

ATTORNEYS' FEES

Group 1

*All I do is win win win no matter what
Got money on my mind I can never get enough...
Got twenty bank accounts, accountants count me in
Make millions every year, the south's champion
Cause all I do, all I, all I, all I
All I do is
All I do is win win win no matter what
Got money on my mind I can never get enough...*

*By: Calvin Broadus / Christopher Bridges / Fahem Najm / Johnny Mellings /
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Why Do We Care About Attorneys' Fees?

1. We like to eat.



Why Do We Care About Attorneys' Fees?

1. We like to eat.
2. Fees impact the decision to litigate and the lives and livelihoods of our clients.

ATTORNEYS' FEES

THE BASICS

THE ENGLISH RULE



THE ENGLISH RULE

- The loser pays: the losing party must pay the winner's litigation costs, including attorneys' fees.
- Can discourage frivolous suits, but can encourage strong but minimal damages suits.
- Can discourage settlement, as a party with a strong case has less incentive to compromise.
- Has created a new industry: fee insurance.



THE AMERICAN RULE



THE AMERICAN RULE

- At the time of the American Revolution, the English Rule was already in place
 - The majority of American courts rejected the English Rule and adopted the American Rule instead:
 - Fees may be awarded only when authorized by statute or by agreement of the parties.
- Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145, 1147-1148 (Fla. 1985)

THE AMERICAN RULE

- Benefits and Problems?
 - Greater access to the courts
 - No disincentive to drop frivolous claims
 - Prevailing party may not be made whole
 - Although there is generally greater access to the courts, it may discourage attorneys and clients from pursuing smaller-value cases

THE AMERICAN RULE

- By statute:
 - Sec. 68.065, *Fla. Stat.* (bad checks)
 - Sec. 83.48, *Fla. Stat.* (landlord-tenant)
 - Sec. 501.2105, *Fla. Stat.* (Florida Deceptive and Unfair Trade Practices Act)
 - Sec. 713.29, *Fla. Stat.* (construction liens)
 - Sec. 733.6171, *Fla. Stat.* (probate estates)
 - So many others!
 - BUT! Statutes awarding attorneys' fees must be strictly construed.
 - *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So.2d 276, 278 (Fla. 2003).

THE AMERICAN RULE

- By agreement of the parties, as set forth in a written contract:
 - Should either party engage the services of an attorney to enforce or defend any of its rights hereunder or to collect any amounts due, the party against whom a final judgment (after any appeals) is obtained shall pay the party obtaining such judgment all costs and expenses incurred by the prevailing party, including reasonable attorney's fees.

THE AMERICAN RULE

- By agreement of the parties, as set forth in a written contract:
 - In the event of litigation under this Agreement, the prevailing party shall be entitled to an award of attorneys' fees and court costs from the other party.

THE AMERICAN RULE

- Sec. 57.105(7), *Fla. Stat.*, provides that if a contract contains a provision allowing prevailing party fees to one party when she must take action to enforce the contract, then the court may allow reasonable attorneys' fees to the other party when that party prevails, whether plaintiff or defendant.

Also see Fla. Hurricane Prot. & Awning, Inc. v. Pastina, 43 So.3d 893 (Fla. 4th DCA 2010).

ATTORNEYS' FEES

GET PAID (BY THE OTHER SIDE)



OTHER WAYS TO GET FEES?

- Sec. 57.105(1), *Fla. Stat.*
 - Upon Court’s own initiative or motion of any party, the court shall award a reasonable attorney’s fee, to be paid in equal amounts by the losing party and the losing party’s attorney, when the Court finds the losing party *or* the losing party’s attorney knew or should have known that a claim or defense, when initially presented or at any time before trial, was (a) 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.
- Other sanctions
 - Failure to provide discovery
- Proposal for settlement

PROPOSAL FOR SETTLEMENT

- Governed by Sec. 768.79, *Fla. Stat.*, and Rule 1.442, *Fla. R. Civ. P.*
- Statute refers to “offer of judgment/demand for judgment”
- Rule refers to “proposal for settlement”
- Case law is a moving target
- No limit on the number of proposals that can be made
- Proposal is valid for 30 days after service
- Proposal can be withdrawn

PROPOSAL FOR SETTLEMENT

- If a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred from the date of filing of the offer, if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer.
- The court shall set off such costs and attorney's fees against the award.
- If the costs and attorney's fees total more than the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the plaintiff's award.
- If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days, and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand.

PROPOSAL FOR SETTLEMENT

- The offer of judgment statute creates an entitlement to attorneys' fees when the statutory and procedural requirements have been satisfied...The mandatory language of section 768.79 reinforces the notion that a proper offer *automatically* creates that entitlement, unless the offer is made in bad faith. See § 768.79(1), Fla. Stat.

Anderson v. Hilton Hotels Corp., 202 So. 3d 846, 856 (Fla. 2016) [internal citation omitted].

- Award of fees pursuant to section 768.79 and rule 1.442 is not dependent on the presence of a contractual fee provision.

DuPont Builders, Inc. v. Baker, 987 So.2d 146 (Fla. 2d DCA 2008).

NOT EVERYTHING IS AWARDABLE

- Work that is necessitated by the client's own behavior should more properly be paid by the client than by the opposing party. *Baratta v. Valley Oak Homeowners' Ass'n at the Vineyards, Inc.*, 928 So. 2d 495, 499 (Fla. 2d DCA 2006).
- For instance, excessive amounts of client hand-holding are not recoverable.
- “The fact that appellant was very emotional and persistent in nature does not mean that all of the time spent with her was reasonably necessary and that is the test in assessing fees against the opposing party.” *Guthrie v. Guthrie*, 357 So. 2d 247, 248 (Fla. 4th DCA 1978).

HOW TO ESTABLISH FEES

- The claim for fees must be pled. *Stockman v. Downs*, 573 So.2d 835 (Fla. 1991).
 - Unless...
 - The defendant prevails on a motion to dismiss before filing an answer, in which case the claim for fees can be made *either* in the motion *or* by separate motion within 30 days following the dismissal. *Green v. Sun Harbor Homeowners' Ass'n, Inc.*, 730 So.2d 1261 (Fla. 1998).

HOW TO ESTABLISH FEES

Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145, 1150-1151 (Fla. 1985)

- Follow the federal lodestar approach:
- Determine the number of hours reasonably expended
- Determine a reasonable hourly rate
- Multiply the number of hours by the reasonable hourly rate = the lodestar, the objective basis for the award of attorneys' fees.
- Court may then add or subtract from the fee based upon a contingency risk factor and the results obtained.

FACTORS TO CONSIDER

- (1) The time and labor required, the novelty and difficulty of the question involved, and the skill requisite to perform the legal service properly.
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- (3) The fee customarily charged in the locality for similar legal services.
- (4) The amount involved and the results obtained.
- (5) The time limitations imposed by the client or by the circumstances.
- (6) The nature and length of the professional relationship with the client.
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
- (8) Whether the fee is fixed or contingent.

Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145, 1150 (Fla. 1985).

REASONABLE HOURLY RATE

To determine a reasonable hourly rate, considering the following factors:

- (1) The skill requisite to perform the legal service properly.
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- (3) The fee customarily charged in the locality for similar legal services.
- (4) The amount involved.
- (5) The time limitations imposed by the client or by the circumstances.
- (6) The nature and length of the professional relationship with the client.
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145, 1150-1151 (Fla. 1985).

HOMEY v. HOME HEALING, LLC

Case File No. 18-CA-100000



HOMEY v. HOME HEALING, LLC

Case File No. 18-CA-100000

ENTITLEMENT TO FEES

- Is Home Healing entitled to fees based upon its lien?

NO!

ENTITLEMENT TO FEES

- Is Home Healing entitled to fees based upon its lien?
- No: Statutes awarding attorney's fees must be strictly construed. *See Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So.2d 276, 278 (Fla.2003).
- Home Healing is not an architect, landscape architect, interior designer, engineer, or surveyor or mapper. *See Sec. 713.03, Fla. Stat.*
- Home Healing has not performed labor or services or furnished materials constituting an improvement to the property. *See Sec. 713.02(3), Fla. Stat.*

ENTITLEMENT TO FEES

- Is Home Healing entitled to fees based upon its proposal for settlement?

NO!

ENTITLEMENT TO FEES

- Is Home Healing entitled to fees based upon its proposal for settlement?
- No: The proposal was sent too soon.
- Rule 1.442(b), *Fla. R. Civ. P.*: A proposal for settlement to a plaintiff shall be served no earlier than 90 days after the action has commenced.

ENTITLEMENT TO FEES

- What about the presence of an equitable claim?
- “Section 768.79 does not apply to an action for both damages and equitable relief...” *Diamond Aircraft Indus., Inc. v. Horowitch*, 107 So. 3d 362, 376 (Fla. 2013).
- But! “When determining whether a complaint alleges an action for damages or one for equitable relief, Florida courts ‘look[] to whether the “real issue” is one for damages’ or equitable relief.” *Polk County v. Highlands-in-the-Woods, L.L.C.*, 227 So. 3d 161, 163 (Fla. 2d DCA 2017).
- Where, as here, the equitable claim really seeks damages, the proposal for settlement could still be valid.

ENTITLEMENT TO FEES

- Is Home Healing entitled to fees based upon its contract?

YES!

ENTITLEMENT TO FEES

- Is Home Healing entitled to fees based upon its contract?
- Yes: the contract contained a valid attorneys' fee provision and Home Healing prevailed. Courts have no discretion to decline to enforce provisions in contracts for awards of attorney fees, any more than any other contractual provision. *Brickell Bay Club Condo. Ass'n, Inc. v. Forte*, 397 So. 2d 959 (Fla. 3d DCA 1981).
- The test for determining who is the prevailing party for purposes of awarding attorney's fees in a contract action is "to allow the trial judge to determine from the record which party has in fact prevailed on the significant issues tried before the court." *Moritz v. Hoyt Enterprises, Inc.*, 604 So.2d 807, 810 (Fla.1992).
- But note! If the Homeys had prevailed, they also would have been entitled to recover fees under the contractual provision. Sec. 57.105(7), *Fla. Stat.*; also see *Fla. Hurricane Prot. & Awning, Inc. v. Pastina*, 43 So. 3d 893, 895 (Fla. 4th DCA 2010).



ENTITLEMENT TO FEES

- Is Home Healing entitled to fees for time expended on all claims?
- In *Centex-Rooney*, the Court held that a \$14 million judgment was an “excellent result” and the trial court did not abuse its discretion in refusing to reduce the fee because the party did not prevail on every claim.
- Is the same true for Home Healing?

Spiritual House Cleansing

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Negative vibrations and thoughtforms

Harmful Electromagnetic fields

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Home Healing, LLC



SPECIFIC FEE ISSUES

- Can Home Healing recover fees where more than one attorney attended a deposition?

NO!

SPECIFIC FEE ISSUES

- Can Home Healing recover fees where more than one attorney attended a deposition?
- No: "If the same task is performed by more than one lawyer, multiple compensation should be denied..." *Brake v. Murphy*, 736 So. 2d 745 (Fla. 3d DCA 1999) [internal citations omitted].
- A party has the right to hire as many attorneys as it desires, but the opposing party is not required to compensate for overlapping efforts, should they result. *Donald S. Zuckerman, P.A. v. Alex Hofrichter, P.A.*, 676 So. 2d 41, 43 (Fla. 3d DCA 1996) [internal citations omitted].

SPECIFIC FEE ISSUES

- Does this mean that fees for overlapping work by multiple attorneys can never be recovered?
- No: Expert opinion can be presented on the matter and fees awarded if appropriate.
- There is nothing inherently unreasonable about a client having multiple attorneys and they may all be compensated if they are not unreasonably doing the same work and are being compensated for distinct contributions from each lawyer. *Nitram, Inc. v. Indus. Risk Insurers*, 154 F.R.D. 274, 277 (M.D. Fla. 1994).
- If attorneys were responsible for different portions of the work (for instance, based upon their billing rate or expertise), then fees for multiple attorneys are appropriate. *Grover v. Grover*, 59 So.3d 333, 334 (Fla. 5th DCA 2011).

SPECIFIC FEE ISSUES

- Can Home Healing recover fees for overhead?

NO!

SPECIFIC FEE ISSUES

- Can Home Healing recover overhead costs?
- No: in *Landmark Winter Park, LLC v. Colman*, 24 So.3d 787, 789 (Fla. 5th DCA 2009), the Court held it was improper to tax the following costs: postage, online research, scanning documents, trial supplies, paralegal overtime, mileage, long-distance phone calls, after-hours heating and air conditioning, photocopies, courier services.
- Costs incurred storing files electronically may not be taxed. *Meyer v. Watras*, 223 So.3d 1010 (Fla. 4th DCA 2017).

SPECIFIC FEE ISSUES

- *Fla. R. Civ. P. Taxation of Costs*:
 - Advisory only
 - Costs that should not be taxed: long distance phone calls; travel time of attorneys and experts; travel expenses of attorneys
 - It is the burden of the moving party to show that all requested costs were reasonably necessary to defend or prosecute the case at the time the action precipitating the cost was incurred.

SPECIFIC FEE ISSUES

- Can Home Healing recover fees for clerical work?

NO!

SPECIFIC FEE ISSUES

- Can Home Healing recover fees for clerical work?
- “In any action in which attorneys’ fees are to be determined or awarded by the court, the court shall consider, among other things, time and labor of any legal assistants who contributed nonclerical, meaningful legal support to the matter involved and who are working under the supervision of an attorney.” Sec. 57.104, *Fla. Stat.*
- Where there was no evidence that work done was paralegal work, as opposed to secretarial work, an award of paralegal fees was reversed. *Nelson v. PharMerica*, 180 So. 3d 130 (Fla. 1st DCA 2015).

SPECIFIC FEE ISSUES

- Can Home Healing recover fees for travel time and costs for travel?

NO!

SPECIFIC FEE ISSUES

- Can Home Healing recover fees for travel time and costs for travel?
- No: Airplane and hotel expenses to take a deposition are generally not recoverable. *Barnes v. City of Dunedin*, 666 So. 2d 574 (Fla. 2d DCA 1996).
- When there is no showing a competent local attorney could not be obtained, fees for travel time are not allowed. *Fence Wholesalers of Am., Inc. v. Beneficial Commercial Corp.*, 465 So. 2d 570, 570 (Fla. 4th DCA 1985).

SPECIFIC FEE ISSUES

- Does this mean that fees for travel time and travel expenses can never be recovered?
- No: Where a party has been unable to find local counsel to represent him, then travel time, plane fare and rental car expenses are appropriate. *S & H Fabricating & Eng'g, Inc. v. Wamley*, 423 So. 2d 435 (Fla. 1st DCA 1982).
- Where the opposing party caused numerous unnecessary hearings, then out-of-town attorney's travel time can be awarded as sanction. *Bohner v. Bohner*, 24 So. 3d 622, 623 (Fla. 4th DCA 2009).

SPECIFIC FEE ISSUES

- Can Home Healing recover fees for block billing?

NO?

SPECIFIC FEE ISSUES

- Can Home Healing recover fees for block billing?
- This issue primarily raised in federal cases, not state cases: 11th Circuit has held that “the general subject matter of the time expenditures ought to be set out with sufficient particularity so that the district court can assess the time claimed for each activity.” *Norman v. Housing Auth.*, 836 F.2d 1292, 1303, (11th Cir. 1988).
- Only addressed by one Florida state court case: where a law firm uses block billing, it becomes impossible to determine the reasonableness of the hours expended on several matters. *Moore v. Kelso-Moore*, 152 So.3d 681, 682 (Fla. 4th DCA 2014).

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*FLORIDA PATIENT'S COMPENSATION FUND V.
ROWE, 472 So.2d 1145 (Fla. 1985)*

- Is the use of a multiplier appropriate in a contract case?

YES!

FLORIDA PATIENT'S COMPENSATION FUND V. ROWE, 472 So.2d 1145 (Fla. 1985)

- Is the use of a multiplier appropriate in a contract case?
- In determining whether a contingent fee multiplier is necessary in a contract case the trial court should consider:
 - whether the relevant market requires a contingency fee multiplier to obtain competent counsel;
 - whether the attorney was able to mitigate the risk of nonpayment in any way
 - whether any of the factors set forth in *Rowe* are applicable, especially, the amount involved, the results obtained, and the type of fee arrangement between the attorney and his client.

Citizens Property Ins. Corp. v. Anderson, 43 Fla. L. Weekly D353 (Fla. 2d DCA Feb. 14, 2018)

FLORIDA PATIENT'S COMPENSATION FUND V. ROWE, 472 So.2d 1145 (Fla. 1985)

- Evidence of each of the factors must be presented to justify the use of a multiplier. *Citizens Property Ins. Corp. v. Anderson*, 43 Fla. L. Weekly D353 (Fla. 2d DCA Feb. 14, 2018).
- If there is no evidence that the relevant market requires a contingency fee multiplier, then a multiplier should not be awarded. *Id.*
- Expert testimony can be sufficient to support the application of a multiplier. *Massie v. Progressive Express Ins. Co.*, 25 So.3d 584, 585 (Fla. 1st DCA 2009).

FLORIDA PATIENT'S COMPENSATION FUND V. ROWE, 472 So.2d 1145 (Fla. 1985)

- Retainer agreement provisions that provide for an alternative fee recovery clause are valid, such that opposing party may be required to pay prevailing party reasonable attorneys' fees in an amount greater than the prevailing party owes to the attorney under the fee agreement. *First Baptist Church of Cape Coral, Florida, Inc. v. Compass Const., Inc.*, 115 So.3d 978 (Fla. 2013).

*FLORIDA PATIENT'S COMPENSATION FUND V.
ROWE*, 472 So.2d 1145 (Fla. 1985)

- Is Home Healing entitled to a multiplier?

NO!

FLORIDA PATIENT'S COMPENSATION FUND V. ROWE, 472 So.2d 1145 (Fla. 1985)

- Is Home Healing entitled to a multiplier?
- No: In awarding attorney's fees, the application of a contingency fee multiplier is the exception, not the rule, and the strong presumption that the lodestar figure is reasonable is overcome only in exceptional and rare circumstances. *TRG Columbus Dev. Venture, LTD v. Sifontes*, 230 So. 3d 541 (Fla. 3d DCA 2017).
- Home Healing has not presented sufficient evidence to overcome the presumption and show that a multiplier is appropriate.

FLORIDA PATIENT'S COMPENSATION FUND V. ROWE, 472 So.2d 1145 (Fla. 1985)

- Is Home Healing entitled to a multiplier?
- An attorney's fee award must be *reduced* from the lodestar amount when the prevailing party achieves only limited success. *Peterson v. Hecht Consulting Corp.*, 226 So.3d 999, 1001 (Fla. 4th DCA 2017).
- Entitlement to recover fees and costs is generally limited to those fees and costs directly and exclusively related to each claim on which recovery is allowed. *Deer Valley Realty, Inc. v. SB Hotel Assoc., LLC*, 190 So.3d 203, 207 (Fla. 4th DCA 2016).
- The party seeking the fees has the burden to allocate them to the appropriate issues or show that the issues were so intertwined that allocation is not possible. *Id.*

FEE AWARD

- Which fees is Home Healing entitled to recover?
- What is the total fee award that Home Healing can recover?



FEE AWARD

“[T]he award of attorney’s fees is a matter committed to sound judicial discretion which will not be disturbed on appeal, absent a showing of clear abuse of discretion.”

DiStefano Const., Inc. v. Fidelity and Deposit Co. of Maryland, 597 So.2d 248, 250 (Fla. 1992).

When he died at the age of 90 in 2015, Texas attorney Joe Jamail was known as the King of Torts. What was his estimated net worth at the time of his death?

\$1.65
Billion