

County Civil Court: CIVIL PROCEDURE – Pleading – Appellant waived his right regarding punitive damages, but it appears the trial court did not use the proper standard in making its determination. The trial court also failed to make the proper findings to support the award of attorney fees and costs. This cause is remanded. *Nick Karagiannis v. Tommy Fasciolo*, No. 2011-AP-000003-WS, (Fla. 6th Cir.App.Ct. September 27, 2012).

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY
APPELLATE DIVISION**

**NICK KARAGIANNIS,
Appellant,**

v.

**UCN: 512011AP000003XXXXWS
Case No: 2011-AP-0003-WS
Lower No: 2008-CC-001907-WS**

**TOMMY FASCIOLO,
Appellee.**

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Appeal from Pasco County Court

County Judge Paul Firmani

Roland D. Waller, Esq.,
for Appellant

David Thorpe, Esq.,
for Appellee

ORDER AND OPINION

Appellant raises two points on appeal. First, Appellant argues that it was reversible error for the trial court to impose punitive damages when the pleadings did not comply with the requirements of Florida Statute 768.72. While Appellant waived his right under section 768.72 with regard to the punitive damages, it appears that the trial court did not use the proper standard in making its determination. Second, Appellant contends that it was reversible error for the trial court to impose attorney fees and costs as sanctions. We find that the trial court made no findings to support the award of attorney fees or that such fees were reasonable and commensurate with the expense caused by the discovery violation. Thus, this cause shall be remanded to the trial court as set forth below.

STATEMENT OF CASE AND FACTS

On May 6, 2008, Tommy Fasciolo (Appellee) filed a Complaint against Nick Karagiannis (Appellant), arising from a monetary dispute. Appellee lent \$12,000 to Appellant. Appellee apparently demanded repayment or a lien on a property owned by Appellant. The Complaint demanded compensatory and punitive damages based on multiple counts arising from the same loan: (1) fraud in the inducement; (2) fraudulent misrepresentation; (3) conversion; (4) constructive trust; (5) equitable lien; (6) foreclosure of equitable lien; and (7) unjust enrichment.

On June 20, 2010, the trial court entered a final judgment following a non-jury trial, in which no court reporter was present. In its order, the trial court found:

Appellee testified that he met Appellant fourteen years prior to trial. He indicated that Appellant wanted to buy a house and asked Appellee to borrow \$12,000 to add to the \$12,000 he was borrowing from someone else to purchase the home. Appellee did not recall Appellant offering to put Appellee's name on the deed; however, he did state that Appellant indicated that he would provide a promissory note for the amount loaned to him. Appellee called witness Nick Forney who testified that he spoke to Appellant. Appellant indicated to Mr. Forney that he needed money for the down payment on his home. The witness indicated that he stated to Appellee that he should get a promissory note and that the witness assisted in having a promissory note drawn, but Appellant ultimately refused to sign it. The witness stated that Appellant called the witness and asked why he should be asked to sign a promissory note. The witness indicated that there was no discussion of which he was aware as to interest or repayment time. Appellee further testified that when he requested repayment, Appellant responded that he did not owe him anything. Appellant later admitted to receiving \$12,000 from Appellee in his answer to Appellee's request for admissions dated October 27, 2008. Appellant's counsel, Joseph Anthony Tsombanidis, presented no evidence in rebuttal and failed to submit a post-trial memorandum.

Based on the facts presented, the trial court found that Appellee provided sufficient facts to prove beyond a preponderance of the evidence all the claims except Count 4. Appellee was awarded actual damages of \$12,000 as to counts 1, 2, 3, and 7. As to Count 1, Appellee was awarded punitive damages of \$6,000. As to count 5, the

trial court found that Appellee was entitled to an equitable lien. As to count 6, the trial court granted Appellee's request for foreclosure of an equitable lien.

The trial court entered an amended final judgment on May 10, 2011 to allow Appellee to recover \$13,978.00 in attorney fees and \$290.00 in costs. The total amount awarded was \$32,268.50. Appellant filed a timely Notice of Appeal on June 8, 2011.

LAW AND ANALYSIS

Appellant first contends that the trial court committed reversible error when it imposed punitive damages. Specifically, Appellant argues that the punitive damages should not have been imposed because the pleadings did not comply with the requirements of Florida Statute 768.72. Subsections (1) and (2) provide:

(1) In any civil action, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages. The claimant may move to amend her or his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure. The rules of civil procedure shall be liberally construed so as to allow the claimant discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages. No discovery of financial worth shall proceed until after the pleading concerning punitive damages is permitted.

(2) A defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence. As used in this section, the term:

(a) "Intentional misconduct" means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage.

(b) "Gross negligence" means that the defendant's conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.

The statute sets forth the requirement that a showing of evidence be proffered establishing a basis for punitive damages after the filing of the initial complaint, which would then be amended to add punitive damages. To comply with the statute's requirements, a plaintiff must obtain leave from the trial court to amend the complaint before punitive damages may be asserted. At that point, the trial court must make a determination whether there is a reasonable basis for the recovery of punitive damages. The claim to punitive damages in this case appears in the initial complaint before any such proffer could be made; however, Appellant's right to relief under § 768.12 was waived by his failure to assert it. Fostock v. Lampasone, 711 So. 2d 1154, 1155 (Fla. 4th DCA 1998); Solis v. Calvo, 689 So. 2d 366, 368 (Fla. 3d DCA 1997). Had Appellant responded to the complaint with a motion to dismiss or a motion to strike, the punitive damages could have been dismissed under §768.72. Kraft General Foods, Inc. v. Rosenblum, 635 So. 2d 106 (Fla. 4th DCA 1994).

While the procedure required to establish punitive damages was waived, further analysis of the facts was still required. In determining punitive damages, a court must use the clear and convincing standard pursuant to § 768.72(2). The final judgment entered by the trial court is unclear as to what standard the trial court used and even appears to use the incorrect standard of a preponderance of the evidence. As such, we must reverse this cause for a proper determination of the punitive damages. On remand, the trial court should also be aware that punitive damages are not recoverable for failure to pay a debt irrespective of the motive of Appellant. See, Greer v. Williams, 375 So. 2d 333 (Fla. 3d DCA 1979). Once a separate cause of action in tort is separately pled and proven, a proper showing of malice, moral turpitude, wantonness or outrageousness in the commission of the tort must be made. Ferguson Transportation v. North Am. Van Lines, 687 So. 2d 821 (Fla. 1996); Griffith v. Shamrock Village, Inc., 94 So. 2d 854 (Fla. 1975). Such misconduct needs to involve an "element of outrage similar to that usually found in a crime." Tiger Point & Country Club v. Hipple, 977 So. 2d 608, 610 (Fla. 1st DCA 2007) (quoting Restatement (Second) Tort § 908 cmt. b (1979)).

Appellant next argues that the trial court committed reversible error when it imposed attorney fees and costs as sanctions. The trial court awarded attorney fees and costs to Appellee in the order dated March 4, 2011 on two bases: (1) theories of discovery violations and (2) under §57.105. Awards of sanctions for discovery rules are dictated by Florida Rule of Civil Procedure 1.380, which allows for a number of potential penalties for failure to comply with discovery requirements. Specifically, Florida Rule of Civil Procedure 1.380(b) provides, “Instead of any of the foregoing orders or in addition to them, the court shall require the party failing to obey the order to pay the reasonable expenses caused by the failure, which may include attorneys’ fees, unless the court finds that the failure was justified or that other circumstances make an award of expenses unjust.” The requirements seek a determination by the court of what amount is reasonable to award for the extra attorney work required by each violation. The sanctions must be reasonable, specific, and saved for exceptional circumstances. Florida Rule of Civil Procedure 1.380(b)(2)(C) provides for the imposition of sanctions for failure to comply with discovery orders. Any sanctions should be commensurate with the offense and the ultimate sanction should be given only under exceptional circumstances. Rockwell Intern. Corp. v. Menzies, 561 So. 2d 677 (Fla. 3d DCA 1990). In this case, the trial court imposed such sanctions without setting forth a basis for reasonableness.

The trial court awarded attorney fees and costs on its own initiative under §57.105; however, it did not complete the required analysis, as summarized in Morton v. Heathcock, 913 So. 2d 662, 669-70 (Fla. 3d DCA 2005):

A fee award must be supported by evidence detailing the nature and extent of the services performed and by expert testimony regarding the reasonableness of the fee. E.g. Nants v. Griffin, 783 So. 2d 363, 366 (Fla. 5th DCA 2001); Saussy v. Saussy, 560 So. 2d 1385, 1386 (Fla. 2d DCA 1990). Although the attorney performing the services for which a fee award is sought need not testify, **competent, substantial evidence regarding the nature and extent of the services rendered must be adduced.** See Nants, 783 So. 2d at 366 (confirming that an affidavit and supporting time records of an attorney providing services, when authenticated by another attorney from the same firm may be admitted into evidence as a business record and constitute competent, substantial evidence to support a fee award); Saussy, 560 So. 2d at 1386 (confirming that time records attached to an attorney’s affidavit, which are introduced into evidence through the testimony of an associate attorney as

business records, are competent, substantial evidence that support a fee award); see also Wiley v. Wiley, 485 So. 2d 2 (Fla. 5th DCA 1986) (reversing a fee award where the attorney rendering services neither testified nor had admitted into evidence an affidavit and time records to establish the nature and extent of the representation).

Although an expert witness testified extensively on both direct and cross examination regarding the services rendered by the [Plaintiffs'] attorneys and the reasonable value of those services, neither of the attorneys who rendered services to the [Plaintiffs] testified as to the nature and extent of their representation. **And while these attorneys did file affidavits and detailed time statements delineating the nature and extent of their services, neither the affidavits nor the time records were authenticated or introduced into evidence.** We therefore reverse the current determination as to the amount of the fee to be awarded because **the record does not include the essential evidentiary support outlined herein.**

Here, the amended final judgment makes no mention of the testimony of an objective attorney as to the reasonableness of the fees in light of the alleged violation. While an affidavit of reasonable attorney's fees and costs has been filed in the court docket, it was signed by Appellee's own counsel, not by an expert. These procedures are clear violations of the 57.105 requirements.

In addition to not making the proper determinations for the theories of discovery violations, the trial court did not delineate between the fees associated with the discovery violations and those under §57.105. There are no findings to support the award, nor are there findings that the fees are reasonable and commensurate with the reasonable expenses caused by the discovery violations. Moreover, an order awarding attorney's fees under section 57.105 must include findings by the trial court to support the award. Dep't of Revenue ex rel. Marchines v. Marchines, 974 So. 2d 1085, 1089 (Fla. 2d DCA 2007); Goldberg v. Watts, 864 So. 2d 59, 60 (Fla. 2d DCA 2003). Attorney fees and costs cannot be imposed as a form of punitive damages. As such, the trial court needs to make the proper determinations on remand.

If upon reconsideration by the trial court that attorney fees and costs should be awarded, the trial court should also follow Florida Statute 57.105(1). An order awarding such fees must be paid in equal amounts by Appellant and his trial attorney, who had not yet been disbarred and was still a qualifying attorney during the litigation in the trial

court. Since the trial court's judgment does not comply with Florida Statute 57.105, we must further remand this cause.

It is therefore,

ORDERED that this cause is hereby REMANDED with directions to the trial court to enter an amended final judgment in accordance with this opinion.

DONE AND ORDERED in Chambers, at New Port Richey, Pasco County, Florida this 27th day of September 2012.

Original order entered on September 27, 2012 by Circuit Judges Stanley R. Mills, W. Lowell Bray, Jr., and Michael F. Andrews.