IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

DREW SCHREIBER,

Appellant,

v.

Case No. 5D20-2684
LT Case No. 2014-DR-14477

DAWN SCHREIBER,

Appellee.
_____/

Opinion filed December 30, 2021

Appeal from the Circuit Court
for Orange County,
Mark S. Blechman, Judge.

AnnMarie Jenkinson and Nancy A. Schofield, of Jenkinson Legal, PLLC, Orlando, for Appellant.

John H. Pelzer, of Greenspoon Marder, LLP, Fort Lauderdale, for Appellee.

WOZNIAK, J.

Drew Schreiber ("Former Husband") appeals the trial court's Order on Former Wife's Motion for Attorney's Fees, which awarded Dawn Schreiber ("Former Wife") the net amount of $52,513.39 in attorneys' fees for the work two law firms performed in representing her in this high-conflict divorce

action. We find merit in Former Husband's argument that the amount awarded is not supported by competent, substantial evidence, and therefore we reverse. We do not remand for a new evidentiary hearing because Former Wife failed to present any competent evidence of her fees at the hearing that would justify remand for a subsequent hearing.

In a bifurcated proceeding, the trial court dissolved the parties' marriage in March 2018 and retained jurisdiction to determine, inter alia, attorneys' fees. Former Wife then moved for attorneys' fees and costs, asserting Former Husband had the ongoing ability to contribute to her fees and costs and that she was in need of such contribution. Her motion gave rise to the two fee hearings that occurred a year apart.

There is no transcript of the October 14, 2019, first hearing (the "First Hearing"). What we can glean from the record is that Former Husband viewed the First Hearing as completely resolving all fee issues, including entitlement and quantification, with Former Wife failing in her evidentiary burden because Former Husband successfully precluded Former Wife's introduction of documentary evidence of her attorneys' fees. The trial court disagreed with this characterization and viewed the First Hearing as resolving only the issue of Former Wife's entitlement to fees. As such, the court rendered an order requiring Former Wife to provide Former Husband

with the invoices from Former Wife's lawyers and, if the parties could not thereafter reach an agreement as to the reasonableness of the fees charged, Former Wife's counsel was to set a hearing on the issue of reasonableness. Because no transcript of the First Hearing exists, we can find no error in the trial court's conclusion that the First Hearing was limited to the issue of entitlement.

Despite the trial court's directive, Former Wife failed to provide Former Husband with her invoices and further failed to notice a hearing on the fee issue. Six months after the First Hearing, the trial court took matters into its own hands and sua sponte rendered an order that recited Former Wife's failings, again ordered Former Wife to provide invoices within two weeks, and, if the parties thereafter could not reach an agreement, ordered that a hearing be set on the reasonableness of the attorneys' rates and hours. No agreement was reached, and the cause proceeded to a second hearing (the "Second Hearing") for the purpose of determining the issues of reasonableness and amounts.

At the October 13, 2020, Second Hearing, Former Wife's evidence consisted solely of testimony from expert witness Peter Cushing. None of the attorneys who billed the fees being sought appeared, and Mr. Cushing's attempt to identify an affidavit of attorney's fees executed by one of Former

Wife's prior attorneys, who was not present at the hearing, was met with Former Husband's objection on hearsay grounds and properly sustained by the trial court.[1] Further, while several other fee affidavits, invoices, and engagement/retainer agreements from various law firms were mentioned at the hearing and noted in the Court Minutes and Evidence Control Sheet as having been marked for identification purposes, none of these documents were introduced into evidence at the hearing.

When Mr. Cushing attempted to testify about hourly rates for each billing attorney, the trial court determined that Mr. Cushing was referencing several pages of notes and a chart that had not been provided to Former Husband or to the court and sustained Former Husband's objection, instructing Mr. Cushing not to refer to the notes or chart.[2] From that point, Mr. Cushing's testimony lacked specificity. Before beginning cross examination of Mr. Cushing, Former Husband moved for a "directed

[1] The court ruled Mr. Cushing could testify to his knowledge of the invoices attached as exhibits to the affidavit, but the invoices themselves were not admissible because they were not authenticated.

[2] A pretrial order required that such items be provided a minimum of three business days before a hearing. The trial court checked its email and noted for the record that Former Wife had emailed the court the chart at 1:29 p.m. for the 1:30 p.m. hearing.

verdict,"[3] arguing that Mr. Cushing's "rough estimates" and "guesses" were insufficient to support a finding of reasonableness and, without testimony or invoices from any of the billing attorneys, there existed no competent evidence of the services provided. The court initially reserved ruling on the motion, which Former Husband renewed at the conclusion of the evidence, then denied it in the Final Judgment.

In the Final Judgment, the trial court rejected Former Wife's claim for fees for two of her attorneys, but awarded fees for the others, finding them reasonable. From the total amount of fees awarded, the trial court subtracted $6,486.61 owed by Former Wife to Former Husband under previous court orders, leaving a total owed by Former Husband of $52,513.39.

We review an award of attorneys' fees in a dissolution proceeding for abuse of discretion. Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980); Joachim v. Joachim, 942 So. 2d 3, 4 (Fla. 5th DCA 2006). The award must be supported by competent, substantial evidence. Faircloth v. Bliss, 917 So. 2d 1005, 1006 (Fla. 4th DCA 2006).

> The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence but refers to the existence of some evidence (quantity) as to each essential element and as to the legality and

[3] Because this was a nonjury proceeding, Former Husband's motion should have been labelled a motion for involuntary dismissal, not directed verdict. Fla. Fam. L. R. P. 12.420(b).

> admissibility of that evidence. Competency of evidence refers to its admissibility under legal rules of evidence. "Substantial" requires that there be some (more than a mere iota or scintilla), real, material, pertinent, and relevant evidence (as distinguished from ethereal, metaphysical, speculative or merely theoretical evidence or hypothetical possibilities) having definite probative value (that is, "tending to prove") . . . .

Lonergan v. Est. of Budahazi, 669 So. 2d 1062, 1064 (Fla. 5th DCA 1988) (quoting Dunn v. State, 454 So. 2d 641, 649 n.11 (Fla. 5th DCA 1984) (Cowart, J., concurring specially)). Therein lies the evidentiary failure in this case.

Although "[a]n application for attorney's fees, suit money, or costs, whether temporary or otherwise, shall not require corroborating expert testimony in order to support an award under this chapter," section 61.16(1), Florida Statutes (2020), the party seeking fees still has the burden "to prove with evidence their reasonableness and necessity of the fees sought." Safford v. Safford, 656 So. 2d 485, 486 (Fla. 2d DCA 1994). This requires that the movant "present records detailing the amount of work performed and the time to perform each task." Nants v. Griffin, 783 So. 2d 363, 366 (Fla. 5th DCA 2001) (citing Fla. Patient's Comp. Fund v. Rowe, 472 So. 2d 1145, 1150 (Fla. 1985) ("To accurately assess the labor involved, the attorney fee applicant should present records detailing the amount of work performed.")).

Clearly then, while an expert need not testify, competent evidence of fees is still required.

In the instant case, Former Wife presented solely expert testimony of fees; there was no properly authenticated fee affidavit or testimony from any of Former Wife's attorneys, nor did Former Wife introduce into evidence, or even proffer, any time sheets or billing records from any of Former Wife's attorneys.[4] Former Wife's failure to adduce competent evidence of fees resulted in a complete lack of evidence on which a fee award could properly be based and requires reversal. See Wiley v. Wiley, 485 So. 2d 2, 3 (Fla. 5th DCA 1986) (reversing fee award where there was only expert testimony of fees; the attorney claiming fees neither testified nor introduced an affidavit of fees); see also Morton v. Heathcock, 913 So. 2d 662, 670 (Fla. 3d DCA 2005) (holding that although an expert testified regarding the services rendered by the attorneys and the reasonableness of the amounts claimed, the failure to have the attorneys themselves testify or to introduce into evidence their detailed time statements required reversal); Warner v. Warner, 692 So. 2d 266, 268 (Fla. 5th DCA 1997) (holding that to establish

[4] As we noted above, the Court Minutes and Evidence Control Sheet for the Second Hearing reflect that Former Wife's exhibits, consisting of several fee affidavits, engagement/retainer forms, and invoices, not all from the same law firm, were marked for identification purposes only.

an award of fees, a party must present evidence detailing exactly what services were performed; finding remand not appropriate because former wife failed to provide any evidence to support fee award); Cohen v. Cohen, 400 So. 2d 463, 465 (Fla. 4th DCA 1981) (reversing fee award where sole evidence of fee was testimony provided by expert and former wife; holding "that the testimony of appellee's attorney should have been required by the trial court"). Although Mr. Cushing's testimony as to the reasonableness of fees could properly accompany other competent evidence of hours expended and hourly rates, his testimony alone could not establish the truth of the numbers that he asserted were reasonable. Thus, without an evidentiary basis for his testimony, Mr. Cushing's testimony was not competent to establish fees.

The remaining question is whether we should remand for Former Wife to have another opportunity to present competent evidence of her attorneys' fees. We hold not. This Court has consistently held that a party must have presented some competent evidence of fees at the fee hearing in order to justify remand for another opportunity to prove fees after reversal. See, e.g., Ali v. Wells Fargo Bank, N.A., 264 So. 3d 1096, 1097 & n.1 (Fla. 5th DCA 2019); Gunn v. Ubbels, 101 So. 3d 420, 421 (Fla. 5th DCA 2012); Nicol v. Nicol, 919 So. 2d 550, 551 (Fla. 5th DCA 2005); Shortes v. Hill, 860 So. 2d

1 (Fla. 5th DCA 2003); Simpson v. Simpson, 780 So. 2d 985, 988-89 (Fla. 5th DCA 2001); Kranz v. Kranz, 737 So. 2d 1198, 1203 (Fla. 5th DCA 1999); Viera v. Viera, 698 So. 2d 1308, 1309 (Fla. 5th DCA 1997); Wiley, 485 So. 2d at 3; Stewart v. Hughes Supply, Inc., 440 So. 2d 476 (Fla. 5th DCA 1983). Former Wife's failure to introduce any evidence clearly fails this standard. Consistent with our own precedent and with that from our sister courts reversing without benefit of remand due to a complete absence of evidence, our reversal is without benefit of remand for another evidentiary hearing. See, e.g., Braswell v. Braswell, 4 So. 3d 4, 5 (Fla. 2d DCA 2009) (reversing without remand because former wife failed to introduce any evidence supporting her claim for fees and former wife's attorney merely stated the total fees and costs sought at the hearing); Faircloth, 917 So. 2d at 1008 (reversing fee award without remand because "[n]ot only did the appellee's attorney fail to present sworn testimony, he also did not present time records or invoices, or offer a detailed description of the work done, the date of the work or the time expended"); Davis v. Davis, 613 So. 2d 147 (Fla. 1st DCA 1993) (holding that while remand is appropriate where the record may contain substantial, competent evidence to support findings as to the Rowe factors, reversal without remand is required where record is devoid of any evidence to support fee award).

In sum, Former Wife improperly attempted to introduce an affidavit consisting of hearsay and signed by an attorney not present at the hearing, and merely referenced—without introducing into evidence or proffering—several invoices, fee affidavits, and engagement/retainer agreements after having her expert identify them. These circumstances not only left the trial court bereft of evidence to support a fee award but also place this case solidly within the line of cases, from this Court and others, declining to remand for an additional opportunity to establish fees. Consistent therewith, our reversal comes without direction for another evidentiary hearing.

Although remand for an evidentiary hearing is not appropriate under the facts and circumstances of this case, remand is required for another reason—Former Wife's $6,486.61 obligation to Former Husband is rendered unpaid with the outcome of this appeal. Accordingly, we remand with instructions to the trial court to enter an order enforcing this obligation.

REVERSED and REMANDED with instructions.

EDWARDS and TRAVER, JJ., concur.