

**STATE OF MICHIGAN
IN THE SUPREME COURT**

LAW OFFICES OF JEFFREY SHERBOW, P.C., Supreme Court No. 159450

Plaintiff-Appellant/
Cross-Appellee,

Court of Appeals No. 338997

v

Oakland County Circuit Court
No. 15-147488-CB

FIEGER & FIEGER, P.C. d/b/a FIEGER,
FIEGER, KINNEY & HARRINGTON, P.C.,

Defendant-Appellee/
Cross-Appellant.

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Attorney for Plaintiff-Appellant/
Cross-Appellee
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greg@jankslaw.com

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APPENDIX TO
PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

1b	8/15/12 Letter from Mr. Danzig to Mr. Sherbow	30b	4/15/15 Letter from Mr. Feiger to Mr. Sherbow
3b	1/2/14 Letter from Mr. Danzig to Mr. Sherbow	32b	4/17/15 Letter from Mr. Sherbow to Mr. Feiger
4b	7/26/12 Estate of Rice Retention Agreement	34b	3/31/15 "Client Letters"
7b	10/15/01 Memorandum	38b	6/16/15 "Client Affidavits"
8b	1/17/17 Order	46b	7/1/16 Plaintiff's Motion for Partial Summary Disposition
10b	8/30/11 Letter from Mr. Sherbow to Ms. Hatchett	60b	8/17/16 Opinion & Order
13b	Mr. Sherbow's Notes	71b	Plaintiff's Proposed Form of Verdict
20b	Danzig Intake Sheet - Dorothy Dixon	74b	Appellate Docket Sheet
21b	7/26/12 Mervie Rice Retention Agreement	82b	Order Granting Leave to Appeal
24b	8/6/12 Phillip Hill Retention Agreement	83b	Order Holding Application for Leave to Appeal in Abeyance
27b	2/20/15 Letter from Mr. Sherbow to Mr. Fieger	84b	<i>Metro Services Organization v City of Detroit</i> , unpublished per curiam opinion of the Court of Appeals, rel'd 2/1/11 (Nos. 292052, 292588)
28b	4/7/15 Notice of Attorney Lien		
29b	3/31/15 Letter from Mr. Feiger to Mr. Sherbow		

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PIEGER, BEGER, KENNEY, GIROUX & DANZIG
A PROFESSIONAL CORPORATION

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MI, FL AND AZ BAR
JEREMIAH JOSEPH KENNEY
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Of Counsel
BARRY FAYNE
JACK BEAM

August 15, 2012

Jeffrey S. Sherbow, Esq.
Sherbow & Associates, PLC
2446 Orchard Lake Road
Sylvan Lake, MI 48320

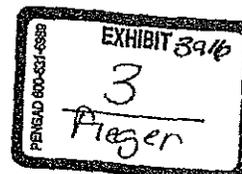
Re: *Estate of Charles Rice v. Complete General Construction, et al*
Our File No. 12868
Dorothy Dixon v. Complete General Construction, et al
Our File No. 12869
Phillip Hill v. Complete General Construction, et al
Our File No. 12887

Dear Mr. Sherbow:

Kindly be advised that we have accepted the above-captioned matters on referral from you and your office and are hereby acknowledging your one-third referral fee in these matters. A separate letter acknowledging the referral fee on the Mervie Rice matter has previously been sent to you under separate cover.

At this time, I have obtained consent and waiver from both Mervie Rice as well as Phillip Hill. I am awaiting the signature of Deon Rice on the Consent and Waiver for the claims on behalf of the Estate of Charles Rice as well as the Estate of Dorothy Dixon. As soon as I obtain Deon's acknowledgment on the waiver and consents, I will be all cleared to represent all parties in this matter.

At this time, I have spoken to counsel for the driver of Vehicle No. 1 that went through the barricade. It is his intent to join forces with us in our claim against the general contractor responsible for the construction site activities. It will be the testimony of his client that there was an opening in the barrels that allowed his client to drive through the barricades into this restricted area, thereby causing the subject accident. Let's hope that testimony stands up.



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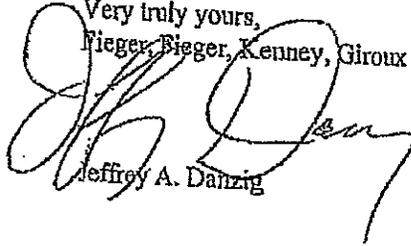
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FIEGER, FIEGER, KENNEY & GIROUX

Page Two

Should you have any questions or concerns whatsoever regarding these matters, please do not hesitate to contact me at your convenience.

Very truly yours,
Fieger, Fieger, Kenney, Giroux & Danzig, P.C.



Jeffrey A. Danzig

JAD/cjj

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1/2/14 Letter from Mr. Danzig to Mr. Sherbow

**FIEGER, FIEGER,
KENNEY, GIROUX, DANZIG & HARRINGTON**
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HEATHER A. GLAZER

SINA G. PATRI

MI AND CO BAR

MATTHEW D. KLAKULAK

Of Counsel

BARRY FAYNE

JACK BEAM

JANUARY 2, 2014

JEFFREY S. SHERBOW, ESQ.
2446 ORCHARD LAKE RD.
SYLVAN LAKE, MI 48320

TOM INTILI, ESQ.
INTILI & GROVES, LPA
130 W. SECOND ST., STE. 310
DAYTON, OH 45402

RE: LINDEN/RICE V COMPLETE GENERAL CONSTRUCTION, INC.
OUR FILE #'S 12869, 12887, 12868, 12847

GENTLEMEN:

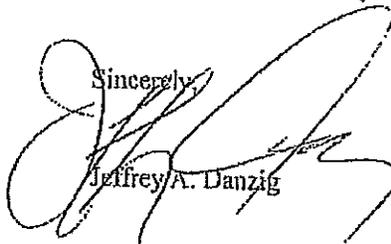
I just thought that given the new year, I would memorialize our mutual understanding of the fee relationship among us. Following our discussion in November of 2013, we agreed to a split of the attorney fees generated, as follows:

- Fieger Law Firm - 60% of net fees generated;
- Intili & Groves - 20% of net fees generated;
- Sherbow referral - 20% of net fees generated.

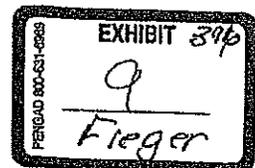
Geoff Fieger approved on 11/11/13 and as such, I am formally notifying you both of our mutual understanding and agreement. Facilitative Mediation is fast approaching on 1/17/14 in Columbus, OH, at which time I am hoping that we can resolve all claims.

Thank you for your attention and continued assistance and cooperation.

Sincerely,



Jeffrey A. Danzig



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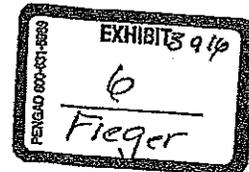
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SIMA G. PATEL
MI AND CO BAR
MATTHEW D. KLAROLAK
Of Counsel
BARRY FLAYNE
JACK BEAM

FILE NO. _____

CONTRACT FOR LEGAL REPRESENTATION

IT IS HEREBY AGREED, by and between DION RICE, ~~SON~~ on behalf
of Charles Rice, Dec. ("Client(s)") and FIEGER,
FIEGER, KENNEY, GIROUX & DANZIG, P.C. (the "Firm") as follows:

- The Firm is retained by the Client(s) for legal representation in connection with a claim for AUTO and/or construction site negligence against
any and all persons, firms, businesses or corp.s
determined responsible for the accident of 7/15/12
- The Firm agrees to represent the Client(s) in said matter. This Retainer does not include any Appeals that may be necessary. If an Appeal is necessary then the Client must retain the Firm on a separate basis and/or pay Quantum Meruit for the legal services performed on Appeal.
- As a legal fee for this representation, the Firm shall receive an amount equal to one-third (1/3) of the net of any recovery. The net of any recovery, as defined by the Michigan Supreme Court, is equal to the total amount of any sum recovered, including the costs taxed and any interest included, whether by settlement or judgment or otherwise, less all disbursements properly chargeable to the enforcement of the claim or prosecution of the action.
- Apart from the fees to which reference is made in Paragraph 3 herein, it is agreed that the Client(s) is ultimately responsible for payment of the necessary disbursements for enforcement of the claim or prosecution of an action as these disbursements are incurred by the Firm. These disbursements may include, but are not limited to, court filing fees, subpoena fees, fees for private investigators, accountants, or other professionals, expert witnesses, court reporter transcripts, telephone charges, travel expenses for attorneys or investigators, copying charges and any other disbursements which the Firm deems necessary for the proper pursuit of the case. It is also agreed that, to the extent such disbursements



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are made by the Firm on behalf of the client(s), the client(s) will be responsible for interest on such disbursements at the rate of 7% per annum from the proceeds of any monies secured on a client's behalf by the Firm.

5. In the event there is no recovery, the Client(s) shall pay no legal fee. However, the Client(s) may be responsible for paying the disbursements referred to in Paragraph 4 to the extent required by Michigan law.

6. The Firm is hereby specifically authorized and empowered by the Client(s) to endorse the name of the Client(s) to any checks, drafts, money orders, or other negotiable instruments which are received by the Firm on behalf of the Client(s) for the purpose of negotiating the same so that the proceeds may be placed in a trust account and disbursed in accordance with this Contract.

7. It is acknowledged by the Client(s) that the Firm has advised the Client(s) that attorneys may be employed under other fee arrangements than that indicated in this Contract for Legal Representation, such other arrangements including those involving fees computed on a rate per hour, or flat fees or per diem fees. The Client(s) specifically acknowledges that by agreeing to the contingency fee, the Firm may receive fees which are greater than would be the case if one of the other fee arrangements indicated in this paragraph were used. However, the Client(s) have determined that such a factor is acceptable to the Client(s) because the Client(s) understand that there is a risk that the Firm may receive no fees under the contingency fee arrangement or may receive less than if one of the other fee arrangements were used and because use of the contingency fee arrangement does not require that the Client(s) pay fees to the Firm in advance of services, at the time services are rendered, or prior to any recovery. Therefore, it is the affirmative election of the Client(s) to retain the Firm on the basis of a contingency fee arrangement because it is the belief of the Client(s) that it is in the best interest of the Client(s) to do so.

8. It is understood by the Client(s) that the Firm makes no promises or guarantees as to the outcome of the case or any aspect thereof. It is agreed by the Client(s) that the Firm may take whatever action the Firm, in its professional judgment, deems appropriate for the proper prosecution of this matter.

9. It is understood by the Client(s) that the Firm makes no promises or guarantees as to the tax consequences of any recovery in this case; further, it is understood that where a Litigant's recovery constitutes income, the Litigant's income may include the portion of the recovery paid to the Firm as a Contingent Fee.

10. It is understood by the Client(s) that this Contract refers only to the matter to which reference is made in Paragraph 1 and does not cover any other matter. If representation is required with respect to a matter other than that to which reference is made in Paragraph 1, a new and separate contract will be required. If a probate proceeding is required in connection with any matter referred to in Paragraph 1, said probate proceeding is considered to be a separate matter for which an additional fee will be applicable at the time of recovery.

11. In the event the Firm is discharged by the Client(s) without cause or in the event that the Firm terminates its services due to some occurrence which is not the fault of the Firm's, the contingency fee portion of this agreement will be held for naught and that the Firm will be entitled to a fee based on quantum meruit. It is specifically agreed by the Client(s) that the Firm shall have a lien against any sum recovered to the extent of said costs or expenses as indicated in Paragraph 4 herein which are incurred by

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the Firm, and that said lien is to be granted a preference, to the extent permitted by law, over any other liens or obligations which may be satisfied from said recovery. In the event the Firm is discharged by the Client(s), the client shall be allowed access to their file maintained in the office of FIEGER, FIEGER, KENNEY, GIROUX & DANZIG, P.C. Upon payment of costs incurred to date plus reasonable copying charges, the Client(s) shall be entitled to a copy of their file.

12. In the event the Firm of FIEGER, FIEGER, KENNEY, GIROUX & DANZIG, P.C. decides that this matter should be referred to outside counsel or another law firm, the plaintiff understands that the Firm of FIEGER, FIEGER, KENNEY, GIROUX & DANZIG, P.C. shall be entitled to a portion of any attorney fee that may be eventually received in this matter and consent to same.

13. In addition, it is specifically agreed to by the client(s) that FIEGER, FIEGER, KENNEY, GIROUX & DANZIG, P.C. shall have a lien against any sum covered to the extent of said costs, expenses and/or fees as indicated in paragraphs 4 and 11 herein, which are incurred by the Firm, and that such lien is to be granted a preference to the extent permitted by law, over any other liens or obligations which may be satisfied from said recovery.

ACKNOWLEDGEMENT OF DISCLOSURE REGARDING CLIENT LIEN OBLIGATIONS

14 It is understood and agreed that the Firm has advised that the Client(s) shall be responsible to satisfy any and all liens from the Client(s) net share of the settlement proceeds, including, but not necessarily limited to, insurance lien(s), Workers Compensation lien(s), Medicare lien(s), Medicaid lien(s), and any and all other lien(s) applicable to this case.

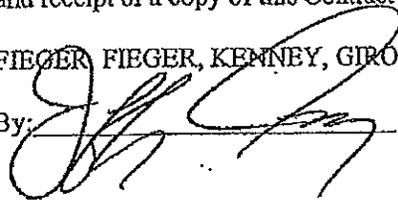
15. It is understood and agreed that if the Client(s) are Medicare eligible, or become Medicare eligible, during the pendency of the lawsuit, the Medicare Recovery Act may require the Client(s) to set up qualified accounts known as a Medicare Set Aside (MSA) accounts to satisfy future medical expenses which would otherwise be paid by Medicare.

16. It is understood and agreed that the Firm has advised the client(s) that failure to comply with all applicable Federal and State laws and Statutes pertaining to applicable liens, including Medicare and Medicaid liens, could result in substantial penalties, including payment of past due liens with interest and costs, as well as a potential forfeiture of future Medicare and/or Medicaid benefits.

By signature to this Contract, agreement is acknowledged by the Client(s) to all of its provisions and receipt of a copy of this Contract is acknowledged by the Client(s).

FIEGER, FIEGER, KENNEY, GIROUX & DANZIG, P.C.

By:



 Dion Rice

 7/26/12
Dated

_____ Dated

_____ Dated

Approved by Geoffrey N. Fieger: _____

_____ Dated

Rev. Mar 2011
wpdata/office/office forms/contract 3-9-11.standard

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MEMORANDUM

TO: All Attorneys
FROM: GNF
RE: REFERRALS
DATE: OCTOBER 15, 2001

I have repeatedly over the years told all Attorneys that no one may accept a referral from another attorney, friend, former friend, former associate, etc., without bringing the case to me to determine if we want to take the case and invest money in it. Apparently, this is continually being ignored. As a result, I am handling it another way.... if you don't have a signed document by me agreeing to accept the referral, the Firm will not pay you or the referring attorney.

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

LAW OFFICES OF JEFFREY SHERBOW, PC,
Plaintiff,

v.

Case No. 15-147488-CB
Hon. James M. Alexander

FIEGER & FIEGER, PC,
Defendant.

_____ /

ORDER

The Court, sua sponte, orders as follows:

In its Dec 16, 2015 Opinion and Order re: Summary Disposition, this Court specifically found that the Michigan law and the Michigan Rules of Professional Conduct (not the Ohio Rules) apply to this case. Defendant then filed an Application for Leave to Appeal this decision to the Court of Appeals, which was denied. [Docket No. 330104 (May 20, 2016)]. As such, the Court will not allow any testimony or discussion of the Ohio Rules of Professional Conduct during Trial. In fact, no witness will be allowed to testify as to opinions about the law that governs this case. The law will be presented by the Court to the Jury in the form of Jury Instructions.

Geoffrey Feiger is listed on the pleadings as an Attorney for the Defendant. Pursuant to MRPC 3.7(a)(1), “[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where: (1) the testimony related to an uncontested issue.”¹ As a result,

1 “Michigan courts have observed that the purpose of the rule is to prevent any problems that would arise from a lawyer’s having to argue the credibility and the effect of his or her own testimony, [and] to prevent prejudice to the

should Mr. Feiger continue to remain counsel on this case, he may only offer witness testimony as to **uncontested issues**. This restriction shall be waived if Mr. Feiger withdraws as a counsel of record.

On or before February 6, 2017, the parties shall provide proposed voir dire questions to the Court. The Court will conduct voir dire. MCR 2.511(C).

IT IS SO ORDERED.

January 17, 2017
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge

opposing party that might arise therefrom.” People v Tesen, 276 Mich App 134, 143; 739 NW2d 689 (2007).

8/30/11 Letter from Mr. Sherbow to Ms. Hatchett

SHERBOW & ASSOCIATES, P.L.C.

Attorneys and Counselors at Law

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Sylvan Lake, Michigan 48320
248/481-9362 Fax 248/481-9406

www.sherbowlaw.com

Jeffrey S. Sherbow
Michael J. Sherbow

August 30, 2011

Jennifer Hatchett
Gratiot McDougall United Community
Development Corporation
7720 LaSalle Boulevard
Detroit, Mi 48206

RE: Gratiot McDougall United Community Development Corporation

Dear Ms. Hatchett:

It was an absolute pleasure meeting with you last week and we did receive your multiple page facsimile last evening relative to the articles of incorporation involving Urban Entity Group V, LLC., as well as the articles of incorporation of filing endorsement for Gratiot McDougall Homes, LLC.

Of significant interest to me was the operating agreement and its amendment.

Throughout the course of the operating agreement for Gratiot McDougall, LLC, there are references to 60% majority control to vote on all items. There was then an addendum wherein 51% was all that was required to vote, pass and execute any corporate direction.

Of course it is interesting that your group, if you will, the Gratiot McDougall United Community Development Corporation, has the 51%. I also find it interesting that in most of the documents and even in some of the other information that was provided with the complaint, it indicates that Jennifer Hatchett is apparently a managing partner. I do see that Peter Barclae is actually doing all of the work.

I also had an opportunity to review the finance documents relative to the December 2010, documents provided by the accountant from Clio, Michigan. It is interesting that he indicates that he is not independent with regards to the financial statement and he has not audited or reviewed the financial statements and does not express an opinion or give assurances as to whether the financial statements are in accordance with the income tax basis of accounting.

Of other interest is a letter attached to the complaint by Mr. Barclae basically breaking down the value of these homes if you're building eighteen homes and your construction loans total \$3,239,491.00, the construction costs on paper come down to almost \$180,000.00. Of course there is another document that intimates the cost of each home is \$145,000.00, but that doesn't take into

Sherbow & Associates, PLC
August 30, 2011

consideration the extra \$630,000.00 in other expenses of which I find difficult to comprehend in the documents provided.

There apparently was a commitment from the City of Detroit for HUD money in the amount of 1.4 million dollars and then a two million dollar commitment from Charter Bank to total the 3.4 million dollars for construction costs.

What is the current status of the construction? Whether or not the units are sold really wasn't an issue. Was the money loaned? Was the money borrowed? How was the money distributed? And where did it go? How close to conclusion of construction of the Gratiot McDougall project are you?

I would like to schedule one more meeting with you and your principals to go over by way of a detailed analysis the documents provided. I have not as of yet made contact with the attorney representing you in that lawsuit for fear of upsetting the apple cart. If a dispute arises as between your company and Mr. Barclae's company, which came together for this joint venture, in the agreement there is a reference to the appointment of an arbitrator to make a binding decision without the need of going to litigation.

I do have a direction in my mind that I would like to take which would include a demand for an accounting as to all monies received from day one on the project. Clearly if there has been some construction there have been some monies paid to somebody. I note on one of the financial statements that there is allegedly money paid to or owed to Cymba. Now that Mr. Barclae's company and is that profit? Is that management fees? Is it for supplies provided? We don't know.

On the other hand, what we also have to discuss is a fee agreement between your company and this office. There apparently is a significant amount of leg work that yet has to be done and a determination as to whether or not we bifurcate the representation between your group and Mr. Barclae's group. There maybe a conflict for one lawyer representing the interests of Cymba and both of the Gratiot McDougall's. The LLC may have a different interest than your participating organization.

There might be a basis for some action or a claim for arbitration as between your 51% group verses Cymba or the LLC. This would depend on really what we find out through an analysis of the finances.

I do believe that it would be very important for us to hire an accountant or someone with that expertise to come in and actually inspect, visit, review, or otherwise comprehend the finances of the entire organization. I would think that had the project gone well, everyone would have made some money, but due to the hard economic times, there is a question as to whether or not any money has been siphoned off. There is corporate liability if in fact the Charter One Bank funds were disbursed and have not been repaid. Again you are a 51% shareholder, if you will, and your non-profit at significant risk if Charter One proceeds to judgment on its mortgage/loan.

Sherbow & Associates, PLC
August 30, 2011

I would recommend that if you can get your troops together, that we meet at my office any evening or afternoon depending on your schedules. I am located just outside of Pontiac, off of Telegraph Road.

I think this would have to be the next step as well as reaching some mutually beneficial arrangement as to how to handle fees and expenses.

Very truly yours,

Jeffrey S. Sherbow

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Jacobe, the aunt fathered to State Farm

Donohy

1/23/54

Charles

2/26/47

Dion

11/1/82

(no siblings)

Mr. Sherbow
Will
(insurer)

Doc. in
Home
Retired
SSD

Charles
31560 Freedom Rd. Apt 107
Farmington Hills, MI
48336

(Phyllis Thorpe) - might be title holder
of VINE PARK address

Farmers (191021702)
Ins. (08-04-2011)
Charles

2003 Cadillac
1G4ET63W13A129840

Q

POA - Donnelly

Dayton (2)

Montgomery County, OH
12/16/23 75

OK 47
S Board

Sauls

Mission Valley Ides
Dayton

Cassandra Fuller

586-246-7500

MMG

Arthur Stewart Sanders

SAST

Dion 978-7462

1416 Virginia Park

~~Dorothy~~ Duchson

Mervie

Mervie Rice

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Dorothy (1-205-516-6554) - (Alabama)

Donna (1-313-975-7462)

Hand back
Mama back
was being -
mother says
yesterday
- Machinery

feeling -

- actually -
Mrs. Wagon

- application for car
insurance
K

450 gk
K

GA

a

Danzig Intake Sheet - Dorothy Dixon

FIEGER, FIEGER, KENNEY & JOHNSON INTAKE SHEET-- AUTO NEG.

Date of Call: 7/25/12

Date of Incident: 7/13/12

Caller Name & Address: Guardian
810 N RICE (CONSERVATOR)
1416 Virginia Park
DETROIT MI 48206
Telephone: 313-978-7462

Injured Name & Address: DOROTHY DIXON LIP
Type of Accident: AUTO NEG

Injury: COMA, Multiple GCS, Scapulae, internal injuries
Facts: _____

Target Defendant (Owner/Driver): ODOT
Address of Defendant: Charles Rice
Location of Accident: I-75 SB mile marker 47, W. CAYTON, OH
Cause of Accident: barrels not blocking center lane
P/R & P/D: OHIO STATE PD Witnesses: _____

Assigned To: JAD.
 Referred To: _____ Date Form Sent: _____
 Rejected, because _____

Receiving Attorney: Please fill out and fax back within 5 days

Date Referral Form Received: _____
Date of follow up call to client: _____
Date and Nature of Contact: _____
Additional Pertinent Information: _____

Referral Response:
 Accept File and Acknowledge Referral Fee
 Reject File because _____

Signed By: _____
Dated On: _____

*NO REPT
NECESSARY*

12869

EG pg. 2
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A PROFESSIONAL CORPORATION

BERNARD J. FIEGER 1922-1988
MI AND NY BAR
GEOFFREY NELS FIEGER
MI FL AND AZ BAR
JEREMIAH JOSEPH KENNEY
MI AND OH BAR 0049-20051
ROBERT M. GIROUX
JEFFREY A. DANZIG

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JONATHAN R. MARCO
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E. JASON BLANKENSHIP
BRIAN R. GARVES
CAROLINE M. WHITTEMORE
JAMES S. CRAIG
MARTIN T. SHEPHERD
Appellate Department
HEATHER A. GLAZER
SIMA G. PATEL
MI AND CO BAR
MATTHEW D. KLARULAK
Of Counsel
BARRY WAYNE
JACK BEAM

FILE NO. 12847

CONTRACT FOR LEGAL REPRESENTATION

IT IS HEREBY AGREED, by and between MERVIE RICE
("Client(s)") and FIEGER,

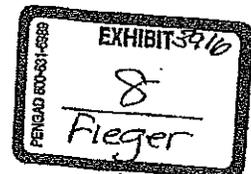
FIEGER, KENNEY, GIROUX & DANZIG, P.C. (the "Firm") as follows:

1. The Firm is retained by the Client(s) for legal representation in connection with a claim for AUTO and/or construction site negligence against any and all persons, firms, businesses or corp.s determined responsible for the accident of 7/13/12

2. The Firm agrees to represent the Client(s) in said matter. This Retainer does not include any Appeals that may be necessary. If an Appeal is necessary then the Client must retain the Firm on a separate basis and/or pay Quantum Meruit for the legal services performed on Appeal.

3. As a legal fee for this representation, the Firm shall receive an amount equal to one-third (1/3) of the net of any recovery. The net of any recovery, as defined by the Michigan Supreme Court, is equal to the total amount of any sum recovered, including the costs taxed and any interest included, whether by settlement or judgment or otherwise, less all disbursements properly chargeable to the enforcement of the claim or prosecution of the action.

4. Apart from the fees to which reference is made in Paragraph 3 herein, it is agreed that the Client(s) is ultimately responsible for payment of the necessary disbursements for enforcement of the claim or prosecution of an action as these disbursements are incurred by the Firm. These disbursements may include, but are not limited to, court filing fees, subpoena fees, fees for private investigators, accountants, or other professionals, expert witnesses, court reporter transcripts, telephone charges, travel expenses for attorneys or investigators, copying charges and any other disbursements which the Firm deems necessary for the proper pursuit of the case. It is also agreed that, to the extent such disbursements



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are made by the Firm on behalf of the client(s), the client(s) will be responsible for interest on such disbursements at the rate of 7% per annum from the proceeds of any monies secured on a client's behalf by the Firm.

5. In the event there is no recovery, the Client(s) shall pay no legal fee. However, the Client(s) may be responsible for paying the disbursements referred to in Paragraph 4 to the extent required by Michigan law.

6. The Firm is hereby specifically authorized and empowered by the Client(s) to endorse the name of the Client(s) to any checks, drafts, money orders, or other negotiable instruments which are received by the Firm on behalf of the Client(s) for the purpose of negotiating the same so that the proceeds may be placed in a trust account and disbursed in accordance with this Contract.

7. It is acknowledged by the Client(s) that the Firm has advised the Client(s) that attorneys may be employed under other fee arrangements than that indicated in this Contract for Legal Representation, such other arrangements including those involving fees computed on a rate per hour, or flat fees or per diem fees. The Client(s) specifically acknowledges that by agreeing to the contingency fee, the Firm may receive fees which are greater than would be the case if one of the other fee arrangements indicated in this paragraph were used. However, the Client(s) have determined that such a factor is acceptable to the Client(s) because the Client(s) understand that there is a risk that the Firm may receive no fees under the contingency fee arrangement or may receive less than if one of the other fee arrangements were used and because use of the contingency fee arrangement does not require that the Client(s) pay fees to the Firm in advance of services, at the time services are rendered, or prior to any recovery. Therefore, it is the affirmative election of the Client(s) to retain the Firm on the basis of a contingency fee arrangement because it is the belief of the Client(s) that it is in the best interest of the Client(s) to do so.

8. It is understood by the Client(s) that the Firm makes no promises or guarantees as to the outcome of the case or any aspect thereof. It is agreed by the Client(s) that the Firm may take whatever action the Firm, in its professional judgment, deems appropriate for the proper prosecution of this matter.

9. It is understood by the Client(s) that the Firm makes no promises or guarantees as to the tax consequences of any recovery in this case; further, it is understood that where a Litigant's recovery constitutes income, the Litigant's income may include the portion of the recovery paid to the Firm as a Contingent Fee.

10. It is understood by the Client(s) that this Contract refers only to the matter to which reference is made in Paragraph 1 and does not cover any other matter. If representation is required with respect to a matter other than that to which reference is made in Paragraph 1, a new and separate contract will be required. If a probate proceeding is required in connection with any matter referred to in Paragraph 1, said probate proceeding is considered to be a separate matter for which an additional fee will be applicable at the time of recovery.

11. In the event the Firm is discharged by the Client(s) without cause or in the event that the Firm terminates its services due to some occurrence which is not the fault of the Firm's, the contingency fee portion of this agreement will be held for naught and that the Firm will be entitled to a fee based on quantum meruit. It is specifically agreed by the Client(s) that the Firm shall have a lien against any sum recovered to the extent of said costs or expenses as indicated in Paragraph 4 herein which are incurred by

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the Firm, and that said lien is to be granted a preference, to the extent permitted by law, over any other liens or obligations which may be satisfied from said recovery. In the event the Firm is discharged by the Client(s), the client shall be allowed access to their file maintained in the office of FIEGER, FIEGER, KENNEY, GIROUX & DANZIG, P.C. Upon payment of costs incurred to date plus reasonable copying charges, the Client(s) shall be entitled to a copy of their file.

12. In the event the Firm of FIEGER, FIEGER, KENNEY, GIROUX & DANZIG, P.C. decides that this matter should be referred to outside counsel or another law firm, the plaintiff understands that the Firm of FIEGER, FIEGER, KENNEY, GIROUX & DANZIG, P.C. shall be entitled to a portion of any attorney fee that may be eventually received in this matter and consent to same.

13. In addition, it is specifically agreed to by the client(s) that FIEGER, FIEGER, KENNEY, GIROUX & DANZIG, P.C. shall have a lien against any sum covered to the extent of said costs, expenses and/or fees as indicated in paragraphs 4 and 11 herein, which are incurred by the Firm, and that such lien is to be granted a preference to the extent permitted by law, over any other liens or obligations which may be satisfied from said recovery.

ACKNOWLEDGEMENT OF DISCLOSURE REGARDING CLIENT LIEN OBLIGATIONS

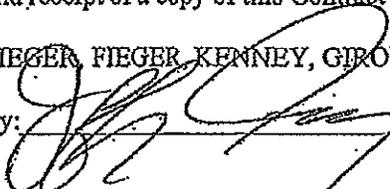
14 It is understood and agreed that the Firm has advised that the Client(s) shall be responsible to satisfy any and all liens from the Client(s) net share of the settlement proceeds, including, but not necessarily limited to, insurance lien(s), Workers Compensation lien(s), Medicare lien(s), Medicaid lien(s), and any and all other lien(s) applicable to this case.

15. It is understood and agreed that if the Client(s) are Medicare eligible, or become Medicare eligible, during the pendency of the lawsuit, the Medicare Recovery Act may require the Client(s) to set up qualified accounts known as a Medicare Set Aside (MSA) accounts to satisfy future medical expenses which would otherwise be paid by Medicare.

16. It is understood and agreed that the Firm has advised the client(s) that failure to comply with all applicable Federal and State laws and Statutes pertaining to applicable liens, including Medicare and Medicaid liens, could result in substantial penalties, including payment of past due liens with interest and costs, as well as a potential forfeiture of future Medicare and/or Medicaid benefits.

By signature to this Contract, agreement is acknowledged by the Client(s) to all of its provisions and receipt of a copy of this Contract is acknowledged by the Client(s).

FIEGER, FIEGER, KENNEY, GIROUX & DANZIG, P.C.

By:  Mervie Rice 7/26/2012
Dated

Dated

Dated

Approved by Geoffrey N. Fieger: _____
Dated

Rev. Mar 2011
wpdata/office/office forms/contract 3-9-11.standard

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FIEGER, FIEGER, KENNEY, GIROUX & DANZIG
A PROFESSIONAL CORPORATION

BERNARD J. FIEGER (4922-1989)
MI AND NY BAR
GEOFFREY NELS FIEGER
MI, FL AND AZ BAR
JEREMIAH JOSEPH KENNEY
MI AND OH BAR (0949-2005)
ROBERT M. GIROUX
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JAMES S. CRAIG
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Appellate Department
HEATHER A. GLAZER
SIMA G. PATEL
MI AND CO BAR
MATTHEW D. KLARULAK
Of Counsel
BARRY FAYNE
JACK BEAM

FILE NO. 12887

CONTRACT FOR LEGAL REPRESENTATION

IT IS HEREBY AGREED, by and between Phillip Hill

("Client(s)") and FIEGER,

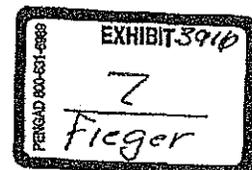
FIEGER, KENNEY, GIROUX & DANZIG, P.C. (the "Firm") as follows:

1. The Firm is retained by the Client(s) for legal representation in connection with a claim for MUSD and/or construction site negligence Appeals any and all persons, firms, businesses or corp's deemed responsible for the accident of 7/13/12

2. The Firm agrees to represent the Client(s) in said matter. This Retainer does not include any Appeals that may be necessary. If an Appeal is necessary then the Client must retain the Firm on a separate basis and/or pay Quantum Meruit for the legal services performed on Appeal.

3. As a legal fee for this representation, the Firm shall receive an amount equal to one-third (1/3) of the net of any recovery. The net of any recovery, as defined by the Michigan Supreme Court, is equal to the total amount of any sum recovered, including the costs taxed and any interest included, whether by settlement or judgment or otherwise, less all disbursements properly chargeable to the enforcement of the claim or prosecution of the action.

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8/6/12 Phillip Hill Retention Agreement

are made by the Firm on behalf of the client(s), the client(s) will be responsible for interest on such disbursements at the rate of 7% per annum from the proceeds of any monies secured on a client's behalf by the Firm.

5. In the event there is no recovery, the Client(s) shall pay no legal fee. However, the Client(s) may be responsible for paying the disbursements referred to in Paragraph 4 to the extent required by Michigan law.

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12. In the event the Firm of FIEGER, FIEGER, KENNEY, GIROUX & DANZIG, P.C. decides that this matter should be referred to outside counsel or another law firm, the plaintiff understands that the Firm of FIEGER, FIEGER, KENNEY, GIROUX & DANZIG, P.C. shall be entitled to a portion of any attorney fee that may be eventually received in this matter and consent to same.

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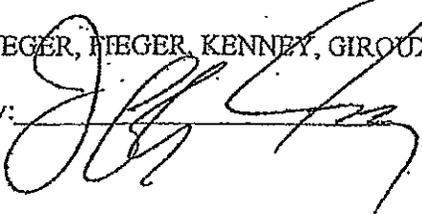
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By signature to this Contract, agreement is acknowledged by the Client(s) to all of its provisions and receipt of a copy of this Contract is acknowledged by the Client(s).

FIEGER, FIEGER, KENNEY, GIROUX & DANZIG, P.C.

By:



Phillip Hill

8-6-2012
Dated

Dated

Dated

Approved by Geoffrey N. Fieger:

Dated

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2/20/15 Letter from Mr. Sherbow to Mr. Fieger

LAW OFFICES OF JEFFREY S. SHERBOW, P.C.

Attorneys and Counselors at Law

2446 Orchard Lake Road
Sylvan Lake, Michigan 48320
248/481-9362 Fax 248/481-9406

www.sherbowlaw.com

Jeffrey S. Sherbow
jeff@Sherbowlaw.com

Law Offices of Matthew S. Wood, PLLC
msw@Sherbowlaw.com

February 20, 2015

Geoffrey N. Fieger, Esquire
Fieger Fieger Kenney Giroux & Harrington PC
19390 W 10 Mile Rd
Southfield, MI 48075

Tom Intili, Esquire
130 West Second Street
Suite 310
Dayton, Ohio 45402

RE: Linden/Rice v Complete General Construction, Inc.
Your File Nos. 12869, 12887, 12868, 12847

Dear Gentlemen:

As you are aware, when this very tragic accident first occurred in 2012, I was instrumental in referring these matters to Mr. Fieger's office. As a result, there was a series of correspondence confirming and memorializing the expectation of a referral fee as well as a division of the net fee being generated.

It is my understanding that you gentlemen were fabulously successful on the liability phase and you look forward to the upcoming damage phase at the trial court.

If I can be of any assistance with the family or in dealing with them, it would be my pleasure to do so.

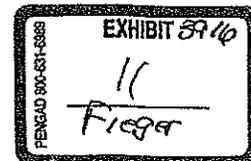
I would appreciate a status update and indication of your expectations at this time.

Thanking you in advance. I remain...

Very truly yours,

Jeffrey S. Sherbow

JSS\klo



IN THE COURT OF COMMON PLEAS
MONTGOMERY COUNTY, OHIO

HOWARD T. LINDEN, ESQ.,
Executor of Estate of Charles Rice, et al.

Plaintiffs,

Case No: 2012 CV 08206

-vs-

(Judge German)
(Magistrate Judge Fuchsman)

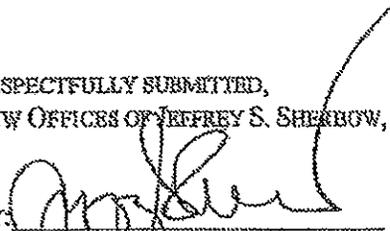
COMPLETE GENERAL CONSTRUCTION,

Defendant.

NOTICE OF ATTORNEY LIEN

Jeffrey S. Sherbow, by and through the Law Offices of Jeffrey S. Sherbow, PC, an attorney at law in the State of Michigan, Michigan State Bar Number P-25324, hereby files this Attorney's Lien and claims a lien in the amount of 20% of any and all attorney fees recovered on and against any and all settlements reached relative to Dorothy Dixon, et al v Complete General Construction, Inc., Case Number 2012 CV 08206 pursuant to agreement and correspondence as attached hereto. Said lien amount is in the amount of 20% of the net attorney fees generated arising from this litigation, whether by jury or settlement, in said action as referenced which was instituted for said clients in the Montgomery County Common Pleas Court, said matter being filed on or about November 19, 2012.

RESPECTFULLY SUBMITTED,
LAW OFFICES OF JEFFREY S. SHERBOW, PC

BY: 
JEFFREY S. SHERBOW (P-25324)
2446 ORCHARD LAKE ROAD
SYLVAN LAKE, MICHIGAN 48330
PHONE: 248/481-9362

DATED: APRIL 7, 2015

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TELEPHONE (248) 366-5555

FAX (248) 355-5148

WEBSITE: www.fiegerlaw.com

e-mail: info@fiegarlaw.com

BERNARD J. FIEGER 1928-1998
MI AND NY BAR

GROFFREY WALS FIEGER
MI FL AND AZ BAR

JEREMIAH JOSEPH KENNEDY
MI AND OH BAR 1946-2005

JAMES J. HARRINGTON, IV

BRIAN K. JOYNER
CAROLINE M. WHITTEMORE
JAMES S. ORAM
TERRY A. DAWEN
MICHAEL E. SOWINSKI
GARY N. FELTY, JR.
CHRISTIAN P. COLLIN
DAVID A. DYCHESKY
APRIL N. NASON
CAMERON T. PERALTA
MIGNON B. WILLIAMS
EVAN N. PARRAS
SHELTON M. ADELSON

Appellate Department
SIMA D. PATEL
MI AND CO BAR
MATTHEW D. KLARULAK
Of Counsel
BARRY FARRER
JACK BRAM
LEON J. WYSS

TAMMY J. REISE 1960-2000

March 31, 2015

Jeffrey Sherbow
2446 Orchard Lake Road
Sylvan Lake, MI 48320

Dear Mr. Sherbow:

A very troubling problem has arisen with the cases I have been handling in Dayton, Ohio.

I was originally informed by Mr. Danzig that you referred the cases to us. I have now confirmed that you did not, and that any representations to the contrary are untrue.

Indeed, my office was initially directly contacted by Ms. Rice within 4 days of the accident. You obviously didn't refer her case, she doesn't even know you. Neither does Mr. Hill, nor Ms. Dixon. Indeed, even Dion Rice told you at his father's funeral that he had contacted our offices.

What prompted you and Mr. Danzig to think that you could claim a referral fee? I remain,

Very truly yours,

[Signature]
Geoffrey Fieger

GNF/vjk



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FAX (248) 356-5148

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e-mail: info@fiegerlaw.com

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GEOFFREY NELS FIEGER
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JEREMIAH JOSEPH KENNY
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MI AND CO BAR
MATTHEW D. KOLAKOFSKI
Of Counsel
HARRY FAXINA
JACK BEAM
LEON J. WEISS
FRANK J. BERRY

April 15, 2015

Jeffrey S. Sherbow, Esquire
Law Offices of Jeffrey S. Sherbow, P.C.
2446 Orchard Lake Road
Sylvan Lake, Michigan 48320

Re: Estate of Charles Rice

Dear Mr. Sherbow:

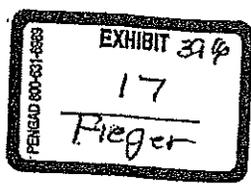
Several weeks ago, I wrote to you asking that you contact me to explain how you made an apparent "claim" that you had referred the four "Rice" cases to my office. You never contacted me.

Instead, today I learned that you had improperly filed a false "lien" with the Ohio court. I have been informed that your actions may be contrary to the Rules of Professional Responsibility in Ohio. They may also be contrary to the Rules in Michigan, and other pertinent statutes.

I possess overwhelming evidence that you never "referred" any of the Rice cases to our offices. In fact, the only "client" you ever met was Dion Rice, however, he is not a party, and he contacted our offices before you met him at his father's funeral.

You have never been admitted pro hac vice in the Ohio case. You have never been an attorney of record in the case. Your improper filing constitutes an improper attempt to interfere with the settlement.

In short, you have no claim against any of the proceeds of this case. You may think you have a contract claim against my firm, however, if you go down that road it will be extremely perilous for you.



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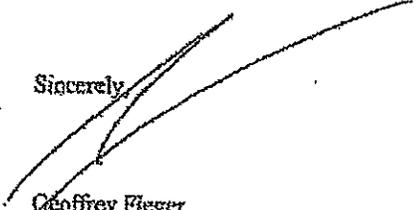
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PIEGER, FIEGER, KENNEY & HARRINGTON

Page Two

If you do not take immediate steps to withdraw your false, scandalous and improper pleading in the Ohio court, both myself, Mr. Intili, and my clients will take further action against you.

Sincerely,



Geoffrey Fieger

GNE/vjk

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4/17/15 Letter from Mr. Sherbow to Mr. Fieger

LAW OFFICES OF JEFFREY S. SHERBOW, P.C.

Attorneys and Counselors at Law

2446 Orchard Lake Road
Sylvan Lake, Michigan 48320
248/481-9362 Fax 248/481-9406

www.sherbowlaw.com

Jeffrey S. Sherbow
jeff@Sherbowlaw.com

Law Offices of Matthew B. Wood, PLLC
msw@Sherbowlaw.com

April 17, 2015

Geoffrey N. Fieger, Esquire
Fieger Fieger Kenney & Harrington PC
19390 W 10 Mile Rd
Southfield, MI 48075

RE: Estate of Charles Rice

Dear Mr. Fieger:

I did in fact receive your correspondence which was dated March 31, 2015 as well as your correspondence dated April 15, 2015.

I also had received correspondence from your firm regarding this matter on August 2, 2012 as well as January 2, 2014. I did reach out to you back on February 20, 2015, and did not have a response from your office.

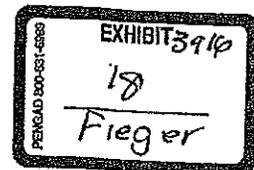
In order to refresh your memory, I attach the correspondence from August 2, 2012, January 2, 2014, as well as my letter of February 15, 2015.

I also do acknowledge that I filed the attorney lien in Ohio, although I have certainly have not sought to practice in Ohio, so I question the need to proceed Pro Hac Vice.

In any event, I would take issue with your references that I have no claim to the fees in this matter pursuant to the correspondence from your partner as referenced.

I would not think that you would impugn the integrity of your partner, Jeffrey Danzig as his integrity is above reproach. I initiated bringing Dion Rice to Jeffrey Danzig. I had a relationship with the Decedent Charles Rice that pre-dated his death by at least two years.

In any event, I have reached out to you. I understand that Mr. Danzig had reached out to you this past week and discussed these matters with you. I also would like to do so and if appropriate have Mr. Danzig, yourself and I meet at a mutually convenient time. I do not relish a dispute and would rather sit down as professionals and discuss this matter.



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4/17/15 Letter from Mr. Sherbow to Mr. Fieger

April 17, 2015

I would also include and reference Michigan Rules of Professional Conduct, Rule 1.15 called Safe Keeping Properties, specifically "C" which is quoted as follows...(c).

"When two or more persons (one of whom may be the lawyer) claim interest in the property, it shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute."

As a result of my attorney lien, it certainly would not affect the balance of the distribution to the clients nor for that matter to Mr. Intili.

In any event, I certainly would like the opportunity to discuss this matter with you at your convenience. My cell phone is (248) 880-0022.

I look forward to hearing from you. I remain...

Very truly yours,

Jeffrey S. Sherbow

JSS:klo
enclosure

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March 31, 2015

Dear Mr. Fieger:

This is to confirm that I retained your office directly. I never retained an attorney who goes by the name of Jeffrey Sherbow. I have no relation whatsoever with Mr. Sherbow, and he did not refer my case to you.

Sincerely,



Dion Rice



EXHIBIT 1

March 31, 2015

Dear Mr. Fieger:

This is to confirm that I retained your office directly. I never retained an attorney who goes by the name of Jeffrey Sherbow. I have no relation whatsoever with Mr. Sherbow, and he did not refer my case to you.

Sincerely,

Mervie Rice



EXHIBIT 3

March 31, 2015

Dear Mr. Fieger:

This is to confirm that I retained your office directly. I never retained an attorney who goes by the name of Jeffrey Sherbow. I have no relation whatsoever with Mr. Sherbow, and he did not refer my case to you.

Sincerely,

Phil Hill



EXHIBIT 4

March 31, 2015

Dear Mr. Fieger:

This is to confirm that I retained your office directly. I never retained an attorney who goes by the name of Jeffrey Sherbow. I have no relation whatsoever with Mr. Sherbow, and he did not refer my case to you.

Sincerely,

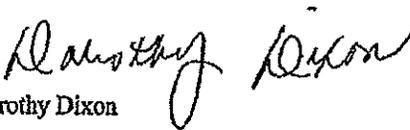

Dorothy Dixon

EXHIBIT 2

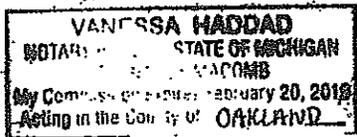
represent me in my case in Ohio, to perform any legal services in connection with that case, to bring about the settlement of that case, or to do anything which was beneficial to me in connection with that case.

7. If called as a witness, I am competent to testify to the foregoing facts.

Dorothy Dixon
DOROTHY DIXON

Sworn to before me this
16 day of June, 2015.

Vanessa Haddad

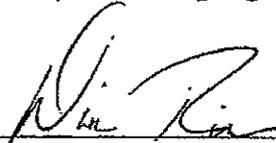


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6. No one ever discussed any division of legal fees with me before I signed the retainer agreement with Mr. Fieger's firm on July 26, 2012, or at any other time and I was unaware that Jeffrey Sherbow was alleging that he was to receive any fees from my case.

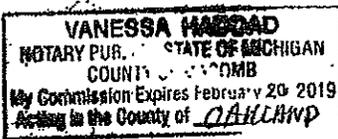
7. Had anyone asked me if I objected to Mr. Sherbow's receiving any fees from the case involving my father's death, I would have objected because, to the best of my knowledge, Sherbow had no role at all in the pursuit of that case, did not perform any legal services in connection with that case, did not do anything which was beneficial to the Estate of Charles Rice in connection with that case, nor did he direct me to the Fieger firm, as I already had contacted that firm prior to Mr. Sherbow's intrusion at the funeral.

8. If called as a witness, I am competent to testify to the foregoing facts.


DION RICE

Sworn to before me this
16 day of June, 2015.





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AFFIDAVIT OF MERVIE RICE

STATE OF MICHIGAN)
)ss.:
COUNTY OF OAKLAND)

MERVIE RICE, first having been duly sworn, deposes and says:

1. I was a passenger in the automobile which Charles Rice was driving in Montgomery County, Ohio, on July 13, 2012, when he was killed due to the negligence of Complete General Construction.

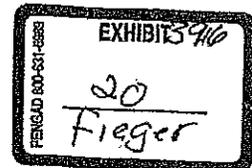
2. I suffered injuries in that same incident due to Complete General Construction's negligence.

3. I retained Geoffrey Fieger's law firm to represent me in connection with the injuries which I suffered in the incident.

4. At the time I decided to retain Mr. Fieger's firm, I had never heard of Jeffrey Sherbow, I had never met Jeffrey Sherbow, and I was not guided by Mr. Sherbow to Mr. Fieger's law firm.

5. No one ever discussed any division of legal fees with me before I signed the retainer agreement with Mr. Fieger's firm on July 26, 2012, or at any other time and I was unaware that Jeffrey Sherbow was alleging that he was to receive any fees from my case.

6. Had I been aware that Sherbow was to receive any fees from my case, I would have objected because, to the best of my knowledge, Sherbow did absolutely nothing to



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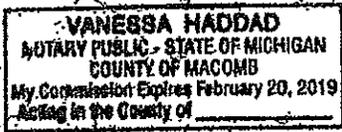
represent me in my case in Ohio, to perform any legal services in connection with that case, to bring about the settlement of that case, or to do anything which was beneficial to me in connection with that case.

7. If called as a witness, I am competent to testify to the foregoing facts.

Mervie Rice
MERVIE RICE

Sworn to before me this
30 day of June, 2015.

Vanessa Haddad



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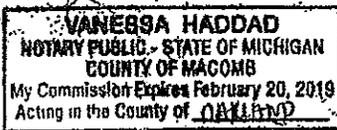
represent me in my case in Ohio, to perform any legal services in connection with that case, to bring about the settlement of that case, or to do anything which was beneficial to me in connection with that case.

7. If called as a witness, I am competent to testify to the foregoing facts.

Philip Hill
PHILIP HILL

Sworn to before me this
16 day of June, 2015.

Vanessa Haddad



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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

LAW OFFICES OF JEFFREY SHERBOW, P.C., Oakland County Circuit Court
No. 15-147488-CB
Plaintiff,

HON. JAMES M. ALEXANDER

v

FIEGER & FIEGER, P.C. d/b/a FIEGER,
FIEGER, KINNEY & HARRINGTON, P.C.,

Defendant.

GREGORY M. JANKS (P27696)
Attorney for Plaintiff
2211 S. Telegraph Road, #7927
Bloomfield Hills, MI 48302
(248) 877-4499
greg@jankslaw.com

GEOFFREY N. FIEGER (P30441)
Attorney for Defendant
19390 West Ten Mile Road
Southfield, MI 48075
(248) 355-5555
g.fieger@fiegerlaw.com

JAMES G. GROSS (P28268)
Attorney of Counsel for Plaintiff
615 Griswold Street, Suite 723
Detroit, MI 48226
(313) 963-8200
jgross@gnsappeals.com

MARK R. BENDURE (P23490)
Co-Counsel for Defendant
15450 E. Jefferson, Suite 110
Grosse Pointe Park, MI 48230
(313) 961-1525
bendurelaw@cs.com

MOTION FOR PARTIAL SUMMARY DISPOSITION

NOW COMES Plaintiff, LAW OFFICES OF JEFFREY SHERBOW, P.C., by and through its attorneys, GREGORY M. JANKS, ESQ., and its attorneys of counsel, JAMES G. GROSS, P.L.C., and says:

1. This is an action to enforce a written agreement whereby Defendant obligated itself to pay Plaintiff a percentage of the attorney fee that Defendant received as a result of the settlement of four cases referred by Plaintiff.

FEE

7/1/16 Plaintiff's Motion for Partial Summary Disposition

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2. For the reasons set forth in the attached Memorandum, a prima facie enforceable contract exists obligating Defendant to pay Plaintiff the referral fee, because MR. DANZIG had the apparent authority to enter into the contract on behalf of Defendant.

3. Defendant has advanced the affirmative defense that the fee sharing agreement is illegal and, therefore, unenforceable because the clients were not advised of it at the time of their retention of Defendant. MRPC 1.5(e).

4. Defendant has the burden of proof on that affirmative defense.

5. The only relevant factual issue is whether the clients were advised of the fee sharing agreement at the time they retained Defendant.

WHEREFORE, Plaintiff, LAW OFFICES OF JEFFREY SHERBOW, P.C., asks this Court to rule:

- (1) There exists a prima facie enforceable contract obligating Defendant to pay Plaintiff the referral fee in question; and
- (2) The only remaining factual issue, on which Defendant has the burden of proof, is whether the clients were advised of the fee sharing agreement at the time they retained Defendant.

GREGORY M. JANKS (P27696)
Attorney for Plaintiff
2211 S. Telegraph Road, #7927
Bloomfield Hills, MI 48302
(248) 877-4499

JAMES G. GROSS, P.L.C.
BY: /s/James G. Gross
JAMES G. GROSS (P28268)
Attorneys of Counsel for Plaintiff
615 Griswold Street, Suite 723
Detroit, MI 48226
(313) 963-8200

Dated: July 1, 2016

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MEMORANDUM IN SUPPORT

INTRODUCTION

This is an action to enforce a written agreement whereby Defendant Firm obligated itself to pay Plaintiff Firm a percentage of the attorney fee that Defendant received as a result of a settlement of four cases referred by Plaintiff. Defendant has denied the existence of the contract, and has also challenged its legality.

Plaintiff seeks a ruling by this Court that: (1) as a matter of law, a prima facie enforceable contract exists for the payment of said fees to Plaintiff; and (2) the only remaining factual issue is whether, at the time the clients signed their retainer agreements with Defendant, they were aware that Plaintiff would receive a portion of the attorney fee.

FACTS: APPARENT AUTHORITY¹

On July 13, 2012, a vehicle driven by Charles Rice was involved in an accident on I-75 in Ohio. (MERVIE RICE Intake Form [Exhibit A], p 1). Mr. Rice drove off the road and into a ditch, striking a viaduct. (Id.). Mr. Rice was killed. (Id.). Three of his passengers, MERVIE RICE, PHILIP HILL, and DOROTHY DIXON, were severely injured. (Id., p 1-2).

Plaintiff² was Mr. Rice's attorney on other matters prior to the accident. (DANZIG Dep [Exhibit B], p 10; DION RICE Dep [Exhibit C], p 28, 50-51). JEFFREY DANZIG was an attorney at Defendant's office. (Exhibit B, p 6). He was assigned to Defendant's case intake department. (Exhibit B, p 6;

¹Plaintiff is seeking summary disposition pursuant to MCR 2.116(C)(10). Accordingly, it will limit itself to relying on documents and uncontested testimony. The material in this section of "Facts" will be limited to that relevant to MR. DANZIG's apparent agency to contract on behalf of Defendant.

²Although Plaintiff is a firm, "Plaintiff" will be used interchangeably to denote the firm and MR. SHERBOW.

7/1/16 Plaintiff's Motion for Partial Summary Disposition

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FIEGER Dep [Exhibit D], p 10, 24). He was listed as a partner on the firm's letterhead. (Exhibit B, p 60; 8/2/12 Letter [Exhibit E]; SHERBOW Dep [Exhibit F], p 6).

On July 17, 2012, MR. DANZIG prepared an intake form for MERVIE RICE. (Exhibit A; Exhibit B, p 13-14). That form indicated that Plaintiff was the referral attorney. (Exhibit A, p 2; Exhibit B, p 20). The original intake sheets for DOROTHY DIXON and CHARLES RICE (Estate) are missing; Defendant failed to produce them. (Exhibit B, p 27-28).

On July 26, 2012, a meeting was held at Defendant's office. (Exhibit B, p 29; Exhibit C, p 17; Exhibit F, p 12). Present at the meeting were Plaintiff, DION RICE, MERVIE RICE, MS. RICE's daughter (Nya Keller), JODY LIPTON, ESQ., and MR. DANZIG. (Exhibit B, p 29; Exhibit C, p 11; Exhibit F, p 12). That day, retainer agreements with Defendant were signed by DION RICE on behalf of Mr. Rice's Estate (Exhibit G), and MERVIE RICE (Exhibit H). MR. HILL signed his retainer agreement (Exhibit I) on August 6, 2012. MS. DIXON signed her retainer agreement on September 11, 2012. (Exhibit B, p 41).

MR. DANZIG signed all of the retainer agreements on behalf of Defendant. (Exhibits G-I; Exhibit B, p 41). On August 2, 2012, MR. DANZIG wrote Plaintiff under Defendant's letterhead acknowledging Plaintiff's entitlement to a one-third referral fee:

"Dear Mr. Sherbow:

"Kindly be advised that we accepted the above-captioned matter on referral from you and your office, and **are hereby acknowledging your one-third (1/3) referral fee** in this matter. Separate letters acknowledging your referral fee on all other cases will be forthcoming as soon as those files are opened. Rest assured **you are entitled to a referral fee on all four cases that we will be handling**, and I will send you separate letters to that effect for each case as they are opened.

"Should you have any questions or concerns, please feel free to contact me.

"Very truly yours,
"Fieger, Fieger, Kenney, Giroux & Danzig, P.C.
/s/ Jeffrey A. Danzig
Jeffrey A. Danzig"

7/1/16 Plaintiff's Motion for Partial Summary Disposition

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(Exhibit E) (emphasis added). On August 15, 2012, MR. DANZIG wrote a letter (Exhibit BB) to MR. SHERBOW confirming the referral fee on all four matters.

Because the underlying suit was in Ohio, local counsel was needed. (Exhibit B, p 15).

Defendant chose Thomas Intili, Esq., because it had worked with him before. (Id.). Originally, Mr. Intili wanted a 10% fee, but subsequently demanded 20%. (Id.). A decision was made to adjust the fee split. (Id., p 17). On January 2, 2014, MR. DANZIG wrote a letter under Defendant's letterhead to Plaintiff and Mr. Intili so informing them:

"Gentlemen:

"I just thought that given the new year, I would memorialize our mutual understanding of the fee relationship among us. Following our discussion in November of 2013, we agreed to a split of the attorney fees generated, as follows:

"Fieger Law Firm -- 60% of net fees generated;

"Intili & Groves -- 20% of net fees generated;

"Sherbow referral -- 20% of net fees generated.

"Geoff Fieger approved on 11/11/13 and as such, **I am formally notifying you both of our mutual understanding and agreement.** Facilitative Mediation is fast approaching on 1/17/14 in Columbus, OH, at which time I am hoping we can resolve all claims.

"Thank you for your attention and continued assistance and cooperation.

Sincerely,
/s/Jeffrey A. Danzig
Jeffrey A. Danzig"

(Exhibit J) (emphasis added).

The case subsequently settled for \$10,225,000. (Exhibit W).

FACTS: ALLEGED ILLEGALITY OF FEE AGREEMENT³

On February 20, 2015, Plaintiff wrote a letter to MESSRS. FIEGER and Intili, reminding them of his entitlement to a referral fee. (Exhibit K). On March 31, 2015, MR. FIEGER responded with the following letter:

"Dear Mr. Sherbow:

"A very troubling problem has arisen with the cases I have been handling in Dayton, Ohio.

"I was originally informed by Mr. Danzig that you referred the cases to us. I have now confirmed that you did not, and that any representations to the contrary are untrue.

"Indeed, my office was initially directly contacted by Ms. Rice within 4 days of the accident. You obviously didn't refer her case, she doesn't even know you. Neither does Mr. Hill, nor Ms. Dixon. Indeed, even Dion Rice told you at his father's funeral that he had contacted our offices.

"What prompted you and Mr. Danzig to think that you could claim a referral fee? I remain,

"Ver [sic] truly yours,
"/s/Geoffrey Fieger
"Geoffrey Fieger"

(Exhibit L).

As evidence of its averments, Defendant has produced four identical letters dated March 31, 2015 (Exhibit M), typed by MR. FIEGER (HILL Dep [Exhibit Q], p 30-31) and signed in Defendant's office (DIXON Dep [Exhibit P], p 29), which read as follows:

"Dear Mr. Fieger:

"This is to confirm that I retained your office directly. I never retained an attorney who goes by the name of Jeffrey Sherbow. I have no relation whatsoever with Mr. Sherbow, and he did not refer my case to you."

³The facts set forth in this section pertain to the affirmative defense that the agreement to pay Plaintiff a referral fee is unenforceable because the clients were not advised of the division of fees as required by MRPC 1.5(e)(1).

(Exhibit M).

Defendant has also produced four identical retention letters, also dated March 31, 2015, purportedly from Mr. Intili, and signed by the clients, setting forth the terms of retention for a medical malpractice(?) case. (Exhibit N). The author and typist initials ("GNF/vjk") indicate that the letters were typed in Defendant's office (compare Exhibit L).

The clients also signed affidavits attesting, in identically worded paragraphs, that no one informed them that Plaintiff would be receiving a portion of the attorney fees. (Exhibit R, ¶6; Exhibit S, ¶5; Exhibit T, ¶5; Exhibit U, ¶5).

At their depositions, DION RICE (Exhibit C, p 12, 33, 52), MERVIE RICE (MERVIE RICE Dep [Exhibit O], p 7, 25-26), MS. DIXON (DIXON Dep [Exhibit P], p 22, 31-32), and MR. HILL (HILL Dep [Exhibit Q], p 19, 39) denied being informed by MR. DANZIG that Plaintiff would be receiving a portion of the attorney fee. Citing attorney-client privilege, MR. FIEGER refused to allow any of the clients to testify as to:

- ! Their cell phone records or numbers⁴ (Exhibit C, p 21-22; Exhibit O, p 11-13)
- ! How it was that they came to sign the affidavits (Exhibit O, p 24; Exhibit P, p 31)
- ! How it was that they came to sign the letters addressed to MR. FIEGER (Exhibit C, p 39; Exhibit O, p 21-22; Exhibit P, p 26-27; Exhibit Q, p 30-31)
- ! How it was that they came to sign the Intili retention letters (Exhibit O, p 23-24; Exhibit P, p 28; Exhibit Q, p 14)
- ! Whether they received anything in exchange for their testimony and signatures (Exhibit Q, p 29-30).

⁴The cell phone numbers and records were requested to enable Plaintiff to check the accuracy of the clients' accounts of when they contacted Defendant, and when they spoke to Plaintiff.

JODY LIPTON, ESQ., was retained to represent the clients as to first-party no-fault benefits. (LIPTON Dep [Exhibit V], p 20, 24, 28). She was present at the July 26, 2012, meeting (id., p 19), and accompanied MR. DANZIG to sign up MR. HILL and MS. DIXON (id., p 35, 48-49).

MS. LIPTON was told by MR. DANZIG on or before July 26, 2012, that Plaintiff was the referral attorney. (Exhibit V, p 35-46). However, she could not recall whether Plaintiff's receiving a fee was mentioned by MR. DANZIG on any of those occasions. (Id., p 36-37, 48-49).

I. AS A MATTER OF LAW, THERE IS A PRIMA FACIE ENFORCEABLE CONTRACT OBLIGATING DEFENDANT TO PAY PLAINTIFF 20% OF THE NET ATTORNEY FEE GENERATED BY THE SETTLEMENT OF THE UNDERLYING CASE.

An enforceable contract was created between Plaintiff and Defendant when MR. DANZIG, acting with apparent authority, agreed that Defendant would pay Plaintiff 20% of the net attorney fee generated in *Linden v Complete General Construction Co.*

Standard of Review

The nonmovant may not rely on mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that a genuine issue exists for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362 (1996); *Maiden v Rozwood*, 461 Mich 109, 121 (1999). When deciding a motion for summary disposition under MCR 2.116(C)(10), a court considers pleadings, affidavits, depositions, admissions, and other documentary materials. MCR 2.116(G)(5); *Maiden*, supra. Such materials, however, shall only be considered to the extent that they would be admissible as evidence. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45 (2006). The nonmovant may not rest on mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Campbell v Kovich*, 273 Mich App 227, 229; 731 NW2d 112 (2006).

Discussion

The elements of apparent or ostensible agency are:

- (1) The person dealing with the agent must harbor a reasonable belief in the agent's authority to bind the principal;
- (2) The belief must be generated by some act of the principal sought to be charged; and
- (3) The person relying on the agent's authority must not be guilty of negligence.

Vanstelle v Macaskill, 255 Mich App 1, 9-10 (2003).

The Michigan Supreme Court has articulated the effect of an apparent agency:

"Gathering together all of these elements, it may be stated as a general rule that whenever a person has held out another as his agent authorized to act for him in a given capacity, or has knowingly and without dissent permitted such other to act as his agent in that capacity, or where his habits and course of dealing have been such as to reasonably warrant the presumption that such other was his agent authorized to act in that capacity -- whether it be in a single transaction or in a series of transactions -- **his authority to such other to so act for him in that capacity will be conclusively presumed** to have been given, so far as it may be necessary to protect the rights of third person who have relied thereon on good faith and in the exercise of reasonable prudence; **and he will not be permitted to deny that such other was his agent authorized to do the act he assumed to do**, provided that such act was within the real or apparent scope of the presumed authority."

Plankinton Packing Co v Berry, 199 Mich 212, 217 (1917) (emphasis added).

That doctrine has been applied to attorney fee sharing agreements. In *Hoglund v Meeks*, 139 Wash App 854; 170 P3d 37 (2007), one attorney Willingham brought several cases with her from the Graf firm to her new firm, Goldstein Law Office. 170 P3d at 41. While there, she split fees with the plaintiff on several cases.

Among the cases that she brought with her was the Bostwick case. When Graf was disbarred, it became necessary to draft a new agreement. 170 P3d at 41. Before they could reduce a new fee agreement to writing, the case settled, generating \$190,000 in attorney fees. *Id.* at 43. Attorney

Willingham then told the plaintiff that he would receive 80% of the first \$50,000. *Id.* She subsequently refused to pay the plaintiff anything other than \$6,000 in expenses. *Id.*

The plaintiff sued for breach of contract. 170 P3d at 43. Goldstein and Willingham argued that Willingham did not have authority from the firm to contract with the plaintiff. *Id.* The trial court found that Willingham had apparent authority, and awarded the plaintiff \$40,000. *Id.* However, the trial court did not articulate its reason for finding that apparent authority. *Id.*, n 2.

The Washington Court of Appeals nevertheless affirmed. It first articulated the general principle involved:

"A trial court may find apparent authority based only on the principal's actions toward a third party and not based solely on the agent's actions. Nonetheless, actual authority to perform certain services on a principal's behalf results in implied authority to perform the usual and necessary acts associated with the authorized services. . . . In addition, a party dealing in good faith with an agent who appears to be acting within the scope of the agent's authority is not bound by undisclosed limitations on the agent's power."

170 P3d at 44.

The court then applied that principle to the case before it:

"Similarly here, Goldstein placed Willingham in a position in which a reasonable person would believe she had the authority to represent clients on behalf of the Goldstein firm, including having authority to enter into an attorney-fee-sharing contract with lawyers outside the firm. . . .

"In addition, an agent's unlimited use and access to her principal's stationery, business forms, and control of the office justifies the third party's reasonable belief in the agent's authority. . . . Here, Willingham communicated with Bostwick and Hogle using Goldstein Law Firm stationery; her superior court pleadings showed the Goldstein name, address and phone number; and she held Bostwick litigation meetings at the Goldstein Law Offices, all with Goldstein's tacit approval. Thus, under *Walker*, Willingham's use of the Goldstein firm stationery, pleading paper, and facilities further underscored her apparent authority to act on the firm's behalf."

Id. at 45 (emphasis added).

In the instant case, the undisputed facts compel the conclusion that MR. DANZIG had apparent authority to bind Defendant to the fee agreement with Plaintiff:

- ! Defendant indicated on its letterhead that MR. DANZIG was a partner. (Exhibit B, p 60; Exhibit E; Exhibit F, p 5-6; Exhibit J).
- ! Defendant assigned MR. DANZIG to the intake department, which decided which cases the firm would take. (Exhibit D, p 10, 24).
- ! Defendant allowed MR. DANZIG to be the lead attorney on the four cases. (Exhibit D, p 50-51).
- ! MR. SHERBOW had referred other cases to Defendant through MR. DANZIG, and had received referral fees on those cases. (SHERBOW Affidavit [Exhibit X], ¶51; DANZIG Affidavit [Exhibit Y], ¶5).
- ! The fee agreement was thrice confirmed in writing on Defendant's letterhead. (Exhibits E, J, BB).
- ! MR. SHERBOW relied on all of the foregoing factors to conclude that MR. DANZIG had the authority to bind Defendant to the fee agreement. (Exhibit F, p 5-6).
- ! MR. SHERBOW would have referred the cases to another firm if he had known Defendant would not honor its written agreement and pay the referral fee. (Exhibit X, ¶52).

In sum, there is no genuine issue of material fact as to whether MR. DANZIG had apparent authority to enter into the referral fee agreement on behalf of Defendant. This Court should so rule.

II. THE ONLY RELEVANT FACTUAL ISSUE IS WHETHER, AT OR NEAR THE TIME THE CLIENTS SIGNED THE RETAINER AGREEMENTS, THEY WERE ADVISED THAT PLAINTIFF WAS TO RECEIVE A PORTION OF THE ATTORNEY FEE.

This issue can be characterized as a motion in limine, or as a ruling complementary to the summary disposition relief sought in Issue I. In either event, it will serve the purpose of narrowing the issues to be tried.

A. DEFENDANT HAS THE BURDEN OF PROOF ON ITS AFFIRMATIVE DEFENSE OF ILLEGALITY.

A claim that a fee agreement violated the Michigan Rules of Professional Conduct (MRPC) constitutes a defense that the contract is unenforceable as against public policy and, therefore, illegal. *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 60 (2003); *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 196 (2000). Such a claim is an affirmative defense. *Metro Services Organization v City of Detroit*, unpublished per curiam opinion of the Court of Appeals, rel'd 2/1/11 (Nos. 292052, 292588) (Exhibit Z), p 5⁵. Accordingly, this Court should rule that Defendant has the burden of proof as to whether its contract with Plaintiff is void for illegality.

B. THE ONLY ISSUE TO BE TRIED IS WHETHER THE CLIENTS WERE ADVISED OF THE AGREEMENT TO DIVIDE THE FEES AT THE TIME THAT THEY SIGNED THEIR RETAINER AGREEMENTS.

Proper framing of the remaining factual issue requires consideration of the evidence supporting the parties' competing contentions.

- ! MR. DANZIG has testified that at the times the clients signed their retainer agreements, there were discussions as to the referral fee, and the clients had no objections. (Exhibit B, p 15, 29-32, 39-42, 45, 53, 55).
- ! MR. SHERBOW has testified that at the June 26, 2012, meeting, there was a discussion of the referral fee. (Exhibit F, p 13, 28-29, 33-34).

⁵*Metro Services* is the only Michigan case that the undersigned attorney of counsel could find which squarely holds that a public policy violation constitutes an affirmative defense on which the defendant has the burden of proof. *Id.*, p 2, 5. That holding is in accord with sister state authority. *Eaton v Brock*, 124 Cal App 2d 10, 268 P2d 58, 60 (1954); *Benson v BH Morgan & Co*, 26 Ill App 22, 25 (1887); *Stebbins v Leowolf*, 57 Mass 137, 143 (1849); *Feldman v Gamble*, 26 NJ Eq 494, 495-96 (1875); *Strausberg v Laurel Healthcare Providers, LLC*, 304 P3d 409, 418 (NM 2013); *Cantleberry v Holbrook*, 2013 WL 3280023 (Ohio App 2013), p 6 (Exhibit AA); *JW Ripy & Son v Art Wall Paper Mills*. 41 Okla 20, 136 P 1080, 1082 (Okla 1913); *Daley Mack Sales, Inc v Klink*, 26 Pa D&C 3d 341, 347 (Pa Common Pleas 1982); *Hermitage House Square, LP v England*, 929 SW2d 356, 359 (Tenn App 1996); *Gill v Smith*, 233 SW2d 223, 226 (1950); *Hughes v Shaw*, 147 Va 409; 137 SE 370, 370-71 (1927); *Wilder v Nolte*, 195 Wash 1; 79 P2d 682, 687 (1938); *Thatcher v Darr*, 27 Wyo 452; 199 P 938, 945-46 (1921).

On the other hand:

- ! DION RICE testified that the fee split was not discussed at the July 26, 2014, meeting. (Exhibit C, p 10, 12).
- ! MERVIE RICE also testified that the fee split was not discussed at the July 26, 2014, meeting. (Exhibit O, p 7, 25-26).
- ! DOROTHY DIXON also testified that the fee split was not discussed with her at the time of Defendant's retention. (Exhibit P, p 22, 31-32).
- ! MR. HILL also testified that the fee split was not discussed with her at the time of Defendant's retention. (Exhibit Q, p 19, 39).

The relevant ethical rule reads as follows:

"(e) A division of a fee between lawyers who are not in the same firm may be made only if:

"(1) **The client is advised of and does not object to the participation of all the lawyers involved;** and

"(2) The total fee is reasonable."

MRPC 1.5(e) (emphasis added).

In terms, the Rule provides that the fee split agreement is permissible if:

! "[T]he client is advised"

and

! "Does not object"

None of the client testified that they objected to the fee split at the time they retained Defendant.

Nor could they, in light of their unequivocal testimony that they were never told of it at the time.

Therefore, **the only relevant factual issue is whether they were advised at the time of their retention of Defendant** of the concomitant agreement to split the fee. If so, Plaintiff prevails.

Conclusion

As a matter of law, a contract existed obligating Defendant to pay Plaintiff a portion of the attorney fees generated in *Linden v Complete General Construction Co.* Defendant has the burden of proving its affirmative defense that the clients were not advised of the fee sharing agreement at the time it was retained. This Court should so rule.

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Dated: July 1, 2016

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

LAW OFFICES OF JEFFREY SHERBOW, PC,
Plaintiff,

v.

Case No. 15-147488-CB
Hon. James M. Alexander

FIEGER & FIEGER, PC,
Defendant.

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on cross motions for summary disposition. This is a referral-fee dispute. According to the Complaint, Plaintiff referred Defendant clients involved in multiple personal-injury and wrongful-death lawsuits related to an automobile accident in Ohio. In return for the referral, Plaintiff claims that it was promised a percentage of Defendant's attorney fee award.

In its motion, Plaintiff seeks a ruling that it has established that a prima facie enforceable contract exists, and the only remaining issue is whether the clients were advised of the fee-sharing agreement. Defendant, on the other hand, seeks dismissal of Plaintiff's Complaint.

Both parties move for summary under MCR 2.116(C)(10), which tests the factual support for Plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).¹

Although the parties agree on little, the following appears to be undisputed. In July 2012, a

¹ Under (C)(10), "In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d

vehicle driven by Charles Rice was involved in an accident on I-75 in Ohio. The accident killed Mr. Rice and seriously injured his three passengers, Mervie Rice, Philip Hill, and Dorothy Dixon. Plaintiff represented Mr. Rice or his business on several matters prior to his death.

At the time, Jeffrey Danzig was an attorney at Defendant's office. On July 26, 2012, a meeting was held at Defendant's office. The following people were present for the meeting – Plaintiff, Dion Rice (on behalf of Mr. Rice's estate), Mervie Rice, her daughter Nya Keller, attorney Jody Lipton, and Mr. Danzig.

Following this meeting and within two months of the accident, Dion Rice (on behalf of Mr. Rice's estate), Ms. Rice, Mr. Hill, and Ms. Dixon all signed retainer agreements with Defendant to pursue claims relating to the same.

On August 2, 2012, Mr. Danzig wrote Plaintiff a letter on Defendant letterhead acknowledging Plaintiff's entitlement to a one-third referral fee on the Mervie Rice case. Two weeks later, on August 15, 2012, Mr. Danzig wrote another letter on Defendant letterhead confirming the same referral fee for the other three clients (estate of Charles Rice, Ms. Dixon, and Mr. Hill).

Because the underlying lawsuits were to be brought in Ohio, local counsel was needed. This allegedly resulted in a split of fees as follows – 60% net to Defendant, 20% net to Ohio counsel, and 20% to Plaintiff. This split was acknowledged in a final Danzig letter on Defendant letterhead dated January 2, 2014. This letter was addressed to both Plaintiff and Ohio counsel. After acknowledging the attorney fee split, the letter provided that "Geoff Fieger approved on 11/11/13 and as such, I am formally notifying you both of our mutual understanding and agreement."

335 (1994).

The parties don't agree on much else. And, although the parties don't dispute that Danzig sent the three letters, Defendant disputes that he had the authority to do so. And the parties dispute whether each client was advised on the fee-sharing agreement and did not object – as required under MRPC 1.5(e).

In its motion, Plaintiff seeks a ruling that Danzig had apparent authority to bind Defendant, which resulted in an enforceable contract as outlined in the letters.² Plaintiff argues that the burden then shifts to Defendant to establish the affirmative defense of illegality of contract – based on a violation of the Michigan Rules of Professional Conduct.

Defendant, on the other hand, seeks a ruling that the alleged contract violates MRPC 1.5(e), which renders it unenforceable. In the alternative, Defendant argues that Danzig was not authorized to, and was specifically forbidden from, agreeing to pay any referral fee without the express approval of Geoffrey Fieger. And Defendant seeks a ruling that Plaintiff cannot recover non-economic damages in this breach of contract case.

1. Defendant's cursory arguments.

The Court notes that Defendant raises two other challenges to the alleged fee-sharing agreement. First, the same is not supported by consideration. Second, Plaintiff could not refer the underlying clients because they were never his "clients." But Defendant's cursory arguments on these issues are unconvincing.

Initially, with respect to Defendant's "client" argument, Defendant fails to cite any authority for the proposition that the referring attorney must have a written agreement with the client in order

² Although only arguing apparent authority in its principal motion and brief, Plaintiff includes an actual authority argument for the first time in its Reply Brief. Because this issue was not raised in its principal brief so that

to refer the same to another attorney. Had our Supreme Court so wished, it could have easily included the same in the Rules.

Next, with respect to Defendant's consideration argument, it is well established that the existence of a valid contract requires an offer, acceptance, consideration, and mutual agreement to all of the contract's essential terms. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452-453; 733 NW2d 766 (2006).

Further, "[t]o have consideration there must be a bargained-for exchange." *Gen Motors Corp v Dep't of Treasury, Revenue Div*, 466 Mich 231, 238; 644 NW2d 734 (2002). But "Courts do not generally inquire into the sufficiency of consideration." *Id.* at 239.

In this case, if Plaintiff establishes its version of events, it performed the service of bringing the clients to Defendant, who received the benefit of representing four valuable tort cases. This is adequate consideration, and Defendant's motion on this issue is DENIED.

2. Apparent Authority.

The Court next turns to the alleged fee-sharing agreement. Plaintiff first argues that Mr. Danzig had the apparent authority to bind Defendant to the alleged agreement. The following elements are necessary to establish apparent or ostensible agency:

(1) the person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one, (2) the belief must be generated by some act or neglect on the part of the principal sought to be charged, and (3) the person relying on the agent's authority must not be guilty of negligence. *VanStelle v Macaskill*, 255 Mich App 1, 10; 662 NW2d 41 (2003); quoting *Chapa v St Mary's Hosp of Saginaw*, 192 Mich App 29, 33-34; 480 NW2d 590 (1991).

Defendant had an opportunity to respond, the Court will not address the same.

Long ago, our Supreme Court reasoned:

it may be stated as a general rule that whenever a person has held out another as his agent authorized to act for him in a given capacity, or has knowingly and without dissent permitted such other to act as his agent in that capacity, or where his habits and course of dealing have been such as to reasonably warrant the presumption that such other was his agent authorized to act in that capacity-whether it be in a single transaction or in a series of transactions-his authority to such other to so act for him in that capacity will be conclusively presumed to have been given, so far as it may be necessary to protect the rights of third persons who have relied thereon in good faith and in the exercise of reasonable prudence; and he will not be permitted to deny that such other was his agent authorized to do the act he assumed to do, provided that such act was within the real or apparent scope of the presumed authority.' *Plankinton Packing Co v Berry*, 199 Mich 212, 217; 165 NW 676 (1917).

Inherent in this analysis is a careful analysis of (among other things) evidence, course of dealing, and reasonable belief. Defendant even appears to acknowledge that Danzig's apparent authority is properly a jury question, arguing that none of the cases cited by Plaintiff ruled on apparent authority as a matter of law.

Indeed, it is well-settled that "When there is a disputed question of agency, if there is any testimony, either direct or inferential, tending to establish it, it becomes a question of fact...." *St Clair Intermediate Sch Distt v Intermediate Ed Assn/Michigan Ed Ass'n*, 458 Mich 540, 556-557; 581 NW2d 707 (1998); quoting *Miskiewicz v Smolenski*, 249 Mich 63, 70; 227 NW 789 (1929).

In this case, Plaintiff points to the following evidence tending to establish agency: (1) Defendant's own letterhead names Danzig in the firm's name; (2) Defendant assigned Danzig to the supervise the intake department; (3) Danzig handled the underlying cases for Defendant's firm until his departure; and (4) Plaintiff referred other cases to Defendant through Danzig, and Defendant paid referral fees on said cases.

Because agency is disputed and Plaintiff has presented some evidence tending to establish

Danzig's authority to bind Defendant, the same is properly a question of fact for the jury. As such, Plaintiff's motion for summary disposition on this issue is DENIED.

3. Does the fee-sharing agreement violate MRPC 1.5(e)?

If Plaintiff can establish that Danzig had authority to bind Defendant to the fee-sharing agreement, the next issue is whether the same is unenforceable for violating MRPC 1.5(e).

Under Michigan law, an alleged contract is unethical if it violates the Michigan Rules of Professional Conduct, and such "unethical contracts violate our public policy and therefore are unenforceable." *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 189; 650 NW2d 364 (2002).

Under MRPC 1.5(e):

A division of a fee between lawyers who are not in the same firm may be made only if:

- (1) the client is advised of and does not object to the participation of all the lawyers involved; and
- (2) the total fee is reasonable.

In other words, in order to be an enforceable fee-sharing agreement, the underlying client must have been "advised of" and "not object to" the participation of both Plaintiff and Defendant. Besides the fee being reasonable, there are no other requirements.³

Plaintiff argues that Defendant carries the burden to establish the affirmative defense that the contract is void or unenforceable as against public policy (and therefore illegal). Indeed, the Court of Appeals in *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 60; 672 NW2d 884 (2003) concluded that a referral fee contract that contradicts the Michigan Rules of Professional Conduct "is void ab initio." And, under MCR 2.119(F)(3)(a) the defense that "that an instrument or transaction is

³ Defendant makes much of the allegation that Plaintiff had no prior contact with three of the four clients. But there is no requirement for prior contact in MRPC 1.5(e).

void” constitutes an affirmative defense.⁴

In response, Defendant argues that Plaintiff actually carries the burden to establish that its claim is based on a legal contract, citing *Am Trust Co v Michigan Trust Co*, 263 Mich 337, 339-340; 248 NW 829 (1933) for the proposition that:

A contract made in violation of a statute is void and unenforceable. When plaintiff cannot establish its cause of action without relying upon an illegal contract, it cannot recover. The contract was of no force, effect, or efficacy. It was invalid, null, and void.

The general rule of law is that a contract made in violation of a statute is void, and that, when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover. (internal citations and quotations omitted).

But in *American Trust*, the burden of proof was not an issue. Based on the plain language of the Court Rule, the Court finds that Defendant’s claim that the fee-sharing agreement is void as a matter of public policy is an affirmative defense, on which, Defendant carries the burden.⁵

This ruling is consistent with other states addressing the issue as cited in Plaintiff’s Motion.⁶

⁴ Plaintiff also cites *Metro Services Organization v City of Detroit*, an unpublished opinion per curiam of the Court of Appeals, issued February 1, 2011 (Docket Nos. 292052, 292588), which concluded that a defendant’s position that a contract was void constitutes an affirmative defense, on which, the asserting party carries the burden.

⁵ The Court notes, however, that while Defendant did not plead the affirmative defense that Plaintiff’s claim is void based on an illegal contract in his affirmative defenses, it did raise the issue in its initial motion for summary disposition filed in lieu of an Answer on June 30, 2015 as permitted under MCR 2.111(F)(2).

⁶ California’s District Court of Appeal considered an interesting, well-reasoned approach to the burden problem in *Eaton v Brock*, 124 Cal App 2d 10, 13; 268 P.2d 58 (1954):

Where the illegality of a contract does not appear from the face of the complaint it becomes a matter of affirmative defense that must be specially pleaded. And in such case the burden of proof is on the defendant. (*Hamilton v. Abadjian*, 30 Cal.2d 49 [179 P.2d 804]; *Gelb v. Benjamin*, 78 Cal.App.2d 881 [178 P.2d 476]; *Vagim v. Brown*, 63 Cal.App.2d 504 [146 P.2d 923]; 12 Cal.Jur.2d p. 508; 17 C.J.S. p. 1226.) Such is the case here. There is nothing on the face of the complaint, nor the contract attached thereto, that discloses any invalidity. The trial court therefore properly required the defendant to assume the burden of proving illegality.

See also *Cantleberry v Holbrook*, No. 12CA75, 2013 WL 3280023, at *4 (Ohio Ct App June 25, 2013), which reasoned: Appellant argues the trial court erred as a matter of law in determining appellee met his burden of proof on the issue of illegality of contract. We agree. A defense alleging illegality of contract is an affirmative defense. *McCabe/Marra Co. v. Dover*, 100 Ohio App.3d 139, 652 N.E.2d 236 (8th Dist.1995); *Arthur Young & Co. v. Kelly*, 88 Ohio App.3d 343, 623 N.E.2d 1303 (10th Dist.1993). When challenging a contract’s enforceability based on illegality, one does not challenge the terms to the agreement; “[i]n short, asserting that defense does not contest the existence of an offer, acceptance,

Next, the parties dispute the timeframe for a client's objection to any fee sharing. As stated, MRPC 1.5(e) only permits a fee-sharing agreement between lawyers not in the same firm if "the client is advised of and **does not object to** the participation of all the lawyers involved."

Plaintiff claims that any such objection must have been raised before said client signed his or her retainer agreement with Defendant.

Defendant, on the other hand, argues that "it makes the most sense to look at the client's agreement or objection to payment **at the time of payment.**"

Initially, the Court notes that there is no explicit temporal element to MRPC 1.5(e). But if the Court were to accept Defendant's approach, then the representing attorney could use his or her months- or years-long relationship with the client to influence said client to object at the last moment – thereby avoiding paying any agreed referral fee long after the referring attorney lived up to his or her end of the bargain. This doesn't make sense.

Rather, the Court finds that any objection must be raised by the time the referring attorney completes his or her bargained-for exchange – bringing the client to the representing attorney. This is complete when the client executes the retainer agreement with the representing attorney.⁷

With this ruling in mind, the Court now turns to the **overwhelming** competing evidence on the issue of whether each client was advised of or objecting to the fee-sharing agreement.

It is worth noting that both parties appear to argue from the perspective that, if the alleged contract is enforceable (or unenforceable) as to one client, then it is enforceable (or unenforceable) as

consideration, and/or a material breach of the terms of the contract." McCabe/Marra Co., 100 Ohio App.3d at 148, 652 N.E.2d at 241. The burden of proving the contract's illegality is upon the party seeking to avoid the obligation Charles Melbourne & Sons, Inc. v. Jesset, 110 Ohio App. 502, 505, 163 N.E.2d 773, 775 (8th Dist.1960).

⁷ The same is true for the other requirement of MRPC 1.5(e) – that the client was "advised of" the participation of all lawyers involved.

to all. This is not the case. There are four underlying clients. Each client must be separately analyzed to determine the enforceability of the purported agreement with respect to that client.

In other words, if the jury finds that Client A was advised of and did not object to the fee-sharing agreement, then said agreement is enforceable as to Client A alone. But it does not mean that Plaintiff is automatically entitled to the same with respect to Clients B, C, and D (should the jury determine that they were not advised of or objected to the fee-sharing agreement).

And the reverse is also true. Should Defendant succeed on establishing that Clients A and B were not advised of (and/or objected to) the purported fee-sharing agreement, it does not mean that the same is necessarily true for Clients C and D.

In support of its position that each client was advised of and did not object to the fee-sharing agreement, Plaintiff cites to the deposition testimony of Danzig and its principal, Jeffrey Sherbow. Danzig testified that, at the time each client signed his or her retainer agreement, they discussed the referral fee and the clients had no objections. Likewise, Sherbow testified that, at the July 26, 2012 meeting, the referral fee was discussed.

Defendant, on the other hand, cites to the deposition testimony of each underlying client, who all claim that the fee split was not discussed at the July 26 meeting.

Each side also attacks the credibility of the other's deponents. In other words, the parties specifically make credibility an issue. It is well settled, however, that credibility is an issue that must be submitted to the trier of fact. *White v Taylor Distributing Company, Inc*, 275 Mich App 615; 739 NW2d 132 (2007). The White Court reasoned that, "courts may not resolve factual disputes or determine credibility in ruling on a summary disposition motion" *White*, 275 Mich App at 625.

As a result, summary disposition is wholly inappropriate and DENIED.

4. Non-Economic Damages

Finally, Defendant next argues that Plaintiff cannot recover for non-economic damages in a breach of contract case, citing *Kewin v Massachusetts Mutual Life Ins Co*, 409 Mich 401, 419-421; 295 NW2d 50 (1980) (holding “absent allegation and proof of tortious conduct existing independent of the breach, . . . exemplary damages may not be awarded in common-law actions brought for breach of a commercial contract); *Manley v Detroit Auto Inter-Ins Exch*, 425 Mich 140, 149; 388 NW2d 216, 220 (1986); and *Isagholian v Transamerica Ins Corp*, 208 Mich App 9, 17; 527 NW2d 13, 17 (1994) (holding “Damages for mental distress are not recoverable in a breach of contract action absent allegation and proof of tortious conduct existing independently of the breach of contract.”).

In response, Plaintiff argues that he sustained “a real damage” when Defendant refused to pay the promised referral fee because. While this may be true, Plaintiff can be made whole if he succeeds on his breach of contract claim, which measures damages based what Plaintiff was supposed to receive vs. what he actually received.

But Plaintiff has entirely failed to allege any tortious conduct existing independently of the alleged breach of contract. As a result, Defendant’s motion on this issue is GRANTED. Plaintiff may not pursue or recover for non-economic damages in this case.

5. Summary/Conclusion

To summarize, Defendant’s motion is GRANTED, but only with respect to Plaintiff’s inability to recover any non-economic damages.

8/17/19 Opinion & Order

In all other respects, for all of the foregoing reasons, and viewing all evidence in the light most favorable to the nonmovant, the Court finds that there remain numerous questions of fact in dispute that precludes summary disposition under (C)(10). As a result, both parties' motions are otherwise DENIED.⁸

IT IS SO ORDERED.

August 17, 2016
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge

⁸ The Court also declines Plaintiff's request to rule that Defendant has violated MCR 8.121(C)(1) when it deducted fees from the gross (rather than net) recovery. This is not properly an issue addressed by this Court.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

LAW OFFICES OF JEFFREY SHERBOW P.C.,

Case No. 15-147488-CB
Honorable James M. Alexander

Plaintiff,

-vs-

FIEGER & FIEGER, P.C., d/b/a FIEGER,
FIEGER, KENNEY & JOHNSON, P.C.,

Defendant.

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Form of Verdict

1. Did Plaintiff refer one, some or all of the following personal injury cases to Defendant?

- | | |
|------------------------|------------------|
| Estate of Charles Rice | Yes_____ No_____ |
| Dorothy Dixon | Yes_____ No_____ |
| Mervie Rice | Yes_____ No_____ |
| Philip Hill | Yes_____ No_____ |

If your answer "yes" to any, or all, of these questions, go to Question 2.

2. Was the Estate of Charles Rice, through any representative or relative, advised as to the participation of all the lawyers involved?

Yes_____ No_____

Plaintiff's Proposed Form of Verdict

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If your answer was "yes", then go to Question 2a. If your answer is "no", go to question 3.

2a. Did the Estate of Charles Rice, through any representative or relative, object to the participation of all the lawyers involved at the time it initially agreed to be represented by Defendant on July 26, 2012?

Yes _____ No _____

Go to Question 3.

3. Was Mervie Rice advised as to the participation of all the lawyers involved?

Yes _____ No _____

If your answer was "yes", then go to Question 3a. If your answer is "no", go to question 4.

3a. Did Mervie Rice object to the participation of all the lawyers involved at the time she initially agreed to be represented by Defendant on July 26, 2012?

Yes _____ No _____

Go to Question 4.

4. Was Philip Hill advised as to the participation of all the lawyers involved?

Yes _____ No _____

If your answer was "yes", then go to Question 4a. If your answer is "no", go to question 5.

4a. Did Philip Hill object to the participation of all the lawyers involved at the time he initially agreed to be represented by Defendant on August 6, 2012?

Yes _____ No _____

Go to Question 5.

5. Was Dorothy Dixon, either individually or through any representative or relative, advised as to the participation of all the lawyers involved?

Yes _____ No _____

If your answer was "yes", then go to Question 5a. If your answer is "no", go to question 6.

5a. Did Dorothy Dixon, either individually or through any representative or relative, object to the participation of all the lawyers involved at the time she initially agreed to be represented by Defendant either on July 26, 2012 and/or on September 11, 2012?

Yes _____ No _____

Plaintiff's Proposed Form of Verdict

6. Did Jeffrey A. Danzig have actual or apparent authority to enter into any contract between Plaintiff and Defendant for the payment of referral fees? .

Yes _____ No _____

7. Did Robert M. Giroux, Jr. have actual or apparent authority to enter into any contract between Plaintiff and Defendant for the payment of referral fees?

Yes _____ No _____

8. Did Jeffrey A. Danzig agree to bind Defendant to pay referral fees to Plaintiff?

Yes _____ No _____

9. Did Robert M. Giroux, Jr. agree to bind Defendant to pay referral fees to Plaintiff?

Yes _____ No _____

10. What is the amount of the referral fee owed to Plaintiff on each case that you find that it referred to Defendant?

Estate of Charles Rice \$ _____

Dorothy Dixon \$ _____

Mervie Rice \$ _____

Philip Hill \$ _____

11. Did Plaintiff suffer consequential damages? Yes _____ No _____

12. What is the amount of Plaintiff's consequential damages? \$ _____

Signed: _____ Dated: _____
Foreperson (printed and signed name)

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Case Search

Case Docket Number Search Results - 338997

Appellate Docket Sheet

COA Case Number: 338997

MSC Case Number: 159450

LAW OFFICES OF JEFFREY SHERBOW V FIEGER & FIEGER PC

1	LAW OFFICES OF JEFFREY SHERBOW PC Oral Argument: Y Timely: Y	PL-AT-XE	OF	(28268) GROSS JAMES G
			RET	(27696) JANKS GREGORY M
2	FIEGER & FIEGER PC Oral Argument: Y Timely: Y	DF-AE-XT	RET	(69541) PATEL SIMA G
			CO	(23490) BENDURE MARK R
3	FIEGER FIEGER KENNEY & HARRINGTON PC	DB		

COA Status: Case Concluded; File Open

MSC Status: Pending on Application

Case Flags: Electronic Record

- 06/28/2017 1 Claim of Appeal - Civil
 Proof of Service Date: 06/28/2017
 Jurisdictional Checklist: Y
 Register of Actions: Y
 Fee Code: EPAY
 Attorney: 28268 - GROSS JAMES G
- 04/26/2017 2 Order Appealed From
 From: OAKLAND CIRCUIT COURT
 Case Number: 2015-147488-CB
 Trial Court Judge: 23289 ALEXANDER JAMES M
 Nature of Case:
 Judgment
- 06/28/2017 3 LCt Order
 Date: 06/08/2017
 For Party: 1 LAW OFFICES OF JEFFREY SHERBOW PC PL-AT-XE
 Attorney: 28268 - GROSS JAMES G
 Comments: motion for JNOV denied
- 06/28/2017 4 Notice Of Filing Transcript
 Date: 06/15/2017
 Timely: Y
 Reporter: 7118 - TRASKOS SANDRA J
 Filed By Attorney: 28268 - GROSS JAMES G
 Hearings:
 02/27/2017
 02/28/2017
 03/02/2017
 03/03/2017

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Appellate Docket Sheet

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- 06/28/2017 5 Notice Of Filing Transcript
 - Date: 06/15/2017
 - Timely: Y
 - Reporter: 7118 - TRASKOS SANDRA J
 - Filed By Attorney: 28268 - GROSS JAMES G
 - Hearings:
 - 04/26/2017

- 06/28/2017 6 Steno Certificate - Tr Request Received
 - Date: 06/20/2017
 - Timely: Y
 - Reporter: 7118 - TRASKOS SANDRA J
 - Filed By Attorney: 28268 - GROSS JAMES G
 - Hearings:
 - 06/07/2017

- 06/28/2017 7 Transcript Requested By Atty Or Party
 - Date: 06/28/2017
 - Timely: Y
 - Reporter: 7118 - TRASKOS SANDRA J
 - Filed By Attorney: 28268 - GROSS JAMES G
 - Hearings:
 - 03/30/2016
 - 04/13/2016
 - 05/18/2016
 - 06/08/2016
 - 11/23/2016

- 06/28/2017 8 Other
 - Date: 06/28/2017
 - For Party: 1 LAW OFFICES OF JEFFREY SHERBOW PC PL-AT-XE
 - Attorney: 28268 - GROSS JAMES G
 - Comments: statement indicating the 12/16/15, 4/13/16, 8/17/16, 7/20/16, 1/25/17, 2/1/17 & 4/26/17 were filed

- 07/03/2017 9 Steno Certificate - Tr Request Received
 - Date: 06/29/2017
 - Timely: Y
 - Reporter: 7118 - TRASKOS SANDRA J
 - For Event #: 7
 - Hearings:
 - 03/30/2016
 - 04/13/2016
 - 05/18/2016
 - 06/08/2016
 - 11/23/2016
 - 12/16/2015
 - 08/17/2016
 - 07/20/2016
 - 01/25/2017
 - 02/01/2017
 - 04/26/2017

- 07/11/2017 10 Appearance - Appellee
 - Date: 07/11/2017
 - For Party: 2 FIEGER & FIEGER PC DF-AE-XT
 - Attorney: 69541 - PATEL SIMA G

- 07/11/2017 11 Claim of Cross Appeal
 - Date: 07/11/2017

Appellate Docket Sheet

For Party: 2 FIEGER & FIEGER PC DF-AE-XT

Attorney: 69541 - PATEL SIMA G

- 07/26/2017 12 Other
Date: 06/15/2017
Comments: ACCO Item; see event 4.
- 07/26/2017 13 Other
Date: 06/15/2017
Comments: ACCO item; see event 5.
- 07/26/2017 14 Other
Date: 06/21/2017
Comments: ACCO Item; see event 6.
- 08/03/2017 15 Docketing Statement MCR 7.204H
For Party: 1 LAW OFFICES OF JEFFREY SHERBOW PC PL-AT-XE
Proof of Service Date: 08/03/2017
Filed By Attorney: 28268 - GROSS JAMES G
- 08/17/2017 16 Invol Dismissal Warning - No Dkt Stmt - Cross AT
Attorney: 69541 - PATEL SIMA G
Due Date: 09/07/2017
- 08/30/2017 17 Telephone Contact
For Party: 1 LAW OFFICES OF JEFFREY SHERBOW PC PL-AT-XE
Attorney: 28268 - GROSS JAMES G
Comments: vmail for AT;please efile suppl brief & list of attachments right side up;no defect ltr sent
- 08/30/2017 18 Docketing Statement MCR 7.204H
For Party: 2 FIEGER & FIEGER PC DF-AE-XT
Proof of Service Date: 08/30/2017
Filed By Attorney: 69541 - PATEL SIMA G
Comments: on cross appeal
- 09/18/2017 19 Notice Of Filing Transcript
Date: 09/18/2017
Timely: Y
Reporter: 7118 - TRASKOS SANDRA J
Hearings:
06/07/2017
- 09/26/2017 20 Notice Of Filing Transcript
Date: 09/26/2017
Timely: Y
Reporter: 7118 - TRASKOS SANDRA J
Hearings:
03/30/2016
04/13/2016
05/18/2016
06/08/2016
11/23/2016
12/16/2015
08/17/2016
07/20/2016
01/25/2017
02/01/2017
04/26/2017
- 11/13/2017 21 Motion: Extend Time - Appellant
Proof of Service Date: 11/13/2017
Filed By Attorney: 28268 - GROSS JAMES G

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Appellate Docket Sheet

For Party: 1 LAW OFFICES OF JEFFREY SHERBOW PC PL-AT-XE

Fee Code: EPAY

Requested Extension: 01/16/2018

Answer Due: 11/20/2017

- 11/15/2017 **22 Motion: Extend Time - Cross-Appellant**
Proof of Service Date: 11/15/2017
Filed By Attorney: 69541 - PATEL SIMA G
For Party: 2 FIEGER & FIEGER PC DF-AE-XT
Fee Code: EPAY
Requested Extension: 01/16/2018
Answer Due: 11/22/2017
- 11/21/2017 **23 Submitted on Administrative Motion Docket**
Event: 21 Extend Time - Appellant
District: T
- 11/21/2017 **24 Submitted on Administrative Motion Docket**
Event: 22 Extend Time - Cross-Appellant
District: T
- 11/22/2017 **25 Order: Extend Time - Appellant Brief - Grant**
View document in PDF format
Event: 21 Extend Time - Appellant
Panel: ELG
Attorney: 28268 - GROSS JAMES G
Extension Date: 01/16/2018
- 11/22/2017 **26 Order: Extend Time - Cross-Appellant Brief - Grant**
View document in PDF format
Event: 22 Extend Time - Cross-Appellant
Panel: ELG
Attorney: 69541 - PATEL SIMA G
Extension Date: 01/16/2018
- 01/16/2018 **27 Brief: Cross-Appellant**
Proof of Service Date: 01/16/2018
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 69541 - PATEL SIMA G
For Party: 2 FIEGER & FIEGER PC DF-AE-XT
- 01/22/2018 **28 Invol Dismissal Warning - No Appellant Brief**
Attorney: 28268 - GROSS JAMES G
Due Date: 02/12/2018
- 01/31/2018 **29 Motion: Extend Time - Appellant**
Proof of Service Date: 01/31/2018
Filed By Attorney: 28268 - GROSS JAMES G
For Party: 1 LAW OFFICES OF JEFFREY SHERBOW PC PL-AT-XE
Fee Code: EPAY
Requested Extension: 01/31/2018
Answer Due: 02/07/2018
- 01/31/2018 **30 Brief: Appellant**
Proof of Service Date: 01/31/2018
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 28268 - GROSS JAMES G
For Party: 1 LAW OFFICES OF JEFFREY SHERBOW PC PL-AT-XE
- 02/01/2018 **31 Oral Arg Advise Ltr Sent**

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Appellate Docket Sheet

Attorney: 28268 - GROSS JAMES G

- 02/07/2018 33 Brief: Cross-Appellee
Proof of Service Date: 02/07/2018
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 28268 - GROSS JAMES G
For Party: 1 LAW OFFICES OF JEFFREY SHERBOW PC PL-AT-XE
- 02/13/2018 32 Submitted on Administrative Motion Docket
Event: 29 Extend Time - Appellant
District: T
Item #: 4
- 02/14/2018 34 Order: Extend Time - Appellant Brief - Grant
View document in PDF format
Event: 29 Extend Time - Appellant
Panel: ELG
Attorney: 28268 - GROSS JAMES G
Comments: The appellant's brief received on 1/31/2018 shall be considered timely.
- 02/26/2018 35 Motion: Extend Time - Reply Brief
Proof of Service Date: 02/26/2018
Filed By Attorney: 69541 - PATEL SIMA G
For Party: 2 FIEGER & FIEGER PC DF-AE-XT
Fee Code: EPAY
Requested Extension: 03/28/2018
Answer Due: 03/05/2018
Comments: requests extension for cross-appellant's reply brief
- 02/26/2018 36 Motion: Extend Time - Appellee
Proof of Service Date: 02/26/2018
Filed By Attorney: 69541 - PATEL SIMA G
For Party: 2 FIEGER & FIEGER PC DF-AE-XT
Fee Code: EPAY
Requested Extension: 05/02/2018
Answer Due: 03/05/2018
- 03/06/2018 37 Submitted on Administrative Motion Docket
Event: 35 Extend Time - Reply Brief
District: T
- 03/06/2018 38 Submitted on Administrative Motion Docket
Event: 36 Extend Time - Appellee
District: T
Item #: 2
- 03/07/2018 39 Order: Extend Time - Reply Brief - Grant
View document in PDF format
Event: 35 Extend Time - Reply Brief
Panel: ELG
Attorney: 69541 - PATEL SIMA G
Extension Date: 03/28/2018
Comments: For cross-appellant's reply brief.
- 03/07/2018 40 Order: Extend Time - Appellee Brief - Grant
View document in PDF format
Event: 36 Extend Time - Appellee
Panel: ELG
Attorney: 69541 - PATEL SIMA G
Extension Date: 05/02/2018

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Appellate Docket Sheet

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- 03/28/2018 41 Brief: Reply - Cross Appeal
 Proof of Service Date: 03/28/2018
 Oral Argument Requested:
 Timely Filed: Y
 Filed By Attorney: 69541 - PATEL SIMA G
 For Party: 2 FIEGER & FIEGER PC DF-AE-XT
- 05/02/2018 42 Brief: Appellee
 Proof of Service Date: 05/02/2018
 Oral Argument Requested: Y
 Timely Filed: Y
 Filed By Attorney: 69541 - PATEL SIMA G
 For Party: 2 FIEGER & FIEGER PC DF-AE-XT
- 05/03/2018 43 Noticed
 Record: REQST
 Mail Date: 05/04/2018
- 05/22/2018 44 Motion: Motion
 Proof of Service Date: 05/22/2018
 Filed By Attorney: 28268 - GROSS JAMES G
 For Party: 1 LAW OFFICES OF JEFFREY SHERBOW PC PL-AT-XE
 Answer Due: 05/29/2018
 Comments: motion to expand page limit for reply brief-17 page reply filed with motion
- 05/22/2018 50 Brief: Reply
 Proof of Service Date: 05/22/2018
 Oral Argument Requested:
 Timely Filed: Y
 Filed By Attorney: 28268 - GROSS JAMES G
 For Party: 1 LAW OFFICES OF JEFFREY SHERBOW PC PL-AT-XE
 Comments: Order granting exceeding page limit in event 49.
- 05/29/2018 45 Record Request
 Mail Date: 05/29/2018
 Agency: OAKLAND CIRCUIT COURT
- 05/30/2018 46 Electronic Record Filed
- 06/05/2018 48 Submitted on Administrative Motion Docket
 Event: 44 Motion
 District: T
- 06/07/2018 49 Order: Grant - Generic
 View document in PDF format
 Event: 44 Motion
 Panel: ELG
 Attorney: 28268 - GROSS JAMES G
 Extension Date: 05/22/2018
 Comments: Mtn to file reply brief exceeding 10 pages is GRANTED, reply brief received on 5/22/18 is accepted.
- 12/10/2018 56 Appearance - Appellee
 Date: 12/10/2018
 For Party: 2 FIEGER & FIEGER PC DF-AE-XT
 Attorney: 30441 - FIEGER GEOFFREY N
 Comments: Appearance of Geoffrey Fieger, of the same firm as Sima Patel
- 12/10/2018 57 Case Call Update For Panel
 Comments: Geoffrey Fieger to appear for AE
- 12/11/2018 55 Submitted on Case Call
 District: D
 Item #: 1

Appellate Docket Sheet

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- Panel: CMM,DBS,MJR
- 12/11/2018 58 Oral Argument Audio
- 01/15/2019 60 Opinion - Authored - Published
View document in PDF format
Pages: 17
Panel: CMM,DBS,MJR
Author: MJR
Result: Affirm in Part, Vacate in Part, Remanded
- 02/05/2019 62 Motion: Reconsideration of Opinion
Proof of Service Date: 02/05/2019
Filed By Attorney: 69541 - PATEL SIMA G
For Party: 2 FIEGER & FIEGER PC DF-AE-XT
Fee Code: EPAY
Answer Due: 02/19/2019
- 02/07/2019 63 Motion: Motion
Proof of Service Date: 02/07/2019
Filed By Attorney: 69541 - PATEL SIMA G
For Party: 2 FIEGER & FIEGER PC DF-AE-XT
Fee Code: EPAY
Answer Due: 02/14/2019
Comments: Mtn to file corrected Mtn for Recon. New Mtn attached to this event and to Evt 62
- 02/14/2019 64 Answer - Reconsideration
Proof of Service Date: 02/14/2019
Event No: 62 Reconsideration of Opinion
For Party: 1 LAW OFFICES OF JEFFREY SHERBOW PC PL-AT-XE
Filed By Attorney: 28268 - GROSS JAMES G
- 02/27/2019 67 Submitted on Reconsideration Docket
Event: 62 Reconsideration of Opinion
Event: 63 Motion
District: C
- 03/05/2019 68 Order: Reconsideration - Deny - Appeal Remains Closed
View document in PDF format
Event: 62 Reconsideration of Opinion
Event: 63 Motion
Panel: CMM,DBS,MJR
Attorney: 69541 - PATEL SIMA G
Comments: Grant motion to file a corrected motion for reconsideration. Correct motion is accepted.
- 03/18/2019 69 SCt: Application for Leave to SCt
Supreme Court No: 159301
Answer Due: 04/15/2019
Fee: E-Pay
For Party: 1
Attorney: 28268 - GROSS JAMES G
- 03/18/2019 70 SCt Case Caption
Proof Of Service Date: 03/18/2019
Comments: Combined caption for both MSC appeals - #159301 & 159450.
- 03/18/2019 71 Other
Date: 03/18/2019
For Party: 1 LAW OFFICES OF JEFFREY SHERBOW PC PL-AT-XE
Attorney: 28268 - GROSS JAMES G
Comments: Notice of filing application for leave to appeal in the Supreme Court
- 04/16/2019 72 SCt: Application for Leave to SCt

Appellate Docket Sheet

Supreme Court No: 159450

Answer Due: 05/14/2019

Fee: E-Pay

For Party: 2

Attorney: 69541 - PATEL SIMA G

- 06/23/2019 73 SCt: Answer - SCt Application/Complaint
Filing Date: 06/23/2019
For Party: 1 LAW OFFICES OF JEFFREY SHERBOW PC PL-AT-XE
Filed By Attorney: 28268 - GROSS JAMES G
- 07/25/2019 74 Michigan Appeals Reports Publication
326 Mich App 684
- 10/31/2019 75 Correspondence Sent
Proof Of Service Date: 10/31/2019
Comments: MSC Clk ltr notifying attys of possible basis for DQ of Justice Bernstein.
- 02/05/2020 76 SCt Order: Abeyance - Grant
View document in PDF format
Comments: No. 159301: Hold in abeyance pending a decision in MSC 159450, Law Ofcs of Sherbow v Fieger & Fieger, PC.
- 02/05/2020 77 SCt Order: Application - Grant
View document in PDF format
Comments: Invited AC=Litigation, Negl Law, Solo & Small Firm Sections of SBM. 20-min arguments per side.
- 03/17/2020 78 SCt Motion: Housekeeping
Party: 2
Filed by Attorney: 69541 - PATEL SIMA G
Comments: Motion to extend time for filing DFAT supp brf to 4-29-2020.
- 03/20/2020 79 SCt Order: Chief Justice - Grant
View document in PDF format
Comments: Grant DFAT motion to extend time for filing brf to 4-29-2020.
- 07/14/2020 80 SCt: SCt Brief - Appellant
Filing Date: 07/14/2020
For Party: 2 FIEGER & FIEGER PC DF-AE-XT
Filed By Attorney: 69541 - PATEL SIMA G
Comments: Requires correction per MCR 7.312(D)
- 07/14/2020 81 Correspondence Sent
Proof Of Service Date: 07/15/2020
Comments: SC e-mail re defective brief; see event 80
- 07/16/2020 82 SCt: Miscellaneous Filing
Filing Date: 07/16/2020
For Party: 2 FIEGER & FIEGER PC DF-AE-XT
Filed By Attorney: 69541 - PATEL SIMA G
Comments: Refiled AT brf with corrected apx.
- 08/18/2020 83 SCt Motion: Housekeeping
Party: 1
Filed by Attorney: 28268 - GROSS JAMES G
Comments: Motion to extend time to 09-08-2020 to file brief on appeal
- 08/21/2020 84 SCt Order: Chief Justice - Grant
[View document in PDF format](#)
Comments: Grant PLAE mtn to extend the time for filing its brf to 9-8-2020.

Case Listing Complete

Order

Michigan Supreme Court
Lansing, Michigan

February 5, 2020

Bridget M. McCormack,
Chief Justice

159450

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

LAW OFFICES OF JEFFREY SHERBOW, PC,
Plaintiff-Appellee,

v

SC: 159450
COA: 338997
Oakland CC: 2015-147488-CB

FIEGER & FIEGER, PC, d/b/a FIEGER, FIEGER,
KENNEY & HARRINGTON, PC,
Defendant-Appellant.

On order of the Court, the application for leave to appeal the January 15, 2019 judgment of the Court of Appeals is considered, and it is GRANTED. The parties shall address: (1) whether Michigan Rule of Professional Conduct (MRPC) 1.5(e) requires the client to have an attorney-client relationship with all participating lawyers; (2) if so, what are the parameters of such relationship and how is it formed; (3) which party carries the burden with respect to a contract's compliance with MRPC 1.5(e), see *Palenkas v Beaumont Hosp*, 432 Mich 527, 548-550 (1989); and (4) if an attorney-client relationship with all participating lawyers is required under MRPC 1.5(e), whether reversal is required in this case. See MCR 2.613(A); *Cox v Bd of Hosp Managers for City of Flint*, 467 Mich 1, 15 (2002). The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

The Litigation, Negligence Law, and Solo and Small Firm Sections of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.



b0129

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

February 5, 2020

Clerk

Order

Michigan Supreme Court
Lansing, Michigan

February 5, 2020

Bridget M. McCormack,
Chief Justice

159301

David F. Viviano,
Chief Justice Pro Tem

LAW OFFICES OF JEFFREY SHERBOW, PC,
Plaintiff-Appellant,

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

v

SC: 159301
COA: 338997
Oakland CC: 2015-147488-CB

FIEGER & FIEGER, PC, d/b/a FIEGER, FIEGER,
KENNEY & HARRINGTON, PC,
Defendant-Appellee.

On order of the Court, the application for leave to appeal the January 15, 2019 judgment of the Court of Appeals is considered and, it appearing to this Court that the case of *Law Offices of Jeffrey Sherbow, PC v Fieger & Fieger, PC* (Docket No. 159450) is pending on appeal before this Court and that the decision in that case may resolve an issue raised in the present application for leave to appeal, we ORDER that the application be held in ABEYANCE pending the decision in that case.



b0129

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

February 5, 2020

Clerk

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STATE OF MICHIGAN
COURT OF APPEALS

METRO SERVICES ORGANIZATION,
Plaintiff-Appellant,

UNPUBLISHED
February 1, 2011

v

CITY OF DETROIT,
Defendant-Appellee.

No. 292052
Wayne Circuit Court
LC No. 08-014413-CK

METRO SERVICES ORGANIZATION,
Plaintiff-Appellant,

v

CITY OF DETROIT,
Defendant-Appellee.

No. 292588
Wayne Circuit Court
LC No. 08-018094-CK

Before: GLEICHER, P.J., and ZAHRA and K.F. KELLY, JJ.

PER CURIAM.

These consolidated appeals involve separate breach of contract claims brought by plaintiff Metro Services Organization against defendant City of Detroit. Plaintiff's suits aver that defendant neglected to pay for cleaning and electrical services that plaintiff performed at Cobo Hall (also referred to as "Cobo Civic Center"). In Docket No. 292052, plaintiff appeals as of right from a circuit court order in LC No. 08-014413-CK granting defendant summary disposition with respect to plaintiff's claim for breach of the cleaning services contract. In Docket No. 292588, plaintiff appeals as of right from a circuit court order in LC No. 08-018094-CK granting defendant summary disposition of plaintiff's claim for breach of the electrical services contract. In both cases, the court ruled the contracts void and unenforceable as contrary to public policy. In each case, we reverse and remand for further proceedings.

We review de novo a circuit court's summary disposition ruling. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 424; 751 NW2d 8 (2008). Although the court did not identify the particular subrule on which it relied in granting defendant's motions, because the court considered documentary evidence beyond the pleadings, we review the motions under MCR

2.116(C)(10). *Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174 (2007). We limit our review to the evidence presented to the circuit court at the time it decided the motions. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475-476; 776 NW2d 398 (2009). Therefore, in considering plaintiff's challenge to the circuit court's decision on the cleaning services contract in Docket No. 292052, we decline to take into account the additional evidence that plaintiff subsequently offered in support of its motion for reconsideration. Pursuant to the same logic, we reject defendant's suggestion in each case that we take judicial notice of Karl Kado's plea agreement in a federal case and Kado's deposition testimony in a separate Wayne Circuit Court case, both of which occurred after the circuit court's summary disposition rulings in these cases.

A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim, as supported by documentation containing "content or substance [that] would be admissible as evidence to establish or deny the grounds stated in the motion." MCR 2.116(G)(6); see also *Adair v Michigan*, 470 Mich 105, 120; 680 NW2d 386 (2004); *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). The moving party bears the initial burden of substantiating its position with affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b) and (4); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to show a genuine issue of disputed fact for trial. *Id.*; *Innovative Adult Foster Care, Inc*, 285 Mich App at 475. Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Healing Place at North Oakland Med Ctr*, 277 Mich App at 56. "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison*, 481 Mich at 425.

In Docket No. 292052, plaintiff complains that the circuit court made its summary disposition ruling before discovery occurred. "Although a motion for summary disposition is generally premature if granted before completing discovery regarding a disputed issue, if a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence." *Davis v Detroit*, 269 Mich App 376, 379-380; 711 NW2d 462 (2006) (internal quotation omitted). For example, MCR 2.116(H)(1) permits a party to "show by affidavit that the facts necessary to support the party's position cannot be presented because the facts are known only to persons whose affidavits the party cannot procure." See also *Coblentz v City of Novi*, 475 Mich 558, 570-571; 719 NW2d 73 (2006). Plaintiff apprised the circuit court of no specific evidence that it could not obtain but wanted to present by the time the circuit court ruled on defendant's motion for summary disposition of the cleaning services contract.

The court viewed the contracts as contravening public policy, and thus void and unenforceable.¹ In *Badon v Gen Motors Corp*, 188 Mich App 430, 439; 470 NW2d 436 (1991), this Court explained:

¹ We need not address plaintiff's brief appellate reference to the cleaning services contract's (continued...)

Public policy has been described as “the community common sense and common conscience, extended and applied throughout the State to matters of public morals, public health, public safety, public welfare, and the like.” *Skutt v Grand Rapids*, 275 Mich 258, 264; 266 NW 344 (1936). It is expressed in the constitution, statutes, judicial decisions, or customs and conventions of the people, and it concerns the primary principles of equity and justice. *Id.* What public policy requires varies with the habits and fashions of the day. *Id.*, pp 263-264; *McNamara v Gargett*, 68 Mich 454, 460-461; 36 NW 218 (1888).

In Michigan, whether a contract or contractual term violates public policy “depends upon its purpose and tendency and not upon an actual showing of public injury.” *Federoff v Ewing*, 386 Mich 474, 480-481; 192 NW2d 242 (1971). “*The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of its courts.*” *Mahoney v Lincoln Brick Co*, 304 Mich 694, 706; 8 NW2d 883 (1943), quoting 17 CJS 211, pp 563-565 (emphasis in original).

Turning first to the cleaning services contract at issue in Docket No. 292052, the particular contract on which plaintiff relies as a basis for entitlement to \$1.75 million in cleaning services comprises the sixth revision to purchase order no. 2578856, dated July 18, 2005. The amount of defendant’s alleged liability is not at issue in this appeal, but we note that the relevant time period is July 2005, when the purchase order was revised to specify “contract increase approved for an additional \$1,750,000,” bringing the total approved amount for the contract period from April 1, 2002 to October 31, 2005 to \$11,411,999. The purchase order obligated plaintiff to furnish various janitorial, ground maintenance, and other services. It lists both monthly (\$220,472.05) and daily (\$3,279.94) rates for plaintiff’s services.

Plaintiff does not dispute on appeal that its officer, Karl Kado, made an illegal payment of nearly \$100,000 to Cobo Hall’s director, Efsthathios Pavledes, in January 2003, followed by an illegal payment of \$15,000 to a successor director, Glenn Blanton, in May 2005. Although plaintiff insists that the payments should rightly be characterized as extortion by public officials, instead of bribery, we fail to comprehend the materiality of this distinction for purposes of ascertaining whether defendant’s alleged liability for \$1.75 million under the revised purchase order should be enforced. In both instances, the crime involves the payment of money to a public official. *People v Ritholz*, 359 Mich 539, 552-553; 103 NW2d 481 (1960); see also MCL 750.214. A person may avoid both crimes in the same manner, by opting against making the payment to the public official. Furthermore, in cases of both bribery and extortion, a person’s payment of money operates to the detriment of the public interest, which is all that Michigan law demands for declaring a contract unenforceable as against public policy based on criminal conduct. *Federoff*, 386 Mich at 481; *Mahoney*, 304 Mich at 705.

But the mere occurrence of some illegal conduct involving an entity’s agent and a public official does not necessarily render *every* contract between the entity and public official void and unenforceable. Some connection must exist between the illegal conduct and the contract that

(...continued)

procurement by fraud, given that the circuit court did not rely on principles of fraud to find that either the cleaning services contract or the electrical services contract was void.

makes enforcement of the contract offensive to public policy. *Miller v Radikopf*, 394 Mich 83, 88-89; 228 NW2d 386 (1975); see also *Device Trading, Ltd v Viking Corp*, 105 Mich App 517, 520-521; 307 NW2d 362 (1981). In *Miller*, 394 Mich at 86-88, our Supreme Court found enforceable a contract to share the proceeds of an Irish Sweepstakes ticket because this agreement did not depend on prior illegal conduct of the contracting parties in their sale and acquisition of Irish Sweepstakes tickets, and enforcement of the contract to share the proceeds would not offend public policy. In reaching this conclusion, the Supreme Court distinguished the contract to share proceeds from other criminal enterprises;

Agreements to share possible proceeds from Irish Sweepstakes tickets are not an "essential part" of the sale and distribution of those tickets. The continued success of the Irish Sweepstakes in this state is in no way dependent on the enforceability of agreements to share winnings. *Miller's* and *Radikopf's* collateral agreement to divide their prospective winnings was not an essential part of their sale and distribution of those tickets. Nor was their agreement dependent on illegal conduct in the acquisition of the lottery tickets; they might have acquired the tickets in a manner free of any suggestion of illegality and then entered into an agreement to share proceeds.

However this case is decided, the courts of this state will continue to refuse to entertain actions seeking an accounting of proceeds obtained from illegal enterprises such as the illegal sale of narcotics and bank robberies. Additionally, enforcement or an accounting will be denied, without regard to whether the proceeds sought to be divided have been legally obtained, if the consideration offered is illegal.

Judicial nonenforcement of agreements deemed against public policy is considered a deterrent for those who might otherwise become involved in such transactions. While nonenforcement . . . might tend to discourage people from agreeing to split their legal winnings, nonenforcement would not tend to discourage people from buying or selling Irish Sweepstakes tickets. Both *Miller* and *Radikopf* have been compensated for selling the tickets and *Radikopf* has received the winnings as the holder of a particular ticket. No interest of the state would be furthered by nonenforcement of *Miller's* claim that he is the owner of one-half of those legal winnings. [*Id.* at 88-89 (footnote omitted).]

In support of defendant's position that plaintiff engaged in unlawful conduct that rendered the cleaning services contract void, defendant relied primarily on evidence of *Pavledes's* and *Blanton's* plea agreements in federal criminal cases.² The plea documentation showed that *Pavledes* agreed to plead guilty to a charge of structuring a transaction to avoid currency reporting requirements, and that *Pavledes* acknowledged the following relevant factual basis for his plea:

² Defendant also submitted a one-page information against *Kado*, which revealed no details of the false income tax reporting charge against him.

In January 2003, [Pavledes] was the Director of the Cobo Civic Center in Detroit, Michigan. At that time, [Pavledes] accepted an illegal payment of about \$100,000 in cash from a Cobo contractor named Karl Kado, owner of Metro Services Organization, Inc. (MSO), in connection with [Pavledes's] performance of his duties.

Blanton pleaded guilty to obstruction of justice, and agreed that the following pertinent facts constituted an accurate basis to support his plea:

In or about May 2005, while serving as Director of the Cobo Civic Center in Detroit, Michigan, [Blanton] accepted \$15,000 in illegal payments from Karl Kado, a city contractor who held electrical, janitorial and food contracts at Cobo Hall. [Blanton] accepted the money knowing that it was given with the expectation that [Blanton] would provide favorable treatment to Kado in [Blanton's] official capacity as Director of the Cobo Civic Center.

Even assuming that these agreements qualify as substantively admissible evidence, they do not suffice to satisfy defendant's initial burden, in the context of this motion for summary disposition, to support its position that the cleaning services contract should not be enforced because it is contrary to public policy. Pavledes's stipulation reveals no details concerning the nature of Kado's "illegal payment" or how it had any connection to Pavledes's duties. The factual premise for Blanton's plea supports a reasonable inference that Kado paid him a bribe. It also arguably supports an inference that Kado sought favorable treatment with respect to all of the specified contracts between plaintiff and defendant. The timing of the payment appears significant because it occurred shortly before the July 2005 cleaning services contract revision. Like the original contract in 2002, under which defendant allowed plaintiff to replace UNICCO to supply various janitorial and other cleaning services, a contract modification requires mutual assent. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372-373; 666 NW2d 251 (2003).

However, defendant's positions that the cleaning and electrical services contracts were void constitute affirmative defenses. MCR 2.111(F)(3)(a) (a claim that "an instrument . . . is void" is an affirmative defense). The party asserting an affirmative defense has the burden of producing evidence to support it. *Attorney General v Bulk Petroleum Corp*, 276 Mich App 654, 664; 741 NW2d 857 (2007). "[W]here the truth of a material factual assertion of a moving party's affidavit depends on the affiant's credibility, there exists a genuine issue to be decided at trial by the trier of fact and a motion for summary disposition cannot be granted." *SSC Assoc Ltd Partnership v Gen Retirement Sys*, 192 Mich App 360, 365; 480 NW2d 275 (1991). "Opinions, conclusionary denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule; disputed fact (or the lack of it) must be established by admissible evidence." *Id.* at 364.

Viewed in the light most favorable to plaintiff, the factual basis for Blanton's plea, even if deemed credible, contains conclusionary rather than substantive information. It does not reveal details concerning the words exchanged between Blanton and Kado, or any specific circumstances surrounding Kado's payment to Blanton, that would assist a trier of fact in determining the basis for (1) Blanton's claimed knowledge that Kado had given him money in anticipation of favorable treatment, or (2) to what extent, if any, anticipated favorable treatment had a relationship to some or all of plaintiff's contracts. Given the conclusionary nature of the

factual bases underlying each plea agreement, the circuit court improperly granted defendant's motion for summary disposition. Defendant's failure to satisfy its initial burden of showing a nexus between the "illegal payments" and the cleaning services contract in particular, or defendant's asserted liability for \$1.75 million pursuant to the cleaning services contract, precluded the circuit court from granting defendant's motion. *Quinto*, 451 Mich at 362. Accordingly, in Docket No. 292052, we reverse the circuit court's summary disposition order in LC No. 08-014413-CK.³

We reach this same conclusion with respect to plaintiff's challenge to the circuit court's summary disposition decision relating to the electrical services contract at issue in Docket No. 292588. Plaintiff's claim for unpaid electrical services rests on several open invoices, identified by reference to amount, invoice number, and date, for the period between November 3, 2003 and July 5, 2006. Defendant relied on the same evidence of Pavledes's and Blanton's plea agreements in their federal criminal cases to factually substantiate its affirmative defense that the electrical services contract was similarly void because its enforcement would contravene public policy. In opposition to defendant's motion, plaintiff submitted an affidavit of Justin Lawrence, who held various managerial positions with plaintiff during the relevant period. Lawrence averred in part that the parties had made unsuccessful attempts to settle the matter in 2006. Other documentary evidence showed that the electrical services contract, as amended in 2002, was due to expire in June 2005, shortly after Blanton received the \$15,000 payment in May 2005. Evidence also showed that Pavledes wrote a letter to Kado confirming defendant's approval of an assignment of the electrical services contract from Trade Show Electrical to plaintiff, dated February 5, 2003, shortly after the date when Pavledes stipulated in his plea agreement that he received an illegal payment of approximately \$100,000. Lawrence's affidavit documenting that he "later learned" details of the illegal payments to Pavledes and Blanton raises the same conclusionary concerns inherent in the stipulations underlying Pavledes's and Blanton's plea agreements. An affidavit must set forth with particularity facts admissible as evidence. MCR 2.119(B)(1); see also *SSC Assoc Ltd Partnership*, 192 Mich App at 364.

Because defendant premised its motion for summary disposition of the electrical services contract on the same stipulations in the plea agreements that we have previously deemed conclusory and insufficient to substantiate defendant's position that the contracts should be found unenforceable as against public policy, the circuit court likewise improperly granted defendant's motion for summary disposition of the electrical services contract under MCR 2.116(C)(10). Defendant's failure to satisfy its initial burden of showing a sufficient nexus between the illegal payments, the electrical services contract, and defendant's alleged liability for the outstanding invoices for electrical services, proves fatal to defendant's motion.

Moreover, we readily distinguish this case from *Mahoney*, 304 Mich 694, on which the circuit court expressly relied in granting defendant summary disposition concerning the electrical

³ In light of our decision to reverse the circuit court's summary disposition decision in Docket No. 292052, we need not consider plaintiff's challenge to the court's denial of its motion for reconsideration.

services contract. The plaintiff in *Mahoney* filed suit to enforce an oral contract, the terms of which obligated the plaintiff to engage in illegal activity, namely the “use[] or attempted . . . use[] [of] political connections, influence, and pressure in his contracts with architects and contractors.” *Id.* at 695-704. Alternatively phrased, an improper purpose permeated the contract and served as the foundation of the agreement that the plaintiff sought to enforce. *Id.* at 704-705. By contrast, the cleaning and electrical services contracts involved entirely legal activities. In light of the evidence before the circuit court when it granted defendant summary disposition, the cleaning and electrical services contracts were at most “remotely connected with an illegal act.” *Device Trading, Ltd*, 105 Mich App at 521. Therefore, in Docket No. 292588, we reverse the circuit court’s summary disposition order in LC No. 08-018094-CK.

Although we have concluded that the stipulations in the plea agreements, even if accepted as substantively admissible, do not suffice to substantiate defendant’s affirmative defense, we will briefly address plaintiff’s arguments regarding the admissibility of the plea agreements in the event this issue arises on remand. Plaintiff contends that the stipulations in the plea agreements consist of inadmissible hearsay or fall subject to exclusion under MRE 403.

Defendant does not dispute that the factual stipulations in the plea agreements are hearsay, MRE 801, but argues that they are nonetheless admissible under the catch-all exception in MRE 803(24). The appearance of a factual stipulation in a plea agreement does not render it admissible under MRE 803(24). Cf. *In re Slatkin*, 525 F3d 805, 811-813 (CA 9, 2008) (ruling on the admissibility of a plea agreement, made under oath, pursuant to FRE 807, which contains admissibility prerequisites similar to those in MRE 803(24)), and *United States v Hawley*, 562 F Supp 2d 1017, 1054 (ND Iowa, 2008) (finding plea agreements inadmissible under FRE 807). A court must examine the circumstances of each case to determine whether evidence qualifies as admissible under MRE 803(24). *People v Katt*, 468 Mich 272, 293; 662 NW2d 12 (2003).

The limited record developed in the circuit court does not establish an adequate foundation for applying MRE 803(24) to the stipulations. No factual development exists with respect to the actual circumstances of the pleas tendered by Pavledes or Blanton to aid a court in determining whether the stipulations have circumstantial guarantees of trustworthiness, especially with respect to any details surrounding the illegal payments that plaintiff disputes. Furthermore, defendant has not explained why either Pavledes or Blanton could not be deposed about the details underlying the payments and how they might relate to the contracts at issue. The “best evidence” requirement of MRE 803(24) presents a high bar that effectively limits the rule to exceptional circumstances. *Katt*, 468 Mich at 293. Here, the limited record developed below does not establish a sufficient foundation for concluding that the factual stipulations in the plea agreements are admissible under MRE 803(24). Without a proper foundation for admitting the evidence, it becomes unnecessary to consider whether MRE 403 would provide a basis for otherwise excluding the evidence.

Reversed and remanded in both cases for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Kirsten Frank Kelly

ZAHRA, J. did not participate.

STATE OF MICHIGAN
COURT OF APPEALS

METRO SERVICES ORGANIZATION,
Plaintiff-Appellant,

UNPUBLISHED
February 1, 2011

v

CITY OF DETROIT,
Defendant-Appellee.

No. 292052
Wayne Circuit Court
LC No. 08-014413-CK

METRO SERVICES ORGANIZATION,
Plaintiff-Appellant,

No. 292588
Wayne Circuit Court
LC No. 08-018094-CK

v

CITY OF DETROIT,
Defendant-Appellee.

Before: GLEICHER, P.J., and ZAHRA and K.F. KELLY, JJ.

K. F. KELLY, J. (*Concurring.*)

I agree with the lead opinion’s statement that “in cases of both bribery and extortion, a person’s payment of money operates to the detriment of the public interest, which is all that Michigan law demands for declaring a contract unenforceable as against public policy based on criminal conduct.” I further agree that the trial court prematurely granted defendant’s motions for summary disposition. Thus, I concur in reversing and remanding these cases for further proceedings.

/s/ Kirsten Frank Kelly

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