In the Superior Court of Pennsylvania

No. 1836 EDA 2011

CHRISTOPHER L. GIDDINGS, ESQUIRE, individually and as an agent and/or principal of Christopher L. Giddings, P.C.,

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: Jeffrey B. Killino, Esquire

BRIEF FOR PLAINTIFF/APPELLEE

On Appeal from the Judgment of the Court of Common Pleas of Philadelphia County, Pennsylvania, Civil Division, July Term, 2010, No. 1212

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I. INTRODUCTION

This appeal involves a dispute over the division of attorneys' fees between plaintiff Christopher Giddings, Esquire, who referred a plaintiff's personal injury case to the law firm of Woloshin & Killino, P.C., and attorney Jeffrey B. Killino, Esquire, who recovered a large settlement in that personal injury case after the Woloshin & Killino law firm had dissolved.

In his Brief for Appellant, Killino raises a whopping eight issues for review. As the Supreme Court of Pennsylvania observed in *Commonwealth* v. *Ellis*, 534 Pa. 176, 626 A.2d 1137 (1993): "We concur with the view of an eminent appellate jurist, Judge Ruggero Aldisert, that the number of claims raised in an appeal is usually in inverse proportion to their merit and that a large number of claims raises the presumption that all are invalid." *Id.* at 183, 626 A.2d at 1140. Killino's appeal once again confirms the truth of that observation.

Moreover, the issues as stated in Killino's Brief for Appellant reveal a hostile and inappropriate disrespect for the trial judge's adjudication of this case. Issue one accuses the trial judge of "misrepresenting a key issue in the case." Issue six accuses the trial judge of having "made a radical interpretation of Pennsylvania Rule of Professional Conduct 1.5." And, perhaps worst of all, issue seven accuses the trial judge of "fabricating a false accusation that Killino committed a tort during the course of litigation." Killino's current law firm is serving as appellate counsel for Killino in this appeal, validating the truth of the popular observation that "he who is his own lawyer has a fool for a client."

As explained herein, the trial court neither committed an error of law nor abused its discretion in ruling that attorney Giddings was entitled to the entry of summary judgment in his favor on his claim for one–third of the attorneys' fee that Killino recovered in representing the plaintiff in the case that Giddings had referred to the law firm of Woloshin & Killino. Killino's arguments in favor of reversal are entirely without merit and verge on desperation. Indeed, one of Killino's most outrageous arguments seeks to place before this Court materials that are not even a part of the trial court's record nor were they presented to or considered by the trial court in reaching the decision that is the subject of this appeal.

Because, for the reasons explained below, the trial court's entry of summary judgment in favor of plaintiff Giddings was entirely proper, this Court should affirm the trial court's judgment.

II. COUNTER–STATEMENT OF THE CASE

A. Relevant Factual Background

On February 13, 2007, Tracey (Dowling) Jordan died under suspicious circumstances while being treated as a patient at Nazareth Hospital. R.203. Ms. Jordan's husband, Solomon Jordan, told Ms. Jordan's twin brother, Stacey Dowling, that Stacey Dowling should act on Mr. Jordan's behalf in seeking legal counsel to pursue any claims arising from Ms. Jordan's death. R.203.

Later in February 2007, Mr. Dowling contacted attorney Danny Elmore. R.203. Attorney Elmore recommended that Mr. Dowling pursue a proper autopsy.

R.203–04. In early April 2007, after the autopsy results became available, Mr. Dowling contacted attorney Elmore to report that the autopsy results showed that Tracey Jordan died from a heart attack related to an overdose of medication received at Nazareth Hospital. R.204. Shortly thereafter, attorney Elmore referred the case to attorney Christopher Giddings, the plaintiff in this matter. R.204.

On April 5, 2007, Solomon Jordan met with attorney Leno Thomas, who was then an associate attorney employed by the law firm of Christopher L. Giddings, P.C., and Mr. Jordan signed a contingent fee agreement retaining Giddings and his law firm to handle the matter. R.148, 204. On April 10, 2007, Giddings referred the case to the law firm of Woloshin & Killino, P.C. in exchange for Giddings' receiving one–third of the total attorneys' fee recovered by the Woloshin & Killino law firm should the case have a favorable outcome. R.139–40, 204–05.

When the Woloshin & Killino law firm dissolved, the Jordan case remained with attorney Killino and his new law firm, The Killino Firm, P.C. R.205. In May 2010, the Jordan matter settled for $4.5 million. R.205. After the Jordan case settled, attorney Killino denied that he owed any referral fee to attorney Giddings. R.206. As a result, attorney Giddings initiated this lawsuit against attorney Killino and his law firm seeking to recover $550,333.33, representing one–third of the attorneys' fee that Killino recovered in the matter. R.221.

B. Relevant Procedural History

Plaintiff Christopher Giddings, Esquire initiated this lawsuit on July 14, 2010, naming as defendants both attorney Danny Elmore (the attorney who referred the Jordan case to Giddings) and attorney Jeffrey Killino (the attorney to whom Giddings referred the Jordan case). R.201.

In December of 2010, attorney Leno Thomas (the attorney employed by Giddings who in that capacity performed the intake of the Jordan matter on behalf of the Giddings law firm) was granted permission to intervene in this lawsuit, based on attorney Thomas's claim that he was personally entitled to some or all of the referral fee for sending the case to the Woloshin & Killino law firm. R.203.

Also in December 2010, defendant Elmore reached an agreement with plaintiff Giddings whereby they agreed to a mutually acceptable division between them of the attorneys' fee that Giddings was seeking to recover from attorney Killino in this lawsuit. *See* trial court's Rule 1925(a) opinion at 2. Plaintiff's claim against Elmore has thus been rendered moot as a result of that agreement.

In April 2011, defendant Killino filed a motion for summary judgment asserting that no one was entitled to recover any referral fee from him on account of the Jordan matter. *Id.* at 3. Soon thereafter, in May 2011, plaintiff Giddings filed a cross–motion for summary judgment, asking the trial court to rule that Killino owed the promised one–third referral fee and that intervenor Thomas was not entitled to any recovery. *Id.* at 4.

After the motion and cross–motion for summary judgment were fully briefed, the trial court on June 27, 2011 denied Killino's motion for summary judgment and granted Giddings' motion for summary judgment. *Id.* at 4. Thereafter, in accordance with Pennsylvania Rule of Appellate Procedure 1925(a), the trial judge issued an opinion in support of those rulings.

Importantly, attorney Thomas has not appealed from the trial court's rejection of his claim to any part of the referral fee, and thus attorney Thomas's claim is no longer at issue in this case because Thomas has forfeited it.

III. SUMMARY OF THE ARGUMENT

The trial court's judgment should be affirmed. In this case, the trial court properly ruled on summary judgment, based on the undisputed facts of record, that the dissolution of the Woloshin & Killino law firm did not entitle attorney Killino to avoid the referral attorneys' fee owed to attorney Giddings in the *Jordan* case once Killino voluntarily took the *Jordan* case with him to his solo law practice. Attorney Killino's conduct in continuing to work on the *Jordan* case sufficed to evidence his assumption of the obligation to pay the referral fee at issue. Killino obtained the benefit of the asset that plaintiff Giddings provided (the ability to serve as lead counsel in the *Jordan* case), and thus Killino could not simultaneously renounce the accompanying obligation to pay a referral fee to Giddings.

Killino's challenge to the trial court's summary of the opinions contained in the report of Giddings' expert is without merit and improperly relies on irrelevant

material from outside of the trial court record in this case. The challenge is also waived because Killino omitted the challenge from his Rule 1925(b) statement of errors complained of on appeal.

By contrast, the trial court in this case properly relied on the representations of Killino's attorney in the lawsuit concerning the dissolution of the Woloshin & Killino law firm that a referral fee was due to another attorney arising out of the settlement of the *Jordan* case. Those representations, which are included in the trial court record in this case, provide further persuasive proof that both Woloshin and Killino recognized, after their former law firm had dissolved, that Killino would have the obligation to pay the previously agreed upon referral fee to Giddings.

Killino's objections to the trial court's reliance on the parties' course of dealings and the trial court's reliance on an email message from Killino to Giddings' paralegal acknowledging the obligation to pay a referral fee in the *Jordan* case are similarly without merit. This evidence qualifies as admissible, reliable, and persuasive in support of the trial court's entry of summary judgment in Giddings' favor.

Also without merit is Killino's argument that Pennsylvania Rule of Professional Conduct 1.5 prohibits the payment of a referral fee in this case. Before becoming Killino's client, the client in the *Jordan* case signed a contingent fee contract with Giddings. R.148. Rule 1.5 does not allow a client to consent to a referral fee and then attempt to renounce the referral fee once recovery is achieved. Moreover, in this case the client will owe the same overall attorneys' fee regardless

of whether a portion of Killino's fee is paid to Giddings as a referral fee, demonstrating that Killino has orchestrated the objection, which even if successful would confer no benefit on the client.

Finally, Killino's objection to the trial court's interpleader order is moot because that order sought to provide a type of interim relief that is no longer relevant now that a final judgment exists in this case.

For all of the foregoing reasons, which are examined in more detail below, this Court should affirm the entry of summary judgment in favor of Giddings and against Killino.

IV. ARGUMENT

A. The Trial Court Properly Ruled, Based On The Undisputed Evidence Of Record, That The Killino Law Firm's Acceptance Of The Jordan Representation Was Subject To The Obligation To Pay The Agreed Upon Referral Fee To Attorney Giddings

In his Brief for Appellant, attorney Killino acknowledges that the "facts clearly show that * * * an agreement for a referral fee in the *Jordan* case existed with Woloshin & Killino, P.C." Brief for Appellant at 14. Killino further admits that someone at attorney Giddings' law firm referred the *Jordan* case to the law firm of Woloshin & Killino, and that attorney Woloshin (who was a 50–50 owner of Woloshin & Killino together with attorney Killino) agreed to pay one–third of any attorneys' fee recovered to the Giddings law firm as a referral fee. *See id.*; *see also* R.139–40.

Attorney Killino's argument on appeal, in essence, is that after the law firm of Woloshin & Killino dissolved and attorney Killino took the *Jordan* case with him to his new solo law practice, attorney Killino could thereafter unilaterally renounce without consequence any obligation to pay the originally agreed upon one–third referral fee to attorney Giddings. According to Killino's argument on appeal, only if Giddings and Killino entered into a new contract whereby Killino agreed to pay to Giddings a one–third referral fee after the Woloshin & Killino law firm had dissolved would Killino have any continuing obligation to pay the originally agreed upon one–third referral fee to Giddings in the *Jordan* matter.

According to Killino's Brief for Appellant, "even if Killino knew of the referral of the *Jordan* case to Woloshin & Killino, P.C. and agreed to payment of a fee for same, this does nothing to show that there was any evidence of any referral agreement in the *Jordan* matter with either Killino, individually, or The Killino Law Firm, P.C." Brief for Appellant at 16. However, Killino is incorrect in arguing that he could benefit from the asset (the referral of the *Jordan* case from Giddings) without assuming responsibility for the obligation attached to that asset (the duty to pay a one–third referral fee to Giddings).

A hypothetical demonstrates the correctness of the trial court's summary judgment ruling and the absurdity of Killino's argument on appeal to the contrary. Assume that Giddings owned a tract of land on which valuable coal was located underground. Assume further that Giddings entered into a contract with the coal mining company of Woloshin & Killino pursuant to which Woloshin & Killino

agreed to pay one–third of the revenue earned on coal mined from that land to Giddings. If Woloshin & Killino dissolved, it is Killino's argument that he can individually continue to mine coal from the Giddings land without having to pay to Giddings the corresponding fee constituting one–third of the revenue earned on the coal mined by Killino alone.

If Killino did not wish to remain subject to the obligation to pay to Giddings one–third of the attorneys' fee recovered in the *Jordan* case after the Woloshin & Killino law firm dissolved, Killino could have and should have told attorney Giddings and his clients in that case that they needed to retain other counsel to replace Killino. By his conduct in choosing to remain as counsel in the *Jordan* case, attorney Killino evidenced his acceptance of the corresponding obligation to pay the originally agreed upon one–third referral fee to Giddings. If an attorney's obligation to pay a referral fee can be defeated as easily as moving from his original law firm to a solo practice while taking the referred case with him, then any promise to pay a referral fee in a plaintiff's personal injury case is rendered essentially worthless and unenforceable.

In his Brief for Appellant, Killino's lone argument for reversal on this point is to cite to *Tayar* v. *Camelback Ski Corp., Inc.*, 957 A.2d 281, 289–90 (Pa. Super. Ct. 2008), *alloc. granted*, 607 Pa. 460, 8 A.3d 299 (Pa. 2010), for the proposition that a contract signed by an officer of a corporation in his corporate capacity does not bind the officer in his individual capacity. But that argument misses the point. Giddings did not argue to the trial court, nor did the trial court hold, that Killino could have

been held individually liable to Giddings in the event that Woloshin & Killino had not dissolved and thereafter defaulted in its obligation to pay the referral fee. Rather, here Killino, acting individually and via his new solo law practice, voluntarily agreed to retain the benefit of the asset (the *Jordan* case) that Giddings had referred, but Killino in doing so also became responsible in those capacities for paying the accompanying liability (the referral fee to Giddings).

If Killino did not want to remain liable to pay a referral fee to Giddings, then Killino should not have agreed to continue to serve as counsel for plaintiffs in the *Jordan* case after the Woloshin & Killino law firm dissolved. As this Court has recognized, *see Accu–Weather, Inc.* v. *Thomas Broadcasting Co.*, 625 A.2d 75, 78 (Pa. Super. Ct. 1993), contracts may be accepted as the result of a party's conduct. Here, Killino's continuing to work on the *Jordan* case after the law firm of Woloshin & Killino dissolved sufficed to constitute Killino's acceptance of the obligation to pay Giddings a one–third referral fee in that matter.

Accordingly, the trial court properly ruled on summary judgment based on the undisputed facts of record that the dissolution of the Woloshin & Killino law firm did not entitled attorney Killino to avoid the referral attorneys' fee owed to attorney Giddings in the *Jordan* case.

B. Attorney Killino's Challenge To The Trial Court's Citations To The Report of Giddings' Expert Is Meritless And Improperly Relies On Materials Outside The Record On Appeal

The trial court's Rule 1925(a) opinion summarizes the conclusions contained in the report of plaintiff's expert witness, but the summary judgment opinion does not suggest that the trial court gave any improper weight or effect to those opinions. The expert witness in question, attorney Bernard Smalley, concluded in his report that the obligation to pay a referral fee traveled with the *Jordan* file and thus became the obligation of Killino's new solo law firm after the Woloshin & Killino law firm dissolved. R.152–53. Attorney Smalley's second opinion was that attorney Thomas, the intervenor, was not entitled to any share of that referral fee because Thomas's involvement in the referral was in his capacity as an employee of the Giddings law firm. R.153.

As explained above, intervenor Thomas has failed to file any appeal from the trial court's rejection of attorney Thomas's claim of entitlement to any portion of the referral fee, and thus that aspect of the trial court's decision is not subject to reversal or further consideration on appeal. Nevertheless, Killino has improperly included in the Reproduced Record filed in this appeal a copy of an expert report that attorney Smalley issued in another case, in an attempt to argue that Smalley's opinion in that other case was contrary to Smalley's opinion in this case on the issue of attorney Thomas's entitlement to share in any referral fee. R.310–44.

Killino's inclusion of that material in the Reproduced Record, and Killino's inclusion of the corresponding argument in his Brief for Appellant, are blatant

violations of the Pennsylvania Rules of Appellate Procedure. The Reproduced Record can only consist of materials properly included in the trial court record. *See* Pa. R. App. P. 2152(a). Pennsylvania Rule of Appellate Procedure 1921 defines the record on appeal as composed of "[t]he original papers and exhibits filed in the lower court." Pa. R. App. P. 1921. The expert report of attorney Smalley submitted in the other case was never filed with the trial court in this case, and thus that expert report from another case is not part of the record in this case and cannot properly be included in the Reproduced Record on appeal. *See Stumpf* v. *Nye*, 950 A.2d 1032, 1041 (Pa. Super. Ct. 2008) ("It is well–settled that this Court may only consider items which have been included in the certified record and those items which do not appear of record do not exist for appellate purposes.").

Moreover, Killino's argument concerning attorney Smalley's opinion about whether intervenor Thomas should be entitled to any portion of the referral fee in this case because attorney Smalley supposedly gave an inconsistent opinion on a similar question in another case was not among the issues that Killino included in his Rule 1925(b) statement of errors complained of on appeal and has thus been waived. *See* Pa. R. App. P. 1925(b)(4)(vii); *Love* v. *Love*, 33 A.3d 1268, 1273 (Pa. Super. Ct. 2011) (recognizing that issues not raised in a Rule 1925(b) statement are waived on appeal). A copy of Killino's Rule 1925(b) statement is attached to the Brief for Appellant, and thus this Court can itself confirm the absence of this issue by reviewing that attachment.

Last but not least, even if attorney Smalley's expert report submitted in another case were properly part of the record on appeal in this case, which it is not, and even if the issue were not waived for having been omitted from Killino's Rule 1925(b) statement, the supposed inconsistency between attorney Smalley's expert report in this case and in the other case would still be irrelevant, because the supposed inconsistency concerns only intervenor Thomas's claim to any portion of the referral fee. Attorney Thomas, however, did not appeal from the trial court's rejection of his claim, and thus attorney Thomas's claim is no longer alive or subject to reinstatement in this case.

Killino's remaining objection to the trial court's consideration of attorney Smalley's expert opinions fares no better. Obviously, the trial court's reference to attorney Smalley's report as "un–contradicted" (Rule 1925(a) opinion at 7) only was intended to communicate that Killino did not present the trial court with any expert reports in support of his position in this litigation. Moreover, attorney Smalley's opinion that Killino was bound by the Woloshin & Killino law firm's promise to pay a one–third referral fee after he took the *Jordan* case for himself does not represent an improper legal opinion. Rather, it expresses an opinion based on attorney Smalley's longstanding experience within the legal profession. Thus, the trial court did not err in relying on attorney Smalley's conclusion that Killino could not disregard the continuing obligation to pay a referral fee simply because Killino never personally agreed to pay such a fee after departing from Woloshin & Killino

to open Killino's solo law practice. The mere act of taking the *Jordan* case with him to his new law firm evidenced Killino's agreement to pay that referral fee.

Finally, in the unlikely event that the trial court should not have relied on the uncontradicted expert opinion of attorney Smalley, based on his many years of practice within the legal profession, the trial court nevertheless correctly ruled as a matter of law that attorney Killino could not defeat attorney Giddings' right to recover the one–third referral fee on the *Jordan* matter simply by dissolving the Woloshin & Killino law firm and taking the *Jordan* case with him to Killino's new law firm. Thus, if there were any error in relying on the expert report, it would constitute harmless error at most and would not necessitate reversal of the trial court's legally correct entry of summary judgment in favor of Giddings. *See Yacoub* v. *Lehigh Valley Medical Associates, P.C.*, 805 A.2d 579, 590 (Pa. Super. Ct. 2002) (defining harmless error as error that does not affect the result).

For all of these reasons, this Court should reject Killino's argument that the trial court's reliance on the expert report of attorney Smalley constituted reversible error.

C. The Trial Court Properly Took Note Of Attorney Killino's Inconsistent Position Concerning A Referral Fee Owed In The *Jordan* Matter Taken In Litigation Involving The Dissolution Of The Woloshin & Killino Law Firm

Unlike the expert report of attorney Smalley filed in another case, which never became part of the trial court record in this case, attorney Giddings did properly file of record in this case in connection with the summary judgment

motions copies of letters that attorneys for both Woloshin and Killino had filed with the trial court in separate litigation over the dissolution of the Woloshin & Killino law firm demonstrating that Killino in fact had acknowledged in that context the obligation to pay a one–third referral fee in the *Jordan* case to either Giddings, intervenor Thomas, or some combination of Giddings and Thomas. R.143–44, 162–64.

Those acknowledgements were properly considered by the trial court in this case because they constituted admissions against interest. If Killino was not obligated to pay a one–third referral fee from the attorneys' fees recovered in the *Jordan* case, then both Woloshin and Killino would have individually recovered more attorneys' fees in their former law firm's dissolution case. Thus, the representations to the trial judge in the law firm dissolution case by the attorneys for both Woloshin and Killino that Killino owed such a referral fee represented a fact that the trial judge in this case could properly take into consideration.

Killino attempts to argue in his Brief for Appellant (at page 27) that the inconsistent positions he has taken regarding the obligation to pay a referral fee itself suffices to give rise to a genuine issue of material fact requiring a trial. In Killino's view, only if he affirmatively expressed verbal agreement with his continuing obligation to pay a referral fee to Giddings would Killino continue to have that obligation after departing with the *Jordan* case from the Woloshin & Killino law firm. What Killino's argument improperly continues to overlook, however, is that his mere conduct in retaining the *Jordan* case for himself, with

knowledge of the corresponding obligation to pay a referral fee to Giddings, after the Woloshin & Killino law firm dissolved sufficed to constitute an agreement to pay that referral fee. If Killino did not wish to assume the obligation to pay that referral fee to Giddings, Killino could have and should have obtained other counsel to handle the *Jordan* case. That course of action, however, would have been irrational, since Killino would simultaneously have deprived himself of the even larger fee that he has earned as a result of retaining and continuing to work on the *Jordan* case.

In sum, the trial court did not abuse its discretion or commit an error of law in observing that Killino's denial of any obligation to pay a referral fee relating to the *Jordan* case was inconsistent with the representations of Killino's and Woloshin's attorneys to the trial court in the litigation over dissolution of their former law firm.

D. Killino's Email To Giddings' Paralegal About The *Jordan* Case Stating That "I Will Of Course Honor The Appropriate Referral" Provides Further Support For The Trial Court's Grant Of Summary Judgment

Seeking to squander any remaining credibility, Killino argues in his appellate brief that an email that he wrote to attorney Giddings' paralegal on the subject of the *Jordan* case in which Killino states that "I will of course honor the appropriate referral" (R.141) was not intended to refer to the *Jordan* case but rather pertained only to referrals that may occur in the future.

A careful reading of Killino's email, whose text appears on page 28 of Killino's Brief for Appellant, reveals Killino's proposed understanding to be absolutely without merit. The email from attorney Giddings' paralegal stated:

> Chris [Giddings] wanted me to drop you a quick line to see what offers were made on the Jordan case. Also, he was wondering who referred the Jordan case to you, himself or Leno [Thomas]?

R.141.

In response, Killino sent the following email to Giddings' paralegal:

> Jordan won't settle until next year. No formal offers will be made until my expert reports are complete. I expect them to be complete by February. I will have to check my file about the referral.
>
> In the future, please note in your emails to me that [L]eno is not involved in the referral so there will be no confusion. I will of course honor the appropriate referral.

R.141.

The final sentence of Killino's email in response — stating that "I will of course honor the appropriate referral" — could only be referring to the *Jordan* case, because in the preceding sentence of that email, Killino provided instructions on how Giddings could avoid any uncertainty about who was making any future referral. Accordingly, the question of who had made the "appropriate" referral could only be referring to the *Jordan* matter. Thus, the final sentence of Killino's email can only be understood as saying that Killino intends to honor the obligation to pay the previously agreed upon one–third referral to Giddings in the *Jordan* matter.

As explained above, the trial court rejected Leno Thomas's claim to any portion of the referral fee in the *Jordan* matter, and thus the "appropriate" referral

that Killino has agreed to honor necessarily must refer to the obligation to pay a one–third referral fee to Giddings.

E. The Trial Court Properly Relied On Course of Dealings Evidence In This Breach Of Contract Suit

Killino next criticizes the trial court for relying on so–called course of dealings evidence whereby, in the case of another referral from Giddings that Killino took with him after the Woloshin & Killino law firm dissolved, Killino paid to Giddings one–third of the attorneys' fee recovered in that case. Straining credulity, Killino argues in his Brief for Appellant that the referral fee was paid in the other case "gratuitously to induce future referrals from Giddings." Brief for Appellant at 30.

Under Pennsylvania law, course of dealings evidence is properly considered in a breach of contract lawsuit to demonstrate how the parties have interpreted their prior contractual obligations to shed light on how the parties' current contractual obligations should be understood. *See Boyle* v. *Steiman*, 631 A.2d 1025, 1033 (Pa. Super. Ct. 1993) ("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 dealings between the parties in order to ascertain their intent."). As a result, the trial court neither erred nor abused its discretion in considering course of dealings evidence between the parties in ruling on the parties' cross–motions for summary judgment.

F. The Trial Court Did Not Make A "Radical" Interpretation Of Pa. R.P.C. 1.5 In Granting Summary Judgment In Favor Of Giddings

In a section of his Brief for Appellant that fails to contain any case law applying or interpreting Pennsylvania Rule of Professional Conduct 1.5, Killino asserts that the trial court somehow violated Pa. R.P.C. 1.5 by enforcing the referral agreement between Giddings and Killino because the client, Solomon Jordan, supposedly now objects to the sharing of any attorneys' fees with Giddings. Killino's failure to cite or analyze any relevant authority should cause the Court to conclude that Killino has waived this issue. *See Harris* v. *Toys "R" Us–Penn, Inc.*, 880 A.2d 1270, 1279 (Pa. Super. Ct. 2005) ("We have repeatedly held that failure to develop an argument with citation to, and analysis of, relevant authority waives that issue on review.").

Moreover, Killino's argument conveniently but improperly omits that before Giddings referred the *Jordan* case to Woloshin & Killino, Solomon Jordan signed a fee agreement contract with Giddings entitling Giddings to 40 percent of any recovery as his fee for serving as counsel for plaintiffs in the *Jordan* case. R.148. The total attorneys' fee that Killino recovered for handling the *Jordan* case (before that fee was further divided among counsel) was approximately 36 percent of the total amount recovered in settlement. Thus, Giddings' referral of the *Jordan* case to Killino not only likely increased the total settlement amount recovered, but the referral also resulted in a slightly lower attorneys' fee being charged to the clients in the *Jordan* case.

According to Killino, the statement in R.P.C. 1.5(e)(1) that "[a] lawyer shall not divide a fee for legal services with another lawyer not in the same firm unless the client is advised of and does not object to the participation of all the lawyers involved" somehow prohibits the payment of a referral fee from Killino to Giddings. Once again, Killino's Brief for Appellant fails to cite any case law or other authority in support of the argument being advanced.

Solomon Jordan agreed to the sharing of legal fees with Giddings when Giddings referred the *Jordan* case to the Woloshin & Killino law firm. Rule 1.5 does not provide the client with the ability to invalidate a referral agreement after–the–fact once recovery is achieved. Moreover, the same total attorneys' fee will be paid by the clients in the *Jordan* case regardless of whether Killino's obligation to pay a referral fee to Giddings is enforced. In other words, Solomon Jordan's recovery does not increase if Giddings receives no referral fee. Rather, all that would happen is the amount of attorneys' fees that Killino would retain would increase. Killino's Brief for Appellant offers no coherent reason why R.P.C. 1.5 should be construed as Killino suggests, to allow a client to object to a sharing of fees that the client has previously approved and that, if disallowed, would not increase the client's own recovery in any way.

Accordingly, the trial court neither abused its discretion nor committed an error of law in ruling that enforcement of the referral agreement, including its fee–sharing provision, would not violate R.P.C. 1.5.

G. The Trial Court Properly Held Killino Personally Liable To Pay The Disputed Referral Fee Because He Individually Orchestrated The Refusal To Pay That Referral Fee

This Court has recognized that personal liability may properly be imposed where an individual directly participates in a corporation's tortious activity. *See Francis J. Bernhardt, III, P.C.* v. *Needleman*, 705 A.2d 875 (Pa. Super. Ct. 1997). This Court's holding in the *Bernhardt* case, which likewise involved an attorney's personal liability for refusing to pay a referral fee to referring counsel, is directly on point here.

As the Supreme Court of Pennsylvania explained in *Wicks* v. *Milzoco Builders, Inc.*, 503 Pa. 614, 621, 470 A.2d 86, 90 (1983):

> Under the participation theory, the court imposes liability on the individual as an actor rather than as an owner. Such liability is not predicated on a finding that the corporation is a sham and a mere alter ego of the individual corporate officer. Instead, liability attaches where the record establishes the individual's participation in the tortious activity.

In *Bernhardt*, this Court observed that "[t]he record adequately demonstrates S. Allen Needleman's wrongful conduct." *See* 705 A.2d at 878. The same is true of Killino's wrongful conduct here.

Moreover, the trial court's decision to impose personal liability on Killino was necessary to avoid any further attempts by Killino to thwart recovery of the referral fee owing to Giddings. In the absence of personal liability, Killino could and likely would pay out the proceeds of that referral fee from his law firm's treasury to himself personally, after which Killino could terminate his current law firm's corporate existence, leaving Giddings with no ability to recover or having to

undertake an expensive and time–consuming fraudulent conveyance action against Killino personally.

If Killino does not take such improper steps to impede collection of the judgment, then Giddings will have no occasion to seek to recover the fee from Killino personally. In other words, the referral fee owing to Giddings is merely a small portion of the larger fee that Killino recovered for his work on the *Jordan* case. Therefore, Killino's law firm should have the funds on hand to pay the referral fee from the proceeds of the recovery in the *Jordan* case, and thus Giddings would have no reason to try and collect the fee from Killino personally.

In sum, the trial court properly ruled under the participation theory that Killino was personally liable to pay the improperly withheld referral fee to Giddings. Nevertheless, Giddings will have no occasion to seek to recover that referral fee from Killino personally unless Killino improperly pays out the portion of that fee owed to Giddings to Killino himself or to others in order to improperly further impede recovery of the referral fee due and owing to Giddings.

H. The Trial Court's Entry Of Summary Judgment In Favor Of Giddings Renders Moot Killino's Appeal From The Trial Court's Interpleader Order

Lastly, Killino's Brief for Appellant requests reversal of the trial court's entry of an interim order to pay the disputed referral fee into the registry of the trial court. Now that the trial court has entered a judgment in favor of Giddings, the interpleader order is moot. Giddings is now entitled to recover on the judgment via

execution proceedings, unless Killino posts appropriate security to postpone execution pending appeal. If appropriate security is posted, then Giddings will be entitled to recover the judgment by executing on that security once the judgment is affirmed. In either event, the period of time in which the interpleader order was relevant has passed.

This Court has defined "moot" as follows: "An issue before a court is moot if in ruling upon the issue the court cannot enter an order that has any legal force or effect." *Deutsche Bank Nat. Co.* v. *Butler*, 868 A.2d 574, 577 (Pa. Super. Ct. 2005) (internal quotations omitted); *see also Commonwealth* v. *Nava*, 966 A.2d 630, 633 (Pa. Super. Ct. 2009) (same). Because Killino's challenge to the trial court's interpleader order is now moot, this Court should dismiss this aspect of Killino's appeal.

V. CONCLUSION

Killino's Brief for Appellant is long on invective but preciously short on substance or merit. The trial court properly ruled that an attorney cannot avoid a preexisting obligation to pay a referral fee to a referring attorney on a personal injury suit merely by dissolving the law firm that received the referral and then taking the case to the attorney's new solo practice. Because Killino's challenges to the trial court's entry of summary judgment in favor of Giddings lack merit, this Court should affirm the trial court's judgment.

Respectfully submitted,

Dated: April 13, 2012

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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving two true and correct copies of the foregoing document upon the person and in the manner indicated below, which service satisfies the requirements of Pa. R. App. P. 121:

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