

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC16-28

ELIZABETH WHITE,

Petitioner,

v.

L.T. CASE NOS.

4D14-488 and 4D14-2460

19th Cir. No. 562011CA003562

MEDERI CARETENDERS VISITING SERVICES OF SOUTHEAST FLORIDA, LLC, and ALMOST FAMILY, INC., a Delaware corporation,

Respondents.

_____ /

RESPONSE TO RESPONDENTS' MOTION FOR APPELLATE ATTORNEYS' FEES

Petitioner, ELIZABETH WHITE, responds to the motion for appellate attorneys' fees filed by respondents, MEDERI CARETENDERS VISITING SERVICES OF SOUTHEAST FLORIDA, LLC, and ALMOST FAMILY, INC., a Delaware corporation (collectively, "Almost Family"). This Court should deny this motion if Almost Family loses in this Court. In the alternative, if Almost Family prevails, this Court should grant the motion, contingent on Almost Family prevailing on the merits in the trial court on remand.

1. The contractual attorneys' fee provision in the non-compete agreement states that "Almost Family shall be entitled to . . . reasonable attorneys

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fees, in the event that the **Employee breaches this Agreement.**” (Appendix p. 6 to Almost Family’s Mot. for App. Fees).

2. In no event should Almost Family be awarded attorneys’ fees if it loses in this Court. That would be a determination that White did not breach the non-compete agreement, so attorneys’ fees would not be warranted under the contract.

3. Even if Almost Family were to win in this Court, it is not entitled to recover attorneys’ fees unless it also prevails in the case following the remand to the trial court. These proceedings arise from a final summary judgment in favor of White, the defendant below. A reversal of the final summary judgment in this case is **not** a determination that White breached the contract, as is required under the contractual attorneys’ fee provision for an award of fees.

4. Further, prevailing party attorneys’ fees are generally awardable only where the party ultimately prevails on the significant issues in the litigation. *See Moritz v. Hoyt Enters., Inc.*, 604 So. 2d 807, 810 (Fla. 1992); *see also Johnson v. Maroone Ford LLC*, 944 So. 2d 1059, 1061 (Fla. 4th DCA 2006); *Allstate Ins. Co. v. De La Fe*, 647 So. 2d 965, 966 (Fla. 3d DCA 1994); *Bridgestone/Firestone, Inc.*

v. Herron, 828 So. 2d 414, 418 (Fla. 1st DCA 2002) (“Ordinarily, a prevailing party in an interlocutory appeal is not entitled to recover appellate attorneys’ fees for the appeal unless that party also prevails on the merits of the case in the proceeding on remand.”).

5. At most, if Almost Family prevails in this Court, this Court should grant Almost Family’s motion for appellate attorneys’ fees, contingent on Almost Family prevailing on the merits on remand.

Accordingly, this Court should deny Almost Family’s motion for appellate attorneys’ fees if Almost Family loses in this Court. In the alternative, if Almost Family should prevail, this Court should grant Almost Family’s motion contingent on Almost Family prevailing on remand.

CONCLUSION

This Court should deny Almost Family’s motion for appellate attorneys’ fee if White prevails in this Court. If Almost Family prevails in this Court, this Court should grant Almost Family’s motion for appellate fees, conditioned upon it prevailing on remand.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by e-mail this 5th day of April, 2016, to: PATRICK M. MULDOWNEY, JAMES W. SEEGER, BAKER & HOSTETLER LLP, 200 South Orange Avenue, Sun Trust Center, Suite 2300, Orlando, FL 32802-0112, pmuldowney@bakerlaw.com, dbichard@bakerlaw.com, jseegers@bakerlaw.com, dmanser@bakerlaw.com, Counsel for Respondents.

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