[Cite as *Brancatelli v. Soltesiz,* 2012-Ohio-1884.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

FRANK R. BRANCATELLI,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2011-L-012**
- vs -	:	
JOSEPH R. SOLTESIZ, SR., et al.,	:	
Defendants-Appellees.	:	

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

Judgment: Affirmed.

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

Dennis J. Kaselak, Petersen & Ibold, Inc., 401 South Street, Bldg. 1-A, Chardon, OH 44024-1495 (Defendants-Appellees).

MARY JANE TRAPP, J.

{¶1} Frank R. Brancatelli appeals from a judgment of the Lake County Court of Common Pleas which awarded him attorney fees in an amount less than he requested. After a review of the record and pertinent law, we affirm the judgment of the trial court.

Prior Appeal

{¶2} This is the second appeal of this attorney fees matter. Mr. Brancatelli represented Joseph R. Soltesiz, Sr., in matters relating to his several businesses between 1995 and 2005. In 2000, the parties entered into a fee arrangement in a

written agreement, which provided that Mr. Brancatelli would receive a monthly retainer of $2,000 for the legal services rendered to Mr. Soltesiz and the various companies controlled by Mr. Soltesiz or his family. In addition to the monthly retainer, Mr. Brancatelli was also to receive 33 1/3 percent of any amount collected.

{¶3} In 2002, a fire occurred in one of Mr. Soltesiz' businesses, Travis Products, Inc. Mr. Brancatelli pursued the claim with the insurance carrier, and proceeds totaling $447,094.65 from the insurance company were deposited with the Mahoning County Clerk of Courts via an interpleader action. After the interpleader action, Mr. Brancatelli and Mr. Soltesiz disagreed as to whether co-counsel should be brought into the case. 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.

{¶4} On February 15, 2008, Mr. Brancatelli filed the instant complaint, alleging non-payment on an account, seeking $189,601.88 in legal fees owed. The matter proceeded to trial. One contested issue was whether the original written fee agreement was subsequently orally modified. The trial 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 percent contingency fee was not orally modified as alleged because no consideration 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 court also found Mr. Brancatelli

owed Mr. Soltesiz $20,000 with interest on a loan Mr. Soltesiz had previously made to Mr. Brancatelli.

{¶5} Mr. Soltesiz successfully appealed from that decision. In *Brancatelli v. Soltesiz*, 11th Dist. No. 2009-L-010, 2009-Ohio-6861, we reasoned that the claim for relief in the fire loss case arose almost two years after the parties entered into the fee agreement and, therefore, could not have been contemplated as part of the contingent fee agreement. As such, it was not enforceable regarding the fire loss case. We further explained that Mr. Soltesiz exercised his right to discharge Mr. Brancatelli as his legal counsel prior to the successful release of the interpleaded proceeds and final judgment in the fire case; thus, even if a contingent fee agreement was in place, Mr. Brancatelli could no longer recover based on the contingent fee agreement. However, he could pursue 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.

{¶6} Consequently, we reversed the judgment of the trial court pertaining to the attorney fees claim only[1] and remanded 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. We stated that in determining the value, the court was 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.

On Remand

1. In its judgment the trial court also awarded Mr. Soltesiz $20,000 on his counterclaim against Mr. Brancatelli regarding a loan he made to Mr. Brancatelli, but dismissed all other counterclaims against Mr. Brancatelli. That portion of the judgment remained intact.

{¶7} On remand, the trial court held three hearings. At the first hearing on November 4, 2010, Mr. Brancatelli testified that the fire loss insurance claim was very complex because there was an ongoing dispute with the insurance carrier, and because multiple corporations owned by Mr. Soltesiz were involved in the facility that was destroyed by the fire. At the hearing, for the first time, Mr. Brancatelli presented a 36-page fee statement for his services, which showed 507.4 hours from June 20, 2002, the day of the fire, to March 2005, when he was discharged. The total fees billed were $76,110.00 (= 507.4 x $150). Because Mr. Soltesiz had not had an opportunity to review the lengthy statement, the court continued the hearing to allow Mr. Soltesiz and his counsel time to review the document. **The court stated:**

{¶8} "Here's what we're going to do: It's the order of this Court that any exhibits that are going to be offered for purposes damages are to be exchange[d] by the parties before the end of this week. That's tomorrow.

{¶9} "We are coming back here on December 3rd at 8:00. The court is going to hear testimony from Mr. Brancatelli concerning what he did in this case. * * * I want to know what it is that was done, and this statement, this billing statement, clearly indicates what in fact was done.

{¶10} "I expect, before we start to have testimony from Mr. Brancatelli, that the Defendants in this case are going to provide the Court with a copy of this statement indicating what they agree is justified and what they contest.

{¶11} "Those items that will be contested we'll take testimony on; Mr. Brancatelli can explain why it was that he did what he said he did; what it was that he did; if it needs clarification, and we'll proceed accordingly."

{¶12} Mr. Brancatelli then explained that the reason he had been unable to provide supportive documentation for the billing statement was because Mr. Soltesiz had possession of the banker boxes of documents regarding the fire loss claim. In response, the trial court stated:

{¶13} "You've provided what I think is a very thorough, a very well defined and a clear explanation of the time that you've put into this case as to why you feel you're entitled to the fees that you're entitled to, you provided that to me today. You've provided it * * * today."

{¶14} The transcript thus indicates that the matter was to move forward based on the fee statement submitted to the court at the first hearing; the court, however, continued the hearing to allow Mr. Soltesiz to review the statement and to contest to items on the statement, and also to allow Mr. Brancatelli an opportunity to provide supporting documents for any billed items once he gained access to the three banker boxes of documents.

{¶15} On December 3, 2010, the scheduled hearing date, the court first stated on the record that the parties were still unable to resolve the documents access issue on their own. Mr. Brancatelli stated he had not obtained cooperation from Mr. Soltesiz's counsel regarding the multi-boxed documents; the latter reported he had not received requests, either in a letter or telephone call, from Brancatelli. The transcript then reflects the following exchange:

{¶16} "MR. BRANCATELLI: Well, I guess the question is if you're going to make these available once I review those documents I may increase my fee bill[;] that was the whole reason I started requesting them back in March of 2009, Judge, or 2010.

{¶17} "THE COURT: Here, the Court is making [Mr. Soltesiz's counsel] have those documents [available] in his office. If you want to review those documents you certainly have the right to. If you want to at the eleventh hour come in here and say you want to increase your fee bill you certainly have the right to ask for it. This Court is growing impatient with the length that this matter has been hanging around so I'm making those documents available to you to support if need be this, I don't know how many pages, your statement is multi page statement asking for compensation from Mr. Soltesiz.

{¶18} "MR. BRANCATELLI: No sir."

{¶19} After stating that the purpose of Mr. Brancatelli's review of the documents was not for him to "revisit" the fee statement but to support it with proper documentation, the trial court then began the process of going over the entire billing statement item and by item, and noting objections raised by Mr. Soltesiz to certain items. Afterward, the court tallied all the objected items from the statement, explaining that these were the items that would be further discussed at the next hearing on December 17, 2010. The transcript then reflects the following:

{¶20} "MR. BRANCATELLI: Now is it my understanding this is part of the trial that is going to go forward on the 17th?

{¶21} "THE COURT: We don't have trial[;] it's you're presenting documentation and supporting evidence to show the Court the amount of time that you worked on this case for, to support the amount of money that you're claiming you're doing, entitled to. * * * [A]t the hearing we're going to have on the 17th it's going to be your opportunity to

present evidence to support your contention that you're entitled to 507.40 hours and at $150.00 an hour [totaling] $76,110.00."

{¶22} The court later again stated in no uncertain terms that it would not allow Mr. Brancatelli to expand the fee bill:

{¶23} "* * * What I'm telling you Mr. Brancatelli, you have the obligation of supporting your fee bill. If for example * * * you indicate that you're entitled to four hours of fee bill time because you composed a 15 page letter to send Kip Reader for example and if Mr. Soltesiz's counsel questions that[,] you have the right to document it, support your documentation. I have no quarrel with that but I am telling you that I am not going to allow you to expand on your fee bill[;] I am not going to allow [you to] expand on this proceeding. We were set to go forward on this case two weeks or three weeks ago and that's what I want to do. I don't want to reopen litigation in this case * * *.

{¶24} "You say you're indicating to me that you want to look in * * * those three banker boxes that Mr. Soltesiz has, take a look at them, if there is something in there that you feel change the complexion, change the playing field dramatically that you want to bring it to the Court's attention you've got a week and a half to do so otherwise we'll see you on the 17th."

{¶25} At the final hearing held on December 17, 2010, the court began the hearing with an explanation of how the proceedings would take place:

{¶26} "Okay. So the record is clear we had this matter set for hearing[.] [A]t the time of the hearing there were zero [--] make sure that is clear on the record [--] zero exhibits to be offered. The court is now looking out at Mr. Brancatelli's trial table and behind and there are boxes and boxes and piles and piles. It's not the Court's intention

to accept all those exhibits into evidence unless it is absolutely positively necessary as far as the Court is concerned. So with that admonition we're going to begin.

{¶27} "The Court also would like to process this matter in the following fashion. There is no reason for us to have Mr. Brancatelli testify as to those [un]disputed matters which were agreed upon * * *. What we're going to do is we're going to go through the fee bill, we're going to go through each disputed matter, we're going to have Mr. Brancatelli testify as to what the fee fill is for, what was done. If there is a dispute we'll allow Mr. Soltesiz or whomever is going to be testifying * * * on behalf of Mr. Soltesiz * * *.

{¶28} Mr. Brancatelli then made an opening statement in which he asked to withdraw the original fee statement and substitute it with an amended statement. He, however, had not sought leave before the hearing for the amendment of the fee statement and apparently only provided the new statement to Mr. Soltesiz two days before the hearing. The court refused the substitution, stating:

{¶29} "Let the record reflect that we are not going to go through the new fee bill, we're going to do as the Court indicated we were going to do. We're going to go through the old fee bill which was submitted last time we were here, that's what we're going to work off of. At the conclusion of that fee bill if you want to revisit the difference between the new fee bill and the original fee bill that was submitted we will address it at that point of time.

{¶30} The following exchange then occurred:

{¶31} "THE COURT: Mr. Brancatelli, how many new matters are listed on the new fee bill?

{¶32} "MR. BRANCATELLI: Judge, I can't answer that.

{¶33} "THE COURT: Okay. I'm not going to * * * reinvent the wheel * * *. We've been on this, whether or not you're dilatory or not that's not an issue before the Court. The record needs to reflect however, that this matter has been going on and on and on and that you were aware of the fact that was needed in order to establish your per diem argument, so we're going to move forward on the fee bill that is dated October 29th, 2010.

{¶34} "MR. BRANCATELLI: Okay."

{¶35} The court then went over every item in the 36-page original fee statement and heard statements from both Mr. Brancatelli and Mr. Soltesiz regarding each item. Most of Mr. Soltesiz's objections concerned the length of time Mr. Brancatelli alleged he spent on specific services. After the court finished reviewing the entire fee statement with the parties, it asked Mr. Brancatelli what he added in the amended statement.

{¶36} "THE COURT: I understand you indicated earlier that you went and reviewed all the records and you found things you had not brought up before.

{¶37} "MR. BRANCATELLI: That's correct, Your Honor.

{¶38} "THE COURT: Are you able to succinctly point out what was not discussed before?

{¶39} "MR. BRANCATELLI: No, Your Honor, I apologize.

{¶40} "THE COURT: That's fine, as I said we're not going to reinvent the wheel here. * * * ."

{¶41} In the judgment entry issued by the trial court, the court stated it had considered the testimony offered and exhibits submitted at the hearing, and determined

that the reasonable value of Mr. Brancatelli's service in the fire loss case prior to his discharge was $68,310.00, which represented 455.4 hours at $150 per hour. It stated: "The Court [] finds that this amount of attorney fees is reasonable in that the case involved was very complex and Plaintiff was able to obtain a favorable result for Defendant. In addition, Plaintiff did not seek reimbursement of any expenses. Moreover, the Court finds that Plaintiff's hourly rate of $150.00 per hour is very reasonable for an attorney of his experience." The court also awarded court costs and interests at 4% per annum from the date of the judgment. The fees awarded were $7,800 less than Mr. Brancatelli had requested.

{¶42} Mr. Brancatelli now appeals, assigning five errors for our review:

{¶43} "[1.] The court committed prejudicial error when it failed to allow Plaintiff the fundamental right at trial to offer testimony about specific items in dispute contained in Plaintiff's fee bill and to cross-examine witness, specifically the defendant, about the time spent for legal services due to the complexity of the case."

{¶44} "[2.] The court committed prejudicial error when it failed to allow Plaintiff the right to amend his fee bill after the court ordered Defendant to turn over three (3) banker boxes of documents prepared by Plaintiff in the prosecution of the fire loss claim after acknowledging that Plaintiff's fee bill might increase due to the documents obtained in establishing the complexity of the case."

{¶45} "[3.] The court committed prejudicial error when it went beyond the scope of the remand when it changed the interest rate rewarded and the effective date of Judgment."

{¶46} "[4.] The court committed prejudicial error when it allowed a non-expert witness to testify as to the time Plaintiff-Appellant determined to be reasonable for the service and the complexity of the matter performed."

{¶47} "[5.] The court committed prejudicial error when it denied Plaintiff's Motion for Sanctions without a hearing concluding that it had sufficient knowledge of the circumstances for the denial of the requested relief."

Standard of Review

{¶48} Ohio Sup.R. 71 provides that attorney fees in all matters shall be governed by Rule 1.5 of the Ohio Rules of Professional Conduct. Prof.Cond.R. 1.5 provides that the factors to be considered in determining the reasonableness of a fee include: (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; and (8) whether the fee is fixed or contingent.

{¶49} "[I]n an action for attorney fees the burden of proving that the time was fairly and properly used and the burden of showing the reasonableness of work hours devoted to the case rest on the attorney. Furthermore, a trial court must base its determination of reasonable attorney fees upon actual value of the necessary services

performed, and there must be some evidence which supports the court's determination." *Climaco, Seminatore, Delligatti & Hollenbaugh v. Carter*, 100 Ohio App.3d 313, 323 (10th Dist.1995). In making such a determination, the court must consider factors such as time and labor, novelty of issues raised, and necessary skill to pursue the course of action, customary fees in the locality for similar legal services, result obtained, and experience, reputation and ability of counsel. *Id.* at 324.

{¶50} Where a court is empowered to award attorney fees, "[u]nless the amount of fees determined is so high or so low as to shock the conscience, an appellate court will not interfere." *Bittner v. Tri-County Toyota, Inc.*, 58 Ohio St.3d 143,146 (1991), quoting *Brooks v. Hurst Buick-Pontiac-Olds-GMC, Inc*., 23 Ohio App.3d 85, 91 (12th Dist.1985). Finally, to allow us to conduct a meaningful review, the trial court must state the basis for the fee determination. *TCF Natl. Bank FBO Aeon Fin., LLC v. Marlatt*, 5th Dist. No. 2009CA00128, 2010-Ohio-1149, ¶26.

The Trial Process

{¶51} On appeal, Mr. Brancatelli complains about the manner in which the trial court conducted the proceedings. He alleges the trial court did not permit him to fully present testimony in support of his fee statement.

{¶52} Pursuant to Evid.R. 611(A), a trial court "shall exercise reasonable control over the mode and order of interrogating witnesses and presentation of evidence so as to * * * avoid needless consumption of time[.]" Alleged errors regarding violations of Evid.R. 611 are reviewed under the abuse of discretion standard. *Ward v. Patrizi*, 11th Dist. No. 2010-G-2994, 2011-Ohio-5100, ¶37, citing *Marshall v. Scalf*, 8th Dist. No. 88708, 2007 Ohio 3667, ¶28-29.

{¶53} Our review of the transcript shows that, before the court started the laborious process of reviewing every single disputed item in the lengthy fee statement, it explained how the proceeding would be conducted: for every item charged, Mr. Brancatelli would testify regarding the specific services performed and the purpose of the services, and Mr. Soltesiz would be allowed to lodge any objection and to give his reason for the objection.

{¶54} Our reading of the transcript reflects that Mr. Brancatelli did not raise any objections regarding this process; instead, he participated willingly and fully, testifying at great length regarding the circumstances for each item billed. We do not find any abuse of discretion on the part of the trial court, and moreover, Mr. Brancatelli waived any perceived error by failing to object. The first assignment is without merit.

Amendment of His Fee Statement

{¶55} Under the second assignment of error, Mr. Brancatelli claims the trial court erred in not allowing him to amend his fee bill statement, which he did after reviewing the documents in Mr. Soltesiz's possession. The record reflects Mr. Brancatelli produced a fee statement on the day of the first hearing. Because Mr. Soltesiz had not seen it, the court continued the proceeding to allow him an opportunity to review it. The court also ordered that Mr. Soltesiz allow Mr. Brancatelli access to the three banker boxes of documents, so that the latter could prepare supportive documentation for his fee bills. At the continued (second) hearing, the court reviewed the lengthy fee statement with the parties and noted the objections by Mr. Soltesiz to certain items. Because the parties were unable to resolve the documents access issue, the court again continued the hearing to so that Mr. Brancatelli could review the documents. The

court emphasized, however, the purpose of the review was not for him to "revisit" the fee statement, but to allow him to properly document the fee statement he had submitted.

{¶56} Despite the court's instruction, at the final hearing, Mr. Brancatelli asked to amend the original fee statement with an expanded statement, which added 42 hours of service and now totaled 549 hours, for a sum of $82,484.00. Although the court refused to conduct the proceedings based on the amended statement, the court did give Mr. Brancatelli an opportunity to summarize the added matters at two separate occasions during the proceeding. Mr. Brancatelli, however, was unable to provide that information to the court.

{¶57} Based on this record, we do not see an abuse of discretion in the trial court's refusal to allow an amendment of the previously admitted fee statement. Furthermore, Mr. Brancatelli, again, failed to preserve any perceived error because he did not lodge any objection at an appropriate time during the proceedings below. The second assignment of error is without merit.

Interest on the Judgment

{¶58} Under the third assignment of error, Mr. Brancatelli claims the court erred in awarding the interest rate in effect on the day of the judgment entered after remand.

{¶59} The December 20, 2008 judgment reversed by this court awarded "costs and interest at eight percent (8%) per annum from the date thereof." Upon remand, the resultant judgment entry awarded "costs and interest at four percent (4%) per annum from the date thereof."

{¶60} Mr. Brancatelli claims the trial court did not have the authority to change the interest rate from eight percent to four percent per annum on the fees awarded, citing *Cugini & Capoccia Builders, Inc. v. Ciminello's, Inc.*, 10th Dist. No. 06AP-210, 2006-Ohio-5787.

{¶61} In that contract case, the trial court awarded damages and postjudgment interest. On appeal, the Tenth District found errors in the amount of damages awarded and remanded with the instruction that the amount of damages be reduced by $3,750. Upon remand, the trial court entered the judgment as instructed, but plaintiff then filed a motion for an award of *prejudgment* interest as well. The trial court denied it, and plaintiff appealed from that denial.

{¶62} The Tenth District cited R.C. 1343.03(B), which provided that generally only postjudgment interest will be awarded, however, under limited circumstances, prejudgment interest may be awarded. The appellate court determined that under the circumstances of that case, the trial court *would* have the discretion to award plaintiff prejudgment interest as an element of the compensatory damages, because of defendant's conversion of the money owed. However, the court held that the trial court lacked jurisdiction to award such additional compensatory damages following the remand. *Id*. at ¶31. The court explained that the remand did not allow "for any new compensatory damages, including damages in the nature of prejudgment interest, to be added." *Id*. at ¶33.

{¶63} *Cuginia* has no relevance to the instant case. That case addressed *prejudgment* interest, which can be awarded by the trial court *within the damage award*. *De Santis v. Smedley*, 34 Ohio App.3d 218, 221 (8th Dist.1986). The instant case, in

contrast, concerns postjudgment interest. After we reversed the prior judgment, the trial court determined the reasonable value of Mr. Brancatelli's service to be $68,301, and, appropriately, awarded postjudgtment interest on that amount, at the current rate of 4 percent, pursuant to R.C. 5703.47. We find no abuse of discretion regarding the court's award of postjudgment interest, and therefore overrule the third assignment of error.

Objections to Mr. Soltesiz' Opinions

{¶64} Under the fourth assignment of error, Mr. Brancatelli complains the trial court should not have allowed Mr. Soltesiz to testify regarding the time for the services he performed, on the ground that Mr. Soltesiz was not an expert.

{¶65} Our review of the transcript shows Mr. Soltesiz did not testify as an expert. Evid.R. 701 permits opinion testimony by a lay witness. It states: "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

{¶66} The trial court allowed Mr. Soltesiz to testify regarding his estimation of the amount of time he himself spent with Mr. Brancatelli on many occasions. For example, some of the billed time related to the telephone conversations the two had, or the trips Mr. Brancatelli made to see the fire-damaged facility, and the court allowed Mr. Soltesiz to testify as to his own recollection of the events.

{¶67} In a few instances, Mr. Soltesiz testified regarding the time he felt Mr. Brancatelli should have spent in performing certain tasks, such as his dealings with the

insurance carrier, based on his own knowledge of the fire loss matter. The trial court, however, did not rely completely on his testimony; the following exchange, involving a June 28, 2002 bill charging two hours for time Mr. Brancatelli spent with a claim adjuster, is a fairly typical colloquy during the lengthy bill reviewing proceeding:

{¶68} "MR. BRANCATELLI: On 6-28-02 I again had a phone call with Bill Dunlap or Don Blackburn who * * * advised that he's now going to adjust the claim. I had a phone call with [Joe Soltesiz] regarding what the needs were to get Ry-Marc to get back in operating. I prepared a letter to Don for immediate concerns for getting Ry-Marc back operating; money to make payroll; damage of goods to be shipped * * * ; boxes to package of the goods to be shipped; getting the phone system up and running; getting the machines cleaned; the electric services to the machines repaired; and the need for the electricity to the building[.] * * * I prepared a facsimile to send a letter to Don Blackburn.

{¶69} "* * *.

{¶70} "MR. SOLTESIZ: Okay. I have no way of knowing how long a phone call could take and I based my opinion in the time [] on what I see here and what's in his exhibits. After studying them it doesn't take two hours to tell an insurance agent what he just read here.

{¶71} " * * *.

{¶72} "THE COURT: Mr. Soltesiz, it's my determination, I'm the one that's going to make a determination as to how long Mr. Brancatelli spent on these matters based on the testimony * * *. I appreciate your opinion but please don't tell me what I have to do, it's my job."

{¶73} Our review of the transcript shows that Mr. Soltesiz's testimony was based on his own perception – he testified regarding his own recollection of the time he spent with Mr. Brancatelli either in person or over the telephone, and gave his opinion, as the owner of the facility that suffered the fire loss, regarding the amount of time he felt Mr. Brancatelli should have spent in dealing with the insurance company. The testimony was obviously helpful to the trial court's determination of the time spent on some of the items billed. Thus, we find no abuse of discretion by the trial court in allowing the testimony of Mr. Soltesiz, and, in any event, the transcript shows the trial court did not necessarily defer to Mr. Soltesiz's estimation of time. The fourth assignment of error is without merit.

Request for Frivolous Conduct Sanctions

{¶74} The fifth assignment of error concerns the motion for sanctions for frivolous litigation filed by Mr. Brancatelli against Mr. Soltesiz.

{¶75} The record reflects that in February 2006, Mr. Soltesiz filed a complaint against Mr. Brancatelli alleging malpractice in an unrelated matter. In response, Mr. Brancatelli filed a counterclaim for attorney fees and a third party complaint naming Mr. Solesiz's current counsel, who took over the fire loss claim. The case was eventually dismissed, without prejudice, by agreement of the parties, in March 2007.

{¶76} Within a year, Mr. Brancatelli filed the instant complaint seeking attorney fees. Mr. Soltesiz, in response to the new lawsuit, filed a counterclaim raising the same malpractice claim. Prior to trial, Mr. Soltesiz dismissed the malpractice claim with prejudice. Mr. Brancatelli then filed a motion for sanctions, pursuant to R.C. 2323.51,

and Civ.R. 11, claiming the malpractice action constituted frivolous litigation filed for the sole purpose of deterring him from pursuing the legal fees claim.

{¶77} To support his allegation that the legal malpractice action was frivolous, Mr. Brancatelli pointed to the fact that the claim was dismissed the day before Mr. Soltesiz was scheduled to be deposed in the malpractice case. Mr. Brancatelli also pointed to communications from Mr. Soltesiz and his counsel suggesting a mutual dismissal of claims.

{¶78} Mr. Soltesiz, on the other hand, defended the merit of his legal malpractice claim citing an expert report he had obtained, which concluded that Mr. Brancatelli failed to properly advise him regarding the statute of limitations in the litigation giving rise to the malpractice claim.

{¶79} "The question of what constitutes frivolous conduct may be either a factual determination, e.g., whether a party engages in conduct to harass or maliciously injure another party, or a legal determination, e.g., whether a claim is warranted under existing law. '[A] trial court's findings of fact are to be accorded substantial deference * * * and are reviewed under an abuse of discretion standard' while legal questions are 'subject to de novo review by an appellate court.' *State Farm Ins. Cos. v. Peda*, 11th Dist. No. 2004-L-082, 2005-Ohio-3405, at ¶28 (citations omitted). The ultimate decision whether to impose sanctions for frivolous conduct, however, remains wholly within the trial court's discretion. *Edwards v. Livingstone*, 11th Dist. Nos. 2001-A-0082 and 2002-A-0060, 2003-Ohio-4099, at ¶17 (citations omitted)." *Curtis v. Hard Knox Energy*, *Inc*., 11th Dist. No. 2005-L-023, 2005-Ohio-6421, ¶15. Furthermore, "a hearing is not required where the court has sufficient knowledge of the circumstances for the denial of

the requested relief and the hearing would be perfunctory, meaningless, or redundant." *Huddy v. Toledo Oxygen & Equip. Co.*, 6th Dist. No. L-91-328, 1992 Ohio App. LEXIS 2390, *5 (May 8, 1992).

{¶80} "A trial court is required to engage in a two-part inquiry when presented with a R.C. 2323.51 motion for sanctions. First, the trial court must determine whether an action taken by the party against whom sanctions are sought constituted frivolous conduct. Second, if the conduct is found to be frivolous, the trial court must decide what amount, if any, for reasonable attorney fees to be awarded to the aggrieved party." *Edwards* at ¶17, citing *Lable & Co. v. Flowers*, 104 Ohio App.3d 227, 232-233 (9th Dist.1995). The decision whether to impose sanctions once frivolous conduct is found rests within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. *Id*. citing *Riley v. Langer*, 95 Ohio App.3d 151, 159 (1st Dist.1994).

{¶81} Here, apparently, Mr. Brancatelli's accusation of frivolous litigation rests basically upon Mr. Solesiz's last-minute dismissal of the malpractice claim and his suggestion of a global settlement via a mutual dismissal of the legal fees and malpractice claims.

{¶82} We agree with the trial court that, "[m]erely offering to mutually settle both claims does not mean that Defendant brought his malpractice claim for an improper purpose. Defendant had an expert report in support of his malpractice claims and states that a cost-benefit analysis led them to determine that it would be fruitless to pursue the claim." Based on this record, we cannot conclude the trial court abused its

discretion in overruling Mr. the motion for sanctions without a hearing. The last assignment of error is without merit.

{¶83} The judgment of the Lake County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.