IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CASE NO. 1D08-3958

SECURITY TRUST PLANS, INC. d/b/a KNAUFF FUNERAL HOME, KNAUFF CREMATORY, and RICHARD P. GOODING FUNERAL HOME,

Appellants,

v. L.T. Case No. 38-2002 CA 001066

ROBERT WESLEY, CATRINA PONCE SHEPARD, and PENNY WESLEY CONRAD,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT, EIGHTH JUDICIAL CIRCUIT, IN AND FOR LEVY COUNTY, FLORIDA

ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

The narrow issue in this appeal is whether the trial court abused its discretion by denying Appellants Security Trust Plans, Inc., d/b/a Knauff Funeral Home, Knauff Crematory and Richard P. Gooding Funeral Home's (collectively "the Funeral Home") motion for attorney's fees based on proposals for settlement that the Funeral Home served on Appellees Robert Wesley, Catrina Ponce Shepard, and Penny Wesley Conrad (collectively "the Children"). (R2:309-317; A4-12.)

The Funeral Home served three separate proposals for settlement on each of the Children, and each proposal was made in the amount of $100,000. (R2:390-317; A4-12.) However, the proposals did not apportion the amount each of the three Funeral Home defendants would pay to the Children. (*Id.*) Rather, the proposals stated in both the title and the body that they were made on behalf of all of the Funeral Home defendants jointly and severally. (*Id.*)

Following trial, separate final judgments for the Children were entered in the amounts of $50,000 for Robert Wesley, $50,000 for Catrina Ponce Shepard, and $60,000 for Penny Wesley Conrad. (R2:319-21; A14-16.) The Funeral Home then moved for attorney's fees and costs pursuant to section 768.79, Florida Statutes and Florida Rule of Civil Procedure 1.442. (R2:306-21; A1-16.) In support of its motion, the Funeral Home provided only the affidavit of its own attorney, Michael

Obringer, to attest to the fees and costs incurred since service of the proposals. (R13:1948-1990; A37-79.) The Funeral Home did not produce an affidavit or live testimony to establish that its attorney's time or fees were reasonable. (R12:1934; A21.)

During the hearing on the Funeral Home's motion for attorney's fees, the Funeral Home's counsel represented to the court that there were no deficiencies in the proposals for settlement. (R12:1932; A19.) The Children's attorney stated that the proposals for settlement were not ambiguous. (R12:1932-33; A19-20.)

Rather than focus on entitlement, the Children's attorney criticized the Funeral Home's failure to produce evidence of the reasonableness of its attorney's fees. (R12:1934; A21.) Indeed, the Children demanded strict proof on the reasonableness of counsel's fee. (R1235; A22.) In response, the trial court held:

> The difference in family law and civil law is in family law you are correct, in family law it is not necessary to have live testimony nor even supporting affidavits in family law. In civil law I have always thought that it was necessary to have either a live witness or a supporting affidavit, one, to establish a claim for attorney's fees. And I believe I'm correct that that is the key distinction between proving attorney fee claims in family law and civil law. I'm about 90 percent sure I'm right on that point. And I'll grant your costs and deny for your fees for that reason. I think there has to be a supporting affidavit or somebody else because we're in civil law and not family law.

(R12:1942-43; A29-30.)

The Funeral Home then requested permission to supplement the record and provide belated evidence of the reasonableness of its attorney's fees. (R12:1943; A30.) The Children objected because the Funeral Home had set the evidentiary hearing itself and failed to bring the necessary proof, the court had already ruled, and the Funeral Home should not be allowed a "second bite at the apple." (R12:1943; A30.) The trial court agreed that the Funeral Home failed to carry its burden of proof and denied the Funeral Home's request to supplement. (R12:1943; A30.) Thereafter, the trial court entered an order denying the Funeral Home's request for attorney's fees (the "Order"). (R12:1924; A33.) This appeal followed.

SUMMARY OF THE ARGUMENT

The Order denying attorney's fees to the Funeral Home should be affirmed for two reasons.

First, the trial court correctly found that the Funeral Home offered no evidence on the reasonableness of its attorney's fees. A court may not award attorney's fees based solely on the affidavit or testimony of the attorney seeking the fee. In the absence of expert evidence on reasonableness, the trial court could not properly award attorney's fees to the Funeral Home. Moreover, the trial court did not abuse its discretion by not allowing the Funeral Home to belatedly offer evidence after the court ruled against awarding fees. The Funeral Home set the evidentiary hearing, it did not offer sufficient proof, and the trial court ruled before

the Funeral Home asked to produce evidence at a later date. The Funeral Home is not entitled to a second bite at the apple.

Second, under the "tipsy coachman" doctrine, the trial court's decision to deny attorney's fees to the Funeral Home should be affirmed because the Funeral Home's proposals for settlement to the Children are invalid on their faces. The proposals clearly state that they are made jointly and severally by all of the Funeral Home defendants. The proposals do not apportion the amount each defendant would pay to resolve the claims against it individually. However, Florida law requires that proposals for settlement state the amount and terms attributable to each party. Thus, the proposals run afoul of established Florida rules and precedent, and cannot form the basis for an award of fees in favor of the Funeral Home.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DENIED THE FUNERAL HOME'S MOTION TO TAX FEES BECAUSE THE FUNERAL HOME DID NOT PRODUCE EVIDENCE OF THE REASONABLENESS OF ITS ATTORNEY'S FEES.

Standard of Review.

This Court reviews the trial court's decision to deny attorney's fees for an abuse of discretion. *Hoover v. Sprecher*, 610 So. 2d 99, 99 (Fla. 1st DCA 1992).

A. The Funeral Home did not produce any evidence to establish that its attorney's fees were reasonable.

The trial court did not abuse its discretion in denying the Funeral Home's motion to tax attorney's fees because the Funeral Home did not provide the court with an evidentiary basis with which to calculate a reasonable fee award.

In *Florida Patient's Compensation Fund v. Rowe*, the Florida Supreme Court established the guidelines for trial courts to follow when setting attorney's fees. 472 So. 2d 1145, 1150 (Fla. 1985). There, the Court required trial courts to consider the eight factors set forth in Disciplinary Rule 2-106(b) of the Florida Bar Code of Professional Responsibility[1] in making a fee award. *Id.* The trial court is required to make specific factual findings concerning each of these eight factors if

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[1] Those eight factors are:

> (1) The time and labor required, the novelty and difficulty of the question involved, and the skill requisite to perform the legal service properly. (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer. (3) The fee customarily charged in the locality for similar services. (4) The amount involved and the results obtained. (5) The time limitations imposed by the client or by other circumstances. (6) The nature and length of the professional relationship with the client. (7) The experience, reputation, and ability of the lawyer or lawyers performing the services. (8) Whether the fee is fixed or contingent.

Rowe, 472 So. 2d at 1150 (emphasis added).

it makes a fee award. *Id.*; *see also Baratta v. Valley Oak Homeowners Ass'n at the Vineyards, Inc.*, 928 So. 2d 495, 498 (Fla. 1st DCA 2006).

When assessing the *Rowe* factors, the trial court must first determine the reasonable number of hours the attorney should have expended on the case. *Rowe*, 472 So. 2d at 1150. The trial court must then determine the reasonable hourly rate for the attorney's services. *Id.* As the Court explained, "[t]he party who seeks the fees carries the burden of establishing the prevailing 'market rate,' i.e., the rate charged in that community by lawyers of reasonably comparable skill, experience and reputation, for similar services." *Id.* at 1151. Because the Funeral Home did not provide the trial court with any evidence concerning the *Rowe* factors (except that its bills show the attorney's fee was hourly) (R13:1950-1966; A39-55), the trial court could not make an evidentiary determination as to the reasonableness of the lawyers' hours, their hourly rates, or the total fees. This evidence easily could have been produced through the simple medium of an affidavit from another attorney who practices in the same legal and geographic area. *See Ganson v. State*, 554 So. 2d 522, 526 (Fla. 1st DCA 1989).

Furthermore, this Court has explicitly held that "it is well settled that absent a stipulation, an attorney's fee awarded, over objection, solely on the basis of an affidavit or testimony of the attorney seeking fees, is improper." *Morgan v. S. Atlantic Production Credit Ass'n*, 528 So. 2d 491, 492 (Fla. 1st DCA 1988).

Indeed, the fee "award must be predicated upon expert testimony regarding the reasonableness of the hourly rate." *Minerd v. Walgreens and Kemper Nat'l Ins. Cos.*, 962 So. 2d 955, 956 (Fla. 1st DCA 2007). Because the Funeral Home failed to produce any expert evidence of reasonableness during its evidentiary hearing (R12:1943; A30), the trial court did not abuse its discretion in denying the Funeral Home's request for attorney's fees.

Further, the Funeral Home's suggestion that the trial court could have declared that the attorney's fees were reasonable on their face is misplaced. (Init. Br. at 6.) The *Thursby* case, cited by the Funeral Home, dealt with the trial court's broad discretion to tax costs, not attorneys' fees. *Thursby v. Reynolds Metals Co.*, 466 So. 2d 245, 252 (Fla. 1st DCA 1984). There, the trial court used evidence of expert witnesses' time spent testifying and their rates to determine a reasonable cost assessment for their preparation time. *Id.* The case does not mention or suggest that a trial court has this level of discretion when assessing attorney's fees. To the contrary, Florida law is clear that the party seeking to tax attorney's fees must establish, through the presentation of expert evidence, the prevailing "market rate" for legal services in the relevant legal community. *Rowe*, 472 So. 2d at 1151. Because the Funeral Home did not present any such evidence, the trial court properly denied the Funeral Home's motion to tax attorney's fees.

B. The Funeral Home is not entitled to a second chance to prove the reasonableness of its attorney's fees.

The Funeral Home should not be given a second bite at the apple to prove the reasonableness of its attorney's fees. The Funeral Home noticed the hearing on its fee motion, yet arrived without any expert evidence. (R12:1943; A30.) It did not produce an affidavit or live testimony addressing the *Rowe* factors, or even an affidavit stating that the attorneys' time and rates were reasonable. (R12:1942-43; A29-30.) The trial court acted within its discretion by finding that the Funeral Home was not entitled to supplement the record with evidence that should have been produced at the evidentiary hearing.

In fact, this Court explained in *Davis v. Davis* that parties should not be given second chances to produce sufficient record evidence. 613 So. 2d 147, 148 (Fla. 1st DCA 1993). The *Davis* Court stated:

> In awarding attorney's fees, the trial court must make specific findings as to hourly rate, the number of hours reasonably expended, and the appropriateness of reduction or enhancement factors. Under circumstances where the record may contain substantial competent evidence to support such findings, the case should be remanded for entry of an appropriate order. In the instance case, however, the record is devoid of any evidence to support an award of attorneys' fees. We therefore reverse the award of attorney's fees.

Id. (emphasis added) (internal citation omitted).

Likewise, the record in this case is devoid of any evidence to establish that the Funeral Home's attorney's fees or hours were reasonable. Nor is there any evidence in the record on the *Rowe* factors. Accordingly, the Funeral Home is not entitled to a reversal and remand so that it can supplement the record with this missing evidence. *See also Pridgen v. Agoado*, 901 So. 2d 961, 962 (Fla. 2d DCA 2005) ("When a fee award is not supported by substantial competent evidence in the record, the appellate court will reverse the award without remand for further findings."); *Warner v. Warner*, 692 So. 2d 266, 268 (Fla. 5th DCA 1997) ("The party failing to establish its attorney's fees claim is not entitled to a second opportunity to make the requisite fee showing.")

The Funeral Home contends that the *Morgan* case, 528 So. 2d at 493, requires that this Court reverse and remand for the trial court to take further evidence on the reasonableness of its attorney's fees. (Init. Br. at 6.) In *Morgan*, the trial court awarded fees based on the requesting attorneys' affidavit and without an evidentiary hearing, even though the party opposing fees requested a hearing. *Id.* at 492. This Court reversed and remanded for a hearing and to allow the trial court to make the findings of fact required by *Rowe*. *Id.* at 493. Unlike *Morgan*, the trial court here exercised its discretion to deny fees to the Funeral Home because it failed to produce, at its own hearing, any evidence to support the

reasonableness of its attorney's hourly rates or the total fee requested. Without any evidence, the Funeral Home is not entitled to a second bite at the apple.

In other words, this is not a case of a trial court simply failing to make findings of fact based on the competent substantial evidence before it, in which case remand would be appropriate. *See, e.g., Giltex Corp. v. Diehl*, 583 So. 2d 734, 735 (Fla. 1st DCA 1991); *Stewart v. Stewart*, 534 So. 2d 807, 807-08 (Fla. 1st DCA 1988). Rather, this is a case where there is no evidence to support the claim for fees; and therefore, no remand can be granted. *See, e.g., Davis*, 613 So. 2d at 148; *Tutor Time Merger Corp. v. Mecabe*, 763 So. 2d 505, 506 (Fla. 4th DCA 2000); *Viera v. Viera*, 609 So. 2d 1308, 1309 (Fla. 5th DCA 1997) (former wife not entitled to present evidence on remand where she failed to present any evidence on *Rowe* factors below). Accordingly, the Order should be affirmed.

II. THE FUNERAL HOME IS NOT ENTITLED TO ATTORNEY'S FEES BECAUSE ITS PROPOSALS FOR SETTLEMENT ARE INVALID.

Standard of Review.

This Court reviews a proposal for settlement for compliance with Florida Rule of Civil Procedure 1.442 and section 768.79, Florida Statutes (2008), *de novo*. *Connell v. Floyd*, 866 So. 2d 90, 91 (Fla. 1st DCA 2004).

Even if this Court concludes that the Funeral Home might be entitled to a second chance to produce evidence on the *Rowe* factors, it should still affirm the Order because the proposals for settlement are invalid on their faces. Under the "tipsy coachman" doctrine, the trial court's Order must be affirmed if the court reached the right result, but for a wrong reason. *Dade Cty. Sch. Bd. v. Radio Stat. WQBA*, 731 So. 2d 638, 644 (Fla. 1999). As the Supreme Court of Florida explained, "[i]n some circumstances, even though a trial court's ruling is based on improper reasoning, the ruling will be upheld if there is any theory or principle of law in the record which would support the ruling." *Id.* In arguing for an affirmance under the "tipsy coachman" doctrine, the appellee "is not limited to legal arguments expressly asserted as grounds for the judgment in the court below. It stands to reason that the appellee can present any argument supported by the record even if not expressly asserted in the lower court." *Id.* at 645.[2]

Here, the Funeral Home filed its proposals for settlement with the trial court. (R2:390-317; A4-12.) In both the title and body of the proposals, the Funeral

[2] Furthermore, the Children are not judicially estopped from arguing that the proposals are invalid even though they did not contest the Funeral Home's entitlement to fees below. "There can be no estoppel ... where the positions taken involved solely a question of law." *Blumberg v. USAA Cas. Ins. Co.*, 790 So. 2d 1061, 1066 (Fla. 2001) (citations omitted). Moreover, the Children did not "successfully maintain" a position with regard to entitlement because the trial court never ruled on entitlement. *Id.*; *see also Grau v. Provident Life and Accident Ins. Co.*, 899 So. 2d 396, 401 (Fla. 4th DCA 2002) (success on prior position required for a party to be judicially estopped).

Home stated that the proposals were made jointly and severally on behalf of all of the Funeral Home defendants. (R2:390-317; A4-12.) Thus, the proposals did not apportion the amount being offered among each of the offering defendants as required by Florida Rule of Civil Procedure 1.442 and section 768.79, Florida Statutes (2008).

Rule 1.442 states in relevant part: "A proposal may be made by or to any party or parties and by or to any combination of parties properly identified in the proposal. A joint proposal shall state the amount and terms attributable to each party." Fla. R. Civ. P. 1.442(c)(3) (emphasis added). Additionally, section 768.79(2)(b), Florida Statutes, requires that proposals "[n]ame the party making it and the party to whom it is being made." The Florida Supreme Court has interpreted the word "party" in the singular to mean "that an offer specify the amount attributable to each individual party." *Lamb v. Matetzschk*, 906 So. 2d 1037, 1041 (Fla. 2005).

Indeed, in *Lamb*, the Court held that "'[a] strict construction of the plain language of rule 1.442(c)(3) requires that offers of judgment made by multiple offerors must apportion the amounts attributable to each offeror.'" *Id.* (quoting *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276 (Fla. 2003) (emphasis added)); *see also Colonel v. Melrose Area Prop. Owners*, 930 So. 2d 755, 756 (Fla. 5th DCA 2006) ("Because the attorney's fee award was based on a joint proposal

for settlement that did not state the amount attributable to each offering party, the proposal was defective and the fee award erroneous."); *Heymann v. Free*, 913 So. 2d 11 (Fla. 1st DCA 2005) (unapportioned offer from one plaintiff to multiple defendants invalid).

The Funeral Home's proposals for settlement did not apportion the amount attributable to each of the three Funeral Home defendants. Rather, they offered each of the Children a sum jointly and severally from all of the defendants. (R2:390-317; A4-12.) Accordingly, the proposals are invalid as a matter of law.

CONCLUSION

For the foregoing reasons, the Court should affirm the Order denying attorney's fees to the Funeral Home.

Respectfully submitted,

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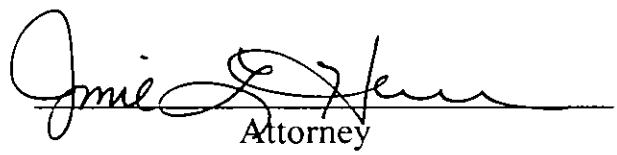
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to **John A. Rudolph, Jr.**, Shirley & Rudolph, P.A., 207 Park Avenue West, Suite B, P.O. Box 1874, Tallahassee, FL 32302; **Michael J. Obringer** and **Pamela Lynde Bower**, 200 West Forsyth Street, Suite 1400, Jacksonville, FL 32202; and **Elizabeth K. Russo**, Russo Appellate Firm, P.A., 6101 Southwest 76th Street, Miami, FL 33143, Attorneys for Appellees, by United States Mail, this 3rd day of February, 2009.



Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

Attorney