IN THE CHANCERY COURT OF THE THIRTIETH JUDICIAL DISTRICT
SHELBY COUNTY, TENNESSEE

STATE OF TENNESSEE
COUNTY OF SHELBY } **SS**

BE IT REMEMBERED that in the Chancery Court of Shelby County, Tennessee, at the Court House in the City of Memphis, present and presiding the Honorable Walter Kurtz, Chancellor of said Court, the following proceedings were had, as appears of record in my office viz:

IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

STEVEN M. MARKOWITZ,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CH-05-1003-3
	)	
GLASSMAN, EDWARDS, WADE & WYATT	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

This is a dispute between lawyers over the division of a substantial attorney fee. The fee was awarded to the firm of Glassman, Edwards, Wade & Wyatt ("law firm") for representing a minor and his parents in a medical malpractice case against a hospital and several doctors (herein referred to as the "Bosse case"). The senior shareholder of that firm, Richard Glassman, divided the fee among three lawyers: Glassman; Tim Edwards; and the plaintiff in the instant case, Steven Markowitz.

Steven Markowitz filed this lawsuit against the law firm contending that the fee was not divided according to the contract between him and Richard Glassman, or, in the alternative, that principles of quasi-contract/quantum meruit entitled him to a much greater percentage of the fees. Markowitz asserts he is entitled to an amount that would be far in excess of one million dollars ($1,000,000.00).[1] Glassman only allocated Markowitz $100,000 of the total fee (about 3% of the

[1] The Bosse case was settled for a substantial amount of money. The Circuit Court entered an Agreed Protective Order as to the amount of the settlement. This Court has done its best to protect the integrity of that Order, but necessity dictates that the attorney fee be discussed in this opinion. The specific amounts are set out in Exhibit 21 filed under seal and obviously

fee.) At one point in the proceeding Markowitz's attorney actually took the untenable position that his client was entitled to the entire fee.

The case was tried before the Court for four (4) days: January 4 - 7, 2010. The Court heard from Glassman, Edwards, Markowitz and a number of witnesses. The Court received multiple exhibits. Both sides filed pretrial briefs which were helpful to the Court. The case was taken under advisement. For the reasons stated below, the Court determines that Steven Markowitz is entitled to a greater fee than he was allotted but not nearly as much as he has requested.

I. HISTORY OF THIS CASE

On May 27, 2005, Markowitz filed his first complaint, and he sued the law firm of Glassman, Edwards, Wade & Wyatt, PC.[2] He specifically asked for "money damages" for "breach of its agreement to pay Markowitz a portion of the fee generated from the Bosse case based on a pro rata division in accord with the work performed on the case . . .." He alleged four causes of action:

1. Breach of Contract
2. Unjust Enrichment
3. Constructive Trust
4. Accounting

On June 20, 2008, Markowitz filed an amended complaint adding Richard Glassman as a personal defendant and also for the first time adding tort causes of action. The amended complaint alleged:

1. Breach of Contract

---

available for appellate review.

[2] The undersigned judge was not appointed to preside over this case until July 21, 2009.

2. Unjust Enrichment

3. Constructive Trust

4. Accounting

5. Intentional Interference with Business Relationship

6. Procurement of Breach of Contract

7. Conversion

8. Punitive Damages

The amended complaint states the specific amount being sought in damages: $4,500,00.00 compensatory and $15,000,000.00 punitive.

Summary judgment motions were filed, and after a hearing the Court entered an Order dismissing all claims against Richard Glassman personally and all the tort claims against the law firm. The case went forward on the contract claim, unjust enrichment/quasi-contract claim, and a punitive damage claim based on the breach of contract. *See* Memorandum and Order of September 10, 2009.

II. FACTUAL BACKGROUND

Jill Bosse and her husband Tom suffered a tragedy in August 2000, when their son was born at Methodist Hospital in Memphis with brain damage because of medical error. They were referred to attorney Richard Glassman who had a reputation for handling medical malpractice cases. Richard Glassman agreed to meet with the Bosses at his home and did so in July 2001.

Richard Glassman testified that he wanted to help the Bosses but that he was not sure he wanted to be attorney of record. He explained that he and his wife had personally suffered from birth trauma malpractice when they lost twins during their delivery in 1988. A civil case

followed which was won by the GLASSMAN. Mr. Glassman testified that birth trauma cases always brought back the memories of that loss and that he had no desire to handle such a case. He further said that one of the doctors in the Bosse matter worked for the same clinic that had handled the 1988 birth, and he was concerned and did not want people to think he was "vindictive."

Here Mr. Glassman's testimony becomes difficult to reconcile. He testified that he was reluctant to represent the Bosses, but then he stated unequivocally that when the Bosses left his home he [Glassman] was their lawyer. While he "was their lawyer," he told the Bosses he was going to get another lawyer to file the lawsuit. The Court could never quite grasp this explanation, and it seems that the explanation of his commitment to the Bosses was based on a very thin thread of logic. Whatever the logic, the Bosses self-described lawyer then went about finding another lawyer to file the lawsuit.

Plaintiff's lawyer has a cynical view of these events. He inferred that Glassman did not want to get completely involved in the Bosse case until he [Glassman] was sure that the case was a good one and worth his effort. Mr. Glassman describes his reluctance as being sincerely based on his prior 1988 experience as well as his daughter's friendship with the daughter of a doctor who was involved in the Bosse birth case. Whatever may be the truth, the Bosses left their meeting with Mr. Glassman assured that he was their lawyer but that Glassman would <u>not</u> file the complaint. Whatever the purpose of this subterfuge, Steven Markowitz was a willing participant.

Glassman called a friend who in turn recommended Steven Markowitz as "front man" for

the Bosse litigation.[3] Markowitz was a late comer to the law and did not obtain a law degree until he was 43 years old. His prior employment was in the medical profession, and he has even been a surgical assistant. At the time of Glassman's phone call to Markowitz, the two were not acquainted and Markowitz was a sole practitioner in an office-sharing arrangement. Markowitz expressed an interest in the case but said he could not finance a major medical malpractice case. Glassman told him that the law firm would provide the financing; office support; and that Glassman would also provide advice. Glassman did open a file at the law firm, but the matter was otherwise turned over to Markowitz.

Steven Markowitz met with the Bosses, undertook their representation, and the Bosses signed a written contingency fee agreement with Steven Markowitz as their attorney on September 12, 2001. When Glassman was asked if he was the Bosses' attorney lawyer, even when the written contract was signed between the Bosses and Markowitz, Glassman responded "yes." Markowitz drafted a complaint which he sent to Glassman. Glassman suggested considerable changes, and with these changes the complaint was filed by Steve Markowitz in *Bosse v. Methodist Healthcare et al.*, No. CT-004898-02 (Shelby County Circuit Court). Steven Markowitz was attorney of record. The circuit court was unaware that Glassman was even involved in the case. At this point Markowitz and Glassman both thought that the case needed to be "slow walked." The Bosses' son Conner had brain damage, but only time would tell the extent of the injury, so some delay was to the advantage of the Bosses' malpractice case.

Over the next year, Markowitz worked on the case out of his own office. He procured the

---

[3] The Court purposely uses the term "front man" as that is how the law firm's lawyer described Mr. Markowitz's role in his opening statement to the Court on January 4, 2010.

medical records, and he found an expert witness, Dr. Livingston, who produced a report that was advantageous to the case. The law firm paid $1,800.00 for the report. Markowitz met with several doctor acquaintances and educated himself on the medicine involving birth trauma cases. He was also able to find an expert nurse on the nursing standard of care. The defendants in the case filed answers. A cursory summary judgment motion was filed by one of the defendants but was never set for hearing. Markowitz worked on the case, but the case was not pressed.

In the Fall of 2002, the relationship between Richard Glassman, the law firm, and Steven Markowitz underwent a significant change. Markowitz was invited to join the law firm; he did so and brought the Bosse case with him. It appears that Glassman and Markowitz had a brief conversation at this point about the attorney fee in the Bosse case. Glassman said that they should wait and see what happens, but whatever happens, "we will do what's fair." On November 17, 2003, Markowitz sent Glassman the following email about the attorney fee:

> I would prefer for you to decide the split, based on what you think is fair - and reduce it to writing. I don't look at this as a one-shot deal - and I don't think you are either. I want to do as much as I can on this case - from a learning perspective - You do what you think is the right thing. I trust your judgment and integrity. If I didn't, I wouldn't be here.

No agreement between Glassman's firm and Markowitz regarding the fee was ever reduced to writing.

The law firm has six shareholders, and other lawyers who might be called "associates" but are called "independent contractors." The law firm is a professional corporation. Tenn Code Ann. § 48-101-601 *et seq.* In theory the shareholders (like senior partners) run the law firm. The Court finds from the evidence that Richard Glassman is the de facto "governing body" of the law

firm. The independent contractors are listed on the letterhead, are subject to conflict checking and disqualification, and are covered by a blanket malpractice policy. The attorney client communication extended from the independent contractors to each other and all other members of the firm. On occasions they are supervised by a shareholder acting in the role as a partner. The hourly rate fees are paid to the independent contractor but are subject to a deduction for overhead and shareholder profit, called the "matrix." The overhead out of the matrix goes to the secretarial staff and paralegals, who are all available to support the independent contractors.

There was some conflict in the testimony about whether or not contingent fees produced by the independent contractors were subject to this matrix. While there may have been some confusion among the new independent contractors and some exceptions made, the weight of the evidence is that the contingent fees produced by the independent contractors were subject to the matrix. The application of the matrix to contingent fees was not reduced to a written contract but was based on an oral contract. The Court finds that Mr. Markowitz understood that whatever fee he obtained in the Bosse case would be reduced by his obligation to pay overhead and shareholder profit consistent with the matrix. He acknowledged as such in his deposition, and this Court finds this to be his clear understanding.

Mr. Markowitz was brought to the firm as an independent contractor. Markowitz continued to work on the Bosse case. Some of his fellow lawyers and even Mr. Glassman's former secretary described Markowitz as "devoted" to the case or doing the "bulk" of the work on the case. One of the witnesses said he was in fact "overly-focused" on the case. It should be noted that Richard Glassman had then formally become co-counsel, and all the pleadings, whether signed by Markowitz or Glassman, were signed in the name of the law firm. While the

Bosses had signed the written contingent fee agreement with Markowitz, it is clear that they then orally agreed to Glassman's involvement, that they agreed to him being the lead attorney, and that the attorney fee would go to the firm.[4] It is also clear that Steven Markowitz agreed to these changes in his role, but he expected the attorney fee would be divided according to the proportion of work performed.

As 2004 progressed, the relationship between Glassman and Markowitz deteriorated. Glassman did more and more on the case. He took most all the depositions (although Markowitz was present for some), he made most of the court appearances, and he handled most of the direct communication with defense counsel. Markowitz's role had become one of reviewing medical literature, preparing questions for depositions, and offering suggestions.

It is relevant to comment on Steven Markowitz's personality, as it directly relates to the issues before the Court. He is smart and articulate. He is not, however, focused or organized. During the time frame of 2001-2005 while he worked on the case - even worked long and hard on the case - his work often seemed unrelated to the prevalent issues in the case and/or not connected to the practical forward movement of the case from pleadings, written discovery, depositions, trial preparation and trial. There was much work done by him but often it did not contribute to the case.

Richard Glassman, on the other hand, is focused, concise, organized and demanding. Perhaps his demands are sometimes barbed, and he does not appear to be patient. Mr. Markowitz's nonconcise approach was bound to clash with the bottom line focus of Glassman.

---

[4] No written contingent fee agreement was ever signed by the Bosses related to retaining Glassman or the Glassman Law Firm. Prior to 2003, a written agreement was not required.

As the case progressed it was clear that liability was not going to be seriously contested by the Bosse case defendants. There had certainly been a serious medical error during the birth of Conner Bosse. In fact, the medical error was so egregious that punitive damages for recklessness were going to be an issue in the case. During this time, the testimony indicated that Markowitz believed that Glassman did not fully understand the medicine involved in the cases, while Glassman thought that Markowitz was unreliable and scattered.

The dispute between the two reached a crisis in the Fall of 2004 after an incident during a mediation which took place in Nashville. According to Richard Glassman, Tom Bosse was talking to the mediator and describing his feeling about what had happened to his son when Mr. Markowitz got up, walked over, got a soft drink, interrupted Tom Bosse, and wanted to know who else wanted a soft drink. Glassman was furious at what he perceived to be gauche inconsideration and insensitivity. He was angered by the incident and apologized to Mr. Bosse for Markowitz's conduct.

Subsequent to that incident, Glassman told Markowitz that he was off the case, and he replaced Markowitz with Tim Edwards. From that point on Glassman gave no more assignments to Markowitz on the Bosse case and did not allow him to participate. Tim Edwards, however, asked Markowitz to do some research in preparation for a deposition, to gather and read a number of articles written by a defense expert, and to research punitive damages in a medical malpractice case. Glassman, by his own admission, stated he was unaware of this contribution when he made the decision regarding the fee.

The trial was set in April 2005, and there were a total of 29 depositions taken during the time leading up to the trial. Steven Markowitz took none, but he did attend 11 depositions, and

he was the only plaintiff's attorney present when the Bosses' depositions were taken by the defense attorneys. It appears that Richard Glassman took 27 depositions. Tim Edwards took two depositions and attended another nine.

The case was settled in February/March of 2005, and the attorney fee, payable to the law firm, was approved by the circuit judge pursuant to Tenn. Code Ann. § 29-26-120. Richard Glassman divided the fee. In its pretrial brief, the defendant law firm explains the division of the fee as follows:

> Mr. Glassman divided the *Bosse* fee earned by the Glassman Firm pursuant to the agreement of the parties and Tim Edwards who also represented the Bosse family on behalf of the Glassman Firm. Pursuant to an agreement of the parties and based on his knowledge at the time of the work performed by Mr. Markowitz, Mr. Glassman in good faith allocated $100,000.00 to Mr. Markowitz's production column with the firm based on his evaluation of Mr. Markowitz's contribution to the result obtained for the Bosse family and his evaluation of the support provided to him by Mr. Markowitz. Pursuant to his compensation agreement with the Glassman Firm, Mr. Markowitz was then entitled to compensation from the firm in the amount of $50,000. Mr. Glassman allocated $140,000.00 to Glassman Firm shareholder, Tim Edwards, for his contribution to the result obtained for the Bosse family.

Defendant's brief at p. 7. The defendant's brief describes the agreement as dividing the fee "between the parties based on the relative contributions of the parties to the case." The plaintiff, in his pretrial brief, describes the fee division arithmetic as follows:

> As compensation for his services as the Bosse's attorney, Defendant Firm, by and through Glassman, allocated Plaintiff less than 3% of the total attorney's fee earned in the Bosse case. This percentage of the Bosse Fee was then further reduced pursuant to "the matrix," which the proof will show is simply an unethical analysis used by Defendant Firm to deprive independent contractor attorneys of their fees, leaving Plaintiff with approximately 1.37%

> of the total fee earned in the Bosse Case. Plaintiff refused to accept this grossly inadequate fee, and the instant action followed. To date, Plaintiff has not received any payment for his services on a case that occupied the majority of his professional life for more than 3 ½ years.

Plaintiff's brief at p. 4. The percentage computation cited above is factually correct.

Time records submitted to the Court are admittedly incomplete. Since this was a contingent fee case, the lawyers seemed to believe it was unnecessary to keep time records.[5] Some do exist, however, in relation to billing statements. This record shows Markowitz's work to not be insubstantial. Markowitz testified that he believed that for every one hour contributed by Glassman and Edwards, he had contributed three. Thus, he contended that of the total lawyer time spent, he had contributed three-fourths. While Markowitz and several of the witnesses described his time involvement as "huge" and his attention to the case as bordering on "obsessive," somehow he managed a fair gross income during 2003-2004 on cases other than the Bosse case. In fact, he grossed $312,000.00 in 2004 while asserting that he was spending most of his time on the Bosse case. The number of his billable hours to non-Bosse cases in 2003-2005 was substantial.

Mr. Glassman testified that in the last several months before the scheduled trial in the Bosse case, the case took up a majority of his time. Glassman's attitude toward the contribution of Steven Markowitz is well-represented in portions of the following email from Glassman to Markowitz on April 19, 2005, at 6:13 a.m.:

> I do not know what world you are in. There is nothing in Bosse of any substance that was from anything you did. The file is chuck full of memos where I had to completely start over on things

---

[5] This view may well be mistaken. The Court will address this issue later.

you were to do after you did not timely do what I had asked, gave things back in a condition that was not proper for filing, wrong names, chuck full of errors, made no sense, etc.

Show me anything that you did of substance in the case, I really need to see it because you are living in a world of denial. You have a lot of knowledge and talent but your defensiveness over comes all that you co[uld] do. You must admit your shortcomings and learn how to over come them which you will never do until you start working in the right direction.

I want you to be a success but your value is zero with your perceptions and lack of reality as to what has to be done in litigation.

What about walking out of the mediation in Nashville while Thom Bosse was pouring his heart out to the mediator to go to the men's room and then walking back through the room to the snack area to get a soda. That was a big contribution to the case. I was just mortified that you wo[uld] do such a thing and told you out in the hall at the 1st opportunity did I not?

The above email was in response to the following email from Mr. Markowitz sent on the day before:

I disagree with you about my level of involvement in Bosse. When you say you "pulled me off Bosse" (December, 04?) It was my understanding that you felt more comfortable having Tim in the second chair during the trial - not that I should have no continuing involvement with this case. The very day you told me that "you could not work with me" I asked Tim to help me understand why you were attacking me so personally - He told me that I had to be mistake-free in anything I presented to you - and that I should steer clear of you and work through him - which I did - I continued to put together the scientific/medical basis for our position - I never stopped preparing the material which would serve as the basis for the impeachment of the opposing experts should the case be tried.

Email of April 18, 2005, Markowitz to Glassman.

Before turning to deciding this case, there are several collateral issues that need to be

resolved.

III. ADMISSIBILITY OF TESTIMONY OF CHARLES WILSON

Charles Wilson was first identified as an expert witness pursuant to the requirements of the Scheduling Order. Wilson was the former (he is now retired) risk manager at Methodist Hospital. Wilson later withdrew his agreement to be an expert, but then defendant sought permission of the Court to amend the Scheduling Order to make a late designation of Wilson as a fact witness and to take his deposition well past the scheduling deadline.

The Court held a hearing, December 15, 2009, on defendant's motion to exempt Wilson from the Scheduling Order. Counsel told the Court that it was not until several weeks earlier that the defense had learned that Wilson was seriously involved in the Bosse case and, therefore, the defense was entitled to have Wilson exempted from the Scheduling Order. Mr. Glassman, an attorney, was in court during the hearing. Relying on the statements from the defense, the Court granted an exemption from the Scheduling Order and allowed his deposition to be taken for its use at trial.

The plaintiff subsequently moved the Court to exclude Wilson as a witness, as it is alleged that the defense misinformed the Court about its prior lack of knowledge of Wilson's involvement in the Bosse case.

During the trial, the following were brought to the Court's attention:

1. Charles Wilson signed the settlement/release papers for the hospital when the Bosse case was settled in 2005;

2. The risk manager who worked directly on the Bosse case, Pamela Curry, was deposed in February 2005 by Mr. Glassman in the Bosse case. On multiple occasions she mentioned Charles Wilson in relation to his involvement in the Bosse case; and

3. When Mr. Wilson was deposed in this case on December 30, 2009, he was asked about his participation in the Bosse case and who would have known of his participation. The exchange was as follows:

> Q. (By Mr. Smith): Would Mr. Glassman have any reason to know that you had had any involvement in the Bosse case, prior to our first phone call to you in October of this year?
>
> A. (By Mr. Wilson) I believe that he likely would.

The Court is of the opinion that it was misinformed by defendant. The defendant knew much more than what was disclosed to the Court of Mr. Wilson's direct involvement in the Bosse case when the motion was argued on December 15, 2009. The motion to strike Mr. Wilson's testimony is **GRANTED**. *See* Tenn. R. Civ. P. 16.06; *see, e.g., Alexander v. Jackson Radiology,* 156 S.W.3d 11, 15 (Tenn. Ct. App. 2004).

IV. TESTIMONY OF PHOEBE DEAN

The Court deals separately with the Dean testimony, because although it does not add much to the case, it is the subject of several pending motions and great contention between the parties.

The testimony of Phoebe Dean was presented by deposition. Dean appeared at trial but because of a scheduling problem she could not testify, and the parties later agreed to present her testimony by deposition. Both parties have filed motions requesting terminal remedies from the Court based upon Ms. Dean's role in this case tangential to her relationship with Markowitz.

There are only a few things clear from her testimony, and one is that she had a romantic relationship with Markowitz - sometimes for money and sometimes not. It is also clear that she has had severe emotional problems and that she has made conflicting statements about her activities under oath. She also has convenient memory problems. She was brought to the attention of the

defendant when she called Glassman in 2007 and reported the events discussed below. When asked why she called Glassman, she responded, "Because I hated Steve's guts at the time."

The defendant contends that relevant to this case is Dean's testimony that she was hired by Markowitz to have sex with an expert witness in the Bosse case (Dr. Livingston) sometime in 2003/2004. It does appear that Mr. Markowitz paid her $500.00 to entertain the expert. Whether Markowitz hired her specifically to have sex with the expert is unclear, but it appears to have been well within his expectations. This action certainly does not speak well for Markowitz.

The second contention of the defendant is that Ms. Dean was asked by Markowitz to alter records and that these records pertained to Markowitz's involvement in the Bosse case and therefore related to the issues in the instant case. The Court does not find the evidence on this issue convincing.

Third, the defendant contends that both Markowitz and his lawyer pressured her to change her potential testimony. Whatever Ms. Dean may have believed about her discussions with Markowitz and his counsel, the Court does not find any convincing evidence that she was threatened or pressured to change her testimony.

The plaintiff has filed a motion requesting that the Court impose sanctions under Tenn. R. Civ. Pro. 11 against the defendant for making accusations based on Dean's statements to Glassman and a subsequent affidavit she signed. Dean's testimony, while confusing and unreliable in parts, at least gave the defendant reason to interject the issue into the case. Recall it was Dean who initiated contact with Glassman. The motion for Rule 11 sanctions is without merit.

The defendants filed a pretrial motion contending that Dean's testimony was such that Markowitz was guilty of such misconduct as to warrant dismissal of this case. The motion for

dismissal and sanctions was denied by Order signed December 1, 2009. That motion remains dismissed. Whatever action, if any, that should be taken against Markowitz for his payment to Ms. Dean to "entertain" Dr. Livingston is outside the purview of this discussion of attorney fee dispute.

V. DECISION ON ATTORNEY FEE

The starting point of the analysis is whether there is an enforceable contract or, if not, whether the relief is in equity under unjust enrichment or quasi-contract.

The law firm takes the view that the fee should be divided according to a contract which was entered into between Richard Glassman, on behalf of the firm, and Mr. Markowitz. The law firm states that they agreed that Glassman would divide the fee and that it would be done based on the "material contribution" of the participating lawyers. Corollary to this is the discussion between the parties that the fee would be divided "fairly." Markowitz said in his complaint that he and the Glassman Firm agreed that the fee generated from the Bosse case would be divided based upon the respective work performed by Markowitz and the Glassman Firm. Either way, whether "material contribution" or "fairly", it was up to Richard Glassman to make the decision, and Markowitz agreed to this formula. The Court infers from the position taken by the law firm that it believes that Glassman was just about free to divide the fee as he saw fit.

Plaintiff, on the other hand, says that the fee must be proportionally divided pursuant to the factors set out at RPC 1.5(a). RPC 1.5(a) states that:

> (a) A lawyer's fee and charges for expenses shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance

of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) whether the fee is fixed or contingent;

(9) prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and

(10) whether the fee agreement is in writing.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

Plaintiff contends that the fee must be divided consistent with the RPC 1.5(a) factors because he was an independent contractor and not a member of the same law firm as Richard Glassman. This being the case, says plaintiff, the fee division is governed by RPC 1.5(e) which states:

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

(1) the division is in proportion to the services performed by each lawyer or, by written consent of the client, each lawyer assumes joint responsibility for the representation; and

(2) the client is advised of and does not object to the participation of all the lawyers involved; and

(3) the total fee is reasonable.

The RPC helpfully defines "firm" in the Comments to Rule 1.10 as follows:

[1] For purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm, and lawyers in the legal department of a corporation or other organization, or in a legal services organization. *See* RPC 1.0(d) (defining "Firm" or "Law Firm"). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two

> practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for the purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to the other.

Thus, fee splitting between lawyers not in the same firm is governed by the RPC proportionality factors. The fee split between lawyers in the same firm is governed by the contract among the lawyers and with the firm. Wahlert, Annotation, *Fee-Splitting Agreements Between Lawyers*, 11 A.L.R 6th 586, § 7 (2006) (contract between lawyers in same firm); *Lawrence v. Wynne*, 598 So.2d 1293 (La. Ct. App. 1992).

The Court finds that Richard Glassman and Steven Markowitz practiced together in the same law firm in 2002 to 2005 and were members of the same firm. The Court's finding is consistent with the definition of "firm" cited above and the conduct of the parties. One court has specifically held under circumstances similar to this case that calling a de facto associate an "independent contractor" does not take the lawyer outside the firm. When lawyers hold themselves out to their clients as members of the firm, practice together as a single collective business entity, and have the protection of the firm, they are in the same "firm." *Welch v. Davis,* 114 S.W.3d 285, 290-291 (Mo. Ct. App. 2003).

The court finds, however, that while Mr. Markowitz was a member of the firm the fee

division is still subject to proportionality division. This is not a case of a specific percentage agreement pursuant to a written contract between an associate and the law firm. *See, e.g., Barwick, Dillian and Lambert v. Ewing*, 646 So.2d 776, 779 (Fla. Ct. App 1994) (associate receives 30% of contigent fee per contract governing fee split among associates and law firm). This was an agreement to divide the fee "fairly" or based upon "material contribution" of the lawyer.

There was a fee division contract, and the terms of the contract are sufficiently definite to be enforceable. The agreement was between members of the bar and was first of all subject to the good faith requirement in interpretation of all contracts.

The Court considers that good faith and fair dealing is part of every contract, and all contracts are to be interpreted consistent with this principle. "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." *Restatement of Contracts Second* § 205. Courts have been especially vigilant to enforce this interpretative rule when one party to a contract is given discretionary power over one of the terms of the contract. Farnsworth, *Farnsworth on Contracts* § 7.17 p. 365 (2004). Furthermore, motive is not always irrelevant. *Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd.* 970 F.2d 273, 280 (7th Cir. 1992) (if a contract party invoked a reasonable contract term dishonestly to achieve a purpose contrary to that for which the contract had been made, such a course would amount to bad faith).

Second, the Court considers the division of the fee to be subject to a reasonableness standard which among lawyers is the RPC 1.5(a) factors. These factors collectively are designed to arrive at a fee consistent with the material contribution of the lawyers. The material contribution or fairness in division of the fee is consistent with the agreement between Mr. Markowitz and the Glassman Law Firm. The contract - such as it was - between Markowitz and the law firm did not allow

Richard Glassman authority to carte blanche divide the fee. Markowitz was entitled to his proportional share of the fee, less reasonable overhead. He was also entitled to recognition that he was the sole attorney of record during the first year of the Bosse case in 2001-2002.

At this point it is appropriate to address the equitable causes of action alternative to an enforceable contract. The Court is convinced that the contract to divide the fee is enforceable and that the "material contribution" agreement is to be enforced consistent with RPC 1.5(a). However, if the Court is wrong in its determination that there is a contract, it would appear not to matter. If the Court applied quasi-contract or quantum meruit obligations, RPC 1.5(a) would still be applied to this fee division. *See Johnson v. Hunter*, 1999 WL 1072562 (Tenn. Ct. App. Nov. 30, 1999).

Returning to the calculation of a reasonable division of the fee, the Court is without accurate time records or even a way to accurately determine the number of hours spent other than in the most general terms. Since this was both a minor settlement and a malpractice settlement in which the attorney fee was to be set by the Court, time records would have been helpful. Even though it was a contingent fee case, being both a minor settlement and a medical malpractice case, it was subject to RPC 1.5(a) standards. *Wright v. Wright*, 2007 WL 4340871 (Tenn. Ct. App. Dec. 12, 2007)(minor settlement attorney fee requires Court to analyze awarded fee under RPC 1.5(a); case remanded). Time records are "central" to calculating attorney fees in minor settlements. *Id.* at *6 n. 6. The same would be true of a medical malpractice attorney fee subject to approval under Tenn. Code Ann. § 29-26-120. The absence of time records puts the Court at a disadvantage. However, the Court has heard a great deal regarding the Bosse litigation, the contributions of the three lawyers involved, and the Court does have some time records. The testimony before it allows the Court to make an informed judgment as to the contributions of the lawyers. The Court has the necessary facts before

it to make a reasonable judgment as to the division of the fee.

Mr. Markowitz put in considerable time in this case. Of all the attorney time expended, he probably put in 40% of the total time. His time, however, was not always well spent and his percentage of contribution to the success of the case is far less than the time he contributed. RPC 1.5(a)(1)(4)(7).

The Bosse case was difficult. Liability for one of the defendants was clear, but the case against the hospital and the extent of its responsibility was less than clear. Glassman had a far better practical grasp of just how to take hold of the hospital and force them to settle. RPC 1.5(a)(1).

The settlement of the Bosse case was substantial, and the results for the Bosses were excellent. It was Glassman who can rightly claim the largest share of the credit, but Markowitz did contribute, and given Glassman's use of Markowitz, especially in 2001-2001, Glassman failed to give Markowitz the credit he was due. RPC 1.5(a)(1)(4)(7).

There can be no doubt that in the years 2001-2005 Glassman had an excellent reputation as a trial attorney. This is not only generally apparent, but his lawyer opponents were aware of his proven abilities. Markowitz did not have such a reputation for excellence, and his organizational abilities and focus have already been commented upon. RPC 1.5(a)(7).

In dividing this fee, the law firm appears to have overlooked the fact that because this was a contingent fee, Markowitz's shared in the risk and must be credited in the sharing of the risk. RPC 1.5(a)(8); 7 Am.Jur.2d *Attorneys at Law* § 299 (2007)(contingency agreement as factor setting fee - hazard of litigation to be considered); *Wright,* 2007 WL 4340871, at *6. In the first year of the Bosse litigation, almost all the risk was on Markowitz, with the law firm risking only a small payment for expenses. Glassman took little risk until it was clear that the case was one of value.

In sum, then, Glassman and Edwards are largely responsible for the affirmative outcome of the Bosse case, but Markowitz must be credited with taking the risk on the front end, holding on to it while it was developed by Glassman and making the contributions discussed above. Accordingly, the RPC 1.5(a) factors analysis indicates that the Glassman firm is entitled to the bulk of the fee, but Markowitz is entitled to a greater percentage than he was allocated by Glassman.

In conclusion, in determining the division of the fee in this case, and ultimately the amount to be awarded to Steven Markowitz, the Court has:

1. Considered application of RPC 1.5(a) factors as set out above; and

2. Considered that Steven Markowitz was sole attorney of record in 2001-2001, and he was sole attorney of record because Richard Glassman used him as a "front man," and Glassman took little risk until he finally became one of the record attorneys; and

3. Credited to the law firm its entitlement to its matrix portion of the fee during the time when Markowitz worked for the firm in 2002-2005; and

4. Credited the law firm with the fee previously given the plaintiff, that being $100,000.00 reduced by the matrix contribution of $50,000.00, for a total in pocket of $50,000.00.

5. Considered to a limited degree its own knowledge of the appropriateness of awarded fees. *See Wilson Management v. Star Distributions*, 745 S.W.2d 870, 873 (Tenn. 1988);

Taking all the above into consideration, the Court finds that Steven Markowitz is entitled to a judgment of $450,000.00. This judgment is a net figure derived from the Court taking the appropriate fee awarded and reducing it by the reasonable matrix contribution as well as the portion of the fee already given plaintiff Steven Markowitz to arrive at the $450,000.00 figure.

VI. PUNITIVE DAMAGES

This is not a case for punitive damages. Mr. Glassman was in error when he only allotted $100,000.00 to Mr. Markowitz, but his error is not such that he or the law firm could be guilty by clear and convincing evidence of such conduct or oppression as to warrant punitive damages. *See Metcalfe v. Waters*, 970 S.W.2d 448, 450-451 (Tenn. 1998); *Hodges v. Toof*, 833 S.W.2d 896 (Tenn. 1992); *Medley v. Chesterton*, 912 S.W.2d 748, 753 (Tenn. Ct. App. 1995)(punitive damages in contract action). *See generally*, Feldman, *Tennessee Contract Law and Practice* § 12:30 (2006)(punitive damages).

VII. PREJUDGMENT INTEREST

The Court is of the opinion that the plaintiff is entitled to prejudgment interest in the amount of 3% per annum computed from January 1, 2006. *See* Tenn. Code Ann. § 47-14-123; *Myint v. Allstate*, 970 S.W.2d 920, 927 (Tenn. 1998); *International Flight Center v. Murfreesboro,* 45 S.W.3d 565, 573 (Tenn. Ct. App. 2000). Mr. Bailey is to compute the amount and submit a proposed order to the Court reflecting the amount of prejudgement interest awarded.

VIII. ORDER

It is the Order of this Court that Steven Markowitz is entitled to a judgment in the amount of $450,000.00, plus prejudgment interest as referenced in § VII. above. Costs are taxed to the defendant. This is a final judgment.

This the 27 day of January, 2010,

Senior Judge Walter C. Kurtz

cc:
R. Sadler Bailey
Wilton McNeely
6256 Poplar Avenue
Memphis, Tennessee 38119
VIA FAX: (901) 680-0580

Tim W. Smith
2670 Union Extended, Suite 1200
Memphis, Tennessee 38112
VIA FAX: (901) 327-5875

Lucian T. Pera
Brinkley Plaza
80 Monroe, Suite 700
Memphis, Tennessee 38103
VIA FAX: (901) 524-5419

J. Houston Gordon
114 W. Liberty Avenue, Suite 300
Covington, Tennessee 38019
VIA FAX: (901) 476-3537

STATE OF TENNESSEE
COUNTY OF SHELBY

I, Donna L. Russell, Clerk and Master of the Chancery Court of Shelby County, State aforesaid, do hereby certify that the following 24 pages contain a full, true, and perfect photostat copy of Memorandum and Order

Entered in a certain cause wherein Stephen M. Markowitz Complainant, and Glassman, Edwards, et al Defendant, as the same appears of record in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said Court at my aforesaid office in the City of Memphis.

This the 4th day of November, A.D., 2016

DONNA L. RUSSELL, Clerk and Master

BY: LaSu Tei

D.C.&M.