

IN THE COUNTY COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR DADE
COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 08-15972 CC 05 (03)

KEITH WHITEHEAD,

Plaintiff,

vs.

STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY AND MOTOR VEHICLES,

Defendant,

ORDER AND FINAL JUDGMENT AWARDING ATTORNEY FEES

This matter came before the Court for an evidentiary hearing as to Attorney Fees for Petitioner's Counsel Michael Catalano on February 26, 2009. After having ruled on certiorari review for Petitioner in Keith Whitehead v. State of Florida, Department of Highway Safety and Motor Vehicles, Case No. 07-113 AP, the Court in finding Petitioner's Writ of Certiorari should be granted, also found Petitioner's "motion for appellate attorney's fees should be granted pursuant to Fla.R.App.P. 9.400, the amount to be adjudicated by a duly designated judge of the county court." Pursuant to order of the Chief Judge this Court was designated to hear this matter. That Court also in Nicolas Martin v. State of Florida, Department of Highway Safety and Motor Vehicles, Case No. 07-101 AP which involved the identical issue as here and Respondent as here, as well as the same counsel who represented Martin there and Petitioner here, stated as follows: "the Respondent should have confessed error than pursuing the appeal".

This Court thereafter ruled it only had jurisdiction to determine attorneys fees for services rendered in the Appellate Division of the Circuit Court but not those rendered in the Third District Court of Appeal.

Fla. R. App. P. 9.400 (b) states as follows:

(b) **Attorney's Fees.** A motion for attorney's fees may be served not later than the time for service of the reply brief and shall state the grounds on which recovery is sought. The assessment of attorney's fees may be remanded to the lower tribunal. If attorney's fees are assessed by the court, the lower tribunal may enforce payment.

It is clear as has been conceded by counsel for both Petitioner and Respondent the starting point is R. Regulating Fla. Bar 4-1.5(b) and (c) which sets forth the factors to be considered in determining a reasonable attorney fee as follows:

(b) **Factors to Be Considered in Determining Reasonable Fees and Costs.**

(1) **Factors to be considered as guides in determining a reasonable fee include:**

(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;

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

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

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

(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;

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

(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

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

(c) Consideration of All Factors. In determining a reasonable fee, the time devoted to the representation and customary rate of fee need not be the sole or controlling factors. All factors set forth in this rule should be considered, and may be applied, in justification of a fee higher or lower than that which would result from application of only the time and rate factors.

Furthermore, in Florida Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) the

Court held that although “[i] inadequate documentation may result in a reduction in the number of hours claimed...” reduction is not required. Additionally lack of contemporaneous records does not justify an automatic reduction in the hours claimed. See City of Miami v. Harris 490 So.2d 69 (Fla. 3rd DCA 1985). Rather the Petitioner’s burden to substantiate the fee award is met when it is supported by substantial competent evidence. See Cohen v. Cohen 400 So.2d 463 (Fla. 4th DCA 1981).

The aforementioned principles of law are those that this Court must apply to the facts elicited at the evidentiary hearing on February 26, 2009. At that hearing the only testimony in the record was that from Petitioner’s Attorney Michael Catalano and his expert witness Janice Sharpstein. Mr. Catalano had been an attorney since 1983 (26 years) whose practice at the time of the hearing was “ninety something percent” criminal. He also testified he had performed 65.5 hours of legal services on this case and charged \$375.00 per hour (see Petitioner’s Exhibit 2). Ms. Sharpstein testified she graduated from law school in 1975 and the “primary focus” of her practice “lately” was appeals. Ms. Sharpstein also testified the bill and hourly rate submitted were “extraordinarily reasonable” and that to properly prepare the Petition for Writ of Certiorari Mr Catalano had to “drop all other cases”. Ms Sharpstein also testified as follows on page 112 of the transcript of the February 26, 2009 hearing which is attached to this order and incorporated herein:

A Not only are they reasonable but I do believe that in light of the circumstances of this particular case, you know, this is not an easy case where you know you just have an administrative hearing or then appeal it and you get back somebody’s

license, this is a case in which they filed writs of cert, they filed writs of certs on writs of certs, they filed mandates to prevent the stay, they filed you know motions for rehearing clarification and supplemental authorities and in light of all of the work that you had to do to respond to what the State chose to do in this case, that these fees are extraordinary reasonable.

The Respondent called no witnesses on its behalf to rebut either Mr. Catalano's testimony or Ms. Sharpstein's testimony. The Court does take note of the fact Respondent's counsel attempted to discredit Mr. Catalano on cross-examination by questioning him about his failure to maintain contemporaneous records. An example of such cross-examination is the following at pages 68-70 of the transcript of the evidentiary fee hearing on February 26, 2009:

MS. LOTANE: So, the first time that you sat down to create a bill for either Whitehead or Martin was August of 2008?

MR. CATALANO: To finish the bill. I may have worked on it before then but eight months ago, I can't tell you how long I worked on it. I get sidetracked when I work. I'm always on the phone or you know come back tomorrow.

MS. LOTANE: Since August of last year to today, you sat down last night to kind of total the rest of it up?

MR. CATALANO: The majority of it. Yes. I had some slips of papers, some notes, and how do I say this nicely, my staff, who just stepped outside, have had this on the

conference table for months working on it and unfortunately or actually, fortunately you gave me a deadline to be ready by today and if you hadn't I never would have got this done.

MS. LOTANE: So, even though these proceedings started in January of 2007 you didn't sit down of over a year and a half to create this bill?

MR. CATALANO: Correct. Some of it.

MS. LOTANE: The same thing with Martin?

MR. CATALANO: Yes, some of it because you know, like I said, I went back and estimated time looking at the work I did ---

MS. LOTANE: And that would be the work contained in these files that you're showing the court?

MR. CATALANO: Yes, ma'am. I did not do contemporaneous, most of the time, time slips.

MS. LOTANE: Did you do any contemporaneous time slips?

MR. CATALANO: There was a couple of times that I put notes in my Outlook that I had just done something, make sure you bill x amount of time because it took a long time.

MS. LOTANE: And how many of those do you have, do you know?

MR. CATALANO: I don't have any of those here. They're in Outlook or they were in Outlook.

MS. LOTANE: Two, three times, ten, twelve times?

MR. CATALANO: Four.

MS. LOTANE: Four. Okay.

MR. CATALANO: Maybe five.

MS. LOTANE: And that was working on all of these together as opposed to any individual file, and that's since we started this mess?

MR. CATALANO: Yes and no. The problem is I've had a folder in Outlook called Trauth/Llamas for four years. I created one for Martin and Whitehead and then I think --- now, let me explain. You're going to laugh. I changed software about a month or two ago and got an iPhone and boy did I screw up my Outlook and I erased a whole bunch of emails and then I found them, put them in a PST file but I still haven't to this day figured out how you extract the PST, if somebody can tell me how you extract the PST, and put the darn things back into the folders where I can see them on my computer and if somebody can show me how to do that, I might be able to find these things, but a month ago I had a nightmare.

As to Respondent's cross-examination of Janice Sharpstein it attempted to discredit her by establishing her expertise as an appellate attorney who never handled a hearing before the Bureau of Administrative Reviews. Ms. Sharpstein further thought she may have filed a petition for certiorari based on the outcome of a hearing from The Bureau of Administrative Reviews. Further the Respondent established on Ms. Sharpstein's cross-examination the Daily Business Review Article (Petitioner's Exhibit 4), concerning hourly

fee rates did not discuss hour fee rates for criminal defense attorneys.

Black Law's Dictionary defines "substantial" as "belonging to substance; actually existing; real; not seeming or imaginary; not illusive; solid; true; veritable". It further defines "competent evidence" as "... generally admissible or relevant, as the opposite of 'incompetent'".

Applying the factors in R. Regulating Fla. Bar 4-1.5 (b) and (c) to the testimony and evidence at the hearing, the Court finds (A), (B), (C), (D), (E), (G) to be relevant here. As to those factors the Court finds the testimony and evidence supports the following:

- (A) An extensive amount of time was required, the labor was extensive, and the skill required to perform the legal services properly was great.
- (B) There was a great likelihood the acceptance by Mr. Catalano of this particular employment would preclude other employment by him.
- (C) The fee and hourly rate charged were those customarily charged in the locality for legal services of a comparable or similar nature.
- (D) The responsibility involved in the litigation was great as Petitioner's driver's license suspension was involved and the results obtained were extremely favorable to Petitioner.
- (E) Time limitations were extreme due to the Petitioner's suspension of his driver's license and the time limitations imposed by the Florida Rules of Appellate Procedure concerning a petition for writ of certiorari.
- (G) Mr. Catalano has been an attorney since 1983 who is experienced in DUI matters,

who has taught at the Florida Bar, the Masters of DUI, the Annual FACEO (sic) Blood, Breath, and Tears; as well as other lawyers for CLE credit, and write the DUI Forms.

The Court further emphasizes all the testimony elicited by Petitioner was un rebutted by Respondent. Based upon the Court's review of the substantial competent evidence presented at the evidentiary hearing on February 26, 2009, it finds there was substantial competent evidence Mr. Catalano is entitled to be compensated by Respondent for 65.5 hours of services rendered minus the entries of 1.00 hours on 08/07/08, 0.3 hours on 08/08/08, 1.6 hours on 10/07/08, 0.5 hours on 10/08/08, 0.8 hours on 10/14/08, 2.0 hours on 10/19/08, 0.4 hours on 10/22/08, 0.4 hours on 12/17/08, 1.2 hours 12/18/08, 2.0 hours on 12/19/08, 0.4 hours on 01/07/09, 0.5 hours on 01/13/09, and 0.4 hours on 01/14/09 (see Petitioner's Exhibit 2)- i.e. 54 hours. The Court further finds there was competent substantial evidence the hourly fee of \$375.00 per hour requested by Mr. Catalano is reasonable under community standards. Therefore, Mr. Catalano is entitled to be compensated the total amount of \$20,250.00 (54 hours x 375.00 dollars). Additionally based upon the legal concept of *expressio unius est exclusio alterius* the Court is not awarding Mr. Catalano reimbursement of costs as, although he requested reimbursement of costs in his Motion for Attorneys Fees Etc., the opinion of the circuit court clearly only found he was entitled to attorney fees. Finally the Court finds Ms. Sharpstein is entitled to be compensated by Respondent the sum of One Thousand One Hundred and Thirty Five dollars (\$1125.00) for her expert witness fee.


Therefore, based upon the foregoing the Court Finds, Orders and Adjudges as follows:

1. The court hereby awards \$20,250.00 in attorney's fees to Mr. Catalano for which let execution issue upon the expiration of 45 days from the date of this Order and Final Judgment signed by the Court. Ms. Sharpstein's expert witness fees of \$1,125.00 shall be paid pursuant to the Order and Final Judgment entered by this Court in Jason Trauth and Luis Llamas vs. State of Florida, Department of Highway Safety and Motor Vehicles, Case No. 06-11736 CC 05 which sum of \$1125.00 shall constitute her expert witness fee for expert testimony in this matter and Nicolas Martin vs. State of Florida, Department of Highway Safety and Motor Vehicles, Case No. 08-15971 CC 05.
2. The State of Florida is hereby ordered to pay Michael A. Catalano, P.A. the total amount of this Order and Judgment- i.e. \$20,250.00.
3. Mr. Catalano has agreed not to demand that a bond be posted.
4. Mr. Catalano has agreed that he will not seek enforcement of this Order and Final Judgment until 45 days from the date it is signed by the Court.
5. The Department of Highway Safety and Motor Vehicles General Counsel is hereby ordered to direct and forward this order and judgment to the appropriate state officials so that it can be honored and paid in a timely manner.
6. The State of Florida shall issue its check to the TrustAccount of

Michael A. Catalano, P.A., 1531 NW 13th Court, Miami, FL 33125.

DONE and ORDERED at Miami-Dade County, Florida this 6th day of May,

2009.


DON S. COHN SIGNED AND DATED
COUNTY COURT JUDGE MAY 06 2009
JUDGE DON S. COHN

cc:

Michael A. Catalano, Esq.
1531 NW 13th Court.
Miami, FL 33125

Robin F. Lotane, Esq.
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