

STATE OF MICHIGAN
COURT OF APPEALS

NINA DODGE ABRAMS,

UNPUBLISHED

Plaintiff- Appellee,

v

No. 170288

LC No. 92-441591-CK

SUSAN FELDSTEIN, P.C., and SUSAN
FELDSTEIN, individually and formerly d/b/a
JOHNSON & FELDSTEIN,

Defendants- Appellants.

Before: Griffin, P.J., and Smolenski and L.P. Borrello,* JJ.

GRIFFIN, P.J., (dissenting).

I respectfully dissent. The lower court enforced an unethical fee splitting contract between two attorneys that directly violates the letter of DR 2-107 of Michigan's Code of Professional Responsibility. I would reverse and hold that contracts that violate Michigan's Code of Professional Responsibility contravene public policy and are, therefore, unenforceable.

Plaintiff does not seriously dispute that the involved fee splitting agreement violated DR 2-107. Indeed, the record contains no documentary evidence that plaintiff ever informed her client that the legal fees for the malpractice action would be split between plaintiff and defendant.¹ See DR 2-107(A)(1). Nor does plaintiff contend that the contingency fee she claims defendant owes her bears any proportion to the services plaintiff performed on the referred malpractice case. See DR 2-107(A)(2). Accordingly, because conduct that violates attorney discipline rules offends Michigan public policy, see *In re Karabatian's Estate*, 17 Mich App 541, 546-547; 170 NW2d 166 (1969), and Michigan courts have traditionally refused to enforce contracts that contravene public policy, see *Weller v Weller*, 344 Mich 614; 75 NW2d 34 (1956); *Cook v Wolverine Stockyards Co*, 344 Mich 207; 73 NW2d 902 (1955); *Cudnick v William Beaumont Hosp*, 207 Mich App 378, 383-384; 525 NW2d 891 (1994), I would join the weight of authority and hold that courts should not enforce unethical fee agreements. See *Scolinos v Kolts*, 37 Cal App 4th 635, 639-640; 44 Cal Rptr 2d 31 (1995); *O'Hara v Ahlgren, Blumenfeld and Kempster*, 158 Ill App 3d 562, 564-566; 511 NE2d 879

* Circuit judge, sitting on the Court of Appeals by assignment.

(1987); *Gorman v Grodensky*, 130 Misc 2d 837, 840-841; 498 NYS 2d 249 (1985); *Fleming v Campbell*, 537 SW2d 118 (Ct App Tex, 1976); see also *Leoris v Dicks*, 150 Ill App 3d 350, 353-354; 501 NE2d 901 (1986).

I am not persuaded by plaintiff's reliance on a provision in the subsequently adopted Michigan Rules of Professional Conduct which states that disciplinary rules are to be used only for disciplinary purposes and not to support or shield against civil liability. See MCPC 1.0(b) and comment. The question of civil liability for an ethics violation is distinguishable from the present issue whether the courts of this state should enforce, and thereby sanction unethical contracts. In my view, this Court should refuse to aid either party to an unjust contract where, as here, enforcing the agreement would further a purpose that violates public policy. See *O'Hara, supra* at 565; *Gorman, supra* at 840; see also *Leoris, supra* at 354. As stated by the California Court of Appeals in *Scolinos, supra* at 640: "It would be absurd if an attorney were allowed to enforce an unethical fee agreement through court action, even though the attorney potentially is subject to professional discipline for entering into the agreement."

For these reasons, I respectfully dissent. I would reverse the trial court and refer this matter to the Attorney Grievance Administrator for appropriate investigation.

/s/ Richard Allen Griffin

¹ Plaintiff claims on appeal that she told her client the malpractice attorney to whom the case was referred would pay any costs plaintiff incurred doing pre-referral research on the prospective malpractice claim. To the extent this alleged statement would present a material factual dispute on the issue whether plaintiff complied with DR 2-107, I would hold that the issue is not properly presented because plaintiff offered no documentary evidence to support this claim when she responded to the motion for summary disposition defendant brought pursuant to MCR 2.116(C)(10). See *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996).