NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

CHRISTOPHER L. GIDDINGS, ESQUIRE INDIVIDUALLY AND AS AN AGENT AND/OR PRINCIPAL OF CHRISTOPHER L. GIDDINGS, P.C.	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	
DANNY ELMORE, ESQUIRE, INDIVIDUALLY AND AS AN AGENT AND/OR PRINCIPAL OF ELMORE, PUGH & WARREN, P.C. AND JEFFREY B. KILLINO, ESQUIRE, INDIVIDUALLY AND AS AN AGENT AND/OR PRINCIPAL OF THE KILLINO FIRM, P.C.	
APPEAL OF: JEFFERY B. KILLINO, ESQUIRE	No. 1836 EDA 2011

Appeal from the Judgment Entered June 28, 2011
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): July Term, 2010, No. 1212

BEFORE: GANTMAN, J., PANELLA, J., and FITZGERALD, J.*

MEMORANDUM BY GANTMAN, J.: **FILED SEPTEMBER 07, 2012**

Appellant, Jeffery B. Killino, Esquire, individually and as an agent and/or principal of the Killino Firm, P.C., appeals from the summary judgment entered in the Philadelphia County Court of Common Pleas, in favor of Appellee, Christopher L. Giddings, Esquire, individually and as an agent and/or principal of Christopher L. Giddings, P.C. We affirm.

The relevant facts and procedural history of this case are as follows. On February 13, 2007, Tracey Jordan died at Nazareth Hospital. Following

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*Former Justice specially assigned to the Superior Court.

her death, the decedent's husband and executor of the estate, Solomon Jordan, contacted Attorney Danny Elmore to pursue a medical malpractice action (the "Jordan matter"). After reviewing the facts of the case, Attorney Elmore referred the Jordan matter to Appellee. Leno Thomas, an associate at Appellee's law firm, conducted the initial intake of the Jordan matter. Although Appellee's firm declined to handle the case, Appellee referred the case to the law firm of Woloshin & Killino, P.C. Thereafter, Appellee entered into a referral fee agreement with David Woloshin (a 50% shareholder of Woloshin & Killino), confirming that Woloshin & Killino would pay Appellee a referral fee of one-third of the attorney's fee recovered, if the case was successful. After accepting the case, Appellant (the other 50% shareholder at Woloshin & Killino) assumed primary responsibilities of the case as lead counsel. While the Jordan matter was pending, the law firm of Woloshin & Killino dissolved. Following dissolution of the firm, Appellant continued with the Jordan matter at his new firm, the Killino Firm, P.C. As part of the dissolution agreement of Woloshin & Killino, Appellant agreed to pay Mr. Woloshin 16% of the attorney's fee in the Jordan matter, if the case produced a favorable outcome. The trial court opinion continues:

> The underlying lawsuit, ***Jordan v. Nazareth Hospital, et al***; Philadelphia CCP; February Term, 2008; No. 1054, settled for $4.5 million. After the case settled, [Appellant] informed [Appellee] that Attorney Danny Elmore was claiming that he was the referring attorney, implying that [Appellee] was not. However, any dispute between [Appellee] and Danny Elmore over entitlement to the referral fee has been resolved as [Appellee] and Attorney

> Elmore [now] agree that they are co-referring counsel. On December 12, 2010, Danny Elmore executed an affidavit stating that he referred the Jordan matter to [Appellee], and they were in agreement over the appropriate distribution of the referral fee. In addition, on April 12, 2011, Danny Elmore and [Appellee] executed a Stipulation of Settlement and Mutual Release Agreement, which provided that 55% of the referral fee owing from [Appellant] would be paid to Danny Elmore, and 45% would be paid to [Appellee].
>
> As a result of the failure of [Appellant] to pay the referral fee in the Jordan matter, [Appellee] commenced this action by filing his Complaint, seeking a declaration that Defendant Elmore was not entitled to a referral fee (now a moot issue) and that [Appellant] was required to pay [Appellee] the referral fee allegedly agreed upon—33 1/3% of [Appellant's attorney's fee].
>
> [Appellant] filed Preliminary Objections to [Appellee's] Complaint on August 5, 2010, and [Appellee] filed his response on August 31, 2010. Defendant Elmore filed his Answer to [Appellee's] Complaint with New Matter, Counterclaim and Cross-claim on August 18, 2010. After [Appellant's] Preliminary Objections were overruled, he filed an Answer to the Complaint with New Matter on October 18, 2010. [Appellee] filed a reply to the New Matter on December 8, 2010.
>
> [Leno Thomas] filed a Motion to Intervene on November 19, 2010,[1] and [Appellee] filed an answer on December 13, 2010. The Motion to Intervene was granted on December 29, 2010.
>
> [Appellee] then filed a Motion to Compel Interpleader on January 11, 2011, and [Appellant] filed his Answer in Opposition on January 28, 2011. Defendant Elmore filed

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[1] In his motion to intervene, Mr. Thomas claimed he was entitled to a portion of the referral fee for his part in persuading Appellee to refer the case to Woloshin & Killino.

> his Joinder to the Motion to Compel Interpleader on January 31, 2011, and [Appellant] filed his Preliminary Objections to the Motion to Compel Interpleader on February 3, 2011.
>
> [Appellee] filed his Motion for Judgment on the Pleadings on February 11, 2011, and [Appellant] filed his Response on March 7, 2011.
>
> On March 18, 2011, this [c]ourt granted [Appellee's] Motion to Compel Interpleader and ordered [Appellant] to deposit the [approximately] $500,000 in disputed referral fees into escrow until the matter was resolved.[2]
>
> This [c]ourt denied [Appellee's] Motion for Judgment on the Pleadings on March 18, 2011. [Appellant] filed his Motion for Summary Judgment on April 22, 2011, and [Appellee] filed a response on May 24, 2011. Defendant Elmore filed his response on May 25, 2011, and Intervener [Thomas] filed his response on May 25, 2011.
>
> [Appellee] filed his [cross m]otion for Summary Judgment on May 2, 2011. [Appellant] filed his Response on June 2, 2011, and Intervener [Thomas] filed his Response on the same day.
>
> On June 27, 2011, this [c]ourt denied the Motion for Summary Judgment submitted by [Appellant] and granted [Appellee's] Motion for Summary Judgment.[3] On July 5, 2011, [Appellant] appealed this [c]ourt's Orders granting the Motion to Compel Interpleader on March 18, 2011, granting [Appellee's] Motion for Summary Judgment on June 27, 2011, and denying [Appellant's] Motion for Summary Judgment on June 27, 2011. [Appellant] filed

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[2] On March 29, 2011, Appellant filed an appeal from the court's order granting Appellee's motion to compel interpleader, which this Court quashed as interlocutory on June 15, 2011.

[3] When the court granted summary judgment in favor of Appellee, the court decided Mr. Thomas was not entitled to any portion of the referral fee. Mr. Thomas did not appeal that decision.

> his Statement of Matters Complained of on Appeal on August 16, 2011.

(Trial Court Opinion, filed December 8, 2011, at 2-4) (internal citations and footnotes omitted).

Appellant raises eight issues for our review:

> 1. DID THE TRIAL COURT COMMIT AN ERROR OF LAW AND/OR ABUSE ITS DISCRETION WHEN IT VIOLATED THE SUMMARY JUDGMENT STANDARD IN MISREPRESENTING A KEY ISSUE IN THE CASE?
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> 2. DID THE TRIAL COURT COMMIT AN ERROR OF LAW AND/OR ABUSE ITS DISCRETION WHEN IT VIOLATED THE SUMMARY JUDGMENT STANDARD WHILE RELYING ON AN INADMISSIBLE, SELF-CONTRADICTING EXPERT WHO VIOLATED THE PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT?
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> 3. DID THE TRIAL COURT COMMIT AN ERROR OF LAW AND/OR ABUSE ITS DISCRETION WHEN IT VIOLATED THE SUMMARY JUDGMENT STANDARD WHILE RELYING ON INADMISSIBLE DISPUTED LETTERS TO A JUDGE IN ANOTHER CASE?
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> 4. DID THE TRIAL COURT COMMIT AN ERROR OF LAW AND/OR ABUSE ITS DISCRETION WHEN IT VIOLATED THE SUMMARY JUDGMENT STANDARD WHILE RELYING ON INADMISSIBLE E-MAILS REGARDING FUTURE REFERRALS?
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> 5. DID THE TRIAL COURT COMMIT AN ERROR OF LAW AND/OR ABUSE ITS DISCRETION WHEN IT VIOLATED THE SUMMARY JUDGMENT STANDARD WHILE RELYING ON INADMISSIBLE EVIDENCE OF PRIOR DEALINGS BETWEEN THE PARTIES?
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> 6. DID THE TRIAL COURT COMMIT AN ERROR OF LAW AND/OR ABUSE ITS DISCRETION WHEN IT MADE A RADICAL INTERPRETATION OF PENNSYLVANIA RULE OF PROFESSIONAL CONDUCT 1.5?

> 7. DID THE TRIAL COURT COMMIT AN ERROR OF LAW AND/OR ABUSE ITS DISCRETION WHEN IT FABRICATED A FALSE ACCUSATION THAT [APPELLANT] COMMITTED A TORT DURING THE COURSE OF LITIGATION?
>
> 8. DID THE TRIAL COURT COMMIT AN ERROR OF LAW AND/OR ABUSE ITS DISCRETION WHEN IT GRANTED [APPELLEE'S] PETITION TO COMPEL INTERPLEADER?

(Appellant's Brief at 4).

Initially we observe:

> "Our scope of review of an order granting summary judgment is plenary." ***Harber Philadelphia Center City Office Ltd. v. LPCI Ltd. Partnership***, 764 A.2d 1100, 1103 (Pa.Super. 2000), *appeal denied*, 566 Pa. 664, 782 A.2d 546 (2001). "[W]e apply the same standard as the trial court, reviewing all the evidence of record to determine whether there exists a genuine issue of material fact." ***Id.*** "We view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Only where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to a judgment as a matter of law will summary judgment be entered." ***Caro v. Glah***, 867 A.2d 531, 533 (2004) (citing ***Pappas v. Asbel***, 564 Pa. 407, 418, 768 A.2d 1089, 1095 (2001), *cert. denied*, 536 U.S. 938, 122 S.Ct. 2618, 153 L.Ed.2d 802 (2002)).
>
> Motions for summary judgment necessarily and directly implicate the plaintiff's proof of the elements of [his] cause of action. ***Grandelli v. Methodist Hosp.***, 777 A.2d 1138, 1145 n.7 (Pa.Super. 2001). Summary judgment is proper "if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury." Pa.R.C.P. 1035.2. Thus, a record that supports summary judgment will either (1) show the material facts are undisputed or (2) contain insufficient evidence of facts to make out a *prima facie*

cause of action or defense and, therefore, there is no issue to be submitted to the jury. ***Grandelli, supra*** at 1143 (citing Pa.R.C.P. 1035.2 Note*)*. "Upon appellate review, we are not bound by the trial court's conclusions of law, but may reach our own conclusions." ***Grandelli, supra*** at 1144. The appellate Court may disturb the trial court's order only upon an error of law or an abuse of discretion. ***Caro, supra***.

> Judicial discretion requires action in conformity with law on facts and circumstances before the trial court after hearing and consideration. Consequently, the court abuses its discretion if, in resolving the issue for decision, it misapplies the law or exercises its discretion in a manner lacking reason. Similarly, the trial court abuses its discretion if it does not follow legal procedure.

Miller v. Sacred Heart Hosp., 753 A.2d 829, 832 (Pa.Super. 2000) (internal citations omitted). "Where the discretion exercised by the trial court is challenged on appeal, the party bringing the challenge bears a heavy burden." ***Paden v. Baker Concrete Constr., Inc.***, 540 Pa. 409, [412,] 658 A.2d 341, 343 (1995) (citation omitted).

> [I]t is not sufficient to persuade the appellate court that it might have reached a different conclusion if…charged with the duty imposed on the court below; it is necessary to go further and show an abuse of the discretionary power. An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill will, as shown by the evidence or the record, discretion is abused. ***Id.*** (internal quotations and citations omitted).

Bartlett v. Bradford Publishing, Inc., 885 A.2d 562, 566 (Pa.Super. 2005).

Lineberger v. Wyeth, 894 A.2d 141, 145-46 (Pa.Super. 2006).

For purposes of disposition, we initially address Appellant's third and fourth issues combined, in which he argues that any documents dealing with the dissolution of Woloshin & Killino are not relevant to this action. Appellant claims the letters the court relied on (drafted by Appellant's attorney and Mr. Woloshin's attorney during dissolution of Woloshin & Killino) are inadmissible because neither his attorney nor Mr. Woloshin's attorney have firsthand knowledge of the facts related to the referral of the Jordan matter.

Additionally, Appellant argues the court considered emails exchanged between Appellant and Appellee's paralegal when the court made its summary judgment decision. Appellant insists the court interpreted the e-mail exchanges out of context by deciding they evidenced that Appellant acknowledged a referral fee was due and owing to Appellee. Appellant contends the e-mails do not show that Appellant acknowledged a referral fee agreement between the parties regarding the Jordan matter, but only that Appellant was discussing with Appellee's paralegal payment generally for **future** referrals. Appellant concludes the trial court improperly relied on these letters and emails when it granted Appellee's motion for summary judgment; and this Court must reverse the trial court's decision. We cannot agree.

The Pennsylvania Rules of Civil Procedure govern motions for summary judgment and responses to motions for summary judgment as follows:

Rule 1035.2. Motion

After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law

(1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or

(2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.C.P. 1035.2.

Rule 1035.3. Response. Judgment for Failure to Respond

(a) Except as provided in subdivision (e), the adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response within thirty days after service of the motion identifying

(1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion or from a challenge to the credibility of one or more witnesses testifying in support of the motion, or

* * *

(2) evidence in the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced.

* * *

> (d) Summary judgment may be entered against a party who does not respond.

Pa.R.C.P. 1035.3.

> …Rules 1035.2 and 1035.3 of the Pennsylvania Rules of Civil Procedure place a duty upon the non-moving party to respond to a motion for summary judgment. Rule 1035.3(d) allows the court to enter judgment against a party who fails to respond to a motion for summary judgment, although the rule is not mandatory. **Nevertheless, arguments not raised initially before the trial court in opposition to summary judgment cannot be raised for the first time on appeal**. With respect to arguments not raised initially before the trial court in opposition to summary judgment, this Court has explained:
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> > Because, under Rule 1035.3, the non-moving party must respond to a motion for summary judgment, he…bears the same responsibility as in any proceeding, to raise all defenses or grounds for relief at the first opportunity. A party who fails to raise such defenses or grounds for relief may not assert that the trial court erred in failing to address them. To the extent that our former case law allowed presentation of arguments in opposition to summary judgment for the first time on appeal, it stands in derogation of Rules 1035.2 and 1035.3 and is not dispositive in this matter. The Superior Court, as an error-correcting court, may not purport to reverse a trial court's order where the only basis for a finding of error is a claim that the responsible party never gave the trial court an opportunity to consider.
> >
> > More recently, we have reaffirmed the proposition that a non-moving party's failure to raise grounds for relief in the trial court as a basis upon which to deny summary judgment waives those grounds on appeal. Our application of the summary judgment rules…establishes the critical importance to the non-moving party of the defense to summary judgment he…chooses to advance. A decision to pursue one argument over another carries the certain

> consequence of waiver for those arguments that could have been raised but were not. This proposition is consistent with our Supreme Court's efforts to promote finality, and effectuates the clear mandate of our appellate rules requiring presentation of all grounds for relief to the trial court as a predicate for appellate review.

Devine v. Hutt, 863 A.2d 1160, 1169 (Pa.Super. 2004) (holding appellants waived issue on appeal that they failed to raise before trial court in their opposition to appellee's motion for summary judgment) (internal citations omitted) (emphasis added). ***See also McHugh v. Proctor & Gamble***, 875 A.2d 1148 (Pa.Super. 2005) (explaining arguments not presented to trial court in opposition to summary judgment motion cannot be raised for first time on appeal).

Instantly, Appellee filed a cross-motion for summary judgment on May 2, 2011. Appellee attached as exhibits to his cross-motion, *inter alia*: (1) Exhibit S: "Killino Email" (e-mail exchange between Appellant and Appellee's paralegal); (2) Exhibit T: "McCaffery's Letter of 02/07/11" (letter from Mr. Woloshin's attorney during dissolution of Woloshin & Killino); (3) Exhibit V: "Bochetto Letter of 01/25/11" (letter from Appellant's attorney during dissolution of Woloshin & Killino). Appellant filed his response in opposition to Appellee's cross-motion for summary judgment on June 2, 2011. Careful review of Appellant's responsive motion makes clear Appellant failed to challenge these letters and emails. Consequently, Appellant's third and fourth issues are waived for review. ***See McHugh, supra***; ***Devine, supra***.

In his second issue on appeal, Appellant argues that Appellee's expert report should have been precluded because it offered conclusions on the ultimate issue of whether a referral fee agreement existed between the parties. Appellant asserts that an expert's conclusion on the "ultimate issue" goes beyond the proper scope of expert evidence under Pennsylvania law. Appellant contends Appellee's expert usurped the function of the fact-finder by acting as "judge and jury." Appellant concludes the court improperly considered the expert report when it granted summary judgment in favor of Appellee, and this Court should reverse the trial court's decision on that ground. We disagree.[4]

Pennsylvania Rule of Evidence 704 governs expert opinion on the ultimate issue as follows:

> **Rule 704. Opinion on ultimate issue**
>
> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

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[4] Additionally, Appellant argues Appellee's expert report was "self-contradicting and unreliable" where the expert acknowledged a referral fee agreement between Appellee and Woloshin & Killino, but simultaneously decided the referral fee agreement existed between Appellee and Appellant. Appellant also complains Appellee's expert engaged in "intellectual flip-flopping," where he opined Mr. Thomas was not entitled to a portion of the referral fee because of his status as an associate in Appellee's law firm; but the expert opined differently in another case involving an associate's entitlement to a referral fee. Appellant failed to raise these arguments in his response to Appellee's motion for summary judgment; therefore, those claims are waived. ***See id.***

Pa.R.E. 704. Admission or exclusion of expert opinion on the "ultimate issue" in a case rests within the sound discretion of the trial court and will be reversed "only upon a showing of abuse of discretion or error of law." ***Jacobs v. Chatwani***, 922 A.2d 950, 960 (Pa.Super. 2007), *appeal denied*, 595 Pa. 708, 938 A.2d 1053 (2007).

> An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous. In addition, to constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful or prejudicial to the complaining party.

Id. ***See also Houdeshell ex rel. Bordas v. Rice***, 939 A.2d 981, 986 (Pa.Super. 2007) (stating court has discretion to consider expert opinions on ultimate issue depending on their helpfulness versus potential to cause confusion or prejudice).

Instantly, Appellee's expert, Bernard Smalley, Esquire, explained in his report that he had reviewed the vast amount of evidence obtained during discovery including, *inter alia*: (1) letters from the attorneys of Appellant and Mr. Woloshin during the dissolution proceedings of Woloshin & Killino, which discussed how to divide the referral fee in the Jordan matter; (2) an e-mail exchange between Appellant and Appellee's paralegal in which Appellant referenced a referral fee agreement in the Jordan matter; and (3) an affidavit from Mr. Woloshin confirming Appellant knew about the referral

fee agreement between Appellee and Woloshin & Killino, and Appellant agreed to its payment. Based on this and other evidence obtained during discovery, Attorney Smalley opined within a reasonable degree of professional certainty that a referral fee contract existed between Appellee and Appellant regarding the Jordan matter. We see no reason to disturb the court's decision to consider Attorney Smalley's report simply because the report embraced an opinion on the ultimate issue. ***See*** Pa.R.E. 704; ***Houdeshell, supra***; ***Jacobs, supra***. Consequently, Appellant's second issue merits no relief.

In Appellant's fifth issue, he explains that in a separate matter Appellee entered into a referral fee agreement with Woloshin & Killino and after the firm dissolved, Appellant retained the matter at the Killino Firm. Following settlement in that other case, Appellant paid Appellee an amount consistent with the initial fee agreement between Appellee and Woloshin & Killino. Appellant insists he made the payment gratuitously to induce future referrals from Appellee to Appellant. Appellant suggests his payment of a referral fee in a separate matter did not establish a "course of dealings" between the parties. In other words, Appellant claims any evidence of prior dealings with Appellee bears no relevance to this action. Appellant concludes the trial court improperly considered Appellee's proffered "course of dealings"; and this Court must reverse the trial court's decision on this ground. We disagree.

Well-established principles of contract law provide that there must be a "meeting of the minds" for an agreement to exist. ***Accu-Weather, Inc. v. Thomas Broadcasting Co.***, 625 A.2d 75, 78 (Pa.Super. 1993).

> [T]he very essence of an agreement is that the parties mutually assent to the same thing…. Without such assent there can be no [enforceable] agreement…. The principle that a contract is not binding unless there is an offer and an acceptance is to ensure that there will be mutual assent….
>
> [I]t is equally well-established that an offer may be accepted by conduct and what the parties do pursuant to the offer is germane to show whether the offer is accepted.
>
> With these precepts in mind, we look to the parties' "course of conduct" to assess the presence of a contract.

Id. (internal citations and quotation marks omitted). "In cases involving contracts wholly or partially composed of oral communications, the precise content of which are not of record, courts must look to surrounding circumstances and course of dealing between the parties in order to ascertain their intent." ***Boyle v. Steiman***, 631 A.2d 1025, 1033 (Pa.Super. 1993), *appeal denied*, 538 Pa. 663, 649 A.2d 666 (1994) (holding course of dealings between parties supported appellees' claim of contract formation between parties). Additionally:

> A contract implied in fact can be found by looking to the surrounding facts of the parties' dealings.[7] Offer and acceptance need not be identifiable and the moment of formation need not be pinpointed. Implied contracts…arise under circumstances which, according to the ordinary course of dealing and the common understanding of [people], show a mutual intention to contract.

> [7] A contract implied in fact has the same legal effect as any other contract. It differs from an express contract only in the manner of its formation. An express contract is formed by either written or verbal communication. The intent of the parties to an implied in fact contract is inferred from their acts in light of the surrounding circumstances.

Ingrassia Const. Co., Inc. v. Walsh, 486 A.2d 478, 483 (Pa.Super. 1984) (internal citations and quotation marks omitted).

Instantly, Appellee produced the following evidence to show a "course of dealings" between the parties: (1) a letter written by Appellee, referring a separate case (the "Reynolds matter") to Woloshin & Killino, in exchange for one-third of any attorney's fee collected; (2) a settlement letter written on behalf of the defendants in the Reynolds matter, marking completion of the case (after dissolution of Woloshin & Killino); (3) a check issued by Appellant from the Killino Firm to Appellee for a referral fee in the Reynolds matter. We see no reason to disturb the court's decision to consider these exhibits as proper "course of dealings" evidence. ***See Jacobs, supra***; ***Boyle, supra***; ***Ingrassia, supra***. Consequently, Appellant's fifth issue merits no relief.

For purposes of disposition, we combine Appellant's first, sixth and seventh issues on appeal. Appellant argues there is no evidence of a referral fee contract in this case between Appellee and Appellant (individually or as an agent of the Killino Firm). Appellant maintains the trial court misrepresented the key issue in the case by determining that a referral fee

agreement between Woloshin & Killino and Appellee necessarily extended to Appellant, following the dissolution of Woloshin & Killino. Appellant acknowledges the existence of a referral fee contract between Appellee and Woloshin & Killino. Appellant emphasizes that Appellee did not file suit against Woloshin & Killino, and that entity is not a party to this appeal. Had Appellee brought a claim against Woloshin & Killino, Appellant suggests Appellee might have been able to collect one-third of the referral fee awarded to Woloshin & Killino, but not one-third of Appellant's attorney's fee.

Additionally, Appellant argues that Solomon Jordan (the plaintiff in the Jordan matter) signed an affidavit expressing his unwavering objection to Appellant sharing any portion of his attorney's fee. Appellant maintains the court's summary judgment decision conflicts with Pennsylvania Rule of Professional Conduct 1.5 (stating attorney shall not divide fee for legal services with another attorney who is not in same firm unless client is advised of and does not object to participation of all attorneys involved). Appellant contends the court "radically interpreted" the Rules of Professional Conduct when the court concluded Mr. Jordan waived his right to oppose the sharing of fees simply because, at one time, Mr. Jordan was aware of a referral fee agreement and did not object.

Further, Appellant argues the trial court ordered him to deposit the disputed funds into an escrow account. Appellant insists this order directly

conflicted with a previous court order directing Appellant to deposit into a receivership account any monies owed to Mr. Woloshin as part of the Woloshin & Killino dissolution agreement. Appellant claims he retained the disputed funds in the Killino Firm's IOLTA account pending resolution of the conflicting court orders, because he could not comply with one court order without violating the other. Appellant insists the trial court misconstrued his actions as tortious conduct and erroneously held Appellant personally liable on that basis. Appellant concludes the court's collective errors warrant reversal, and this Court should dismiss Appellant as an individual defendant from this action and reverse the summary judgment in favor of Appellee. We disagree.

After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the Honorable Allan L. Tereshko, we conclude Appellant's first, sixth and seventh issues merit no relief. The trial court opinion comprehensively discusses and properly disposes of those questions. (***See*** Trial Court Opinion at 6-13) (finding: **(ISSUE 1)** Mr. Woloshin executed affidavit confirming that Appellee referred Jordan matter to Woloshin & Killino in April 2007, and Appellant knew of and agreed to referral fee payment of one-third of attorney's fee collected, if case produced favorable outcome; Appellee's expert, Attorney Smalley, opined in his expert report that valid and enforceable referral fee agreement existed between Appellee and Appellant when Jordan matter settled;

Appellant acknowledged he owed Appellee referral fee in email exchange with Appellee's paralegal, post-dissolution of Woloshin & Killino; course of dealings between parties shows Appellant previously honored similar referral fee payments with Appellee, even after dissolution of Woloshin & Killino; letters from Appellant and Mr. Woloshin's counsel during dissolution of Woloshin & Killino further support Appellee's position that Appellant knew referral fee was due and owing; correspondence in proceedings related to dissolution of Woloshin & Killino indicates Mr. Woloshin's percentage of fees from Jordan matter was calculated **after** deduction for referral fee; **(ISSUE 6)** Appellant cannot now claim his client objects to payment of referral fee after matter was concluded; Mr. Dowling, decedent's brother, stated in his deposition testimony that Mr. Jordan saw Mr. Dowling writing source of referral on contingency fee agreement with Woloshin & Killino, and Mr. Jordan did not object; under these circumstances, it is appropriate to infer Mr. Jordan knew referral fee would be due, and waived his right to object to fee sharing; **(ISSUE 7)** Appellant has repeatedly failed to comply with court orders (both from this court, and from court presiding over dissolution of Woloshin & Killino) requiring Appellant to deposit disputed referral fees into escrow account until resolution of this case;[5] Appellant's flagrant disregard

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[5] Although Appellant alleges he could not comply with the trial court's order in this case because of a "conflicting order" from the jurist presiding over proceedings with respect to the dissolution of Woloshin & Killino, Appellant
(Footnote Continued Next Page)

for court orders evidences tortious conduct on his behalf; personal liability for his actions is proper). Accordingly, we affirm on the basis of the trial court's opinion with respect to Appellant's first, sixth and seventh issues.[6]

In Appellant's eighth issue, he argues that only a **defendant** can petition a court to compel interpleader, as the rules related to interpleader make multiple references to obligations a defendant must fulfill. Appellant asserts the trial court improperly granted Appellee's motion to compel interpleader because Appellee was the **plaintiff** in this action. Appellant concedes that if this Court affirms the trial court's award of summary judgment in favor of Appellee, then this issue will be moot because Appellant is no longer in possession of the disputed funds. Appellant concludes the trial court erred by granting Appellee's motion to compel interpleader. Based on our disposition, Appellant is entitled to no relief.

(Footnote Continued) ———————————

did not raise this argument in either his response in opposition to Appellee's petition to compel interpleader or in his preliminary objections to Appellee's petition to compel interpleader. Appellant's failure to raise this claim at the appropriate stage of the proceedings constitutes waiver on appeal. ***See generally Thompson v. Thompson***, 963 A.2d 474 (Pa.Super. 2008) (explaining party must make timely and specific objection at appropriate stage of proceedings before trial court to preserve issue for appellate review).

[6] On the bottom of page 7 of its opinion, the trial court states: "On April 10, 2007, [Appellee] referred the Jordan matter to [Appellant]." The record makes clear Appellee referred the case to Woloshin & Killino on that date. Additionally, in the middle of page 12, the trial court states: "Stacey Dowling noted on the contingency fee agreement signed with [Appellant] that the case was referred by Danny Elmore." The record shows Mr. Dowling executed the contingency fee agreement with Woloshin & Killino.

This Court has discussed the purpose of interpleader, as follows:

> An interpleader is the procedural mechanism through which adverse claimants against the money, property or debt held by another may be required to litigate their claims in one proceeding. An interpleader's purpose is the avoidance of the expense and inconvenience which results from the defense of multiple actions arising out of identical claims of entitlement to a "stake" of money, property or debt. An interpleader may be properly granted under such circumstances to avoid exposing the defendant to the vexation of multiple suits or multiple liability upon the same claim. However, interpleader should be denied where the petitioner has incurred independent liability to either of the claimants. The grant or refusal of a petition for interpleader is an equitable consideration resting within the sound discretion of the trial court and will not be disturbed absent an abuse of such discretion.

Lewandowski v. Life Ins. Co. of North America, 608 A.2d 1087, 1088-89 (Pa.Super. 1992) (internal citations and quotation marks omitted).

Instantly, Appellant conceded in his reply brief that if this Court affirmed the trial court's grant of summary judgment in favor of Appellee, then his eighth issue would be moot because Appellant no longer holds the disputed referral fee funds—the "stake" at issue. Based on our disposition with respect to Appellant's other issues, we agree Appellant's eighth issue on appeal is moot. ***See generally Deutsche Bank Nat. Co. v. Butler***, 868 A.2d 574 (Pa.Super. 2005) (explaining issue is moot if in ruling upon issue court cannot enter order that has any legal force or effect). Accordingly, we affirm.

Judgment affirmed.

Judgment Entered.

Prothonotary

Date: 9/7/2012