IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO.: 72,713

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

APPEAL NO.: 84-1786
FIFTH DISTRICT COURT OF APPEAL

APPEAL NO. 86-1140
FIFTH DISTRICT COURT OF APPEAL

ROBERT JAY KATZ,

Petitioner,

vs.

HARRY VAN DER NOORD,
et al.,

Respondents.

PETITIONER'S AMENDED REPLY BRIEF

DAVID H. SIMMONS, ESQUIRE
DRAGE, DE BEAUBIEN, KNIGHT
& SIMMONS
120 SOUTH ORANGE AVENUE
POST OFFICE BOX 87
ORLANDO, FLORIDA 32802
(407)422-2454
FAX #(407)849-1845
ATTORNEYS FOR PETITIONER

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PREFACE

The Petitioner has been forced to reply to the (4) four new issues raised by the Respondents in their Answer Brief. The Petitioner has a Motion to Strike those portions of the Respondents Answer Brief that are improperly before this Honorable Court. The Petitioners' assert that the Respondents should have filed a cross-appeal with this Honorable Court. Because Respondents have sought to include these new issues, the Petitioner has been extremely hard pressed to keep this Reply Brief within the page limit requirement as set out in Rule 9.310, Florida Rules of Appellate Procedure.

(P.R. _____) - refers to the Prior Record on appeal which has been requested by the Petitioner to be sent to the Florida Supreme Court based on it being necessitated by the contents of the Respondents Answer Brief.

Buyer - refers to the Petitioner, Robert J. Katz.

Katz I - refers to Van Der Noord v. Katz, 481 So.2d 1280.

Katz II - refers to Van Der Noord v. Katz, 526 So.2d 940.

ARGUMENT I

KATZ, AS BUYER OF THE MOBILE HOME PARK, OFFERED COMPETENT SUBSTANTIAL EVIDENCE OF THE AMOUNT OF TIME HIS ATTORNEYS SPENT IN PROSECUTION OF THIS CASE THROUGH JUDGMENT NON OBSTANTE VEREDICTO AND AS A RESULT, IS ENTITLED TO HAVE THE AWARD OF ATTORNEYS' FEES AFFIRMED. IN THE ALTERNATIVE, ANY FAILURE TO OFFER COMPETENT SUBSTANTIAL EVIDENCE WAS HARMLESS ERROR CAUSED BY THE FAILURE OF THE TRIAL COURT TO ALLOW TESTIMONY REGARDING TIME RECORDS.

In Buyers' Affidavit of Attorneys' Time and Fees, his attorneys have shown the date of professional services rendered, the services rendered and the time spent on the case by his attorneys. The Affidavit accurately displays the billing strips utilized by the law firm in this case. Additionally, the Affidavit shows the initials of the attorney performing the work. In the fourteen page Affidavit, Buyer's attorneys detail the 838 hours performed on the case for which KATZ was billed a total of $68,391.00.

Respondents assert that the testimony by David Simmons was hearsay and not the basis for evidence supporting the judgment. Pursuant to McCoy v. Rudd, 367 So.2d 1080 (Fla. 1st DCA 1979), however, the testimony by David Simmons is not hearsay.

In McCoy v. Rudd, supra, the Trial Court admitted into evidence an estimator's testimony as to the cost of replacement of a building which had burned down. This estimate was based upon an architect's plans which were drawn up at the owner's request. Because the owner had participated in the acquisition of such materials and in the construction of such building, it was held that evidence was not hearsay and the Court did not err in

admitting it. Based upon the evidence presented at the hearing by Mr. Simmons as to supervision of the tasks and attorneys as well as review of the Affidavit when it was prepared, review of the monthly billing statements as they were sent out, receipt of monies from Buyer when paid and participation in the entire trial process as lead counsel, this evidence is not hearsay as well.

It is clear from the proceedings that the Affidavit was submitted, at least informally, to the Trial Court to be placed into evidence. The Trial Court accepted it over Respondents objection.

Further, the Affidavit of Attorneys' Time and Fees is not hearsay, because it fits within the business record exception of Section 90.803(6), Fla. Stat. Daniel P. Rooney did not testify at the trial based upon the Court's ruling that the Affidavit was not questioned and that in the event that Respondents challenged the Affidavit, they should call him to cross examine him (P.R. 122).

As to the time records being made at or near the time recorded, Mr. Simmons testified that it is the policy of the law firm that time sheets are kept on a daily basis and that payroll checks not be given to attorneys until time strips are turned in (P.R. 120-121). As to the time records being kept in the ordinary course of the business, Mr. Simmons previously testified that as treasurer of the law firm, he reviews the bills and was sure that the bills were sent out on a monthly basis (P.R. 95-96). As to the being the regular practice of the firm, Mr. Simmons noted that time records were kept on a daily basis and sent

out on a monthly basis, payroll checks not being delivered to attorneys until their time strips were turned in (P.R. 95-96, 120-121).

The Trial Court allowed David H. Simmons to testify as to the Affidavit's content as he had knowledge of his own business records concerning attorneys' time spent on the case (P.R. 95). In fact, the Respondents acknowledged that the Affidavit of Attorneys' Time and Fees qualified as a business record.

> By Mr. Bettin: Your Honor, the document (Affidavit) themself are hearsay. They can qualify as business records but the person who can qualify them as business records is the person who made the document. (P.R. 95). (Emphasis Added).

Section 90.803(6) contradicts Respondents' assertion; Section 90.803(6) requires only the "custodian or other qualified witness" testify as to the business records, unless the sources of information or other circumstances show lack of trustworthiness. Mr. Simmons certainly, as partner and treasurer of the law firm, and lead counsel during the entire lawsuit, was a "qualified person" to testify regarding the affidavit. Further, Mr. Simmons submitted Mr. Rooney to testify.

> By Mr. Simmons: He is certainly here in Court and I am sure that you could take a minute to let him testify that his hours are accurate.
>
> By Mr. Bettin: That's fine. (P.R. 113).

Not only that, but Daniel Rooney attempted to testify but the Trial Judge, using normal trial procedure, required Respondents to call Mr. Rooney:

> By Mr. Rooney: Your Honor, at this point I believe I am the last one to testify from our side. I need to be sworn in, I believe, at this time.

> By the Court: You need to testify too?
>
> By Mr. Rooney: Your Honor, I was the one who actually prepared this Affidavit. If you want to know the mechanics of how it was done, I think its probably necessary.
>
> By the Court: Well then, let them call you. Because, you know, I don't...we're not questioning the way this thing was done...at least I'm not. (P.R. 122) (Emphasis added).

The records further show that after this invitation by the Court to cross examine Daniel Rooney, Respondents chose not do to so (P.R. 122-123). One of the primary reasons for rejecting hearsay evidence is its inherent unreliability and the obvious unfairness in not allowing the party against whom it is offered an opportunity to question the declarant. Doersam v. Brescher, 468 So.2d 427 (Fla. 4th DCA 1985). Here, the opposing party had an opportunity to cross-examine Mr. Rooney, but chose not to do so. This at best is harmless error.

Even if this Honorable Court finds the Affidavit of Attorneys' Fees was not properly introduced into evidence, this Court should still uphold the Trial Court's award of attorneys' fees based on the holdings of City of Miami v. Harris, 940 So.2d 69 (Fla. 3d DCA 1986), and the very recent holding in The Glades, Inc. v. The Glades County Club Apt Assoc., 13 FLW 2662 (Dec. 16, 1988, 2nd DCA). These cases state that in hearings to recover attorneys' fees, Rowe, does not necessarily require time spent by attorneys be specifically reflected in written time records. Therefore, even if there was no written records of hours spent because they were not properly introduced into evidence, this Court should still follow the Rowe requirements and award attorneys' fees to the Buyer.

The Respondent has argued that the award of attorneys' fees should be denied because the Affidavit containing written records of hours spent was not introduced into evidence at the attorneys' fees hearing. This argument does not hold water given the detailed competent testimony of Buyers three expert witnesses, the testimony of lead counsel at trial, David Simmons, and Buyer himself, Robert Katz, even if the fourteen (14) page Affidavit of Attorneys' Time (detailing hours spent, dates, description of time, as well as attorneys names who completed each tasks) was not properly introduced into evidence. See generally, City of Miami, supra, and the The Glades, Inc. supra.

ARGUMENT II

THE TRIAL COURT'S AWARD OF ATTORNEYS' FEES SHOULD BE AFFIRMED BECAUSE IT IS BASED UPON ALL OF THE FACTORS CONTAINED IN FLORIDA PATIENTS COMPENSATION FUND V. ROWE.

Three highly reputable attorneys as expert witnesses testified that the Buyer's attorneys' fees were worth between $76,000 to $82,500. The Trial Court was therefore within the range established by the expert witnesses as to a reasonable fee in the case. Rather than assess only the result obtained as proposed by Respondents, the Trial Court correctly considered all factors contained in DR 2-106 (P.R. 129-130).

Respondents' argument is based upon their statistical analysis of dollars recovered compared to original dollars demanded. This is not the standard to be applied in determining reasonable attorneys' fees. As noted by the Trial Judge, there was no doubt in his mind that the Buyer was the prevailing party (P.R. 127). Respondents assert that the Buyer prevailed on only

one of four claims, and then on only a portion of that claim. This is incorrect. The Buyer clearly prevailed on Respondents' entire counterclaim. In addition, Buyer also prevailed on the issue of defense to the breach of contract action with the Respondents' twenty-three affirmative defenses. The time spent on those portions of the case are clearly compensable under the prevailing party clause. Erickson Enterprises v. Louis Wohl & Son, 422 So.2d 1085 (Fla. 3d DCA 1982); Peacock Construction Company v. Gould, 351 So.2d 394 (Fla. 2d DCA, 1977); Keys Lobsters, Inc. v. Ocean Divers, Inc., 468 So.2d 360 (Fla. 3d DCA).

In post-Rowe litigation, Sockolof v. Eaton Point North Condominium Assoc., Inc., 487 So.2d 1114 (Fla. 3d DCA, 1986), the Court stated:

> "as to the award of attorneys fees and costs, our review of the record reveals that the amount awarded was calculated in accordance with the Load Star approached enunciated in Florida Patients Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985)...we recognize the lengthy court proceedings involved in this case created a disparity between the relief sought and the amount of attorneys' fees incurred. Because we find that the award of attorneys' fees fell within the perimeters of the expert testimony, we affirm the judgment for attorneys fees and costs."

In the present case, the Trial Court considered the extent of the litigation using the Rowe analysis, and as fact finder determined that three expert witnesses' testimony was credible, and awarded reasonable attorneys' fees.

As noted by the Trial Court the labor required in prosecuting and defending the case was of primary importance to it in assessing attorneys' fees. While the time a lawyer spends on a given case is only one factor to be considered in setting a fee,

it must be given considerable weight because a lawyer's time is his stock in trade. Manatee County v. Harbor Ventures, Inc., 305 So.2d 299 (Fla. 2d DCA 1974). "Labor like time is a fundamental factor of value...not all labor entitled to compensation appears in the record for it may consist of consultation, advise, investigation and determination." Penn-Florida Hotels Corp. v. Atlantic National Bank, 170 So. 877 at 880 (Fla. 1936). The question of fees can only be resolved with reference to a particular case. Findings of fact underlying Trial Court's consideration of factors to be considered in determining reasonable value of services is clothed with the presumption of correctness.

The amount of attorneys' fees to be awarded is largely within the sound judicial discretion of the trial judge and his determination should not be disturbed unless he has abused his discretion. Tietig v. Kusik, 279 So. 2d 890 (Fla. 3d DCA 1973). Absent a clear showing of abuse of such discretion, an Appellate Court should not substitute its judgment for that of the trial judge. All Star Insurance Corp. v. Scandia, Inc., 353 So.2d 171 (Fla. 3 DCA 1977); United Resources, Inc., v. City National Bank of Miami, 380 So.2d 1060 (Fla. 3 DCA 1980); Snider v. Snider, 375 So.2d 591 (Fla. 3 DCA 1979). The Trial Court did not abuse its discretion and ably handled this extremely hard fought case.

ARGUMENT III

THE TRIAL COURT PROPERLY RULED THAT NO REDUCTION OR APPORTIONMENT OF FEES IS WARRANTED OR POSSIBLE BECAUSE THE CENTRAL ISSUE OF THE CASE, THE BREACH AND MISREPRESENTATION OF THE WARRANTY THAT NORMAL OPERATING EXPENSES OF THE MOBILE HOME PARK WOULD NOT EXCEED THIRTY-TWO PERCENT OF THE GROSS INCOME, IS INEXTRICABLY INTERMINGLED IN ALL COUNTS OF THE COMPLAINT AND COUNTERCLAIM.

Respondents contend that the majority of the Buyer's judgment for attorneys' fees should be eliminated because the Buyer prevailed on one of four counts of his Complaint. Respondents claim that since Buyer prevailed on the breach of contract action, only those time strip entries directly related to the breach of contract action should be awarded as attorneys' fees. This is clearly not the case. Respondents fail to note that Buyer prevailed on the entire counterclaim, the twenty-three affirmative defenses raised to Buyer's complaint, and on one of two issues submitted to the jury, the breach of contract count. Further, Florida Patients Compensation Fund v. Rowe, supra, at 1151, shows the trial court what its duties are in this respect.

> "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."

The Trial Court made just such an analysis, which noted in the Final Judgment for Attorneys' Fees (P.R. 211-212). In its findings of fact, the Court held:

> C. The Court finds that the central issue of this case, the breach and misrepresentation of the warranty, that normal operating expenses of the mobile home park would not exceed

> thirty-two percent of the gross income, is inextricably intermingled in all counts of the Complaint and Counterclaim. (Emphasis Added).
>
> D. Because of this inextricable intermingling of the central issue throughout the pleadings and trial, no allocation or apportionment of fees is warranted or possible.

The Trial Court had testimony from the expert witnesses that the various counts of Buyer's Complaint were interrelated. Buyer's expert, Eric Ludwig, noted this fact, (P.R. 39-40) and that in such a situation the prevailing party should recover for all of the time expended on the file so far as the counts are related (P.R. 40). Buyer's expert witness, Donald E. Christopher, further noted that Buyer prevailed on the essential issue of the case (P.R. 47-48).

Bruce Bogin (Respondents' witness) noted "It seems to me that the issue was who had breached the contract and the ground for that breach was a representation about the ratio between the expenses versus gross revenue." (P.R. 55-56). Perhaps most damaging of all was the Respondents' own expert witness, Frederic B. O'Neal, who noted that the central issue of the case revolved around the normal operating expenses of the park. He acknowledged that this issue was inextricably intermingled in the case.

> By Mr. Rooney: So the central issue of this case was a breach of that warranty and a misrepresentation of that particular term. Is that correct?
>
> By Mr. O'Neal: As I understand it, yeah. (P.R. 72-73)

The law is settled in this area that where the counts are inextricably intermingled, no separation of attorneys' fees is possible. Bill Rivers Trailers, Inc., v. Robert J. Miller, 489

So.2d 1139 (Fla. 1st DCA 1986); Heindel v. Southside Chrysler-Plymouth, Inc., 476 So.2d 266 (Fla. 1 DCA 1985); J.L. Laferney v. Scott Smith Oldsmobile, Inc., 410 So.2d 534 (Fla. 5th DCA 1982). The Trial Court therefore correctly applied the principles relied upon in Florida Patients Compensation Fund v. Rowe, supra, by not merely looking at time strip entries, but rather evaluating the relationship between the successful and unsuccessful claims and determining that the investigation and prosecution of the successful claims could not be separated from the unsuccessful claims.

ARGUMENT IV

THE TRIAL COURT PROPERLY RULED IN RESERVING JURISDICTION FOR FURTHER HEARING ON THE ISSUE OF COSTS BECAUSE COURT HAD INSUFFICIENT TIME TO HEAR ALL MATTERS BEFORE IT THAT DAY.

As previously noted in the Respondents' Answer Brief, Buyer was only able to obtain a one-half hour time period for the noticed hearing. The Court had to interrupt Buyer's Motion for Costs and Attorneys' Fees on two separate occasions in order to hear other hearings scheduled during this day (P.R. 50, 74). In total, Buyer's hearing lasted approximately three hours when only thirty minutes were scheduled.

Respondents in their brief misstate what occurred at the hearing. In fact, the Court made it clearly known that it ran out of time and in an attempt to expedite further hearing on the matter, the Court requested information from Respondents as to which portions of the costs were objectionable.

> By the Court: "Let's note that because frankly I am not going to rule on costs today. I am going to require them to submit the bills to you for the ones you have objected to and see if you can arrive between the two of you

> what the costs should be. And if you can't, I'll hear you ex-parte or whatever. Well, knowing this case it better not be ex-parte." (P.R. 98-99)

After being advised of this fact by the Court, the Buyer brought what testimony was necessary in order that he would not be required to travel to Florida from his home in California again for the Motion for Costs hearing. (P.R. 50) After so being advised, Buyer's attorneys proceeded to complete the attorneys' fees hearing and at that point rested (P.R. 122). Prior to resting, the Court had made it clearly known that costs would not be entertained that day.

A Trial Court has discretion to control its hearing. "A trial judge has broad discretion over the management of a trial. The judge is not a mere moderator but is the governor of the trial for purposes of insuring its proper conduct." Southeastern Fidelity Insurance Co. v. Rodgers, 430 So.2d 603 (Fla. 4th DCA 1983). As noted by the Court, Motion for Costs was not to be entertained that day because the Court was out of time. Further argument in this area is not warranted.

ARGUMENT V

THE FIFTH DISTRICT COURT OF APPEAL ERRED IN FINDING THAT ATTORNEYS' FEES AWARDED IN TRYING THIS LAWSUIT (KATZ II) WERE BARRED BY THE LAW OF THE CASE DOCTRINE, BECAUSE SUCH FEES WERE TOTALLY UNRELATED TO THE DAMAGE AWARD IN THE TRIAL (KATZ I).

When a Court has decided a question of law, the decision of the appellate court is said to become the law of the case. Generally, once an issue has been settled as the law of the case

in one appellate proceeding, it may not be relitigated before the appellate court in a subsequent appeal in the same case. Brunner Enterprises, Inc. v. Dept. of Revenue, 452 So.2d 550 (Fla. 1984); Valsecchi v. Proprietors, Inc., Co., 502 So.2d 1310 (Fla. 3d DCA 1987); and Dept. of Transportation v. Soldovere, 500 So.2d 568 (Fla. 4th DCA 1986).

The doctrine of the "law of the case" generally precludes reconsideration of a legal issue decided in a previous appeal in the same case; it does not divest the Appellate Court of its inherent power to correct a prior ruling that was erroneous. It is well established that this Honorable Court may correct an erroneous decision made in a prior appeal even though it has become the "law of the case". Strazzulla v. Hendrick, 177 So.2d 1 (Fla. 1965). (Emphasis Added).

The "law of the case" doctrine was one basis the Fifth District Court of Appeal employed when denying attorneys' fees to the Buyer in the second appeal (KATZ II). The Respondents expressly addressed this issue in their Answer Brief on pages 11, 15 and 19 through 32.

In the first appeal (KATZ I), the Fifth District Court of Appeal sustained the Judgment N.O.V., but denied a new trial on damages stating in Katz I, supra, at 1230:

> "With regard to any out of pocket expenses caused by the sellers' breach, the buyer's evidence of accountant and attorney expenses presented at the first trial was based solely on speculation. Having failed to introduce competent, substantial evidence in regard to this issue, the buyer is not entitled to the second bite of the apple. (Emphasis Added).

The result of the first appeal's ruling was to deny the Buyer a new trial on damages, i.e., attorney and accountant fees incurred by the Buyer in forming the syndication to buy the mobile home park; the Court then precluded the Buyer from relitigating this issue by virtue of the "law of the case" doctrine. This doctrine, however, did not preclude the Buyer from seeking attorneys' fees as the prevailing party in the lawsuit, which fees had absolutely nothing to do with Buyer's syndication attorneys' fees introduced at trial as an element of his damages.

After KATZ I, the Trial Court held a hearing for attorneys' fees based on: (1) the provision in the contract for the prevailing party to be entitled to fees; and, (2) a stipulation in the pre-trial compliance dated July 11, 1984, which stated: "6. the issue of attorneys' fees for the prevailing party shall be heard at a hearing after the trial". It was after this hearing on attorneys' fees that KATZ II ensued.

In KATZ II at 942, the Fifth District Court of Appeal erroneously held, among other things, that:

> "in our prior opinion in this very case, this Court expressly adjudicated that the Buyer's evidence as to attorneys' fees was legally insufficient and that he was not entitled to another chance to litigate the issue". 526 So.2d 940 at 912.

Why is the Fifth District Court of Appeal opinion erroneous regarding the "law of the case" argument? (1) Because the attorneys' fees award granted after the attorneys' fee hearing which is the subject of the KATZ II, had not even taken place at the time of the KATZ I; (2) Because the attorneys' fees which were

the subject of the KATZ I related to the fees incurred in forming the syndication to purchase the mobile home park, not the attorneys' fees incurred to try this lawsuit; and, (3) The attorneys used by the Buyer in purchasing and forming this syndication were not even the same as the attorneys used to pursue this lawsuit.

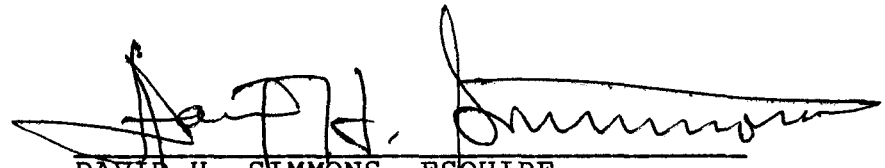
This issue, "law of the case", was unilaterally raised by the Fifth District Court of Appeal in KATZ II, and illustrates the devastating effect that courts can have on the litigants when they seek to rule on an issue that is not briefed or argued by the parties. The Fifth District Court was thoroughly confused when it thought that the attorneys' fees referred to in the KATZ I opinion were the attorneys' fees incurred in prosecuting the lawsuit. Respondents cannot in good faith, honesty, and candor to this Court assert that the Fifth District was not in error. Buyer respectfully requests this Honorable Court to correct this prior erroneous decision made by the Fifth District Court of Appeal; which is clearly within the ambit of this Court's authority per Strazzulla v. Hendrick, 177 So.2d 1 (1965).

CONCLUSION

For the foregoing reasons and the reasons stated in the Petitioners' Brief on the Merits, this Honorable Court should reverse the Fifth District Court of Appeal holding in the case below and award the Petitioner attorneys' fees.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of Petitioner's Amended Reply Brief have been provided to Debbie Causseaux, Chief Deputy Clerk, The Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927, and Charles Holcomb, Esquire, and Bradly Bettin, Esquire, Holcomb & Deans, 9 Magnolia Street, Cocoa, Florida 32922, by U.S. Mail this 22nd day of December, 1988.



DAVID H. SIMMONS, ESQUIRE
DRAGE, deBEAUBIEN, KNIGHT & SIMMONS
120 SOUTH ORANGE AVENUE
POST OFFICE BOX 87
ORLANDO, FLORIDA 32802
(407)422-2454
ATTORNEYS FOR PETITIONER