[Cite as *Brancatellli v. Soltesiz,* 2009-Ohio-6861.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

FRANK R. BRANCATELLI,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-L-010**
- vs -	:	
JOSEPH R. SOLTESIZ, SR., et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Court of Common Pleas, Case No. 08 CV 000557.

Judgment: Affirmed in part, reversed in part and remanded.

Frank R. Brancatelli, pro se, 7318 Gallant Way, Concord, OH 44077 (Plaintiff-Appellee).

Todd E. Petersen and *Dennis J. Kaselak*, Petersen & Ibold, Inc., 401 South Street, Bldg. 1-A, Chardon, OH 44024-1495 (For Defendants-Appellants).

MARY JANE TRAPP, P.J.

{¶1} Joseph R. Soltesiz, Sr. appeals from a judgment of the Lake County Court of Common Pleas in favor of Frank R. Brancatelli in a complaint filed by Mr. Brancatelli to recover legal fees from Mr. Soltesiz for the legal work he performed. For the following reasons, we reverse and remand for further proceedings consistent with this opinion.

{¶2} **Substantive Facts and Procedural History**

{¶3} Mr. Brancatelli represented Mr. Soltesiz for his businesses for a decade, between 1995 and 2005. On July 21, 2000, the parties entered into a fee arrangement

in a written agreement, signed by Mr. Brancatelli and Mr. Soltesiz. The agreement provided that Mr. Brancatelli would receive a monthly retainer of $2,000 for the legal services he rendered for Mr. Soltesiz, his wife, and any of the companies controlled by Mr. Soltesiz or his family. In addition to the monthly retainer, Mr. Brancatelli was also to receive 33&1/3% of any amount collected, except for one specifically named case, the fee of which was separately determined and is not part of the instant case. The contingency portion of the agreement stated the following:

{¶4} "The retainer [of $2,000 per month] is in addition to any monies which may be generated from cases, whether from an original suit filed on your behalf and/or on behalf of any of the companies controlled by you and/or your family ***, and/or generated through a counterclaim ***. The additional monies would be a contingent fee of 33&1/3 percent of any amount collected except the Ampac/Trinity case which is based upon a fee that has already been negotiated."

{¶5} Almost two years later, in June of 2002, a fire occurred in a Tennessee facility operated by one of Mr. Soltesiz' businesses, Travis Products, Inc. Mr. Brancatelli pursued the claim with Ohio Casualty Group, the insurance carrier, and, on April 12, 2004, proceeds totaling $447,094.65 from the insurance company were deposited with the Mahoning County Clerk of Courts via an interpleader action. The funds were not paid by the insurance company to Travis Products, Inc., because certain issues remained regarding the replacement value of the machines lost in the fire and the lost profits resulting from the fire. After the interpleader, Mr. Brancatelli and Mr. Soltesiz disagreed as to whether a co-counsel should be brought into the case. Mr. Brancatelli refused to work with the co-counsel Mr. Soltesiz eventually hired. As a

result, on April 2, 2005, before the funds were released, Mr. Soltesiz terminated Mr. Brancatelli's representation of him and his companies in all legal matters.

{¶6} In February of 2006, Mr. Soltesiz filed a complaint against Mr. Brancatelli alleging malpractice in an unrelated matter in *Travis Products, Inc. et. al. v. Brancatelli*, Lake County Common Pleas No. 06 CV 457. Mr. Brancatelli filed a counterclaim for attorney fees and a third-party complaint naming Mr. Soltesiz' new counsel and two other attorneys. The case was dismissed on March 12, 2007.

{¶7} On February 15, 2008, Mr. Brancatelli filed the instant complaint, alleging non-payment on an account, seeking $189,601.88 in legal fees owed.[1] The defendants, in turn, filed a counterclaim alleging malpractice in the *Travis* case, breach of a loan agreement, unauthorized withdrawal from an escrow account, and conversion of files and documents. Mr. Soltesiz also sought a declaration regarding the rights and obligations of the parties regarding the contingency fees, and an accounting of Mr. Brancatelli's charges for his services. The defendants later dismissed the malpractice claim and the matter proceeded to trial on the remaining claims. Mr. Brancatelli and Mr. Soltesiz were the only two witnesses who testified at trial. One of the issues disputed was whether the original written fee agreement was subsequently orally modified. Following trial, the trial court ruled in favor of Mr. Brancatelli.

{¶8} The court found no documentation was presented by Mr. Soltesiz to dispute the itemization of fees introduced by Mr. Brancatelli showing a balance of $189,601 owed by Mr. Soltesiz. It also found the original written agreement for a 33&1/3% contingency fee was not orally modified as alleged because no consideration

1. The defendants listed in the complaint are Mr. Soltesiz and seven companies he controls: J&N Products, Inc., Travis Products, Inc., Travis Products Manufacturing, Inc., Ry-Marc Plastics, Inc., Preston Tool & Mold, Inc., and Viewlite International, Inc.

supported the purported modification. The court therefore entered judgment in favor of Mr. Brancatelli for the amount of $189,601.88 with interest against Mr. Soltesiz and the corporate defendants. The amount included a 33&1/3% contingency fee in the proceeds deposited with the Clerk of Court in the fire loss case. The court also found Mr. Brancatelli owed Mr. Soltesiz $20,000 with interest for the loan Mr. Soltesiz had previously made to Mr. Brancatelli.

{¶9} Mr. Soltesiz now appeals, presenting the following assignments of error for our review:

{¶10} "[1.] The trial court committed reversible error when it determined the parties' oral modification of a prior written fee agreement was insufficient to modify the terms upon which appellee would represent appellants in the 'fire' case.

{¶11} "[2.] The trial court committed reversible error when it rendered judgment against each and every defendant, as opposed to only Joseph R. Soltesiz., Jr. [sic], as no testimony or evidence was presented regarding the corporate entities' responsibility for payment of all or any portion of the fees claimed by appellee.

{¶12} "[3.] The trial court committed reversible error when it repeatedly received hearsay testimony regarding portions of a report by a witness that was not deposed or called at trial."

{¶13} The only issue on appeal in this fee dispute concerns the attorney fees Mr. Brancatelli is entitled to regarding $447,094.65 deposited via the interpleader action with the Clerk of Courts by the insurance company as part of the proceeds for the losses sustained in the 2002 fire. The parties, at trial and on appeal, focused on whether the July 21, 2000 contingency agreement was subsequently orally modified. However, as we explain below, the July 21, 2000 contingency fee agreement is

unenforceable as to the fire case, and therefore the issue raised by Mr. Soltesiz regarding whether the written contingency fee agreement was subsequently modified is immaterial to a proper and correct resolution of this matter. We thus dispose of this appeal based on the unenforceability of the contingency fee agreement, rather than on whether the agreement was subsequently orally modified.

{¶14} **Whether a Reviewing Court Can Consider Issues not Raised by the Parties**

{¶15} In *State v. 1981 Dodge Ram Van* (1988), 36 Ohio St.3d 168, the Supreme Court of Ohio encountered a situation where the court of appeals decided an appeal based on its determination of the unconstitutionality of a criminal statute, even though the constitutionality of the statute was not raised at the trial court by either party, was not assigned as an error by the appellant, and was not briefed by either party on appeal. The court stated that "we have previously held that nothing prevents a court of appeals from passing upon an error which was neither briefed nor pointed out by a party," id. at 170, citing its previous decisions in *Hungler v. Cincinnati* (1986), 25 Ohio St.3d 338 and *C. Miller Chevrolet, Inc. v. Willoughby Hills* (1974), 38 Ohio St.2d 298. The *Dodge* court, however, concluded the appellate court's sua sponte consideration of the constitutionality of the statute was an abuse of the court's discretion. Id. at 170-171. *Dodge* left it uncertain whether the Supreme Court of Ohio altered its previous view regarding the court of appeals' review power.

{¶16} The uncertainty was clarified by the court in *Browning v. Burt* (1993), 66 Ohio St.3d 544. In that case, the court of appeals considered and decided a statute of limitations issue neither raised nor briefed by the parties. The Supreme Court of Ohio found no abuse of discretion by the court of appeals. It explained that the law was clear

on the statute of limitations issue. More importantly, the court stated that "the issue decided by the court of appeals did not involve the constitutionality of a statute and, thus, the case of [*State v. 1981 Dodge Ram Van*] is distinguishable." Id. at 564. The court reiterated that there is no general prohibition in App.R. 12(A) requiring that issues not assigned as error in the court of appeals be treated as waived. Id.

{¶17} **Unenforceability of the Instant Contingency Fee Agreement**

{¶18} Pursuant to the law in effect at the time this case arose,[2] a contingency fee agreement was permitted pursuant to DR 2-106, DR 2-107, and R.C. 4705.15. R.C. 4705.15(A)(1) provides:

{¶19} "(1) 'Contingent fee agreement' means an agreement for the provision of legal services by an attorney under which the compensation of the attorney is contingent, in whole or in part, upon a judgment being rendered in favor of or a settlement being obtained for the client and is either a fixed amount or an amount to be determined by a specified formula, including, but not limited to, a percentage of any judgment rendered in favor of or settlement obtained for the client."

{¶20} Here, the cause of action in the fire case arose almost two years after the parties entered into the fee agreement, and therefore, could not have been contemplated as part of the contingency agreement on July 21, 2000. As such, it is not enforceable regarding the fire loss case.[3] The issue of whether the agreement was subsequently orally modified is therefore moot.

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2. Rule 1.5(c) of the Ohio Rules of Professional Conduct, effective February 1, 2007, states, "[a] fee may be contingent on the outcome of *the* matter for which the service is rendered." (Emphasis added.) The use of the definite article in the rule indicates there must be a separate agreement for each specific matter.

3. We recognize that in fairness to the parties, a court of appeals contemplating a decision upon an issue not briefed should give notice of its intention and opportunity to brief the issue. See *Willoughby Hills*, supra, fn. 3. However, in this case, Mr. Soltesiz *did* assert the unenforceability of the fee agreement as

{¶21} Furthermore, even if there were a contingency fee agreement in effect for the fire loss case, Mr. Brancatelli could no longer recover on the contingent fee agreement after Mr. Soltesiz discharged him in April of 2005.

{¶22} As the Supreme Court of Ohio held in *Fox & Assoc. Co., L.P.A. v. Purdon* (1989), 44 Ohio St.3d 69, syllabus: "When an attorney is discharged by a client with or without just cause, and whether the contract between the attorney and client is express or implied, the attorney is entitled to recover the reasonable value of services rendered the client prior to discharge on the basis of quantum meruit. (*Scheinesohn v. Lemonek* [1911], 84 Ohio St. 424, 95 N.E. 913, and *Roberts v. Montgomery* [1926], 115 Ohio St. 502, 154 N.E. 740, overruled.)"

{¶23} The Supreme Court of Ohio reaffirmed this rule in *Reid, Johnson, Downes, Andrachik & Webster v. Lansberry* (1994), 68 Ohio St.3d 570. "[P]ursuant to *Fox*, even if an attorney is discharged without cause, and even if a contingent fee agreement is in effect at the time of the discharge, the discharged attorney recovers on the basis of quantum meruit, and not pursuant to the terms of the agreement." Id. at 573.

{¶24} "The quantum meruit rule adopted by the court in *Fox* 'strikes the proper balance by providing clients greater freedom in substituting counsel, and in promoting confidence in the legal profession while protecting the attorney's right to be compensated for services rendered." Id. at 574 (citations omitted).

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an affirmative defense in his answer, although he focused on the alternative claim of subsequent oral modification at trial. Because Ohio is a notice-pleading state, *Cincinnati v. Beretta U.S.A. Corp*., 95 Ohio St.3d 416, 2002-Ohio-2480, Mr. Soltesiz' assertion of the affirmative defense regarding the unenforceability of the agreement, although cursory, sufficiently placed Mr. Brancatelli on notice that the enforceability of the contingency was contested. Furthermore, the Ohio Rules of Professional Conduct clearly requires a separate contingency fee agreement for each specific matter, and the record undoubtedly shows the fire matter, which arose two years after the contingency fee agreement, could not

{¶25} "One of the central tenets of the *Fox* approach is that a client has an absolute right to discharge an attorney or law firm at any time, with or without cause, subject to the obligation to compensate the attorney or firm for services rendered prior to the discharge. Once discharged, the attorney must withdraw from the case, and can no longer recover on the contingent-fee-representation agreement. The discharged attorney may then pursue a recovery on the basis of quantum meruit for the reasonable value of services rendered up to the time of discharge." Id. (citations omitted).

{¶26} The court in *Reid* summarized the law in its syllabus as follows:

{¶27} "1. A client has an absolute right to discharge an attorney or law firm at any time, with or without cause, subject to the obligation to compensate the attorney or firm for services rendered prior to the discharge.

{¶28} "2. When an attorney representing a client pursuant to a contingent-fee agreement is discharged, the attorney's cause of action for a fee recovery on the basis of quantum meruit arises upon the successful occurrence of the contingency.

{¶29} "3. A trial court called upon to determine the reasonable value of a discharged contingent-fee attorney's services in quantum meruit should consider the totality of the circumstances involved in the situation. The number of hours worked by the attorney before the discharge is only one factor to be considered. Additional relevant considerations include the recovery sought, the skill demanded, the results obtained, and the attorney-client agreement itself."

{¶30} See, also, *Meros v. Mazgaj* (April 30, 2002), 11th Dist. No. 2001-T-0100, 2002-Ohio App. LEXIS 2052.

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have been contemplated as part of the contingency agreement. Under these circumstances, we do not believe additional briefing by the party on this issue is required.

{¶31} Here, Mr. Soltesiz exercised his right to discharge Mr. Brancatelli as his legal counsel in the April 2, 2005 correspondence, prior to a successful release of the interpleaded proceeds and final judgment in the fire loss case. Therefore, Mr. Brancatelli could no longer recover on the contingent fee agreement, even if one was in place. Pursuant to *Fox* and *Reid*, however, he may pursue a recovery on the basis of quantum meruit for the reasonable value of services he rendered in the fire loss matter up to the time of his discharge.

{¶32} Accordingly, we reverse the judgment of the trial court as it pertained to plaintiff's claim for fees regarding the fire loss case, only, and remand the matter for the court to determine the reasonable value of the services Mr. Brancatelli provided in the fire loss matter before being discharged by Mr. Soltesiz. In determining the value, the court is to consider the totality of the circumstances, including the number of hours worked, as well as other pertinent factors such as the skill demanded, the results obtained, and the complexity of the matter.

{¶33} Because we resolve the appeal based on the error by the trial court in enforcing an unenforceable contingent fee contract and on the doctrine of quantum meruit, it is unnecessary to determine whether the July 21, 2002 contingency fee agreement was subsequently orally modified. Similarly, the claim raised in Mr. Soltesiz' second assignment of error relating to an expert report submitted in the earlier action regarding the contingency fee agreement is likewise moot.

{¶34} In his second assignment of error, Mr. Soltesiz claims the trial court should have rendered judgment against him only, instead of against all corporate defendants named in the complaint as well. We find this contention to be without merit.

{¶35} The instant complaint listed seven corporations controlled by Mr. Soltesiz as defendants. Our review of the record indicates the answer to the complaint, as well as all subsequent filings throughout this litigation, were filed by counsel on behalf of "defendants" in the plural. No issue was ever raised at the proceedings below regarding a lack of liability of the corporate defendants. Therefore, any claim challenging the liability of the corporate defendants has been waived and we overrule the second assignment of error.

{¶36} The judgment of the Lake County Court of Common Pleas is affirmed in part, reversed in part, and we remand the matter for further proceedings consistent with this opinion.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

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{¶37} I respectfully dissent.

{¶38} As the majority notes, Ohio's appellate courts are empowered to dispose of cases on an issue not originally raised by the parties, but which an appellate court finds in the record, and following briefing. *State v. Peagler* (1996), 76 Ohio St.3d 496, 499. However, "[a] court of appeals cannot consider the issue for the first time without the trial court having had an opportunity to address the issue." Id. at 501. I believe the majority is violating this principle. The majority points to the fact that Mr. Soltesiz raised the unenforceability of the fee agreement as an affirmative defense in his answer to

support its position that Mr. Brancatelli should have been on notice that this issue was contested – thus justifying this court in deciding the appeal based on this issue. The fact remains that the parties, as well as the trial court, treated the case as concerning whether an oral modification of the fee agreement had occurred. I think we should be careful in deciding appeals on matters not put before us by the parties.

{¶39} This matter was tried to the trial court, and a full record was created concerning the fees sought by Mr. Brancatelli. Consequently, I do not believe there is any reason to reverse the trial court's decision and remand. The same evidence used to support Mr. Brancatelli's claim for the fees as a matter of contract, supports his claim when it is recast as one for quantum meruit, pursuant to *Fox*, supra, and its progeny. Hence, I would affirm the judgment of the trial court, even if under a different theory.