IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No.: SC10-1754
L.T. Case Nos.: 4D10-203
2008DR011685MB

ROBIN ROSHKIND,

Petitioner,

v.

BELINDA CHARLENE MACHIELA,

Respondent.
_____/

INITIAL BRIEF OF PETITIONER

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INTRODUCTION

Petitioner, ROBIN ROSHKIND, P.A., shall be referred to as "Petitioner" or "the Roshkind firm." Respondent, BELINDA CHARLENE MACHIELA, shall be referred to as "Machiela." References to the Appendix are abbreviated as follows:

> (App., A:(pg.#)) = Order on Robin Roshkind P.A.'s Corrected Motion for Entry of Final Judgment Adjudicating Charging Lien and for Entry of a Money Judgment
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> (App., B:(pg.#)) = Motion for Rehearing on Robin Roshkind P.A.'s Corrected Motion for Entry of Final Judgment Adjudicating Charging Lien and for Entry of a Money Judgment
>
> (App., C:(pg.#)) = Retainer Agreement
>
> (App., D) = Notice of Charging Lien

STATEMENT OF CASE AND FACTS

Petitioner, Robin Roshkind, P.A., represented Respondent, Machiela, in a dissolution of marriage proceeding in the trial court (App., A). The fee agreement between Machiela and the Roshkind firm was a periodic fee agreement that provided Machiela would pay the firm $262.50 per hour for attorney's fees and $135.00 per hour for paralegal time (App., C:2-3)[1]. The fee agreement also required Machiela to object in writing within thirty days to any charges she disputed or found erroneous (App., C:2).

On October 21, 2009, the trial court granted the Roshkind firm leave to withdraw from the representation, and Machiela thereafter obtained substitute counsel (App., A:1).[2] The Roshkind firm later sought a charging lien relative to any and all property of Machiela in the dissolution proceeding (App., D). On October 26, 2009, the Roshkind firm filed a Corrected Motion for Entry of Final Judgment Adjudicating Charging Lien and for Entry of a Money Judgment (App., A).

The trial court held a hearing on the Roshkind firm's motion on December 21, 2009 (App., A:1). The Roshkind firm presented testimony from the lead

[1] Page 3 of the fee agreement shows a notation that the stated fee of $350.00 for attorney time would be subject to a 25% reduction. This reduction accounts for the $262.50 per hour rate.

[2] The trial court docket reflects that although the Roshkind firm filed its motion to withdraw on or about July 24, 2009, the trial court did not grant the motion until October 21, 2009.

attorney on the case regarding the amounts due and owing, the firm's written fee agreement with Machiela, the complete billing history for the firm's representation of Machiela in this case, and the firm's timely-filed Notice of Charging Lien (App., B:4). The Roshkind firm also presented uncontroverted evidence that Machiela never objected in writing to the fees billed (App., B:4).

The trial court denied the Roshkind firm's motion by written order dated December 22, 2009 (App., A). In its Order, the trial court stated that "[w]hile an award of fees under Chapter 61 need not be supported by testimony of a corroborating expert," the Roshkind firm sought fees pursuant to the contract with its former client and not a statutory fee award under Chapter 61, Florida Statutes (App., A:2). The trial court denied the firm's motion on the basis that the firm "failed to present any independent expert testimony" in support of its motion (App., A:2).

The Roshkind firm appealed the trial court's ruling to the Fourth District Court of Appeal ("Fourth District"). *Robin Roshkind, P.A. v. Machiela*, 45 So. 3d 480 (Fla. 4th DCA 2010). On appeal, the Roshkind firm argued that the trial court erred in finding that the law required expert testimony where an attorney seeks fees directly from the attorney's client rather than from the adverse party. *Robin Roshkind, P.A.*, 45 So. 3d at *1. The Fourth District issued an opinion affirming the trial court's decision. The court stated that the general rule is that a party

seeking attorney's fees must present independent expert testimony where the party seeks fees from the adverse party. *Id.* at *3-4. The Fourth District also stated that "case law throughout this state has adhered to the requirement of an independent expert witness to establish the reasonableness of fees, regardless of whether a first or third party is responsible for payment." *Id.* at *4.

However, the Fourth District noted that it had previously questioned the expert testimony requirement, and opined that the requirement that attorneys' fees be reasonable may not warrant the associated increased litigation costs and use of judicial resources. *Id.* at *6-7. The Fourth District further noted that the factual circumstances of the present case provide the perfect context for again questioning the requirement's validity. *Id.* at *5-6. The Fourth District therefore affirmed on the basis the trial court's ruling was required under the existing law, but certified the question to this Court as one of great public importance. *Id.* at *7.

SUMMARY OF THE ARGUMENT

Expert testimony supporting attorney fees should no longer be required as a matter of law generally. As the Fourth District Court of Appeal and other courts have noted, requiring expert testimony needlessly increases litigation costs and expends judicial resources, especially in light of the fact that judges are already aware of reasonable attorney fees in their legal communities. The requirement of expert testimony is of little or no assistance to the court, and should be abolished because any assistance it provides is outweighed by the additional costs and resources it requires.

More specific to this case, the trial court committed an error of law when it denied the Roshkind firm's motion for failure to present independent expert testimony. Independent expert testimony regarding fees is not required under Florida law under these circumstances, when a law firm seeks fees owed directly from its client by means of a charging lien based on the contractual relationship created by a fee agreement. Even if expert testimony regarding the reasonableness of fees were required for Petitioner's charging lien, the trial court should have allowed Petitioner the opportunity to provide such testimony before denying the motion.

STANDARD OF REVIEW

The trial court denied the Roshkind firm's motion based on a question of law. "An appellate court will review de novo whether the trial court's determinations are based on a proper interpretation of the law." *G.S. v. T.B.*, 985 So. 2d 978, 982 (Fla. 2008). Petitioner therefore submits that the appropriate standard of review is de novo.

ARGUMENT

I. EXPERT WITNESS TESTIMONY REGARDING THE REASONABLENESS OF ATTORNEY'S FEES SHOULD NOT BE REQUIRED

Expert fee witness testimony should no longer be required to support the reasonableness of an attorney's fees. Several district courts of appeal in Florida, in cases outside of the first-party charging lien context present in this case, have previously questioned whether the requirement actually serves its purported purpose. These cases provide the reasoning and analysis this Court should use to hold the requirement no longer valid.

In *Island Hoppers, Ltd. v. Keith,* 820 So. 2d 967, 972 (Fla. 4th DCA 2002), the Fourth District affirmed an attorney's fee award arising out of a wrongful death case where entitlement to the award had already been established and the amount of the award was the only issue. The Fourth District noted the general rule

requiring expert testimony and held that the requirement had been met despite the appellant's allegation that the expert witness lacked a factual predicate for his opinion. *Island Hoppers*, 820 So. 2d at 970-71. However, the court expressed its concern about the requirement of expert testimony as to fees. *Id.* at 972. Specifically, the court expressed doubt that expert witnesses are more knowledgeable in many cases than trial judges as to the reasonableness of attorney fees. *Id.; but see Sourcetrack, LLC v. Ariba, Inc.*, 34 So. 3d 766, 768 (Fla. 2d DCA 2010) (adhering to requirement of expert fee testimony and noting some judges may be unfamiliar with work performed by counsel). The court also pointed out that appellate courts do not hesitate to disregard the expert testimony and reverse "patently excessive" fee awards. *Id.*

Concurring specially, Judge Gross stated that the requirement rests on "shaky theoretical grounds," because it traces back to *Lyle v. Lyle*, 167 So. 2d 256 (Fla. 2d DCA 1964), where the court justified the requirement on public policy grounds but failed to cite any authority. *Id.* at 976; *see also* Robert J. Hauser, Raymond E. Kramer III, & Patricia A. Leonard, *Is Expert Testimony Really Needed in Attorney's Fees Litigation?*, Fla. B.J., Jan. 2003, at 38 ("There is no Florida rule of procedure, rule of evidence, or statute requiring expert testimony to support an award of attorneys' fees. This requirement originated in case law"). Noting that the public policy basis of the rule was ostensibly to maintain the image

of lawyers, Judge Gross opined that any contribution the rule had made "is not so great so as to preclude modification of the rule to be more in accord with the current reality." *Id.* Judge Gross further noted the contradiction present in the fact that the law requires expert testimony but the trial court is free to disregard the testimony of the lawyer and his expert regarding the fees. *Id.* at 977.

Recently, in *Sea World of Fla., Inc. v. Ace Am. Ins. Cos., Inc.*, 28 So. 3d 158, 161 (Fla. 5th DCA 2010), the Fifth District Court of Appeal joined the Fourth District in questioning the need for the rule requiring expert testimony to support an award of fees:

> Although not necessary to the resolution of the instant case, we join the Fourth District Court of Appeal in questioning the continued need for this judicially-created rule [requiring expert testimony]. *Island Hoppers Ltd. v. Keith*, 820 So. 2d 967, 977 (Fla. 4th DCA 2002), *rev. on other grounds, Sarkis v. Allstate*, 863 So. 2d 210 (Fla. 2003) (Gross, J., concurring specially) ("Though Florida courts have long required the corroborative testimony of an expert 'fees witness,' we question whether the rule is always the best, or more judicious practice.") It is speculation as to whether the application of this rule has helped to "maintain the image of lawyers in the eyes of the public." It is not speculation that claimants expend time and money to retain fee experts, even in those cases where their testimony is likely to be of little or no assistance. As observed by some commentators, expert testimony in fees cases "is often nothing more than a rubber stamp of the billing and time records submitted to the court by the party seeking fees, . . ."

The cases above accurately set forth the reasons why the judicially-created rule requiring expert testimony in support of attorney's fees should be abolished. In sum, the rule is acknowledged to provide little help to the capable judges of this

state while draining judicial resources and adding to the amount of litigation and expense of a case. Petitioner respectfully urges this Court to recognize that doing away with the testimony requirement will not do away with the reasonableness requirement itself, and to hold that expert testimony is no longer necessary.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED THE ROSHKIND FIRM'S CHARGING LIEN FOR FAILURE TO PRESENT EXPERT TESTIMONY

The trial court incorrectly interpreted the law when it denied the Roshkind firm's motion for failure to present independent expert testimony. The trial court's ruling assumes that the trial court had the duty, sometimes imposed upon trial courts in other contexts, to review the attorney's fee for reasonableness. Such is not the case here. Independent expert testimony regarding fees is not required under Florida law when a law firm seeks a charging lien for fees owed directly from its client based on the contractual relationship created by a fee agreement.

The Fourth District stated that Petitioner's cited cases, *Franklin & Marbin, P.A. v. Mascola*, 711 So. 2d 46, 47 (Fla. 4th DCA 1998) and *Gossett & Gossett, P.A., v. Mervolion*, 941 So. 2d 1207, 1208 (Fla. 4th DCA 2006), failed to support Petitioner's argument because an expert witness had testified in *Franklin* and it was unclear if an expert had testified in *Gossett*. Petitioner respectfully disagrees with the Fourth District's conclusion regarding the applicability of *Franklin* and *Gossett* to the present case. Petitioner maintains that, despite the points noted by

the Fourth District in its opinion, *Franklin* and *Gossett* provide useful reasoning and guidance on this issue.

In *Franklin*, a law firm entered into a periodic fee agreement with a client to represent her in a paternity case. 711 So. 2d at 47-48. The written fee agreement included a provision requiring the client to object to any errors or discrepancies in the bill in writing within fifteen days. *Id.* The firm later withdrew from the representation and filed a motion for a charging lien. *Id.* at 48. The trial court held a hearing on the law firm's motion for final judgment on its charging lien and reduced the law firm's fee from $19,561.00 to $6,800.00 even though the client never objected to the fee. *Id.* The law firm appealed. *Id.*

On appeal, the Fourth District explained that *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985) and *Standard Guaranty Ins. Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1990) require courts to award only a *reasonable* fee when someone other than the client is required to pay the other party's attorney's fees. *Id.* at 48-49. The Court further explained that "[u]nder *Rowe*, the trial court determines a reasonable fee from testimony by expert witness lawyers as to the prevailing rates for attorneys in comparable circumstances and as to the amount of time reasonably expended by the attorney for the party seeking payment." *Id.* at 49. The Court distinguished those situations from the one before it, which involved a client's contractual obligation to pay fees directly to the

client's lawyer. *Id.* The Court noted that it and other courts had held "the *Rowe* formula" inapplicable when the law firm seeks fees directly from its client. *Id.* at 50.

The Court discussed the foundation, based in freedom of contract principles, for the rule that agreements for services between attorneys and clients should be enforced after services are performed. *Id.* at 50-51. After cautioning that fee agreements are still subject to the requirements of rule 4-1.5(d) of the Rules Regulating the Florida Bar, the Court concluded[3]:

> [T]he contract rule of *Stabinski*, *Lugassy*, and *Pierce*, as well as rule 4-1.5(d), governs the rights and liabilities of the parties to this fee agreement. In the absence of a legal determination by the court that the fee contract is illegal, prohibited, or excessive, under a periodic fee agreement for services already performed the lawyer is entitled to a money judgment for the amount of fees due under the contract.

Id. at 52.

The court's holding quoted above is squarely applicable to the instant case. The Fourth District was correct that the law firm in *Franklin* had an expert testify that the firm's fees and hours expended were reasonable. *Id.* at 48. Despite that fact, the law firm's contention was that the fee dispute was governed by the client's contract with the firm and the reasonableness of the fee was not a matter to be determined by the trial court as it is under prevailing party attorney fee provisions

[3] The Court ultimately reversed the trial court's determination of the amount of fees due because there was nothing recovered in the paternity action to which the lien could attach. *Id.* at 54.

of certain contracts or statutes. *Id.* The clear extension of the holding in *Franklin* - that the first party dispute should be governed by the fee agreement between the lawyer and client - is that the reasonableness of the fee should not require expert testimony because it is not subject to the court's determination.[4]

More recently, the Fourth District ruled, consistent with the reasoning of *Franklin* discussed above, to reverse a trial court's decision reducing a law firm's fees in the enforcement of a charging lien. In *Gossett & Gossett, P.A., v. Mervolion*, 941 So. 2d 1207, 1208 (Fla. 4th DCA 2006), Mervolion[5] entered into a written fee agreement with a law firm in which she paid a sum up-front, agreed to pay another lump sum shortly afterward, and further agreed to pay $300 per hour for the firm's services. The agreement included a charging lien in favor of the law firm upon the proceeds of the litigation and Mervolion's real property that was the subject of the litigation. *Gossett*, 941 So. 2d at 1208. Following trial, the trial court entered "a final judgment enforcing the charging lien . . . in an amount less than that contractually billed, but in an amount determined by the court to be a 'reasonable fee.'" *Id.* at 1209.

The law firm appealed, arguing that the trial court erred in reviewing the bills and determining Mervolion owed less than she was billed, pointing out that

[4] Outside of a finding pursuant to rule 4-1.5(d) of the Rules Regulating the Florida Bar.

[5] Mervolion later changed her name to Flori, and the opinion refers to her mainly as Flori. *Gossett*, 941 So. 2d at 1208.

Mervolion never objected to the charges.[6] *Id.* The Fourth District agreed with the appellant law firm, under the reasoning that, "[a] charging lien is contractual in nature and is to be based upon the amount agreed with the client, not an amount to be determined by the trial court." *Id.* The Court reversed and remanded to the lower court to enter judgment "based on the contractually agreed-to fees." *Id.*

The trial court's ruling in the present case overlooks the key distinction discussed by this Court in *Franklin*, the identity of the party from whom the law firm seeks the payment of fees. *Franklin* and *Gossett* illustrate that the "contract theory" applies where a law firm seeks its fees directly from a former client by means of a charging lien. As the Fourth District noted, it is unclear whether the law firm in *Gossett* introduced the testimony of an expert as to fees. However, whether an expert testified as to fees is irrelevant, because *Gossett* clearly held that the reasonableness of the fees as agreed to in the fee agreement was not an issue for the trial court to determine. *Id.* Similarly, the trial court here was not required to examine Petitioner's fees for reasonableness because the Roshkind firm sought a charging lien for fees owed to it directly from its former client. Expert witness testimony was therefore unnecessary to enter a judgment enforcing Petitioner's charging lien.

[6] The appellant law firm in *Gossett* also appealed the trial court's denial of fees incurred in collecting its attorney fees and the denial of fees under section 57.105, Florida Statutes. These issues are not relevant to the present appeal.

The Roshkind firm's periodic fee agreement with Machiela is similar to the one at issue in *Franklin*. The trial court's order states that "[the Roshkind firm] presented testimony that it billed Wife $61,530 in attorney's fees at $262.50 an hour; $27,661.50 in paralegal time at $135 per hour; $8,919.15 in administrative costs (computed at 10% of professional bills); $1,577.32 for WestLaw research; $1,092.52 for other costs; and $5,272.79 for 18% interest on outstanding fees." (App., A:2). The Roshkind firm also presented evidence that Machiela did not object to the fees in writing as required by the fee agreement (App., B:4). Machiela failed to present any evidence to the contrary, and admitted she failed to object to the fees in writing (App., B:4). Absent a finding that the fee agreement violated rule 4-1.5, *Franklin*, *Gossett*, and the cases discussed therein dictate that the trial court did not have the discretion to deny the Roshkind firm its charging lien on the grounds that it did not present independent expert testimony in support of its fees.

CONCLUSION

Based on the foregoing argument, the Roshkind firm respectfully requests this Honorable Court hold that expert witness testimony as to the reasonableness of attorney's fees is no longer necessary, and reverse the trial court's order denying its Corrected Motion for Entry of Final Judgment Adjudicating Charging Lien and for Entry of a Money Judgment because the trial court's ruling is based upon a clear error of law. In the alternative, if this Court finds the trial court correctly interpreted the law, the Roshkind firm respectfully requests that this Court remand so the Roshkind firm may present independent expert testimony in support of its motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished by U.S. Mail, postage prepaid, on this _____ day of December, 2010 to the following:

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth by this Court's local rules. This brief contains Times New Roman, 14 point typeface.

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