page Forklift Serv., Inc. v. Material Handling Servs., Inc.*, 195 Ill. 2d 71, 79 (2001).

The precise issue presented in the present case is whether Illinois Rule of Professional Conduct 1.5(e) ("Rule 1.5(e)") renders a referral only contract unenforceable if that contract does not explicitly state that both the Plaintiff and Defendant maintain joint financial responsibility in the case. After review of the record of the prior proceeding, including the motion to dismiss and the closing argument after the trial, the court finds that this precise issue was not litigated in the prior case and the doctrine of issue preclusion does not apply.

Motion to Dismiss

Plaintiff initially argues that the issue was raised in Defendant's Reply brief to his Motion to Dismiss. In Paragraph 6, the Defendant in the prior litigation argued that Rule 1.5(e) would mandate dismissal because the Plaintiff did no work on the case and never assumed joint financial responsibility for the representation. First, this is not the same precise issue, as the assertion in the prior litigation does not claim the contract is unenforceable because it does not contain the joint financial responsibility language. Second, the issue was not actually litigated and decided upon by the Court.

The Plaintiff apparently never addressed this argument in writing. The reason is obvious. It was raised in the first instance in the reply, so Plaintiff did not have a chance to respond in writing. In fact, Defendant first brought up this issue during rebuttal argument on the Motion to Dismiss. Plaintiff's counsel objected, asserting the argument had been waived and that it had nothing to do with subject matter jurisdiction – the issue that was being litigated in the Motion to Dismiss. (June 27,

2012 Transcript, P. 12.) More pointedly, Defense counsel never requested that the court dismiss the complaint because the contracts did not strictly comply with Rule 1.5(e). Instead, Defendant simply argued that since jurisdiction properly rested with Industrial Commission, then it was the Industrial Commission that would determine whether the Rules of Professional Responsibility would allow the contract to be enforced. (June 27, 2012 Transcript Tr. P. 12). This argument did not address the Rule 1.5(e) issue squarely, but instead circled back to the jurisdictional issue.

It is also clear from the transcript that Judge Fusz in no way decided the matter at issue in the instant case. He simply held that the circuit court had jurisdiction to hear the dispute for fees. (June 27, 2012 Transcript Tr. P. 18.)

Trial and Closing Argument

The transcript of the closing arguments also does not justify the application of the doctrine of issue preclusion. During closing, the Defense correctly argued that Rule 1.5(e) requires that two attorneys from different firms can divide fees only if proportioned to the services performed or if the primary service is the referral and the referring attorney assumes joint financial responsibility. (January 16, 2013 Transcript, P. 14.) Then he argued that the Plaintiff did not perform any work on the file, and that the Plaintiff also did not assume joint financial responsibility on the file because it did not share in the costs of prosecuting the Worker's Compensation cases. (January 16, 2013 Transcript, P. 14-15). He later argued that the Plaintiff was not entitled to compensation "under the rules of contract, incorporating the rules of professional conduct" (January 16, 2013 Transcript, P. 17), apparently because the Plaintiff did not participate in prosecuting the case and did not assume joint financial responsibility by sharing in the costs of financing the case. Defense counsel misconstrued the rule, at least in part, because apparently he believed that the "assume joint financial responsibility" language of the rule meant the sharing of costs, rather than being jointly responsible for malpractice claims. Since Plaintiff did not do any work on the files, and since Plaintiff did not advance any costs, he reasoned, the Ferris firm was not entitled to enforce the agreement. (January 16, 2013 Transcript, P. 15).

Plaintiff, in response to this argument, summarily stated that the Rules of Professional Conduct allow this type of referral only agreement where the Plaintiff maintained malpractice insurance and agreed that it would assume joint financial responsibility on the cases. (January 16, 2013 Transcript, P. 19-20.)

Indeed, one of the facts in dispute in the prior litigation was whether the contract required Plaintiff to participate in the worker's compensation cases or whether Plaintiff was simply acting as a referring attorney. In his ruling, Judge Fusz found that the agreement was referral only, and that "there was, I believe, an acceptance of financial responsibility by Ferris.... Whether it was stated in the contracts or not, I think the law requires and imposes a financial responsibility." (January 16, 2013 Transcript, P. 30).

Again, the Defendant in the prior closing argument never argued – as the Defendant does in the instant case – that the contract was unenforceable because it did not contain the language that the Plaintiff agreed to assume joint financial responsibility in the referred cases. Nor did Judge Fusz rule on this specific issue. Judge Fusz found that the rule required that the Plaintiff assume joint financial responsibility on the files, but whether that provision was required to be explicitly set forth in the contract was never litigated or decided. While the parties in the previous litigation danced around this issue, the record does not conclusively show that this specific matter "was so in issue at the previous proceeding that it was necessarily determined by the court rendering the judgment." See *Anderson* 285 Ill. App. 3d at 132. Thus, the court finds that issue preclusion or collateral estoppel does not apply to the instant case.

## *II.* REQUIREMENTS OF REFERRAL CONTRACTS

Having found that issue preclusion does not apply, the court turns to the merits of the Defendant's Motion to Dismiss. It is undisputed that the referral contract at issue did not contain any language that Plaintiff would maintain joint financial responsibility. Defendant argues that this fact mandates dismissal because a contract that lacks such language is unenforceable. Plaintiff argues that the rule does not require that this language be a part of the written contract. Plaintiff's argument is without merit.

Rule 1.5(e) applies to agreements for the division of fees between lawyers who are not in the same firm, and states:

> (e) A division of a 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 if the primary service performed by one lawyer is the referral of the client to another lawyer and each lawyer assumes joint financial responsibility for the representation;
> (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
> (3) the total fee is reasonable.

Ill. R. Prof. Conduct (2010) R. 1.5(e) (eff. Jan. 1, 2010).

The plain language of the Rule states that if the primary service performed by one lawyer is the referral, each lawyer must assume joint financial responsibility. The client must agree to this, and it must be confirmed in writing. A referral only contract that does not contain this language runs afoul of Rule 1.5(e) and is unenforceable.

*Donald W. Fohrman & Associates, Ltd. v. Mark D. Alberts, P.C.*, 2014 IL App (1st) 123351 mandates this result. *Fohrman* concerned an attorney who tried to enforce his attorney's lien pursuant to a referral only contract, where the contract did not strictly comply with the requirements of Rule 1.5(e). The Plaintiff in *Fohrman* argued that his lien was enforceable because the contract at issue substantially complied with Rule 1.5(e). In fact, the Plaintiff in *Fohram* did not appeal the trial court's dismissal of the breach of contract claims where the trial court found that the contract was unenforceable because it did not strictly comply with Rule 1.5(e), in part because it did not contain the clause that both attorneys would maintain joint financial responsibility. *Id.* at ¶ 36. Although dismissal of the contract claim was not the issue presented to the Appellate Court in *Fohrman,* it is clear that the Appellate Court entirely agreed with the Trial Court on this ruling. Fohrman noted that the public policy behind the rule is to protect the client's rights, rather than provide remedies for the lawyers. *Id.* at ¶ 35. If the purpose of this provision is to protect the client, then it logically follows that the language setting forth this joint responsibility must be clearly set forth in the contract signed by the client and the lawyers. *Fohrman* was very clear on this issue: "'The writing must not only authorize a division of fees, but also set out the basis for the division, **including the respective responsibility to be assumed** and economic benefit to be received by the other lawyer,'" *Id.* at ¶ 35

(emphasis added), quoting *In re Storment*, 203 Ill.2d 378, 398 (2002). A referral contract that does not strictly comply with Rule 1.5(e) is unenforceable. *Id.* at ¶ 44.

As the referral contracts at issue did not contain the language that Plaintiff and Defendant would maintain joint financial responsibility, the contracts did not strictly comply with Rule 1.5(e) and, therefore, are unenforceable.

Motion to Dismiss is granted, with prejudice.

ENTER:

JUDGE THOMAS SCHIPPERS

Dated at Waukegan, Illinois
this 1st Day of July, 2015

STATE OF ILLINOIS )
) SS
COUNTY OF LAKE )

FILED
OCT 28 2015
Keith Grim
CIRCUIT CLERK

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS

FERRIS, THOMSON AND ZWIEG, LTD )
)
-vs- ) GEN. NO. 13 L 483
)
ANTHONY ESPISITO )

**ORDER**

This cause coming to be heard on Defendant's Motion to Reconsider this Court's order dismissing the case with prejudice. The Court finds as follows:

Plaintiff makes two interrelated arguments as to why this Court erred in dismissing its complaint with prejudice. First, Plaintiff argues that the law-of-the-case doctrine precludes this court from ruling contrary to the decisions made by the trial court in 12 SC 622. Next, Plaintiff maintains that the Illinois Supreme Court in *Ferris, Thompson & Zweig, Ltd. v. Esposito*, 2015 IL 117443 (*"Ferris II"*) found that substantively identical contracts were valid, and therefore this Court is mandated to follow the findings set forth therein.

1. Law-of-the-Case Doctrine

The law-of-the-case doctrine bars relitigation of an issue previously decided in the same case. "Questions of law that are decided [in] a previous appeal are binding on the trial court on remand as well as on the appellate court in subsequent appeals." *Radwill v. Manor Care of Westmont, IL, LLC*, 2013 IL App (2d) 120957, ¶ 8. The doctrine applies when the same issue comes up again in **the same case**. This is not the same case. The case in which Plaintiff

implores the court to apply the law-of-the-case doctrine is over. The judgment has been entered. The case no longer lives. Although that prior case may, as Plaintiff asserts, contain the same contractual "template," it concerns a completely different set of contracts entered into by the plaintiff and defendant pertaining to completely different clients.

Even if this court were to find the law-of- the case doctrine applicable, the result would not change. As with the doctrine of issue preclusion, the law-of-the-case doctrine does not bind the circuit court in a subsequent litigation if there are different issues involved. *Preferred Pers. Servs., Inc. v. Meltzer, Purtill & Stelle, LLc.*, 387 Ill. App. 3d. 933, 947 (1st Dist. 2009). *Garland v. Sybaris Club Int'l, Inc.*, 2014 IL App (1st) 112615 aptly illustrates this point.

In *Garland,* the widow of a man who died in an airplane crash brought suit against various individuals and entities under various tort theories. The matter was heard three times on appeal. The first appeal dealt with whether Illinois recognized the tort of educational malpractice. *Waugh v. Morgan Stanley & Co.*, 2012 IL App (1st) 102653. In the second appeal, the appellate court affirmed the trial court's dismissal of the widow's claim against her husband's employer based upon the exclusive remedy provision of the Workers' Compensation Act because the death was accidental and the employer was not acting in a dual capacity at the time of the aircraft crash. *Garland v. Morgan Stanley & Co.*, 2013 IL App (1st) 112121.

In the prior appeals, the court had noted that the pilot, Turek, was an experienced, licensed private pilot and specifically qualified to fly multi-engine aircraft. The prior opinions stated:

> Prior to January 2006, Turek was fully licensed by the Federal Aviation Administration (FAA) to fly twin-engine aircraft, including the accident aircraft. From January 6 through January 9, 2006, Turek completed a flight training course with Recurrent to transition from his Baron B55 twin-engine plane to the Cessna 421B. Previous to taking this course,

> Turek had 1,284.05 hours in total fight experience, including over 1,050 hours in multi-engine aircraft. Turek had piloted a Cessna 421B aircraft for over 29 hours. At the time he completed the Recurrent course, Turek had been an FAA-licensed pilot for nine years. There is no argument made that Turek was not properly qualified to pilot the subject aircraft under FAA regulations.

*Waugh,* 2012 IL App (1st) 102653, ¶ 7; *Garland v. Morgan Stanley & Co.*, 2013 IL App (1st) 112121 ¶9.

In the third appeal, the court dealt with the Plaintiff's claim for damages based on the tort of negligent entrustment. The defendants argued that the theory of negligent entrustment assumes that the pilot was incompetent or reckless in flying the aircraft. The defendants claimed that that the appellate court had previously determined that the pilot was experienced and not at fault in the crash, based upon the excerpt cited above. The law-of-the-case doctrine, argued the defendants, barred relitigation of this issue previously decided in the same case. To that argument, the court said this:

> We wish to be absolutely clear here: this quote the defendants have taken from the prior two opinions issued by this court in this matter does not determine the issue now before us. Neither previous case dealt with the same issues as are presented in the instant case. Additionally, the statement in *Garland* was merely part of the background facts provided in connection with our decision regarding the application of the dual capacity doctrine in the context of the exclusive remedy provision of the Illinois Workers' Compensation Act. In the other case... this court dealt with the question of whether the tort of educational malpractice was cognizable in Illinois and found it was not. Again, the quoted language was merely a part of the background facts in the opinion and not an issue resolved by this court.

*Garland v. Sybaris Club Int'l, Inc.*, 2014 IL App (1st) 112615, ¶ 47 (citations omitted).

Just as the court in *Garland* set forth the training and experience of the pilot only as background information to resolve other issues, *Ferris II* merely set forth the terms of the contracts as background information in resolving whether the circuit court had jurisdiction to

hear the case.[1] Plaintiff is correct that the reviewing courts had to look at the contracts to determine the duties assigned to the Ferris firm in determining whether the Illinois Industrial Commission ("the Commission") or the circuit court had jurisdiction. However, the discreet issue of whether the contract was void because it did not contain the "joint financial responsibility" language as set forth in Illinois Rule of Professional Conduct 1.5(e) ("Rule 1.5(e)") was not previously litigated nor ruled upon.[2]

2. *De novo* review by *Ferris II.*

Plaintiff next asserts that *Ferris II,* by holding that the circuit court had jurisdiction to hear the dispute, conducted a *de novo* review of the trial judge's ruling and thus had to find that the contracts were valid. In order to determine whether the circuit court had jurisdiction, Plaintiff argues, *Ferris II* was required to analyze the contract between the parties within the context of Rule 1.5(e). To do that, Plaintiff contends, *Ferris II* had to find the contracts enforceable in the context of Rule 1.5(e). Had the court found the contracts unenforceable, Plaintiff concludes, it would have reversed the trial court *sua sponte.* "After the supreme court found the first contracts enforceable," Plaintiff argues, "this court should have protected the settled expectations" of the parties.

The issue, then, is whether *Ferris II* found – by its silence – the contracts enforceable. The record does not justify such a conclusion. The sole issue before the second district was whether the trial court erred in denying Esposito's Motion to Dismiss pursuant to 735 ILCS 5/2–

1 The manner in which *Ferris II* dealt with the contract is set forth in more detail in Section 2 below.
2 This Court in its July 2, 2015 order set forth in some detail its reasoning in concluding that the precise issue in this instant matter was not litigated or resolved in the prior case in the context of the doctrine of issue preclusions. The court incorporates by reference that reasoning herein.

619 (West 2014) on the grounds that the circuit court lacked subject matter jurisdiction to hear the case. *Ferris, Thompson, & Zweig, Ltd. v. Esposito*, 2014 IL App (2d) 130129, ¶ 1 ("*Ferris I*"). Likewise, the sole issue before the Supreme Court was "whether the circuit court has subject matter jurisdiction to resolve a dispute based on a referral agreement apportioning attorney fees earned in a claim filed under the Workers' Compensation Act (Act)." *Ferris II*, 2015 IL 117443, ¶ 1.

To address plaintiff's argument, Ferris *II* must be examined in some detail. The precise issue in *Ferris II* was whether a dispute concerning attorney fees or contracts for attorney fees must be heard and decided by the Commission. *Ferris II*, 2015 IL 117443, ¶ 11. In *Ferris II*, plaintiff filed a complaint alleging two counts of breach of contract. Under the contracts, plaintiff was to receive 45% of the attorney fees recovered in the two cases and defendant would receive the remaining 55% of the fees. After the cases were settled, defendant refused to pay plaintiff its share of the attorney fees. Attached to the complaint were the separate attorney-client agreements for each count. The agreements, signed by plaintiff, defendant, and the clients, stated that the clients had retained plaintiff and understood that plaintiff had "contracted with [defendant] to pursue this workers' compensation claim on [their] behalf." The court then went through the contracts in detail, setting forth the exact responsibilities required of the plaintiff. *Ferris II*, 2015 IL 117443, ¶ 3-7.

Defendant filed a section 2–619 motion to dismiss the complaint, asserting that the circuit court lacked subject matter jurisdiction to consider plaintiff's claims. Defendant argued that any disputes regarding attorney's fees had to be heard before the Commission. The motion was denied, and following a trial, the trial court entered judgment in favor of plaintiff in the amount

of $4,965.25. *Ferris II*, 2015 IL 117443, ¶ 7-8. The second district affirmed in *Ferris I*.

After reviewing the applicable code provisions of the Workers' Compensation Act ("the Act")

(820 ILCS 305/1 *et seq.* (West 2012)), the Supreme Court said that the issue of whether the commission had jurisdiction first turned on whether the plaintiff was tasked with assisting with the representation of the client before the Commission. 2015 IL 117443, ¶ 24-25. The court held that since Ferris had no obligation pursuant to the contract to represent the client before the commission, the Commission did not have jurisdiction to hear the dispute. 2015 IL 117443, ¶ 39.

Plaintiff asserts, however, that because the court cited both the language contained in the contracts **and** the language contained in Rule 1.5, the court necessarily had to find that the contracts complied with Rule 1.5. The record does not justify such a conclusion.

*Ferris II* referred to Rule 1.5 only in response to the defendant's argument that even if the court were to find that the contracts were referral only, the Commission still had exclusive jurisdiction over this dispute pursuant to section 16b of the Act, *Ferris II*, 2014 IL App (2d) 130129, ¶ 24. Section 16b states that an attorney shall not accept any gift in exchange for a referral "except for a division of a fee between lawyers who are not in the same firm in accordance with Rule 1.5 of the Code of Professional Responsibility." 820 ILCS 305/16b(a) (West 2012). The defendant argued, unsuccessfully, that because the legislature specifically referred to referral only contracts and the strictures governing those contracts as set forth in Rule 1.5, it exhibited a legislative intent that referral disputes should be heard by the Commission. *Ferris II*, 2015 IL 117443, ¶ 28-30.

That is the only context in which Rule 1.5 arose – as justification by the defendant as to

why the commission had jurisdiction. *Ferris II* in no way analyzed the contracts with respect to whether they complied with Rule 1.5.

The Plaintiff has failed to cite any specific language in *Ferris II* to justify its conclusions that "the supreme court found the contracts enforceable." One engaged in some future litigation would be prudent to proceed with caution before citing *Ferris II* for the settled proposition that the "joint financial responsibility" language as set forth in Rule 1.5 need not be reduced to writing to be enforceable.

The fact that the reviewing courts reviewed the trial court's ruling on the Motion to Dismiss under the *de novo* standard of review also does not change the result, either. A denial of a motion to dismiss under 735 ILCS 5/2–619 (West 2014)) is reviewed *de novo*. As Plaintiff aptly notes, *de novo* means the court reviews the entire matter anew, "the same as if the case had not been heard before and as if no decision had been rendered previously." *Ryan v. Yarbrough*, 355 Ill.App.3d 342. In other words, the reviewing court looks at the issue in dispute without any deference to the trial court.

This does not mean – as Plaintiff seems to say -- that the reviewing courts are presumed to have identified, analyzed, researched and resolved every possible issue that might have been raised by any party based upon the statement of facts presented. Our reviewing courts have enough work dealing with the issues identified by the litigants. Imagine the workload if they were burdened with the task of identifying every potential issue? One might ponder whether even the most learned and diligent Ivy League Professor of law, on a timeless sabbatical, would be bold enough to undertake such a theoretically limitless endeavor.

The long history of judicial estoppel and law-of-the-case jurisprudence make it clear that

the identical issues must be argued and litigated for the doctrines to apply. The reason for this is similar to the admonishments by reviewing courts to the trial courts to be wary of citing *dicta* for precedential value. These remarks or references made by reviewing courts that are not essential to the decision are not binding precedent because they "*lack[] the authority of adjudication.*" *Exelon Corp. v. Dep't of Revenue*, 234 Ill. 2d 266, 277 (2009), quoting *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir.1988) (emphasis added).

The issue of whether *Ferris II* stands for the proposition that Rule 1.5 does not requires the "joint financial responsibility" language to be reduced to writing in a referral contract "lacks the authority of adjudication." Plaintiff's Motion to Reconsider is denied.

ENTER:

JUDGE THOMAS SCHIPPERS

Dated at Waukegan, Illinois
this 28th Day of October, 2015

121297

No. _____

IN THE SUPREME COURT OF ILLINOIS

| | |
|---|---|
| FERRIS, THOMPSON & ZWEIG, LTD., | ) On Petition for Leave to Appeal from the |
| | ) Appellate Court of Illinois, Second District |
| Plaintiff-Respondent, | ) No. 2-15-1148 |
| | ) There Heard on Appeal from the Circuit |
| v. | ) Court for the Nineteenth Judicial Circuit |
| | ) Lake County, Illinois |
| ANTHONY ESPOSITO, | ) No. 13 L 483 |
| | ) Honorable Thomas Schippers |
| Defendant-Petitioner. | ) Judge Presiding |

## AMENDED NOTICE OF FILING

TO: Saul M. Ferris
Ferris, Thompson & Zweig, LTD
103 S. Greenleaf Ave., Suite G
Gurnee, IL 60031

PLEASE TAKE NOTICE that on **September 9, 2016**, we filed with the Clerk of the Illinois Supreme Court, **via First Class Mail**, one original and nineteen (19) copies of the Petition for Leave to Appeal to the Illinois Supreme Court on behalf of Defendant-Petitioner, ANTHONY ESPOSITO, and hereby served all counsel of record with three (3) copies of the same.

Attorney for Defendant-Petitioner

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STATE OF ILLINOIS )
) SS
COUNTY OF KANE )

**CERTIFICATE OF SERVICE**

I, the undersigned attorney for Defendant-Petitioner, ANTHONY ESPOSITO, after being first duly sworn on oath, depose and certify that three (3) copies of the Petition for Leave to Appeal of Defendant-Petitioner, ANTHONY ESPOSITO, were served on the attorney of record as addressed above by depositing a copy of said documents with the U.S. Mail at Geneva, Illinois, 60134, with proper postage fully paid, on **September 9, 2016.**

Attorney for Defendant-Petitioner

RECORD ON APPEAL AND REPORT OF PROCEEDINGS

TABLE OF CONTENTS

## RECORD ON APPEAL

**REPORT OF PROCEEDINGS**