

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROBERT A. SCHWEICKERT, JR.,)	
)	
Petitioner,)	
)	
vs.)	Case No. 11-3428FC
)	
CITRUS COUNTY AND DEPARTMENT OF)	
COMMUNITY AFFAIRS,)	
)	
Respondents,)	
)	
and)	
)	
CITRUS MINING AND TIMBER, INC.,)	
)	
Intervenor.)	
)	

FINAL ORDER

The final hearing in this matter was held on September 7, 2011, in Inverness, Florida, before Bram D.E. Canter, Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

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For Respondent Citrus County:

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For Department of Community Affairs:

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For Intervenor: Edward P. de la Parte, Jr., Esquire
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STATEMENT OF THE ISSUE

The issue to be determined is the amount of reasonable attorney's fees and costs incurred by Citrus Mining and Timber, Inc. ("CMT") in Robert A. Schweickert, Jr. v. Department of Community Affairs and Citrus Mining and Timber, Inc., Case. No. 1D10-3882 (Fla. 1st DCA 2011).

STATEMENT OF THE CASE

On January 26, 2010, Robert Schweickert, Jr., unrepresented by legal counsel, filed a petition for hearing with the Department of Community Affairs to challenge the Department's determination that an amendment to the Citrus County Comprehensive Plan was "in compliance" under section 163.3184, Florida Statutes (2010). Following a de novo hearing and a Recommended Order from DOAH, the Department issued a Final Order on June 25, 2010, which determined that the plan amendment was in compliance.

On July 22, 2010, Schweickert, still unrepresented by counsel, appealed to the District Court of Appeal for the First District. On May 4, 2011, the court entered an order dismissing the appeal on the basis that Schweickert had not demonstrated his standing to appeal. In the same order, CMT's motion for attorney's fees was granted "as appellant knew or should have known he lacked standing to bring the appeal." On June 24, 2011, the court granted CMT's motion for clarification as to attorney's fees, remanding the case to DOAH "for determination of the amount of attorney's fees and costs."

Official recognition was taken of the pleadings, orders, and briefs filed in the court. CMT Exhibits 1 through 13 were admitted into evidence. CMT presented the testimony of Daniel Stengle. Schweickert presented the testimony of Howard Heims, but offered no exhibits.

The Transcript of the final hearing was filed with DOAH and the parties filed proposed final orders that were considered in the preparation of this Final Order.

FINDINGS OF FACT

Appellate Attorney's Fees

1. Sarah Lahlou-Amine of the law firm of Fowler White Boggs, P.A. ("Fowler") was the attorney with primary responsibility for research and drafting documents for the appeal on behalf of CMT. She prepared and filed a notice of

appearance, a motion to dismiss, a motion for attorney's fees, an amended motion for attorney's fees, the answer brief, a notice of supplemental authority, a second motion for attorney's fees, and a motion for clarification. Ms. Lahlou-Amine was assisted and supervised by more senior lawyers at Fowler. The total number of hours charged by Fowler was 134.8. The total attorney's fees charged by Fowler was \$39,010.

2. Lawyers from two other law firms were employed by CMT and charged attorney's fees and costs for the appeal. The Law Office of Clark Stillwell, P.A., charged 18 hours for a total attorney's fees of \$6,030. Edward de la Parte and other lawyers of the law firm of de la Parte & Gilbert, P.A., charged 24.9 hours for total attorney's fees of \$5,382.50.

3. The grand total of all the attorney hours expended for the appeal is 177.7 hours and the grand total of all fees charged to CMT for the appeal is \$50,422.50.

4. It was the opinion of CMT's expert witness, Daniel Stengle, that all of these hours and fees are reasonable. Schweickert's expert witness, Howard Heims, believes that 25 or 30 hours was all the effort that was reasonable for this appeal.

5. The hourly rates of \$225.00 to \$435.00 an hour that were used by CMT's attorneys are not contested by Schweickert. The evidence established that the rates are reasonable. The dispute focused on the number of hours expended for the appeal.

6. Heims contends that it was unreasonable for CMT to file a motion to dismiss for lack of standing, because appellate courts rarely grant such a motion and the standing issue could have been saved for CMT's answer brief. The court did not summarily deny CMT's motion to dismiss but, instead, ordered Schweickert to show cause why the motion should not be granted. The issuance of the order to show cause indicates that it is not the court's practice to deny all motions to dismiss that are filed before the briefs. Following Schweickert's response, the court still did not deny the motion to dismiss, but deferred ruling to the panel of judges that would determine the merits of the appeal.

7. It was not unreasonable to file a motion to dismiss in this case because Schweickert's lack of standing was unusually clear. The controlling factual issue was simple--whether Schweickert made timely comments to Citrus County about the proposed comprehensive plan amendment. Furthermore, the argument made in the motion eventually prevailed.

8. Heims also believes that it was unreasonable for CMT to file three motions for attorney's fees and costs. The motions were not identical, but filing three such motions is unusual and was not shown to be necessary or important.

9. It was not persuasively shown that 177.7 attorney hours was reasonable for this appeal.

10. The evidence does not establish that the attorney's fees charged by the law firms of Clark Stillwell and de la Parte & Gilbert should be included as part of the reasonable fees for the appeal. These fees were not shown to be necessary or to contribute materially to the appeal.

11. Rule 4-1.5 of the Rules Regulating the Florida Bar, Code of Professional Conduct, sets forth factors to be considered in determining a reasonable attorney's fee. The factors listed in rule 4-1.5(b)(1) are addressed below, in sequence:

(A) the time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

The time and labor expended on the appeal was not shown to be reasonable. The questions involved were not difficult. The case was not complex. No unusual skills and expertise were required to perform the legal services.

(B) the likelihood that the acceptance of the particular employment would preclude other employment by the lawyer;

CMT did not contend that this factor was applicable.

(C) the fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature;

Reasonable hourly rates were charged, but persuasive evidence was not presented to show that the total amount of the fees

charged to CMT are customary for the services that were performed.

(D) the significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained;

Although a reversal of the Department's Final Order would have had adverse consequences for CMT, it was not shown that the situation was of an unusual nature. Furthermore, a reversal on the merits (to find the comprehensive plan amendment not in compliance) was almost impossible because no factual findings were made that supported Schweickert's claims. CMT points to the unusual result--attorney's fees awarded against a pro se litigant--as justifying the attorney's fee, but this unusual result is due to Schweickert's unusually weak case. The issues and the law applied were not unusual.

(E) the time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client;

CMT's argument that time limitations of an usual nature existed in this matter was not persuasive.

(F) the nature and length of the professional relationship with the client;

The applicability of this factor was not argued by CMT and was not demonstrated by the evidence.

(G) the experience, reputation, diligence, and ability of the lawyer or lawyers performing the service and the skill, expertise, or efficiency of effort reflected in the actual providing of such services; and

The lawyers involved have good reputations and experience, but those attributes were not likely to have materially affected the outcome. Performing the legal services did not require unusual skills. The services were not efficiently provided.

(H) whether the fee is fixed or contingent, and if fixed as to amount and rate, then whether the client's ability to pay rested to any significant degree on the outcome of the representation.

This factor was not shown to be a basis to support a larger fee.

12. It was Heims' opinion that 25 to 30 hours was a reasonable number of attorney hours to prepare the answer brief and one motion for attorney's fees. Thirty hours was a sufficient number of hours for the research and drafting work done by Ms. Lahlou-Anime. However, because it has been determined that the filing of the motion to dismiss was reasonable, some additional time should be added.

13. CMT Exhibit 1 indicates that Ms. Lahlou-Anime charged about 23 hours for her work on the motion to dismiss. However, in determining a reasonable number of hours for the work on the motion to dismiss, consideration must be given to the fact that the standing arguments made in the motion were repeated in CMT's

answer brief, which has already been accounted for in the 30 hours. The parties did not address this specific issue. However, the evidence supports the addition of 10 hours for Ms. Lahlou-Anime, for a total of 40 hours.

14. Forty hours for Ms. Lahlou-Anime at her rate of \$260 per hour equals \$10,400.

15. Heims also failed to fairly account for the reasonableness of the attorney hours expended by Karen Brodeen, a senior attorney at Fowler who represented CMT in the lower administrative proceedings and who assisted Ms. Lahlou-Anime in the preparation of the motion to dismiss and answer brief. CMT Exhibit 1 shows that Ms. Brodeen charged 0.9 hours at \$375 per hour and 16.9 hours at \$385 per hour, for a total fee of \$6,844.

16. The grand total of reasonable attorney time is 57.8 hours and the total reasonable attorney's fee is \$17,244.

Appellate Costs

17. CMT is seeking \$3,250.95 in costs for the appellate proceeding, comprised of \$3,156.41 in costs charged by Fowler and \$94.54 charged by de la Parte & Gilbert. However, as discussed in the Conclusions of Law, the costs which CMT seeks to recover --routine office expenses--are not recoverable legal costs under the applicable statutes.

Prejudgment Interest

18. CMT seeks daily prejudgment interest at the rate of 0.01644 percent.

Requested Sanctions in the DOAH Remand Proceeding

19. CMT also seeks to recover its attorney's fees and costs incurred following the remand from the Court of Appeal to DOAH to determine the amount of appellate attorney's fees and costs, as a sanction for alleged misconduct by Schweickert.

20. CMT seeks a sanction against Schweickert for his failure to appear at a scheduled deposition for which Schweickert had been subpoenaed. Schweickert was not represented by an attorney at the time. Schweickert told CMT's attorneys that he was not going to appear at the deposition, but CMT's attorneys went forward as planned. Schweickert did not appear for his deposition. CMT seeks to recover its attorney's fees charged by de la Parte & Gilbert that are related to Schweickert's failure to appear for his deposition, which are \$17,975.00, and costs of \$818.63.

21. CMT also sought a sanction against Schweickert for having to respond to Schweickert's Motion for Cause of Contempt for Citrus Mining and Timber's Violation of Court Order, which demanded sanctions against CMT for CMT's scheduling of Schweickert's deposition without attempting to contact him to arrange a mutually agreeable date and time. The motion was

denied. Schweickert was not represented by an attorney at the time. CMT seeks to recover its attorney's fees charged by de la Parte & Gilbert to respond to the motion, which are \$2,357.50, and costs of \$21.52.

22. The day before the final hearing, CMT filed a motion for sanctions for Schweickert's failure to provide complete answers to some of CMT's discovery requests.

23. At the time of the final hearing on September 7, 2011, CMT showed a total of \$35,570 in attorney's fees associated with the DOAH remand proceeding, and costs of \$1,693.73. CMT seeks recovery of those fees and costs as well as subsequent fees and costs through issuance of the Final Order in this remand proceeding, which are estimated to be \$22,000 and \$10,870, respectively. In summary, CMT seeks to recover \$70,133.73 in fees and costs that it was charged by its attorneys for their effort to show that CMT's appellate fees and costs of \$53,673.45 were reasonable.

CONCLUSIONS OF LAW

24. CMT has the burden to prove the reasonableness of the attorney's fees. See City of Miami v. Harris, 490 So. 2d 69 (Fla. 3d DCA 1985).

25. Attorney's fees generally cannot be recovered when the evidence is insufficient to show what services were performed.

See Warner v. Warner, 692 So. 2d 266, 268 (Fla. 5th DCA 1997); Tucker v. Tucker, 513 So. 2d 733, 735 (Fla. 2d DCA 1987).

26. The number of hours reasonably expended on the litigation, multiplied by a reasonable hourly rate, produces the "lodestar," which is an objective basis for the award of attorney's fees. Fla. Patient's Comp. Fund v. Rowe, 472 So. 2d 1145, 1150 (Fla. 1985). The lodestar may be adjusted up or down to account for a "contingency risk" factor or the "results obtained." The former factor is inapplicable and the latter does not warrant an adjustment in this case.

27. In Rowe, the Supreme Court of Florida stated that, in determining reasonable attorney's fees, the courts should use the criteria set forth in Disciplinary Rule 2-106(b) of The Florida Bar Code of Professional Responsibility. Id. These criteria are now found in rule 4-1.5(b), Rules Regulating the Florida Bar, Rules of Professional Conduct.

28. After considering the evidence presented and all the guidelines contained in rule 4-1.5(b), it is concluded that a reasonable attorney's fee for the appeal is \$17,244.

29. Section 57.105(1), Florida Statutes, provides that prejudgment interest shall be included in the award of a reasonable attorney's fee under this section. The date of a court's determination that a party is entitled to fees fixes the date for computing prejudgment interest. Mason v. Reiter, 564

So. 2d 142 (Fla. 3d DCA 1990). In this case, the operative date is May 4, 2011.

30. The total reasonable attorney's fees, including prejudgment interest, is \$17,782.63.¹

31. The costs which CMT seeks to recover are office expenses, such as for postage, telephone, on-line legal research, and facsimiles. CMT did not cite any legal authority to support its claim for these costs. These are not recoverable legal costs. See Robbins v. McGrath, 955 So. 2d 633, 635 (Fla. 1st DCA 2007).

32. Copying expenses are not recoverable unless a showing is made that the copies were for documents filed in court and reasonably necessary. Ocean Club Cmty. Ass'n, Inc. v. Curtis, 935 So. 2d 513, 518 (Fla. 3d DCA 2006). No such showing was made.

33. Although Schweickert's expert witness was not permitted to offer an opinion as to the reasonableness of CMT's costs, an expert opinion is unnecessary to determine that CMT's costs are not recoverable.

34. A party may recover additional attorney's fees for litigating the issue of entitlement to fees, but generally a party may not recover attorney's fees for time spent litigating the amount of the fees. See State Farm Fire & Cas. Co. v. Palma, 629 So. 2d 83 (Fla. 1993). However, the same kinds of

misconduct that would justify imposing a sanction against a party in the original case can justify a sanction if the misconduct occurs in a subsequent proceeding to determine a reasonable attorney's fee. See Condren v. Bell, 853 So. 2d 609 (Fla. 4th DCA 2003).

35. Because it was determined by the Administrative Law Judge that there was no basis for deposing Schweickert, and CMT was ultimately prohibited from deposing him, no sanction is imposed on Schweickert for his failure to appear for his deposition.

36. No evidence was presented by CMT at the final hearing to prove the allegations made in support of the requested sanction against Schweickert for filing his Motion for Cause of Contempt for Citrus Mining and Timber's Violation of Court Order. The fact that Schweickert's motion was denied is not, standing alone, sufficient cause to impose a sanction against him.

37. As to CMT's requested sanction against Schweickert for failing to provide complete responses to certain discovery requests, Schweickert was prohibited at the final hearing, because of that failing, from presenting an expert opinion on the reasonableness of the appellate costs or any evidence on the reasonableness of the fees charged by CMT's attorneys for

litigating the amount of the fees to be awarded. No additional sanction is imposed.

38. In summary, CMT's motions for further sanctions against Schweickert for matters arising during the remand proceeding are denied.

DISPOSITION

Based upon the Findings of Fact and Conclusions of Law, it is

ORDERED that the amount of reasonable attorney's fees for the appeal, including prejudgment interest, is \$17,782.63, and there are no legal costs that are recoverable.

DONE AND ORDERED this 10th day of November, 2011, in Tallahassee, Leon County, Florida.



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Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of November, 2011.

ENDNOTE

1/ The interest rate on judgments is 6.0 percent per annum, which produces a daily interest rate of 0.01644 percent. There are 190 days between May 4, 2011, and the date of this Final Order. Multiplying 0.01644 by 190 produces a total interest rate of 3.1236 percent. Applying this rate to \$17,244 results in prejudgment interest of \$538.63.

COPIES FURNISHED:

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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 one copy of a Notice of Administrative Appeal with the agency clerk of the Division of Administrative Hearings and a second 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 Administrative Appeal must be filed within 30 days of rendition of the order to be reviewed.