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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: 72,713

CIVIL ACTION NO.: 83-6869
ORANGE COUNTY, FLORIDA

APPEAL NO.: 86-1140
DISTRICT COURT OF APPEAL

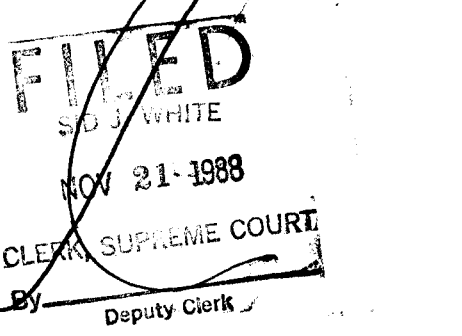
ROBERT J. KATZ,

Petitoner,

vs.

HARRY VAN DER NOORD, et al.,

Respondents.



RESPONDENTS ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Because this cause was the subject of an appeal to the Fifth District Court of Appeal prior to the Appeal for which this court has accepted jurisdiction, the Clerk of the Circuit Court in and for Orange County, Florida has made use of the index from the prior appeal (No. 84-1786 in the Fifth District Court of Appeal of the State of Florida) in this appeal. As a result, the pages of the record from the prior appeal have not been re-numbered to take into account the testimony and pleadings generated by the prosecution of the motion for attorneys fees and costs. The documents and transcript on the issue of attorneys fees and costs, which are listed on the first two pages of the Index of this appeal, shall be referenced as "R:____". References to the record from the prior appeal will be cited as "PR:____".

The Defendants below, who are the Appellants here, ROBERT UNDERWOOD and HARRY VAN DER NOORD, d/b/a INDIANA EXCHANGER PARTNERSHIP, will be referred to as Appellants. ROBERT J. KATZ, the Plaintiff below, will be referred to as the Appellee.

Citations to Appellants Appendix will be as follows: "A:____".

Citations to Appelle's Answer Brief filed in the Fifth District Court of Appeal shall be as follows: "AB:_____".

SUMMARY OF ARGUMENTS

This Court should follow the reasoning of the Third District Court Appeal and the Fifth District Court of Appeal in holding that contract which is repudiated by refusal to perform the contract does not allow an award of attorney's fees as such reasoning is the logical result of the principles of contract law. However, even if this Court accepts the reasoning of the Fourth District Court of Appeal, the Appellants should still prevail based upon the following reasons.

The Fifth District Court of Appeal entered its opinion based upon the principles of res judicata and law of the case which that court is authorized to do. The award of an attorneys fee of $68,391.00 by the Trial Court, in addition to the above, should be reversed on the evidenciary grounds argued in the briefs before the Fifth District. The presentation of competent, substantial evidence of the services rendered by an attorney seeking fees is an absolute prerequisite to an award of attorneys fees, the absence of which bars any award whatsoever.

In the instant case, the trial court relied upon an affidavit which was never offered or received into evidence (and to which Appellants objected) and the testimony of one of Appellee's attorneys, who had not reviewed the time records he was allegedly testifying to. Neither the testimony or affidavit serves as competent, substantial evidence of the work performed. There is nothing in the record which can serve as a basis for any award of fees for Appellee's attorneys.

The Appellee had the duty to adduce competent evidence of his attorney's services. The trial court erred in forgiving Appellee's failure to introduce competent, substantial evidence of the work

performed by his attorneys. The judgment for attorneys fees should be reversed and remanded with directions to enter judgment for Appellants on this issue.

If this Court finds an attorneys fee award is appropriate, then the fee should be reduced substantially, due to the very limited success Appellee enjoyed. Florida law allows a fee award only for issues prevailed on, and requires courts to identify and deduct time spent on other issues. The trial court made no reduction for time spent on the issues Appellee lost on. Had the Trial Court examined the affidavit it relied on, it could have easily identified time unrelated to the good faith breach of contract issue prevailed on. Futhermore, it is error to award a fee almost three times the amount recovered where: a) the recovery is at most 6.25% of the damages demanded at trial; b) Appellee lost a new trial on his out of pocket damages because his proof of such expenses at trial was not competent or substantial; and c) the tenor of the litigaton was strained and the hours expended increased substantially by the presence of a claim for fraud, with punitive damages, on which Appellee did not prevail. If any fee is appropriate, it should be reasonable compared to the limited results obtained.

The trial court's reservation of jurisdiction for further hearing on costs is error. Appellee had his opportunity to prove his costs on May 6, 1986, and is not entitled to keep coming back with more evidence until he gets it right. His entitlement to costs should be judged by the evidence he presented on May 6, 1986. His motion was for costs and attorneys fees, both aspects of his motion were noticed for hearing and heard on that date, and he rested. No evidence was presented to substantiate or justify the expert witness fees sought.

The trial court's judgment in effect allows Appellee to hear all of Appellants objections and correct the defects in his proof at a second hearing, making the first hearing little more than a "practice run". The trial court should be directed to only award costs based upon the evidence presented, with further directions that none of the expert witness fees sought are supported by the record and therefore cannot be awarded.

STATEMENT OF THE CASE AND FACTS

Appellant (Seller) and Appellee (Buyer) entered into a Contract For Sale and Purchase of Sunrise Village Mobile Home Park in Cocoa, Florida. One of the Contract terms provided that for approximately six months after the signing of the contract and prior to the closing, that Appellant would warrant that normal operating expenses would not exceed 32% of gross profit, a warranty in futuro. At the last minute , Appellee refused to close on the Contract (claiming that expenses were in excess of 32% of gross profit) unless Appellants reduced the purchase price on the Contract. Appellants refused to reduce the purchase price and Appellee sued for specific performance, breach of contract, misrepresentation and recission.

Appellees, by election of remedies prior to trial (recission and specific performance being mutually exclusive) elected remedies and dropped specific performance but proceeded with breach of contract and misrepresentation. The action for recission was not dismissed. The jury found for Appellant on its Breach of Contract count against Appellee in the Counterclaim. The jury found no misrepresentation as alleged in Appellee's Complaint nor as alleged in Appellant's Counterclaim. The jury awarded Appellant the $25,000.00 deposit. Upon Motion for Judgment N.O.V. by Appellee, the Trial Court entered judgment for Appellee against Appellant for good faith Breach of Contract, ordering the return of the deposit to Appellee and ordering a new Trial on consequential damages. A: 1-3.

Upon Appeal, the Fifth District Court of Appeal, in Van der Noord v. Katz , 481 So 2d 1228 (Fla. 5th DCA 1985) (the First appeal) affirmed the return of the deposit to Appellee, but reversed the Order

for new Trial for consequential damages. The trial court granting a new trial was error, the Court held, because Appellee was not entitled to any damages other than the return of his deposit. As to the "benefit of the bargain" damages sought, Appellee lost the right to seek such damages by repudiating the contract he sued upon. As to the out-of-pocket expenses sought, Appellee lost his right to a new trial on that issue because the evidence he offered to substantiate such damages at trial "...was based solely on speculation. Having failed to introduce competent substantial evidence in regard to this issue, the buyer [Appellee] is not entitled to a second bite at the apple." Page 1230, Van der Noord , supra.

After issuance of mandate, Appellee filed his Motion for Costs and Attorneys Fees. R: 203-204. In support of the Motion, Appellee filed (but never introduced or offered as evidence) an Affidavit of Costs and an Affidavit of Attorneys Time and Fees. A: 6-15; 16-17. The Motion was first set for hearing on April 15, 1986; it was later rescheduled for hearing on May 6, 1986. R: 205; R: 206. Appellee reserved only thirty minutes of time for the hearing, as can be seen by the Trial Court's comments. R: 6; R: 74. In the hearing, Appellee called three expert witnesses, the Appellee himself, and Appellee's lead trial counsel, allowing an average of only six minutes per witness. When this Court considers Appellee's excuses for failing to present proper evidence on his Motion for attorneys fees and costs, it should keep this fact in mind as well as no allowance of time for Appellants, Appellant's witnesses and no testimony for costs by the experts listed by Appellee on its filed Affidavit.

On May 6, 1986, Appellee's Motion for Costs and Attorneys Fees was heard before Circuit Judge Fredrick Pfeiffer. In Appellee's

opening statement, Appellee's counsel recited from the Attorneys Time Affidavit the alleged number of hours his firm spent on the case. Appellee's Affidavit was immediately objected to by Appellants. R: 5. Appellee then proposed to call his first expert witness on attorneys fees, Bruce Blackwell. R: 8. Appellants again objected, on the ground that Appellee had not laid a predicate for such testimony because no evidence had been offered to establish that Appellee's lawyers had spent any amount of time prosecuting the case. The trial court implicitly recognized the propriety of the objection, but determined it would take the Appellee's experts out of order. R: 7.

Appellee's first witness was Bruce Blackwell, who testified that approximately 780 of the total hours claimed were reasonable. In reaching this opinion, the witness reviewed only Appellee's time Affidavit (not in evidence) and file; he did not review Appellee's attorney's time records. R: 17; R: 9. Mr. Blackwell admitted that the result which emerged from the Fifth District on the prior appeal was "not very grand for either side". R: 10. The witness was asked whether Appellee's practice of having (and seeking court-awarded attorneys fees for) three attorneys at trial was reasonable. While Bruce Blackwell did not find the use of and billing for three attorneys at trial unreasonable, he did allow that he wished he "had the luxury , sometimes, of doing that...". R: 26 (emphasis added). Nevertheless, he felt an appropriate attorneys fee was $76,000.00. Id.

Appellee's second witness was Eric Ludwig. Early in his examination of Mr. Ludwig, Appellee's counsel Daniel Rooney, by his own statements, recognized that his Affidavit of Attorneys Time and Fees was not admitted in evidence. R: 28. (In fact, Appellee's

counsel never did tender the Affidavit into evidence.) Based on his review of the Affidavit, Mr. Ludwig testified that 800 to 810 of the hours claimed were reasonable. R: 29. He believed that a reasonable fee for Appellee's attorneys would be $76,000 to $80,000. R: 31.

Appellee's final expert witness was Donald E. Christopher. Mr. Christopher said he based his opinion on reviewing Appellee's Time Affidavit. R: 42. In his opinion, 780 of the hours claimed expended were reasonable, and $82,500 would be a reasonable fee for the court to award. R: 43; R: 45.

To establish the terms of Appellee's contract with his attorneys and the time allegedly invested in the prosecution of the case by his lawyers, Appellee called two witnesses: the Appellee himself and David Simmons, Appellee's lead counsel at trial. The Appellee testified he was given a professional courtesy discount on his attorneys fees, but that his agreement with his attorneys was that attorney's fees would be sought from the Court at the full rate, i.e., without the discount, and, if this windfall was awarded, the difference would belong to Appellee's lawyers. R: 78-79. Appellee also stated that he paid $14,149.67 in costs.

Mr. Simmons testified that he had reviewed the Affidavit of Attorney's Time and Fees and that he was familiar with the attorneys referenced in its attachments. R: 94. When Mr. Simmons was asked how many hours were invested by his firm in prosecuting Appellee's claim, Appellants objected, based upon the hearsay nature of the affidavit which was signed by Mr. Rooney, not Mr. Simmons. R: 95. The trial court admitted the testimony over Appellants objection, apparently based on the business records exception. R: 96. Mr. Simmons then testified that 838 hours had been invested in prosecuting this case

through the Judgment N.O.V. Id .

On cross-examination, the source of Mr. Simmons ability to testify to the amount of the time other attorneys had spent on the case was questioned. As an example, he admitted that he did not watch Daniel P. Rooney spend 4.9 hours working on this case on July 1, 1983. R: 109 (Line 22); R: 110 (Line 9). After much verbal jousting, he finally admitted that he could not testify as to his personal knowledge that Mr. Rooney spent 4.9 hours on that date. R: 111. When asked whether he would admit that he could not testify to the exact amount of time any of the other various attorneys in his firm spent in prosecuting Appellee's case, Mr. Simmons denied that he could not; then he admitted he could not. R: 111. Later he stated that Appellants could "take a minute to let [Mr. Rooney] testify that his hours are accurate". Id. When asked whether associate attorney T. Kevin Knight was the last word concerning the amount of time he spent in this case, Mr. Simmons denied the truth of that assertion, although he could not testify from personal knowledge that the time shown for Mr. Knight was actually spent. R: 113-114. Mr. Simmons also finally admitted that there were periods of time when he was not supervising Mr. Milbrath (R: 115-117); or Susan Gibson. (R: 118).

As for the Affidavit of Attorneys Time, Mr. Simmons said it was prepared by Mr. Rooney and himself. R: 120. Mr. Simmons gave the time slips to Mr. Rooney, told him to prepare the affidavit, and then he looked over it. R: 120. Mr. Simmons did not, however, verify the accuracy of the items shown on the affidavit. In fact, he did not match any of the firm's time slips against the time shown on the Affidavit. Further, Mr. Simmons did not even verify that the time shown for him in the Affidavit matched his own time slips. R: 120.

Appellants offered three witnesses in rebuttal of Appellee's claim for attorneys fees. These witnesses were necessay as the Trial Court had allowed expert testimony by Appellee's witnesses without the Affidavit of Attorney's Time and Fees being introduced into evidence over objection of Appellant. It was apparent that the Trial Judge was going to ignore objections and rule on the testimony even though the Affidavit was never offered into evidence after repeated objections. Bruce Bogin, Appellee's first expert, testified that Appellee's attorneys should have been able to secure the result they obtained (gaining the return of the $25,000.00 deposit) in approximately 100 hours. R: 54. Based upon that figure and the results obtained, Mr. Bogin believed a reasonable fee for Appellee's attorney would be between $10,000.00 and $12,000.00. Id. Mr. Bogin based his opinion on the dictates of Florida Patient's Compensation Fund v. Rowe , 472 So.2d 1145 (Fla. 1985). R: 55.

Appellants second expert was Frederic B. O'Neal. Mr. O'Neal testified that a reasonable fee for Appellee's attorneys would be $10,000.00. R: 64. Mr. O'Neal arrived at his opinion by evaluating Appellee's time Affidavit, the Appellee's Complaint and his initial demand in light of the dictates of Rowe . Id. He found that he had difficulty properly seperating hours spent on issues Appellee did not prevail on from the good faith breach of contract issues because the Affidavit was inadequately detailed. R: 65. He eventually decided to determine what a reasonable fee would be if Appellee had set out to obtain a return of his deposit and had prevailed on that claim. R: 66.

Mr. O'Neal noted that a number of the items on Appellee's time Affidavit appeared unreasonable on their face. Id. In the final

analysis, however, it was Appellee's conduct of the case which Mr. O'Neal found unreasonable:

BY MR. O'NEAL:

... I do have a problem with the -- looking over the scope of the case and how it developed, it seems to me right off the bat the case started off -- well, the demand letter was for $750,000.00.

The allegations in the Complaint were fraud, misrepresentation, et cetera, et cetera, so immediately the case balooned and became a very, very major case in comparison with what the end result was.

And hindsight being 20/20, it's -- I think, in my opinion, that a reasonable way of approaching this case would not be to immediately declare nuclear war and allege fraud and misrepresentation, et cetera, et cetera, but try to resolve the one claim in which they ultimately were responsible.

The deposit --

I think the amount spent was unreasonable with regards to the actual time per the notations here; and, two, the way the case was handled. I think it was handled unreasonably. I think they (Appellee and Appellee's attorneys) went after flies with sledgehammers. ...

If you have a situation where there's a dispute, as I understand it, over the meaning of a key legal phrase used in the contract and the underlying facts are pretty well agreed upon as to what the actual expenses were and was the money paid for those particular items, it could have been brought -- and it should have been brought in my opinion, in a manner of which basically you could have stipulated to the underlying facts and then there would be a question of law in how you determine the law.

In light of those facts, it could have been brought as a declaratory relief action or similar contract.

But if you immediately escalate and want [$750,000.00] in compensatory [damages] and also punitive, you force the other side, almost, to react in a similar manner and the case becomes what it became...

R: 67; R: 69.

Appellants' trial attorney, Charles M. Holcomb, Esquire, testified last. He believed the trial was delayed because Appellee's attorneys chose to endlessly repeat evidence and because Appellee had failed to list his exhibits in his Pre-Trial Statement, with the result that Appellants' counsel had to examine Appellee's exhibits for the first time at trial. R: 126; See PR: 1789-1792. Appellee's counsel claimed the exhibit list had been attached to their Pre-Trial Statement. R: 34.

The Appellee did not offer any testimony to establish the amount of time invested by Appellee's experts on Appellee's behalf, nor did any of the experts testify at the jury trial of this cause concerning the time they spent. The Affidavit of Attorney's Time was never offered or received into evidence. The Affidavit (A: 6-15) did not even break out the total hours of time allegedly spent by each attorney nor the hourly rate at which the time was billed. The billing rate was "ranging from $70.00/hour to $100.00/hour." The attorneys were not adequately identified or the services adequately identified. The Trial Judge could not have determined the "Lodestar" by use of the Affidavit even if it has been introduced into evidence. The Affidavit of Taxable Costs was never offered or received into evidence. No time records of Appellee's attorneys were ever offered

or received into evidence. No invoices, time records, receipts or cancelled checks for alleged costs were ever offered or received into evidence. None of the alleged experts whose costs Appellee wished to tax were called to testify, either as to the time they spent on behalf of Appellee or the amount of their fee. No one was called to testify to the reasonableness of the experts' fees claimed as costs. Despite the presence at the attorneys fees hearing of Mr. Rooney, Mr. Milbrath [R: 54] and Mr. Simmons, Appellee's three counsel at trial, only Mr. Simmons testified to the amount of time invested in the prosecution of the case by his firm. Mr. Simmons never testified to the number of hours he spent in prosecuting the case. Mr. Simmons purported to testify to Mr. Rooney's and Mr. Milbrath's time, as well as that of all of the other partners and associates of his firm who were not present, even though he had not reviewed the time records of his firm, and was obviously taking Mr. Rooney's word for what the time records of the firm allegedly showed.

Appellee will claim the trial court precluded Daniel P. Rooney from testifying, supposedly because the testimony he would present would be repetitive to his Affidavit as he alleged in his Answer Brief. (AB: 5). Appellee never proffered Mr. Rooney's testimony, nor was the Affidavit ever offered or received into evidence. The burden of proof was upon Appellee and Appellant was not obliged to make Appellee's case for him.

On page 10 of his Answer Brief, Appellee cites testimony of David Simmons which he claims shows Mr. Simmon's personal knowledge of the time records of Appellee's attorneys, Mr. Simmons had admitted, however, that he had not verified the accuracy of the Affidavit of Attorneys Time by comparison with the firm's time records. R: 120.

In fact, from Mr. Simmons testimony, it is readily apparent he had no personal knowledge of the total number of hours actually expended by his law firm.

Appellee also contends that the trial Court deferred action on the Motion for Costs on Page 11 of his Answer Brief. The Court did no such thing:

> BY THE COURT: Okay, Fine.
> Now, what I've done, I have put some little pencil x's here of some things (items of costs) that I definitely wouldn't allow and some x's to things that are subject to finding out whether I would allow them or not.
> So, let's go on and finish up our hearing and I'll give you my ruling on costs. .....
> R: 128.

In its ruling, the judge stated he would provide counsel with his copy of the cost Affidavit with his x's showing what was allowed and disallowed, ordered transmittal of copies of all bills which Appellee sought to tax, and asked the parties to come to some agreement on the remaining items. R: 128-129. The Court did not defer ruling on costs. It ruled for and against certain items and left others open to question. It was the decision to leave certain items open for further evidence and not requiring personal testimony of experts as to costs that Appellee objected to.

As a result of the hearing on May 28, 1986, the Trial Judge entered a Final Judgment for attorney's fees for the sum of $68,391.00 against Appellants. A: 4-5..

Appellants appealed the second Judgment based in part upon the fact that there was no competent substantial evidence introduced upon which to sustain the award of attorney's fees, that the criteria for award of fees was not followed by the Trial Court and the reservation of further hearings for costs was error. The Fifth District Court of

Appeal issued its opinion on May 12, 1988, holding the Appellee was not entitled to attorney's fees as a result of the Court's first opinion in the first appeal, citing res judicata and the law of the case as the basis thereof. The Fifth District did not address the arguments made in the briefs of the parties or argued before the Court. The Court reasoned that Appellee's refusal to close on the Contract was repudiation of the Contract tantamount to recission and thus, no other damage claims of attorney's fees could be claimed as those issues were foreclosed by the first opinion were based on res judicata and law of the case determinations.

Appelee filed his motion and request for rehearing en banc on May 27, 1988. Appellants filed their response and Motion to Strike or Deny Motion for Rehearing June 6, 1988. The Fifth District denied the Motion for Rehearing on June 23, 1988, and Plaintiff then filed a Notice to Invoke the Discretionary Jursidiction of this Court on July 5, 1988. The Court accepted jurisdiction on October 4, 1988.

Two statements of Appellee is his Initial Brief on The Merits are misrepresented and should be noted by the Court. On page 7, second paragraph, Appellee states "and Judge Pfeiffer, finding that Sellers (Appellant) had been a big factor in the escalated costs of litigation..." Appellant cites for this his Appellees Appendix, Page 1-4). Such statement is not in the appendix and was not found by Judge Pfeiffer in the Final Judgment awarding attorney's fees (A: 4-5). Appellee also states in the third paragraph on the same page 7, "at oral argument, the unreasonablesness argument was abandoned." Such statement is a misrepresentation to this Court. What the Appellant stated was that the amount of the hourly fee customary in the community for Associates and Partners in Appellee's counsel's firm

did not appear unreasonable. However, the number of total hours were unreasaonable and not apportioned. Further, by use of the Affidavit "filed" but not in evidence, no Lodestar could have been determined by the Trial Judge as it showed the hourly rates to range "between $70.00/hour and $100.00/hour." Further the time spent by each attorney was not totaled or segregated. Therefore no specific rates could be applied to any specific hours of either attorney to obtain the Lodestar.

POINT I

THE FIFTH DISTRICT COURT OF APPEAL WAS CORRECT IN ITS RULING DENYING ATTORNEY'S FEES AND COSTS TO APPELLEE.

The Appellee, KATZ, asks this Court to apply the rules of construction and interpretation of contracts to find that the attorneys fees provision of a repudiated contract affords him recovery. In that regard he cites Sousa v. Palumbo , 426 So. 2d 1072 (Fla 4th DCA 1983).

It is elementary law in Florida that attorneys fees may be awarded only where authorized by contract, statute, or for services by an attorney in bringing into the court an equitable fund or estate. Estate of Hampton v. Fairchild - Florida Construction Company , 341 So. 2d 759 (Fla 1976), citing Kittel v. Kittel , 210 So. 2d 1,3 (Fla 1967).

In interpretation and construction, a contract must be read and considered as a whole. Triple E Development Co. v. Floridagold Citrus Corp. , 51 So. 2d 435 (Fla 1951); Florida Power Corp. v. City of Tallahassee , 18 So. 2d 671 (Fla 1944).

Whether a contract is entire or divisible depends upon the intention of the parties, which may be determined by construction of the terms of the contract itself and by the subject matter to which it has reference. Local No. 234 v. Henley & Beckwith, Inc. , 66 So. 2d 818 (Fla 1953).

A contract should be treated as entire and indivisible when, by consideration of its terms, subject matter, nature and purpose,

each and all of its parts appear to be interdependent and common to one another and to the consideration. Local No. 234, supra.

As to dependent and independent covenants, covenants are always considered dependent unless the contrary intention appears. In a bilateral contract, the obligations of the parties are ordinarily mutual and dependent. In doubtful cases the Courts are inclined to treat the covenants as dependent, since the contrary construction would allow one party to have the benefits of a contract without performing it. 11 Fla Jur 2d CONTRACTS Section 142, citing: Walker v. Close , 125 So. 521, (Fla 1929); Sanford v. Cloud , 17 Fla 532 (Fla 1880) and Pratt v. Weeks , 1 F Supp 953 (1932); VOL 17A, C.J.S., CONTRACTS , Section 344(b).

In the instant case no contrary intention appears. The provision as to attorneys fees is neither severable nor independent. In the event the parties had intended the provision to be so, the intention would have been reflected in the language of the provison. For example, the following language could support a finding that an attoneys fees provision was severable or independent:

> Attorneys fees:
> In the event any litigation shall arise as a result of the negotiation of this contract, representations by either party, failure of a contingency or condition precedent, or if it is determined that no Contract ever existed, and whether the action filed is based upon contract or tort or other legal theories, the prevailing party in such litigation shall be entitled to recover reasonable attorney's fees and costs from the non-prevailing party. This Agreement is independent of the other terms and conditions of this Contract and may be maintained by either party regardless of any ruling by a court that no contract was brought into existence between the parties hereto.

In order to find the attorney's fees provision in the contract in the instant case to be independent, a court would have to

find that intention on the part of the parties. Local No. 234 , supra.

That clearly was not the determination of the Fifth District Court of Appeal in its opinions rendered in 1985 or 1988.

As the 5th DCA has noted, it had determined in the first opinion that because the Appellee had repudiated the agreement and recovered the deposit he could not thereafter seek to recover damages under the agreement. See Van Der Noord v. Katz , 526 So. 2d 940 at 941 (Fla 5th DCA 1988). Further, that the Appellee was precluded by res judicata and the law of the case from seeking further attorney's fees or costs and could not have a second bite at the apple. ID , Page 942.

The Appellee did not request rehearing or appeal to the Florida Supreme Court on that point in the first Appeal. It may have been that the full impact of the court's decision in the first Appeal was not realized by the parties prior to the second opinion. Thus, the request by the Appellee for consideration of attorney's fees and costs was not objected to by Appellant. The 5th DCA opinion then became the law of the case. the Appellee now seeks to overturn the second decision, which merely recited Leitman v. Boone , 439 So 2d 318 (Fla 3rd DCa 1983) in passing but was based primarily upon the law of the case and res judicata.

In Van Der Noord , the 5th DCA states at page 941, that after the first appeal the Appellee was not entitled to a new trial on the issue of damages for breach, and that holding was binding upon the trial court.

The trial court's subsequent award of damages contrary to the prior appeallate ruling was the basis of the 5th DCA's second opinion,

not the existence or non-existence, dependence or independence, or severability of a contract clause for attorney's fees.

Nevertheless, in the instant case, to allow repudiation of the contract and recovery of attorney's fees by the Appellee would allow benefits without performance, in the absence of any indication that the parties intended the provision to be independent or severable. Clearly this would be contrary to the rules of contract construction and interpretation as set forth above.

The language of the attorney's fees provision in question does not set forth its independence or severability and such intention cannot be drawn from the language within the provisions.

The Appellee argues that the 5th DCA should have applied the rationale of Sousa v. Palumbo, supra. However Sousa dealt with parties who sought to enforce or interpret the rights or obligations of parties to a contract which was found to exist but to be unenforceable.

In the present case the 5th DCA held that the Appellee's repudiation of the contract also repudiated his rights to the benefits of the contract. This was a voluntary decision by the Appellee. Repudiation of the contract and its benefits applies equally to all provisions unless the contract is severable or contains independent covenants. No such intent can be determined from the contract provisions here.

The 5th DCA's reference to Leitman reflects the Court's determination that the Appellee's voluntary repudiation of the contract extinguished all of the provisions. In Leitman the court found that where a contract did not exist legally an attorney's fees provision could not be enforced unless it could conclude that the

attorney's fees provision was a separable mini-contract, enforceable in and of itself. at 319 . The 5th DCA referenced this rationale when it stated:

> If a contract never existed obviously no one is a party to it and no one is entitled to recover attorney's fees based on some provision in it. See Leitman v. Boone , 439 So. 2d 318 (Fla 3rd DCA 1983).

Application of the Leitman reasoning here is not flawed. There is nothing to indicate that the attorney's fees provision is meant to survive independently or meant to be severable. Sousa does not conflict with this reasoning. In Sousa the contract was not repudiated. It "existed" but was not enforceable as all conditions precedent required to make the contract enforceable had not occurred. The attorney's fees provision in Sousa was not required to be an independent covenant, a mini-contract or a severable provision to be enforceable. This is so because the contract itself had not been repudiated or found to be non-existent. It existed but was unenforceable. The condition precedent to its enforceability had not occurred to obligate the other party to perform the contract.

In the instant case however, the 5th DCA rightly recognized that the repudiation of the contract is more analogous to the reasoning in Leitman than in Sousa . In Leitman and Van Der Noord the attorney's fees provision has to survive independently to be enforceable.

The Appellee also argues that Florida Law 88-160 amending Section 57.105, Florida Statutes, sets forth as public policy a legislative mandate that all attorney's fees provisions in contracts are to upheld and enforced. Chapter 88-160 however, is plainly an equalization of remedy, affording both parties to a contract the right

to a reasonable attorney's fee when the contract provides recovery for only one party. Classic inequities sought to be cured by the legislature are clauses for attorney's fees in promissory notes and leases as an example, where the holder or lessor is entitled to recover fees upon prevailing but the maker or lessee have no such right upon prevailing. Law 88-160 has not set public policy or altered case law to afford attorney's fees to the prevailing party in every instance. Law 88-160 does not cause attorney's fees to be recoverable to contracting parties where there is no such provision in the contract. Law 88-160 would not alter the decision of a court where the contract was found to have been repudiated, or not exist, or where an attorney's fees provision was not found to be independent of the contract.

Suits based upon fraud in the inducment of a contract with a provision allowing attorney's fees to the prevailing party in litigation "arising out of the contract," have been recently held by the Florida Courts not to allow attorney's fees because the suits were based upon tort and not enforcement of the contract. Hopp v. Smith , 520 So 2d 673 (Fla 4th DCA 1988); Location 100, Inc., v. Gould S.E.L. Computer Systems, Inc. , 517 So 2d 700 (Fla 5th DCA 1987); Dade Savings and Loan Association v. Broks Center Limited , 529 So 2d 1775 (Fla 3rd DCA 1988). It is clear that the mere presence in a contract of a clause such as the one found in the contract between Appellant and Appellee, does not automatically afford recovery of attorney's fees to the prevailing party in every situation where litigation is filed in reference to the contract.

POINT II

THE APPELLEE FAILED TO OFFER ANY COMPETENT, SUBSTANTIAL EVIDENCE OF THE AMOUNT OF TIME HIS ATTORNEYS SPENT IN PROSECUTION OF THIS MATTER THROUGH JUDGMENT N.O.V., AND AS A RESULT IS NOT ENTITLED TO ANY AWARD OF ATTORNEYS FEES, NOR IS HE ENTITLED TO A "SECOND BITE AT THE APPLE" BY A REMAND FOR RE-HEARING, JUST AS A PARTY WHO FAILS TO PRODUCE COMPETENT, SUBSTANTIAL EVIDENCE OF OUT OF POCKET DAMAGES SUSTAINED AS A RESULT OF A PARTY'S BREACH OF CONTRACT IS NOT ENTITLED TO A NEW TRIAL ON SUCH DAMAGES.

This court, by acceptance of discretionary review on the basis of conflict with prior decisions of District Courts of Appeal, has the duty and responsibility to consider the case on the merits and decide the points in question as though the case had originally come before this Court on appeal. This court should dispose of all contested issues. Smith v. Smith , 160 So 2d 697 (Fla. 1964); Kelly v. Scussel , 167 So 2d 870 (Fla. 1964); St. John v. Michaels , 178 So 2d 193, (Fla. 1965); D'Agostino v. State , 310 So 2d 12 (Fla. 1975); Brown v. State , 206 So 2d 377 (Fla. 1968); Foley v. Weaver Drugs, Inc. , 177 So 2d 221 (Fla. 1965); Kennedy v. Kennedy , 303 So 2d 629 (Fla. 1974); Negron v. State , 306 So 2d 104 (Fla. 1974); Friddle v. Seaboard C.L. R. Co. , 306 So 2d 97 (Fla. 1974); Florida Constitution, Article 5, Section 4.

Even if this court reverses the Fifth District Court of Appeal by approving Sousa v. Palumbo , supra ,. and rejecting Leitman v. Boone , supra , the Defendant is still entitled to prevail on the merits based upon the matters argued herein and in the briefs filed with the Fifth District and argued but not ruled upon by that Court.

If this court reverses the Fifth District Court of Appeal but

declines to determine the case on the merits, then it should remand the case to the Fifth District Court of Appeal for determination on the merits. North Shore Hospital, Inc., vs. Barber , 143 So 2d 849 (Fla. 1962).

In May, 1985, this court waded into the morass of court awarded attorneys fees in Florida Patient's Compensation Fund v. Rowe , 472 So.2d 1145 (Fla. 1985). Its entry into the debate about attorneys fees was prompted by the "great concern... focused on a lack of objectivity and uniformity in court-determined reasonable attorneys fees". 472 So.2d at 1149. This concern and debate was and is disquieting, because it reflects poorly upon the courts and our system of jurisprudence, as the Court had long recognized:

> There is but little analogy between the elements that control the determination of a lawyer's fee and those which determine the compensation of skilled craftsmen in other fields. Lawyers are officers of the court. The court is an instrument of society for the administration of justice. Justice should be administered economically, efficiently, and expeditiously. The attorneys fee is, therefore, a very important factor in the administration of justice, and if it is not determined with proper relation to that fact it results in a species of social malpractice that undermines the confidence of the public in the bench and bar. It does more than that. It brings the court into disrepute and destroys its power to perform adequately the function of its creation.
>
> 472 So.2d at 1149-50, quoting Baruch v. Giblin, 164 So. 831, 833 (Fla. 1935) (emphasis added).

As a starting point, the Court focused on the Code of Professional Responsibility:

> In determining reasonable attorneys fees, courts of this state should utilize the criteria set forth in Disciplinary Rule 2-106(b) of The Florida Bar Code of Professional Responsibility:
>
> (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.

472 So.2d at 1150, citing Disciplinary Rule 2-106(b) of the Florida Bar Code of Professional Responsibility (footnotes omitted).

Having identified the considerations to be utilized in awarding fees, the Court then tackled the task of establishing a framework of analysis for attorneys fees deliberations. The Court adopted the federal "lodestar" approach. 472 So.2d at 1150. The first step of the process is to determine the number of hours reasonably expended by the attorneys seeking fees. Id. Of course, to determine how many hours are reasonable, the attorneys must first provide the court with competent, substantial evidence of the time actually spent, as the Court recognized:

> Florida courts have emphasized the importance of keeping accurate and current records of work done and time spent on a case, particularly when someone other than the client may pay the fee. To accurately assess the labor involved, the attorney fee applicant should present records detailing the amount of work performed. Counsel is expected, of course, to claim only those hours that he could properly bill to his client. Inadequate documentation may result in a reduction in the number of hours claimed, as will a claim for hours that the court finds to be excessive or unnecessary.

Id. (emphasis added)(citations omitted).

The next step in the lodestar process is to determine a reasonable hourly rate for the attorney seeking fees. Id. After determining the reasonable hourly rate and the number of reasonable hours, the court is supposed to multiply the two to arrive at the "lodestar". Id. at 1151. The lodestar can only be determined if the number of reasonable hours for each attorney are first computed and then multiplied times that attorney's reasonable hourly rate. After arriving at the "lodestar", the Court must consider whether the fee should be increased or decreased based upon the "results obtained" and a "contingency risk" factor. Id. The final fee award is governed by two further precepts: first, the actual fee agreement between the party and his attorney does not control the fee award, because otherwise courts would be placed in the position of enforcing exorbitant fee contracts made by unscrupulous parties; and second, under no circumstances should the court awarded fee exceed that which the prevailing party agreed to pay. Id. Thus, this Court made it clear that in cases litigated on an hourly fee basis, the fee actually incurred by the prevailing party is the "ceiling" for the court's award.

In determining the results obtained, the Court properly determined that a party should not receive fees for litigating issues the party lost on:

> When a party prevails on only a portion of the claims made in the litigation, the trial judge must evaluate the relationship between the successful and unsuccessful claims and determine whether the investigation and prosecution of the successful claims can be separated from the unsuccessful claims. In adjusting that fee based upon the success of the litigation, the court should indicate that it has

considered the relationship between the amount of the fee awarded and the extent of success. Id.

In summary, this Court requires the following determinations from a trial court awarding attorneys fees:

(1) number of reasonable hours expended (by each attorney claiming fees);

(2) reasonable hourly rate for the type of litigation involved (for that attorney);

(3) multiplication of the first two factors to reach the "lodestar"; and

(4) whether enchancement or reduction is appropriate based upon contingency risk and results obtained.

Id. at 1151-1152.

The courts of Florida have also long recognized that a hearing on attorneys fees is subject to the same rules of conduct and evidence as the trial which preceeded it:

> In all litigation involving professional fees proof is required of the nature of, and the necessity for, the services rendered, and the reasonableness of the charge made therefor. In this respect the legal profession stands on the same plane with other professions.
>
> The reasonableness of the attorney's fee is not the subject of judicial notice, neither is it to be left to local custom, conjecture or guesswork.
>
> To those lawyers whose practice brings to them more than an occasional suit in which the fee is set by the court, the routine of giving testimony detailing the services and the proving of the value of the services may seem tedious, monotonous or even distasteful. Certainly the hearing of such proof by the trial judge day after day, week after week, may become a routine humdrum which does little, if anything, to add interest to the proceedings. However the parties to the suit, having their day in court, cannot be ignored; such testimony is not routine to them. Neither can the elementary rules of evidence be ignored.

Lyle v. Lyle, 167 So.2d 256, 258 (Fla. 2d DCA

1964)(emphasis added).

Judicial Notice is not intended to fill the vacuum created by failure of a party to prove an essential fact. Moore v. Choctawhachee Electric Co.-Operative, Inc., 196 So 2d 788 (Fla. 1st DCA 1967). The Fifth District Court of Appeal has recognized the duty of the party seeking fees to provide the trial court with competent, substantial evidence when seeking attorneys fees, and has held, quite properly, that where a party seeking fees fails to provide the Court with competent, substantial evidence in favor of the award, that party loses. See Jacobsen v. Jacobsen , 414 So.2d 34 (Fla. 5th DCA 1982).

The Appellee, seeking attorneys fees, naturally had the burden of proving both that services were rendered by his attorneys and the value of those services. See United Services Automobile Association v. Kiibler , 364 So.2d 57 (Fla. 3d DCA 1978). Just as any other judgment, a trial court's judgment for attorneys fees must be supported by competent, substantial evidence. Benitez v. Benitez , 337 So.2d 408 (Fla. 4th DCA 1976). It has long been settled that expert witnesses must testify as to what a reasonable fee would be. See, e.g., Lyle, supra. It has also been settled that each attorney who allegedly rendered the services must testify to what he or she did and Affidavits cannot be used over objecton. Cohen v. Cohen , 400 So.2d 463 (Fla. 4th DCA 1981), In Re one 1972 Volvo Vehicle , 489 So 2d 1240 (Fla. 4th DCA 1986); I n Re Forfeiture of 1978 Cadillac 4-Door , 451 So 2d 1054 (Fla. 4th DCA 1984); Wiley v. Wiley , 485 So 2d 2 (Fla 5th DCA 1986); Morgan v. South Atlantic Production Credit Assoc. , 528 So 2d 491 (Fla. 1st DCA 1988). This is true even though experts testify as to reasonableness and value of services. In Re Forfeiture , supra. Absent competent, substantial evidence of the services

provided by the Appellee's attorneys, Judge Pfeiffer had no authority to award any fee whatsoever. See Jacobsen v. Jacobsen , 414 So.2d 34 (Fla. 5th DCA 1982); Wiley v. Wiley , 485 So 2d 2 (Fla. 5th DCA 1986).

Jacobsen v. Jacobsen , 414 So.2d 34 (Fla. 5th DCA 1982), is especially helpful in this matter, because it also was an appeal from an award of attorneys fees based upon the lack of any competent, substantial evidence of the services provided by the attorney. Ironically, the attorneys fee award reversed in Jacobsen was entered by the Honorable Frederick T. Pfeiffer, the same circuit judge whose award of attorneys fees is under attack in this appeal. In Jacobsen, the Court reversed and awarded Appellee's attorney no fees whatsoever because the attorney failed to produce any competent evidence or testimony detailing the services he rendered. 414 So.2d at 34. Appellants will demonstrate that the evidence in the instant case is similarly deficient, and deserving of the same fate as the judgment in Jacobsen. The Affidavit (never introduced) purported to compile the time records of all attorneys working on the case. It was signed by only one (Rooney) who never testified and none of the other attorneys testified other than David Simmons. He did not even testify as to the number of hours that he spent. Mr. Milbrath and Mr. Rooney were in the courtroom and certainly were available to testify. Presumably, the others were only a short distance away at their office and could be called as the hearing took place over the morning and afternoon as only one half hour was scheduled by Appellee and the Trial Judge tried to use available time between other hearings to complete the testimony.

Appellee can only point to two items which could possibly

constitute evidence of the services rendered by Appellees attorneys: first, the Affidavit of Attorneys' Time and Fees prepared by Daniel P. Rooney, Esquire; and second, the testimony of David H. Simmons, Esquire, Appellee's lead counsel at trial. Both are patently deficient and cannot serve as the basis of any finding regarding either the services rendered or hours devoted by Appellee's counsel.

The Affidavit cannot serve as competent substantial evidence of the services rendered for any number of reasons, the most elementary of which being that it was NEVER OFFERED OR RECEIVED INTO EVIDENCE. Appellee may wish to dispute this fact before this Court, but his attorney's words confirm that it is, indeed, a fact:

BY MR. ROONEY:

Q. Have you had an opportunity to review the file and the affidavits that are in evidence --- excuse me, that have been filed in this action, the Katz versus Underwood Case?

R: 28 (emphasis added).

The Affidavit was never offered or received into evidence. Despite its presence and the references to it in this appeal, there should be no doubt that Appellants objected to it at the attorneys fees hearing (R: 5), and objected to its consideration by the trial court. Since the Affidavit was never offered or admitted into evidence, it is obvious that it cannot serve as competent substantial evidence of the services rendered by Appellee's attorneys, because evidence is:

> Any species of proof, or probative matter, legally presented at the trial of an issue, by the act of the parties and through the medium of witnesses, records, documents, exhibits, concrete objects, etc. for the purpose of inducing belief in the minds of the court or jury as to their contention. Black's Law Dictionary at 498 (5th Ed.), citing Taylor v. Howard, 304 A.2d 891,

893(R.I.)(emphasis added).

The Affidavit, never being offered, certainly was never "legally presented at the trial" on attorneys fees. Being "filed" without authority is not being offered into evidence.

Assuming for the sake of argument that Appellee had offered the Affidavit, it still could never have been properly considered by the trial court. Upon Appellee's first mention of the Affidavit, Appellants objected to the Affidavit as heresay. R: 5. There can be no doubt that the Affidavit, if offered, would have been objectionable heresay:

> "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Section 90.801(1)(c), Florida Statutes (1985).

At trial, Appellee's counsel took the position that the Affidavit was a business record. R: 6. That this Affidavit cannot qualify for the business records hearsay exception is readily apparent from the definition of the exception:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances show lack of trustworthiness....

Section 90.803(6), Florida Statutes (1985).

Appellee's Affidavit is reproduced in its entirety in Appellants Appendix. A: 6-15. The Court will see that the Affiant, Mr. Rooney: a) does not purport to be the custodian or other qualified

witness of these records; b) does not testify that their firm's time records are made at or near the time of the events recorded by a person with knowledge; c) does not testify that the time records are kept in the ordinary course of business; and d) does not testify that it was the regular practice of their firm to make such records. The failing of the Affidavit is fundamental: it fails to lay a predicate for admission of the alleged records. The Affidavit only states that Mr. Rooney "reviewed the billing strips." The absolute requirement that counsel lay the necessary predicate has been addressed by Florida Courts on any number of occasions. One of the most elouquent pronouncements on the issue is in National Car Rental System, Inc. v. Holland , 269 So.2d 407 (Fla. 4th DCA 1972):

> The probability of trustworthiness, which is the basic justification for permitting business records into evidence as an exception to the hearsay rule, can be satisfactorily assured only if the trial court requires as a predicate that (1) the custodian or other qualified witness testify to its identity and the mode of its preparation, and (2) it is further shown that the entry was made in the regular course of business at or near the time of the act, condition or event of which it purports to be a record, and finally, (3) the court is satisfied that the sources of information, method and time of preparation were such as to justify its admission. ... We have discussed the point because we have noted from time to time a tendency to view anything labelled "business records" as being thereby admissible under the statute without more.
>
> 269 So.2d at 413(emphasis added).

Appellee's Affidavit fails to establish the necessary predicate for the business records exception, and could not have been properly admitted over a hearsay objection - had the Affidavit ever been offered. There can be little doubt that Appellee fell into the trap the National Car Court warned against. The Affidavit is not evidence, it cannot support the trial court's attorneys fees award, and it was improper for the trial court to consider it in determining

an attorneys fee award. Further, the Affidavit is not the business records (i.e. the time slips). It purports to be a summation only of the actual records allegedly made in the course of business by several different attorneys. It is well known law that summary of past transactions will not qualify as a business record. Beckerman v. Greenbaum , 439 So 2d 233 (Fla. 2nd DCA 1985). When records are made by an alleged records custodian from other records made by others and which are not in evidence, such summary or record is inadmissible. Austria v. Donovan , 169 So 2d 377 (Fla. 2nd DCA 1964); Smith vs. Frisch's Big Boy, Inc. , 208 So 2d 310 (Fla. 2nd DCA 1968).

Having disposed of the Affidavit, Appellants now turn to the testimony of the only attorney of Appellee who testified: David Simmons. His testimony is similarly deficient. At no time did Appellee lay the necessary foundation through Mr. Simmons to introduce any business records, nor were any offered . In fact, Mr. Simmons could not testify to the total hours invested by his firm because he never examined the alleged records:

BY MR. BETTIN:

Q. Who actually prepared this affidavit, Mr. Simmons?

A. Dan [Daniel P. Rooney, Appellee's counsel at the attorneys fees hearing] and I both worked on it. I took the actual billing records, gave them to him, told him to take the bills, photocopy them, put them one after another, the ones that are applicable here.

Q. And then, once that was all done, you reviewed the work that he'd done?

A. Yes, I did.

Q. Did you match up each individual bill with each item on the list [Exhibit A to the Affidavit]?

A. I did not do that. I reviewed it and asked him [Mr. Rooney] to make sure everything was correct.

A. So you have not gone through and matched your individual billing slips as against each item on this list?

A. No, I have not done that.

R: 119-120 (emphasis added).

It seems obvious that Mr. Simmons could not testify to the hours spent by his firm if he never reviewed the records which supposedly document those hours. Moreover, the business records exception allows the introduction of the records, it does not allow a witness to testify to what the records say. Cullimore v. Barnett Bank of Jacksonville , 386 So.2d 894 (Fla. 1st DCA 1980); In the Interest of G.J.N., a child , 405 So.2d 787 (Fla. 4th DCA 1981). Further, in addition to the actual time strips, the attorney expending the time must testify as to such time and be subject to cross-examination as to why the time was spent, its relation to the issues in the case and time spent on each issue. Otherwise, no expert could render an opinion as to the "reasonableness" of the time spent as well as its value as required under Rowe , supra.

Appellee has only two items to address the necessity of proving what services his attorneys rendered: the Affidavit of Attorney's Time and Fees, and David Simmons testimony. See objections (T-95). The Affidavit was never offered as evidence; even if it had been, it was objectionable as hearsay and could not qualify for the business records exception. As for Mr. Simmons testimony, it is obvious that he was not competent to testify on the issue because he never reviewed the records. His testimony makes it clear he took the word of Mr. Rooney as to what the records showed. He did not even

testify as to the total number of hours he spent or his actual rate charged the client for each hour.

The trial court further erred in considering the testimony of Appellee's expert witnesses, Bruce Blackwell, Eric Ludwig and Donald E. Christopher. When Appellee called Bruce Blackwell to testify before any of the alleged evidence of hours expended was produced, Appellants objected to Appellee offering any expert testimony without first establishing the proper predicate. R: 6-7. The trial court decided to take Appellee's experts out of order , i.e., their testimony would be considered only if Appellee laid the proper predicate through later testimony. R: 7. Because Appellee failed to lay the necessary predicate, the testimony of Appellee's experts could not properly be considered by the trial court.

The trial on a motion for attorneys fees is supposed to be conducted just like any other trial: if a party fails to put on a proper case, that party loses. Appellee failed to introduce any competent, substantial evidence of the work his attorneys performed, which also means he failed to lay the necessary predicate for the court to consider the testimony of Appellee's experts. Where a party fails to introduce competent, substantial evidence of the time expended by his attorneys, an absolute requirement under Rowe , that party is not entitled to a "second bite at the apple". The final judgment for attorneys fees should be reversed, as was the attorneys fees award in Jacobsen v. Jacobsen , 414 So.2d 34 (Fla. 5th DCA 1982).

Appellee will likely contend there was competent substantial evidence of the time spent by his attorneys, based upon the Affidavit of Daniel P. Rooney and the testimony of David Simmons and that David Simmons is qualified to testify to the total number of hours spent by

attorneys of his firm, based upon McCoy v. Rudd , 367 So 2d 1080 (Fla 1st DCA 1979). Mr. Simmons had no personal knowledge of the total hours shown by his firms's time records because he worked "in conjunction with Daniel Rooney in preparing the Affidavit." AB: 18. Mr. Simmons admitted he gave the time slips to Mr. Rooney, told Mr. Rooney to put them in order, told Mr. Rooney to prepare the Affidavit, but never verified that the Affidavit and time slips agreed. R: 120. In fact, Mr. Simmons told Mr. Rooney to "make sure everything was correct". Id. The case cited of, McCoy v. Rudd , supra, does not support the admission of Mr. Simmons testimony. McCoy reveals a court admitting expert witness testimony based upon a hypothetical question, which is clearly permissible. In McCoy , the Andrew Rudds sued their neighbor, Charle McCoy, for negligence regarding a fire which destroyed three outbuildings and personal property on the Rudds property. 367 So 2d at 1081. The trial court permitted an estimator to testify to the cost of repacing the destroyed buildings, because his testimony was based upon plans prepared by an architect in conjunction with the owner, presumably Mr. Rudd, to rebuild the buildings exactly as they had been before the fire. Id. The evidence before the trial court showed that Mr. Rudd participated in the acquisition of the materials for and the construction of the buildings. Id. That case is in no way analogous to the case at bar.

POINT III

THE TRIAL COURT'S AWARD OF THE ENTIRE AMOUNT OF ATTORNEYS FEES SOUGHT BEARS NO RATIONAL RELATIONSHIP TO THE RESULT OBTAINED BY APPELLEE'S ATTORNEYS AND SHOULD, THEREFORE, BE REVERSED.

In its final judgment, the trial court found that all 838 hours claimed by Appellee's attorneys were reasonably expended. R: 212. Based upon this finding, the court awarded Appellee 100 cents on the dollar of attorneys fees sought, granting a judgment for the full $68,391.00 demanded. Id.

Appellee only recovered $25,000.00 as a result of the trial court's Judgment N.O.V. At trial, however, Appellee demanded twenty-four times that amount, $600,000.00! R: 183. Even then, the victory of Judgment N.O.V. was only a half-a-loaf: Appellee lost any chance of recovering out of pocket expenses as damages because the evidence of those expenses presented at trial was wholly speculative. R: 202. Appellee prevailed on only one of four claims, and then only on a portion of that claim, yet the trial court found Appellee's attorneys were entitled to a fee of $68,391.00. R: 212.

The trial court's finding that the entire amount demanded was a reasonable fee is contrary to Florida law, which requires a rational relationship between the beneficial value of the attorneys services and the fee award. Ruwitch v. First National Bank of Miami , 327 So.2d 833 (Fla. 3d DCA 1976). In Ruwitch , the Third District Court of Appeal reversed (for the second and final time) an attorneys fee award it felt was unreasonable in light of what the bank's attorneys accomplished. At trial, a judgment of $120,000.00 was obtained. The parties stipulated that, based upon the judgment amount, a reasonable fee would be $17,500.00. 327 So.2d at 833. The Third District changed the equation by reducing the judgment to $22,352.46, and

remanded for a new determination of attorneys fees, based upon the lesser judgment. The trial court then entered the $15,000.00 judgment which was the subject of the 1976 Ruwitch appeal. This second judgment was reduced to $8,000.00 by the appellate court, because the lesser amount was "reasonable and proper" based upon the result obtained. Id.

In the instant case, Appellee recovered only 4.1667% of the total amount of damages claimed. Even if the lesser figure of $400,000.00 breach of contract damages demanded is used, Appellee still only recovered 6.25% of his demand. Appellants do not argue here that Appellee's attorneys should only receive $4,274.44, or 6.25% of his attorneys fee demand, assuming arguendo Appellee presented sufficient evidence to justify any award. Surely, however, the attorneys fee award must take into account all of the issues Appellee lost on. He demanded and abandoned specific performance of the contract at a lower price. He demanded and abandoned recission. He demanded $600,000.00 in damages in fraud, but failed to convince either the jury or the trial court that he had proven fraud. He demanded $400,000.00 in damages for breach of contract, but recovered only his deposit of $25,000.00, losing his chance to recover out of pocket expenses by failing to put on any competent, substantial evidence of such damages at trial.

Appellee did not file suit in this case, he declared war. Appellee's initial demand, as shown by Exhibit B to his Complaint, was for $750,000.00 or a reduced contract price. PR: 1582-1626; A: 18-20. Appellee filed a motion to hold Appellant's counsel in contempt because a non-party failed to sign his deposition and provide copies of his work files. R: 193-197. Appellee's attorneys are seeking fees for preparing that Motion. A: 10 (8/9/84 entry of DPR). Appellee had

three attorneys present throughout the trial of this cause [Daniel P. Rooney (DPR), David H. Simmons (DHS), and Stephen D. Milbrath (SDM)], one of whom never examined a witness or made an argument: Daniel P. Rooney. Yet Appellee was charged and seeks a award of fees for Mr. Rooney's time, along with the others. A: 7. Even Appellee's witness, Bruce Blackwell, who of course did not find this course of conduct unreasonable, nevertheless let slip that he wished he had that "luxury" from time to time. R: 26. This court has previously upheld a trial court which found there was no basis for requiring a party to pay for the other's multiple representation. See Dykes v. Dykes , 475 So.2d 1261 (Fla. 5th DCA 1985). There is no basis for requiring Appellants to pay for Appellee's multiple representation here.

Again, assuming arguendo the Appellee's time Affidavit could be considered, there are a multitude of instances in which charging Appellants for time spent by Appellee's attorneys is objectionable. Appellee seeks fees for his attorneys talking with each other, and they each charge for their half of the conversation. See, e.g. , A: 8 (July 5, 1983); A: 10 (December 15 & 16, 1983). As examples, Appellee seeks fees for three attorneys preparing one order. A: 10 (January 16 & 17, 1984). Appellee seeks fees for two lawyers attending the Motion to Dissolve Lis Pendens hearing. A: 11 (January 27, 1984). Appellee seeks fees for preparing a motion for preliminary injunction related to the specific performance count which was abandoned. A: 11 (February 13, 14 & 15, 1984). Appellee seeks fees for a Petition for Common Law Certiorari which was never filed or prosecuted. A: 11 (March 5 & 6, 1984). Appellee seeks fees for making airline reservations !! A: 13 (May 29, 1984).

Florida Patient's Compensation Fund v. Rowe represents a step forward in the struggle to arrive at sensible attorneys fees awards.

It does not, however, create a right to receive a fee out of line with the results obtained by the attorney. The "lodestar" approach is to be employed within the context of Disciplinary Rule 2-106(b) . Rowe , 472 So.2d at 1150. One of the factors which must be considered by a trial court is the "amount involved and the result obtained". Rule 2-106(b)(4) of the Florida Bar Code of Professional Responsibility . The only cause of action Appellee prevailed upon was good faith breach of contract. The claims Appellee lost on, especially the claim for fraud, with its demand for punitive damages, necessarily changed the entire complexion of this litigation and substantially increased the hours spent litigating. Appellee should not be rewarded for escalating a simple breach of contract skirmish into World War III by being awarded the full amount of attorneys fees sought.

Affirmance of the trial court in this case will send the wrong message. Rowe will be seen as the case which allows an attorney to recover fees for all claims filed, even those which have little likelihood of success but which, by their very nature, escalate the hostilities between the parties, if he prevails on any of the claims. That is certainly the wrong message to be sending at a time when our courts are already over-crowded and our trial and appellate judges are over-worked. Assuming arguendo Appellee's attorneys are entitled to any fee, based upon the evidence presented, that fee should be reduced to take into account the result actually obtained for Appellee by his attorneys. An appropriate fee award, if one is justified, would be in the range testified to by Mr. Bogin and Mr. O'Neal: $10,000.00 to $12,000.00.

POINT IV

THE TRIAL COURT ERRED IN FINDING THAT NO APPORTIONMENT OF TIME SPENT BETWEEN ISSUES APPELLEE PREVAILED ON AND THOSE APPELLEE LOST ON WAS WARRANTED OR APPROPIATE.

In its final judgment, the trial court found that "because of [the] inextricable intermingling of the central issue throughout the pleadings and trial, no allocation or apportionment of [Appellee's attorneys] fees is warranted or appropriate." R: 211. The trial court further made it plain that it relied upon the Affidavit of Attorneys Time and Fees (which was never offered or received into evidence) in determining the number of hours expended. R: 212.

Plaintiff filed a four count complaint, seeking damages for fraud and breach of contract, and seeking equitable relief of rescission and specific performance. R: 1582-1626. In connection with the specific performance count, a lis pendens was filed. R: 1627-1629. The specific performance count was unusual, to say the least, in that Appellee demanded the court to order Appellants to sell the subject property at a lower price than that the Appellee agreed to pay in the contract being sued upon, a remedy apparently without precedent in Florida. Appellee lost on or abandoned all counts except breach of contract.

Certainly this Court will accept the proposition that Florida Patient's Compensation Fund v. Rowe requires the trial court to make some effort to search for time spent on issues the Appellee lost on. In this case, Appellee lost on three of the four counts: Fraud, specific performance and recission (specific performance and recission being abandoned by Appellee). Under Rowe , the trial court had a duty

to examine the evidence for time spent on those issues. Assuming arguendo the trial court could consider the attorneys time affidavit, even a cursory examination of the defective affidavit would have revealed time allegedly spent on issues the Appellee did not prevail on. As examples: on July 29, 1983, "DPR" spent 3.6 hours having a summons issued and researching specific performance, fraud and misrepresentation. A: 3. On January 19, 1984, "DPR" spent 4.6 hours researching Appellants Motion to Discharge Lis Pendens; on January 26 & 27, 1984, "DHS" & "TKK" spent 18.5 hours on the Lis Pendens issue. A: 5; A: 6. The Affidavit states that research on a petition for certiorari regarding the Lis Pendens was done, for which Appellee wants attorneys fees from Appellants. A: 6. The record is replete with instances where the trial court could have easily identified hours and hours devoted to issues upon which the Appellee lost. Rowe clearly requires the Court to eliminate such hours. See 472 So.2d at 1151. The trial court erred in considering the Affidavit to begin with, but once embarked on that erroneous course, the trial court had a duty to examine the Affidavit for hours devoted to issues the Appellee lost on. Judge Pfeiffer erred in finding that no reduction was possible or appropriate. In the event this Court finds any fee award is appropriate, it should reduce the award an appropriate amount to represent the time spent by Appellee's attorneys on issues which the Appellee lost on.

POINT V

THE TRIAL COURT ERRED IN RESERVING JURISDICTION FOR FURTHER HEARING ON THE ISSUE OF COSTS, IN THAT APPELLEE WAS AFFORDED AN EVIDENTIARY HEARING ON COSTS, PRESENTED HIS EVIDENCE ON THAT ISSUE, AND SHOULD NOT BE GIVEN AN OPPORTUNITY TO CURE THE DEFECTS IN THE EVIDENCE ADDUCED BY ALLOWING HIM FURTHER EVIDENTIARY HEARINGS.

In its Final Judgment, the trial court reserved jurisdiction to determine costs in a later hearing, and ordered Appellee to provide Appellants with "copies of all bills appearing on the Affidavit of Costs" prior to any further hearing. R: 212.

The trial court best explained what it meant by this portion of the judgment:

BY THE COURT:

Now, as to costs, what I'm going to do is ask that the [Appellee] submit a bill for everything that he has charged costs for -- he's asking costs for.

MR. ROONEY: That was objected to or all of them?

THE COURT: Well, I think you should submit them for even things that were objected to because that might turn up an objection that we didn't have before.

I have made, on the affidavit by Mr. Rooney -- which totals $14,149.00 -- some pencil marks where I disallowed some items with a double X. Some items, with an X, I have in question, so that I will allow some controversy on that, such as expert witness fee of Thomas, Beck of $6,000.00. Some of these things I would want to know more about before I either approved or disapproved .

So I am going to send each counsel a copy of the affidavit, Xeroxed with my little X's on it, and then you will know what he has

not objected to, what I have disallowed and the items with the X, I would hope that you could -- after Mr. Holcomb receives the bill, you could get together and either decide or not decide whether or not those costs would be taxed. And if you can't decide on it, then I will give you some hearing time and I'll listen to both sides and decide it.

R: 128-129 (emphasis added).

The motion heard by the trial court on May 6, 1986 was not a motion for attorneys fees only, it was a motion for attorneys fees and costs . R: 203-204. The motion in its entirety was noticed for hearing. R: 205; R: 206. The Appellee presented evidence on costs: he himself testified to the costs he had paid ($14,149.67). R: 80. He admitted that $573.70 of those costs were not properly chargeable to Appellants. Id. Mr. Simmons testified that all of the monies shown on the Affidavit for costs went through his firm's trust account. R: 97. Appellants' counsel went through the cost items one by one to let the trial court know which items were objected to by Appellants. R: 98 - 107. Appellants admitted the following costs were taxable: filing fee; service of process; Appellants depositions on September 19, 1983; the deposition of Schneider on June 28, 1984; the court reporter's per diem for the trial; and the per diem for the hearing on the judgment N.O.V., totalling $2,076.82. Appellants objected strenuously to an award of expert witness fees to Philip Snyderburn, Dennis Basile, Thomas Beck & Company and Cooper & Lybrand, based upon the lack of any expert testimony to substantiate the reasonableness of the expert witness fee sought. R: 103-104; R: 106-107. Appellants also objected to an award of an expert witness fee to Edward Stern, the attorney who represented Appellee during the

negotiations of the contract and efforts to close the transaction. In objecting, Appellants cited Posner v. Flink , 393 So.2d 1140 (Fla. 3d DCA 1981), which held that expert witness fees must be substantiated in the same manner as attorneys fees before they can be awarded. R: 104; R: 85. See also American Indemnity Company v. Comeau , 419 So.2d 670 (Fla. 5th DCA 1982) (the Court held that where there were objections made to the demanded expert witness fee, the prevailing party must present evidence concerning the necessity and reasonableness of the fee); Dhondy v. Schimpeler , 528 So 2d 484 (Fla. 3rd DCA 1988). Appellee waived the cost of the Willett deposition and witness fees for Van Drunen, Iden, Stevenson, Hise and Willett, totalling $573.50. R: 103.

At the end of the hearing on the Motion for Costs and Attorneys Fees, Appellee rested and did not move for a continuance. R: 122. He offered no evidence to support the time spent, reasonableness or necessity of the fees sought for Mr. Snyderburn, Mr. Basile, Mr. Stern, Thomas Beck & Company, and Cooper & Lybrand. The effect of the trial court's reservation of jurisdiction is to allow Appellee to come to the hearing on costs unprepared, fail to put on proper evidence to support taxing the expert witness fees, hear Appellants objections to the award of the expert witness fees sought, and then have a second bite at the apple in the later hearing in which to produce new evidence and cure the defects in his presentation at the initial hearing. Appellee noticed his Motion for Costs for hearing on May 6, 1986, and the Motion was heard at that time. Appellee put on his evidence. Appellee rested at the end of the hearing. His motion for costs should have been judged based upon the evidence presented at that time. The trial court's reservation of

jurisdiction for further hearing on costs should be reversed, and this Court should remand to the trial court for a ruling on costs based upon the evidence produced at trial, with directions to the trial court that the expert witness fees sought are not supported by the record and therefore cannot be awarded.

Apellee may argue that the records custodian "testified." The only mention was in Daniel Rooney's opening statement , and it does not satisfy the requirement of testimony from the records custodian or other qualified person to authenticate the business records (T-6). Mr. Rooney's statement was not made under oath, nor was it subject to cross-examination. His statement is nothing mre than Appellee's bald assertion that the Affidavit is a business record because Appellee says it is. It is almost embarrassing to point out what is certainly obvious to this Court: statements and arguments of attorneys are not evidence.

Appellee may also argue that Appellants' attorneys admitted the Affidavit was a business record but, no such thing was admitted. In fact, this Court should note from a review of the record that Apellant made the point clearly that the documents are time strips which may qualify for the exception, but not the Affidavit"

> BY MR. BETTIN: Your honor, the documents (note the plural), themself are hearsay. They can qualify as a business records, but the person who can qualify them as business records is the person who made the document.
>
> Mr. Simmons does not have the way to testify from his own personal knowledge that in every case each individual attorney made those records contemporaneously in a situation where they can qualify for the exception.
>
> R: 95 (emphasis added)

Finally Appellee may argue that 1) Appellants had the duty to

call Daniel Rooney and question him about the Affidavit, and 2) the trial court precluded Daniel Rooney from testifying, justifying a remand in the event his omission is fatal. AB: 21-23. The latter contenton is easily disposed of. Appellee did not proffer Mr. Rooney's testimony, which precludes this Court from determining the propriety of excluding the evidence. Atlantic Coast Line Railroad Co v. Shouse , 83 Fla. 156, 91 So 90 (1922). Appellee cannot seriously contend that the trial judge, who allowed a thirty minute hearing to take three hours of his time, would have refused Appellee an opportunity to proffer Mr. Rooney's testimony. No proffer was made because Appellee's attorneys thought Mr. Rooney's testimony was unnecessary. If Appelle was wrong, and Appellants contend he was, this Court should not allow Appellee to blame the trial judge for Appellee's errors.

Appellee may contend that Appellant was required to call Daniel Rooney. Such an argument flies in the face of the theory behind the adversary system of our courts.

Finally, as for the proposition that the trial judge could take judicial knowledge of the time Affidavit, Appellants point out that a) the Affidavit was never offered into evidence; b) it was repeatedly objected to by Appellants (T: 5; T: 95; T: 122). It has long been recognized that Affidavits dealing with attorney's fees are inadmissable when objected to. See Siciliano v. Hunerbert , 135 So 2d 750 (Fla. 2nd DCA 1961); Morgan v. South Atlantic Production Credit Assoc. , 528 So 2d 491 (Fla 1st DCA 1988); cf. Insurance Company of North America v. Julien P. Benjamin Equipment Co., 481 So 2d 511 (Fla 1st DCA 1985)(failure to object to an affidavit is acquiesence to its use).

CONCLUSION

The Fifth District Court of Appeal was correct in its analysis and opinion and its reasoning of Leitman , supra, is not flawed.

There was no competent, substantial evidence of the services rendered by Appellee's attorneys through Judgment N.O.V., an absolute prerequisite to the award of any fees under Florida Patient's Compensation Fund v. Rowe , 472 So.2d 1145 (Fla. 1985). Appellee failed to meet his burden of proof and is not entitled to any attorneys fees whatsoever.

If this Court determines any attorneys fee award is proper, this Court should reduce the fee to reflect the very modest result obtained by Appellee's counsel. The award should bear some rational relationship to the results obtained, and it should take into account the many hours spent on issues Appellee lost on, any number of which can be ascertained from an examination of the defective time Affidavit of Appellee.

The trial court erred in reserving jurisdiction on costs. Appellee was afforded the only opportunity he is entitled to to substantiate his costs in the hearing on May 6, 1986. Appellee failed to adduce any evidence that the charges of the various expert witnesses were necessary or reasonable. He is not entitled to learn of Appellants objections to the costs and then have a second chance to rectify the errors of his first presentation of that evidence. Mandate should be issued to the trial court to rule on costs based upon the evidence at the May 6, 1986 hearing, with directions that none of the expert witness fees sought may be awarded.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of Respondent's Answer Brief On The Merits have been provided to SID J. WHITE, Clerk of the Supreme Court of the State of Florida, Supreme Court Building, Tallahassee, Florida 32399 by Federal Express and one copy of Respondent's Answer Brief On The Merits has been provided to DAVID H. SIMMONS, Esquire, Post Office Box 87, Orlando, Florida 32802 by United States Mail on this 18th day of November, 1988.

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