STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BRYAN YAMHURE and HENRY YAMHURE,	)	
Petitioner,	)	
vs.	)	Case No. 02-4003RX
DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES,	)	
Respondent.	)	

FINAL ORDER GRANTING MOTION FOR REHEARING AND SUPPLEMENTING FINAL ORDER OF DECEMBER 19, 2003

A Final Order entered December 19, 2003, in this case awards Petitioners $5722.20 in attorneys' fees for an earlier, successful rule challenge. The Final Order rejects Petitioners' claim for costs of $2472.50. This is the expert witness fee of Mr. E. Gary Early, an attorney who testified in support of Petitioners' claim for attorneys' fees. Mr. Early testified pursuant to a contract calling for payment for his testimony, and he expected compensation for his testimony.

On January 2, 2004, Petitioners filed a Motion for Rehearing requesting reconsideration of the portion of the Final Order declining to award as costs Mr. Early's expert witness fee. The Motion for Rehearing raises two points: the Final Order fails to explain why the Administrative Law Judge rejected

Petitioners' claim for the cost of Mr. Early's expert witness fee and the Final Order errs in rejecting this claim because the Administrative Law Judge lacks the discretion not to award this cost item. This Order supplements the Final Order because the first contention is correct, although the second contention is not.

In Travieso v. Travieso, 474 So. 2d 1184 (Fla. 1985), the Florida Supreme Court applied Section 92.231, Florida Statutes, to a request for costs that included the expert witness fee of a lawyer who had testified as to the reasonableness of attorneys' fees. Travieso is of obvious importance in identifying the circumstances under which a court may award as costs the expert witness fee of a lawyer testifying about attorneys' fees. However, it is not entirely clear that Travieso applies to this case. Section 92.231(1), Florida Statutes, applies to judicial actions, not administrative proceedings. The authority for awarding costs in this case is Section 120.595(3), Florida Statutes, not Section 92.231, Florida Statutes. Section 120.595(1)(e)2, Florida Statutes, defines "costs" as the word is used in Chapter 57, Florida Statutes, not Section 92.231, Florida Statutes.

Nonetheless, both statutes address costs, and Section 120.595(3), Florida Statutes, has not generated the case law that has construed Section 92.231(1), Florida Statutes, and

other cost statutes. This Order therefore assumes that Travieso applies to this case. However, the application of Travieso and subsequent cases cannot override the limitation in Section 120.595(3), Florida Statutes, of any cost award to "reasonable" costs.

The Supreme Court stated in Travieso:

> We hold that pursuant to section 92.231, expert witness fees, at the discretion of the trial court, *may* be taxed as costs for a lawyer who testifies as an expert as to reasonable attorney's fees. We do not hold that such expert witness fees must be awarded in all cases. Generally, lawyers are willing to testify gratuitously for other lawyers on the issue of reasonable attorney's fees. This traditionally has been a matter of professional courtesy. An attorney is an officer of the court and should be willing to give the expert testimony necessary to ensure that the trial court has the requisite competent evidence to determine reasonable fees. Only in the exceptional case where the time required for preparation and testifying is burdensome, should the attorney expect compensation.

474 So. 2d at 1186.

The two dissents underscore the holding of Travieso that a trial judge has the discretion to award an expert witness fee for a lawyer testifying about reasonable attorneys' fees. Justice Overton's dissent argues for a ruling prohibiting such an award in all cases. 474 So. 2d at 1187-89. Justice Ehrlich's dissent argues for a ruling requiring such an award in all cases. 474 So. 2d at 1187. Both dissents object to the

discretion that the majority opinion has clearly left to the trial court.

In one respect, though, Travieso is ambiguous. It is unclear from the cited language whether the discretion of the trial court not to award an expert witness fee is limited to the situation in which the testifying lawyer has testified for free or at least should have testified for free, given the simplicity of the matter and the little time required. For example, a testifying lawyer might spend be considerably burdened analyzing the record in a complicated case. If the trial court attaches little or no weight to the lawyer's testimony, Travieso is unclear as to whether the trial judge has the discretion not to award the testifying lawyer's fee among the costs. Subsequent case law has not resolved such narrow questions, but has instead wrestled with the broader question of whether the trial judge has any discretion at all.

In B & H Construction & Supply Co., Inc. v. Tallahassee Community College, 542 So. 2d 382 (Fla. 1st DCA 1989), the First District Court of Appeal applied the Travieso case, noting that the Supreme Court had held that the award of a lawyer's expert witness fee, in connection with his or her testimony concerning attorneys' fees, is "within the discretion of the trial court." 542 So. 2d at 391. The First District expressly rejected language from Straus v. Morton F. Plant Hospital Foundation,

Inc., 478 So. 2d 472, 473 (Fla. 2d DCA. 1985), that interpreted Travieso to mean that "an award of costs for an attorney who testifies as to the reasonableness of fees is discretionary only where the attorney does not expect to be compensated for his testimony." 542 So. 2d at 391-92. The First District remanded the case to the trial court, which had refused to award the fees of a lawyer testifying as to reasonable attorneys' fees, so that the court could explain how (or whether) it had exercised its discretion in accordance with Travieso.

Petitioners rely on a more recent First District case, Estate of McQueen v. First Guaranty Bank & Trust Company, 699 So. 2d 747 (Fla. 1st DCA 1997), in support of their assertion that the trial court lacks the discretion to refuse to award expert witness costs of a lawyer testifying as to attorneys' fees, if, as here, the lawyer had a contract and expected to be compensated.

McQueen omits any mention of B & H Construction. McQueen cites approvingly Stokus v. Phillips, 651 So. 2d 1244 (Fla. 2d DCA 1995), in which the Second District, in reliance upon its earlier Straus decision, interpreted Travieso to mean that the trial court lacks the discretion not to award expert witness fees as costs, if the testifying lawyer expected to be compensated. However, this portion of McQueen is merely dictum. The pertinent holding in McQueen is to reverse and remand the

final judgment with directions that the trial court rule on the claim for costs.

As between the First District's holding in B & H Construction and its dictum in McQueen, the better approach is not to require the award of costs in all cases in which the testifying attorney seeks compensation. First, McQueen's dictum relies on a Second District case that relies on an earlier Second District case that the First District has already rejected, in an opinion of which the McQueen court was possibly unaware. Second, a McQueen approach ignores the restriction in Travieso that costs for such fees may only be awarded in the "exceptional case where the time required for preparation and testifying is burdensome." Third, a McQueen approach essentially rejects the position of the majority in Travieso and adopts instead the dissenting opinion of Justice Ehrlich, which is that the trial court should be required to award such costs in all cases. The only difference between the McQueen holding and the Ehrlich dissent is that the McQueen holding requires the lawyer seeking costs to have sufficient foresight to "require" his or her expert witness to sign a contract stating that the witness expects compensation. The McQueen approach clearly eliminates the trial court's discretion in all cases but those involving lawyers uninformed of this simple device and hastens

the disappearance of the professional courtesy that the Travieso Court endorsed.

Outside of the Second District, Florida appellate courts have recognized the discretion afforded trial courts by Travieso. Cf. Gonzalez v. Veloso, 731 So. 2d 63 (Fla. 3d DCA 1999) (trial court's denial of expert witness fees not an abuse of discretion, citing Travieso and other cases); Rivers v. Integon General Insurance Corporation, 719 So. 2d 384 (Fla. 4th DCA 1998) (per curiam; trial court's denial of expert witness fees not an abuse of discretion, having considered Travieso); and United State Fidelity and Guaranty Co. v. Rosado, 606 So. 2d 628 (Fla. 3d DCA 1992) (per curiam; trial court's award of expert witness fee reversed on authority of Travieso because the simply personal injury protection case that settled six days after filing was not an "exceptional case where the time required for preparation and testifying is burdensome") with Rock v. Prairie Building Solutions, Inc., 854 So. 2d 722 (Fla. 2d DCA 2003) (citing Stokus v. Phillips, 651 So. 2d 1244 (Fla. 2d DCA 1995), court reverses trial court's refusal to award expert witness fee to testifying lawyer and awards $1000).

However, even a member of the majority in Rock questions the direction that the Second District has taken since Travieso. The concurring opinion in Rock notes that Stokus relied on an earlier Second District case, Straus (which is the case that the

First District declined to follow in B & H Construction), in holding that Travieso requires the award of such expert fees in all cases in which the testifying lawyer expects compensation. The concurring opinion adds that Stokus and Straus

> appear to have read Travieso more broadly than is warranted by its language. Rather than eliminating the trial court's discretion, Travieso suggested what a trial court might considering in exercising its discretion. See B & H Constr. & Supply Co. v. [Tallahassee Community College], 542 So. 2d 382, 291-92 (Fla. 1st DCA 1989). However, in light of this court's decisions in Stokus and Straus, and in the absence of anything in the record reflecting why an award was not made, I agree that the trial court erred by not taxing as a cost the fee charged by Mr. Pettit.

854 So. 2d at 726 (Silberman, J., concurring).

A recurring theme in the case law is that an appellate court will remand to the trial court, if the latter has not ruled on the request for costs or has ruled and inadequately explained how his or her ruling exercises the discretion afforded the trial courts by Travieso. This Order now explains why, under Travieso, Petitioners are not entitled to an award of costs of Mr. Early's expert witness fee.

This fee case and the underlying rule challenge do not present the "exceptional case where the time required for preparation and testifying is burdensome." Respondent never contested the reasonableness of the hourly rates claimed.

Respondent disputed the amount of hours, although most of Respondent's dispute seems to have taken the form of an attack on the evidentiary ruling, affirmed in Stokus, that the invoices were competent substantial evidence on which the Administrative Law Judge could base an award.

As discussed in detail in the Final Order, the underlying rule challenge was simple. Analysis of the invoices and the value of the work of Petitioners' counsel was not burdensome.

Notwithstanding Mr. Early's professional distinction, his testimony in this case concerning the amount of attorneys' time reasonably required did not prevail and merited little weight in arriving at reasonable attorneys' fees. At this point, the amount that Petitioners seek for Mr. Early's time is 43 percent of the reasonable attorneys' fees themselves.

For all of these reasons, the Administrative Law Judge has exercised his discretion not to award any part of Mr. Early's expert witness fee as a cost in this case. Alternatively, Petitioners are not entitled to this cost item because, under the circumstances described above, neither it, nor any lesser amount, is a "reasonable" cost, within the meaning of Section 120.595(3), Florida Statutes.

It is

ORDERED that the Motion for Rehearing is granted, Petitioners' request for the cost of Mr. Early's expert witness

fee is denied in its entirety, and the Final Order issued December 19, 2003, is supplemented by this Order.

DONE AND ORDERED this 7th day of January, 2004, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
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Filed with the Clerk of the
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this 7th day of January, 2004.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.