SIXTH DISTRICT COURT OF APPEALS
STATE OF FLORIDA

App Case No.: 6D23-1482
LT. Case No.: 2020-CA-007792-O

CHARLES RUFFENACH,
Appellant,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR AMERIQUEST MORTGAGE SECURITIES INC., ASSET- BACKED PASS-THROUGH CERTIFICATES SERIES 2005-R8, RAYMOND LOZANO, ALILI RIHKRAND, ET AL.,
Appellees.

_____/

APPELLANT'S MOTION FOR REHEARING AND MOTION FOR EN BANC DECISION

Pursuant to Fla. R. App. P. 9.330-9.331 Appellant, CHARLES RUFFENACH, moves for rehearing, and/or for an en bac decision

1. In this case, this Court has created new law. In this District, an expert opinion is not required for an attorney's fee judgment. Neither is an evidentiary hearing. Because attorney's fees are unliquidated damages, the latter holding contradicts

current law, and is even in apparent conflict with this DCA's own recent decision in *Daley v. Elevate Roofing & Exteriors, Inc.*, 6D2023-4022 __ So. 3d. __ (Fla. 6th DCA Apr. 2, 2026) (Reversing judgment awarding unliquidated damages without notice and hearing). Due to this apparent conflict, this Court should consider having the attorney's fees issue submitted to the entirety of the Sixth District en banc.

2. On rehearing, this Court should reverse of refine its decision on attorney's fees. In doing so, it should narrow the scope of it holding to conform to current law. Currently, an evidentiary hearing is usually required for an award of attorney's fees. Attorney's fees are considered liquidated damages. *Cellular Warehouse, Inc. v. GH Cellular, LLC*, 957 So. 2d 662, 665 (Fla. 3d DCA 2007). A party has a "due process entitlement to notice and an opportunity to be heard as to the presentation and evaluation of evidence necessary to a judicial interpretation of the amount of unliquidated damages." *Bowman v. Kingsland Dev., Inc.*, 432 So. 2d 660, 663 (Fla. 5th DCA 1983); *Also Wells Fargo Bank, N.A. v. Sawh* ,

194 So. 3d 475 (Fla. 3d DCA 2016) (Discussing the need for an evidentiary hearing or trial to determine unliquidated damages).

3. But an evidentiary hearing is not always required. In *R. Plants, Inc. v. Dome Enters* , 221 So. 3d 752, 754 (Fla. 3d DCA 2017), the Court noted that an evidentiary hearing is not required for attorney's fees and other unliquidated damages where they are proven through summary judgment. *R. Plants* teaches that due process will not require an evidentiary hearing on unliquidated damages where they are not in material dispute. Currently, numerous judges can determine if there is a dispute on attorney's fees by requiring the opposing party to make specific objections to certain time entries, and to specifically object to the hourly rate. An evidentiary hearing is then only required if the opposing party raises a dispute, and the disputed items can be resolved at an evidentiary hearing. This format complies with the parameters of due process.

4. This Court should accordingly refine its ruling. It should clarify that an evidentiary hearing is typically required for a judgment of attorney's fees, unless the facts are not in dispute. This

would re-align this Court with the longstanding rule that a trial or evidentiary hearing is required to adjudicate contested facts on unliquidated damages.

5. This Court's opinion opens the door for having attorney's fees resolved through affidavits. While this procedure is acceptable through summary judgment proceures, or where the fees are not contested, it is not sufficient where the opposing party disputes the hourly rate or the quantum of fees. Within this context, the opposing party has a due process right to cross-examine witnesses. In *B.C.S. v. Wise*, 910 So. 2d 871, 874, (Fla. 5th DCA 2005), the Court wrote:

> Affidavits are not admissible to prove facts in issue at an evidentiary hearing because they are not subject to cross-examination, and they shift the burden to the other party. *Doug Sears Consulting, Inc. v. ATS Servs., Inc.*, 752 So. 2d 668, 670 (Fla. 1st DCA 2000). Without the opportunity to cross-examine Ms. Gai, the affidavit was insufficient to satisfy *Venetian Salami [Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla. 1989)]. *McMurrain v. Fason*, 573 So. 2d 915, 919-920 (Fla. 1st DCA 1990).

6. Within this context, affidavits are regarded as hearsay in evidentiary hearings. *See McMurrain v. Fason*, 573 So. 2d 915, 920

(Fla. 1st DCA 1990) *citing* Fla 1 Fla.Jur.2d Acknowledgments §37 (1977); 3 Am.Jur.2d Affidavits § 30 (1986) (as a general rule, an affidavit is not admissible as independent evidence to establish facts material to the issues being tried since the adverse party has the right, if possible, to be confronted by the witness against him and is entitled to the general protection of the hearsay rule; an affidavit is not admissible as prima facie evidence of the facts it contains because admission for such a purpose would improperly cast upon the adverse party the burden of going forward with the proof).

7. Where an evidentiary hearing or trial is required to adjudicate contested facts concerning attorney's fees, the movant bears the burden of proving that the fees are reasonable. Fla. R. Prof. Cond. 4-1.5 and *Standard Guar. Ins. Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1990) create a set of factors that test the attorney's hourly rate and the number of hours that can be reasonably apportioned to the opposing party. When apportioning the fees to the other side, there are a number of instances where the fees are permitted against the represented party, but not permitted against

the opposing party. Travel time and excessive hand-holding are two examples of fees that can be permitted against the represented party but not permitted against the opposing party. Fee disputes can become even more complicated where a party did not prevail on all of its claims, and time spent on the prevailing claim must be separated from time on the non-prevailing claim. *See eg. Saunders v. Dickens*, 103 So. 3d 871, 881 (4th DCA 2014) (Proof required to allocate fees between the claims or to show that the issues were so intertwined that allocation is not feasible); *Also Blanton v. Godwin*, 98 So. 3d 609 (Fla. 2d DCA 2012)

8. These issues necessarily require expert testimony, because an attorney's self-serving testimony does not prove that fees are reasonable, or that the fees are recoverable against the opposing party. Yet, the movant still bears that burden of poof. This Court's decision presumes that a trial court judge can supplant the need for an expert, thereby excusing the movant's evidentiary burden to prove that the fees are permitted by Fla. R. Prof. Cond. 4-1.5, *Standard Guar. Ins. Co. v. Quanstrom*, 555 So. 2d 828 (Fla.

1990), and applicable law. In doing so, this Court's decision removes the judge as a neutral arbiter and imposes a role of an expert witness upon the court. This role change ultimately benefits the movant, who can use the judge instead of bearing his or her burden to prove the legal factors required for the proof of attorney's fees.

9. Not every judge is qualified to adjudicate attorney's fees disputes without an expert. Florida's judges come from diverse backgrounds. Many judge come from legal backgrounds without hourly rates. Examples include: criminal law, in-house counsel, non-profit work, and government work.

10. There are dangers with having judges supplant the role of expert witnesses. It invites reliance upon personal biases or facts outside the record of the case. Further, judges are not subject to cross-examination like expert witnesses are.

11. In *El Brazo Fuerte Bakery 2 v. 24 Hour Air Serv., Inc.*, 330 So. 3d 552 (Fla. 4th DCA 2021), the trial court reduced the plaintiff's uncontroverted reasonable hourly rate as requested from

$350 to $175, and reduced the plaintiff's expert's uncontroverted hourly rate from $600 to $225. None of the record evidence supported this reduction, so the Fourth District reversed. Because the facts were uncontroverted, the trial judge's reversed order can only be explained by two possibilities. One: the trial judge relied upon his or her personal opinions rather than the record evidence. Or, two: the trial judge relied upon non-record evidence to make the ruling rather than the record evidence.

12. Under current Florida law, trial judges can use their own experience in a fee hearing. *Philip Morris USA Inc. v. Gore*, 344 So. 3d 1, 8-9 (Fla. 4th DCA 2002) However, when they do so the judge is required to "make specific findings to support that determination." *El Brazo*, 33 So. 3d at 556. *Also Lizardi v. Federated National Ins. Co.*, 322 So. 3d 184, 189 (Fla. 2d DCA 2021); *Fletcher v. Bennent,* 365 So. 3d 396, 401-403 (Fla. 2d DCA 2025) Even then, this method should be cautiously exercised. If judges are going to rely upon non-record evidence at a hearing, they should make that clear at the hearing, and specifically state what non-record evidence they

will use in their determinations. Since judges are not subject to cross-examination, the parties should have a right to rebut the judge's non-record evidence. However, a judge's reliance upon non-record evidence is dangerous, because it can indicate a bias or pre-judgement of the issues.

13. Removing the expert witness requirement would also place a burden on trial courts. Current trial court workloads vary by district, but the case loads for federal courts are vastly lower than the case loads given to Florida's circuit and county court judges. Federal court judges often have clerks at their disposal which many state court judges do not have.

14. This Court's reasoning reliance upon federal decisions to support abandoning the expert witness requirement fails to account for the difference in workloads between the state and federal courts. State courts have dramatically less resources than their federal counterparts. Currently, fee experts in Florida are tasked with auditing the time records, comparing them to the court records, and looking for entries that are not chargeable to the opposing party

under Florida law. Experts are also tasked with the often complex task of using the lodestar method to evaluate those hours chargeable to the other party. If done properly, this process could require an hour or more of time. With limited court resources, there is a great risk that state court judges simply do not have the time to do this kind of review. And if state court judges do not have time for this, their positions may not be adequately supported by the facts and law. The use of expert witnesses lowers the burden on state courts to audit the fee records.

15. Fla. R. Prof. Cond. 4-1.5 underscores the fact that there are ethical dimensions in any fee award. The Florida Supreme Court incorporated fee factors in Fla. R. Prof. Cond. 4-1.5 when it issued *Standard Guar. Ins. Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1990). The proper use of fee experts is necessary to ensure compliance with these standards. Conversely, it is foreseeable that removing the expert witness requirement will reduce the likelihood that fee judgments conform to these legal standards. For this reason, and the reasons articulated above, this court should

reconsider its ruling, and should consider having the attorney's fee issue considered by the full Sixth District Court en banc.

WHEREFORE, Appellant requests that this Court reconsider its ruling as set forth above, and/or consider submitting the case to en banc review by the full Sixth District Court of Appeal.

CERTIFICATE OF COMPLIANCE WITH RULE 9.045

I HEREBY CERTIFY that the foregoing complies with the requirements of Florida Rule of Appellate Procedure 9.045. Specifically: the font is 14-point Arial or Bookman Old Style; the text is double-spaced; and the document does not exceed any applicable word limits.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was furnished via eservice to Rosannie Troche Morgan at rtmorgan@burr.com, dmorales@burr.com, and abaxley@burr.com, on this day of April 3, 2026.

/s/ Nicholas Vidoni
Nicholas A. Vidoni, Esquire

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