IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

JERRY BASS and CAROLYN BASS,

APPELLANT(S)

v.

WMT HOUSING, LLC D/B/A LIVE OAK HOMES, WAYNE FRIER HOME CENTER OF MACCLENNY, LLC

APPELLEE(S)

CASE 1D2023-2889
L.T. NO. : 2022-CA-158

ON APPEAL FROM THE TRIAL COURT
OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SUWANEE COUNTY, FLORIDA

REPLY BRIEF

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STANDARD OF REVIEW

The parties are in agreement that normally an award of attorney's fees is reviewed for an abuse of discretion, but "the determination of whether multiple claims within a lawsuit are separate and distinct is a matter of law to be reviewed de novo." *Current Builders of Fla., Inc. v. First Sealord Sur., Inc.,* 984 So. 2d 526, 533 (Fla 4th DCA 2008); *Anglia Jacs & Co. v. Dubin,* 830 So. 2d 169, 171 (Fla. 4th DCA 2002) (Answer Brief at 3-4).

ARGUMENT

I. THE TRIAL COURT IMPROPERLY APPLIED A NEWLY CREATED STANDARD TO THE AWARD OF ATTORNEYS FEES

In the Initial Brief Mr. and Mrs. Bass set forth their argument that the trial court created a new standard without precedential support, to wit, the requirement to apportion fees between parties rather than claims. Appellees failed to address this argument and cite no cases to support this newly created judicial standard. Indeed, there are none. Rather than dividing the award fees equally or jointly and severally, the trial court ordered no fees at all (other than those stipulated by defense counsel) for extensive legal services indisputably rendered by counsel for Mr. and Mrs. Bass.

Here, the Defendants stipulated to the entitlement to attorney fees. The hourly rate of Bass' counsel was undisputed. The number of hours expended and the reasonableness of the amount of time expended were also undisputed. No time was found to be unreasonable nor was there any claim that any time was unreasonably expended. Additionally, it was undisputed that all of that time claimed by Bass' counsel was spent in the prosecution of the claims asserted in the complaints that were filed in this action. Finally, it is further undisputed that all claims asserted in the complaint would entitle the plaintiffs to attorney's fees. Thus, the award of less than one-third (1/3) of the attorney's fees requested was error.[1]

Appellees clearly recognize the proper standard to be applied is the allocation between issues for which fees were awardable and those which were not.[2] However, no such allocation was necessary in this case since

[1] Attorney's fees of $37,377.50 fees requested (R. 901, 902; 922,925) fees of $11,065.00 awarded (R. 960, 963) equals 29.6%.

[2] "Expert was not clear as to which counts of plaintiffs Second Amended Complaint were against which defendants"(the Answer Brief at 4); "the trial court held that, because Plaintiffs did not allocate their fees to the **issues** (*emphasis added*) for which fees were awardable" (Answer Brief at 5); [no] "competent substantial evidence that the **issues** (*emphasis added*) for which fees were awardable were so intertwined that allocation was not feasible (Answer Brief at 5); "Plaintiffs summarily conclude that the **issues** (*emphasis added*) in Plaintiffs' case were inextricably intertwined because they involved…(Answer Brief at 5).

attorneys' fees were awardable for all claims. Instead, the trial court and Appellees seek to justify depriving Plaintiffs of over two-thirds of fees necessarily incurred in the prosecution of this action because there was no way to allocate the fees between the two Defendants.

Essentially, Appellees argue that Mr. and Mrs. Bass failed to present sufficient expert testimony or evidence of apportionment. However, as they recognize, the determination of whether multiple claims are separate and distinct is de novo review. That is because the court of appeals does not need to weigh and evaluate evidence on this issue but is in the same position as the trial court to evaluate the claims set forth in the complaint.

II. THE RECORD UNEQUIVOCALLY ESTABLISHES THAT THE CLAIMS ARE INTERTWINED AND THEREFORE, THE WORK BETWEEN THE TWO DEFENDANTS IS NECESSARILY INTERTWINED.

Although the trial court did not base its decision on a finding that the claims asserted in the Second Amended Complaint (R. 735) were not intertwined, the record unequivocally establishes that they were. Thus, even applying a claims standard, Plaintiffs have sufficiently met their burden. Paragraph 23 of the Second Amended Complaint (R. 735, 738-739) lists twenty-four alleged defects of the subject mobile home. Each and every count of the Second Amended Complaint incorporates this list of defects as

the factual predicate for the legal theory asserted. Each count of the Second Amended Complaint bases its claim for legal relief on the precise set of facts. Clearly every claim asserted then is based on the same common core of facts. See, *Current Builders of Fla., Inc.* at 533-534.

A de novo review of the Second Amended Complaint demonstrates that each and every count of the Second Amended Complaint is based on a related or alternative legal theory to hold both defendants legally responsible for the defects listed in paragraph 23. Thus, the separate counts are simply different theories of liability "for the same wrong." See *Avatar Dev. Corp. v. DePani Constr. Inc.,* 883 So. 2d 343, 346 (Fla 4th DCA 2004).

The defects listed in paragraph 23 include defects which may be attributable to one defendant or the other, **or both**. The legal claims and the facts, on their face, overlap to a substantial degree to seek recovery for the same wrong. This demonstrates that they are indistinguishable and intertwined for the purpose of assessing whether the work performed related to some, or all, of the claims asserted and against one or both Defendants. Again, fees were properly part of the damages asserted for every count of the Second Amended Complaint. Since the facts and legal theories were intertwined, the work performed by counsel for the Plaintiffs was necessarily intertwined vis a vis both defendants with no apportionment possible.

Based on the *de novo* standard of review and the detailed allegations of the Second Amended Complaint, no external evidence or expert evidence on the intertwining of the claims was necessary at all. However, it is not necessary for this court to make that determination in this case since there was unrebutted expert testimony that the claims and work performed were indistinguishable. This testimony itself is sufficient to meet Plaintiff's burden. See, *Current Builders* at 533 ("expert claimed it was impossible to distinguish which fees were incurred on behalf of [each defendant.").

Appellees presented no evidence, expert or otherwise, at the trial court regarding distinguishing between the parties or claims. Only on appeal (Answer Brief at 6) do appellees attempt to make minor distinctions in the statutory claims. However, fees legitimately incurred when there is a common core of facts and related legal theories should be awarded, "unless it can be shown that the attorney spent a separate and distinct amount of time on counts as to which no attorney's fees were sought or were authorized." *Current Builders of Fla., Inc.* at 533-534 quoting *Anglia Jacs & Co.* at 172. See also, *Chodorow v. Moore,* 947 So. 2d 577, 579 (Fla 4th DCA 2007).; *Chrysler Corp. v. Weinstein,* 522 So. 2d 894, 896 (Fla 3d DCA 1988).; *Caplan v. 1616 E. Sunrise Motors, Inc.* 522 So. 2d 920, 922 (Fla 3d DCA 1988). In such a case, "the award of attorneys fees should not be reduced

in the absence of a showing that the defendant's attorneys spent a separate and distinct amount of time in defending a count upon which no attorney's fees were awardable." *Caplan* at 922, cited in *Chodorow* at 579 (emphasis in original). Here there was no such showing and fees for the entire amount claimed should have been awarded.

III. JOINT AND SEVERAL LIABILITY IS APPROPRIATE

For the reasons set forth in the Initial Brief, joint and several liability of the defendants is appropriate in this claim for attorney's fees. See, *Parton v. Palomino Lakes Prop. Owners Ass'n*, 928 So.2d 449, 454 (Fla. 2d DCA 2006)(where fees could not be apportioned between parties or counts movant is entitled to a fee award that is joint and several). Since the counts substantially overlap, and are based on the identical list of defects (contained in paragraph 23 of the Second Amended Complaint), the work performed relates to both Defendants and the majority of the work would have been necessary against either Defendant individually. Moreover, the types of relief sought in each of the several counts is the same relief for both defendants. In other words, a determination that the mobile home was defective would have given rise to liability for both defendants as to a majority of the list of defects in paragraph 23.

There is nothing in the record to suggest that the defendants pointed at each other with respect to the defects alleged. Indeed, both were represented by the same counsel and a conflict of interest would have been created had they attempted to do so. The case was defended as a whole. Attorney's fees should likewise be awarded as a whole against both Defendants jointly and severely.

Appellees simply confused the issue of joint and several liability as to each separate count with the obligation of joint and several liability for attorney's fees by prosecuting the case as a whole. Perhaps if the case had not settled before trial a jury verdict could have identified defects that were clearly the responsibility of one defendant versus the other. At that point there could possibly be a basis for distinguishing fees between defendants. This case was settled at mediation by both defendants with a single defense counsel and the entitlement to fees was stipulated.

IV. CONCLUSION

For all the foregoing reasons, Appellants respectfully ask this Honorable Court to Reverse the Order on Attorney's Fees and Costs and Remand this case with directions to award attorneys' fees in the amount of $37,377.50 to be awarded jointly and severally against both Defendants

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via USPS and the e-filing portal this 20th day of June, 2024, to:

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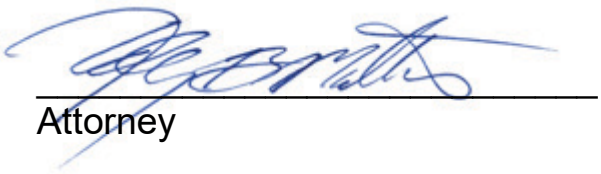
CERTIFICATE OF COMPLIANCE WITH FONT AND WORD COUNT REQUIREMENT

I hereby certify that this brief satisfies the font and word count requirements of Florida Rules of Appellate Procedure Rule 9.045(b) and 9.210(a)(2)(B). The Reply Brief was typed using Arial 14 pt. font.



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