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

CITY OF DAYTONA BEACH, FLORIDA, AND MICHAEL CHITWOOD, AN INDIVIDUAL,

Appellants/Cross-Appellees,

v. Case No. 5D19-6

A.B., AN INDIVIDUAL, AND FLORIDA CARRY, INC., A FLORIDA NON-PROFIT CORPORATION,

Appellees/Cross-Appellants.

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Opinion filed October 2, 2020

Appeal from the Circuit Court for Volusia County, Michael S. Orfinger, Judge.

Gary M. Glassman, Assistant City Attorney, Daytona Beach, for Appellants/Cross-Appellees.

Eric J. Friday, of Kingry & Friday, Jacksonville, for Appellees/Cross-Appellants.

EDWARDS, J.

This appeal and cross-appeal involve an award of attorney's fees made pursuant to section 790.33, Florida Statutes (2013), also known as the Joe Carlucci Uniform Firearms Act. Joined by Appellee/Cross-Appellant, Florida Carry, Inc., a gun owners'

advocacy group,[1] A.B. successfully sued Appellant, City of Daytona Beach. He secured the return of his guns from the Daytona Beach Police Department through a replevin action, was awarded the cost to repair damage to his guns caused by the police department's failure to properly handle and store them, and obtained a declaratory judgment that the City's action violated section 790.33. Following an evidentiary hearing, the trial court awarded most of the attorney's fees Cross-Appellants incurred plus a multiplier of the lodestar amount of fees. The City appeals only that portion of the trial court's judgment that applied a 1.5 multiplier to the attorney's fee award. We affirm as to that issue. Cross-Appellants, A.B. and Florida Carry, argue that the trial court employed a fee multiplier that was too low and abused its discretion by refusing to award fees for the replevin action and for the attorney's time spent traveling from his office in Duval County to Volusia County where the case was venued. As to the cross-appeal, we affirm the denial of fees for the attorney's travel time and affirm as to the multiplier used, but reverse and remand for an award of fees related to the replevin action.

In December 2012, Appellee/Cross-Appellant A.B. called a veterans assistance hotline and relayed comments suggesting he might be contemplating suicide using a firearm. The hotline operator notified the Daytona Beach Police Department, who went to A.B.'s home. While he was neither arrested nor charged with any crime, A.B. was temporarily taken into custody and involuntary committed for a mental health examination under the Baker Act. The police department seized sixteen firearms, bows and arrows, and a combat vest, which were laid out on the bed in A.B.'s home.

[1] According to Cross-Appellants' Complaint, Florida Carry exists for the purpose of representing the rights and interests of Florida gun owners, including advocating for the existence of uniform firearms laws throughout the state.

When A.B. was stabilized and released, he sought the return of his weapons. After several phone calls to the police produced no answers, A.B. finally spoke with a supervisor who said they could not return the weapons unless and until A.B. took several steps. First, the police said he would have to submit two affidavits/questionnaires, one to be filled out by a relative and the other to be completed by a mental health professional, both of which had to assert that A.B. was of "sound mind." The police department had forms for the affidavits/questionnaires, but told A.B. that he could not personally pick them up from the department; they required him to send a surrogate. A.B.'s cousin obtained the necessary forms and filled hers out, stating that she felt he was of sound mind. A.B. was examined repeatedly by a mental health professional who, after A.B.'s sixth visit, filled out the police department affidavit/questionnaire in which he stated that A.B.'s troubles on the night in question were primarily alcohol related, although he did have certain underlying issues, and that he demonstrated no intent to harm himself or others. Instead of releasing A.B.'s guns to him or his surrogate after receiving the properly executed mental health forms, the police advised that he would now need a court order if he wanted to get his weapons back. Each time A.B. complied with one of their demands, the police seemingly came up with something else he needed to do. A.B. decided he needed legal advice, so he sought counsel.

In May 2013, attorney Eric Friday of Duval County filed suit on behalf of A.B. and Florida Carry against the City and others, seeking a writ of replevin for the return of A.B.'s weapons. The suit alleged that the defendants had violated section 790.33, which by its express terms broadly preempted all local regulation of firearm ownership and possession and provided for recovery of damages and attorney's fees for any person adversely

affected by a preempted local government's regulation.[2] In August 2013 following a non-jury trial, the court granted the writ of replevin and ordered the police department to return A.B.'s firearms. Because his firearms had not been handled and stored properly, several were damaged and needed repair.

After winning the replevin portion of his case, Attorney Friday further amended the complaint, which already sought a declaratory judgment, injunctive relief, money damages and attorney's fees, in an effort to also recover for the cost of repairs. By the time of trial, Cross-Appellants were on their fourth amended complaint, which included

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[2] Because of the importance of this statute to several aspects of this case, we set forth relevant portions of section 790.33 here and later in the opinion:

> (1) **Preemption.--** Except as expressly provided by the State Constitution or general law, the Legislature herby declares that it is occupying the whole field of regulation of firearms and ammunition, including the purchase, sale, transfer, taxation, manufacture, ownership, possession, storage, and transportation thereof, to the exclusion of all existing and future county, city, town, or municipal ordinances or any administrative regulations or rules adopted by local or state government relating thereto. Any such existing ordinances, rules, or regulations are hereby declared null and void.
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> (2) **Policy and intent.--**
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> (a) It is the intent of this section to provide uniform firearms laws in the state; to declare all ordinances and regulations null and void which have been enacted by any jurisdictions other than state and federal, which regulate firearms, ammunition, or components thereof; to prohibit the enactment of any future ordinances or regulations relating to firearms, ammunition or components thereof unless specifically authorized by this section or general law; and to require local jurisdictions to enforce state firearms laws.
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> (b) It is further the intent of this section to deter and prevent the violation of this section and the violation of rights protected under the constitution and laws of this state related to firearms, ammunition, or components thereof, by the abuse of official authority that occurs when enactments are passed in violation of state law or under color of local or state authority.

§ 790.33, Fla. Stat. (2013).

claims against Michael Chitwood, individually, who had been the Daytona Beach police chief during the time that A.B.'s guns were taken and kept from him.

The case proceeded to trial, and in August 2017, the trial court entered its judgment, which denied injunctive relief, but declared that the police department's actions violated and were preempted by section 790.33. It awarded money damages totaling approximately $900 to cover the cost of replacing one weapon that the police lost, repairs to some firearms, and the cost of the mental health consultations needed for the initial police-required mental health affidavits. The trial court entered judgment in favor of former Chief Chitwood, a defendant below, after determining that he could not be individually liable to Cross-Appellants given the facts and applicable law.

The trial court also found that Cross-Appellants were entitled to an award of reasonable attorney's fees and their taxable costs pursuant to the explicit language of section 790.33(3)(f). Cross-Appellants filed their second amended motion for attorney's fees, which was supported by billing documents and affidavits. The court conducted an evidentiary hearing in September 2018, during which it received documentary evidence, the deposition testimony of A.B., and the live testimony of Attorney Friday, Cross-Appellants' fee expert Attorney Mitchel Woodlief, and Appellant's fee expert Attorney Dennis Bayer.

The trial court's final judgment taxing attorney's fees and costs contained a detailed recitation of the evidence presented. The court's analysis began by examining the eight factors set forth in *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145, 1150 (Fla. 1985), to determine a lodestar fee. This led the trial court to find that, based upon the novelty and difficulty of the case, coupled with Attorney Friday's

experience, his firearm law expertise, and the results obtained, Attorney Friday reasonably expended 127.2 hours directly related to litigating all aspects of the case other than for the initial replevin proceedings. The trial court then determined that the evidence presented as analyzed under *Rowe* led to a conclusion that a reasonable hourly rate for Attorney Friday's services in this case was $360.00. When coupled with the reasonable amount of paralegal time incurred, the total lodestar attorney's fee awarded was $46,667.50, a figure that neither side contests on appeal.

The trial court refused to award fees for Attorney Friday's time spent traveling between his office in Duval County and Volusia County, where all court proceedings took place. We find that the trial court's decision is supported by competent substantial evidence and that it neither erred nor abused its discretion by denying fees for travel time. *See In re Amends. to Unif. Guidelines for Tax'n of Costs*, 915 So. 2d 612, 617 (Fla. 2005) (listing travel time and travel expenses as costs that should not be taxed); *Gwen Fearing Real Estate, Inc. v. Wilson*, 430 So. 2d 589, 591 (Fla. 4th DCA 1983) (citing *Chandler v. Chandler*, 330 So. 2d 190 (Fla. 2d DCA 1976)). Accordingly, we affirm as to that issue raised in the cross-appeal.

However, we find that the trial court abused its discretion in denying Cross-Appellants' request for the attorney's fees incurred in relation to the replevin action, which had been pled as part of the overall lawsuit from the beginning. The trial court accurately noted that section 790.33 does not specifically include replevin as a remedy and correctly observed attorney's fees are not recoverable in an ordinary replevin action. Nevertheless, the actual, practical relief that A.B. had sought from the outset—the return of his weapons—was only achieved through the efforts of his attorney pursuing replevin. The

basis for this replevin action and the justification for requiring the return of A.B.'s weapons was the application of section 790.33, which by its terms established the City's liability and eliminated almost all conceivable defenses that could be asserted to justify the actions of the police department.[3] That statute specifically provides for an award of reasonable attorney's fees to a person or an organization adversely affected by any contrary rule, enactment, order or policy. *See* § 790.33(3)(f), Fla. Stat. A.B.'s replevin action successfully set forth how he was adversely affected, thereby entitling him to a fee award.

Furthermore, when two claims are "inextricably intertwined" such that the "determination of the issues in one action would necessarily be dispositive of the issues raised in the other," a party should be able to recover fees for a claim where fees are not typically awarded. *See Anglia Jacs & Co. v. Dubin*, 830 So. 2d 169, 172 (Fla. 4th DCA 2002) (quoting *Cuervo v. W. Lake Village II Condo. Ass'n*, 709 So. 2d 598, 599–600 (Fla. 3d DCA 1998)). Claims are inextricably intertwined where, despite being separate causes of action, they are based on a common core of facts and are based on related legal theories. *Conti v. Auchter*, 266 So. 3d 1250, 1251 (Fla. 5th DCA 2019).

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[3] Section 790.33(3) provides that:

> (a) Any person, county, agency, municipality, district, or other entity that violates the Legislature's occupation of the whole field of regulation of firearms and ammunition . . . by enacting or causing to be enforced any local ordinance or administrative rule or regulation impinging upon such exclusive occupation of the field shall be liable as set forth herein.
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> (b) If any county, city, town, or other local government violates this section, the court shall declare the improper ordinance, regulation, or rule invalid . . . . It is no defense that in enacting the ordinance, regulation, or rule the local government was acting in good faith or upon advice of counsel.

In order to prevail on the replevin claim, Cross-Appellants had to prevail on the same legal and factual issues that supported the claims for those remedies specifically listed in section 790.33. Accordingly, we hold that Cross-Appellants were entitled by section 790.33(3)(f) to reasonable attorney's fees for services rendered in their pursuit of the writ of replevin and also because the replevin, declaratory judgment, and money damage claims were inextricably intertwined. We remand this matter for the trial court to determine a reasonable fee for the time spent on the replevin action and for entry of an amended final judgment taxing attorney's fees and costs.

Next, the trial court considered whether a contingency risk multiplier, as requested by Cross-Appellants, was justified. "[T]he standard of review with respect to the application of a multiplier is one of abuse of discretion." *Holiday v. Nationwide Mut. Fire Ins.*, 864 So. 2d 1215, 1218 (Fla. 5th DCA 2004). Section 790.33(3)(f) is one of the few Florida statutes that specifically mentions a contingency multiplier in connection with authorization to award fees. In this regard, it states that "[a] court shall award the prevailing plaintiff in any such suit . . . [r]easonable attorney's fees and costs in accordance with the laws of this state, including a contingency fee multiplier, as authorized by law . . . ." § 790.33(3)(f)1., Fla. Stat.

Predictably, the City argued that no fee multiplier should be used, and less predictably, urged the court to reduce the lodestar because Cross-Appellants had not been successful on several claims and several defendants had been dismissed during the course of litigation. Cross-Appellants asserted that because the statute so specifically authorizes it, a fee multiplier must be given in every section 790.33 case in which the plaintiff is successful. "The fundamental rule of construction in determining legislative

intent is to first give effect to the plain and ordinary meaning of the language used by the Legislature." *State v. Sousa*, 903 So. 2d 923, 928 (Fla. 2005). We disagree that a multiplier is mandated in every section 790.33 case because the plain language of the statute provides for a contingency fee multiplier "as authorized by law." § 790.33(3)(f)1., Fla. Stat. Thus, we must determine if the trial correctly applied Florida law when it applied a 1.5 contingency fee multiplier to the lodestar.

The trial court painstakingly analyzed the evidence presented during the attorney's fee hearing, utilizing the applicable considerations discussed in *Joyce v. Federated National Insurance Co.*, 228 So. 3d 1122, 1126–34 (Fla. 2017), and the factors set forth in *Standard Guaranty Insurance Co. v. Quanstrom*, 555 So. 2d 828, 831 (Fla. 1990), and *Rowe*, 472 So. 2d at 1151. In reaching its decision, the trial court noted that: Attorney Friday was very knowledgeable on the topic of firearms law; he was one of only three attorneys in the entire state actually handling section 790.33 cases; none of those three attorneys had offices in Volusia County; the case presented novel issues as section 790.33 was a relatively new statute; the language of section 790.33 made success for Cross-Appellants appear likely from the outset; this was primarily a public policy case; the outcome of the litigation was very favorable to Cross-Appellants; the fee contract was contingent in nature; and Attorney Friday was not able to mitigate the risk of nonpayment of his fees. We find that the trial court's decision to apply a contingency fee multiplier and to use a factor of 1.5 for that multiplier is supported by competent substantial evidence and is fully authorized by applicable Florida law. Accordingly, we find no abuse of discretion in awarding a fee multiplier of 1.5.

We reverse and remand for the trial court to determine a reasonable fee for time spent litigating the replevin action related to the section 790.33 claim, and as to all other issues raised, we affirm. The thoughtful, detailed orders and judgments of the trial court, combined with the exceptional appellate advocacy of both sides, have been of great assistance to this Court.

AFFIRMED IN PART, REVERSED IN PART, REMANDED WITH INSTRUCTIONS.

COHEN and WALLIS, JJ., concur.