2012 IL App (2d) 120467-U
No. 2-12-0467
Order filed September 10, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THOMAS G. ODDO, Plaintiff-Appellee, v. SHAWN M. COLLINS, THE COLLINS LAW FIRM, P.C., and EDWARD J. MANZKE, Defendants-Appellants,	)	Appeal from the Circuit Court of Du Page County. No. 11-L-612 Honorable Kenneth L. Popejoy, Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Zenoff and Schostok concurred in the judgment.

ORDER

Held: A plaintiff is required to plead a separation or retirement agreement, but not post-separation consideration to comply with requirements of the 2006 version of Illinois Rule of Professional Conduct 1.5(j) (eff. Aug. 1, 1990); whether compensation is due based on events occurring after termination of employment depends on the terms of the compensation agreement; and issues outside of the scope of certified questions would not be addressed.

¶ 1 I. INTRODUCTION

¶ 2 Plaintiff, Thomas G. Oddo (an attorney), filed a complaint in the circuit court of Du Page County seeking to recover $173,750 he claims he is owed by defendants Shawn M. Collins, the

Collins Law Firm, P.C., and Edward J. Manzke due to his bringing a case to the Collins Law Firm (law firm), which was subsequently settled. Plaintiff was an employee of the law firm at the time he brought the case to the law firm, but not at the time the case settled. Defendants moved to dismiss, and the trial court denied that motion. However, it granted defendants' request to certify two questions to this court in accordance with Illinois Supreme Court Rule 308 (eff. Feb. 26, 2010), and we allowed the appeal. We now answer those questions.

¶ 3 Before turning to the particular questions presented to this court, we must clarify the scope of our review. An appeal pursuant to Rule 308 necessarily involves a question of law, so review is *de novo*. *Tri-Power Resources, Inc. v. City of Carlyle*, 2012 IL App (5th) 110075, ¶ 9. Moreover, our jurisdiction is strictly limited to the questions presented. *Sassali v. DeFauw*, 297 Ill. App. 3d 50, 51 (1998). Thus, we may only answer the questions posed, and we may not render opinions on any of the underlying orders of the trial court. *Miller v. American Infertility Group, S.C.*, 386 Ill. App. 3d 141, 144 (2008). Similarly, we may not expand the scope of a certified question to encompass additional issues that could have been included in it, but were not. *McCarthy v. LaSalle National Bank & Trust Co.*, 230 Ill. App. 3d 628, 631 (1992). Accordingly, this order should not be read as expressing an opinion on anything beyond the two questions presented (such as the sufficiency of the particular pleadings in this case or whether plaintiff should be allowed to amend his complaint, for example). The parties are aware of the facts, and, given our limited scope of review, we will not restate them here. With these principles in mind, we now turn to the first question certified by the trial court.

¶ 4 II. FIRST CERTIFIED QUESTION

¶ 5 The first question presented in this appeal is as follows:

"Whether, under the [2006] version of Rule of Professional Conduct 1.5(f), a plaintiff-

> lawyer, following termination of his employment with defendant law firm, may seek to enforce an oral fee sharing agreement allegedly entered into during his employment, where he has failed to allege that he entered into a 'separation or retirement agreement' with the firm, or that he furnished post-termination consideration to support the alleged fee sharing agreement."

Thus, we are actually confronted with two questions. First, we must decide whether a plaintiff must allege he or she entered into a "separation or retirement agreement" where the plaintiff, after ceasing employment with a defendant, seeks to enforce a fee sharing agreement that arose during employment (we will assume that the attorney has not complied with the client-consent provision of Rule 1.5(f)). Second, we must determine whether it is necessary for such a plaintiff to have furnished post-termination consideration. Both questions must be considered in the context of the version of Illinois Rule of Professional Conduct 1.5(f) (eff. Aug. 1, 1990) in effect in 2006 which provided, *inter alia*, as follows:

> "Except as provided in Rule 1.5(j), a lawyer shall not divide a fee for legal services with another lawyer who is not in the same firm, unless the client consents to employment of the other lawyer by signing a writing which discloses:
>
> (1) that a division of fees will be made;
>
> (2) the basis upon which the division will be made, including the economic benefit received by the other lawyer as a result of the division; and
>
> (3) the responsibility to be assumed by the other lawyer for performance of the legal services in question."

Rule 1.5(j) provides an exception: "Notwithstanding Rule 1.5(f), a payment may be made to a lawyer formerly in the firm pursuant to a separation or retirement agreement."

¶ 6 We answer the first question affirmatively. Supreme Court Rules are to be interpreted using the same principles we use to interpret statutes. *Applebaum v. Rush University Medical Center*, 231 Ill. 2d 429, 438 (2008). This includes the Rules of Professional Conduct. *In re Marriage of Stephenson*, 2011 IL App (2d) 101214, ¶ 26. Indeed, the Rules of Professional Conduct are supreme court rules, and they have the force of law. *In re Marriage of Newton*, 2011 IL App (1st) 090683, ¶ 40. In ascertaining the meaning of a Rule of Professional Conduct, we look first to the language of the rule and, if that language is unambiguous, we give effect to its plain meaning. *In re Marriage of Levinson*, 2012 IL App (1st) 112567, ¶ 34. Here, the plain language of the relevant version of Rule 1.5(j) states that a division of fees may be made in accordance with "a separation or retirement agreement."

¶ 7 Furthermore, Illinois is a fact-pleading jurisdiction. *Johnson v. Matrix Financial Services Corp.*, 354 Ill. App. 3d 684, 696 (2004). Hence, a plaintiff is required to set forth "ultimate facts that support his or her cause of action." *Id*. The existence of a retirement or separation agreement constitutes such an ultimate fact. Accordingly, a plaintiff must plead a separation or retirement agreement to fall within Rule 1.5(j)'s exception to Rule 1.5(f). Indeed, plaintiff acknowledges that he must plead the existence of such an agreement.

¶ 8 We note that both parties address the issue of the sufficiency of plaintiff's complaint. Defendants' brief contains a section titled "The Allegations in Plaintiff's Complaint do not Allege a Separation or Retirement Agreement." Plaintiff responds by setting forth the allegations he believes show the existence of a separation agreement. Such matters are clearly outside the scope of the first certified question; hence, we cannot address them (*In re Estate of Renchen*, 405 Ill. App. 3d 1141, 1143-44 (2010) ("[T]he scope of review of an interlocutory appeal brought under Illinois Supreme Court Rule 308 is strictly limited to the certified question.")). The first certified question

clearly asks what it is that a plaintiff must allege rather than whether plaintiff's allegations in this case are sufficient. While these may be related issues, as noted above, a reviewing court may not expand the scope of a certified question and address additional issues that were not actually raised. *McCarthy*, 230 Ill. App. 3d at 631.

¶ 9 We now turn to the issue of whether a plaintiff must allege that he or she furnished post-termination consideration. It must be remembered here that the sole issue before us at this point is what is necessary to comply with the dictates of Rule 1.5(j). Defendants contend that plaintiff's failure to allege what consideration supported the agreement plaintiff seeks to enforce is "especially damaging." Given the scope of our review, this argument is misplaced. The question of what is necessary for plaintiff to enforce the separation agreement is not within the scope of the certified question, at least to the extent that it does not implicate compliance with Rule 1.5. We have not been asked to analyze the agreement between the parties as a matter of contract law.

¶ 10 We note that the plain language of Rule 1.5(j) requires an "agreement" rather than a "contract." An agreement is merely "[a] mutual understanding between two or more persons about their relative rights and duties." Black's Law Dictionary 67 (7th ed. 1999). Thus, the plain language of Rule 1.5(j) indicates that details pertaining to the formation of a contract, like consideration (*Schafer v. Union Bank/Central*, 2012 IL App (3d) 110008, ¶ 38), are not relevant to determining whether an attorney has violated the rule. Moreover, even if the term "agreement" were somehow ambiguous, we would come to the same conclusion. In such circumstances, we may look to the purpose of a rule and the evils it was designed to remedy for guidance. *People v. Santiago*, 384 Ill. App. 3d 784, 787 (2008). The fee-sharing provisions of Rule 1.5 exist to "preserve a client's right to be represented by the attorney of his choosing." *Canel & Hale, Ltd. v. Tobin*, 304 Ill. App. 3d 906, 915 (1999). It is unclear to us how requiring that a separation agreement be an enforceable

contract between two attorneys would advance the purpose of protecting the client. See also *Romanek v. Connelly*, 324 Ill. App. 3d 393 (2001) ("The provisions of RPC 1.5 operate with the force and effect of law [citation], and embody this State's public policy of placing the rights of clients above and beyond any lawyers' remedies in seeking to enforce fee-sharing arrangements."). Accordingly, we answer the second portion of the first certified question by stating that it is not necessary to allege post-separation consideration in order to comply with the requirements of Rule 1.5(j).

¶ 11 Defendants cite *Romanek*, 324 Ill. App. 3d 393, and an unpublished decision of the federal district court for northern Illinois (*Gimbel v. Wintroub*, No. 02-C-8795 (N.D. Ill June 30, 2004)). *Romanek* does not compel a different result. Addressing consideration, the *Romanek* court explained:

> "The fee-sharing agreement is further not predicated on a mere client referral. While we acknowledge plaintiff's repeated references in her amended complaint to the payment as a 'referral fee,' a liberal reading of the complaint shows that the firm's payment represents its consideration for plaintiff agreeing not to take all the Thunderhead files with her upon leaving the firm's employ. Hence, the agreement does not impermissibly reward plaintiff for 'simply being a link in the chain.' " *Id*. at 403-04.

Obviously, the *Romanek* court was not speaking of consideration in the usual sense we use it when analyzing a contract. Consideration may be anything of value. *McInerney v. Charter Golf, Inc.*, 176 Ill. 2d 482, 486 (1997). A referral would clearly seem to be a thing of value. Thus, the *Romanek* court was not considering the enforceability of the separation agreement under contract law. This is confirmed by the fact that the *Romanek* court went on to find the plaintiff's complaint insufficient to state a claim for a breach of contract after it concluded the separation agreement did not violate

the ethical rules. *Id.* at 404. The ethical issue was whether the agreement "impermissibly rewarded [the] plaintiff for 'simply being a link in the chain' [that resulted in the referral of the client]." *Id*. While furnishing consideration beyond the referral itself may be one way of avoiding this ethical problem, we do not read *Romanek* as stating that it is the only way to avoid doing so.

¶ 12 We further note the *Romanek* court's concern pertaining to arrangements where all fees generated from a client were to be paid to a departing lawyer. The court feared that such arrangements would disincentivize the law firm from providing zealous representation. *Id*. at 402. In this case, such concerns are not at issue, as—accepting plaintiff's allegations as true—defendants remained entitled to 85% of any fees generated after plaintiff's departure. Indeed, the unpublished federal decision cited by defendants found a separation agreement did not violate the ethical rules under similar circumstances.

¶ 13 In sum, we hold that a plaintiff must plead a separation or retirement agreement, but not post-separation consideration, to comply with the requirements of the 2006 version of the Illinois Rule of Professional Conduct 1.5(j) (eff. Aug. 1, 1990).

¶ 14 III. SECOND CERTIFIED QUESTION

¶ 15 The trial court also certified the following question to this court:

> "Whether under the Wage Payment and Collection Act or Illinois common law, a former lawyer/employee of defendants' firm may recover a commission on a contingency case pursuant to an alleged compensation agreement which provided that commissions were 'deemed "earned" *** when [defendants] received a fee payment' when: defendants did not receive a fee payment on the case until two and a half years after plaintiff was terminated; at the time he was terminated, plaintiff had performed only 100 of 10,175 hours ultimately required to successfully resolve the case; and plaintiff did nothing on the case after his

termination."

The parties have not discussed the Wage Payment and Collection Act in their briefs; therefore, we limit our answer to Illinois common law. They also do not address the significance of the fact that plaintiff performed 100 hours of work on the case, which took 10,175 hours of work to resolve, so we also decline to address it.

¶ 16 Thus, we answer the second certified question as follows. If we assume only that the compensation agreement between the parties provided that commissions were earned at the time defendants received a payment and that defendants did not receive a payment until after plaintiff's employment with defendants ended, it is impossible to state definitively whether plaintiff would be entitled to receive a commission. In *Technical Representatives, Inc. v Richardson-Merrell, Inc.*, 107 Ill. App. 3d 830, 833 (1982), the first district stated:

> " Under the [procuring cause] rule, a party may be entitled to commissions on sales made after the termination of a contract if that party procured the sales through its activities prior to termination. The rule applies, however, only if the contract does not expressly provide when commissions will be paid.
>
> The contract involved in the instant case expressly provided that plaintiff would receive commissions 'on sales during the period of this agreement.' *** The procuring cause rule is inapplicable here and the trial court, therefore, did not err in finding that plaintiff was not entitled to commissions on sales made after the June 30, 1974 expiration date of the agreement."

To answer the second certified question, we would have to make an assumption regarding whether the compensation agreement specified that compensation would be limited to commissions earned during the period of employment. We expressly take no position regarding the particular terms of

the compensation agreement between these parties, as that is beyond the scope of the certified question. *McCarthy*, 230 Ill. App. 3d at 631.

¶ 17 IV. CONCLUSION

¶ 18 Having answered the two certified questions, we remand this case to the trial court for further proceedings.

¶ 19 Certified questions answered; cause remanded.