SIXTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No. 6D23-1136
Lower Tribunal No. 2018-CA-013886-O

CED CAPITAL HOLDINGS 2000 EB, LLC,

Appellant,

v.

CTCW-BERKSHIRE CLUB, LLC

Appellee.

Appeal from the Circuit Court for Orange County.
John E. Jordan, Judge.

February 3, 2023

NARDELLA, J.

This appeal stems from an interim judgment denying CED Capital Holdings 2000 EB, L.L.C.'s ("CED") Motion for Attorneys' Fees and Costs ("motion") after it prevailed against CTCW-Berkshire Club, L.L.C. ("CTCW").[1] The parties agreed that CED was entitled to recover its reasonable fees but disagreed about the amount

[1] This case was transferred from the Fifth District Court of Appeal to this Court on January 1, 2023.

to be awarded. Following an evidentiary hearing, the trial court denied CED's motion, finding that it failed to present sufficient evidence, namely testimony from its attorneys, concerning the legal services performed in the case. Because invoices in evidence were sufficient, it was error for the trial court to deny CED's motion on the ground that testimony from counsel was also required. Accordingly, we reverse and remand for further proceedings.

Background

This case has a long and contentious history which need not be recounted to understand this appeal. Suffice it to say, CED filed this case against CTCW claiming that it breached their partnership agreement. The agreement contained a provision allowing the prevailing party in such an action to recover reasonable attorneys' fees and costs. As the prevailing party, CED filed a motion seeking an award of nearly $900,000 in attorneys' fees.

Thereafter, the trial court held a two-day evidentiary hearing on CED's motion. During CED's case-in-chief, Brian Spear, CED's manager, and Robert Stovash, an expert witness, testified in support of the motion. During Mr. Spear's testimony, CED entered the invoices it received from its counsel. The invoices described the tasks performed and identified the individuals who performed each task, the amount of time spent on each task, and the amount billed for each task. Importantly, the invoices were admitted into evidence without limitation and over

discrete objections, none of which are at issue in this appeal.[2] After the invoices were admitted, Mr. Spear testified that he received the invoices, reviewed them, and found them to be reasonable and reflective of the work he commissioned.

Counsel for CED did not call any attorney who had worked on the case, despite disclosing those attorneys as witnesses and despite several of those attorneys being present during the hearing. CED also did not introduce into evidence the attorneys' affidavits it had previously attached to its motion that outlined the fees billed.

After Mr. Spear's testimony, CED proceeded to address the reasonableness of its fee request. In doing so, CED called CTCW's lead attorney, who testified to billing CTCW nearly twice the amount of fees CED was seeking. CED then called attorney Robert Stovash as an expert witness, who, after describing the unique aspects of the case, opined as to the reasonableness of the number of hours spent on the case and rates charged per hour by each timekeeper. After Mr. Stovash's testimony, CED rested.

At the conclusion of all the evidence, and after calling only a rebuttal fee expert, CTCW moved for a directed verdict, arguing that CED failed to present

[2] CTCW objected to select invoices on the grounds that they were irrelevant because they were not billed to CED and/or contained fees that are not recoverable under the parties' partnership agreement. CTCW did not object on hearsay or authenticity grounds.

testimony from its attorneys about the work performed during the case and, thus, failed to satisfy its burden of showing that it was entitled to the fees it sought. The trial court agreed and entered an interim judgment denying CED's motion, finding, in relevant part, that CED's evidence was insufficient because

> none of the attorneys for [CED] testified to provide evidence detailing the services performed to [CED]. No affidavit of any attorney for [CED] was moved into evidence. The testimony of Mr. Spear with respect to the receipt, review and payment of [CED's] attorneys' fees invoices is insufficient for [CED] to carry its burden. He is not an attorney, did not provide detail as to the services provided, and did not (and could not, as a non-expert) offer an opinion that the tasks performed as described [in] the fee invoices were reasonably related to the prosecution of [CED's] case.

In light of this ruling, the trial court did not go on to consider whether the work performed, or the requested hourly rates were reasonable. *See generally Rosen v. Rosen*, 696 So. 2d 697, 699 (Fla. 1997) ("[U]nder the lodestar approach, a court multiplies the number of hours *reasonably* expended by a *reasonable* hourly rate. This produces the 'lodestar,' which is the objective basis for the award of attorney's fees."). Instead, this appeal followed.

On appeal, CED argues that the trial court erroneously concluded that the attorneys performing the work must testify as to the services performed. In response, CTCW cites several cases supporting the trial court's ruling which hold that testimony from counsel, in some form, is necessary to prove the legal work which was performed. As the error alleged by CED is based upon the trial court's

interpretation of law, our review is de novo. *Infiniti Emp't Sols., Inc. v. MS Liquidators of Ariz., LLC*, 204 So. 3d 550, 553 (Fla. 5th DCA 2016) (quoting *Ferere v. Shure*, 65 So. 3d 1141, 1144 (Fla. 4th DCA 2011)).

Analysis

The parties' arguments on appeal mirror the disagreement among Florida's appellate courts regarding the need for testimony from the attorney who performed the work to support a request for attorneys' fees. CED argues that we should follow those cases holding that testimony from the attorney who performed the work is not required when there is other admissible evidence detailing the nature and extent of the services performed. *See, e.g.*, *Cozzo v. Cozzo*, 186 So. 3d 1054, 1055–56 (Fla. 3d DCA 2015) (finding that invoice time sheets were sufficient, admissible proof); *Morton v. Heathcock*, 913 So. 2d 662, 669 (Fla. 3d DCA 2005) (holding that an attorney performing the services need not testify, but that evidence regarding the nature and extent of the services rendered must be adduced); *Nants v. Griffin*, 783 So. 2d 363, 366 (Fla. 5th DCA 2001) (holding that the attorney performing the work is not required to testify when evidence is introduced at the hearing detailing the services performed); *Saussy v. Saussy*, 560 So. 2d 1385, 1386 (Fla. 2d DCA 1990) (stating that competent evidence included time slips).

CTCW, on the other hand, argues that we should agree with cases requiring an award of attorneys' fees to be supported by evidence in the form of attorney

testimony. *See, e.g.*, *Henderson v. OneWest Bank, FSB*, 217 So. 3d 209, 210 (Fla. 1st DCA 2017) (holding that absent a stipulation or waiver, the party seeking fees should present testimony from the lawyer who performed the services or an authorized representative of the law firm); *Pridgen v. Agoado*, 901 So. 2d 961, 962 (Fla. 2d DCA 2005) (holding that an award of attorney's fees requires evidence in the form of testimony by the attorney preforming services); *Tutor Time Merger Corp. v. MeCabe*, 763 So. 2d 505, 506 (Fla. 4th DCA 2000) (holding that an award of fees must be supported by expert evidence, including the testimony of the attorney who performed the services); *Rodriguez v. Campbell*, 720 So. 2d 266, 267 (Fla. 4th DCA 1998) (holding that expert testimony is required to award attorney's fees and expert testimony includes the testimony of the attorney performing the services); *Cohen v. Cohen*, 400 So. 2d 463, 465 (Fla. 4th DCA 1981) (holding that testimony of the attorney who performed the work should be required by the trial court).

In addressing this disagreement among Florida's intermediary courts, we begin by repeating a well-known rule—that an appellate court is not bound by any of the decisions issued by its sister appellate courts. *Point Conversions, LLC v. WPB Hotel Partners, LLC*, 324 So. 3d 947, 960 (Fla. 4th DCA 2021). This rule of Florida jurisprudence applies equally to the newly created Sixth District Court of Appeal. *E.g.*, *Bunkley v. State*, 882 So. 2d 890, 924 (Fla. 2004) (Pariente, J., dissenting) ("A district court [of appeal] decision is never binding on [the Supreme Court of Florida]

or another district court."); *Va. Ins. Reciprocal v. Walker*, 765 So. 2d 229, 233 (Fla. 1st DCA 2000) (noting that the decision of a sister district court of appeal was binding on the trial court following diagonal authority principles but stating that "the decision does not have the same binding effect in this court"); *State v. Hayes*, 333 So. 2d 51, 53 (Fla. 4th DCA 1976) ("[A]s between District Courts of Appeal, a sister district's opinion is merely persuasive."). As a result, the Sixth District Court of Appeal is not bound by the precedent of any of its sister courts, including the Second and Fifth District. Instead, in the absence of a Florida Supreme Court decision on point, our consideration of whether sworn testimony from counsel must be introduced as evidence of the work performed is analyzed by returning to first principles.

It is well rooted in our jurisprudence that attorneys' fees in civil litigation are ordinarily borne by the party who incurs them. *Topalli v. Feliciano*, 267 So. 3d 513, 518 (Fla. 2d DCA 2019). Over the years exceptions to this deeply rooted rule have developed, leaving the question of how best to determine the amount of fees recoverable when such an exception presents. That is the very issue the Florida Supreme Court tackled in *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985), wherein the court adopted the federal lodestar approach for computing reasonable attorneys' fees and articulated specific guidelines to aid trial judges in the setting of attorneys' fees.

The first step in the lodestar analysis requires the court to determine the number of hours reasonably expended on the litigation. *Id*. at 1150. To prove that number, the Florida Supreme Court instructed that "the attorney fee applicant should present records detailing the amount of work performed." *Id*. There is no dispute that CED did that here by entering into evidence invoices which described with particularity the tasks performed, the individuals who performed each task, the time it took to complete each task, and the hourly rate of each timekeeper.[3]

The dispute here centers on what *Rowe* does not say—whether testimonial evidence from the attorney performing the work is also required to satisfy the first step in the lodestar analysis. There is no edict imposing such a requirement in *Rowe*, nor can we find any Florida Supreme Court opinion making such a pronouncement. Nevertheless, several cases from our sister courts have imposed such a requirement. *See, e.g.*, *Henderson*, 217 So. 3d at 210; *Pridgen*, 901 So. 2d at 962; *Tutor Time Merger Corp.*, 763 So. 2d at 506; *Rodriguez,* 720 So. 2d at 267; *Cohen*, 400 So. 2d at 465. The question becomes then, on what authority rests this requirement?

[3] While it is common for the attorney who performed the work to authenticate the records and lay the proper foundation for admission, that did not occur here. CTCW, however, never objected to the admission of the records nor requested for the records to be admitted for a limited purpose or contingent on the testimony of another witness. Once admitted into evidence with no limitation, the invoices could be used by CED as proof of the legal services performed by its counsel. *McCormick On Evid*. § 54 (8th ed. 2020).

The foundation for imposing such a requirement appears to have been laid by the Second District Court of Appeal's decision in *Lyle v. Lyle*, 167 So. 2d 256 (Fla. 2nd DCA 1964). There, amid creating an independent expert witness requirement, the *Lyle* court discussed the "routine" of counsel testifying to detail the services provided. The *Lyle* court's observation then became the support for a subsequent decision by the Fourth District Court of Appeal in *Cohen v. Cohen*, wherein it held that attorney testimony "should have been required by the trial court" because the practice had been expressly recognized in *Lyle*. 400 So. 2d at 465. Notably, neither the *Lyle* court's recognition of the practice nor the *Cohen* court's holding requiring such a practice is supported by rule or statute. And the policy grounds discussed in *Lyle* for the creation of a separate expert witness requirement[4] are never applied by

[4] At least two of our sister courts addressing the independent expert witness requirement conceived of in *Lyle* have questioned its wisdom. *Island Hoppers Ltd. v. Keith*, 820 So. 2d 967, 977 (Fla. 4th DCA 2002) ("Though Florida Courts have long required the corroborative testimony of an expert 'fees witness,' we question whether the rule is always the best, or most judicious, practice."), *disapproved of on other grounds by Sarkis v. Allstate*, 863 So. 2d 210 (Fla. 2003) ; *Sea World of Fla., Inc. v. Ace Am. Ins. Cos., Inc.*, 28 So. 3d 158, 161 (Fla. 5th DCA 2010) (joining Fourth District Court of Appeal in questioning the need for independent expert witnesses in support of fee request). That issue, however, is not before us today, as CED called an expert witness who opined as to the reasonableness of the number of hours spent on the case and rates charged per hour by each timekeeper. We mention the *Lyle* court's policy grounds because the *Lyle* decision is the authority cited by the *Cohen* court when it held that legally sufficient evidence requires the attorney who had performed the legal services testify at a hearing in which attorneys' fees are contested.

the *Cohen* court which simply pronounced a new requirement untethered to any authority and without supporting analysis. *Id*. Instead of citing authority, the *Cohen* court reiterated the rule that an attorneys' fee award be supported by "competent substantial evidence"[5] and then concluded that the testimony of the attorney should have been required.

We find the *Cohen* court's conception of legally sufficient evidence to be too narrow. Legally sufficient evidence has been defined as evidence, "in character, weight, or amount, as will legally justify the judicial or official action demanded." *Tibbs v. State*, 397 So. 2d 1120, 1123 (Fla. 1981), *aff'd sub nom. Tibbs v. Fla.*, 457 U.S. 31, 102 S. Ct. 2211, 72 L. Ed. 2d 652 (1982) (citing Black's Law Dictionary 1285 (5th ed. 1979)). While an attorney testifying based upon his or her personal knowledge of the services performed would suffice, the presentation of testimony is not the only way to establish a fact. *See generally Mace v. M&T Bank*, 292 So. 3d

[5] Upon review of these cases, we observe that Florida courts have articulated the applicable trial court standard in different terms. For example, the *Cohen* court stated a trial court must determine that an attorneys' fee award is supported by "competent substantial evidence." Other cases, however, have characterized the same standard in terms of "sufficiency of the evidence." *Nicol v. Nicol*, 919 So. 2d 550, 551 (Fla. 5th DCA 2005). In our view, the trial court's standard is more precisely stated as whether or not the evidence is "legally sufficient," while the term "competent substantial evidence" most often refers to an appellate standard of review. *See Rollins v. Rollins*, 336 So. 3d 1241, 1243 (Fla. 5th DCA 2022) (explaining that competent substantial evidence is an appellate standard of review, wherein appellate courts review a trial court's findings of fact to determine if those findings are supported by competent substantial evidence).

1215, 1220 (Fla. 2d DCA 2020) (discussing different types of evidence capable of proving a letter was mailed). Detailed business records that bear upon the same issue are also sufficient, especially in this case where those records—which are received without limitation, condition or objection—describe the tasks performed, the individuals who performed each task, the time it took to complete each task, and the hourly rate of each timekeeper.

Accordingly, we hold that the very evidence the Florida Supreme Court instructed parties to present on the issue of the work performed is also legally sufficient evidence as to that issue. *Rowe*, 472 So. 2d at 1150 ("To accurately assess the labor involved, the attorney fee applicant should present records detailing the amount of work performed."). Therefore, we reverse the trial court's order and remand for further proceedings. We also certify conflict with the Fourth District Court of Appeal's decision in *Cohen*, on the issue of whether a party's counsel must present counsels' sworn testimony detailing the work counsel performed in support of a request for attorneys' fees.

REVERSED and REMANDED; CONFLICT CERTIFIED.

SASSO, C.J., and WOZNIAK, J., concur.

Tucker H. Byrd and Scottie N. McPherson, of Byrd Campbell, P.A., Winter Park, and David A. Davenport and Justin H. Jenkins, of BC Davenport LLC, Minneapolis, Minnesota, Pro Hac Vice, for Appellant.

Zachary J. Bancroft, of Baker Donelson Bearman Caldwell & Berkowitz, PC, Orlando and Steven F. Griffith, Jr., of Baker Donelson Bearman Caldwell & Berkowitz, PC, New Orleans, Louisiana, Pro Hac Vice, for Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF TIMELY FILED