NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

CHAD BURNETT, Appellant, v. WADE GUNN'S PAIN FREE PRODUCT, LLC, A WYOMING CORPORATION, Appellee.	)	Case No. 2D17-1018

Opinion filed August 17, 2018.

Appeal from the Circuit Court for Hillsborough County; Richard A. Nielsen, Judge.

Raymond A. Haas and Keith Shevenell
Of HD Law Partners, Tampa,
for Appellant.

Rocco J. Carbone, III of Law Offices of
Rocco J. Carbone, III, PLLC,
St. Augustine, for Appellee.

PER CURIAM.

Affirmed.

CASANUEVA, CRENSHAW, and ATKINSON, JJ., Concur.

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, FLORIDA

CHAD BURNETT,

Appellant,

Case No.: 2D17-1018
LT Case No.: 14-CA-2498

v.

WADE GUNN'S PAIN FREE PRODUCT, LLC,

Appellee.
_____/

APPELLEE'S ANSWER BRIEF

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COUNSEL FOR APPELLEE

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PRELIMINARY STATEMENT

Appellant, CHAD BURNETT, in an individual, was the co-defendant in the trial court, Appellant before this Court, and will be referenced herein as "Appellant" or "Mr. Burnett." Appellee, WADE GUNN'S PAIN FREE PRODUCT, LLC, A WYOMING CORPORATION, was the plaintiff before the trial court, is the Appellee before this Court, and will be referenced in this brief as "Appellee" or "WADE GUNN." William McFate, co-defendant in the trial court, will be referenced herein as "co-defendant McFate." References to the record on appeal will be designated by the relevant page number in parentheses. References to the initial brief will be designated by "IB" and the relevant page number. References to the appendix to the initial brief will be designated as "IB. App." followed by the relevant page number. The record consists of one volume totaling 1,455 pages.

STATEMENT OF THE CASE AND FACTS

This appeal arises from the trial court's order awarding sanction fees of $3,478.75 to Appellee for Appellant's repeated discovery violations pursuant to Florida Rule of Civil Procedure 1.380. (R. 892). Appellant's three issues on appeal relate entirely to the way the trial court awarded this sanction fee. (IB 12-20). Appellant does not challenge the underlying findings that he was in contempt for repeated discovery violations. (IB. 12-20). Rather, Appellant challenges the trial court's decisions on how it determined this award based on the evidence presented to it at the sanctions fee hearing, and whether the trial court's decisions were an abuse of discretion. (IB. 12-20).

On December 7, 2016, a hearing was held to determine the sanction award for the Appellant's discovery violations. (IB. App. at 4-42). Appellee's lead counsel, Joseph Kennett, Esq. testified. (IB. App. at 4-12). Mr. William L. Yanger, a member of Mr. Kennett's firm, also testified as an expert witness regarding the reasonableness of the fee awards. (IB. App. at 14). Mr. Kennett testified that the motion at issue, and the sanctions stemming from that motion, arose from Appellant's "repeated refusal to not only provide discovery but comply with the Court's order" for over eighteen months. (IB. App. at 5).

When questioned on cross-examination regarding differentiation amongst work done for Appellant's co-defendant, McFate, and the work performed for

Appellee, as a co-defendant, Mr. Kennett testified that besides the initial discovery requests, every action that was taken, as far as a "call, correspondence, e-mail, motion to compel, motion for sanctions, writ of bodily attachment, all hearings, those were for both defendants. It's the same work that would have been done for each one." (IB. App. at 12-13; 19). Mr. Kennett stated that the fees sought during the hearing, were irrespective of any award of attorney's fees recovered against co-defendant McFate, as sanctions for a motion in contempt and sanctions for discovery violations. (IB. App. at 13-14). In co-defendant McFate's case, there was an award of a judgment that included attorney's fees pursuant to the civil theft statute, but those fees were ordered for each defendants' failure to comply with the trial court's order; those were different fees than what was awarded in the judgment. (IB. App. at 14). Following Mr. Kennett's testimony, Mr. Yanger testified regarding the reasonableness of the fees. (R. IB. App. at 14). While Appellant objected to his testimony arguing he was not an "independent" expert, Appellant's counsel never objected to Mr. Yanger's qualifications to provide an opinion.

On December 29, 2016, the trial court issued an Order Awarding Attorney's Fees as Sanctions. (R. 890-892). In pertinent parts, the order states the following:

> The Defendant raised an objection to the testimony of attorney William Yanger, who is a member of the same firm as the attorney who did the legal work for the plaintiff in this case. Although the better practice in providing expert testimony on attorney's fees is to have an independent

> and disinterested attorney testify, no case law was presented prohibiting this approach. [Order at ¶ 1.3]
>
> ***
>
> The Defendant objected to an award of fees against him on the grounds that all of the attorney's fees have already been awarded to the attorney for the Plaintiff in a final judgment awarded against the co-defendant. Although such an award has been made, it does not bar the sanctions award. To the extent the Plaintiff's attorney collects attorney's fees from either Defendant, counsel may not receive more than the total amount of attorney's fees awarded in the final judgment without further awards from the court. [Order at ¶ 1.4]
>
> ***
>
> Although the services for which an award of attorney's fees is sought were not differentiated between the two defendants, it does not prevent recovery in this case. In this matter the Plaintiff was forced to resort to motions to compel against both Defendants' due to their refusal to respond to various discovery requests propounded to them both. [Order at ¶ 1.7]

(R. 890-892).

Further, the order held that the total attorney's fees that could be awarded due to the contested discovery were $6,957.50. (R. 891). However, the trial court ordered that the "total attorney's fees that could be awarded must be divided in half to determine the amount chargeable to the Defendant, Chad Burnett, as opposed to Defendant, William McFate." (R. 891). As such, the trial court awarded a total of $3,478.75 in total award of attorney's fees to Appellee for the contested discovery matters against Appellant. (R. 891-892).

SUMMARY OF ARGUMENT

Appellant raises three issues on appeal. (IB. 12-20). Each issue relates to the trial court's decisions on how it determined an award of attorneys' fees as a sanction for Appellant's repeated discovery violations. *Id.* Each of these issues is without merit, and therefore, this Court should affirm the trial court's order.

First, Appellant alleges the trial court abused its discretion by accepting and relying on expert testimony from Mr. Yanger who was not an "independent" expert witness. (IB. 13-14). Mr. Yanger testified for purposes of establishing the reasonableness of the attorney's fees award. (IB. App. at 4-42). This issue is without merit because Florida law does not require an "independent" expert witness testify. Rather, the only requirement under Florida law is that an expert witness testify who is not the attorney seeking the award of attorneys' fees. This issue is without merit and the trial court did not abuse its discretion by relying on Mr. Yanger's testimony. *Infra* Argument I at 7.

Second, the Appellant alleges the trial court abused its discretion when it awarded duplicate attorneys' fees. (IB. 14-17). This argument is without merit because it is factually and legally inaccurate. The trial court awarded attorneys' fees as a sanction for Appellant's repeated discovery violations, independent of any award of attorneys' fees against the co-defendant. (R. 890-892). The trial court clearly awarded these attorneys' fees because Appellee's attorney was forced to

resort to motions to compel discovery against both defendants due to their joint refusal to respond to various discovery requests. (R. 891; IB. App. At 5-12). Additionally, the trial court's order requires that any recovery of attorneys' fees for these sanctions are limited by the award of attorneys' fees on the final judgment. (R. 890-892). It is not possible for Appellee to receive duplicate attorneys' fees, and therefore, the trial court did not abuse its discretion in awarding these fees. *Infra* Argument II at 12.

Third, and finally, Appellant alleges the trial court abused its discretion by awarding attorneys' fees according to a fifty-fifty split when there was "no evidence or testimony presented to differentiate" between the time spent on both co-defendants files to compel the discovery at issue. (IB. 17-20). This argument is without merit because Mr. Kennett testified to the manner that he recorded his time, and the trial court divided the time accordingly based on Mr. Kennett's testimony. *Infra* Argument III at 13. Therefore, as discussed more fully below, Appellee respectfully requests this Court affirm the lower court's award of attorney's fees.

ARGUMENT

Standard of Review

Decisions on matters that are within the discretion of the trial judge should not be reversed absent an "abuse of discretion." *See Mercer v. Raine*, 443 So. 2d 944 (Fla. 1983). "Abuse of discretion" is judged by the use of a general standard of

reasonableness. *Canakaris v. Canakaris*, 392 So. 2d 1197 (Fla. 1980). As stated by the Florida Supreme Court, the test for an abuse of discretion is as follows:

> In reviewing a true discretionary act, the appellate court must fully recognize the superior vantage point of the trial judge and should apply the 'reasonableness' test to determine whether the trial judge abused his discretion. If reasonable men [or women] could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness.

Id. at 1203.

A trial court's order on attorneys' fees is reviewed for an abuse of discretion, *Glantz v. Glantz, P.A.*, 17 So. 3d 711, 713 (Fla. 4th DCA 2009), as is an order imposing sanctions. *Rush v. Burde*, 141 So. 3d 764 (Fla. 2d DCA 2014).

I. THE TRIAL COURT PROPERLY AWARDED REASONABLE ATTORNEYS' FEES BASED ON EXPERT WITNESS TESTIMONY (RESTATED)

Appellant argues that an *independent* expert witness was required to establish the reasonableness of the fees awarded. (IB. 12-14). The crux of Appellant's argument is that Mr. Yanger, who testified as an expert, was not independent because he was a member of the same firm as the lead counsel in the matter, and therefore, the trial court abused its discretion by relying on his testimony (IB. 12-14). This argument is without merit because Appellant incorrect expands the legal requirements for a trial court's award of attorneys' fees in the State of Florida.

Further, Appellant has not established how, under the facts of the case at bar, the trial court acted unreasonably in awarding these fees as a sanction for Appellant's failure to adhere to its discovery obligations.

The settled case law in the Second District Court of Appeal requires that, when an attorney seeks an award of attorney's fees, an expert must testify to the reasonableness of those fees. *See Yakubik v. Bd. of Cty. Comm'rs*, 656 So. 2d 591, 592 (Fla. 2d DCA 1995) ("The only evidence offered to support the award of the attorney's fee was the attorney who performed the services. The trial court erred in establishing the amount of attorney's fees in this case based solely on the testimony of the attorney seeking the fees and without testimony from an expert witness on the reasonable amount of the fees."). There is no obligation that the expert also meet an additional requirement of independence. Cases that cite to a requirement of independence lack precedential support.

Appellant cites several cases for the proposition that an expert must be independent; however, in the vast majority of these cases, the word "independent" does not even appear within the four corners of the opinions. (IB. 12-14); *see, i.e., Sourcetrack, LLC v. Aribia, Inc.*, 34 So. 3d 766 (2d DCA 2010) (no mention of a need for "independent" expert testimony); *Crittenden Orange Blossom Fruit v. Stone*, 514 So. 2d 351, 352-53 (Fla. 1987) (same); *Brake v. Murphy*, 736 So. 2d 745, 747 (Fla. 3d DCA 1999) (same); *Markham v. Markham*, 485 So. 2d 1299, 1301 n. 8

(Fla. 5th DCA 1986) (same); *Mullane v. Lorenz*, 372 So. 2d 168 (Fla. 4th DCA 1979) (same); *Sciandra v. PennyMac Corp.*, 227 So. 3d 164, 164 (Fla. 2d DCA 2017) (reversing only because the appellee failed to present *any* expert testimony as the reasonableness of their attorney's hourly rate hours expended.). In only two of the cases cited by Appellant is there even a reference that an expert must be independent; however, both inexplicably create this additional requirement by reliance on cases that do not support this position.

In *Robin Roshkind, P.A. v. Machiela*, 45 So. 3d 480, 481 (Fla. 4th DCA 2010), the Fourth District erroneously cited this Court's decision in *Sourcetrack, LLC* for the proposition 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." (emphasis added). However, as noted above, at no point in *Sourcetrack, LLC*, does this Court address a requirement that the expert be "independent," only that expert witness testimony—in some form—is required. 34 So. 3d at 766.

Additionally, in *Ghannam v. Shelnutt*, there is a reference that an "independent expert" must testify to substantiate an award of attorney's fees. 199 So. 3d 295, 300 (Fla. 5th DCA 2016). However, this decision erroneously cites to *Roshkind, P.A.* (which relies on *Sourcetrack, LLC*), and cases arising out of the this Court that make no mention of an expert's need to be independent. *Ghannam*, 199

So. 3d at 300 n. 2 (citing *Sourcetrack, LLC*, 34 So. 3d at 768; *Lafferty v. Lafferty*, 413 So. 2d 170, 171 (Fla. 2d DCA 1982) (no mention of an "independent" expert)). Admittedly, *Ghannam* also cites to the Fifth District's decision *Sea World of Fla., Inc. v. Ace Am. Ins. Cos.*, 28 So. 3d 158, 160-01 (Fla. 5th DCA 2010), because it acknowledges "the general rule in Florida . . . that independent expert testimony is required" to support attorney fee awards. 199 So. 3d at 300. But this case does not support this position either.

As evidenced by a reading of *Sea World of Fla., Inc.*, many of the other district courts of appeal—notably the Fourth and Fifth Districts—question even the need for *any* expert testimony for an award of attorneys' fees. *See, e.g., Island Hoppers Ltd. v. Keith*, 820 So. 2d 967, 977 (Fla. 4th DCA 2002), (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."), *overruled on other grounds, Sarkis v. Allstate*, 863 So. 2d 210 (Fla. 2003). The Fifth District decision that "acknowledges the general rule" also agreed with the Fourth District that the rule is antiquated. *See Sea World of Fla., Inc.*, 28 So. 3d at 161 ("we join the Fourth District Court of Appeal in questioning the continued need for this judicially-created rule."). The court stated that this so because the need for this rule "rests on shaky theoretical grounds." *Sea World of Fla., Inc.*, 28 So. 3d at 161 n. 3. In *Sea World of Fla., Inc.*, the Fifth District even

identified that an award of attorneys' fees does not always require an expert witness. This case specifically held that an expert witness was not necessary for an award of attorneys' fees when the previously incurred fees were an element of damages in a breach of contract action. *Id.* at 159-160 (citing *Schimpf v. Reger*, 691 So. 2d 579, 580 (Fla. 2d DCA 1997)).

To summarize, in *none* of the cases cited by Appellant was a lower court's award of attorneys' fees reversed because an expert was not "independent." (IB. 12-14). Nor can the undersigned find any cases in the State of Florida that ever substantively address when, and how, an expert would be deemed "independent." Here, the awarded attorneys' fees were based on Appellant's failure to adhere to its discovery obligations and were awarded pursuant to Florida Rule of Civil Procedure. 1.380. (R. 613-617; 656-670). All that is required for the imposition of a fine for a discovery violation is the minimal due process consideration of a notice and an opportunity to be heard, *i.e.*, the procedural safeguards equivalent to entry of a contempt order. *See Channel Components, Inc. v. Am. II Elecs., Inc.*, 915 So. 2d 1278 (Fla. 2d DCA 2005). "Because civil contempt sanctions are viewed as nonpunitive and avoidable, fewer procedural protections for such sanctions have been required … civil contempt may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard." *Id.* at 1293 (quoting *Parisi v. Broward County*, 769 So. 2d 359, 363-64, 365 (Fla. 2000) (internal quotation marks, citations,

and footnote omitted)). Thus, based on this standard, Appellee was not even required to offer Mr. Yanger as an expert witness to substantiate the reasonableness of the fees. The fact that Mr. Yanger testified as an expert witness regarding the fees, even though he was a member of the same firm as Mr. Kennett, does not rise to the level of an abuse of discretion, and the trial court did not err by accepting his testimony. Therefore, the trial court did not abuse its discretion, and the order should be affirmed.

II. THE TRIAL COURT DID NOT AWARD DUPLICATE ATTORNEYS' FEES (RESTATED)

Appellant alleges that the trial court abused its discretion in awarding "duplicate" attorneys' fees where there was already a final judgment and an attorney fee award of record for the same time and expense against the co-defendant. (IB. 14-17). In support of this position, Appellant relies on an argument that the Florida Supreme Court abolished joint and several liability, and thus, each defendant must be independently evaluated for purposes of liability and damages. (IB. 14). This argument is meritless because it does not relate to the issues raised in this case at all.

In support of his position, Appellant relies on a series of cases that are both factually and legally distinguishable to the case at bar. At issue in this case is an award of attorneys' fees as a sanction for discovery violations pursuant to Florida Rule of Civil Procedure 1.380. (R. 613-617). Appellant's arguments, and cited cases

relate to proposals for settlement, *Pratt v. Weiss*, 161 So. 3d 1268, 1271 (Fla. 2015), and a series of cases wherein multiple attorney's from different law firms billed for the same work. *North Dade Church of God, Inc., v. J Statewide, Inc.*, 851 So. 2d 194 (Fla. 3d DCA 2003); *Donald Zuckerman P.A. v. Alex Hfrichter, P.A.*, 676 So. 2d 41 (Fla. 3d DCA 1996); *Thompson v. Thompson*, 492 So. 2d 1154 (Fla. 3d DCA 1986). None of these cases ever address an award of attorneys' fees as a sanction. Although these cases do address that an expert may be needed when a claim of duplicative legal efforts arises, there is *never* a mention of the need of an *independent* expert's testimony—in *any* of Appellant's cited cases.

Here, the trial court awarded these attorneys' fees fully acknowledging the award of attorneys' fees against the co-defendant. (R. 891, ¶ 1.4). As such, the trial court limited this award of attorneys' fees for the discovery sanctions accordingly: "the extent the Plaintiff's attorney collects attorney's fees from either Defendant, counsel may not receive more than the total amount of attorney's fees awarded in the final judgment without further awards from the court." *Id.* Thus, regardless of where the attorneys' fees arise from, there will always be a cap on the amount of attorneys' fees awardable based on the "total amount of attorney's fees" in the final judgment. *Id.* The trial court acted reasonably based on the facts of this case and did not abuse its discretion in awarding these fees. Therefore, this order should be affirmed.

III. THE TRIAL COURT PROPERLY AWARDED ATTORNEYS' FEES ACCORDING A 50/50 SPLIT (RESTATED)

Appellant argues that a "court cannot automatically spit a fee award between co-defendants when there is no way to differentiate the time spent amongst the multiple claims." (IB. 18) (citing *Stowe v. Walker Builders Supply, Inc.*, 431 So. 2d 180 (Fla. 2d DCA 1983)). Appellant argues that, based on the record evidence, "there was no distinction made between work and/or services made between [McFate] and [Appellant]." (IB. 19). However, this argument is erroneous in light of Mr. Kennett's testimony, and the trial court's clear reliance on it. (IB. App. at 4-12). The trial court's order identified that Appellee was "forced to resort to motions to compel against both Defendants' due to their refusal to respond to various discovery requests propounded to them both. (R. 890-892; Order at ¶ 1.7). In this order, the trial court found that the "total attorney's fees that could be awarded devoted to the contested discovery matters in this case" was $6,957.50. (R. 891). Therefore, based on Mr. Kennett's testimony, and out of fairness to the parties, the trial court ordered that the "total attorney's fees that could be awarded must be divided in half to determine the amount chargeable" to both co-defendants. (R. 891). This was a reasonable decision based on Mr. Kennett's testimony at the hearing. Therefore, the trial court did not abuse its discretion, and its order should be affirmed.

CONCLUSION

Appellee, WADE GUNN'S PAIN FREE PRODUCT, LLC, A WYOMING CORPORATION, respectfully requests this Court affirm the lower court's award of attorneys' fees.

Respectfully submitted,

s/ Rocco J. Carbone, III
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic mail to Keith Shevenell at Shevenell@hdlawpartners.com on this the 20th day of February 2018.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared with Times New Roman, 14-point type and complies with the font requirements of Rule 9.210.

Respectfully submitted,

s/ Rocco J. Carbone, III