

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FOURTH DISTRICT

CASE NO: 4D2023-0493

Lower Tribunal No.: CACE-19-025931

TRAVIS PALMER,

Appellant.

vs.

O'REILLY AUTOMOTIVE STORES, INC. and JOSELYN RAUSHANNA  
COLEMAN BROWN

Appellee.

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ON APPEAL FROM THE CIRCUIT COURT FOR THE SEVENTEENTH  
JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

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APPELLEE'S ANSWERING BRIEF

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**Preface**

The case emanated from a motor vehicle accident, involving Plaintiff Travis Palmer (“Palmer” or “Plaintiff”) and a vehicle owned by O’ Reilly Automotive Stores and driven by its former employee, Joselyn Coleman Brown (“Defendant”). The matter is a fee dispute between former counsel

and incoming counsel involving the corpus of settlement proceeds that emanated from the motor vehicle accident.

Felicetti Law Firm, PLLC (“former counsel”) had a valid charging lien and performed a supermajority of the legal work on the file. Coffey Trial Law, PLLC (“incoming counsel”) performed one task: settled a case for an amount well below the aggregate medical and non-recourse funding liens that existed in this case. We can rephrase this another way. Former counsel performed all the legal work on the file and Incoming counsel performed no legal work except attacking former counsel.

The client, Plaintiff Travis Palmer, demanded a seven-figure recovery from former counsel. This could not be achieved. Former counsel was prepared at the mediation but was not prepared to accept a sum that was not seven figures.

Incoming counsel settled this case for a sum well below the value of the medical billings and the non-recourse funding loans that were received in this case. Despite this intransigence, incoming counsel received 50% of the contingency fee. Those are the facts.

Procedurally, former counsel waived its right to take the deposition of former counsel’s fee expert. Under a totality of circumstances approach, not the strictly hourly fee approach that exists in the proposal for settlement

paradigm that forms the majority of Appellant's merits brief, the expert opined that Appellee was entitled to between 50% and 80% of the contingency fee. The trial court ruled on the lowest end of the scale. As this is a quantum meruit recovery and Appellee did not engage in unprofessional conduct requiring forfeiture or a reduction of its attorney fee, the only issue is whether the trial court abused its discretion in only awarding the law firm that did the lion share of the work 50% of the contingency. This is answered in the negative.

The order of Circuit Court, per curium, should be affirmed.

### **ISSUES PRESENTED**

1. Did the Appellant waive its argument that Nicholas Shanin was not qualified to testify under Daubert?

This should be answered in the affirmative since as the Circuit Court observed in the order denying rehearing, the issue was never presented to the Court

2. Did the Appellant forfeit its right to challenge the courts' denial to conduct a discovery deposition of Nicholas Shanin?

This should be answered in the affirmative since the record shows that Appellant waived its right to seek a deposition and there was no order or transcript from the motion hearing on the issue.

3. Did the Circuit Court on the merits properly exercise its discretion in finding Nicholas Shanian qualified to testify and in awarding Felicetti Law Firm, PLLC a quantum meruit recovery of 50% of the gross contingency attorney fee?

This should be answered in the affirmative and the order of Circuit Court, per curiam, should be affirmed.

4. Did the Circuit Court properly exercise its discretion in finding that Felicetti Law Firm, PLLC was not discharged for cause?

This should be answered in the affirmative and the order of Circuit Court, per curiam, should be affirmed.

5. Should this appeal be dismissed since there was no Notice of Appeal from the Motion denying the Motion for Rehearing?

This should be answered in the affirmative.

### **Statement of the case and facts**

#### **A. Procedural History – the underlying tort case**

The case began when former counsel on December 18, 2019, filed its complaint in this matter along with the initial discovery demands. (Record on Appeal [hereinafter “R”], pp. 23-31). Defendant on February 11, 2019, and February 14, 2019, answered the complaint and filed responses to certain discovery demands. (R. 36-47)

Plaintiff on June 30, 2020 filed its Notice for Trial and a motion to set a trial date. (R. 52-55). The Court set a trial date through order date August 11, 2020. (R. 68-73). On October 8, 2020, following the deposition of Defendant, Plaintiff filed a request for admissions from Defendant. (R. 80). On November 9, 2020, the parties filed dueling discovery motions. (R. 88-96).

On December 2, 2020, and December 4, 2020, Defendant filed requests for admissions and its witness and exhibit list. (R. 97-115). Plaintiff filed a proposal for settlement, on December 8, 2020. (R. 119). Plaintiff filed its motion for summary judgment as to liability. (R. 120-153). The mediation occurred on January 7, 2021, which was an impasse. (R. 178). Evidence in opposition to the summary judgment was filed on January 11, 2021. (R. 179-182). On January 20, 2021, the process of discharging former counsel began. (R. 187-88). On January 24, 2021, former counsel filed its notice and claim of attorneys charging lien. (R. 206-207)

No other legal work took place on the file. Rather, a Notice of settlement was filed on July 28, 2021. (R. 293)

## **B. Procedural History – The Fee Dispute Litigation**

Incoming counsel on February 4, 2021, filed a motion to compel production of the case file, despite failing to pay the reasonable fees for the

file's production. (R. 208-214). Purported emergency relief was sought, which was denied. (R. 215; 226-227). Former counsel responded to the motion. (R. 216-218; 221-223).

Incoming counsel filed a second motion and third motion and filed two applications for sanctions, despite former counsel only seeking to have its disbursement paid, before turning over the file. (R. 229-234; 237-240). The issue was resolved through court order. (R. 235-236)

A motion to consolidate a separate declaratory judgment action involving the medical provider's billing (CACE-21-006418) was filed. The declaratory judgment action was dismissed as being improperly brought. The motion to consolidate was therefore never noticed for hearing and denied *sub silentio*. (R. 245-250)

On July 20, 2021 incoming counsel filed its motion to determine the charging lien. (R. 248). A response to the motion was filed. (R. 287-292)

On July 28, 2021, and August 6, 2021, former counsel filed notices to produce. This included: All time entries that Coffey Trial Law kept, all notices and letters setting forth for which the amount settled, the executed release, the entire file of Coffey Trial Law, and the Coffey Trial Law retainer.

On August 10, 2021, the Court issued the following document: "Corrected Scheduling order on motion to determine charging lien". A motion

hearing was scheduled for November 17, 2021, in accordance with the order.  
(R. 298-300)

The order stated within ten (10) days, former counsel must provide: “[a] copy of all invoices, time records, canceled checks, records evidencing services rendered, the name, address and C.V. of their expert witness, and any other supporting documentation (which may be the entire file other than the records kept in the Court file “ (R. 296-297)

Within fifteen (15) days of receiving the disclosure, incoming counsel was supposed to provide the C.V. of the expert and either agree or disagree with the assertions in the submissions of the former counsel. Expert depositions were scheduled to take place after the ordered discovery occurred. (R. 298-300).

Incoming counsel objected to former counsel’s discovery demands on August 16, 2021. On August 21, 2021, former counsel filed a motion to overrule the objections. (R. 301-310).

On August 20, 2021 and in compliance with the court order, former counsel complied with the Court’s August 10, 2021 amended order. Presented were the following: (1) Copies of all invoices, records, etc.; and (2) Disclosure of former counsel’s fee expert, Nicholas Shannon and his CV.

On September 20, 2021, incoming counsel filed its objections to former counsel's evidence.

Former counsel filed a motion to overrule objections on August 21, 2021. It was granted as per the order dated January 1, 2022. (R. 329-330)

On April 19, 2022, the Court set this matter down for an evidentiary hearing on June 23, 2022. (R. 374-375)

Finally, on April 21, 2022, Incoming counsel filed expert discovery demands that were answered on June 6, 2022, following a Court order. (R. 392-393)

A motion on June 15, 2022, was filed to continue the hearing due to incoming counsel seeking a deposition of Nicholas Shannin. (R. 394-397). A response was filed to the motion. (R. 398-400). The motion was possibly denied, however, there is neither an order of a hearing transcript of what occurred at this motion hearing.

The evidentiary hearing took place over three days: June 23, 2022, September 16, 2022 and December 28, 2022. (R. 416-521; 705-772; 776-804)

### **C. The Hearing on the Fee Dispute**

At the opening, incoming counsel told the court "it's our position that

there absolutely needs to be a determination on the entitlement to a charging lien period, and that is going to be the bulk of our argument today, on a violation of multiple bar rules and conflict of interest rules.” (R. 422).

### **Testimony of Jason Tenenbaum**

Jason Tenenbaum (“Tenenbaum”) has been an attorney for 21 years and has been an attorney admitted in the State of Florida since 2004. (R. 425). Tenenbaum has known Scott Felicetti since approximately 2012, tried cases for him in New York and began working of-counsel for Mr. Felicetti. In 2020, Tenenbaum took over for the prior partner, who became a Miami-Dade County Judge. After 9 months, Tenenbaum sold his shares to Darren Aponte, Esq., and he became of counsel to former counsel. To the present date, Tenenbaum still does of-counsel work for former counsel (R. 425-428)

Tenenbaum worked on the Palmer case. The knowledge for the testimony came from review of the entire file. (R. 427). Tenenbaum recognized the retainer agreement. Substantial pre-suit work was performed. (R. 431). A lawsuit was filed in this matter since the insurance company representing the Defendant, Zurich Insurance Company, did not wish to negotiate this claim in good faith. (R. 431). Two depositions were taken, discovery occurred, summary judgment practice was engaged in and a Notice for Trial was filed. (R. 432-433).

Defendant went through a stop sign causing the collision. A request for admission on the issue of negligence was filed. Defendant admitted negligence but denied that Plaintiff was not negligent. Summary judgment as to liability was filed. (R. 433). It was never heard due to former counsel's discharge. (R. 433-434)

Throughout the life of the file, Mr. Palmer was a frequent visitor at the former counsel's law firm. Mr. Palmer was always seeking lawsuit funding and Tenenbaum became acutely familiar with this case. (R. 434-435)

A mediation occurred. Tenenbaum testified that there were \$800,000 in liens, including lawsuit funding and medical bills. The demand was for one million dollars. That was what Tenenbaum was authorized to accept by Plaintiff. The mediation ended at an impasse. (R. 435-436).

A discharge letter was sent to former Counsel. (R. 435). There was no reason in the letter for terminating former counsel's legal services. (R. 438)

Former counsel had this case for eighteen (18) months prior to being discharged. (R. 439-440). After former counsel's discharge, the only work incoming counsel performed on the file was fighting former counsel. (R. 440-441). A Notice of Lien was filed in this case. (R. 442)

A time sheet was compiled based on notes in the case management system. (R. 443). Former counsel incurred costs of \$4,027.49. (R. 446). An attorney hourly rate of \$650 has been awarded to Tenenbaum in the past. (R. 448). 130.5 hours was attributed to attorney work and 82.8 was attributed to paralegal work. This is a total of \$105,525 from an hourly attorney fee perspective. (R. 449)

Tenenbaum explained this client consumed extensive resources at the law firm. It was also presented that the medical issues that Mr. Palmer presented, in the view of the defense law firm, were probably not related to the accident. (R. 449-450). Tenenbaum believed the matter would settle at the mediation for between \$400,000 and \$650,000 based upon experience with these types of cases.

Former counsel sought 2/3 of the gross settlement amount based upon the work former counsel performed on the file and the lack of work that Incoming counsel performed on the file. (R. 453). Law firm funding took place. It was ill-advised but Mr. Palmer insisted on obtaining the funding. As time went on, it became more difficult to obtain the funding. (R. 459)

Tenenbaum advised Mr. Palmer not to engage in funding. Mr. Palmer declined Tenenbaum's advice. (461-462).

## **Nicholas Shannin**

Nicholas Shannin (“Shannin”) is an attorney who graduated from Rice University and University of Florida School of Law in 1994, where he graduated with honors.

I have practiced as an appellate attorney, I have worked with plaintiff firms throughout the state. I am very familiar with the practice of plaintiff firms, personal injury cases in particular. I've also worked directly as an attorney with a personal injury law firm, which included litigation work, as well as appellate work. So I am -- I am very familiar with the practice in cases like this. I've also testified as an appellate -- not appellate, an attorney's fee expert, both on behalf of plaintiffs and defendants, in jurisdictions throughout the state, and as part of that practice I've become further familiar with the practice required for plaintiffs to properly prosecute a case, and what the value of those cases would be.

(R. 476-477)

Mr. Shannin testified as an expert in personal injury cases, in many jurisdictions through the State of Florida. (R. 477). He stated:

I've got several hats. I -- one of them is mediator which both gives me some insight into some of the issues involved in this case regarding the mediation issues involved that we've already heard discussed, but that also provides me insight for attorneys and their practices, and what's necessary properly to get a case ready for settlement, to optimize it for settlement.

(R. 477)

Mr. Shannin stated: "I've lectured multiple times on attorney's fees".

(R. 477) The following was observed:

So, I was asked to review the documents pertinent to this case, review the billing records that have already been discussed before the court, to look at the totality of this case from an outsider's perspective, and to render an opinion based upon the Florida – the guiding case law as to what a reasonable quantum meruit fee would be

(R. 479)

So I just mentioned the docket. I reviewed the pertinent pleadings, including the complaint and the Motion for Summary Judgement I found particularly instructive. I reviewed the billing records. I also refreshed myself on the various case law that's specific to -- I mean, there's general case law such as Roe (phonetic), Quanstrum (phonetic), and Florida Bar Rule 4-1.5 that I rely upon for all fee cases, but when it's a lien case, and it's a, you know, an intra-plaintiff fight like this, and we hope to avoid those when possible, of course, but occasionally litigation is required to resolve it, that requires a review of some other cases. The CRC (phonetic) case, Morgan Morgan, Guardianship of Makeen (phonetic) come to mind, that -- the Santini v. Clinic case. Those are cases that discuss how even though in a normal fee matter, what you're doing is you look at lodestar purely based upon hours expended, and a reasonable hourly rate for those hours, and then you consider a multiplier when appropriate.

(R. 479-480)

The following was then noted: “But to finish the sentence, it's simply that in a lien matter the court is to look at the totality of the circumstances, and to, instead of purely basing it on hours and time, to look at that totality, and to ensure that attorneys get paid for the value of the services rendered, which may -- may be different from a purely lodestar based analysis.” (R. 481).

As to an hourly rate, “I preface the discussion of hourly rate, or hours, those aren't the key to a lien valuation, but it's still useful information, clearly.” (R. 482). Mr. Shannin as mediator, fee expert and attorney found the time billed to be proper in light of the client involvement and the summary judgment motion. (R. 483-484). The rate of \$650 per hour in light of the experience of Mr. Tenenbaum and Judge Aponte was reasonable. (R. 482)

The conclusion was as follows:

Sure. If one looked solely at the docket and utilized the amount of docket activity done by the prior firm, and the amount of docket activity not related to the intra-plaintiff fight that we unfortunately have here, if you remove that activity, if you only look at the activity conducted by the successor law firm relative to the prior law firm, you would be looking at an 80-20 kind of balance, where 80% of the recovery would make sense to be the prior law firm's. I'm not going to opine that. Credit is due for concluding a case, and for the ability to get a client and the defendant on the same page, and that is something that the successor law firm did. So instead of opining an 80-20 split being reasonable, it's my opinion that something either two-

thirds, or even as low a half would be reasonable, and so that's my range is 50% through 66%, and looking at the total settlement number of \$220,000, that means my opinion would be that the quantum meruit be as high as \$146,000, or as low as \$110,000 would be appropriate as just remuneration for the prior law firm's efforts on behalf of Mr. Palmer.

(R. 484-485)

The retainer agreement from former counsel was compliant with Florida Rule 4-1.5. There was no materiality to any added language, assuming there was a breach of rules, which did not occur in this case. (R. 489-489)

Mr. Shanin was also clear that:

Part of the reason why you bring an expert or when something like this is because I've seen a lot of files. I've seen a lot of files as an expert. attorney. I've seen a lot of files as an Appellate I've seen a lot of files. And so, I do that calculus not based upon a side-by-side review with a specific other case, but with all the cases that I've seen in order to decide that's reasonable or that's not so reasonable. And in my opinion, this is landed in a reasonable category.

(R. 746-747)

### **Travis Palmer**

Mr. Palmer was initially represented by former counsel. (R. 780-781). Plaintiff learned about the medical providers through former counsel (R. 783). Plaintiff was not advised of the amount of the billings or that they would

be paid for by his settlement. Yet, Plaintiff was aware of the amount of Unified Medical's charges. (R. 785-786). Former counsel was fired because "[h]e wanted too much money and he wasn't prepared." (R. 786-787). Mr. Tenenbaum asked Plaintiff about the facts of the case. Plaintiff did not listen to Mr. Tenenbaum during the negotiations. (R. 787-788). Plaintiff was unaware of comparative negligence, surveillance issues, and the effect of pre-settlement funding. (R. 788-789). Plaintiff was never advised against taking out loans and was told to seek medical treatment. (R. 790).

#### **Jason Tenenbaum – redirect**

Mr. Palmer was told that his bills and liens totaled between \$600,000 and \$800,000. (R. 791-792). He was told not to keep borrowing money against his lawsuit. Also, Mr. Palmer was using this money to fund an opulent lifestyle, when his occupation was that of security. (R. 791-793). The surveillance was discussed with Mr. Palmer at the mediation. (R. 795)

#### **D. Court Order determining Charging Lien**

The court issued its order following the conclusion of the hearing. Mr. Tenenbaum and Mr. Shannin were considered credible. Plaintiff was credible in part and incredible in part. The testimony of Ms. Morris-Webster was not probative or determinative of the issues in this case.

Quantum meruit was determined by the totality of the circumstances. The Court found former counsel was not discharged for cause. The Court even wrote – this was the Court’s addition to the proposed order that “Also, Plaintiff’s drug use was certainly known to Plaintiff and if he was foolish enough to use drugs, then any negative ramifications from such abuse are the sole burden of Plaintiff”

The court concluded as follows – again this was the Court’s own verbiage:

Based upon the services performed by both law firms and giving credit for the fact that, the Coffey firm effectuated a settlement whereas the Felicetti law firm was not able to settle the case at mediation; the Felicetti and Coffey firms shall split the gross contingency fee collected equally (50/50).

The order stated the following:

(i) The net contingency fee from the settlement is \$220,000.00; (ii) The Felicetti Law Firm, PLLC shall be entitled to the sum of \$110,000.00; (iii) Coffey Trial Law Firm, PLLC shall be shall be entitled to the sum of \$110,000.00; (iv) Travis Palmer shall pay to Felicetti Law firm expenses of \$2,207.49 v) Travis Palmer shall pay to Felicetti Law firm the expert fee of Nicholas Shannin, Esq., in the sum of \$3,300.00. (vi) Coffey Trial Law, PLLC shall issue the above payments from its escrow account to The Felicetti Law firm, PLLC within twenty (20) days of the filing of this order

(R. 805-811)

### **E. Motion for Rehearing and Court order**

Incoming Counsel filed a motion for rehearing. Counsel for the first time stated that a *Daubert* hearing should have been held and Mr. Shanin's testimony should have been stricken.

Similarly, the argument that former counsel was fired for cause was rehashed and an argument that the retainer agreement that former counsel executed was defective was presented. (R. 833-848)

The Trial Court in its order denying the motion for rehearing stated: "ORDERED AND ADJUDGED, that the motion is denied, Defendant, [Coffey Trial Law] failed to raise this issue at the numerous hearings addressing the charging lien or attorney fees prior to this motion. As such, Defendant waived this claim and argument." (R, 861).

Incoming counsel filed a Notice of Appeal. (R. 849-857). Appellant filed its merits brief,

This Appellee brief now ensues.

### **SUMMARY OF ARGUMENT**

This entire appeal revolves around whether the Circuit Court abused its discretion in its handling of the evidentiary hearing. This must be answered in the negative.

Initially, as the Circuit Court Judge observed in its order denying rehearing, the crux of the Appellant's argument on appeal, that Nicholas Shannin was not competent to testify was not presented before the trial court. Therefore, the issue is similarly not preserved for Appellate review. The order should be affirmed, per curiam.

Secondly, Appellant waived any dispute it had with the Circuit Court not granting Appellant's motion to compel the deposition of Nicholas Shannin. Appellant failed to present a signed order or a hearing transcript from the hearing on the motion. Review is therefore foreclosed.

Third, on the merits, the Circuit Court considered all relevant factors as the caselaw requires, made credibility findings and crafted a fee split award that was fair and equitable to the attorneys in this matter. An argument could be made that incoming counsel received too much of the aggregate attorney fee but since the award was within the Circuit Court's broad discretion, the award is beyond this Court's power of review.

We would parenthetically note that the substance of Appellant's argument, upon a non-preserved issue, is predicated upon the evidence needed to obtain an attorney fee following a successful proposal for settlement. *Philip Morris USA, Inc. v Naugle*, 337 So 3d 13, 17 (Fla 4th Dist Ct App 2022). This case is not about the number of hours former counsel

worked on the file, but it is based upon all relevant factors that go beyond time spent on the file. This basis to contest the order must be denied. And in any event, Appellee's expert set forth a sufficient foundation for the consideration of his testimony.

Fourth, the Court made credibility determinations, found Mr. Tenenbaum credible, found Mr. Shannin credible, found Ms. Morris-Webster not relevant and Mr. Palmer was partially credible. On this basis, the Court found that former counsel was not discharged for cause. The trial court did not abuse its discretion in making this finding. The order should be affirmed, per curiam.

Fifth, the Notice of Appeal does not encompass the motion for rehearing. Under the new rule that was interposed, the Notice of Appeal would need to encompass the motion for rehearing. Therefore, the appeal has been improperly brought and should be dismissed.

### **STANDARD OF REVIEW**

The standard for review for the amount of an attorney fee is reviewed for abuse of discretion. *Nationstar Mtge. LLC v Faramarz*, 331 So 3d 738, 745 (Fla 4th DCA 2021). The standard of review for determining whether to continue a trial is abuse of discretion. *SSJ Mercy Health Sys., Inc. v Posey*, 756 So 2d 177, 179 (Fla 4th DCA 2000)

Since the Court did not abuse its discretion, the order should be affirmed, per curiam.

## ARGUMENT

### I. THE DAUBERT ISSUE INVOLVING NICHOLAS SHANNIN WAS NOT PRESERVED AND THE CIRCUIT COURT'S ORDER MUST BE AFFIRMED

The first issue herein presented is whether Appellant waived its right to contest whether Mr. Shannin's testimony was barred under the *Daubert* standard. This must be answered in the affirmative.

In this case, Appellant failed to file any challenges either prior to or during the hearing of Mr. Shannin. "The general rule is that issues not preserved for appeal are waived." *Bill's Equip. & Rentals v Teel*, 498 So 2d 536, 537 (Fla. 1st DCA 1986).

In *Vorbeck v. Betancourt*, 107 So. 3d 1142, 1147-48 (Fla. 3d DCA 2012), the Court explained:

The rule of preservation, which is a keystone in our appellate process, dictates that "[i]n the absence of fundamental error, an appellate court will not consider an issue that has been raised for the first time on appeal." *Keech v. Yousef*, 815 So. 2d 718, 719 (Fla. 5th DCA 2002); see also *Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005) ("As a general rule, it is not appropriate for a party to raise an issue for the first time on appeal."). As Florida courts have long recognized, "[i]n order to be preserved for further review by a higher court, an issue must be presented to the lower

court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation [\*1123] . . . ." *Sunset Harbour*, 914 So. 2d at 928 (quoting *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985)).

*Wadley v Nazelli*, 223 So 3d 1118, 1122-1123 (Fla 3d DCA 2017)

Here, Appellant at no time during the proceedings challenged the credentials or expertise of Nicholas Shannin. The opening statement of course proves this fact where no mention was made about Mr. Shannin's expertise.. This was also observed by Judge Frink, when he denied Appellant's motion for rehearing based upon the failure of Appellant to raise this issue at any point during the proceedings. That said, there is no reason why this unpreserved argument should be considered by this Court. As such, the order of the Circuit Court should be affirmed.

**II. THE CIRCUIT COURT'S DENIAL OF APPELLANT'S REQUEST TO DEPOSE NICHOLAS SHANNON WAS NOT PRESERVED AND THE CIRCUIT COURT'S ORDER MUST BE AFFIRMED**

The next issue involves whether the Circuit Court abused its discretion in failing to compel Appellee to produce Mr. Shannin for deposition. This was not properly preserved in the Appellate record, and the order after the fee hearing must be affirmed.

The court held as follows: "Although a hearing was held on Appellant's motion, there is no transcript of the hearing. Under the circumstances of this

case, in the absence of a transcript, we cannot reasonably conclude that the trial court abused its discretion, and therefore, we affirm.” *Charry v Torres*, 263 So 3d 238, 238 (Fla 3d DCA 2019)

Similar to *Charry*, there is no basis to conclude that the Court abused its discretion under the circumstances of the matter.

Yet, should this Court evaluate the claim on its merits, Appellee presented discovery demands on July 28, 2021 and August 6, 2021. The Circuit Court on August 10, 2021, issued a discovery schedule. The record shows that Appellee disclosed its expert, Nicholas Shannin on August 20, 2021.

It was not until the Court issued an order on April 19, 2022, setting this matter down for an evidentiary hearing on June 23, 2022, that Appellant filed any expert witness discovery demands.

Appellant filed its motion to continue on June 15, 2023, eight days before the scheduled evidentiary hearing. The hearing transcript was never provided and an order from the hearing was never uploaded. But let us assume that there was a hearing and the motion was denied. This would have been proper. “The trial court possesses broad discretion in granting or refusing discovery motions and also in protecting the parties against possible abuse of discovery.” *Eyster v Eyster*, 503 So 2d 340, 343 (Fla 1st

DCA 1987). “A denial of a continuance should not be reversed unless there has been an abuse of discretion clearly appearing in the record.” *Cargile-Schrage v Schrage*, 908 So 2d 528, 529 (Fla 5th DCA 2005)

On the record before this Court, there is no indication that the trial court abused its discretion in denying Appellant’s request to continue the hearing to conduct Appellee’s expert’s deposition. The Circuit Court did not abuse its discretion in denying the discovery motion that was subsumed within the continuance motion. The order of Circuit Court should be affirmed.

**III. THE CIRCUIT COURT CONSIDERED ALL RELEVANT FACTORS IN CRAFTING A FEE SPLIT BETWEEN THE ATTORNEY’S IN THIS MATTER**

In contingency matters, the amount of a lien is not derived from a mathematical computation between the hours spent on a matter and the rate of the timekeeper. The Supreme Court has been clear that: “However, here, the trial court erred as a matter of law by failing to consider the totality of the circumstances present in this case, instead considering only the time reasonably expended and the reasonable hourly rate for the services, as determined under the principles set forth in Rowe.” *Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Poletz*, 652 So. 2d 367 (Fla. 1995).

The Fifth District Court of Appeals held that:

But the criteria should encompass all relevant factors surrounding the professional relationship, including the actions taken by the attorney, whether and to what extent they benefitted the client, the skill demanded and demonstrated, and the results obtained. It concluded that the determination as to which factors are relevant in a given case, the weight to be given each factor and the ultimate determination as to the amount to be awarded, are matters within the sound discretion of the court

*Hallowes v. Bedard*, 877 So. 2d 953, 956-957 (Fla. 5th DCA 2004)

A proper quantum meruit award is one: “[t]hat is fair to both the attorney and client. For example, the fee agreement itself, the reason the attorney was discharged, actions taken by the attorney or client before or after discharge, and the benefit actually conferred on the client may be relevant to that determination..” *O’Malley v. Freeman*, 241 So. 3d 204, 207 (Fla. 4th DCA 2018).

The above is read against the proposition of law that: “[t]he basis for a quantum meruit award is essentially an equitable one. One person should not benefit from the work efforts of another under circumstances where the person doing the work has the reasonable expectation of being paid by the person benefitted, and the person benefitted has a reasonable expectation of paying for the work.” *Sattiewhite v. Kula & Samson, L.L.P.*, 2013 U.S. Dist. LEXIS 196803, \* 6- 7 (Fla SD 2013), *quoting Hallowes* 877 So. 2d at 957

A failure to follow the *Searcy* rule would be reversible error. "The trial court erred as a matter of law by failing to consider the totality of the circumstances present in this case, instead considering only the time reasonably expended and the reasonable hourly rate for the services." *Santini v. Cleveland Clinic*, 65 So. 3d 22, 33 (Fla 4th DCA 2011)

Similarly, the District Court of Appeals held that:

However, we disagree with the trial court's conclusion that fees could not be awarded solely because Morgan & Morgan did not keep, or attempt to recreate, accurate time records. Although time spent on a case is one factor to be considered under a quantum meruit theory, the trial court must consider " the totality of the circumstances surrounding the professional relationship" in computing the reasonable value of the services rendered.

*Morgan & Morgan, P.A. v. McKean*, 60 So. 3d 575, 577 (Fla. 2d DCA 2011)

Here, the trial Court considered all the relevant factors. This included the work performed on the file, the depositions conducted, the funding arrangements former counsel engaged at Plaintiff's behest, the motions written, the responses to the motion, the discovery that was procured, the discovery responses and the value of the work former counsel brought to the case. Additionally, the hours worked upon the case was a factor.

Except for closing the case, Incoming Counsel performed no work on the file. In fact, the only work on the docket that the Incoming Counsel

performed was attacking former counsel. That said, the Circuit Court still awarded incoming counsel 50% of the gross contingency fee. While probably unfair to the former counsel, this was within the broad discretion of the Circuit Court. To the extent it is event preserved, Appellant stakes his entire argument on *Philip Morris USA, Inc. v Naugle*, 337 So 3d 13, 14 (Fla 4th DCA 2022). We shall discuss *Naugle*.

*Naugle* is distinguishable on the basis that the attorney fee sought was related to a proposal for settlement (“PFS”) that was satisfied. The attorney fee inquiry in a PFS situation has two elements once entitlement is determined: (1) Hourly rate; and (2) Amount of hours. This Court found the retired Broward County Judge who testified as an expert failed to follow the factors the Supreme Court delineated in *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985).

Rowe established eight (8) factors, similar to the Federal Lodestar approach in determining compensation for rendered services. This case does not involve a PFS or a fee-shifting statute, the latter of which can implicate a multiplier. Contrariwise, this matter involves a fixed attorney fee that needs to be split between two (2) law firms. The factors to determine the quantum of compensation for each law firm do not involve any of the *Rowe* factors. The test here involves all relevant factors. Critically, *Morgan*

taught us that a proper fee award can be determined without resort to time spent times the hourly rate analysis.

The analysis of Appellant cannot be reconciled with settled precedent and must be summarily rejected. Additionally, the analysis presented before this Court was not even preserved.

Yet, even if a lodestar analysis is considered, there is no doubt that unlike *Rowe* and *Naugle* Mr. Shannin explained the basis for the hourly rate and noted that while the time spent was from recollection as opposed to contemporaneous time entries, it was reasonably accurate. The expert in *Naugle* had no basis for ascribing an hourly rate of \$1500 per hour and for explaining the “extraordinary” time and labor devoted to the case that warranted an attorney fee of \$5,328,725. Rather, the hourly attorney fee that Mr. Shannin calculated in this case was close to the \$110,000 that the Court eventually awarded former counsel. This analysis was supported by competent evidence. The Circuit Court did not abuse its discretion in awarding former counsel \$110,000 in attorneys fees, after considering all the relevant factors.

Lastly, Appellant discusses a term in the retainer that discusses Appellee’s compensation upon discharge. Mr. Shannin testified that this was not a material term to the contract. Additionally, Appellee’s recovery is based

upon quantum meruit, which is separate from a contractual recovery. *Land Co. of Osceola County, LLC v Genesis Concepts, Inc.*, 169 So 3d 243, 248-249 (Fla 4th DCA 2015)(“Because an express contract existed between the parties, Genesis's recovery in quantum meruit was inappropriate.”)

Finally, there was no credible or relevant evidence involving the settlement offer before Appellee’s discharge that would somehow trigger or otherwise mandate a fee split other than what Circuit Court awarded..

The order of the Circuit Court should be affirmed, per curiam.

**IV. THE CIRCUIT COURT PROPERLY FOUND THAT FORMER COUNSEL WAS NOT DISCHARGED FOR CAUSE**

Appellant in his last point argues that Appellee was discharged for cause and is therefore not entitled to its attorney fee. This is error, and the order should be affirmed.

The Court observed:

A client has a right at all times to discharge counsel....The ultimate question is whether he will have to compensate the discharged attorney and, if so, the amount of any such compensation. Because the attorneys had been [upon finding of the trial court] discharged without cause, they are entitled to recovery of a fee, leaving only the question of the amount of said fee.

*Levin v Rosenberg*, 372 So 2d 956, 958 (Fla 3d DCA1979)

Simply put, the Court took testimony and found that former counsel was discharged without cause. The Court credited the testimony of Mr. Tenenbaum, Mr. Shannin and partially credited the testimony of Mr. Palmer. The Court found Ms. Morris-Webster's testimony irrelevant. A finding that former counsel was not discharged for cause has record support.

We would also note that even if former counsel were discharged for cause, this would not lead to a forfeiture of the fee. "An attorney discharged for cause is entitled to the quantum meruit value of the services rendered less any damages which the client incurred due to the attorney's conduct and discharge." *Kushner v Engelberg, Cantor & Leone, P.A.*, 699 So 2d 850, 851 (Fla 4th DCA 1997)

The Circuit Court awarded Appellee 50% of the gross contingency in quantum meruit, which was at the lower point of Appellee's expert's analysis. This was done despite Appellee performing all the beneficial legal work in the case, short of settling the matter. Even if Appellee was guilty of a for cause termination as Appellant advocates, the Court's resolution of the fee split- again at the lower end of the spectrum - was not an abuse of the Circuit Court's discretion. The order of the Circuit Court should be affirmed, per curiam.

V. **THIS APPEAL IS PROCEDURALLY IMPROPER AS THE NOTICE OF APPEAL WAS FILED PRIOR TO THE ORDER DENYING REHEARING IN VIOLATION OF THE FLORIDA RULES OF APPELLATE PROCEDURE**

As this is an appeal from an evidentiary hearing, the rules require that an appeal be made from the motion for rehearing. This did not occur in this case.

Fla R. Civ. Pro. 1.530(a) states:

To preserve for appeal a challenge to the failure of the trial court to make required findings of fact in the final judgment, a party must raise that issue in a motion for rehearing under this rule. On a motion for a rehearing of matters heard without a jury, including summary judgments, the court may open the judgment if one has been entered, take additional testimony, and enter a new judgment.

This rule would seem to mean that any filed Notice of Appeal would need to be made from the order, denying motion for rehearing. This did not occur in this matter. This forms an additional basis to affirm the order of Circuit Court.

**CONCLUSION**

In total, the order of the Circuit Court should be affirmed, per curiam.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic service through the E-filing Portal to:

[Pleadings@ct-law.com](mailto:Pleadings@ct-law.com), Counsel for Appellants; Sage Morris-Webster, Esq.  
at Sage@websterlawgroup.com, Counsel for Defendants. on this 1st day  
of December, 2023.

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Florida Bar No.: 0670200

### **CERTIFICATE OF COMPLIANCE**

Pursuant to Fla. R. App. P. 9.100(g) and Fla. R. App. P. 9.045(b), the undersigned counsel hereby certifies that this brief was submitted in ARIAL, 14-point font. This brief also complies with the word count limit requirements, excluding the parts exempted by Fla. R. App. P. 9.045(e).

By: **/s/ Jason Tenenbaum**  
Jason Tenenbaum, Esquire  
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