IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

CASE NO. 3D23-1416
L.T. NO. 20-4641

LAW OFFICES OF SCOTT ALAN ORTH, P.A, et al.,

Appellant,

v.

IN RE: ESTATE OF MARIO QUINTERO,

Appellees.

INITIAL BRIEF

ON APPEAL FROM ORDERS OF THE CIRCUIT COURT,
ELEVENTH CIRCUIT, IN AND FOR MIAMI-DADE COUNTY

SCOTT ALAN ORTH, ESQ.
Florida Bar No. 436313
Law Offices of Scott Alan Orth, P.A.
Attorney for Appellants
3860 Sheridan Street, Suite A
Hollywood, Florida 33021
305.757.3300 / 305.757.0071 F
scott@orthlawoffice.com
service@orthlawoffice.com (Primary)
eServiceSAO@gmail.com (Secondary)

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SUMMARY

This was a probate case that pitted the adult daughters (McGowan and Sparkman) of the decedent who stand to inherit under intestacy law against the named step-granddaughter (Eva Anderson) who had been willed the home of the decedent. The adult daughters were represented initially by attorneys Justin Stivers and Jamy Barreau. Subsequently, attorney Donna Solomon appeared in Quintero I[2] and continued thereafter as counsel to the the Personal Representative (and silently as counsel to Ms. Sparkman). (3R 62, 76-110). Attorneys Scott Orth and Eric Giunta[3] represented Ms. Anderson. McGowan was appointed as Personal Representative of the Estate (herein, sometimes "PR").

It was initially discovered that the decedent undertook to have a will prepared and signed but the original with witness signatures could not be located. (1R 25). McGowan swore there was no will known to her. (1R 13,

[1] References to the Record include the prior appeals and will be identified as follows: Case No. 3D21-2021 (referred to as "1R"); 3D23-0054 (referred to as "2R"); and this case, Case No. 3D23-1416 (referred to as "3R").

[2] An appeal of a proforma homestead determination. Case No. 3D21-2021.

[3] Attorney Giunta, who accepted a position in state government, filed a notice of non-affiliation on April 5, 2023.

at ¶ 9). An intestate probate case was initially approved upon McGowan's ex-parte proforma petition in May, 2021. (1R 13, 64, 66).

Anderson's initial lost will petition (7/16/2021) ("First Petition") mistakenly identified a document entitled "will" and bearing the decedent's original ink signature as an incomplete duplicate copy of the will believed to have been partially executed at the formal will signing. (1R 25, 44, 48). That will copy was later discovered to not be a copy signed at the October 2017 will signing, but apparently was an extra draft, held by and later signed by the testator sometime after April 30, 2018 and separately notarized (by N. Dively) but not witnessed ("Will Copy"). At the probate court's suggestion and order, the named will witnesses (all strangers to Ms. Anderson) were located and then deposed in June, 2021. Subsequently, the will scrivener was located and deposed as well. (1R 70, 87, 92).

On October 13, 2021, just 35 days after an ex-parte proforma "homestead" ruling, Anderson filed her "renewed" lost will petition with all the deposition transcripts attached (2R 21) ("Second Petition"). A notice of filing to include the computer records and draft of the Will produced from the scrivener's computer file was filed on November 3, 2021. (2R, Supplemental Record, Order dtd 6/22/23).

Ultimately, Anderson's Second Petition to probate a lost will was denied without any evidentiary hearing based on a putatively interlocutory[4] intestacy determination and that result was recently affirmed on appeal, albeit based on alternative rationale. Anderson v. Est. of Quintero, No. 3D23-0054, 2024 Fla. App. LEXIS 706 (3d DCA Jan. 31, 2024). ("Quintero II").

In the interim, the PR was granted attorneys fees and costs (payable by counsel) pursuant to two fall-winter 2021 Motions for Sanctions under §57.105(1)(a). (3R 170).

Anderson's counsel now appeals those awards on procedural and substantive grounds.

I. MR. QUINTERO PASSES AWAY AND AN ESTATE IS OPENED

Mrs. Quintero was the grandmother of Ms. Anderson. (2R 72, at ¶ 2). Mrs. Quintero owned and lived in a home in Miami for 30 years; later in life marrying Mr. Quintero and transferring the property to the couple as husband and wife. (2R 72, at ¶¶ 4-6). Mrs. Quintero predeceased Mr. Quintero. (1R 62). Mr. Quintero died on October 16, 2020. (1R 13-14, 20). The Estate was opened shortly thereafter. (1R 13).

[4] The order was consistent with the default procedure under Probate Rule 5.270(b), which authorizes the administration of the estate to "proceed."

The Nation, the Courts and the parties were all in the throes of the pandemic and regular court operations were not yet restored at that time and for many months thereafter.

The Estate was opened by McGowan's filing of a form "Petition for Administration (intestate Florida resident – single petitioner)" on November 19, 2020 (1R 13). Subsequently, Anderson objected to the petition based on the partially executed will she had filed. (1R 25, 62). Anderson continued trying to find the original will or to otherwise establish the content and execution of the "lost will," before and during the appeal proceedings in Quintero I.[5] (1R 27, 25, 30, 42, 44-45, 62, 80).

McGowan, for herself and her sister, were trying to have the estate administered under intestacy and to have the matter closed forthwith. (1R 13, 64, 66, 125).

On June 18, 2021, the lower court, having heard oral argument on Anderson's objection to McGowan's Petition for administration, overruled the objection, but expressly did so: "without prejudice," ruling that "[i]n light

[5] In order to probate a lost or destroyed will, a proponent must establish the will content and its execution. In re Estate of Hatten, 880 So. 2d 1271, 1275 (Fla. 3d DCA 2004): "As explained by the statute, establishment of a will can be accomplished only if there is the testimony of a disinterested witness plus a copy of the will, or if there is the testimony of two disinterested witnesses." A draft is sufficient with two disinterested witnesses. *See* In re Estate of Parker, 382 So. 2d 652 (Fla. 1980).

of the disputed writing claimed to be a will, **[Anderson] shall . . . notice the depositions of the witnesses to the purported will and may thereafter file any appropriate pleadings in this estate (i.e., petition for removal, etc**)." (1R 70). (Emphasis supplied).

In compliance with the Court's directive, on June 28, 2021, named will witness Suarez was examined under oath. (1R 87). Named will witness Maurici's deposition testimony was taken two days later. (1R 92). Both Suarez and Maurici testified that they visited the Decedent at his home in late October 2017, that they witnessed him sign his Original Will, and that they (Suarez and Maurici) signed the Will in each other's presence and in the presence of the Decedent. The notary to the Original Will was not then identified by name and Anderson proceeded in the mistaken belief that the Will Copy was a partially signed extra copy of the October 2017 will, with N. Dively as notary. (1R 80, 89-90, 93-95).

II. ANDERSON'S MISTAKEN FIRST PETITION TO ESTABLISH LOST WILL

On August 17th, the Probate Court ruled that the will that Anderson had filed (the version Decedent signed before notary Dively), that was then believed to have been signed and witnessed in or around late October 2017, ***could not be*** the piece of paper proffered by Anderson as the lost

will.[6] This preliminary ruling resulted when the court itself noticed - at a non-evidentiary hearing -[7] that the notary seal of Dively could not have been issued prior to April 30, 2018 (the date four years prior to the stamped expiration date). (1R 28). Confused and concerned by the conflict of the date of the N. Dively notarized version of the will and the witnesses' testimony that they attended a will signing in October 2017 (and did not know or meet Dively), the Court stated:

See FR. 157 (Tx 8/11/2021):

> "THE COURT: But what you are trying to prove to me, …, is that **this copy** [N. Dively notarized version] **was the copy that they** [the will witnesses] **had on that date and they allegedly signed.** The problem with that is that the notary stamp that was used is an invalid notary stamp. So the motion is denied. All right. **So proceed with intestate**. Thank you.
>
> MR. ORTH: Your Honor, is that without prejudice if I can bring in another witness?
>
> THE COURT: I don't know how you are going to get around that notary problem because what you are proving to me is not that there was a will. **There may have been a will**. What you are proving is that **this piece of paper** was the will. And because of

[6] As a notary is not required to prove up a will's execution, the witnesses were not fully questioned by either counsel about the presence of a notary, except that they did not know that person – Nancy Dively.

[7] Anderson submitted a form requesting a 1-hour hearing on her First Petition (Amended) for establishment and probate of a lost or destroyed will. The court rejected that request and set a 15-minute non-evidentiary hearing. (1R, Supplemental Record, Order dtd 2/2/22, at 3:22-25).

> that defect, I am going to be kind and say the defect on that stamp and the date, it is impossible for you to prove that that's it. **So there may have been a will, but that piece of paper with the notary stamp with the date is impossible to prove." (**Emphasis supplied).

Thus, Anderson's first petition to admit a lost will was denied on its face. (1R 148 -162). Anderson conceded that the Probate Court was correct in its determination that the Dively notarized will was not *THE* Will the witnesses had testified to.

III. ANDERSON SEEKS DISCOVERY TO SOLVE THE INCONSISTENCY

To solve the mystery of the timing of the execution and whether the lost will otherwise could be established, and following the suggestion of the probate judge, Anderson searched for additional evidence of a different lost will. Anderson then located the scrivener of the will. On September 2, 2021, Anderson filed a notice of taking deposition of Ms. Ybelice Garzaro, the Will's scrivener (herein, the "Scrivener"). The deposition was later set for September 28, 2021 at the witnesses' request. (1R. 81, ¶ 9; 1R 89, 9:10 – 10:8; 1R. 90, 15:5-15; 1R. 10).

On September 8, 2021, six days after Anderson noticed the deposition of the Will Scrivener to support the lost will claim, McGowan and Sparkman submitted and obtained a pro forma, *ex parte* declaration of

exemption of the subject real property as "homestead." (1R 143). Anderson, concerned about the future effect and premature entry of that order, filed an appeal ("Quintero I"). (1R 136).[8]

The meaning and effect of the decision in Quintero I, *vis-a-vis* Florida Probate Rule 5.270(b) and Florida Statute §733.208, were hotly opposed by the parties going forward.

When finally deposed 20 days later, the Scrivener testified that she interviewed the Quinteros, determined their intent to be mutual and prepared draft wills and sent the drafts to the Quinteros. Their intent was to leave the home to Isela's granddaughter, Eva Anderson. (2R 39, at 7:18-8:8). The Quinteros called the Scrivener back and made an appointment for the execution of their mutual wills. The execution was attended by the Quinteros, the witnesses named on the Will Copy and the Scrivener. The Scrivener notarized the original Will after the testator and witnesses all executed the Will. According to the Scrivener, the original Wills were left with Mr. and Mrs. Quintero because they were signed at their home, and they had no copy machine. (2R 39, at 11:17-22, 13:12-16, 15:16-16:15,

[8] Anderson's concern was heightened by McGowan's rush to also then file a petition for discharge, which appeared to be granted. (1R 125, 128, 132, 198, 166, at 4:3-6:18; 2R 100).

19:16-22). Nevertheless, she urged them to make a copy for the beneficiary and to keep the original in a safe place. (2R 39, at p. 13).

The Scrivener further testified that she surmised that because the will in her computer was identical in content to the Will Copy, that Mr. Quintero later found the unexecuted (but identical) draft and re-signed it and had someone else (N. Dively) notarize it. (2R 39, at pp. 15, 24). The Scrivener made it clear that the Dively notarized Will Copy was not the will signed and notarized in October, 2017. The Scrivener was disinterested in the Estate as she was neither a beneficiary of the Will nor related to any beneficiary. (2R 39, generally).

IV. THE SECOND PETITION TO ADMIT LOST WILL AND 57.105 MOTIONS

Based on this new testimony, Anderson promptly filed her Second Petition to probate a lost will on October 13, 2021 together with all deposition transcripts and her affidavit of facts on the history of the property and the circumstances under which Anderson obtained and delivered the Dively notarized Will Copy to her counsel. (2R 21, 72). The Second Petition advanced the new position that the later signed (Dively notarized version referred to as the "Will Copy"), will was only a "copy of the [lost] Will, which contains the dispositive scheme intended by the decedent." (2R 21, p. 2,

¶¶ 7, 11f). Thus, the Second Petition relied on the Will Copy only as proof of the content - not the execution of the lost will. The Will Copy was clearly not the lost will. The Second Petition attached and incorporated the deposition testimony of the Scrivener as Exhibit “D”.

As the deposition reflects, by the date of the deposition, the scrivener had not had time to locate and produce the documents requested in the deposition subpoena served on her. The deposition was left open to give the witness time to locate and produce the requested documents. (2R 39, at 25:15-25). On October 27, 2021 the Scrivener sent an email pursuant to the Subpoena and attached documents that contained an image of her last draft of the Quintero wills. Mario’s will was identical *in content* to the content of the Will Copy. These documents, email and computer images were filed for the record five days later. (2R, Supplemental Record, Order dtd 6/22/23). Pages 7 to 10 of these documents reflect the draft of Mario’s rather simple will and pages 21 to 23 reflect the mirror image in a draft of Isela’s will. Both wills ultimately leave the home to Anderson and the residue to Luke Sparkman. The documents produced show no prior versions, creation on October 26, 2017 and the only access date thereafter October 27, **2021,** the day that they were retrieved and sent to counsel pursuant to the deposition subpoena. (2R, Supplemental Record, Order dtd

6/22/23, pp. 9 and 22). By incorporation of these documents into the Second Petition by the Notice of Filing, this computer copy was then *the* lost will being prosecuted.

These pleadings, depositions and documents were all filed less than a year from the opening of the Estate and Anderson's Second Petition was timely under the law. In re Estate of Killinger, 448 So. 2d 1187 (Fla. 2d DCA 1984); and Fla. Stat. §733.208. Anderson and her counsel then believed that the law entitled her to a final evidentiary hearing on this Second Petition. (3R 33).

On December 13, 2021, Ms. Anderson filed a Motion for Leave to Take Ms. McGowan's Deposition while the homestead appeal was pending. (2R, Supplemental Record, Order dtd 6/22/23). On February 24, 2022, the probate court entered an order denying Appellant's motion to take Ms. McGowan's deposition. (2R 12).

On August 31, 2022, this Court filed its Opinion (herein, the "Opinion") in Case No. 3D21-2021 (Quintero I), dismissing, for lack of jurisdiction, Ms. Anderson's appeal of the homestead determination based on the prior intestacy "finding." Anderson v. Estate of Quintero, 374 So. 3d 67 (Fla. 3d DCA 2022). On October 4 , 2022 the panel in Quintero I denied Anderson's motion for rehearing.

Given that the Opinion in Quintero I did not expressly or impliedly preclude the Probate Court from granting relief from its own "proceed intestate" and exemption orders, Anderson, after Quintero I, continued to prosecute her Second Petition to administer a lost will. Anderson's counsel fully considered the situation. Given that the Probate Court itself proclaimed that the appeal in Quintero I was "premature" (1R 166, at 4:11-14), counsel determined that the Second Petition was timely and fully supported factually and legally viable under Fla. Stat. §§733.207 – 733.208, Probate Rules 5.215, 5.270(b), 5.510 and would be consistent with Rule 1.540(b), Florida Rules of Civil Procedure. (3R 33). The lost will being then prosecuted was the version of the Will in the Scrivener's computer. (2R 21, 72, 172; 2R, Supplemental Record, Order dtd 6/22/23).

On September 7, 2022, in a "belt and suspenders" protective filing, Anderson filed a Motion to Vacate the order denying the motion to strike (statement regarding creditors) and renewed her motion to vacate the order determining homestead on the additional grounds and facts discovered. (2R 168).

V. In order to prepare for a final evidentiary hearing, on November 18, 2022, Anderson's counsel filed an "Addendum" to the October 13, 2021 Second Petition and in good faith informed the parties and the probate

court of the proceedings, the decision on appeal, Anderson's interpretation thereof, and, citing Estate of Killinger, (to the effect that the deadline for a newly discovered will must be presented before the discharge of the PR and closing of the estate) announced that it was Anderson's intent to take the depositions of an interested party (D. Sparkman) and the person (M. Fernandez)(recently re-located) that had delivered the Will Copy to Anderson's mother after the death of Mr. Quintero. (2R 172).[9] Consistent therewith, Anderson's counsel noticed the taking of depositions. (2R 186, 189).

Without any dispute of the underlying facts that had been developed, and without answering the Second Petition, McGowan instead took the position that Quintero I barred all further proceedings to establish any lost will.

First, McGowan attacked Anderson's "Motion to Vacate." On October 28, 2022, McGowan served Anderson and her counsel with McGowan's first Fla. Stat. §57.105 Motion (herein, "First Sanctions Motion" and demand that Anderson withdraw her September 7, 2022 Motion to Vacate. 2R 260:

[9] These depositions were intended to complete the factual background – not to verify the lost will itself.

> Here, Anderson and her Counsel knew or should have known, or should know now, that their Duplicative 1.540 Motion is (a) not supported by the material facts necessary to support it; and/or (b) would not be supported by the application of then-existing law to those material facts. In fact, ***the Opinion [Quintero I] makes it crystal clear that Anderson and her Counsel cannot continue to seek a "finding that the decedent died [sic] intestate."*** *(Emphasis supplied)*.

The Motion to Vacate was not withdrawn, but was never set for hearing or argued. In fact, it was never ruled on.

As Anderson's counsel continued to press for the depositions, (3R 186, 189), McGowan filed a Motion to preclude the discovery based on the holding in Quintero I. *See* Motion for Protective Order (November 18, 2022) (2R 176):

> Anderson's continued intervention in this action – including the noticing of depositions -- *flies in the face of the Third District's decision that the August 17, 2021 order was an appealable final order that Anderson failed to timely appeal* and thus constitutes egregious conduct and/or bad faith. Accordingly, attorney's fees should be awarded against Anderson. *See* Bitterman v. Bitterman, 714 So. 2d 356, 365 (Fla. 1998) (finding, in a probate action, that the inequitable conduct doctrine permits the award of attorney's fees where one party has exhibited egregious conduct or acted in bad faith).
>
> WHEREFORE, the Personal Representative respectfully requests this Court to enter an Order precluding Anderson from taking depositions in this matter and awarding attorney's fees against Anderson for her egregious conduct and/or bad faith.

That same day, November 18, 2022, McGowan served Anderson's counsel with her second Fla. Stat. §57.105 motion taking again the position that

Quintero I barred all actions and demanding the withdrawal of the addendum and deposition notices (herein, "Second Sanctions Motion"). (2R 214).

On December 6th, before the safe harbor period expired on the Second Sanctions Motion, the probate court heard and then granted the motion for protective order (2R 464):

> "THE COURT: -- your motion?
>
> MS. SOLOMON: Yes, that is the case, but more importantly here, Your Honor, there is something that's very important with our motion for protective order, . . . the intervenor should not be allowed to set any additional depositions or further intervene in this case, and that's because of the order from the Third DCA on this issue. The Third DCA clearly said that the order determining intestacy is a final appealable order. It was not appealed, and therefore the Third District had no jurisdiction to consider any arguments that the estate should not proceed intestate, and **Your Honor likewise has no jurisdiction to continue to hear these arguments** that there was in fact a will that should be probated.
>
> THE COURT: That is correct."

(2R 355, at 4:11-5:5).

> R. GIUNTA: Your Honor. We're not disputing that as of now the finding of the Court is that the decedent died intestate, but it's still [n]ot too late for the Court to establish a newly-discovered will. The case law - "

(2R 355, at 6:8-12).

> THE COURT: "You know what? That ship has sailed and I don't see how you can just keep on coming back and saying, well, it's really not really final-final and then after that there's another bite and at what point is something final?
>
> MR. GIUNTA: Your Honor, the Third DCA itself gave an example, gave us an example of a final order that nevertheless does not necessarily terminate a future proceeding. So, for example, the DCA in its opinion cited case law to the effect that a dismissal of a civil suit without prejudice is a final order. That does not preclude the plaintiff in that case from re-filing his suit. Do you sunderstand, Your Honor?"

(2R 355, at 6:22-7:10).

> "MR. GIUNTA: Is it the position of this Court that the deadline on the time during which a newly-discovered will can be offered for probate is not in fact the closing of the estate and the discharging of the personal representative?
>
> THE COURT: I am saying that this issue has been dealt with by myself, by the appellate court, and it is done. That's what I'm saying. What I'm saying is that you have no right to take depos in this matter. I don't know how more clear I can say that."

(2R 355, at 8:12-22).

On December 6, 2022 McGowan filed her Second Sanctions Motion – 18 days after service and prior to the safe harbor period. (2R 214).

On December 8, 2022, the lower court entered an Order vacating the Notices of Taking Deposition, therein opining that, pursuant to this Court's Opinion in Quintero I, Ms. Anderson "has no legitimate basis to continue to intervene in her attempt to probate a purportedly lost will." (2R 464).

Thereafter, on December 14, 2022, the Court entered an Order, agreed to in form by both counsel, denying Eva Maria Anderson's (October 13, 2021) Renewed Petition To Establish Will And Addendum, "pursuant to the Order entered on December 8, 2022." (2R 467). Anderson timely appealed both Orders. (2R 455). ("Quintero II").

McGowan rapidly filed a Motion to Dismiss Quintero II. (1/10/23). Anderson responded. (1/25/23). This Court in Quintero II initially carried the motion to dismiss with the case and subsequently denied it. (2/1/23 and 1/31/24).

In Quintero II, McGowan also filed a Motion for Fees as a Sanctions, on the same grounds as the §57.105 motions filed below, *i.e.*, that Anderson could not continue to seek relief based on Quintero I. (6/27/23). Anderson replied and concluded for several reasons that:

> "18. This case is worthy of review as it presents equitable and legal issues that are based on so far, undisputed facts, but are

> caught up in genuine gaps in the case law. This situation requires applications of statutes and rules to a peculiar set of facts. As the probate of a lost will can have myriad facts, particularly some or most that the proponent does not have a grasp of as (here) a stranger to the events surrounding its execution and re-execution, and as the effort is to honor the decedent's wishes, the rules should be applied in an equitable fashion to achieve fairness in the litigation and disposition of the matter below."

(7/31/23).

Quintero II was fully briefed and then set for an oral argument on December 6, 2023. Thereafter, based on the "unique" facts, an opinion was issued affirming the result of the Probate Court's orders on review. Anderson v. Est. of Quintero, No. 3D23-0054, 2024 Fla. App. LEXIS 706 (3d DCA Jan. 31, 2024).[10]

This Court's opinion in Quintero II was not based on the rationale of the §57.105 motions and was not an adoption of the argument that it was too late for Anderson to prosecute a lost will petition. Rather, the panel based the affirmance on the conclusion that the Second Petition failed to present or identify a separate and distinct will – a position neither argued below nor found by the probate court.[11]

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[10] This brief is being submitted as ordered but before the time for a motion for rehearing in Quintero II.

[11] While Anderson admits that the words of both of the will copies (Dively notarized and computer stored) were identical, the Probate Court when

Despite the affirmance, in Quintero II, the Motion for Fees by McGowan – on the identical grounds as the two filed below - was denied in this Court. (January 31, 2024).

VI. FEE LITIGATION

While the Quintero II appeal was pending, the Probate Court proceeded to consider the PR's entitlement to fees based on Fla. Stat. §57.105(1)(b). (2R 345). The initial hearing on the Motion was noticed as a regular (non-evidentiary) hearing. (3R, Supplemental Record, Order dtd 12/8/23). Anderson, via counsel, filed a response to the motion (3R 18) and amended response (to correct typographical error) (3R 33).

In their response, Appellants herein: pointed out the dispute of the parties in interpreting Quintero I; the reasons for the decision to proceed on the timely October 13, 2021 Second Petition; recited to the candid Addendum they filed with the Court - designed to explain the proceedings and dispute to the Court; pointed out that there was insufficient evidence to

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denying on its face, Anderson's First Petition focused strictly on the "piece of paper" and ruled that it was impossible for ***that*** piece of paper to be the will that the witnesses attested to. Anderson perhaps could have made it clearer but the Second Petition, with its addendum, and deposition transcript and subsequent incorporation of the computer screen shots and will drafts demonstrated that the "lost will" being prosecuted was the one the scrivener prepared, carried to the Will signing which was fully executed and notarized by the scrivener - not the Dively version.

support sanctions; and analyzed at length the opinion in Quintero I to establish counsel's good faith belief that the District Court had not barred Anderson from seeking further relief in the probate court. (3R 33).

The probate court, nevertheless, went forward on the entitlement issue on February 14, 2023. (2R, Supplemental Record, Order dtd 5/8/23). The transcript establishes that Ms. Solomon (for McGowan) was successful in convincing the probate court that Quintero I stood for the proposition that *res judicata* barred all further action by Anderson, based on the "proceed intestate" Order that this Court had declined to review based on jurisdiction:[12]

> By Ms. Solomon: First of all, she [referring to Anderson] says that the Court should defer ruling until a Third DCA declares, you know, "once and for all," that Anderson has no further recourse to, try to establish her step-grandfather's lost or destroyed will. **But the Third DCA just did that in its opinion.[13] It specifically held that.**

[12] Respectfully, that ruling should be limited to the case or even abandoned by this Court as an incorrect conclusion of the law (in light of Fla. Prob. R. 5.270(b)), that left undisturbed is manifestly unjust and will likely have unintended repercussions in other probate proceedings. This Court has the power to do that. Fischbach & Moore, Inc. v. McBro, Div. of McCarthy Bros. Co., 619 So 2d 324 (Fla. 3d DCA 1993) The ruling in Quintero I gives the false impression that any order directing the administrator to proceed intestate is, however interlocutory, a bar to a subsequent lost will petition. Indeed, the first order granting the petition to administer the Estate was based on an "intestate" form petition and in similar cases could be argued to be a bar to a lost will petition. Quintero II in effect may recede from or correct Quintero I on this point, but it is not entirely clear.

[13] Referring to the Opinion in Quintero I.

(Emphasis added).

(2R, Supplemental Record, Order dtd 5/8/23) (Transcript at 5:6-10).

That Judge Cueto was led into error on that point is evident as follows:

> Judge Cueto: Okay. All right. I do find that the intestacy issue is res judicata in this case. In fact, there was no withdrawal of the attachment by the 21st day of the 57.105. And I note that the 57.105 has been altered some years ago where a good faith **-- bad faith is not required**. Let me put it in that way. I**t's that you did not follow the law at the time as it existed** and that the facts that you're relying on don't support your position. I do find that that is the case. So therefore, I do find that there are entitlement to attorney's fees. Such amount will be determined at a later date. Okay?
>
> . . .
>
> I'm not going to prepare an order. You prepare the order. You're the movant. Just show Mr. Orth and make sure that it's consistent with this very simple pronouncement that I just said.

(Emphasis supplied).

(2R, Supplemental Record, Order dtd 5/8/23) (Transcript at 11:13-12:4)

Ms. Solomon's proposed order, which the judge signed without change, went well beyond this "very simple pronouncement" by also basing the attorney fee award on, "the inequitable conduct doctrine under Bitterman," which is all about bad faith and was therefore contrary to and not supported by the ruling of the Court. (3R 170, 173).

As to the amount of fees, the probate court held an evidentiary Zoom hearing on June 27, 2023. (3R 174). Ms. Solomon submitted her redacted invoices and summary of time spent, for the entire period since this Court's ruling in Quintero I. (3R 75-110). Ms. Solomon did not testify as to the manner in which the records were kept, reviewed or produced. Ms. Solomon did not testify as to the bills at all, but they were received by the court but not marked into evidence. (3R, Supplemental Record, Order pending). Next, the PR called an expert witness to testify. That witness opined that certain fees of the co-counsel to the PR were not awardable; but that the bulk of the fees by Ms. Solomon were awardable at an enhanced[14] rate of $525 per hour, included "fees for fees," and made no deduction for the plethora of clerical and administrative matters billed by Ms. Solomon at her full rate. (3R, Supplemental Record, Order pending, at pgs. 11-12, 13-22). The expert then testified to his own hourly rate and time devoted to the matter. (3R, Supplemental Record, Order pending, at 13:2-13, 22:8-24).

During the cross examination of the expert's testimony, the Court announced that it was terminating the presentation. (3R, Supplemental Record, Order pending, at pgs. 33, 45). The Court terminated the

[14] Ms. Solomon's fee agreement called for $450 per hour. (3R 62).

evidentiary hearing also without receiving the testimony of Anderson's counsel. Judge Cueto then made findings as to hourly rates but begrudgingly allowed Anderson/Orth to submit a post hearing affidavit (3R, Supplemental Record, Order pending, at pgs. 45-46), which was filed on July 3, 2023 (3R 118). Anderson/Orth timely submitted detailed written testimony and analysis both legal and factual addressed to various aspects of the fee claim. (3R 118-125). Pre-hearing, Ms. Solomon filed papers in support of her fee claim which included her fee agreement which was with the Personal Representative **and** the other heir, Ms. Sparkman. (3R 50, 62). These documents were also not marked into evidence.

Post hearing, the PR filed certain documents that the expert claimed to have reviewed. (3R, Supplemental Record, Order dtd 12/7/23).

At the conclusion of the fee hearing, the probate court took the matter under advisement. While Anderson's counsel was out of the country on vacation, pursuant to a previously filed Notice of Unavailability, opposing counsel suggested to the Court that it receive the submission of "proposed orders." (3R 134).

The probate court, via the judicial assistant, responded on July 5th requesting that proposed orders to be submitted – without a deadline for same. (3R 133). Anderson's counsel's staff immediately responded and

advised the Court of counsel's unavailability and respectfully requested a deadline for submission to shortly after counsel's return, *i.e.*, July 21st was proposed. (3R 133). Without courtesy for counsel's absence or a counterproposal as to a reasonable deadline, opposing counsel objected generally and requested permission to submit her proposed order at that time. (3R 132).

Thereafter, on July 6th, the Court advised the parties, via email communication from the judicial assistant: "July 21? Why? The proposed orders should be submitted forthwith. Proposed orders should be submitted by 5 pm, Friday July 7, 2023." (Due within 24 hours from the delivery of said email directive). (3R 131).

Despite counsel's objection, via email, that this would prejudice Appellant's ability to effectively and efficiently participate, on or about July 7, 2023, the Honorable Jorge E. Cueto, via his judicial assistant, sent an email transmission that stated: "Message from Judge: He [referring to attorney Scott Orth] can file a proposed order or not. I asked them to, but I couldn't care less if he chooses not to do so. Ms. Solomon has said she will be submitting one." (3R 131). Nevertheless, in short order, Anderson/Orth complied as best they could and submitted their proposed order, largely

tracking the detailed factual and legal analysis of the Orth written testimony. (3R 141).

Thereafter, within minutes of receipt of the Solomon proposed order, the Court entered (verbatim) the form of order submitted by Solomon. Judge Cueto completely ignored Orth's testimony and analysis. (3R 118, 141).

Judge Cueto's entered order awarded 100% of the hours testified to by the Estates' expert,[15] at an enhanced hourly rate, allowed time for fee amount litigation ("fees for fees"), and allowed over $8,000 for the heirs' fee expert. (3R 173). Orth and Giunta filed a motion for rehearing that was summarily denied. (3R 135, 183).

From the fee orders, Orth and Giunta timely appealed.

[15] The only time entries declined by the fee expert were time entries in Quintero II.

SUMMARY OF THE ARGUMENT

Appellants, as counsel[16] to Eva Anderson (the lost will proponent) in the proceedings below, seek review and reversal of a fee award in favor of McGowan, acting as the Personal Representative of the Estate of Mario Quintero, deceased, based on Fla. Stat. §57.105(1)(b), and the "inequitable conduct" doctrine.

The fee award was based on two motions that asserted that Anderson's counsel violated §57.105 by filing an addendum to the Second (lost will) Petition and noticing two depositions, and refusing to withdraw Anderson's September 7, 2022 Motion to Vacate.

Based on the arguments that follow, the subject order granting McGowan's Motion for Fees should be reversed and remanded for the entry of an order denying same altogether or, at the very least, remanding for additional essential findings and reversed with instructions to deny certain unsupportable awards (enhanced rates, costs, clerical fees and "fees for fees").

The fee entitlement order was based solely on the probate court's

[16] Eric Giunta was formerly associated with Appellant, Orth and the Law Offices of Scott Alan Orth, P.A., and worked on the Anderson matter. Although he was specifically named in only one of the §57.105 motions, the court included him as being joint and severally liable for all fees awarded. There are no particularized findings as to any inequitable conduct of Giunta.

determination that Quintero I was "*res judicata*" and barred all further proceedings and that Appellants "should have known" that was the law.

The recent decision in Quintero II, although adverse to Anderson, essentially establishes that a direction to "proceed intestate" (as suggested by Probate Rule 5.270(b)) is simply a procedural device to keep a probate case moving while a lost will is in the process of being vetted and is not a bar to the probate court's equitable power to admit a lost will on a proper showing. Indeed, the *ratio decidendi* of Quintero II is entirely different from the probate court's *res judicata* pronouncement as the basis for sanctions.

A total reversal is justified upon this Court's recognition that the arguments advanced by counsel for Anderson in Quintero II raised meritorious arguments for reversal and/or that Anderson's counsel's promotion of the Second (lost will) Petition was in good faith (and hence not "inequitable" or violative of §57.105(1)(b)).[17]

Even if the entitlement is not reversed in its entirety, this Court should reverse and remand for a redetermination of the fees awardable upon consideration of all of the evidence, where the Probate Court failed to allow

[17] As the opinion in Quintero II was just issued on January 31, 2024, Anderson may have a limited avenue for rehearing which could be case dispositive. It seems obvious that a reversal there would require the vacation of the fee awards on review here. Fieldstone v. Chung, 416 So. 2d 11, 12 (Fla. 3d DCA 1982)

complete cross of the expert, and refused to receive the testimony of Appellants' witness or by virtue of its verbatim order, failed to exercise independent analysis.

Further, certain awards must be reversed as unsupportable, i.e., the "fees for fees", an award in excess of the contractual rate agreed upon, the excessive administrative and clerical time awarded at $525 per hour, and the costs award (expert's fees).

Lastly, the incomplete proceedings and the adoption of a verbatim order, along with certain comments of the court, demonstrate an abandonment of the probate court's adjudicative function, which require reversal and remand.

As will be shown in the following arguments, the court order granting entitlement to the fees is unsupported, fails to make the requisite findings and should be reversed as: (a) Anderson's lost will claims were initially supported by the facts and the law; (b) Anderson's actions advancing the claim was a good faith assertion by counsel to the effect that this Court's decision in Quintero I did not preclude the continued litigation of Anderson's (October 13, 2021) then still pending lost will petition as supplemented and amended.

Even if either §57.105 motion was properly filed and well taken and

not excused by a good faith belief that the facts and law supported continued presentation of the lost will cause, the good faith belief in seeking an extension of the laws applicable to probate proceedings precludes the award of entitlement.

There is no evidence and no finding of "inequitable conduct" as that doctrine has come to be defined by the courts. Preferred Gov't Ins. Tr. v. Aelion, 307 So. 3d 129, 130–31 (Fla. 3d DCA 2020).

The court prejudiced the Appellants by prejudging the fee matters as reflected in its refusal to receive testimony from Appellants and entering a verbatim order.

The amount of the fees awarded below are not properly supported on the record and under precedents applicable thereto as there is excessive time spent by counsel performing administrative and clerical work. The award of "fees for fees" is not legally supported under §57.105 case precedent and there is no finding or suggestion that Appellants litigated the fee matter in bad faith. Nazarova v. Nayfeld, 339 So. 3d 475, 476 (Fla. 3d DCA 2022).

The award of the fee amount for expert fees is an award of costs and is unsupportable under §57.105. Law Offices of Alexander E. Borell v. Acevedo, 322 So. 3d 1218 (Fla. 3d DCA 2021).

ARGUMENT ONE

THE FEE AWARDS SHOULD BE SUMMARILY REVERSED BASED ON THE GOOD FAITH ARGUMENTS ADVANCED BELOW - REFLECTED IN THE RESPONSE FILED IN THE PROBATE COURT, AS WELL AS THE BRIEFS, ORAL ARGUMENT AND DECISION IN QUINTERO II.

The Appellee's position below and to this Court in Quintero II was solely that the determination of the probate court to "proceed intestate" precluded all further attempts to gather evidence or to prosecute a later lost will claim. The probate court first adopted that rationale in its December 2022 orders denying final discovery and denying the Second Petition (October 13 2021 Renewed Petition to Probate a Lost will, etc.). As set out in detail in the statement of the case, this position formed the sole basis for the probate court's fee entitlement determination under Appellee's §57.105 motions. *Infra,* at 11:13-24, Transcript 2/14/23 (2R, Supplemental Record, Order dtd 5/8/23).

As evidence of the debatable nature of the dispute, one need look no further than the state of the proceedings in Quintero II. There, Appellee moved to dismiss that appeal and filed a motion for sanctions against Appellants therein on the same basis as the §57.105 motions.

Specifically, on or about November 6, 2023, this Court, in Quintero II, after full briefing, selected the case for oral argument (which was held on

December 6, 2023). Notably, the PR had moved to dismiss that appeal on the same basis as the §57.105 motions, *i.e.*, that "Anderson and her counsel are impermissibly attempting to have this Court revisit its August 31, 2022 opinion issued in Case No. 3D21-2021." That motion, after response, was "carried with the case," tending to indicate that Anderson and her counsel's position presented a meritorious argument of facts and law, *i.e.*, that the decision in Quintero I was not an absolute bar to further litigation as contended by McGowan. *See* Motion to Dismiss (01/10/2023) and Response (01/25/2023) in Case 3D23-0054 (Quintero II). Indeed, although the panel affirmed the probate court's denial of the Second (lost will) Petition, it did so on an entirely different basis. This alone demonstrates the lack of any bad faith by Appellants.

When pressed at oral argument, Appellee in Quintero II appeared to concede to the Court that a lost will petition could be prosecuted and potentially granted regardless of the directive to "proceed intestate." As recited by the Court:

> "[T]he parties do not seem to disagree with the general notion that our holding in Anderson I would not preclude a proponent of a lost will – whether that proponent be Anderson or someone else – from seeking to establish the validity of a will that is different from the one invalidated in the probate court's August 17th order."

(Quintero II, Opinion at p. 5).

Thus, the January 31st affirmance in Quintero II is based on the factual conclusion of this Court that the Second Lost Will Petition failed to seek to probate a **distinct or different** Lost Will:

> "This so-called second lost will, appended to Anderson's renewed petition, though, is identical to the Lost Will that Anderson had initially presented to the probate court in November 2020, and which the probate court, in its August 17th order, had determined was invalid." Quintero II, Opinion at pp. 3-4;

Also:

> "The problem with Anderson's argument is that, irrespective of Anderson's characterization of the documents, at no point did Anderson seek to have probated a will that differed in any meaningful way from the Lost Will that the probate court concluded was invalid in its August 17th order. Put another way, Anderson's renewed petition did not seek to have the trial court probate a different will from the one she initially unsuccessfully sought to have probated." Quintero II, Opinion at pp. 5-6.

This is important because the Appellee never made that argument to the probate court or to the panel in Quintero II, and it was not the basis of the §57.105 motions now on review.[18]

Anderson and her counsel were making good faith fact and record

[18] This position or defense could have been fully litigated below but for the probate court's failure to invoke the Rules of Procedure and require an answer or responsive pleading to the Second Petition. Despite, presumably knowing that a lost will claim is an adversarial proceeding, which, under the Probate Rules, requires a written answer, Appellee, led by its counsel, failed to file any "answer" whatsoever. (See Probate Rule 5.025).

based arguments in a difficult setting that involved the intersection of the Rules of Civil Procedure, the Probate Rules, the Probate Statutes, excusable neglect/newly discovered evidence, compounded by the then on-going pandemic that complicated non-party discovery, and an understandable (mistake) by misconstruction of a Will Copy that actually contained an after-the fact re-execution of the Will by the decedent, which was not, in the Second Petition, *the* lost Will itself, but simply evidence of the testator's intent not to destroy his Will. *See* Response of Anderson to the §57.105 motion in Quintero II (7/31/23, at ¶13).

Appellants' principal good faith arguments were that either or both 1.540(b) and/or §733.208 and/or the Probate Rules permitted the second lost will petition. These good-faith arguments were properly based in the law, rules and statutes governing this situation. Based on this good-faith argument, this Court denied the PR's motion to dismiss appeal, set oral argument, and denied the PR's Motion for Sanctions in Quintero II. Now, that same good faith, or lack of any bad faith, should require reversal of the fee entitlement order.

Further, Anderson and her counsel had good-faith arguments for the continuation of the probate proceedings where there was *prima facie* evidence of a lost will and one or more rules or laws that extended the time

to present same. For this point, Appellants adopt the arguments made in their Response and the briefs and oral argument in Quintero II.

Certainly, when the Court selected Quintero II for oral argument after full briefing, it was made to appear that Anderson's position and arguments in support were not frivolous or without a good faith basis in the law applicable to the facts. This Court can, of course, take judicial notice of those proceedings.

That this Court decided Quintero II adverse to Anderson, does not *ipso facto* lead to the conclusion that Appellee was entitled to fees or that the fee entitlement was properly entered. Cullen v. Marsh, 34 So. 3d 235, 242 (Fla. 3d DCA 2010).

Appellants further suggest that their actions in this particular case and the arguments advanced after Quintero I were based on a good faith interpretation of:

1. Quintero I as failing to find or rule that Anderson was barred from further attempts to establish a lost will; and
2. The effect of the then still pending and undecided Renewed Petition from October 2021 as supplemented and amended to probate a different lost will;
3. The probate court's comments that the denial of the initial

petition was expressly "without prejudice" and under the Probate rules any re-filing could only take place within the probate case - not a new filing; and

4. The probate court's express statement (while the appeal was pending) that the appeal (Quintero I) was "premature," meaning that the court still had jurisdiction to undo the homestead determination and admit a lost will if proven; and
5. The impact of Rule 1.540(b), Probate Rule 5.510 and 5.270 and Fla. Stat. §§733.207/208 which all indicate that until the probate case is closed, the Probate Court has the power to continue the administration of the case, but also had the authority to admit a lost will to probate (and hence, the obligation to hear and consider the evidence thereon).

These matters reflect that Anderson, and her counsel, did not violate court orders or rules of procedure, did not proceed without reflection, and based their claims on the state of the law and facts as understood at the time – which admittedly changed over time as the matter developed. Sanctions were, on this record, not supportable and should be vacated and remanded as to entitlement with direction to enter an order denying same.

ARGUMENT TWO

THE FEE AWARDS MUST BE REVERSED BASED ON THE PROBATE COURT'S FAILURE TO FIND OR ARTICULATE BAD FAITH.

Judge Cueto never stated why Anderson's counsel should have known that *res judicata* attached, particularly given the extended time period to admit a lost will – properly supported.

A review of the transcript of the hearing on entitlement further reveals that the probate judge was of the belief that he did not need to find any bad faith or lack of good faith to award sanctions:

> "And I note that the 57.105 has been altered some years ago where a good faith -- bad faith is not required. Let me put it in that way. It's that you did not follow the law at the time as it existed and that the facts that you're relying on don't support your position. I do find that that is the case."

Transcript 2/14/23 (2R, Supplemental Record, Order dtd 5/8/23).

This is an incorrect statement that first incorrectly recites the law on good faith and then crosses concepts under sections §57.105(1)(a) with 57.105(1)(b). It is incorrect as a conclusion of the law developed under §57.105 and is a dangerous precedent.

It ignores Anderson's good faith analysis of the Opinion in Quintero I and the rules and laws applicable. It ignores the mistake that the court discovered in the first petition and the rapid correction after an additional

witness was located and her testimony was transcribed. It ignores that the court was empowered to set aside the intestacy determination, even the homestead determination upon a proper lost will petition.

Further, the law in the Third District has been very clear that a trial court is required to make detailed, specific findings of bad faith when granting a §57.105 sanction:

To award attorney's fees under this statute, the court must make specific findings of bad faith, and should recite the facts on which it bases its conclusions in the order awarding such fees. Lanson v. Reid, 314 So. 3d 385, 387 (Fla. 3d DCA 2020). "[W]hen a trial court grants a motion for sanctions based on section 57.105, it is required to make detailed, specific findings of bad faith, and should recite the facts on which it bases its conclusions." Llanso v. WNF Law, P.L., 306 So. 3d 221, 224 (Fla. 3d DCA 2020). See also Gonzalez v. Int'l Park Condo. I Ass'n, Inc., 217 So. 3d 1128, 1133 (Fla. 3d DCA 2017).

Further, see JP Morgan Chase Bank, N.A. v. Hernandez, 99 So. 3d 508, 513 (Fla. 3d DCA 2011). See also MC Liberty Express, Inc. v. All Points Servs., Inc., 252 So. 3d 397, 403 (Fla. 3d DCA 2018) (holding "the trial court must find that the action was 'frivolous or so devoid of merit both on the facts and the law as to be completely untenable.' .... Additionally, the

trial court's findings must be based on substantial competent evidence that is either contained in the record or is otherwise before the court") (internal citations omitted).

Other Districts mostly[19] follow suit:

> An order awarding attorney's fees as a sanction under section 57.105(1) "must include findings by the trial court to support the award." Goldberg v. Watts, 864 So. 2d 59, 60 (Fla. 2d DCA 2003) (citing Mason v. Highlands Cty. Bd., 817 So. 2d 922, 923 (Fla. 2d DCA 2002)). "[T]he trial court must find that there were no justiciable issues of law or fact and that the losing party's attorney did not act in good faith based on the representations of his or her client." Siegel v. Rowe, 71 So. 3d 205, 211 (Fla. 2d DCA 2011) (quoting Weatherby Assocs., Inc. v. Ballack, 783 So. 2d 1138, 1143 (Fla. 4th DCA 2001)). See Jackson v. Jackson, 177 So. 3d 639, 641 (Fla. 2d DCA 2015) (citing Perez v. Perez, 100 So. 3d 769, 771 (Fla. 2d DCA 2012)). See also At&T Mobility, LLC v. Rigney, 48 Fla. L. Weekly 1773 (3 Dist. Ct. App. 2023)(Concur and dissent).

If the trial court concludes that an award of fees under section 57.105 is an appropriate sanction, "it should recite in its order the facts upon which it bases that conclusion." Regions Bank v. Gad, 102 So. 3d 666, 667 (Fla. 1st DCA 2012); Lago v. Kame, 120 So. 3d 73, 75 (Fla. 4th DCA 2013); Regions Bank v. Gad, 102 So. 3d 666, 667 (Fla. 1st DCA 2012).

None of these precedents were followed below in the least.

[19] The Fourth District seems to have relaxed its requirements since 2015. *See* Pronman v. Styles, 163 So. 3d 535, 537–38 (Fla. 4th DCA 2015).

Appellants suggest that the court below failed to make specific findings of counsel proceeding without good faith arguments, based in the laws or reasonable extensions thereof, because there were none. Instead, the court imposed a sort of strict liability where the moving party made a demand and the court agreed with it. The probate court recited only that "the intestacy issue is *res judicata*" and that Anderson's counsel failed to withdraw her "attachment [sic] by the 21st day of the 57.105." Such a process does meet the high and strict standards of section 57.105(1)(b), and the fee entitlement order should be reversed and an order entered denying same.

While normally a lower court's order on a section 57.105(1)(a) motion is reviewed for an abuse of discretion, an appellate court's standard of review is *de novo* when the lower court's treatment of a section 57.105(1)(a) motion is based on an issue of law. See AT&T Mobility, LLC v. Rigney, 48 Fla. L. Weekly 1773 (3d DCA 2023).

Here, the treatment is solely on an issue of law – *i.e.*, the *res judicata* effect of Quintero I. Given the acknowledged mistake as to the Will Copy and its origin in the First Petition and the change of claim from the Dively Will (First Petition) to the Garzaro Will (Second Petition), it cannot be said that it was clear that the law would preclude the Second Petition. It was

only the unique facts found by the District Court that precluded (so far) Anderson's Second Petition. McGowan staked her claims on absolute preclusion, whereas the resulting affirmance was based on the "Wills" being construed to be the same by the panel decision.

The mere fact that Anderson did not prevail does not *ipso facto* create a liability for fees. Preferred Gov't Ins. Tr. v. Aelion, 307 So. 3d 129, 130–31 (Fla. 3d DCA 2020); relying on Resnick v. Cty. Line Auto Ctr., Inc., 639 So. 2d 1091, 1092 (Fla. 3d DCA 1994) (reversing order imposing sanctions under section 57.105, noting the mere fact that the defendant prevailed on a motion for summary judgment does not demonstrate that "the action was so clearly devoid of merit both on the facts and the law as to be completely untenable" and further noting that the "standard of frivolousness necessary to support an award of fees pursuant to section 57.105 'is not equivalent to the standard required to prevail on a summary judgment, judgment on the pleadings, or even a motion to dismiss for failure to state a cause of action'").

Merely losing a case is not a basis for sanctions under section 57.105. Cullen v. Marsh, 34 So. 3d 235, 242 (Fla. 3d DCA 2010). Similarly, a court's finding that a party's interpretation of a legal document is incorrect "does not mean that the other party is necessarily entitled to section 57.105

fees." Peyton v. Horner, 920 So. 2d 180, 183 (Fla. 2d DCA 2006). See also Minto PBLH, LLC v. 1000 Friends of Fla., Inc., 228 So. 3d 147 (Fla. 4th DCA 2017); and Chaiken v. Suchman, 694 So. 2d 115 (Fla. 3d DCA 1997).

Requisite findings to support such conclusion of bad faith are still required. MC Liberty Express, Inc. v. All Points Services, Inc., 252 So. 3d 397, 403 (Fla. 3d DCA 2018).

Lastly, although counsel for the PR slipped in the "inequitable conduct doctrine" in the entitlement order she prepared, there were clearly no facts submitted, no documents proffered and no record developed that would support a finding of inequitable conduct. Judge Cueto did not announce any such conclusion and the record could not have supported same.

Further, there are no findings or even hints of particular inequitable conduct. Such a lack of specific findings requires reversal. The Florida Supreme Court allowed fees – contrary the American jurisprudence in a very limited circumstance in Bitterman v. Bitterman, 714 So. 2d 356, 365 (Fla. 1998): "We note that this doctrine is rarely applicable. It is reserved for those extreme cases where a party acts "in bad faith, vexatiously, wantonly, or for oppressive reasons."(citations omitted). This sanction is reserved for cases of clear attorney misconduct.

In Moakley v. Smallwood, 826 So. 2d 221, 226-27 (Fla. 2002), the Florida Supreme Court further cautioned and limited this doctrine to cases where the rules and statutes do not apply and in requiring - as to counsel - specific and detailed findings of unprofessional and unethical conduct:

> "In exercising this inherent authority, an appropriate balance must be struck between condemning as unprofessional or unethical litigation tactics undertaken solely for bad faith purposes, while ensuring that attorneys will not be deterred from pursuing lawful claims, issues, or defenses on behalf of their clients or from their obligation as an advocate to zealously assert the clients' interests. The inherent authority of the trial court, like the power of contempt, carries with it the obligation of restrained use and due process.
>
> Accordingly, we conclude that the trial court's exercise of the inherent authority to assess attorneys' fees against an attorney must be based upon **an express finding of bad faith conduct and must be supported by detailed factual findings describing the specific acts of bad faith** conduct that resulted in the unnecessary incurrence of attorneys' fees. Thus, a finding of bad faith conduct must be predicated on a high degree of specificity in the factual findings. In addition, the amount of the award of attorneys' fees must be directly related to the attorneys' fees and costs that the opposing party has incurred as a result of the specific bad faith conduct of the attorney.
> (Emphasis supplied).

The record before this Court fails to even begin to approach these lofty requirements and no fact exists in the record of the proceedings below that can even be argued to raise the inequitable conduct doctrine.

ARGUMENT THREE

THE AWARD PURSUANT TO APPELLEE'S TWO §57.105 MOTIONS WAS IMPROPER PROCEDURALLY AND IMPROPERLY INCLUDED MATTERS NOT LEGALLY AWARDABLE AND NOT FACTUALLY SUPPORTED.

Procedural Issues

The probate court on a procedural level improperly awarded fees pursuant to the second §57.105 motion for two reasons. First, the motion was disposed of by the court before the safe harbor period expired (2R 464) and, second, the movant filed the motion with the court prior to the expiration of the safe harbor period. (2R 214).

This Second Sanctions Motion is likely the basis for the fee entitlement as ruled by the probate court, based on the pronouncement that the "attachment" was not withdrawn within 21 days. "Attachment" seems to be referring to the Addendum that Anderson filed on November 18, 2022 to bring the court up to speed on Anderson's positions and the proceedings and developments to that date. Strangely, that Addendum was an obvious good faith explanation of why Anderson had elected to proceed on the Second Petition. (2R 172). The Second Motion should be denied for the additional reason that it did not comply with the requirements of Section 57.105, Florida Statutes.

Section 57.105(4) expressly provides that "[a] motion by a party seeking sanctions under this section must be served, but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." McGowan indisputably failed to comply with this requirement. The Second Motion, taking issue with Ms. Anderson's Notices of Deposition of two nonparties, was served upon Ms. Anderson (via counsel) on November 18, 2022. Just eighteen days later, on December 6, 2022, this Court heard argument on McGowan's Motion for Protective Order and orally pronounced in McGowan's favor that the deposition would not be allowed. On December 8, 2022, twenty days after service of the Second Motion, the court entered its written order vacating the notices, thereby mooting the second §57.105 motion.

Further, McGowan filed this Motion for Sanctions on December 6th, eighteen (18) days after service. It being well-established that section 57.105 "must be strictly construed as it awards attorney's fees in derogation of the common law," Anchor Towing, Inc. v. Fla. DOT, 10 So. 3d 670, 672 (Fla. 3d DCA 2009), Ms. Anderson and/or her counsel should not be sanctioned under the Second Motion.

As to the First Sanctions Motion, the Court (if it granted that motion at all – and that is not really clear from the transcript) procedurally improperly granted fees thereunder where the challenged pleading, Anderson's September 7, 2022 Motion to Vacate was never brought before the Court, was never the subject of any discovery request and was never ruled on by the Court. Further, this (September 7, 2022) motion was filed timely as to the September 7, 2021 homestead determination (under Rule 1.540(b)), and it was intended to preserve jurisdiction (if necessary) to vacate the homestead determination which was technically a separate determination from the August 17th directive that the case "proceed intestate." The August 17th directive was actually required under the applicable rule, Fla. Prob. R. 5.270(b), whereas the homestead determination was not. This was good faith action and was not sanctionable.

Substantive Issues

The court failed to make specific findings pursuant to Rule 4-1.5 of the Rules Regulating the Florida Bar in support of the award. In determining the number of hours that have been "reasonably expended," the court must consider the time that would ordinarily have been spent by lawyers in the community to resolve this particular type of dispute, which is not necessarily the number of hours actually expended by counsel in the

case at issue. In re Estate of Platt, 586 So. 2d 328, 333 (Fla. 1999); Trumbull Ins. Co. v. Wolentarski, 2 So. 3d 1050, 1057 (Fla. 3d DCA 2009); Levine v. Keaster, 862 So. 2d 876, 882 (Fla. 4th DCA 2003). Any doubts as to whether time should be awarded should be resolved against the party seeking the fee. Haines v. Sophia, 711 So. 2d 209, 212 (Fla. 4th DCA 1998); Universal Property & Casualty Ins. Co. v. Desphande, 314 So. 3d 416 (Fla. 3rd DCA 2020)(when calculating the number of hours reasonably expended on the litigation for purposes of attorneys' fees award, applicants are expected to exercise billing judgment, and if they do not, courts are obligated to do it for them, to cut the amount of hours for which payment is sought, pruning out those that are excessive, redundant, or otherwise unnecessary).

The court failed to make specific findings as to fees allowed on each §57.105 motion, which creates an additional burden on appeal if part of the fee entitlement or amount is reversed.

The court failed to require testimony of the counsel (Solomon) that submitted fee records and, as such, the records alone – which were never entered as "evidence," are insufficient. This also precluded cross examination of the only person who could support the manner in which the time was recorded, entered, edited, and redacted.

Necessarily included in the award below were fees incurred during the amount of fees phase, (*i.e.*, “fees for fees”), the fees of the movant’s fee expert - properly regarded as costs, an hourly rate ($525) in excess of the contractual rate agreed to by the attorney and client(s), and vast time spent on administrative or clerical activities. (3R 118). We note here that the only time not included from the entire fee summary was time spent on the appeal in Quintero II; time that this Court also refused to award.

Pursuant to §57.105, an award of sanctions cannot include “fees for fees,” administrative or clerical activities and cannot include an award of costs (expert fees). Such an award should not exceed the rates either agreed to or reasonable in the circumstances. Such an award should not compensate when highly qualified and priced attorneys perform clerical or administrative functions and then bill for that.

In Nazarova v. Nayfeld, 339 So. 3d 475, 476 (Fla. 3d DCA 2022) this Court reiterated the general rule against fees for fees:

> “The billing records of defendant's attorney, upon which the trial court's order was based, included entries for work performed and time billed for litigating the amount of fees to be awarded. These are sometimes referred to as "fees for fees," and generally are not recoverable. See Palma, 629 So. 2d at 833 (holding "fees may be awarded for litigating the issue of entitlement to attorney's fees but not the amount of attorney's fees"); N. Dade Church of God, Inc. v. JM Statewide, Inc., 851 So. 2d 194, 196 (Fla. 3d DCA 2003)) ("It is settled that in

> litigating over attorney's fees, a litigant may claim fees where entitlement is the issue, but may not claim attorney's fees incurred in litigating the amount of attorney's fees.")

Other Districts agree. It is well established that "[a] party may recover attorney's fees for time spent establishing entitlement to fees; however, a party cannot recover fees for time spent contesting or determining the amount of fees due." Household Fin. Corp. III v. Williams, 290 So. 3d 508, 511 (Fla. 4th DCA 2020). A party generally cannot recover attorney's fees incurred after a finding of entitlement has been made. See also Eisman v. Ross, 664 So. 2d 1128, 1129 (Fla. 4th DCA 1995) and Wight v. Wight, 880 So. 2d 692, 694 (Fla. 2d DCA 2004).

The Court below awarded the expert's expenses and ignored that expert expenses in a fee matter are "costs" under the law and Fla. Stat. §57.105 does not permit costs – only fees. Tribble v. L.O.B., 315 So. 3d 1239 (Fla. 2d DCA 2021). Law Offices of Alexander E. Borell v. Acevedo, 322 So. 3d 1218 (Fla. 3d DCA 2021).

There is a large block of time obviously reflecting attorney Solomon performing administerial and/or secretarial duties which, under the law, and the record in this case, does not justify an award of fees. (3R 75, 125, 118). Excessive time spent on simple administrative and ministerial tasks such as reviewing documents or filing notices of appearance is non-

compensable. N. Dade Church of God v. JM Statewide, Inc., 851 So. 2d 194, at 196 Fla. 3d DCA 2003); Haines v Sophia, 711 So. 2d 209, at 211 (Fla. 4th DCA 1998); see also Centex-Rooney Constr. Co. v. Martin County, 725 So. 2d 1255, 1261 (Fla. 4th DCA 1999).

The fee awards should be reversed based on the procedural issues and, if not reversed entirely, then the specific non-compensable awards should be reversed and remanded with instructions to recalculate the fees awardable consistent herewith.

Lastly, the probate court failed to consider that counsel for Anderson had (and has) a good faith belief that the court's equitable powers, the Probate Code and potentially Rule 1.540(b) all grant power to the probate court to make orders establishing a lost will and granting relief from intestacy proceedings. See Casey v. Jensen, 189 So. 3d 924 (Fla. 2d DCA 2016) (reversing §57.105 award). Upon any remand, the probate court should expressly address that good faith extension defense under Fla. Stat. §57.105(3)(a).

ARGUMENT FOUR

THE AWARD PURSUANT TO APPELLEE'S §57.105 MOTION MUST BE REVERSED WHERE THE COURT ABANDONED ITS ADJUDICATIVE FUNCTIONS

The fee award pursuant to McGowan's Section 57.105 motion must be reversed because the Court abandoned its adjudicative functions when it:

a. Refused to allow the Appellants to complete the cross of the fee expert and refused to hear the testimony of counsel for Appellants; and

b. Later demanded proposed orders within 24 hours and indicated that it "did not care if (Anderson's Counsel) submitted a proposed order" where same were suggested by Appellee, on short notice; and

c. Entered a verbatim order, without reflection, on an incomplete evidentiary basis, in excess of any fee agreement, without a proper foundation and without sufficient particular findings required; and

d. failed to determine if the claim was "initially presented to the court as a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law" because

such a finding would preclude sanctions under section 57.105. See §57.105(3)(a), Fla. Stat.

As set forth with more detail in the facts section, the 1-hour hearing time allotted by Judge Cueto for the fee amount presentation was consumed by Mrs. Solomon's argument and (part of) her expert's testimony. The Court terminated the evidentiary hearing without allowing the completion of cross and without receiving the live testimony of Anderson's counsel. Judge Cueto then begrudgingly allowed Anderson/Orth to submit a post hearing affidavit. Anderson/Orth submitted detailed testimony and analysis both legal and factual addressed to various aspects of the fee claim. (3R 118).

The Court then, at attorney Solomon's suggestion demanded proposed orders on very short notice and rejected Appellants' request for more time. The Court made a clear indication that it had pre-determined the matter. (3R 131-134). Appellants made an effort to comply, (3R 141) but it fell on deaf ears as the probate judge rapidly entered the Appellee's submitted order – verbatim. (3R 173).

Judge Cueto's (verbatim) order awarded 100% of the hours testified to by the PR's expert, at an enhanced hourly rate, allowed time for fee

amount litigation, and allowed over $8,000 for the Personal Representative's fee expert. (3R 173).

Based on the indifference, and remarks that were interpretated as pre-judging and bias, Petitioners promptly filed their Motion to Disqualify on July 24, 2023 at 10:04 PM. (3R 126). Shortly thereafter, Petitioners filed a Motion for Rehearing (July 24, 2023 at 10:20 PM). (3R 135).

The motion to disqualify was denied without any stated reason on July 25, 2023 at 6:54 AM. (3R 139). The Motion for Rehearing was denied without a stated reason on July 26, 2023 at 9:55 AM. (3R 183).

The requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision-making process. See Carey v. Piphus, 435 U.S. 247, 259-262, 266-267 (1978).

In this case, the Judge failed to act fairly, and abdicated his adjudicative functions, failing to exercise independent judgment resulting in the verbatim order. In Perlow v. Berg-Perlow, 875 So. 2d 383 (Fla. 2004), the Florida Supreme Court did not adopt a *per se* rule against a trial judge adopting verbatim the proposed order of one of the parties. However, the Court did caution that a party's proposed order "cannot substitute for a

thoughtful and independent analysis of the facts, issues, and law by the trial judge." Id. at 390. In Perlow, the trial judge adopted verbatim the proposed order of one party without giving the other party an opportunity for comments or objections. In reversing that order under review, the Florida Supreme Court stated:

> When the trial judge accepts verbatim a proposed final judgment submitted by one party without an opportunity for comments or objections by the other party, there is an appearance that the trial judge did not exercise his or her independent judgment in the case. This is especially true when the judge has made no findings or conclusions on the record that would form the basis for the party's proposed final judgment. This type of proceeding is fair to neither the parties involved in a particular case nor our judicial system.

Id. (footnote omitted). Further, the Florida Supreme Court provided the following guidance to trial judges when requesting proposed orders:

> (1) the trial judge may ask both parties or one party to submit a proposed final judgment; (2) if proposed final judgments are filed, each party should be given an opportunity to review the other party's proposed final judgment and make objections; (3) if only one party submits a proposed final judgment, there must be an opportunity for review and objections by the opposing party; and (4) prior to requesting proposed final judgments, the trial judge should, when possible, indicate on the record the court's findings of fact and conclusions of law.

Id. at 384.

In the proceedings before Judge Cueto, he failed to follow these guidelines, indicated a lack of care for the Appellants and their position and

exceeded known precedent in making the fee awards. The adoption of the verbatim order in less than 2 hours after submission indicates the lack of independent judgment. While not as extreme as that in Berg-Perlow, this case has several markers that support the lack of independence as set forth above. This District has had recent occasion to reiterate the need for the courts to be reflective and independent. See First Baptist Church of Greater Miami v. Miami Baptist Ass'n, 373 So. 3d 1194 n.3 (Fla. 3d DCA 2023):

> While a trial court's verbatim adoption of a proposed order does not by itself constitute reversible error, see, e.g., Certain Underwriters at Lloyd's London v. Candelaria, 339 So. 3d 463 (Fla. 3d DCA 2022); Kendall Healthcare Grp., Ltd. v. Madrigal, 271 So. 3d 1120 (Fla. 3d DCA 2020), a party's proposed order "cannot substitute for a thoughtful and independent analysis of the facts, issues, and law by the trial judge." Perlow v. Berg-Perlow, 875 So. 2d 383, 390 (Fla. 2004). The circumstances presented here merits reaffirming the need for a trial court's order to reflect its thoughtful and independent analysis of the facts, issues, and law…

In the event that a remand is ordered here, the probate court should likewise be reminded to make an independent analysis.

CONCLUSION

This Court should reverse *in toto* the order granting entitlement to fees and remand with directions to deny same.

Alternatively, if this court affirms any possible entitlement, the entitlement order should still be vacated and the matter remanded for further proceedings – including a full hearing thereon.

Alternatively, if the Court affirms the entitlement order in its entirety, the fee award must be reversed and reconsidered in light of the binding precedent that fee enhancement, fees for fees, costs (expert witness fees) and clerical time spent by counsel are not properly awardable.

Lastly, the probate court should be directed reconsider (or consider of the first time) Appellants good faith arguments pursuant to Section 57.105(3)(a).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been filed, served and furnished to:

Donna Greenspan Solomon, Esq.
Solomon Appeals, Mediation & Arbitration
901 South Federal Highway, Suite 300
Ft. Lauderdale, FL 33316
Donna@solomonappeals.com

via the Florida Courts e-Filing Portal on this 5th day of February, 2024.

s/ Scott Alan Orth
SCOTT ALAN ORTH, ESQ.
Florida Bar No. 436313
LAW OFFICES OF SCOTT ALAN ORTH, P.A.
Counsel for Appellant
3860 Sheridan Street, Suite A
Hollywood, FL 33021
305.757.3300 / 305.757.0071 Fax
scott@orthlawoffice.com
service@orthlawoffice.com (primary)
eserviceSAO@gmail.com (secondary)

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Arial 14-point font and that it complies with the word count requirements in the Florida Rules of Appellate Procedure.

s/ Scott Alan Orth
Scott A. Orth, Esq.