IN THE SUPREME COURT OF THE STATE OF FLORIDA

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

ROBIN ROSHKIND, P.A.,

Petitioner,

v.

BELINDA CHARLENE MACHIELA,

Respondent.
_____/

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

ARGUMENT

I. THERE IS NO LONGSTANDING RULE THAT INDEPENDENT EXPERT TESTIMONY IS REQUIRED WHEN AN ATTORNEY SEEKS A CHARGING LIEN DIRECTLY AGAINST A FORMER CLIENT

Respondent's Answer Brief provides a lofty discussion of the fiduciary duty owed to a client by a lawyer. Some of the general discussion on that topic provided by Respondent in the Answer Brief is not a subject of dispute. Respondent spends a significant amount of space in the Answer Brief exalting the role of attorneys as defenders of the public trust in our system of justice. Yet Respondent's argument ignores the undeniable practical reality that an attorney seeking fees will never introduce an expert who testifies that the fees of the attorney hiring the expert are unreasonable. At the same time, nothing prevents a party *opposing* an award of fees from putting on an expert to opine that the fees of the attorney seeking fees are unreasonable. The Roshkind Firm stands on its Initial Brief as to its contention that the requirement of expert testimony should be abolished in general even in situations other than the one at issue in this case where a lawyer seeks a charging lien for fees directly from a client.

Respondent makes the sweeping and incorrect assertions that attorneys generally testify gratuitously for each other regarding fees and that the additional fees associated with proving fees will be borne by the prevailing party. (Answer Brief, at 14). Neither of these statements is true as a blanket statement. Attorneys

regularly charge their fellow attorneys a fee to provide independent expert testimony at fee hearings. Furthermore, in a case such as a family law proceeding where Fla. Stat. §61.16 applies, the standard for a party to obtain attorney's fees from the other party is need and ability to pay, regardless of who is the "prevailing party."

Respondent's Answer Brief demonstrates that some clarification regarding the issue on appeal is necessary. Respondent contends that "the Florida Supreme Court has yet to issue a ruling on the necessity of expert testimony to support attorney's fee claims. However, since all parties agree that it is the established rule that such testimony is required, this Court should give the rule the same weight it gives other precedent." (Answer Brief, at 14 n.1). Respondent's statement is not entirely accurate. The Roshkind Firm agrees that the established rule is that independent expert testimony is required in support of fees where the trial court is required to review the attorney's fees for reasonableness because a law firm seeks an award of fees from the opposing party. *See e.g., Sourcetrack, LLC v. Ariba, Inc.*, 34 So. 3d 766 (Fla. 2d DCA 2010) (holding expert testimony was necessary to support fee award from appellants to appellees); *Sea World of Fla., Inc. v. Ace Am. Ins. Cos., Inc.*, 28 So. 3d 158, 160 (Fla. 5th DCA 2010) ("We recognize that where a party seeks to have the opposing party in a lawsuit pay for attorney's fees incurred in that same action, the general rule in Florida is that independent expert

testimony is required"); *Island Hoppers, Ltd. v. Keith,* 820 So. 2d 967 (Fla. 4th DCA 2002) (addressing sufficiency of expert testimony where court awarded attorney's fees from appellant to appellee's counsel). In cases where one party seeks an award of fees from the other, the court logically has a higher interest in monitoring the fee agreement because one side is paying fees based on a fee agreement that it did not negotiate or agree to.

However, it is extremely important to note that the Roshkind Firm does not concede that there is an established rule that independent expert testimony is required in cases such as the present case. In fact, as already explained more fully in the Roshkind Firm's Initial Brief, the case law indicates that where a law firm seeks a charging lien directly against a client for services rendered pursuant to a fee agreement, Florida's courts have embraced the "contract theory" under which the reasonableness of the fee agreement is not a matter for the trial court's determination. *See Franklin & Marbin, P.A. v. Mascola,* 711 So. 2d 46, 47 (Fla. 4th DCA 1998) (holding *Rowe*[1] formula of determining reasonable fee inapplicable to a client's contractual obligation to pay fees directly to the client's lawyer). Independent expert testimony is not, and should not be, required in such cases. Thus, the Roshkind Firm disputes any blanket assertion that Florida law requires expert testimony in support of attorney's fees in every case.

[1] *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985).

Respondent cites *Lee Engineering & Construction Co. v. Fellows*, 209 So. 2d 454 (Fla. 1968) in support of her argument that record evidence is required upon which the trial court may rely in awarding attorney's fees. *Lee Engineering* was a proceeding under the Workman's Compensation Act in which a claimant was awarded a disability award that included attorney's fees as well as the fees for expert witnesses who testified regarding the attorney's fee. 209 So. 2d at 456.

Lee Engineering is not applicable to the present case because, although it is not entirely clear from the Court's opinion, *Lee* appears to have involved a stipulation by the parties that the Deputy commissioner could set an attorney fee award without evidence. *Id.* at 457. This Court devoted substantial space in its opinion to addressing the appropriate procedure when the parties stipulate to the Deputy's ability to fix a fee without evidence. *Id.* The Florida Industrial Commission urged in favor of allowing such stipulations for the sake of expediency due to the high case volume handled by the Commission. *Id.* This Court stated that whether or not there is a stipulation as to the amount of fees, the judge should have evidence to support any finding and not rely solely on his own discretion:

> In the absence of a stipulation fixing the dollar amount, the burden is on the moving party to show by appropriate proof, through testimony, depositions, affidavits, or otherwise, the services and benefits which he has rendered and to which he is reasonably entitled. Much valuable proof can be provided in a verified petition for fees, setting forth the

> approximate time consumed, out of pocket expenses, the delicacy of the question of law involved, and value of the award to the claimant.

Id.

The Court's holding in *Lee Engineering*, a Workman's Compensation Act case, should be narrowly confined to the circumstances of that case. *Lee Engineering* is not applicable here because that case involved an award of attorney's fees from one party to the other, rather than the situation in the present case where the attorney sought a charging lien for fees directly against a former client. *Lee Engineering* also should not apply because the facts of *Lee Engineering* were that the parties stipulated to the Deputy's ability to award fees without receiving evidence. To the extent that this Court in *Lee Engineering* held that fees must be substantiated in the record, this requirement was met in the present case by the Roshkind Firm's introduction of its billing records into evidence along with the fee agreement and testimony from the lead attorney on the case verifying the amounts due and owing.

II. AS THE REASONABLENESS OF THE FEE AGREEMENT WAS NOT AN ISSUE FOR THE COURT, THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED THE ROSHKIND FIRM'S CHARGING LIEN FOR FAILURE TO PRESENT EXPERT TESTIMONY

Florida case law supports the position that, regardless of where it may be required in other contexts, independent expert testimony is not required under Florida law where a law firm seeks a charging lien for fees owed directly from its

client based on the contractual relationship created by a fee agreement. In *Franklin & Marbin, P.A. v. Mascola*, 711 So. 2d 46, 48-49 (Fla. 4th DCA 1998), the Fourth District Court of Appeal distinguished the cases involving a law firm's action for fees directly against a former client from cases in which the opposing party or someone other than the client is required to pay the fees. The Fourth District held that in the former scenario, the Court does not evaluate the fee agreement for reasonableness. *Franklin*, 711 So. 2d at 52. The Court concluded that unless there is a finding the fee agreement violates Rule 4-1.5 of the Rules Regulating the Florida Bar, the lawyer should get a money judgment for his fees due pursuant to the fee agreement. *Id.*

Furthermore, in *Gossett & Gossett, P.A. v. Mervolion*, 941 So. 2d 1207, (Fla. 4th DCA 2006) the Fourth District Court of Appeal clearly held that it was error for a trial court to determine whether or not a client's charges were reasonable where the client never questioned them. Respondent's assertion that *Franklin* and *Gossett* do not apply is unpersuasive.[2] The factual circumstances of that case are on point with the present case. The clear meaning of these cases is that where the lawyer seeks his fees from a client pursuant to a fee agreement, the

[2] Respondent's argument regarding "the quantum meruit rule" is nearly impossible to follow. However, the Roshkind Firm notes that the Firm did not seek to be paid any sort of liquidated contract price not based on the agreed rate for the hours of work performed.

court is not to inquire into the reasonableness of the fees. This, in turn, eliminates any need for expert testimony.

Contrary to Respondent's suggestions, the Roshkind Firm does not suggest that attorneys in Florida should be allowed to charge unreasonable fees. An attorney's fee will always be governed by the limitations of Rule 4-1.5 of the Rules Regulating the Florida Bar. However, despite Respondent's various late-raised protestations about the fee agreement in this case, there was no suggestion in the present case that the Roshkind Firm's fee agreement violated Rule 4-1.5. This case simply is not about that issue.

Respondent already waived any dispute regarding the reasonableness of the fee by her failure to object to the fee amount within thirty days as required under the fee agreement. Despite Respondent's late-discovered problems with the fee agreement's terms,[3] the fact remains that Respondent freely agreed to the terms of the fee agreement in this case. In underlined print, the fee agreement specifically encouraged Respondent to seek separate counsel regarding the fee agreement itself. Respondent did not exercise this right. If Respondent had such serious problems

[3] It should be noted that Respondent erroneously describes the fee agreement in the present case as one that contained "no set hourly rate or specific fee based on contingency." This is flatly incorrect. As Respondent noted previously in her Answer Brief, Respondent's fee agreement with the Roshkind Firm set the hourly attorney's fees for attorney Roshkind's time at $350.00 per hour, and also set out in detail the amounts the Roshkind Firm would charge for associate counsel, paralegals, and legal secretaries.

with the contract, the time for her to raise them was prior to agreeing to be bound by those terms. If Respondent had any problems with the fee she was charged by the Roshkind Firm, the time to raise them was within thirty days of receiving the bill, as required by the fee agreement.

Instead, Respondent has waited until her Answer Brief in this Court to raise problems with the terms of the fee agreement she voluntarily entered. Respondent's complaints highlight that an important purpose of enforcing a contractual time period for objection as described in *Franklin* is to allow expedient resolution of fee dispute issues. "Allowing the client to raise objections for the first time after the services have been rendered, and suit has been instituted to recover the fees due, would eliminate an essential purpose of a contractual provision designed for mutual benefit." *Franklin*, 711 So. 2d at 52. The Court here was not being called upon to evaluate the reasonableness of this fee agreement. It was therefore error for the trial court to deny the Roshkind Firm its charging lien for failure to present expert testimony.

CONCLUSION

Florida law does not, and should not, require independent expert testimony to support an award of attorney's fees pursuant to a charging lien by a lawyer directly against his former client. Based on the foregoing argument, the Roshkind Firm respectfully requests this Honorable Court 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 an 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 February, 2011 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.

By: _____
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