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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

APELLEE(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

INITIAL BRIEF

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PRELIMINARY STATEMENT

The Appellants, Jerry Bass and Carolyn Bass, shall be referred to as "Plaintiffs".

The Appellees, WMT Housing, LLC d/b/a Live Oak Homes and Wayne Frier Home Center of Macclenny, LLC shall be referred to as Defendant WMT Housing and Defendant Wayne Frier and collectively referred to as "Defendants".

The proceedings below were before the Honorable Jennifer Kuyrkendall Griffin and will be herein referred to as the "trial court".

References to the Record on Appeal will be designated as "R." followed by the appropriate page numbers, e.g., (R. 10), and, where applicable, paragraph numbers and deposition line numbers on which the information can be found, e.g., (R. 10 p. 9), or (R. 10 lines 15-17).

STATEMENT OF CASE AND FACTS

On May 3, 2022, Plaintiffs filed their Second Amended Complaint against both Defendants. (R. 735) The Second Amended Complaint alleged that Plaintiffs purchased a double-wide mobile home from Defendant Wayne Frier that had been manufactured by Defendant WMT Housing. (R. 737) Defendant WMT Housing was engaged in the manufacture, sale, and/or distribution of manufactured/mobile homes. Defendant Wayne Frier was an

authorized WMT Housing sales and service provider and is engaged in the business of selling manufactured/mobile homes to the general public. (R. 736) Both parties were represented by the same counsel throughout the litigation. (R. 435)

The Second Amended Complaint alleged that the mobile home suffered from various defects and non-conformities. (R. 738) These defects included:

a. The entire roof of the mobile home was defective;
b. The eaves of the roof were misaligned;
c. The roof allowed water leakage;
d. One end of the roof/eaves were five inches longer than the other;
e. One side of the mobile home was longer than the other;
f. The two sections of the mobile home would not align with each other;
g. Entire side of the front of the house shifted/sunk into ground;
h. Opposing section improperly connected to the other section of the home;
i. One section out of alignment with the opposite section on the X axis;

j. Home collapsed on one end to the ground and had to be reset;

k. Gaps and separations all along the front side of interior rooms;

l. Significant gap in marriage line between the two halves of the mobile home causing instability, water leakage, and other problems;

m. Floors not level;

n. Marriage line trim off center;

o. Misalignment resulting in water leaking into the home;

p. Splitting of floors;

q. Splitting of interior walls;

r. Missing skirting;

s. Incomplete siding;

t. Doors binding in their jamb;

u. Doors unable to close;

v. Doors not level;

w. Collapse of under floor insulation; and

x. Additional defects affecting the value, longevity, and appearance of the mobile home.

(¶ 23, Second Amended Complaint (R.738)). The Second Amended Complaint further alleged that both the Defendants failed in their opportunity

to cure the defects and rectify the problems (¶31, 34, Second Amended Complaint (R. 739)).

Plaintiffs brought claims for recission, breach of contract, breach of statutory warranties, breach of implied warranty under the Magnuson-Moss Warranty Act, and revocation of acceptance against Defendant Wayne Frier (Counts I, II, III, IV and V) and claims for breach of express warranty under the Magnuson-Moss Warranty Act and breach of statutory manufacturer warranties against Defendant WMT Housing (Counts VI, VII). Plaintiffs brought a claim for violation of the Florida Deceptive and Unfair Trade Practices Act against both Defendants Wayne Frier and WMT Housing. (Count VIII). All of the claims against both Defendants were predicated on the precise same defects set forth in paragraph 23 of the Second Amended Complaint set forth above. In addition, Plaintiffs pled, and were entitled to, attorney's fees for each separate Count of the Second Amended Complaint.

On July 10, 2023, the underlying claims against both Defendants were resolved by a confidential written Settlement Agreement at mediation. The Settlement Agreement provided, *inter alia*, for court determination of the amount of attorney's fees and costs.[1]

[1] The parties stipulated as to entitlement of attorneys' fees in the Settlement Agreement.

On August 8, 2023, Plaintiffs' attorney filed a Motion for Attorney's Fees and Costs (the "Motion"). (R. 901) The Motion included all billing entries for all legal services performed. (R. 905) These billing entries detailed the work performed by Plaintiffs' attorney, setting forth the time expended and the specific service provided. In support of the Motion, an Affidavit of Attorney's fees signed by counsel setting forth the amount of fees incurred, the billing, and related factors was filed. (R. 922) In addition, an Affidavit of Reasonableness of Attorney's Fees by Plaintiff's expert was filed in support of the Motion. (R. 930) The testimony at the subsequent hearing tracked the Affidavits.

On October 9, 2023, a hearing was held on Plaintiffs' Motion.[2] At the hearing Plaintiff's fee expert testified regarding the reasonableness of the hourly rate, the reasonableness of the hours expended, and the *Quanstrom* factors. The defense did not call an expert witness, stipulated to the hourly rate sought, and did not contend that the hours expended were not reasonably expended in connection with the case. Instead, the defense claimed that some of the hours initially were related to a defendant that was later dropped (the holder of the note which was a necessary party to the

[2] There was no court reporter present at the hearing and the hearing was not transcribed. However, the significant issues in this appeal regarding the expert witness testimony are referenced in the trial court's subsequent Order.

claim for revocation of acceptance) and made the single argument that the Plaintiffs' expert failed to apportion the attorneys' fees sought between their two clients.

Plaintiffs' fee expert testified that he did not make an apportionment of attorney's fees between the Defendants because it was his impression that "it is indivisible" and was not substantively different as to the nature of the counts. Plaintiffs' fee expert testified that although there were six counts against Defendant Wayne Frier and three counts against Defendant WMT Housing, he was unable to apportion time spent because it was his belief all of the time was necessary with respect to the instant action and that the nature of the counts against Defendants were not substantially different and in his mind, the attorney's fees and claims were indivisible between Defendants.

A subsequent Order was entered on October 18, 2023, only awarding Appellants $10,425.00 of the $37,377.50 in attorney's fees requested against Defendants jointly and severally, and only $640.00 against Defendant WMT Housing, individually. (R.960-975). In making this decision, the trial court summarily concluded that Plaintiffs' attorney fee expert must not only establish the reasonableness of the hourly fee, but that the expert

must also establish that the reasonableness of the amount of time expended "*should be as to each defendant*."

In the trial court's Order on Attorney Fees and Costs the trial court ruled that it could not distinguish between what fees should be allocated to Defendant WMT Housing or Defendant Wayne Frier and therefore only awarded fees that defense counsel stipulated to.

ARGUMENT ON APPEAL

Standard of Review

Determination of attorney's fees is generally within the sound discretion of the trial court and will not be disturbed absent a showing of abuse of discretion. *Baker v. Falcon Power, Inc.*, 788 So. 2d 1104, 1106 (Fla. 5th DCA 2001) (holding that, although the trial court found Falcon Power was entitled to attorney's fees as prevailing party only as to its counterclaim, award of entire amount of fees based on finding that claims were indivisible was not abuse of discretion). However, the determination of whether multiple claims within a lawsuit are separate and distinct is a matter of law to be reviewed de novo. See, *Gibbs Constr. Co. v. S.L. Page Corp.,*755 So. 2d 787, 790 (Fla. 2d DCA 2000). "While trial courts are not bound by expert opinions provided at evidentiary hearings or by attorney testimony submitted

at such hearings, they may only reduce attorneys' fees that they deem to be excessive if they make specific findings to support that determination." *El Brazo Fuerte Bakery 2 v. 24 Hour Air Service, Inc.,* 330 So. 3d 552 (Fla. 4th DCA 2021).

I. THE TRIAL COURT ABUSED ITS DISCRETION BY REQUIRING PLAINTIFFS' FEE EXPERT TO APPORTION TIME BETWEEN DEFFENDANTS

The trial court confused the issue of divisibility of attorney fees based on claims (one or more which provided for fees and one or more that did not) with divisibility between parties. Here every claim against both Defendants gave Plaintiffs an entitlement for attorney fees as the prevailing party. For such a situation there is no authority in the State of Florida for a requirement to apportion fees between two or more defendants.

Here, all claims arose from the same set of facts, the same transaction, the same alleged defects against related parties, each bearing legal responsibility for warranty issues in connection with the defective mobile home. Plaintiffs' fee expert understandably testified, in such a situation, that most of the fee entries were indivisible *vis a vis* the two defendants. To burden Plaintiffs expert with separating the inseparable is not required before fees are rewarded.

Moreover, in its Order, the trial court specifically found that "this Court cannot distinguish between what fees should be allocated to WMT Housing LLC d/b/a Live Oak Homes and what fees should be allocated to Wayne Frier Home Center Macclenny, LLC." (R. 960, 962). However, instead of thus properly awarding all fees against both Defendants based on its acknowledgment that the fee expert was right, it denied all fees except those "Defense counsel stipulated to." (R. 960, 962). By doing so, the trial court created a new standard without precedential support of requiring a division of fees even when no separation is possible.

Moreover, even if a claims analysis is undertaken with regard to parties, the testimony of indivisibility meets that requirement. The trial court is not required to apportion attorney's fees where work for one claim cannot be distinguished from work on other claims. *State Farm Fire & Cas. Co. v. Becraft*, 501 So. 3d 1316, 1318 (Fla. 4th DCA 1986). "Where the bulk of the work involved was intertwined…so as to make it difficult to separate the time spent [on different issues], the allowance of fees for the entire service furnished is not error." 501 So. 2d at 1319. Claims are "inextricably intertwined" when a "determination of the issues in one action would necessarily be dispositive of the issues raised in the other." *Cuervo v. W. Lake Village II Condo. Ass'n,* 709 So. 2d 598, 599-600 (Fla. 3d DCA 1998).

The issues presented in Plaintiffs' case were inexorably intertwined because they involved a common core of facts, were based on related legal theories, were based on the same transaction, and sought the same damages for the same mobile home defects, such that an apportionment of the attorney's fees expended amongst the Defendants and the claims asserted was not possible.

When counts are intertwined, trial courts often have no choice but to award attorney's fees as to time spent on all claims, whether fees are pleaded in all counts or not, as long as the prevailing party pleads entitlement sufficiently to give notice to the other party. *Anglia Jacs & Co. v. Dubin*, 830 So. 2d 169, 2002 Fla. App. LEXIS 14590. Each of Plaintiffs' eight count complaint sought an award of attorney fees putting each Defendant on notice of Plaintiffs' intent to seek fees. Indeed, here the defendants stipulated to the entitlement of fees.

Attorney's fees should not be apportioned when incurred for representation of an issue common to multiple causes of action, involve a common core set of facts and are based on related legal theories among both defendants. It is simply not feasible to parse out work between defendants under the same claims and related legal theories.

In the instant case, the trial court Order stated Plaintiffs failed to meet their burden in establishing that the fees assessed were so inextricably intertwined between Defendants that they should be allocated to both Defendants and cited *Current Builders of Fla., Inc. v. First Sealord Sur., Inc.,* 984 So. 2d 526, 533 (Fla. 4th DCA 2008) citing *Chodorow v. Moore,* 947 So. 2d 577, 579 (Fla. 4th DCA 2007) and *Conti v. Auchter*, 266 So.2d 1250 (Fla.5th DCA 2019) as its reasoning. However, all three cases relate to a distinction between claims that allow for attorney's fees and those that do not.

Current Builders specifically addressed the division between claims issue but also recognized that fees should be awarded in whole unless it is shown that there is separate and distinct time where the case involves a common core of facts and related legal theories.

> In the event a party is entitled to an award of fees for only some of the claims involved in the litigation, i.e., because a statute or contract authorizes fees for a particular claim but not others, the trial court must evaluate the relationship between the claims and "where the claims involve a 'common core' of facts and are based on 'related legal theories,' a full fee may be awarded *unless it can be shown that the attorneys spent a separate and distinct amount of time on counts as to which no attorney's fees were sought* [*or were authorized*]."
>
> quoting *Anglia Jacs & Co. v. Dubin*, 830 So. 2d 169, 172 (Fla. 4th DCA 2002) ; *see also Caplan v. 1616 E. Sunrise Motors, Inc.*, 522 So. 2d 920, 922 (Fla. 3d DCA 1988).

Current Builders, 984 So.2d at 533-534. *Current Builders* did not rule that the counts need to be apportioned as between each defendant, the

distinction is between counts where attorney fees were authorized versus counts where there is no entitlement to attorney's fees. Even for apportioning between claims, the trial court must evaluate the relationship between the claims and whether the claims involve a 'common core' of facts and are based on 'related legal theories.' Thus, even if the division between claims analysis is valid, the trial court failed to apply the correct standard. Here, the common core of facts and related legal theories of the claims for the mobile home defects by the Plaintiffs clearly meets these criteria.

Likewise, *Chodorow* involved apportionment between claims for which fees were awardable and those that were not. The above quotation from *Current Builders* was pulled directly from the *Chodorow* case. *Chodorow* went on to say,

> ("[W]here . . . all the claims made against a defendant involve 'a common core of facts and [are] based on related legal theories,' the award of attorney's 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*.") (citing *Chrysler Corp. v. Weinstein*, 522 So. 2d 894, 896 (Fla. 3d DCA 1988))

Id. at 579. (emphasis added). As the court in *Canalejo v. ADG, LLC*, 2015 U.S. Dist. LEXIS 157236 (M.D. Fla. 2015), explained, "[t]he reasoning for the proposition is simple. "'[T]ime spent marshaling the facts' of the related claims is compensable because it 'likely would have been spent defending

any one or all of the counts.'" Citing *Durden v. Citicorp Trust Bank*, FS, 763 F. Supp. 2d 1299, 1306-07 (M.D. Fla. 2011), *Caplan v. 1616 E. Sunrise Motors, Inc.*, 522 So. 2d 920, 922 (Fla. 3d DCA 1988)).

The final case cited by the trial court for its failure to award fees based on its novel distinction relating to fees between co-defendants also fails to support its newly created legal standard. *Conti v. Auchter*, 266 So.3d 1250 (Fla. 5th DCA 2019) likewise deals only with allocating fees between issues, not between parties. Id. at 1251. Moreover, *Conti* further recognized the applicable standard of determining whether there was a "common core" of facts and "related legal theories." *Id*., relying on *Boswell v. Shirley's Pers. Car Servs. Of Okeechobee, Inc.,* 211 So. 3d 210, 212 (Fla. 4th DCA 2017) and *Anglia Jacs & Co. v. Dubin*, 830 So.2d 169, 172 (Fla. 4th DCA 2002), also relied on by *Current Builders*.

While the district court has wide discretion as to when to apportion fees and how to divide liability, in exercising that discretion the Court should try to achieve the most fair and sensible solution possible. *United States v. Patrol Servs., Inc.*, 202 F. App'x 357, 362 (11th Cir. 2006) citing *Council for Periodical Distrib. Ass'ns. v. Evans*, 827 F. 2d 1483, 1487-88 (11th Cir. 1987). The trial court's allocation requirement leading to a two-thirds reduction in fees for which the hourly rate and reasonableness of the time expended were not

contested was wholly unreasonable. scheme along with slicing Plaintiffs' attorney's fees by two-thirds is not the most fair and sensible solution. In *Vollstedt v. Fredericks,* 814 P.2d 525 (Ore. App. 1991), plaintiff appealed a judgment for defendant in an action based on theories of breach of a stock pledge agreement, quasi-contract, constructive trust, conversion and breach of fiduciary duty. Only one of plaintiff's five claims was stated as a contract claim however, all of plaintiff's claims shared common issues, therefore the court ruled that defendant need not apportion the attorney fees incurred in their defense.

Refusing to award any attorney fees that the defense did not stipulate to was simply error. There was no contention that the hours were inflated, unreasonable, or not related to the claims asserted in the complaint.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY NOT AWARDING ATTORNEY'S FEES JOINT AND SEVERALLY AGAINST DEFENDANTS

The instant case meets almost all, if not all, of the equities that courts generally consider when looking to impose joint and several liability. *Moore v. Shands Jacksonville Med. Ctr., Inc.,* 2014 U.S. Dist. LEXIS 197215, WL 12652475 (M.D. Fla. Apr. 3, 2014) ("Equities favoring joint and several liability include joint representation of the non-prevailing parties, common

theories of liability or defense among the non-prevailing parties, equal cost attributions, and the unfairness of requiring the prevailing party to collect costs from several sources and bear the risk of non-payment from one or more of them.") (citing *Concord Boat Corp. v. Brunswick Corp.,* 309 F. 3d 494, 497 (9th Cir. 2002)). The Defendants satisfy many of these factors because they hired the same lawyer, argued the same theories of non-liability and defenses, jointly attended mediation, jointly entered into a settlement agreement and tendered one settlement check on behalf of both Defendants.

It is well established that "trial courts have discretion not only in setting the amount of an award of attorney fees, but in allocating the award among various defendants based on their relative culpability." *Gorman v. Tassajara Development Corp.* 178 Cal. App. 4th 44, 97-98 (2009). The great weight of authority supports the imposition of joint and several liability for the award of attorney's fees against multiple real parties in interest who are jointly represented and proceed against common defendants based upon a common theory. *Cal. Trout v. Superior Court* 218 Ca. App. 3d 187, 212 (1990) ("[t]he fees, together with the costs of this proceeding, shall be the joint and several liability of both real parties interest"); *Acosta v. SI Corp.* 129 Cal. App. 4th 1370, 1376 2005) (costs are joint and several because the

plaintiffs joined together (represented by the same attorney) in a single theory of liability against a defendant who prevailed.

Similarly, here Plaintiffs' claims against Defendants contained a common nucleus. Fees generated in litigation of claims "centered on a set of common issues against two or more jointly responsible defendants should be assessed jointly and severally." *Turner v. District of Columbia Bd. Of Elections Ethics*, 359 U.S. App. D.C. 332, 339, 365 F.3d 890, 897 (2004) (quoting *Herbst v. Ryan,* 90 F. 3d 1300, 1305 (7th Cir. 1996).

Despite extensive research, Plaintiffs can find no caselaw supporting the trial court's deduction of over twenty-six thousand dollars of attorney's fees in lieu of an award of joint and several liability between the defendants.

CONCLUSION

For all the foregoing reasons, Appellant respectfully asks 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.[3]

Respectfully submitted,

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[3] Although the trial court referenced purported testimony of Plaintiff's expert witness that "there were three different defendants, which involved a lot of work made unnecessary by the instant Defendants" and Appellants recognize that no transcript exists, an analysis of the invoices demonstrates minimal work related to the initial holder of the Note (21st Mortgage Corporation) and, in connection with a claim for revocation of acceptance due to the mobile home defects, it is indisputable that 21st Mortgage Corporation was an indispensable party. Since the revocation of acceptance claim was based on the same mobile home defects (See, Count V, Amended Complaint, R. 556), as a matter of law it was the actions of the defendants that necessitated all work done in connection with 21st Mortgage Corporation.

And

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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 29th day of January, 2024, to:

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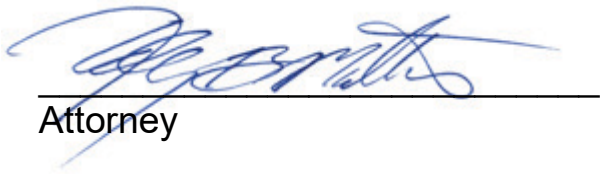
CERTIFICATE OF COMPLIANCE WITH FONT AND WORD COUNT REQUIREMENT

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 Initial Brief was typed using Arial 14 pt. font.



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