INNS OF COURT: TEAM 3

SEEKING ORDERS FOR OPPOSING COUNSEL TO PAY FOR OUR CLIENT'S FEES

SKIT

(total of 10 minutes)

We start with a demonstration of how misconduct of an opposing counsel can damage the positive relationships we have with our clients, and how it degrades the public view of our legal system. We have attorney, Mark Slack, and his longtime client, John Cardillo, who until recently has always been a positive and satisfied client.

57.105 FACT PATTERN

(5 minutes to read, 10 minutes for table discussion, 30 minutes for each table to spend 5 minutes on answer)

Next, we have a general fact pattern we will read to start off our discussion of rule 57.105. Each table has a unique question based on the fact pattern. After hearing the facts, the tables will get 5 minutes to come up with a table answer and a spokesperson. Then each table spokes person will be called on to read the table question and tell us the table's answer.

Here is **Terai** with your fact pattern:

1. Mr. Smith was diagnosed with terminal cancer 2 years before his death.

2. At the time of Mr. Smith's diagnosis, his will provided for his attorney to be his personal representative, and for his daughter Jane and his wife, Mrs. Smith, to each receive half of his estate.

3. One year after receiving his diagnosis, Mr. Smith changed his will, providing for Mrs. Smith to be his personal representative and for Mrs. Smith to inherit his entire estate.

Jane filed a petition alleging that:

1. Mrs. Smith had prevented Jane from having any contact with her father in the last 2 years of his life.

2. Mr. Smith lacked the requisite testamentary capacity to change his will.

3. Mrs. Smith exerted undue influence over Mr. Smith.

4. Mrs. Smith is not a suitable personal representative because she is a career felon.

[Sabsina takes over]

Jane gave the following deposition testimony early in the case:

1. 11 months after receiving his diagnosis, Mr. Smith was admitted to the hospital for minor surgery. Jane testified that she had gone to the hospital after Mr. Smith's surgery, hoping to visit with him, but that he was so disoriented and irrational that he did not even recognize Jane. He kept insisting Jane was his first wife, the first Mrs. Smith, who was Jane's mother. Mr. Smith insisted that he was not in a hospital and was not recovering from surgery.

2. Jane testified that her stepbrother, Tom, had been living with the Smiths, from the time Mr. Smith received his diagnosis through Mr. Smith's death, and that Tom had telephoned Jane about one month after Mr. Smith's surgery, that he had called to tell Jane that her father had been mentally confused and that he had wandered around the neighborhood lost on several occasions.

3. Jane testified that everyone that knows her father and Mrs. Smith believe that Mrs. Smith married her father for his money.

[Frank takes over]

Mrs. Smith's documentary evidence included:

1. Emails from Mr. and Mrs. Smith's email addresses to Jane over the 2 years before her father's death, telling her of Mr. Smith's poor health and asking her, and then begging her, to visit with her father.

2. Telephone records from Mr. Smith's cell phone and the Smith's land line showing their attempted calls to both Jane's cell number and her work number over the year prior to Mr. Smith's death.

3. Mrs. Smith's cell phone text log showing unanswered texts from Mrs. Smith's cell phone to Jane's cell phone in the month before Mr. Smith's death telling Jane that Mr. Smith had only days to live, and asking Jane to visit before it was too late.

4. Reports of 2 neurologists who upon the request of counsel for Mr. Smith examined Mr. Smith just before he changed his will and that the reports state that Mr. Smith showed no signs of any decrease in his cognitive ability as a result of his illness or treatment.

5. A video that Mr. Smith recorded for Jane the day he changed his will. In the video, Mr. Smith tells Jane that he is very sad that she has chosen to continue the silent treatment she started on the day he married Mrs. Smith, and that he has decided that Mrs. Smith, who is always there for him, will inherit his entire estate.

[Erica takes over]

Jane's attorney had sent Mrs. Smith's attorney long winded letters and broad discovery requests and he had received all Mrs. Smith's documentary evidence. While waiting for a case conference:

1. Jane's attorney admits he had not looked at any of the documentary evidence because it didn't matter to him – his job was to try to get money for Jane.

2. Jane's attorney jokes that "Mrs. Smith sure doesn't look like a bank robber."

3. Jane's attorney admits that he had not done a criminal record check, and had no evidence other than Jane's claim that Mrs. Smith had a criminal record.

Mrs. Smith is furious about her legal bills, demanding to know why she should have to keep incurring fees when Jane and her lawyer know that Jane's facts are untrue.

As Mrs. Smith's attorney, what if any action can we take on behalf of our unhappy Mrs. Smith?

Each table has a specific question for the table to take the next 5 minutes to discuss, and then we will call on the spokesperson for each table to share the question and the table's answer.

INNS OF COURT: TEAM 3

SEEKING ORDERS FOR OPPOSING COUNSEL TO PAY FOR OUR CLIENT'S FEES

LEGAL OUTLINE

All Tables: *57.105* Florida Statutes (2010)

Table #1: When award of fees is based on a statute, fees for time spent to determine amount to be awarded will not be included in award: *State Farm Fire and Casualty v Palma*, 629 So.2d 830 (Fla.1993), *Wight v Wight*, 880 So.2d 692 (2nd DCA 2004) and *Wood v Hack*, 54 So.3d 1082 (4th DCA 2011)

When award of fees is as a result of a sanction for failure to follow a court's order or for bad faith litigation conduct, then fees for time spent to determine amount to be awarded will be included in award: *Bennett v Berges,* 50 So.3d 1154 (4th DCA 2010)

Table #2: None

Table #3 *57.105* award based on the court's own volition: *Koch v Koch,* 47 So.2d 320 (2nd DCA 2010)

Table #4: None

Table #5: Fee award based on inherent authority of the court and the bad faith conduct of the attorney: *Patsy v Patsy*, 666 So.2d 1045 (4th DCA 1996)

Table #6: Notice and opportunity to be heard: *Shniderman v. Fitness Innovations and Technologies, Inc., and DTR Associates LP*, 994 So.2d 508, 515 (Fla. 4th DCA, 2008) and *Moakley v Smallwood*, 826 So.2d 221, 227 (Fla. 2002)

Ethical Rules: Rules of Professional Conduct: Competence, 4-1.1, and Diligence 4-1.3

INNS OF COURT: TEAM 3

SEEKING ORDERS FOR OPPOSING COUNSEL TO PAY FOR OUR CLIENT'S FEES

TABLE #1

Should you serve notice and file a motion under 57.105 against Jane and her attorney for reimbursement of Mrs. Smith's attorney's fees?

Consider the costs to Mrs. Smith for you to represent her at a hearing to determine the amount of the fee award

Consider the risks to Mrs. Smith, that if she does not prevail, she and you could end up paying for Jane's fees.

Handouts of 57.105 Florida Statutes (2010)

Discussion point:

When award is based on a statute, clients cannot be awarded fees for the determination of the amount of the fee award [State Farm Fire and Casualty v Palma 629 So.2d 830 (Fla.1993), Wight v Wight, 880 So.2d 692 (2nd DCA 2004), and Wood v Hack, 54 So.3d 1082 (4th DCA 2011)

When sanction not based on statute, client may be awarded fees for determining the amount of the fee award [Bennett v Berges 50 So.3d 1154 (4th DCA 2010),]

TABLE #2

Assume that you have served proper notice and filed a motion for reimbursement of Mrs. Smith's fees under 57.105, and that Mrs. Smith also incurred costs for court reporters, transcripts, and time billed by your two experts, should you also seek reimbursement of costs under 57.105?

TABLE #3

Assume it is now 2 weeks prior to trial and no 57.105 motion had been served or motion filed and Jane testifies at a second deposition as follows:

1. Jane admits that she had never really gone to the hospital as she had earlier testified.

2. Jane admits although Tom had telephoned her, it was to tell her that her father's illness was terminal and to ask if she would visit him, and that Tom never actually told her that her father had been confused or disoriented, or lost in the neighborhood.

3. Without any question before Jane, she states that all the telephone records were fabricated by Mrs. Smith, and that the neurologists were probably paid off to side with Mrs. Smith.

4. Jane admits that she has no evidence to support her claim except for her own testimony and her opinion that she knows her father better than anyone else and she knows that if her father had been of sound mind that there is no way he ever would have disinherited his only child.

With less than 21 days until trial, is there any way to use 57.105 to get your client's fees reimbursed?

Handout of Koch v Koch, 47 So.2d 320 (2nd DCA 2010)

TABLE #4

Assume that you did not file a 57.105 claim months earlier and that Jane testifies at trial as follows:

1. Jane admits that she had never really gone to the hospital as she had earlier testified.

2. Jane admits although Tom had telephoned her, it was to tell her that her father's illness was terminal and to ask if she would visit him, and that Tom never actually told her that her father had been confused or disoriented, or lost in the neighborhood.

3. Without any question before Jane, she states that all the telephone records were fabricated by Mrs. Smith, and that the neurologists were probably paid off to side with Mrs. Smith.

4. Jane admits that she has no evidence to support her claim except for her own testimony and her opinion that she knows her father better than anyone else and she knows that if her father had been of sound mind that there is no way he ever would have disinherited his only child.

Are there any rules or statutes that would allow the court to award fees or costs to your client?

TABLE #5

Assume that you did not file a 57.105 claim months earlier and that Jane testifies at trial as follows:

1. Jane admits that she had never really gone to the hospital as she had earlier testified.

2. Jane admits although Tom had telephoned her, it was to tell her that her father's illness was terminal and to ask if she would visit him, and that Tom never actually told her that her father had been confused or disoriented, or lost in the neighborhood.

3. Without any question before Jane, she states that all the telephone records were fabricated by Mrs. Smith, and that the neurologists were probably paid off to side with Mrs. Smith.

4. Jane admits that she has no evidence to support her claim except for her own testimony and her opinion that she knows her father better than anyone else and she knows that if her father had been of sound mind that there is no way he ever would have disinherited his only child.

If there are no other rules or statutes that would apply to authorize the court to award Mrs. Smith her fees, should you ask the court to invoke its inherent authority to assess fees and costs against Jane and Jane's attorney?

Handout of Patsy v Patsy, 666 So.2d 1045 (4th DCA 1996)

TABLE #6

Assume that you did not file a 57.105 claim months earlier and that Jane testifies at trial as follows:

1. Jane admits that she had never really gone to the hospital as she had earlier testified.

2. Jane admits although Tom had telephoned her, it was to tell her that her father's illness was terminal and to ask if she would visit him, and that Tom never actually told her that her father had been confused or disoriented, or lost in the neighborhood.

3. Without any question before Jane, she states that all the telephone records were fabricated by Mrs. Smith, and that the neurologists were probably paid off to side with Mrs. Smith.

4. Jane admits that she has no evidence to support her claim except for her own testimony and her opinion that she knows her father better than anyone else and she knows that if her father had been of sound mind that there is no way he ever would have disinherited his only child.

If there are no other rules or statutes that would apply to authorize the court to award Mrs. Smith her fees, and you want to ask the court to invoke its inherent authority to assess fees against Jane and Jane's attorney for bad faith conduct, is notice to Jane and her attorney required, and if so, how would you insure that proper notice was given?

Handout of *Shniderman v. Fitness Innovations and Technologies, Inc., and DTR Associates LP*, 994 So.2d 508, 515 (Fla. 4th DCA, 2008), and *Moakley v Smallwood,* 826 So.2d 221, 227 (Fla. 2002)

West's Florida Statutes Annotated
Rules Regulating the Florida Bar (Refs & Annos)
Chapter 4. Rules of Professional Conduct (Refs & Annos)
4-1. Client-Lawyer Relationship

West's F.S.A. Bar Rule 4-1.3

Rule 4-1.3. Diligence

Currentness

A lawyer shall act with reasonable diligence and promptness in representing a client.

Editors' Notes

COMMENT

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See rule 4-1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

A lawyer's workload must be controlled so that each matter can be handled competently.

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

Unless the relationship is terminated as provided in rule 4-1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See rule 4-1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See rule 4-1.2.

Notes of Decisions (195)

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West's F. S. A. Bar Rule 4-1.3, FL ST BAR Rule 4-1.3
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Rules Regulating the Florida Bar (Refs & Annos)
Chapter 4. Rules of Professional Conduct (Refs & Annos)
4-1. Client-Lawyer Relationship

West's F.S.A. Bar Rule 4-1.1

Rule 4-1.1. Competence

Currentness

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Editors' Notes

COMMENT

Legal knowledge and skill

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also rule 4-6.2.

Thoroughness and preparation

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major

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litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. The lawyer should consult with the client about the degree of thoroughness and the level of preparation required as well as the estimated costs involved under the circumstances.

Maintaining competence

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

Notes of Decisions (103)

West's F. S. A. Bar Rule 4-1.1, FL ST BAR Rule 4-1.1
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West's Florida Statutes Annotated
Title VI. Civil Practice and Procedure (Chapters 45-89) (Refs & Annos)
Chapter 57. Court Costs (Refs & Annos)

West's F.S.A. § 57.105

57.105. Attorney's fee; sanctions for raising unsupported claims or defenses; exceptions; service of motions; damages for delay of litigation

Effective: July 1, 2010
Currentness

(1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:

(a) Was not supported by the material facts necessary to establish the claim or defense; or

(b) Would not be supported by the application of then-existing law to those material facts.

(2) At any time in any civil proceeding or action in which the moving party proves by a preponderance of the evidence that any action taken by the opposing party, including, but not limited to, the filing of any pleading or part thereof, the assertion of or response to any discovery demand, the assertion of any claim or defense, or the response to any request by any other party, was taken primarily for the purpose of unreasonable delay, the court shall award damages to the moving party for its reasonable expenses incurred in obtaining the order, which may include attorney's fees, and other loss resulting from the improper delay.

(3) Notwithstanding subsections (1) and (2), monetary sanctions may not be awarded:

(a) Under paragraph (1)(b) if the court determines that the claim or defense was initially presented to the court as a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, as it applied to the material facts, with a reasonable expectation of success.

(b) Under paragraph (1)(a) or paragraph (1)(b) against the losing party's attorney if he or she has acted in good faith, based on the representations of his or her client as to the existence of those material facts.

(c) Under paragraph (1)(b) against a represented party.

(d) On the court's initiative under subsections (1) and (2) unless sanctions are awarded before a voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

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(4) A motion by a party seeking sanctions under this section must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

(5) In administrative proceedings under chapter 120, an administrative law judge shall award a reasonable attorney's fee and damages to be paid to the prevailing party in equal amounts by the losing party and a losing party's attorney or qualified representative in the same manner and upon the same basis as provided in subsections (1)-(4). Such award shall be a final order subject to judicial review pursuant to s. 120.68. If the losing party is an agency as defined in s. 120.52(1), the award to the prevailing party shall be against and paid by the agency. A voluntary dismissal by a nonprevailing party does not divest the administrative law judge of jurisdiction to make the award described in this subsection.

(6) The provisions of this section are supplemental to other sanctions or remedies available under law or under court rules.

(7) If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract. This subsection applies to any contract entered into on or after October 1, 1988.

Credits

Laws 1978, c. 78-275, § 1; Laws 1986, c. 86-160, § 61; Laws 1988, c. 88-160, § 1, 2; Laws 1990, c. 90-300, § 1. Amended by Laws 1995, c. 95-147, § 316, eff. July 10, 1995; Laws 1999, c. 99-225, § 4, eff. Oct. 1, 1999; Laws 2002, c. 2002-77, § 1, eff. July 1, 2002; Laws 2003, c. 2003-94, § 9, eff. June 4, 2003; Laws 2010, c. 2010-129, § 1, eff. July 1, 2010.

Notes of Decisions (1065)

West's F. S. A. § 57.105, FL ST § 57.105
Current through Ch. 255 (End) of the 2014 2nd Reg. Sess. and Sp. "A" Sess. of the Twenty-Third Legislature

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Original Image of 629 So.2d 830 (PDF)

629 So.2d 830
Supreme Court of Florida.

STATE FARM FIRE & CASUALTY CO., Petitioner,
v.
Margarita J. PALMA, Respondent.

No. 78766. | Dec. 23, 1993.

Insured under automobile policy sued insurer for refusal to pay medical bill. The Circuit Court, Palm Beach County, held for insurer, and the District Court of Appeal, 489 So.2d 147, reversed and remanded. On remand, the Circuit Court, W.C. Williams, III, J., awarded insured attorney fees, and insurer appealed. The District Court of Appeal, 524 So.2d 1035, affirmed, and the Supreme Court, 555 So.2d 836, approved its decision. On remand, the Circuit Court, Edward A. Garrison, J., awarded attorney fees for services rendered on appeal, and applied contingency fee multiplier of 2.6. The District Court of Appeal, 585 So.2d 329, affirmed in part, reversed in part and remanded. On application for review, the Supreme Court, Harding, J., held that: (1) insurer who loses suit to insured but contests insured's entitlement to attorney fees may be held liable for attorney fees incurred in litigating issue of entitlement to fees, but not for time spent litigating amount of fees, and (2) contingency fee multiplier in excess of 2.5 should not have been applied.

Quashed in part and remanded.

Kogan, J., concurred in part, dissented in part and filed opinion in which Barkett, C.J., and Shaw, J., joined.

Attorneys and Law Firms

***830** Charles W. Musgrove, and Stephen C. McAliley, West Palm Beach, for petitioner.

Ronald V. Alvarez, Ronald V. Alvarez, P.A., and Larry Klein, Klein & Walsh, P.A., West Palm Beach, for respondent.

Opinion

HARDING, Justice.

We have for review *State Farm Fire & Casualty Co. v. Palma,* 585 So.2d 329 (Fla. 4th DCA 1991), based on conflict with *State Farm Mutual Automobile Insurance Co. v. Moore,* 597 So.2d 805 (Fla. 2d DCA 1992). We have jurisdiction pursuant to article V, section 3(b)(3) of the Florida Constitution.

This case has been before the Fourth District Court of Appeal three times and is currently making its second appearance before this Court. Margarita Palma (Palma) was injured in a car accident and sought no-fault benefits from her insurance company, State Farm Fire & Casualty Co. (State ***831** Farm). When Palma submitted the bill for a $600 thermographic examination, State Farm refused to pay. Palma brought suit against State Farm, which answered that it was not required to pay for the thermographic examination because this treatment did not constitute a necessary medical service. The trial judge agreed with State Farm and refused to order payment.

On appeal, the Fourth District Court of Appeal reversed the trial judge's ruling and remanded the case for entry of a judgment in favor of Palma and to determine and award costs and attorney's fees incurred in the proceedings before the trial court and on appeal. *Palma v. State Farm Fire & Casualty Co.,* 489 So.2d 147 (Fla. 4th DCA), *rev. denied,* 496 So.2d 143 (Fla.1986). On remand, the trial court awarded Palma attorney's fees for both the trial and the appeal. State Farm appealed to the district court,

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which affirmed the award of attorney's fees for Palma, entered an order granting Palma's motion for attorney's fees for that appeal, and remanded the cause in order for the trial court to determine the appropriate amount. *State Farm Fire & Casualty Co. v. Palma,* 524 So.2d 1035 (Fla. 4th DCA 1988). On review, this Court approved the district court's decision and remanded to the trial court for a determination of entitlement and the amount of fees. *State Farm Fire & Casualty Co. v. Palma,* 555 So.2d 836 (Fla.1990).

On remand, the trial court awarded Palma attorneys' fees for services rendered in both the district court and this Court, finding that they were proper under section 627.428, Florida Statutes (1983). The trial court also applied a contingency fee multiplier of 2.6, finding that this was the law of the case. State Farm again appealed to the Fourth District Court of Appeal, questioning the propriety of the awards. The district court found that the issue of entitlement was no longer open to question because in the earlier appeal the district court had granted Palma's motion for attorney's fees and only left the amount of fees for the trial court's determination. *Palma,* 585 So.2d at 330. However, the district court noted that the issue of fees for services in this Court was not as clear cut because this Court's order remanded to determine both entitlement and amount. *Id.* at 331. Notwithstanding this observation, the district court affirmed the trial court's ruling as to the entitlement issue for services performed in both the district court and this Court. However, the court found that the trial court's use of the 2.6 multiplier was improper as it exceeded the range established by *Standard Guaranty Insurance Co. v. Quanstrom,* 555 So.2d 828 (Fla.1990), which had been decided eight months prior to the entry of the appealed final order. The district court reversed on that issue and remanded for a new determination of the amount of attorneys' fees to be awarded in light of *Quanstrom. Palma,* 585 So.2d at 333-34.

This Court granted State Farm's petition for review on the basis of conflict with *Moore.* In *Moore,* the Second District Court of Appeal held that time spent litigating the issue of attorney's fees is not compensable. 597 So.2d at 807. In the instant case, the district court held that the attorney's fees can be awarded for the time spent litigating the issue of fees. 585 So.2d at 333. Several other district courts have also permitted recovery of attorney's fees incurred in litigating the issue of fees. *See Ganson v. State, Dep't of Admin.,* 554 So.2d 522, 525 (Fla. 1st DCA 1989) ("[I]t also appears to be well settled that attorney fees may also be recoverable for the time spent litigating entitlement to attorney fees."), *quashed on other grounds,* 566 So.2d 791 (Fla.1990); *Tiedeman v. City of Miami,* 529 So.2d 1266, 1267 (Fla. 3d DCA 1988) ("[A]ttorney's fees were properly awardable under the ... statute for, among other things, litigating the amount of fee to be awarded[.]"); *Gibson v. Walker,* 380 So.2d 531 (Fla. 5th DCA 1980) (finding that even though claim was limited to the recovery of attorney's fees, it was still a claim under the policy and insured was entitled to recover attorney's fees through the final judgment). In contrast, the Second District Court of Appeal has held that such fees will not be allowed where "the prevailing party has no interest in the fee recovered." *U.S. Sec. Ins. Co. v. Cole,* 579 So.2d 153, 154 (Fla. 2d DCA 1991); *accord B & L Motors, Inc. v. Bignotti,* 427 So.2d 1070, 1073-74 (Fla. 2d DCA 1983), *disapproved on other grounds,* ***832** *Travieso v. Travieso,* 474 So.2d 1184 (Fla.1985).

[1] This Court has followed the "American Rule" that attorney's fees may be awarded by a court only when authorized by statute or by agreement of the parties. *See Florida Patient's Compensation Fund v. Rowe,* 472 So.2d 1145, 1148 (Fla.1985), *modified, Standard Guar. Ins. Co. v. Quanstrom,* 555 So.2d 828 (Fla.1990). The statute at issue in this case provides:

> Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which recovery is had.

Section 627.428(1), Fla.Stat. (1983).

The statute clearly provides that attorney's fees shall be decreed against the insurer when judgment is rendered in favor of an insured or when the insured prevails on appeal. As this Court stated in *Insurance Co. of North America v. Lexow,* 602 So.2d 528, 531 (Fla.1992), "[i]f the dispute is within the scope of section 627.428 and the insurer loses, the insurer is always obligated

for attorney's fees." Thus, the issue presented in this case is when does a dispute relating to attorney's fees fall within the scope of section 627.428.

While this Court has not addressed this particular issue under section 627.428, we have approved an award of fees for litigating entitlement to attorney's fees in a worker's compensation case. *See Crittenden Orange Blossom Fruit v. Stone,* 514 So.2d 351 (Fla.1987). In approving that award, the Court characterized the fees as "a substantial benefit to the claimant." *Id.* at 353. The Second District Court of Appeal has applied a similar rule in insurance cases by disallowing statutory attorney's fees for litigating the issue of attorney's fees "when ... the prevailing party has no interest in the fee recovered." *Cole,* 579 So.2d at 154; *accord Moore,* 597 So.2d at 807.

The Fourth District Court of Appeal approved statutory attorney's fees under section 627.428 in a case where the only issue was entitlement to fees. *Cincinnati Ins. Co. v. Palmer,* 297 So.2d 96 (Fla. 4th DCA 1974). In *Cincinnati,* the insurance company paid the proceeds of the policy only after the insured brought suit on the policy. This voluntary payment rendered moot all issues other than the question of attorney's fees, which the insurance company refused to pay. The trial court awarded attorney's fees and costs to the insured. On appeal, the insurance company argued that no "judgment" had been entered on the policy and thus section 627.428 was not applicable. Finding that the terms of the statute are a part of every insurance policy issued in Florida, the district court concluded that the relief sought was both the policy proceeds *and* the attorney's fees. Thus, as long as the insurance company refused to pay any part of the relief sought, the action constituted a claim under the policy. *Id.* at 99.

[2] Because the statute applies in virtually all suits [1] arising under insurance contracts, we agree with the *Cincinnati* court that the terms of section 627.428 are an implicit part of every insurance policy issued in Florida. When an insured is compelled to sue to enforce an insurance contract because the insurance company has contested a valid claim, the relief sought is both the policy proceeds *and* attorney's fees pursuant to section 627.428. The language of subsection (3), which provides that "compensation or fees of the attorney shall be included in the judgment or decree rendered in the case [,]" also supports this conclusion. Section 627.428(3), Fla.Stat. (1983).

[3] Thus, if an insurer loses such a suit but contests the insured's *entitlement* to attorney's ***833** fees, this is still a claim under the policy and within the scope of section 627.428. Because such services are rendered in procuring full payment of the judgment, the insured does have an interest in the fee recovered. Accordingly, we hold that attorney's fees may properly be awarded under section 627.428 for litigating the issue of entitlement to attorney's fees.

However, we do not agree with the district court below that attorney's fees may be awarded for litigating the *amount* of attorney's fees. The language of the statute does not support such a conclusion. Such work inures solely to the attorney's benefit and cannot be considered services rendered in procuring full payment of the judgment.

We recognize that federal courts that have addressed the issue have not distinguished between entitlement to attorney's fees and the amount of attorney's fees, but instead permit fees for the entire time spent on the issue. *See generally* Marguerite H. Davis & Judge James C. Hauser, *A Plea for Uniformity,* 64 Fla.B.J., Apr. 1990, at 33 (reviewing both federal and state case law relating to the issue of whether a prevailing party may recover attorney's fees for litigating the issue of attorney's fees). In awarding fees for litigating all issues relating to attorney's fees, the federal courts have noted that such awards comport with the purpose behind most statutory fee authorizations, namely to encourage attorneys to represent indigent clients. *See, e.g., Prandini v. National Tea Co.,* 585 F.2d 47, 53 (3d Cir.1978) (awarding fees in a Title VII class action).

Florida courts, including this Court, have consistently held that the purpose of section 627.428 is "to discourage the contesting of valid claims against insurance companies and to reimburse successful insureds for their attorney's fees when they are compelled to defend or sue to enforce their insurance contracts." *Lexow,* 602 So.2d at 531. Our conclusion that statutory fees may be awarded for litigating the issue of entitlement to attorney's fees but not the amount of attorney's fees comports with the purpose of section 627.428 and with the plain language of the statute. If the scope of section 627.428 is to be expanded to include fees for time spent litigating the amount of attorney's fees, then the Legislature, rather than this Court, is the proper party to do so.

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State Farm raises two issues relating to the use of a contingency risk multiplier in determining the amount of fees applicable. The final judgment of the trial court provided that "[b]ased upon the law of this case, the contingency risk multiplier of 2.6 is applicable." State Farm argues that it is unclear whether the trial court erroneously assumed that the application of a multiplier was mandatory and that the district court should have directed the trial judge to reconsider whether a multiplier was appropriate at all. The district court concluded that "just because the trial court found 2.6 to be the proper multiplier as determined by the law of the case does not unequivocally show that it considered use of the multiplier mandatory as established by the earlier appeal." *Palma,* 585 So.2d at 333. However, the district court did reverse the final judgment of the trial court with directions to apply the range of multipliers established in *Quanstrom* because the 2.6 multiplier exceeded that range.

[4] [5] We agree with the district court on both points. The application of a contingency fee multiplier is discretionary with the trial court. *Quanstrom,* 555 So.2d at 831. Although the trial court's order in this case provides that the multiplier *rate* was based on the law of the case, there is no indication that the trial court considered the *application* of a multiplier mandatory. Furthermore, we find that the trial court's application of a multiplier was proper because of the extraordinary circumstances present. However, we agree with the district court that the 2.6 multiplier was not proper. In *Quanstrom,* this Court modified the decision in *Rowe* to allow a multiplier from 1 to 2.5. This modification was applicable "to all cases in which the trial court has not set attorney's fees as of the date this opinion is released [January 11, 1990]." *Quanstrom,* 555 So.2d at 834. The trial court entered the final order at issue here on August 22, 1990, approximately eight months after the release of *Quanstrom.* Thus, we agree with the district court that *Quanstrom* is applicable, and the multiplier should not have exceeded 2.5.

***834** Accordingly, we quash the decision below to the extent that it authorizes attorney's fees under section 627.428 for litigating the amount of fees. We also disapprove *Moore* to the extent that it can be read as not permitting attorney's fees for litigating entitlement to fees. We remand the case with directions that the trial court redetermine the attorney's fees pursuant to the rationale of this opinion.

It is so ordered.

OVERTON, McDONALD and GRIMES, JJ., concur.

KOGAN, J., concurs in part and dissents in part with an opinion, in which BARKETT, C.J. and SHAW, J., concur.

KOGAN, Justice, concurring in part, dissenting in part.
I cannot agree that attorneys fees are unavailable for litigating the amount of those fees even though, as the majority concedes, fees may be awarded for litigating the entitlement to the fees. In actual practice, the two issues are inextricable, and I believe the majority is expecting the legislature to draft legislation with a distinction far more fine than we have required in other contexts. The purpose of the attorneys fees legislation is to make legal representation more widely available to those who need it. The federal courts have recognized this and have adopted a rule in harmony with what I am advocating here. I would adhere to the federal view as a matter of state law. There is no sound reason in policy or in statutory construction to depart from the view used by the largest court system in this nation. Otherwise, I concur with the majority.

BARKETT, C.J., and SHAW, J., concur.

Parallel Citations

19 Fla. L. Weekly S2

Footnotes

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1 No attorney's fees are allowed in suits based on claims arising under life insurance policies or annuity contracts "if such suit was commenced prior to expiration of 60 days after proof of the claim was duly filed with the insurer." Section 627.428(2), Fla.Stat. (1983).

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57.105 language says Palma applies

Original Image of 54 So.3d 1082 (PDF)

54 So.3d 1082
District Court of Appeal of Florida,
Fourth District.

Merle A. WOOD, III, Appellant,
v.
Meyel HAACK, Jr., Appellee.

No. 4D08–4548. | March 2, 2011.

Synopsis

Background: Business associate of corporation brought action against corporation, its president, and an employee of the corporation alleging, among other things, assault by president. After the assault claim was voluntarily dismissed, the Seventeenth Judicial Circuit Court, Broward County, Robert B. Carney, J., granted president's motion for an award of attorney fees pursuant to statute authorizing an award of such fees as a sanction for raising unsupported claims or defenses. President appealed, and business associate cross-appealed.

Holdings: The District Court of Appeal, Stevenson, J., held that:

[1] president was entitled to fees incurred from the time of filing of the original complaint, rather than only those fees incurred from the date of service of the third amended complaint, but

[2] president was not entitled to recover fees for the time spent litigating the amount of fees to be awarded.

Reversed and remanded.

Attorneys and Law Firms

***1083** Mike Pfundstein of Mike Pfundstein, P.A., Fort Lauderdale, for appellant.

Kelley B. Stewart and Walter G. Campbell, Jr., of Krupnick, Campbell, Malone, Buser, Slama, Hancock, Liberman & McKee, P.A., Fort Lauderdale, for appellee.

Opinion

STEVENSON, J.

Merle Wood, one of several defendants in a suit filed by Meyel Haack, Jr., challenges an order awarding him 57.105(1) attorney's fees, arguing that the trial court erred in limiting the fees to those incurred from the date of service of the third amended complaint, the pleading that was pending at the time the 57.105 motion for fees was served and filed. Haack has cross-appealed, arguing that the trial court erroneously included in the attorney's fee award time incurred in litigating the amount of fees to be awarded. We find that both parties' arguments have merit and reverse the order appealed.

In October of 2003, Haack filed suit against Merle Wood & Associates, Inc. (MWA), Merle Wood, and Clifford Allenby. The complaint contained a single count for assault and battery. It alleged that Wood was the president of MWA; that Wood became

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involved in a business dispute with Haack that "resulted in specific threats of physical violence being made by Defendant, Merle Wood, to Plaintiff"; that Wood instructed employees Brad Wood and Allenby to intentionally strike the plaintiff; and that, on February 25, 2002, Brad Wood and Allenby carried out those instructions, intentionally striking the plaintiff and causing serious bodily injury. By March of 2006, Haack had filed a third amended complaint. Count I asserted a claim for battery against Allenby. Count II asserted an assault claim against Merle Wood, alleging Wood "by his word, appearance and actions offered corporeal injury to Plaintiff," placing plaintiff in fear of immediate harm. Count III sought to hold MWA vicariously liable for Allenby's striking of Haack. Counts IV and V asserted negligent hiring and retention claims against MWA.

Wood filed a motion for summary judgment on the assault claim, asserting Haack's own deposition testimony established that Wood had not threatened or assaulted Haack. Then, on January 30, 2007, Wood served a motion for sanctions pursuant to section 57.105, Florida Statutes, asserting that, from the time of the filing of the original complaint, Haack knew he could not state a claim against Wood as evidenced by Haack's 2002 deposition, wherein Haack stated under oath that Wood had never put his hands on him, did not threaten him with physical harm, and did not yell at, or use abusive language with, Haack. More than a month later, Haack voluntarily dismissed the assault claim. The trial court ultimately awarded 57.105 fees to Wood, but limited the award to those fees incurred from the date of service of the third amended complaint, explaining that it was "of the view ... that since the first demand under 57.105(4) was directed to the third amended complaint then that is the trigger date ***1084** for fees." The trial court included in the award fees incurred litigating the amount of fees to be awarded, reasoning that the fees were awarded as a sanction.

[1] The trial court's limitation of the fee award to those incurred from the date of service of the third amended complaint was in error. The motion for 57.105 fees plainly asserted that the suit had been without merit since its inception. Further, section 57.105(1)(a) provides that fees are to be awarded "on any claim ... at any time ... in which the court finds that the losing party ... knew or should have known that a claim ... when initially presented to the court or at any time before trial ... [w]as not supported by the material facts necessary to establish the claim." Consistent with this language, in *Yakavonis v. Dolphin Petroleum, Inc.*, 934 So.2d 615 (Fla. 4th DCA 2006), this court held that it is not the bringing of the motion for 57.105 fees that starts the clock running for recoverable fees. Rather, once the twenty-one day safe harbor expires, "[t]he trial court is free to measure the attorney's fees from the time it was known or should have been known that the claim had no basis in fact or law." *Id.* at 620. Here, the record demonstrates that that time pre-dates the filing of the initial complaint.

[2] As for the cross-appeal, in *State Farm Fire & Casualty Co. v. Palma*, 629 So.2d 830, 833 (Fla.1993), our supreme court held that a section 627.428 fee award did not permit the award of those fees incurred for litigating the amount of fees to be awarded as "[s]uch work inures solely to the attorney's benefit and cannot be considered services rendered in procuring full payment of the judgment." Here, the fees were clearly awarded pursuant to section 57.105, and *Palma* and its rationale applies to 57.105 fee awards as well. *See Yakavonis*, 934 So.2d at 620; *Eisman v. Ross*, 664 So.2d 1128 (Fla. 3d DCA 1995).

Accordingly, the trial court's 57.105 attorney's fee award is reversed and the matter is remanded for further proceedings consistent with this opinion.

Reversed and Remanded.

WARNER and GERBER, JJ., concur.

Parallel Citations

36 Fla. L. Weekly D439

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Original Image of 880 So.2d 692 (PDF)

880 So.2d 692
District Court of Appeal of Florida,
Second District.

Paul Donald WIGHT, Appellant,
v.
Melissa Anne WIGHT, Appellee.

No. 2D02-4036. | April 28, 2004.

Synopsis

Background: In post-dissolution proceeding, former wife filed a motion for attorney fees for time spent litigating the enforcement of settlement agreement. The Circuit Court, Pinellas County, Ray E. Ulmer, Jr., J., awarded wife attorney fees. Husband appealed.

[Holding:] The District Court of Appeal, Covington, J., held that attorney fees awarded to wife should not have included fees incurred for the time spent litigating the amount of attorney fees.

Affirmed in part, reversed in part, and remanded.

Silberman, J., concurred specially and filed opinion.

Attorneys and Law Firms

*693 Dorothy C. Venable and Edward M. Brennan of Gallagher & Howard, P.A., Tampa, for Appellant.

Ingrid Anderson and Ann Loughridge Kerr, Clearwater, for Appellee.

Opinion

COVINGTON, Judge.

In this postjudgment dissolution proceeding, the husband appeals from an order awarding attorney's fees and costs to the wife. Because we agree that the trial court erred in establishing the amount of the attorney's fees, we reverse and remand for recalculation of the attorney's fees award.

After conducting discovery, the husband and wife entered into settlement negotiations hoping to resolve their disputes. Part of their agreement called for the husband to pay $3000 per month in child support and obtain, as security for this obligation, a $500,000 life insurance policy. Some time thereafter, since the husband did not obtain the life insurance policy, the wife filed several motions to enforce the agreement. In addition, the wife filed motions for contempt relying on the fact that the husband had not timely remitted the child support payments. Before the hearing on the contempt motions was held, the husband paid the arrearage and became current with respect to his obligations.

The wife's attorney then filed a motion for attorney's fees for the time spent litigating both the life insurance matter and the contempt issues. Pursuant to section 61.16(1), Florida Statutes (2000), the trial court awarded attorney's fees to the wife in the

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amount of $27,833.21. On appeal the husband raises several claims in support of his contention that the attorney's fees award should be set aside. While we affirm the award in all other respects, we do find merit to one of the husband's arguments.

A portion of the fee awarded to the wife included time billed for litigating the amount of attorney's fees. Relying on *State Farm Fire & Casualty Co. v. Palma,* 629 So.2d 830, 833 (Fla.1993), the husband submits that while it may be permissible to award attorney's fees for litigating entitlement to fees, such an award should not include the time spent litigating the amount of the fees. In denying fees for fees, the *Palma* court reasoned that work performed by an attorney concerning the amount of the fee "inures solely to the attorney's benefit and cannot be considered services rendered in procuring full payment of the judgment." *Id.* at 833.

We are cognizant that under certain limited circumstances, Florida courts have determined that they are not bound by *Palma* and have permitted the awarding of fees for litigating the amount of fees. *See, e.g., Condren v. Bell,* 853 So.2d 609 (Fla. 4th DCA 2003) (permitting fees for fees because the fee awarded was a sanction); *Citibank Fed. Sav. Bank v. Sandel,* 766 So.2d 302 (Fla. 4th DCA 2000) (permitting fees for fees because federal law controlled the award of fees); *Diaz v. SantaFe Healthcare, Inc.,* 642 So.2d 765 (Fla. 1st DCA 1994) (permitting fees for fees in claim for lost wages filed pursuant to § 448.08, Fla. Stat. (1995)).

***694** However, this court has declined to apply *Palma* only to contingency fee actions or to otherwise limit *Palma's* holding. We have denied fees for litigating the amount of fees in a number of different contexts. *See, e.g., Fleet Servs. Corp. v. Reise,* 857 So.2d 273 (Fla. 2d DCA 2003) (concerning fees sought pursuant to § 57.105, Fla. Stat. (1997), in a case involving the collection of a promissory note); *Barron Chase Sec., Inc. v. Moser,* 794 So.2d 649 (Fla. 2d DCA 2001) (involving arbitration award against securities dealer pursuant to § 517.211(6), Fla. Stat. (1997)); *Nat'l Portland Cement Co. v. Goudie,* 718 So.2d 274 (Fla. 2d DCA 1998) (denying fees for litigating amount of fees in wrongful termination action filed pursuant to § 448.08, Fla. Stat. (1995)); [1] and *Pelaez v. Persons,* 664 So.2d 1022 (Fla. 2d DCA 1995) (denying fees for litigating amount of fees sought pursuant to § 45.061, Fla. Stat. (1987), in an action involving breach of home repair contract).

This court is not alone in its interpretation of *Palma.* Generally speaking, courts throughout Florida have interpreted *Palma* to apply not only to contingency fee cases, but to other matters as well. *See, e.g., Mediplex Constr. of Fla., Inc. v. Schaub,* 856 So.2d 13, 14 (Fla. 4th DCA 2003) (barring fees for fees under § 57.105(7), Fla. Stat. (2003), in contract dispute); *Oruga Corp., Inc. v. AT & T Wireless of Fla., Inc.,* 712 So.2d 1141, 1145 (Fla. 3d DCA 1998) (barring fees for fees under offer of judgment statute § 768.79(6)(a), Fla. Stat. (1995)); *Dep't of Transp. v. Robbins & Robbins, Inc.,* 700 So.2d 782, 785 (Fla. 5th DCA 1997) (barring fees for fees under §§ 73.091 and 73.092, Fla. Stat. (1993), in eminent domain proceeding).

We recognize that *Palma* was a case against an insurance carrier involving a contingency fee, while the case at bar is a dissolution proceeding. However, the fact that this is an hourly fee case, as opposed to a contingency fee case, should not make a difference. *McMahan v. Toto,* 311 F.3d 1077, 1085 (11th Cir.2002) *cert. denied sub nom. Nemesis Veritas, L.P. v. Toto,* 539 U.S. 914, 123 S.Ct. 2273, 156 L.Ed.2d 129 (2003). In *McMahan,* the party who sought fees for litigating the amount of fees argued that because his was an hourly fee case and *Palma* was a contingency fee case, *Palma's* reasoning should not apply. *Id.* at 1086. The Eleventh Circuit, applying Florida law, was tasked with deciding whether *Palma* was distinguishable. *Id.* The court analyzed *Palma* and concluded that its holding applied to hourly fee cases as well as contingency fee cases. *Id.* The *McMahan* court stated, "[T]he Florida Supreme Court has explained that whether attorney's fees should be awarded for litigating the amount of fees due depends on the purpose of the statute under which the fees are sought; it does not depend on the method of calculating them. *Palma,* 629 So.2d at 833." *McMahan,* 311 F.3d at 1086.

[1] [2] "In awarding fees for litigating all issues relating to attorney's fees, the federal courts have noted that such awards comport with the purpose behind most statutory fee authorizations, namely to encourage attorneys to represent indigent clients." *Palma,* 629 So.2d at 833. Following the *Palma* court's analysis, if a statute's intent is to promote the representation of the poor, attorneys would be permitted to recoup fees for litigating the amount of fees. However, when the purpose of the statute is " 'to discourage the contesting of valid claims against insurance companies and to reimburse successful insureds for their attorney's fees,' " ***695** such fees are not recoverable. *Palma,* 629 So.2d at 833 (quoting *Ins. Co. of N. Am. v. Lexow,* 602 So.2d 528, 531 (Fla.1992)).

[3] In a dissolution proceeding, the determination of an appropriate attorney's fee is governed by section 61.16, Florida Statutes, which specifically provides that "the financial resources of both parties" are to be considered in awarding attorney's fees. Unlike the federal statutes referred to in *Palma,* there is no indication of legislative intent in this statute to encourage lawyers to represent indigent clients. Rather, "[t]he statute's purpose is to ensure that both parties possess a similar ability to retain competent legal counsel." *Lopez v. Lopez,* 780 So.2d 164, 166 (Fla. 2d DCA 2001).

[4] The rule limiting fees for fees has the advantage of encouraging parties to litigate fees in an efficient manner. If litigants are able to obtain fees for litigating the amount of fees, then the party who expects to win lacks an incentive not to excessively litigate the issue. The opposing party is left with little choice but to do the same. While there certainly are valid reasons why fees should be awarded for litigating the amount of fees, it is the role of the legislature, rather than the courts, to broaden the statute. *See Palma,* 629 So.2d at 833; *Mediplex,* 856 So.2d at 15.

Because we find that *Palma* controls, we reverse on this issue and remand for the trial court to recalculate the award, eliminating those fees incurred for time spent litigating the amount of attorney's fees. In all other respects the order of the trial court is affirmed.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

KELLY, J., concurs.

SILBERMAN, J., concurs specially.

SILBERMAN, Judge, Specially concurring.
Based on the precedent cited in the majority's opinion, I reluctantly concur in the conclusion that the former wife cannot recover attorney's fees to establish the amount of attorney's fees that the former husband must pay. However, I am concerned that in the context of dissolution of marriage proceedings, the "usual" considerations supporting the denial of such fees do not necessarily apply.

In dissolution proceedings, one party (the "monied party") may be required to pay the reasonable attorney's fees incurred by the other party (the "needy party") based on a consideration of the financial resources of both parties. *See* § 61.16, Fla. Stat. (2000). An existing limitation under the law is that if the parties litigate the amount to be paid by the monied party, the monied party is not liable for those fees incurred by the needy party to establish the amount.

When the amount of recoverable fees is in dispute, the issue may be vigorously litigated. Yet the needy party may have no ability or a limited ability to pay counsel to undertake such litigation. In contrast, the monied party has no similar limitation to being able to afford counsel to litigate the issue. This imbalance, which may hamper the needy party's ability to properly litigate the matter, does not comport with the requirements of section 61.16 concerning the determination of need and ability to pay in relation to an award of attorney's fees.

In *State Farm Fire & Casualty Co. v. Palma,* 629 So.2d 830 (Fla.1993), the court noted that the work performed by the plaintiff's attorney concerning the amount of fees was for the benefit of the attorney, rather than the client, because the insurer ***696** was responsible for the payment of fees. Other cases cited in the majority's opinion apply the *Palma* rationale in a variety of contexts. In a dissolution action, however, the client has an interest in and benefits from the recovery of fees because the client would otherwise be responsible for payment to his or her attorney.

The majority states that the limitation on the recovery of fees for litigating the amount of fees encourages parties to litigate fees in an efficient manner. Unfortunately, a monied party may engage in litigation as to the fee amount simply because he or she

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is financially able to do so and the other party does not have similar resources. If the monied party will not have to pay the fees incurred by the needy party to litigate the amount of fees, the monied party may have less of an incentive to litigate efficiently and more of an incentive to use litigation as leverage or as a means of vexation or vindictiveness.

The Florida Supreme Court has reiterated that dissolution proceedings are in equity and are governed by basic rules of fairness and that trial judges have wide leeway to work equity in dissolution cases. *See Rosen v. Rosen,* 696 So.2d 697, 700 (Fla.1997). Concerning attorney's fees, the court stated that "section 61.16 should be liberally-not restrictively-construed to allow consideration of any factor necessary to provide justice and ensure equity between the parties." *Id.* Moreover, a significant purpose of section 61.16 "is to assure that one party is not limited in the type of representation he or she would receive because that party's financial position is so inferior to that of the other party." *Id.* at 699 (quoting *Standard Guar. Ins. Co. v. Quanstrom,* 555 So.2d 828, 835 (Fla.1990)). In my view, that purpose may be undermined, at least in part, when a needy party is unable to recover the fees that are incurred to establish the amount that the monied party must pay. The needy party, who must pay his or her attorney to the extent that the monied party is not required to do so, may be forced into making litigation decisions based on the needy party's limited or non-existent financial resources. The monied party is able to make decisions knowing that he or she is able to afford to litigate and knowing that he or she has no exposure to pay the needy party's fees to litigate the amount of fees.

Although the cases cited by the parties and noted in the majority's opinion are not dissolution cases, this court has stated without reservation that fees cannot be awarded for the time spent litigating the amount of fees. *See Barron Chase Sec., Inc. v. Moser,* 794 So.2d 649, 650 (Fla. 2d DCA 2001). If I were writing on a clean slate, I would affirm the decision of the trial court; however, based on the existing case law, I reluctantly concur in the result reached by the majority.

Parallel Citations

29 Fla. L. Weekly D1046

Footnotes

1 In *Goudie,* this court certified conflict with *Diaz.*

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Original Image of 50 So.3d 1154 (PDF)

50 So.3d 1154
District Court of Appeal of Florida,
Fourth District.

Jacquelyn BENNETT and Bobbie Sue Miller, Appellants,
v.
Marie–Christine BERGES, Christian DeVocht, Jean–Luc DeVocht, Ludovic J. DeVocht, M.D., Ltd. Profit Sharing Plan, and John L. DeVocht, Trustee, Appellees.

No. 4D09–3129. | Dec. 8, 2010.

Synopsis

Background: After decedent's alleged mistress and another purported heir of decedent's estate sought to probate a will leaving a substantial portion of decedent's estate to them, decedent's children challenged the will and sought to probate an earlier will. The parties reached a settlement that was never approved, and then purportedly reached another settlement. The Seventeenth Judicial Circuit Court, Broward County, Mark A. Speiser, J., entered orders compelling reimbursement of estate assets and discharging the personal representative. Mistress and other purported heir appealed, and the District Court of Appeal, 32 So.3d 771, reversed and remanded for an evidentiary hearing on whether an enforceable settlement existed. On remand, the Circuit Court, Speiser, J., ordered mistress and other purported heir to pay a portion of children's attorney fees and costs after they were unable to prove allegations of misconduct by the children. Mistress and other purported heir appealed.

Holdings: The District Court of Appeal, Warner, J., held that:

[1] trial court's order could not be supported under statute allowing an attorney to be compensated for services rendered to the estate;

[2] trial court did not abuse its discretion by ordering payment of attorney fees and costs as a sanction for bad faith litigation conduct; but

[3] trial court's award of $12,500 in attorney fees was excessive.

Affirmed in part, reversed in part, and remanded.

Attorneys and Law Firms

***1156** Diane H. Tutt of Diane H. Tutt, P.A., Davie, for appellants.

Nancy W. Gregoire of Kirschbaum, Birnbaum, Lippman & Gregoire, PLLC and Jody Leslie of Leslie & McLaughlin, LLP, Fort Lauderdale, for appellees.

Opinion

WARNER, J.

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This appeal arises out of an attorney's fees award in an adversarial probate proceeding. The court awarded fees against appellants personally, and they appeal. We affirm the sanction but reverse the determination of the amount of the award, because not only did the trial court fail to determine the reasonable number of hours expended, it also awarded an excessive amount for the sanctionable conduct.

The decedent, Dr. Ludovic DeVocht, passed away in 2005, survived by his wife, who passed away fifteen days later, and his three children. The appellants, Bennett and Miller, sought to admit a will executed in 2005, which left a substantial portion of the estate to them. Bennett claimed to be the decedent's long-term mistress, while the relationship of Miller to DeVocht is not stated. DeVocht's children challenged the will and sought to admit a will executed in 2004. The parties settled the case at mediation, agreeing to admit the 2005 will to probate with substantial modifications. The court entered an order approving the settlement in 2006. However, Bennett refused to sign the releases contemplated under the settlement, and in September 2006, the children moved for sanctions and to enforce the settlement.

Bennett moved to vacate the settlement agreement because the settlement agreement approved by the court contained different terms than the one agreed to at mediation. The court vacated the order approving the settlement, although it found that the changes made to the agreement were a result of neglect and not bad faith. Despite the fact that the trial court vacated its approval of the 2006 settlement, the estate apparently continued to be probated pursuant to the terms of the 2006 settlement agreement.

In 2008 Bennett's attorney announced at a court hearing that the parties had agreed to another settlement. Subsequently, the attorney withdrew, and Bennett, acting pro se, filed a myriad of motions attacking the purported settlement agreement. The children filed a motion to enforce, claiming that the dispute had been resolved and that the parties had reached a formal settlement agreement. They alleged that before Bennett's counsel withdrew, he represented to the court that his clients would sign the formal settlement agreement and the releases, but the appellants still had not done so.

During a November 2008 hearing on the children's motion to enforce settlement, the children argued that appellants' counsel made numerous representations to the court at the prior hearing that appellants would sign the settlement agreement, but ***1157** nothing had been signed. Bennett, who was then representing herself, opposed the motion to enforce the settlement. Among other things, she claimed that she had not agreed to the settlement and that she hired an investigator who informed her that the children had improperly removed assets from the profit sharing plan which was part of the estate. She also claimed that she was misinformed concerning her entitlement to assets of the estate other than the profit sharing plan. The court asked her what evidence she had to support her allegations of misappropriation, or to give the court the name of her investigator, explaining that the motion to enforce was set and she had to support her objections to enforcement at the hearing. She could provide neither, maintaining that she did not know that she needed that information at the hearing. In an abundance of caution, the court decided to continue the hearing, admonishing Bennett that if she did not provide proof at the reset hearing, it would order her responsible for the children's attorney's fees "for today and any other time we come back." The court also indicated that if she did not come forward with proof of her allegations, it would enforce the 2008 settlement. The court scheduled a hearing for January 2009 for Bennett to present proof that assets were taken out of the profit sharing plan.

Before the January 2009 hearing, the trial court entered two orders compelling reimbursement of estate assets, as well as an order discharging the personal representative. In a related case (case no. 4D08–4986), appellants appealed those orders, arguing primarily that there was no enforceable settlement agreement. [1]

While the related appeal was pending, the trial court held the January 2009 hearing. Appellants, through new counsel, argued that there was no settlement agreement. As to appellants' allegations regarding a misappropriation of assets, Bennett admitted that she did not bring any evidence with her to show that any assets were improperly removed from the profit sharing plan. The court acknowledged that it could not force Bennett to sign the formal settlement agreement (i.e., the formal agreement her former counsel had prepared in 2008), but that it could find her responsible for attorney's fees if it determined that she engaged in vexatious litigation and unduly prolonged the litigation. In March 2009, the court entered an order refusing to enforce the 2008 settlement agreement but finding that appellants failed to produce any evidence to substantiate their claim that the children

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removed assets from the profit sharing plan. The court thus ordered them to pay the children's fees and costs for the preparation and attendance of the November and January hearings.

The court then held two hearings on the attorney's fees issue. The children's expert testified to a reasonable hourly rate of $325 per hour and a reasonable number of ***1158** hours, which included all of the time preparing for and attending the November hearing as well as the January hearing and all the subsequent hearings, including those on the determination of the amount of attorney's fees. The expert also stated that his rate was $350 an hour and his total fee was $1,225 for the work he had done. The children's attorney also testified, claiming that she was entitled to fees based upon section 733.106, Florida Statutes, in that her efforts benefited the estate by ending litigation and preserving assets. Counsel seemed to acknowledge that not all of the fees requested were directly related to the appellants' failure to come forward with proof that assets had been taken from the profit sharing plan, but nevertheless maintained that she presented the time incurred that she believed was reasonable pursuant to the court's orders and oral ruling at the November 19, 2008 hearing. Appellants' counsel further argued that the children were seeking a fee award which would punish the appellants for not signing the formal settlement agreement. The court, however, stated that the appellants "can't be punished for not entering into the Settlement Agreement."

At the conclusion of the hearing, the trial court found that the children's use of an expert witness was necessary given appellants' refusal to provide a written waiver. The court also found that "fees for fees" were awardable under the circumstances of this case, reasoning that children were paying their attorney, the fees were contested, and the award was being imposed as a sanction on the appellants pursuant to the court's inherent authority. The court cited *Moakley v. Smallwood,* 826 So.2d 221 (Fla.2002), in support of the award, though the court stated that it was not "sanctioning the attorney," but rather was "sanctioning the client" based upon her unsupported allegations, which caused a delay in the proceedings.

The court awarded $12,500 in fees out of the $15,990 requested, but the court did not make any findings regarding the fee or otherwise explain the basis for the reduction, nor did it make any findings specifying the amount of reasonable hours or the hourly rate of the children's counsel. The court awarded the full $2,558.30 of the requested costs. The entire amount was assessed against the appellants personally. This appeal follows.

Because the appellees argued entitlement pursuant to section 733.106, Florida Statutes, and the trial court did not explain in its written order whether it was awarding fees as a sanction or pursuant to statute, we first address the legal basis to support an award. Based upon the trial court's oral statements at several hearings, we conclude that the court awarded fees as a sanction and not pursuant to the statute. We agree with the appellants that an award pursuant to the statute would be improper.

[1] **[2]** Section 733.106(3), Florida Statutes, provides: "Any attorney who has rendered services to an estate may be awarded reasonable compensation from the estate." Section 733.106(3) does not provide a valid basis for *personal liability* for attorney's fees. *See Snyder v. Bell,* 746 So.2d 1100, 1104 (Fla. 2d DCA 1999); *Dayton v. Conger,* 448 So.2d 609, 612 (Fla. 3d DCA 1984). Although the fee order stated that the fees could come from the appellants' share of the estate if the appellants did not pay the fees by a date certain, the order imposed personal liability on the appellants. We thus reject appellees' contention that the award could be based upon the statute.

[3] Instead, as the trial court itself orally pronounced in at least two hearings ***1159** and one written order, the fees were awarded as a sanction. A trial judge's decision to impose sanctions for bad faith litigation conduct is reviewed under an abuse of discretion standard. *See Shniderman v. Fitness Innovations & Techs., Inc.,* 994 So.2d 508, 515 (Fla. 4th DCA 2008).

[4] **[5]** In *Moakley,* our supreme court held that a trial court possesses the inherent authority to impose attorney's fees against an attorney for bad faith conduct. 826 So.2d at 226. "Although *Moakley* involved the imposition of fees against an attorney, the procedures described in the case are equally applicable to the assessment of fees against a party." *T/F Sys., Inc. v. Malt,* 814 So.2d 511, 513 (Fla. 4th DCA 2002). The supreme court cautioned, however, that the "inherent authority of the trial court, like the power of contempt, carries with it the obligation of restrained use and due process." *Moakley,* 826 So.2d at 227. A trial court's exercise of the inherent authority to assess attorney's fees "must be based upon an express finding of bad faith

conduct and must be supported by detailed factual findings describing the specific acts of bad faith conduct that resulted in the unnecessary incurrence of attorneys' fees." *Id.* Further, "the amount of the award of attorneys' fees must be directly related to the attorneys' fees and costs that the opposing party has incurred as a result of the specific bad faith conduct of the attorney." *Id.*

[6] Based upon the appellants' position at the November and January hearings, we conclude that the court acted within its discretion in sanctioning appellants to some extent. At the November 2008 hearing, Bennett represented to the court that she would not execute the formal settlement agreement, in part because of the children's alleged theft from the profit sharing plan. She claimed to have evidence of improprieties of the children in handling the estate assets. The court deferred ruling on the motion to enforce and continued the case so that appellants would have the opportunity to bring proof of this allegation, cautioning her that if she failed to support those allegations with proof, that the court would award attorney's fees for the November hearing and any subsequent hearings. It is therefore clear that the continuance was attributable to appellants' allegations, which were never substantiated. Further, the court specifically found that appellants had engaged in vexatious litigation conduct by making the unsubstantiated claim that the children had improperly taken assets from the profit sharing plan. [2]

Nevertheless, at the January hearing, the court refused to enforce the settlement agreement because it found that the appellants could not be compelled to sign the settlement agreement and releases, even though it found that appellants should be sanctioned for failing to support their allegations of improprieties by the children.

Thus, the sanctionable conduct consisted only of the appellants' failure to support their allegations of misconduct by the children, not the appellants' other arguments as to why the case had not been settled. Here, it is clear that appellants caused some delay in the proceedings, and the court acted in its discretion in imposing a sanction for fees caused by the delay. This case is analogous to cases affirming fee awards as sanctions where a party moves for a continuance on the eve of trial, causing the other side to incur unnecessary ***1160** fees. *See Dep't of Children & Families v. M.G.*, 838 So.2d 703 (Fla. 5th DCA 2003) (holding that a trial court did not abuse its discretion in awarding fees incurred because the Department moved for a continuance on the eve of trial).

[7] The amount of fees awarded, however, is excessive based upon the extent of the sanctionable conduct. As stated by the Fifth District, an award of fees under the inequitable conduct doctrine requires "an express finding of bad faith conduct and must be supported by detailed factual findings describing the specific acts of bad faith conduct that resulted in the unnecessary incurrence of attorneys' fees." *Allegheny Cas. Co. v. Roche Sur., Inc.*, 885 So.2d 1016, 1020 (Fla. 5th DCA 2004). Likewise, *Moakley* makes clear that an award of fees as a sanction must be *directly related* to the attorney's fees and costs that the opposing party has incurred as a result of the specific bad faith conduct.

It is apparent that the trial court awarded fees that were not directly related to the specific bad faith conduct of appellants. The fee award should have been limited to the narrow circumstance of the appellants' failure to come forward with proof of their allegation of theft at the January 2009 hearing. The November hearing was scheduled by the children on their motion to enforce the settlement agreement. Bennett's conduct compelled the trial court to continue the hearing until January 2009. Thus, the only delay or "vexatious litigation" involved the January hearing, and at most fees should have been limited to those incurred in preparing for and attending that hearing. Moreover, since the presentation at that hearing convinced the court that it could not enforce the alleged 2008 settlement agreement, we are hard-pressed to conclude that the entire hearing was "vexatious." Bennett obtained the relief she sought. Nevertheless, the court could have assessed some portion of appellees' fees against Bennett as a sanction.

[8] Not only did the court award fees in excess of those directly related to the sanctionable conduct, it failed to determine the reasonable number of hours and hourly rate. When someone other than the client is required to pay the other party's attorney's fees, the trial court must award only a reasonable fee, determined from testimony by expert witness lawyers as to the prevailing rates for attorneys in comparable circumstances and as to the amount of time reasonably expended by the attorney for the party seeking payment. *Franklin & Marbin, P.A. v. Mascola*, 711 So.2d 46, 48–49 (Fla. 4th DCA 1998); *Fla. Patient's Comp. Fund*

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v. Rowe, 472 So.2d 1145 (Fla.1985). This requires the trial court to make findings of fact in the judgment as to the number of hours spent and a reasonable hourly rate. *Simpson v. Simpson,* 780 So.2d 985, 988 (Fla. 5th DCA 2001).

In this case the trial court simply awarded a lump sum of $12,500 in fees. The court made no findings as to the reasonable hourly rate and the reasonable number of hours. Although the children suggest in their brief that the court awarded 38.46 hours, the court never actually made this finding. Rather, it is apparent that the children have simply arrived at that figure by dividing the court's lump-sum fee award by the hourly rate claimed at the fee hearing ($325). The court's order was insufficient, because it is improper to "reverse engineer" the required findings based upon a lump sum award of fees. *Id.* at 988.

[9] The court also assessed "fees on fees" for all of the time spent by appellees in the two hearings to secure an award. Appellants contend that it was improper to assess those fees. In *State Farm Fire & ***1161** Casualty Co. v. Palma,* 629 So.2d 830, 833 (Fla.1993), the supreme court held that in cases involving disputed insurance claims, statutory fees may be awarded pursuant to section 627.428(1) "for litigating the issue of entitlement to attorney's fees but not the amount of attorney's fees." However, this court has affirmed an award of attorney's fees, including fees incurred in determining the amount of fees to be awarded, where the award of attorney's fees was a sanction. *See Condren v. Bell,* 853 So.2d 609, 610 (Fla. 4th DCA 2003) (holding that "because the fees awarded for litigating the issue of fees was a sanction and supported by substantial competent evidence, the award does not run afoul of [*Palma*]"); *accord Bates v. Islamorada,* 939 So.2d 171, 172 (Fla. 3d DCA 2006) ("The fees awarded in the instant case differ in that they were not statutorily based, and were instead, awarded as **sanctions** levied against the appellants for failing to comply with the trial court's orders.") (emphasis in original). Because the trial court awarded fees as a sanction against Bennett, it was within its discretion to include "fees on fees" for the time spent in litigating the amount of fees.

Finally, as to the issue of awarding the expert's fees, this too was within the trial court's discretion. *See Condren,* 853 So.2d at 610 (affirming award of sanctions which included fees for the expert witness). Absent a stipulation, case law required the children to have an expert witness as to the reasonableness of fees. *See Franklin,* 711 So.2d at 48–49. However, in this case the expert's testimony regarding the fees did not comport with the law. The expert opined on the entire amount of time expended by appellees' attorneys, rather than the time incurred connected with the narrow range of sanctionable conduct. The court should take this into consideration on remand in determining the appropriate costs to be awarded to the appellees.

In sum, while the court was within its discretion in sanctioning the appellants for Bennett's "vexatious litigation" in making unfounded claims of misappropriation against the children, it awarded fees in excess of those *directly related* to the sanctionable conduct. We reverse for a redetermination of those fees and leave it to the trial court's discretion whether to award "fees on fees" as well as expert costs, in an amount commensurate to what would be necessary to establish fees permitted by *Moakley.*

Affirmed in part, reversed in part and remanded for proceedings consistent with this opinion.

POLEN and FARMER, JJ., concur.

Parallel Citations

35 Fla. L. Weekly D2689

Footnotes

1 On appeal, this court reversed for an evidentiary hearing on the issue of whether an enforceable settlement agreement exists:

> Appellants assert that there is no enforceable settlement agreement because the court vacated the order approving the settlement. Appellees argue the court vacated only the order approving the incorrect version of the settlement and that the correct version of the settlement upon which the parties agreed in mediation is valid and enforceable. From the record, it is unclear whether an enforceable settlement agreement exists. Because a factual determination needs to be made, we reverse and remand for an

evidentiary hearing on whether the settlement agreement is enforceable and should be accepted; if not enforceable, then the case should proceed to a trial on the merits.

Bennett v. Berges, 32 So.3d 771, 771–72 (Fla. 4th DCA 2010).

2 Although Bennett appears to have been the driving force behind the allegation that the children misappropriated assets, Miller has not individually raised any argument on appeal that the trial court should have sanctioned only Bennett.

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47 So.3d 320
District Court of Appeal of Florida,
Second District.

Sandra A. KOCH, Appellant,
v.
Wesley E. KOCH, Appellee.

No. 2D09-1514. | Sept. 22, 2010. | Rehearing Denied Nov. 18, 2010.

Synopsis

Background: Ex-wife appealed from decision of the Circuit Court, Hillsborough County, Emily A. Peacock, J., ordering her to personally pay her ex-husband his attorney fees as a sanction for legal work done by ex-husband's attorney in response to ex-wife's motion to set aside the parties' marital settlement agreement (MSA).

[Holding:] The District Court of Appeal, Villanti, J., held that substantial, competent evidence supported trial court's decision to award ex-husband his attorney fees.

Affirmed.

Wallace, J., filed dissenting opinion.

Attorneys and Law Firms

***321** Andra T. Dreyfus and Morten B. Christoffersen of Andra Todd Dreyfus, P.A., Clearwater, for Appellant.

William A. Borja, Clearwater; and Simone Lennon, Clearwater, for Appellee.

Opinion

VILLANTI, Judge.

Sandra Koch, the former wife, appeals a final judgment that ordered her to personally pay Wesley Koch, the former husband, his attorney's fees as a sanction under section 57.105(1), Florida Statutes (2008), for legal work done by Mr. Koch's attorney in response to Mrs. Koch's motion to set aside the parties' marital settlement agreement (MSA). Because the trial court did not abuse its discretion in entering the fee award as a sanction, we affirm.

The facts underlying this appeal paint a picture of a simple dissolution of marriage that one would typically expect to proceed uncontested. The parties generated few assets and liabilities during their short-term marriage, were on relatively equal financial and employment footing, raised no alimony or special equity issues, and had no children together. What few assets the parties had were equitably divided by them in the MSA.

In February 2007, Mr. Koch informed Mrs. Koch that he wanted a divorce. Thereafter, by her own choice, Mrs. Koch engaged in settlement negotiations with Mr. Koch without the benefit of counsel. Based upon her prior divorce experience and her desire to save attorney's fees, Mrs. Koch knowingly elected to represent herself. After negotiations with Mr. Koch that lasted a little

over a month, Mrs. Koch signed the MSA prepared by Mr. Koch's attorney, which divided the couple's modest assets, personal belongings, and liabilities. Thereafter, relying on the parties' MSA, Mr. Koch filed a petition for an uncontested dissolution of marriage and scheduled a final hearing.

However, before the final hearing took place, Mrs. Koch retained counsel. Thereafter, Mrs. Koch's counsel moved to set aside the MSA, alleging (1) that she had signed it because of harassment, coercion, duress, and overreaching by Mr. Koch; (2) that because there had been a lack of financial disclosure by Mr. Koch, she did not have an accurate picture of Mr. Koch's finances before she signed the MSA; and (3) that she had discovered that Mr. Koch had a credit card that was previously unknown to her and that he had a separate savings and checking account. We hasten to point out that there is no contention that Mrs. Koch's pleading was filed as a result of any obstreperous conduct of her counsel.

Mr. Koch did not file a response to Mrs. Koch's motion to set aside the MSA, but in response to her requests for financial information he filed two motions for protective orders. Those motions requested attorney's fees, stating: "[Mr. Koch] has incurred reasonable attorney fees and *322 costs in bringing this motion for protective Order and [Mrs. Koch] is well able to afford and pay for the attorney fees and costs." One of the two motions also stated that Mrs. Koch's claim that Mr. Koch had not disclosed certain bank account and credit card information to her before signing the MSA was false. However, Mr. Koch did not prevail on those motions and accordingly was not awarded fees at that time. Mr. Koch made no other request for attorney's fees until after the trial court ruled on the merits of Mrs. Koch's motion to set aside the MSA.

At the evidentiary hearing on Mrs. Koch's motion to set aside the MSA, the trial court received evidence establishing that the information Mrs. Koch allegedly had not received prior to signing the MSA had, in fact, been at her disposal beforehand. Predicated on the evidence, the trial court found that Mrs. Koch had no factual or legal basis to set aside the MSA because there had been no concealment of financial information. The court further found that Mr. and Mrs. Koch had negotiated the MSA at arms' length for a month and that Mrs. Koch had been an active participant in the negotiations. Thus, the court denied Mrs. Koch's motion to set aside the MSA. Despite there being no pending motion for fees filed by Mr. Koch, at the end of the hearing the trial court stated without any objection: "I'm not going to grant fees to either one of you, because we haven't had a fee hearing." The court subsequently entered a written order finding that Mrs. Koch had failed to demonstrate that Mr. Koch committed fraud, duress, coercion, overreaching, or misrepresentation during the MSA negotiations, and it denied Mrs. Koch's motion to set aside the MSA. Importantly, the trial court specifically reserved jurisdiction, of its own volition, to consider an award of attorney's fees.

Thereafter, Mr. Koch filed a motion to tax fees and costs, alleging that Mrs. Koch had filed the motion to set aside the MSA without legal basis and to harass him. This motion did not state the specific legal authority under which Mr. Koch sought fees. At the hearing on Mr. Koch's fee motion the court stated:

> I am inclined to award fees to them [Mr. Koch and his attorney], because I do recall the course of the litigation. However, I want you to write something to me, about two pages each, about my ability to do that, without having been pled to, and if they've been pled for and requested several times.
>
> ....
>
> I do recall a lot of the difficulty between the two of you, which is apparent still today. I don't understand why, or whether it's just this case or whether it's every case. But, you know, I would be inclined to order some fees, if I can....
>
> So, I will look at that, if I'm entitled to. So I'll give you both about five days to write something for me, and get it back over here, regarding my ability to award fees.

In response, Mrs. Koch filed a memorandum in opposition to Mr. Koch's motion to tax fees and costs in which she argued that Mr. Koch was not entitled to an award of fees because he had not sufficiently pleaded a request for fees prior to the court's ruling on the motion to set aside the MSA and because he had not given notice of his intent to seek fees if she proceeded with litigation.

Six weeks later, the trial court issued an order awarding fees to Mr. Koch. The court found that Mrs. Koch's motion to set aside the MSA had been "unnecessary" and had "needlessly extended the litigation." The court noted that "none of the discovery that the Wife requested yielded any 'new' evidence other than that which ***323** was available prior to her having signed the MSA." Mrs. Koch knew or should have known that the parties never had substantial assets between them, and her contention that assets were being "hidden" from her prior to entering the MSA was "facetious" because all the items "discovered" by her motion turned out to be the same "exact items she had accessible to her all along." The court found that Mrs. Koch was a "competent, rational, and intelligent person, [who] knew or should have known that the MSA she had made was based upon data available to both parties prior to signing of the contract and that she was propelling forward litigation that she had no reason to believe to be successful." Based on these findings and relying exclusively on the discretion conferred upon it by section 57.105(1), the court ordered Mrs. Koch to pay Mr. Koch $18,650 in attorney's fees.[1] This appeal followed.

On appeal, Mrs. Koch does not contest the amount of the fee award, but she argues that the trial court could not award any fees as a sanction under section 57.105(1) because its order was not truly initiated by the court and simply adopted Mr. Koch's fee motion. In support of her argument, she relies on *Davidson v. Ramirez,* 970 So.2d 855 (Fla. 3d DCA 2007). In *Davidson,* the defendant filed a motion for attorney's fees under section 57.105(5) after the court dismissed the amended complaint. *Id.* at 856. The motion was invalid because the defendant had not complied with section 57.105(4), which requires that a *party* give twenty-one days' notice to the opposing party before filing a motion for sanctions to allow the opposing party an opportunity to withdraw or correct the challenged paper, claim, contention, or allegation. Nevertheless, the trial court in *Davidson* awarded the defendant fees pursuant to subsection 57.105(1), which allows the trial court to impose sanctions on the court's own initiative without twenty-one days' notice. *Id.* The Third District reversed the trial court's sanctions, concluding that the court had effectively adopted the defendant's motion as the court's own motion, thereby allowing the defendant to circumvent the twenty-one-day notice requirement imposed on parties by section 57.105(4). *Id. Davidson,* however, is not applicable to the facts of this case.

[1] **[2]** As a general proposition, a trial judge has the inherent power to award attorney's fees for bad faith conduct as a sanction against an offending party, even in the absence of statutory authority. *Bitterman v. Bitterman,* 714 So.2d 356, 365 (Fla.1998); *see also Robert J. Moraitis, P.A. v. Vitakis-Vachine,* 988 So.2d 682, 682 (Fla. 4th DCA 2008) (noting that court can award fees as sanction under section 57.105 or based on the inherent authority of the court). However, "if a specific statute or rule applies, the trial court should rely on the applicable rule or statute rather than on inherent authority." *Moakley v. Smallwood,* 826 So.2d 221, 227 (Fla.2002). Here, the trial court's order awarding fees rightfully relied on section 57.105(1). Therefore, the issue before us is whether the trial court erred in applying section 57.105(1) in this case.

[3] District courts review an award of section 57.105 fees for an abuse of discretion. *Salazar v. Helicopter Structural & Maint., Inc.,* 986 So.2d 620, 623 (Fla. 2d DCA 2007). " 'If reasonable men could differ as to the propriety of the action ***324** taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion.' " *Morgan v. Campbell,* 816 So.2d 251, 253 (Fla. 2d DCA 2002) (quoting *Mercer v. Raine,* 443 So.2d 944, 946 (Fla.1983)).

Section 57.105(1) clearly and explicitly confers upon the trial court the authority to award attorney's fees to the prevailing party upon the court's initiative, if "the court finds that the losing party ... knew or should have known that a claim or defense when initially presented to the court or at any time before trial ... [w]as not supported by the material facts necessary to establish the claim or defense." In this case, the trial court made the findings necessary to award fees as a sanction under the statute.

We decline to follow *Davidson* here for several reasons. First, Mrs. Koch's contention that the trial court did not award sanctions on its own initiative is contradicted by the record. The trial court first raised the issue of fees at the conclusion of the hearing on Mrs. Koch's motion to set aside the MSA. At that time, the court stated that it was not going to grant fees to either party because "we haven't had a fee hearing" but that it was going to reserve ruling on the issue of fees. Thereafter, at the conclusion of the subsequent fee hearing, the court specifically stated twice: "I am inclined to award fees to them, because I do recall the course of the litigation" and "I would be inclined to order some fees, if I can." The court's only concern was whether it had the legal authority to award fees if Mr. Koch had not properly pleaded a request for fees. At the end of the hearing, the court indicated

that it would look into whether it was nevertheless legally entitled to award fees. Based on the foregoing, the record does not support a conclusion that the trial court was simply "adopting" Mr. Koch's motion for fees.

Furthermore, Mr. Koch's motion to tax fees and costs did not cite to section 57.105 as authority for his fee request. At the fee hearing subsequently held, Mr. Koch argued for an award of fees based on *Rosen v. Rosen,* 696 So.2d 697 (Fla.1997). At the conclusion of that hearing, the court had already indicated that it wished to award fees, if it had the authority to do so. Mr. Koch first mentioned section 57.105(1) as a basis for fees in a letter to the court on February 3, 2008, in response to the court's request for input following the fee hearing, almost as an afterthought to his *Rosen* contention. Based on these facts, even though Mr. Koch's fee motion used some language that seemed to fit section 57.105's import without citing to the statute itself, it defies logic to assert that the trial court was "adopting" a party's argument before the party actually made that specific argument.

[4] Even if the above-discussed differences did not exist, applying *Davidson* to the facts of this case would be troubling to us because its holding imposes preconditions on the trial court's ability to apply sanctions when no such preconditions exist in the statute's plain language. Nothing in section 57.105(1) states that a court cannot impose sanctions for the same reasons set forth in a party's failed motion for sanctions. *See generally Unifirst Corp. v. City of Jacksonville,* 42 So.3d 247 (Fla. 1st DCA 2009) (awarding section 57.105(1) fees on the court's own initiative when appellee's motion failed to comply with the notice provision of section 57.105(4)). Accepting *Davidson's* reasoning at face value would mean that the trial court loses the ability to impose sanctions even when clearly warranted if a party files a section 57.105 motion for sanctions that fails to comply with the twenty-one-day notice requirement imposed on *parties.* Under such a scenario, which this case demonstrates is ***325** not unheard of, any court order imposing sanctions could be interpreted as merely "adopting" the opposing party's deficient fee motion. In our view, such an approach would unreasonably restrict a court's discretion and would not advance the clear purpose of section 57.105 to reduce frivolous litigation.

[5] Mrs. Koch also argues that a fee award was improper because she did not have notice that fees would be an issue until after Mr. Koch filed the motion to tax costs and fees, which was after the trial court had denied her motion to set aside the MSA. Such contention might have been true if the court had construed Mr. Koch's belated motion as having cured a pleading defect seeking fees under *Rosen*[2] or chapter 61, Florida Statutes. However, this argument cannot defeat a court-imposed fee sanction under section 57.105(1) because the twenty-one-day notice provision simply does not apply to a court-imposed fee sanction. Moreover, a court is typically faced with the decision to impose sanctions for frivolous litigation only *after* the parties' respective positions have been presented to the court at a substantive hearing. Thus, the twenty-one-day notice requirement of section 57.105(4) cannot, as a practical matter, apply to the court because the plain language of the statute does not require the trial court to give twenty-one days' notice and because due process does not require a court to provide the same degree of notice as a party before imposing sanctions. Reasonable notice is enough. And Mrs. Koch was provided with such reasonable notice when she was given time to file a memorandum setting forth her position on whether the court could impose sanctions on its own initiative.

In conclusion, we recognize the trial courts' superior vantage point when determining whether to impose sanctions. *See generally Canakaris v. Canakaris,* 382 So.2d 1197, 1203 (Fla.1980). On the record before us, we cannot disagree with the trial court's discretionary ruling. Because the trial court's award of fees as a sanction was based upon substantial, competent evidence, we must affirm.

Affirmed.

WHATLEY, J., Concurs.

WALLACE, J., Dissents with opinion.

WALLACE, Judge, Dissenting.

I respectfully dissent. The first sentence of the final judgment under review states: "THIS CAUSE came to be heard on January 26, 2009[1] on the Husband's 'Motion to Tax Attorneys' Fees and Costs.' " Undeniably, the subject of the hearing which resulted in the award of attorney's fees in favor of Mr. Koch and against Mrs. Koch was Mr. Koch's motion, not a court-initiated proceeding for the imposition of fees. Here, as in *Davidson v. Ramirez,* 970 So.2d 855 (Fla. 3d DCA 2007), the trial court adopted Mr. Koch's motion as its own in order to make the award of attorney's fees against Mrs. Koch. The result is to frustrate "[t]he legislative intent ... to require the twenty-one-day notice whenever a subsection 57.105(5) motion is filed by a party."[3] *Id.* at 856. Because the motion that was the basis for the fee award was a party-filed motion, the requirements of subsection 57.105(4) had to be observed. *Id.*

***326** Mr. Koch did not file his motion to tax attorney's fees and costs until after the trial court had ruled on the motion to set aside the MSA, when the litigation was substantially at an end. It is undisputed that Mr. Koch's motion did not comply with the procedural requirements of subsection 57.105(4). Thus Mrs. Koch was deprived of the benefit of the safe-harbor provision of the statute in deciding whether or not to continue her effort to set aside the MSA. Because Mr. Koch failed to comply with the requirements of subsection 57.105(4) to the detriment of Mrs. Koch, I would reverse the final judgment for attorney's fees on the authority of *Davidson.*

The majority attempts to distinguish the facts of this case from *Davidson.* However, I believe that the minor factual differences between *Davidson* and this case are not significant. In addition, the majority's discussion of *Davidson* suggests that it fundamentally disagrees with the Third District's reasoning in that case. If so, it would be appropriate to certify direct conflict with *Davidson* so that Mrs. Koch can seek further review if she is so inclined.

Parallel Citations

35 Fla. L. Weekly D2091

Footnotes

1 As correctly pointed out by the dissent, the trial court's order accurately referenced that the fee *hearing* was held pursuant to the husband's motion to tax fees. However, the substance of the court's order makes it clear that the court's fee *award* was made pursuant to its own initiative and authority under section 57.105(1).

2 While *Rosen* factors can overlap with section 57.105 grounds, a party seeking fees under *Rosen* is not excused from timely and properly pleading entitlement to attorney's fees. *See Mook v. Mook,* 873 So.2d 363, 365-66 (Fla. 2d DCA 2004), *receded from on other grounds, First Protective Ins. Co. v. Featherston,* 978 So.2d 881 (Fla. 2d DCA 2008) (dealing with pleading entitlement to costs).

3 Although Mr. Koch did not specifically reference section 57.105 in his motion, he supplemented the motion with a letter to the trial court asserting that it had the ability to award fees in accordance with subsection 57.105(1).

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Original Image of 666 So.2d 1045 (PDF)

666 So.2d 1045
District Court of Appeal of Florida,
Fourth District.

Jonathan D. PATSY, Appellant,
v.
Rosanne M. PATSY, Appellee.

No. 94-3112. | Jan. 31, 1996.

Based upon finding that motion filed by former husband's attorney had no factual basis, was filed solely to delay proceedings, and was a sham, the Circuit Court, Palm Beach County, Edward A. Garrison and Lucy Brown, JJ., assessed attorney fees and costs against attorney, and he appealed. The District Court of Appeal, Klein, J., held that: (1) trial court had inherent power to assess attorney fees against attorney individually for litigating in bad faith, but (2) attorney's professional association could not be held liable without finding of bad faith with regard to association.

Affirmed.

Attorneys and Law Firms

***1046** William C. Porter of William C. Porter, P.A., Coral Springs, for Michael C. Meisler.

Michael C. Meisler, for appellant.

Gregg H. Glickstein of Schwartz, Gold, Cohen, Zakarin & Kotler, P.A., Boca Raton, for appellee.

Opinion

KLEIN, Judge.

Michael C. Meisler appeals an order awarding attorney's fees and costs against him, as counsel, as a sanction for filing a motion in bad faith. He argues that because there is no specific rule or statute authorizing an award of attorney's fees for filing such a motion, we must reverse. We conclude that the trial court had the inherent power to do so.

In a modification proceeding in which he represented the former husband, Meisler filed a motion to disqualify opposing counsel on the ground that he had perpetrated a fraud on the court on two prior occasions. At Meisler's request, based on the motion, the court stayed further proceedings until after it conducted an evidentiary hearing on the motion to disqualify. After hearing the evidence the trial court found that the motion had no factual basis, was filed solely to delay the proceedings, and was a sham. The court assessed attorney's fees of $1,870 and costs.

Meisler appears to be correct in his arguments that there is no specific statute or rule of civil procedure which authorizes attorney's fees to be assessed against him as a sanction for filing this motion.

[1] Section 57.105, Florida Statutes (1993) authorizes the award of attorney's fees where there is "a complete absence of a justiciable issue of either law or fact raised by the complaint or defense of the losing party," but does not authorize attorney's fees for filing a frivolous motion where the underlying action or defense is not frivolous. *Muckenfuss v. Deltona Corp.*, 508 So.2d 340 (Fla.1987).

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[2] Nor does Florida Rule of Civil Procedure 1.150, which provides for the striking of sham pleadings, contain any language authorizing the award of attorney's fees. *See Kirby v. Adkins,* 582 So.2d 1209 (Fla. 5th DCA 1991); *Muckenfuss.* There is also authority that a motion is not a pleading within the meaning of rule 1.150. *Motzer v. Tanner,* 561 So.2d 1336 (Fla. 5th DCA 1990). Florida Rule of Civil Procedure 1.380(a)(4), which does authorize the sanction of attorney's fees and costs, is limited to discovery abuse and is thus inapplicable.

Florida Rule of Judicial Administration 2.060 provides that a signature of an attorney ***1047** constitutes a certificate that there is "good ground to support" a pleading or other paper; however, the only remedy provided in that rule is striking the pleading or paper. [1]

The fact that no statute or rule authorizes the imposition of attorney's fees against counsel for litigating in bad faith, however, does not preclude courts from doing so under the "inherent power possessed by the courts." *Sanchez v. Sanchez,* 435 So.2d 347, 350 (Fla. 3d DCA 1983). *See also Emerson Realty Group, Inc. v. Schanze,* 572 So.2d 942 (Fla. 5th DCA 1990). Other jurisdictions in which the courts have concluded that they have the inherent power to assess attorney's fees for litigating in bad faith are collected in *Attorney's Liability Under State Law for Opposing Party's Counsel Fees,* 56 A.L.R.4th 486 (1987).

On the other hand, in *Israel v. Lee,* 470 So.2d 861 (Fla. 2d DCA 1985), the trial court assessed attorney's fees against counsel for refusing to comply with court orders and a subpoena, and the second district reversed, holding that in the absence of a contractual provision or a statute there was no authority to assess attorney's fees against counsel. The court did not discuss the issue of whether counsel was acting in bad faith or if the court had the inherent power to assess fees.

Although Federal Rule of Civil Procedure 11 gives broader power to the federal courts to assess attorney's fees as a sanction against counsel than is provided in the Florida Rules of Civil Procedure, the Supreme Court has held that federal courts also have the inherent power, apart from the authority contained in rules or statutes, to assess attorney's fees against counsel who litigate in bad faith. *Roadway Exp., Inc. v. Piper,* 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980). *Roadway* was followed by *Chambers v. NASCO, Inc.,* 501 U.S. 32, 50, 111 S.Ct. 2123, 2136, 115 L.Ed.2d 27 (1991), in which the court explained:

> A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees ... Furthermore, when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power. But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power. (Citations omitted).

Chambers extended *Roadway,* which involved sanctioning counsel, to sanctioning litigants who are in bad faith, an issue which was not involved, but was the subject of dicta in *Roadway. Id.* at 765-67, 100 S.Ct. at 2464. This court declined to adopt the *Roadway* dicta in regard to a litigant in *Department of Revenue of State v. Arga,* 420 So.2d 323 (Fla. 4th DCA 1982). In *Arga* the trial court had assessed attorney's fees against the Florida Department of Revenue for litigating in bad faith on the authority of *Roadway.* We noted in our reversal that the prevailing party was not asserting that it was entitled to fees under section 57.105, Florida Statutes, and that there was a difference between bad faith and the 57.105 standard.

Whether attorney's fees can be assessed against a litigant is not in issue in the present case, and accordingly our reliance on *Roadway* and the quotation in *Chambers* is solely as authority for sanctioning counsel. *Chambers* has been cited by the third district as authority for assessing fees against a litigant, in *Sheldon Greene and Associates, Inc. v. Williams Island Associates, Ltd.,* 592 So.2d 307 (Fla. 3d DCA 1991).

[3] [4] We agree with *Sanchez, Emerson,* and *Roadway* that courts have the inherent power to assess attorney's fees against counsel for litigating in bad faith. We therefore affirm the order awarding attorney's fees and costs against Meisler. We reverse that portion of the order which makes Meisler's professional association also liable, because the court made no finding of

bad faith in regard to the professional association. *Cf.* ***1048** *Brignoli v. Balch Hardy & Scheinman, Inc.*, 735 F.Supp. 100 (S.D.N.Y.1990).

POLEN and PARIENTE, JJ., concur.

Parallel Citations

21 Fla. L. Weekly D302

Footnotes

1 Appellate courts, by virtue of Florida Rule of Appellate Procedure 9.410, do have rule authority to impose sanctions against counsel, which include attorney's fees, for "the filing of any proceeding, motion, brief, or other paper that is frivolous or in bad faith."

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Original Image of 826 So.2d 221 (PDF)

826 So.2d 221
Supreme Court of Florida.

Barbara MOAKLEY, Petitioner,
v.
Sheri SMALLWOOD, Respondent.

No. SC95471. | Feb. 28, 2002. | Rehearing Denied April 18, 2002.

Former wife subpoenaed former husband and two of his former attorneys to compel production of original promissory note awarded to her in final judgment. The Circuit Court, Monroe County, Sandra Taylor, J., imposed monetary sanctions against former wife and her counsel for subpoena. Former wife appealed. On rehearing, the District Court of Appeal, 730 So.2d 286, affirmed and certified conflict. On review, the Supreme Court, Pariente, J., held that: (1) a trial court possesses the inherent authority to impose attorney fees against an attorney for bad faith conduct, disapproving *Israel v. Lee*, 470 So.2d 861, and *Miller v. Colonial Baking Co.*, 402 So.2d 1365; (2) the trial court needed to make an express finding of bad faith conduct and to support it by detailed factual findings describing the specific acts of bad faith conduct; and (3) the due process clause required notice and an opportunity to be heard.

Approved in part and quashed in part.

Wells, C.J., concurred in the result and filed opinion.

Lewis, J., concurred in the result.

Attorneys and Law Firms

***222** John P. Fenner, Boca Raton, FL, for Petitioner.

Sheri Smallwood, pro se, Key West, FL, for Respondent.

Opinion

PARIENTE, J.

We have for review *Moakley v. Smallwood*, 730 So.2d 286 (Fla. 3d DCA 1999), a decision of the Third District Court of Appeal, which expressly and directly conflicts with the decision of the Second District Court of Appeal in *Israel v. Lee*, 470 So.2d 861 (Fla. 2d DCA 1985), and the First District Court of Appeal in *Miller v. Colonial Baking Co.*, 402 So.2d 1365 (Fla. 1st DCA 1981). We have jurisdiction. *See* art. V, § 3(b)(3), Fla. Const. The conflict issue presented in this case is whether a trial court possesses the inherent authority to assess attorneys' fees as a sanction against an attorney for the attorney's bad faith conduct during the course of litigation.

BACKGROUND

This case arises out of post-dissolution proceedings and the imposition of attorneys' fees against petitioner Barbara Moakley, the former wife, and her trial attorney. The Third District explained the factual background of this case as follows:

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> According to the findings of the trial court in post-dissolution proceedings, the former wife [Moakley] subpoenaed the former husband and two of his former attorneys, seeking to compel production of an original note which had been awarded to the former wife in the final judgment. On its face, the motion to compel production conceded that one of the former attorneys, appellee Sheri Smallwood, did not have the note and she so testified. Because of short notice, Ms. Smallwood was unable to be relieved of the obligation to attend the hearing, fifty miles from her office. The trial court granted monetary sanctions against the former wife and her counsel. The court concluded that there was no reasonable explanation for issuance of the subpoena to Ms. Smallwood.

Moakley, 730 So.2d at 286-87 (footnote omitted). The trial court imposed attorneys' fees in the amount of $1125 against Moakley and her counsel, Margaret Broz, as compensation for the time Smallwood expended in responding to the subpoena. *See id.* at 287. On appeal, the Third District ***223** affirmed the imposition of monetary sanctions against both Moakley and her attorney, concluding that the trial court possessed the inherent authority to do so. *See id.*

ANALYSIS

The issue before us in this case is whether the trial court possessed the inherent authority to impose attorneys' fees against Moakley's attorney absent a specific rule or statute authorizing the imposition of such fees. [1] This Court has explained ***224** that "[g]enerally, a court may only award attorney's fees when such fees are 'expressly provided for by statute, rule, or contract.' " *Bane v. Bane*, 775 So.2d 938, 940 (Fla.2000). However, since 1920, this Court has recognized the inherent authority of trial courts to assess attorneys' fees for the misconduct of an attorney in the course of litigation. *See United States Sav. Bank v. Pittman*, 80 Fla. 423, 86 So. 567, 572 (1920). In *Pittman*, this Court approved an award of fees against an attorney, where the trial court found that the attorney had unnecessarily conducted foreclosure proceedings on a mortgage for the sole purpose of increasing his fee and that the attorney was acting in his own self-interest and against the wishes of his client. *Id.*

As we have subsequently stated, "Clearly, a trial judge has the inherent power to do those things necessary to enforce its orders, to conduct its business in a proper manner, and to protect the court from acts obstructing the administration of justice." *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co.*, 639 So.2d 606, 608-09 (Fla.1994). Most recently, the Court in *Bitterman v. Bitterman*, 714 So.2d 356, 365 (Fla.1998), recognized the inherent authority of a trial court to award attorneys' fees for bad faith conduct against a party, even though no statute authorized the award:

> The inequitable conduct doctrine permits the award of attorney's fees where one party has exhibited egregious conduct or acted in bad faith. Attorney's fees based on a party's inequitable conduct have been recognized by other courts in this country. *See Vaughan v. Atkinson*, 369 U.S. 527, 530-31, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962) (awarding attorney's fees based on respondent's "recalcitrance" and "callous" attitude); *Rolax v. Atlantic Coast Line R.R. Co.*, 186 F.2d 473, 481 (4th Cir.1951) (holding that attorney's fees were justified because "plaintiffs of small means have been subjected to discriminatory and oppressive conduct by a powerful labor organization"). We note that this doctrine is rarely applicable. It is reserved for those extreme cases where a party acts "in bad faith, vexatiously, wantonly, or for oppressive reasons." *Foster v. Tourtellotte*, 704 F.2d 1109, 1111 (9th Cir.1983) (quoting *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 129, 94 S.Ct. 2157, 2165, 40 L.Ed.2d 703 (1974)). "Bad faith may be found not only in the actions that led to the lawsuit, but also in the conduct of the litigation." *Dogherra v. Safeway Stores, Inc.*, 679 F.2d 1293, 1298 (9th Cir.1982) (quoting *Hall v. Cole*, 412 U.S. 1, 15, 93 S.Ct. 1943, 1951, 36 L.Ed.2d 702 (1973)). This Court and other courts in this state have recognized that attorney's fees can be awarded in situations where one party has acted vexatiously or in bad faith. *See Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145, 1148 (Fla.1985) ("This state has recognized a limited exception to this general American Rule in situations involving inequitable conduct."); *Hilton Oil Transport v. Oil Transport Co.*, 659 So.2d 1141, 1153 (Fla. 3d DCA 1995); *In re Estate of DuVal*, 174 So.2d 580, 587 (Fla. 2d DCA 1965).

Nothing in the Court's reasoning in *Bitterman,* in which we acknowledged the trial court's inherent authority to award attorneys' fees under extremely narrow circumstances, limits the application of this authority to a party rather than the party's attorney. Indeed, the attorney is not only a representative of the client, but also an officer of the court. *See* Preamble to Rules of Professional Conduct, R. Regulating Fla. Bar ("A lawyer is a representative of clients, an officer of the legal system, ***225** and a public citizen having special responsibility for the quality of justice.").

Moreover, appellate decisions that have addressed this issue have recognized that trial courts must sparingly and cautiously exercise this inherent authority to award attorneys' fees against an attorney. For example, in *Patsy v. Patsy,* 666 So.2d 1045 (Fla. 4th DCA 1996), another post-judgment dissolution proceeding, the Fourth District affirmed an award of attorneys' fees and costs against an attorney for the bad faith filing of a motion to disqualify counsel. The Fourth District recited the facts as follows:

> In a modification proceeding in which he represented the former husband, Meisler filed a motion to disqualify opposing counsel on the ground that he had perpetrated a fraud on the court on two prior occasions. At Meisler's request, based on the motion, the court stayed further proceedings until after it conducted an evidentiary hearing on the motion to disqualify. *After hearing the evidence the trial court found that the motion had no factual basis, was filed solely to delay the proceedings, and was a sham.* The court assessed attorney's fees of $1,870 and costs.

Id. at 1046 (emphasis supplied). After reviewing the applicable case law, the Fourth District concluded that trial courts possess the inherent authority to assess attorneys' fees for litigating in bad faith. *See id.* at 1047; *see also David S. Nunes, P.A. v. Ferguson Enter., Inc.,* 703 So.2d 491, 491 (Fla. 4th DCA 1997) (citing *Patsy* for the proposition that the trial court had inherent authority to assess attorneys' fees against counsel who did not attend a mediation and advised his clients that they also did not have to attend).

Similarly, in *Lathe v. Florida Select Citrus, Inc.,* 721 So.2d 1247, 1247 (Fla. 5th DCA 1998), the Fifth District upheld the imposition of attorneys' fees against an attorney who lied to the trial court after he failed to appear for a deposition. The Fifth District observed that the attorney did not deny that he lied to the court, but argued that the trial court could not impose attorneys' fees without first finding him in contempt. *See id.* Relying on this Court's decision in *Pittman,* the Fifth District rejected this argument and held that a "trial court has inherent authority to order an attorney, who is an officer of the court, to pay opposing counsel's reasonable attorney's fees incurred as a result of his or her actions taken in bad faith." *Lathe,* 721 So.2d at 1247. The Fifth District explained that in the case before it, the attorney had notice and an opportunity to object to the sanctions and to provide mitigating evidence before awarding fees for the attorney's bad faith conduct. *See id.*

Indeed, many jurisdictions recognize this limited inherent authority to impose attorneys' fees against an attorney for bad faith conduct in the course of litigation. *See, e.g., Eberly v. Eberly,* 489 A.2d 433, 449 (Del.Super.Ct.1985) (holding that trial court had inherent authority to assess attorneys' fees against attorney who "unreasonably and vexatiously prolonged the proceedings below and increased the cost of representation to both parties"); *Charles v. Charles,* 505 A.2d 462, 467 (D.C.1986) (holding that trial court has inherent authority to impose attorneys' fees against attorney who repeatedly failed to obey court orders to file an answer or affidavit in lieu thereof); *Lester v. Rapp,* 85 Hawai'i 238, 942 P.2d 502, 505-06 (1997) (remanding case to trial court to determine whether counsel's misrepresentation of facts to the court constituted bad faith and whether his conduct resulted in the unnecessary incurrence of attorneys' fees); *State v. Grant,* 487 A.2d 627, 629 (Me.1985) (holding that trial court had inherent authority ***226** to compel attorney who improperly took money from client to return money to client); *Battryn v. Indian Oil Co.,* 472 A.2d 937, 941-42 (Me.1984) (holding that trial court had inherent authority to impose sanctions against attorney for discovery abuses); *Winters v. City of Oklahoma City,* 740 P.2d 724, 727 (Okla.1987) (holding that the intentional filing and prosecution of a claim under Oklahoma law that lacked any plausible factual or legal basis constituted a bad faith action and justified the award of sanctions against the attorney); *Coburn v. Domanosky,* 257 Pa.Super. 474, 390 A.2d 1335, 1338 (1978); *Van Eps v. Johnston,* 150 Vt. 324, 553 A.2d 1089, 1091 (1988) (holding that trial courts have inherent authority to impose sanctions against attorneys for "bad faith," which encompasses both the filing and the conduct of litigation and includes "abuse of the judicial process"); *Daily Gazette Co. v. Canady,* 175 W.Va. 249, 332 S.E.2d 262, 266 (1985) (holding that trial court

has inherent authority to "order payment by an attorney to a prevailing party reasonable attorneys fees and costs incurred as the result of his or her vexatious, wanton, or oppressive assertion of a claim or defense that cannot be supported by a good faith argument for the application, extension, modification, or reversal of existing law"). *See generally* Alan Stephens, Annotation, *Attorney's Liability Under State Law for Opposing Party's Counsel Fees,* 56 A.L.R.4th 486 (1987).

In reaching their conclusions, many jurisdictions rely upon the United States Supreme Court's decision in *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 766, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980), in which the Court held that federal district courts have the inherent authority to impose attorneys' fees against counsel for "bad faith" conduct. As explained in *Roadway Express,* the "power of a court over members of its bar is at least as great as its authority over litigants. If a court may tax counsel fees against a party who has litigated in bad faith, it certainly may assess those expenses against counsel who willfully abuse judicial processes." *Id.* (footnote omitted). The Supreme Court followed *Roadway Express* in *Chambers v. NASCO, Inc.,* 501 U.S. 32, 50, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991), in which it explained:

> A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees. Furthermore, when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the [Federal] Rules [of Civil Procedure], the court ordinarily should rely on the Rules rather than the inherent power. But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.

(Citation omitted.) The Supreme Court has explained, however, that a "specific finding as to whether counsel's conduct ... constituted or was tantamount to bad faith" is a necessary precedent to any sanction of attorney's fees under the trial court's inherent authority. *Roadway Express,* 447 U.S. at 767, 100 S.Ct. 2455.

[1] [2] [3] We thus hold that a trial court possesses the inherent authority to impose attorneys' fees against an attorney for bad faith conduct. In exercising this inherent authority, an appropriate balance must be struck between condemning as unprofessional or unethical litigation tactics undertaken solely for bad faith purposes, while ensuring that attorneys will not be deterred from pursuing lawful claims, issues, or defenses on behalf of their clients or from their obligation as an advocate to zealously assert the clients' interests. The ***227** inherent authority of the trial court, like the power of contempt, carries with it the obligation of restrained use and due process. [2]

[4] [5] [6] [7] Accordingly, we conclude that the trial court's exercise of the inherent authority to assess attorneys' fees against an attorney must be based upon an express finding of bad faith conduct and must be supported by detailed factual findings describing the specific acts of bad faith conduct that resulted in the unnecessary incurrence of attorneys' fees. Thus, a finding of bad faith conduct must be predicated on a high degree of specificity in the factual findings. In addition, the amount of the award of attorneys' fees must be directly related to the attorneys' fees and costs that the opposing party has incurred as a result of the specific bad faith conduct of the attorney. Moreover, such a sanction is appropriate only after notice and an opportunity to be heard-including the opportunity to present witnesses and other evidence. Finally, if a specific statute or rule applies, the trial court should rely on the applicable rule or statute rather than on inherent authority. *See Chambers,* 501 U.S. at 50, 111 S.Ct. 2123 ("Furthermore, when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power. But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent authority.").

With regard to the conflict cases, we disapprove the decisions in *Israel* and *Miller* to the extent that they rejected the inherent authority of the trial court as a basis for awarding attorneys' fees. We do not decide whether the award of attorneys' fees would have been proper in those cases.

[8] In this case, we conclude that the Third District's decision must be quashed because the trial court did not make an express finding of bad faith, and did not provide the attorney notice and an opportunity to be heard before imposing the attorneys' fees. Instead, the trial court merely found that there was no reasonable explanation for the issuance of the subpoena. *See Moakley,*

730 So.2d at 287. Therefore, although we approve of the Third District's recognition of the inherent authority of the trial court to assess attorneys' fees, we quash the decision below in accordance with this opinion.

It is so ordered.

SHAW, HARDING, ANSTEAD, and QUINCE, JJ., concur.

WELLS, C.J., concurs in result only with an opinion.

LEWIS, J., concurs in result only.

WELLS, C.J., concurring in result only.
I concur only in quashing the district court decision.

I do not join the majority's opinion because I conclude that it is not in accord with this Court's precedent. In *Burns v.* ***228** *Huffstetler,* 433 So.2d 964 (Fla.1983), this Court said:

> There are three alternative methods for the disciplining of attorneys, and the first two procedures derive directly from this Court's delegation of its power to regulate the practice of law in Florida, as conferred by article V, section 15, Florida Constitution. The first alternative is the traditional grievance committee-referee process in which an attorney is prosecuted by The Florida Bar under the direction of the Board of Governors. Under this procedure, sanctions are imposed by the Supreme Court after the Court considers the referee's recommendations. *See* Fla. Bar Integr. Rule, art XI, Rules 11.02-11.13. The second alternative is a procedure initiated by the judiciary with the state attorney prosecuting. Judgment is entered by the trial court and is subject to review by the supreme court. *See* Fla. Bar Integr. Rule, art. XI, Rule 11.14. The third alternative is the exercise of the inherent power of the courts to impose contempt sanctions on attorneys for lesser infractions, a procedure which this Court expressly approved in *Shelley v. District Court of Appeal,* 350 So.2d 471 (Fla.1977).

Id. at 965.

The present majority introduces a new basis for sanctioning lawyers through the imposition of monetary sanctions against an attorney for "bad faith conduct." Majority op. at 227. My problem with this is that, apparently, this is a sanction which comes within neither attorney discipline procedures nor the Court's contempt power. Therefore, there are no procedures to apply to the application of this sanction, nor are there definitions of bad faith or limitations on the sanctions. The majority holds, in its footnote 2, that the justification for finding the Court's power to impose the new sanction is because "the actions in this case could not have been disciplined through the trial court's contempt power, because the contempt power is based on the failure to obey a specific judgment or order of the court." Majority op. at 227, n. 2. This statement makes it clear that the bad-faith sanction is broader than contempt.

I recognize that the majority states that the trial judge must make an express finding of bad faith, set out detailed factual findings, and give notice and an opportunity to be heard. However, bad faith is not defined. What is bad faith in the subjective view of one judge is in all likelihood not going to be bad faith to another. Lawyers will not have notice of the boundaries of "bad faith." Furthermore, I do not know on what basis a lawyer could get appellate relief from a trial court's determination of "bad faith." Clearly, the review would be an "abuse of discretion," but without a specific definition of "bad faith," on what basis can there be an abuse of discretion?

The majority likewise does not set any limits on the monetary sanctions which the trial court can impose. Are the sanctions limited to attorney fees actually expended by the aggrieved party, or are the monetary sanctions to be punitive, as a fine would be in a contempt situation?

Based upon my experience as a litigator, it is tempting to join the majority because I certainly have witnessed firsthand the type of lawyer abuse which the majority is desirous of sanctioning. Since I have been on this Court, I am aware of instances of lawyer abuse which should have been sanctioned but was not, for the likely reason that the trial judge did not feel that there was an effective way to do it.

I deplore this abuse, but I have to weigh this against the problems I foresee with opening a new way to sanction lawyers which has the lack of specificity resulting from this opinion. As clearly as the judicial system needs to be protected from this ***229** type of lawyer abuse, the judicial system has to also be protected against restraining lawyers in work on innovative and unpopular causes and in innovative ways which to some trial judges could appear to be "bad faith." Lawyers cannot be placed in a position of fearing monetary exposure based upon decisions which cannot be effectively reviewed by appellate courts. Frankly, I am concerned about arbitrary or intimidating applications of undefined and unlimited "bad faith" sanctions.

Rather than announcing this change in the ways lawyers can be sanctioned in this opinion, which in fact quashes the approval of such sanctions, I conclude it would be better to have the rules committees develop rules in which "bad faith" is defined and the sanctions specified. In that way, the Bar can debate the issues and present to the Court a proposal that has been fully and fairly scrutinized.

Therefore, I would quash the district court's decision and remand with instructions that in this case the trial court's award of monetary sanctions be stricken. I would join in sending the issue of bad faith sanctions against lawyers to the rules committees.

Parallel Citations

27 Fla. L. Weekly S357, 27 Fla. L. Weekly S175

Footnotes

1 Smallwood urges as an alternative basis for affirmance section 92.231, Florida Statutes (1997), which provides for compensation of expert witnesses. However, the record does not reflect that Smallwood was offered as an expert or permitted by the court to qualify and testify as such, as required by section 92.231. *See Lee County v. Galaxy Fireworks, Inc.*, 698 So.2d 1371, 1372 (Fla. 2d DCA 1997); *Thellman v. Tropical Acres Steakhouse, Inc.*, 557 So.2d 683, 684 (Fla. 4th DCA 1990). Thus, the award cannot be upheld on that basis.

Smallwood also argues that the amount awarded to her is proper under section 92.151, Florida Statutes (1997), as witness compensation. Although section 92.151 does provide that "[c]ompensation shall be paid to the witness by the party in whose behalf the witness is summoned," section 92.142, Florida Statutes (1997), which provides that witnesses shall receive $5 per each day of actual attendance and six cents for actual distance traveled to and from the court, does not provide authority for the $1125 awarded to Smallwood.

Finally, we note that neither the trial court nor the Third District based its award of attorneys' fees against Moakley and Broz on section 57.105, Florida Statutes (1997), which allows for attorneys' fees against an attorney and a client in equal shares for bringing a complaint or defense raising a "complete absence of a justiciable issue of either law or fact." § 57.105, Fla. Stat. (1997). Therefore, we express no opinion as to whether the award of attorneys' fees would have been proper under this statute. Further, the assessment of attorneys' fees in this case preceded the enactment of the amendments to section 57.105, Florida Statutes, which became effective in October 1999. Moreover, neither party argues the applicability of the amended version of section 57.105, which is broader than the version existing at the time attorneys' fees were assessed in this case, and provides:

(1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee to be paid to the prevailing party *in equal amounts by the losing party and the losing party's attorney* on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:

(a) Was not supported by the material facts necessary to establish the claim or defense; or

(b) Would not be supported by the application of then-existing law to those material facts.

However, *the losing party's attorney is not personally responsible if he or she has acted in good faith,* based on the representations of his or her client as to the existence of those material facts. If the court awards attorney's fees to a claimant pursuant to this subsection, the court shall also award prejudgment interest.

(2) Paragraph (1)(b) does not apply if the court determines that the claim or defense was initially presented to the court as a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, as it applied to the material facts, with a reasonable expectation of success.

(3) At any time in a civil proceeding or action in which the moving party proves by a preponderance of the evidence that any action taken by the opposing party, including, but not limited to, the filing of any pleading or part thereof, the assertion of or any response to any discovery demand, the assertion of any claim or defense, or the response to any request by any other party, was taken primarily for the purpose of unreasonable delay, the court shall award damages to the moving party for its reasonable expenses incurred in obtaining the order, which may include attorney's fees, and other loss resulting from the improper delay.

(4) The provisions of this section are supplemental to other sanctions or remedies available under law or under court rules.

§ 57.105, Fla. Stat. (2001) (emphasis supplied).

2 We note that the actions in this case could not have been disciplined through the trial court's contempt power, because the contempt power is based on the failure to obey a specific judgment or order of the court. *See generally Parisi v. Broward County,* 769 So.2d 359 (Fla.2000); *see also Levin, Middlebrooks,* 639 So.2d at 609 ("[A] trial court would have the ability to use its contempt powers to vindicate its authority and protect its integrity by imposing a compensatory fine as punishment for contempt."); § 38.23, Fla. Stat. (1997) (providing for exercise of contempt power where a party has failed to abide by "any legal order, mandate or decree, made or given by any judge").

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