

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RALPH SEXTON AND RANCH)	
MANAGEMENT CONSULTANTS, INC.,)	
)	
Petitioners,)	
)	
vs.)	Case No. 10-0009
)	
WILD TURKEY ESTATES OF VERO,)	
LLC, AND ST. JOHNS RIVER WATER)	
MANAGEMENT DISTRICT,)	
)	
Respondents.)	
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FINAL ORDER

The question presented at this point in the proceeding is whether Section 57.105, Florida Statutes, allows an award of attorney's fees against a losing party's attorney when an award of fees cannot be made against the losing party. Because this order rules that the answer to the question is "no," and that answer disposes of all that remains of the proceeding, this order is a final order.

Background

Prior to conducting any discovery, Respondent Wild Turkey Estates of Vero, LLC ("Wild Turkey"), filed a motion for attorney's fees. Among the claims in the motion was the following:

Petitioners knew or should have known that the claims made in the Petition are not supported by material facts necessary to establish the claims alleged in the Petition and therefore, Wild Turkey is entitled to an award of attorney's fees pursuant to Section 57.105(1), Florida Statutes.

Motion for Attorney's Fees Pursuant to Section 57.105, Florida Statutes, and Section 120.595, Florida Statutes, filed February 22, 2010.

On March 16, 2010, Petitioners filed "Petitioners' Motion to Award Attorney's Fees," and then on May 5, 2010, an amended motion. In each, Petitioners' asserted that "Respondent . . . and Respondent's attorney Jonathan Ferguson knew or should have known that [their] motion for attorney's fees was not supported by the material facts necessary to establish the requested relief." This assertion, like one of the bases in Wild Turkey's motion for attorney's fees,^{1/} was made under the authority of Section 57.105, Florida Statutes.

On March 29, 2010, Petitioners filed "Petitioners Motion for Summary Final Order Denying Respondent Wild Turkey Estates of Vero, LLC's Motion for Attorney's Fees" ("Motion for Summary Final Order"). The motion was directed solely at the attorney's fees sought by Wild Turkey under Section 57.105, Florida Statutes.

Wild Turkey did not file a response to the Motion for Summary Final Order. Prior to the expiration of the time for filing a response, Jonathan A. Ferguson, who had filed the motion for attorney's fees on behalf of Wild Turkey against Petitioners, withdrew as counsel to Wild Turkey. Mr. Ferguson's successors as counsel to Wild Turkey did not file a response either.

Petitioners then filed their Notice of Voluntary Dismissal with Prejudice (the "Notice of Voluntary Dismissal") on May 20, 2010. In the Notice of Voluntary Dismissal, Petitioners not only dismissed the petition but explicitly gave notice of withdrawal of the pending motion for attorney fees against Wild Turkey: "Petitioners also give notice of withdrawal of Petitioners' pending motion for attorney's fees as to Respondent Wild Turkey Estates of Vero Beach, LLC." As discussed below, the withdrawal of the Petitioners' motion for attorney's fees against Wild Turkey is crucial to the outcome of their attempt to obtain fees against Wild Turkey's counsel. The Notice of Voluntary Dismissal also asked that jurisdiction be retained to rule on the Motion for Summary Final Order^{2/} and Wild Turkey's Counsel Jonathan Ferguson's liability for attorney's fees pursuant to Petitioners' motion for attorney's fees.

An order was entered on May 21, 2010, that relinquished jurisdiction over the Petition and, as requested by Petitioners, retained jurisdiction over the Motion for Summary Final Order and Petitioners' motion for attorney's fees against Mr. Ferguson. On the same day, Petitioners filed "Petitioners'

Request for Ruling Regarding Motion for Summary Judgment and Request for Hearing on Liability for Attorney's Fees against Counsel for Respondent."

On May 24, 2010, Mr. Ferguson filed a response to the Petitioners' request for a ruling on the Motion for Summary Final Order and for a hearing on his liability for attorney's fees, opposing both.

The parties^{3/} to the attorney's fees issues, meaning Petitioners and Mr. Ferguson, were ordered on May 25, 2010, to file memoranda of law on the issue of whether any attorney's fees under the circumstances of the case could be awarded solely against Mr. Ferguson pursuant to Section 57.105, Florida Statutes, when the statute calls for attorney's fees to be borne equally by a "losing party" and the losing party's attorney.

Discussion

Section 57.105 mandates:

award of a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during [an administrative proceeding^{4/}] in which the court [or an administrative law judge^{5/}] finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented . . . or at any time before [the administrative hearing^{6/}] or at any time before [hearing^{7/}]:

(a) Was not supported by the material facts necessary to establish the claim or defense;

§ 57.105(1), Fla. Stat.

Attorney's fees may be awarded under Section 57.105, Florida Statutes, for having to defend an unsupportable motion for attorney's fees filed pursuant to the same statute. See Albritton v. Ferrara, 913 So. 2d 5 (Fla. 1st DCA 2005).

Mr. Ferguson, however, maintains that they are not awardable against him under the circumstances of this case based on a plain reading of the statute, case law and the equities of the case. Mr. Ferguson's argument on the basis of the equities is not ripe for determination. It cannot be settled without an evidentiary hearing. The other two bases, however, do not require evidence. They can be decided as matters of law.

First, Mr. Ferguson points out that Section 57.105 calls for an award "in equal amounts by the losing party and the losing party's attorney." He argues that the use of the conjunctive "and," rather than "and/or" or the disjunctive "or," demonstrates that liability is to be shared and may not be imputed to either the losing party or the party's attorney without the other unless there is a specific statutory provision for doing so.

There is a provision in the statute that frees the losing party's attorney under certain circumstances from liability for Section 57.105 fees: "However, the losing party's attorney is not personally responsible if he or she has acted in good faith, based on the representations of his or her client as to the existence of those material facts." § 57.105(1), Fla. Stat. The opposite is not true. There is no statutory provision that allows Section 57.105 fees to be awarded solely against an attorney. The statute is silent with regard to situations in which the client is free from responsibility because of having been led astray by bad faith actions of the attorney.

In Mr. Ferguson's view, moreover, there is no jurisdiction in this case to make the judgment under the statute as to whether Section 57.105 fees are appropriate since the Division of Administrative Hearings no longer has jurisdiction over Wild Turkey. If Wild Turkey is not a participant, a hearing on fees over what was known or should have been known about its claim for fees from Petitioners is problematic, in Mr. Ferguson's view. This point in his argument, however, overlooks that the inquiry at such a hearing is whether either the losing party or the losing party's attorney knew or should have known that there was no support for Wild Turkey's motion for attorney's fees. Wild Turkey's absence will not be an impediment to determining what Mr. Ferguson, himself, knew or should have known about the basis for the motion for attorney's fees he filed on behalf of his client. But his argument with regard to jurisdiction, as discussed, below, is valid. There is no jurisdiction under the statute to consider fees solely as to the losing party's

attorney if the losing party is not also liable for an appropriate share of the fees.

Countering Mr. Ferguson's argument is Petitioners' contention that Avemco Ins. Co. v. Tobin, 711 So. 2d 128 (Fla. 4th DCA 1998) clearly holds that an attorney can be held liable for Section 57.105 fees when his client is not responsible for them and, accordingly, is not liable for them. A cursory reading of Avemco could lead one to agree with Petitioners. But a careful reading shows it is not on point with this case and it is not controlling.

The first paragraph of the opinion of the court contains the following sentence: "[u]nder the circumstances of this case, we hold that the lawyer could be made solely liable for fees incurred by adverse parties arising from frivolous positions taken by the lawyer on his own behalf." Avemco, 711 So. 2d at 129 (emphasis added.) The circumstances to which the court alludes are detailed in the opinion. The lawyer obtained funds deposited in the court registry in payment of a judgment in favor of his client for himself without his client's knowledge. He then moved ex parte to have the remaining funds released to his client, obtained an order for their release, and, with knowledge of a pending emergency motion to have the order vacated, turned the funds over to the client. When the trial court vacated the order and required the return of the funds to the registry, the lawyer refused. The result of the lawyer's unprofessional and unethical behavior was that his client was held in contempt of court. The lawyer was disciplined by the Florida Bar for failure to inform the court of all material facts during the ex parte proceeding, failure to maintain the disputed funds in trust and refusal to comply with the court order until his client was held in contempt.

After two hearings for attorney's fees, the court found the lawyer to have caused extensive litigation by his refusal to comply with the court order and that his position in the litigation lacked any legal merit and was frivolous.

On appeal, the Fourth District Court of Appeal ruled that the lawyer's assertions of his own personal interests by bringing his personal claim for charges against a recovery in the litigation raised his status from "lawyer" to "party." As such, he could be both the losing party's lawyer and a losing party and he became a losing party in the collateral proceeding within the main action. Having made himself a party, the court held, the lawyer was properly liable for 57.105 fees even though

his "nominal client in the litigation was not itself liable for such fees." Id., at 131.

There is no allegation in Petitioners' motion that Mr. Ferguson has made himself a party in this proceeding or acted in any manner that would have raised his status to a "party" as did the lawyer in Avemco. Rather, the allegations are simply that when the motion for attorney's fees were filed against Petitioners for the claims in their petition, Mr. Ferguson knew or should have known that there was no basis for the claim for fees, the standard under the statute.

Mr. Ferguson also refers to Neustein v. Miami Shores Village, 837 So. 2d 1054 (Fla. 3d DCA 2002) in which in a footnote, the court recognizes that Section 57.105 fees cannot be awarded solely against an attorney:

In the rare case in which it is appropriate to assess the entire attorney's fee of one side against the opposing side's counsel, the more appropriate framework for analysis would now appear to be the Florida Supreme Court's recent decisions in Moakley v. Smallwood, 862 So. 2d 221 (Fla. 2002), and Diaz v. Diaz, 856 So. 2d 229 (Fla. 2002).

Id. at 1056, n. 3. While the first clause in the endnote could be viewed as supporting Petitioners' position, the endnote in entirety is not supportive of their position. The Moakley and Diaz opinions discuss inherent judicial authority to impose sanctions solely against an attorney absent a rule or statute authorizing such sanctions rather than authority under Section 57.105.

In stark contrast to the interpretation Petitioners advance with regard to Avemco, is the clear language of the court in Gopman v. Dep't of Education, 974 So. 2d 1208 (Fla. 1st DCA 2008):

Section 57.105 allows an award of fees to be paid solely by the litigant if counsel can show that he "acted in good faith, based on the representations of [the] client as to the existence of" material facts. Unfortunately, section 57.105 does not allow for an award of fees to be paid solely by an attorney when the client acts "in good

faith, based on the representations of" the attorney as to the legal sufficiency of claims or defenses. If the law allowed, we would order the fees to be paid solely by counsel.

Id. at 1212 n. 3 (emphasis added.) The underscored language in the quote above is consistent with construction of the statute advanced by Mr. Ferguson.

The facts of Gopman, however, are not on all fours with the facts of this case. Gopman did not involve an attempt to have fees assessed against a losing party when the pleading that initiated the proceeding had been dismissed concurrently with an explicit withdrawal of a pending motion for fees against the losing party.

The outcome of Petitioners wish to obtain fees solely from the losing party's attorney might have been different had Petitioners not released Wild Turkey, the losing party, itself, from participation in an award of fees under Section 57.105. Had Petitioners obtained an award under the statute, they would likely have been able validly to waive half of the fees from the losing party and take the remaining half from the losing party's attorney. The attempt by Petitioners now in this proceeding, however, to have fees awarded only against the losing party's attorneys without any involvement as to liability of the losing party is outside the framework of Section 57.105, Florida Statutes. Unlike the situation in which the losing party may be held entirely liable for Section 57.105 fees specifically addressed by the statute, there is nothing in the statute to suggest that a prevailing party who moves for attorney's fees can allow the losing party to escape them before a decision has been made as to whether they should be awarded and then pursue fees solely against the losing party's attorney.

CONCLUSION

Section 57.105, Florida Statutes, does not allow the award of attorney's fees solely against Mr. Ferguson. Avemco, above, is of no avail to Petitioners because of unique facts inapplicable to this case.

Fees cannot be awarded against Wild Turkey because of the withdrawal of the claim for the fees from Wild Turkey in the Notice of Voluntary Dismissal with Prejudice filed by Petitioners. If fees cannot be awarded against Wild Turkey,

they cannot be awarded under Section 57.105, Florida Statutes, against Wild Turkey's attorney.

It is, therefore, ordered:

1. The Motion for Summary Final Order is deemed moot;

2. The request for a hearing on the liability of Mr. Ferguson for attorney's fees under Petitioners' Motion for Attorney's Fees under the authority of Section 57.105, Florida Statutes, is denied. There is no authority in Section 57.105, Florida Statutes, for an award of fees against the losing party's attorney without an award against the losing party.

DONE AND ORDERED this 16th day of June, 2010, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of June, 2010.

ENDNOTES

1/ The motion sought denial of the fees claimed under Section 57.015, Florida Statutes. The motion did not address the claim for fees by Wild Turkey under Section 120.595, Florida Statutes.

2/ A ruling on the motion is a condition precedent to Petitioners' motion for attorney's fees. If Petitioners prevail on the Motion for Summary Final Order, Petitioners will be the prevailing party on Wild Turkey's motion for attorney's fees and Wild Turkey will be the losing party, thus fulfilling a condition for an award of Section 57.105 fees.

3/ The term "parties" as used in the Order of May 25, 2010, was clarified to include Petitioners and Mr. Ferguson in an order entered May 26, 2010. The use of the term "parties" in these two orders as applied to Mr. Ferguson was not intended to be a determination that Mr. Ferguson is a party to the case or that he is a "party" as that term is used in Section 57.105, Florida Statutes, either as a "prevailing party" or a "losing party." It is simply a reference to him as a party to the attorney's fees issues that remained after relinquishment of jurisdiction over the petition.

4/ See § 57.105(5), Fla. Stat.

5/ Id.

6/ Id.

7/ Id.

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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 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.