

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

IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT  
IN AND FOR PINELLAS COUNTY, FLORIDA  
APPELLATE DIVISION

PORTFOLIO RECOVERY ASSOCIATES,  
LLC

Appellant,

Case No.: 16-000049AP-88A  
UCN: 522016AP000049XXXXCI

v.

JENNIFER K. COAKLEY,  
Appellee.

\_\_\_\_\_  
Opinion Filed \_\_\_\_\_

Appeal from Order Denying Motion to Strike  
Order Granting Entitlement to Attorney's Fees  
and Order Granting Award of Attorney's Fees  
Pinellas County Court  
Judge Myra S. McNary

Chantel Wonder, Esq.  
Robert E. Sickles, Esq.  
John P. Gaset, Esq.  
Attorneys for Appellant/Cross-Appellee

Heather A. Harwell, Esq.  
Attorney for Appellee/Cross-Appellant

**PER CURIAM.**

Portfolio Recovery Associates, LLC. Appeals the "Order Denying Portfolio Recovery Associates, LLC's Motion to Strike Heather A. Harwell's Motion for Attorney's Fees," the "Order Granting Heather A. Harwell's Entitlement to Attorney's Fees," and the "Order Granting Defendant's Motion for Award of Attorney's Fees, Costs, and Expenses." Jennifer Coakley cross-appeals the "Order Granting Defendant's Motion for Award of Attorney's Fees, Costs, and Expenses." Upon review of the briefs, the record on appeal, and the applicable case law, this Court dispensed with oral argument

pursuant to Florida Rule of Appellate Procedure 9.320. We affirm in part, reverse in part, and remand.

### **Statement of Case**

In April 2012, Portfolio filed an action in small claims court against Coakley for breach of contract and unjust enrichment for failure to pay \$1,138.03 due under a credit card agreement. On July 11, 2013, Portfolio voluntarily dismissed the case. On July 15, 2013, Attorney Michael Tierney, on behalf of Coakley, filed "Defendant's Motion to Determine Entitlement to Attorney Fees and Cost, and Motion to Tax Reasonable Attorney's Fees and Cost." Tierney was Coakley's attorney of record. On April 25, 2014, the parties filed a "Joint Stipulation Regarding Defendant's Entitlement to Attorney's Fees and Costs." Portfolio stipulated to the issue of "Defendant's" entitlement, but left pending the amount of fees and costs. The Stipulation was signed by an attorney for Portfolio and Tierney.

On May 15, 2014, Attorney Heather Harwell, on behalf of Coakley, filed a motion for attorney's fees "as to Heather A. Harwell, Esquire." In the Motion, it is alleged that when Tierney "developed a conflict and was unable to attend the pre-trial conferences or the first trial date, [Harwell] agreed to cover the trial for him." Furthermore, Coakley "retained [Harwell] to act as co-counsel."<sup>1</sup> Harwell was not Coakley's attorney of record while the case was pending, but it is undisputed that she appeared on Coakley's behalf at several hearings and at trial. On August 5, 2014, Portfolio filed "Plaintiff's Amended Motion to Strike Heather Harwell's Motion for Attorney's Fees," asserting the Motion must be stricken because it was untimely and because Harwell is not an attorney of record. After a hearing,<sup>2</sup> the court denied the Motion to Strike finding that under Florida Small Claims Rule 7.175, the timely filed July 13, 2013 Motion for Fees "was applicable to all attorneys representing [Coakley]." On October 14, 2014, the court entered an order granting Harwell's entitlement to attorney's fees. On March 17, 2015, Portfolio filed a "Stipulation for Payment of Attorneys' [sic] Fees and Order of Dismissal as to Attorney Michael Tierney." On May 8, 2015, a hearing was held to determine the

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<sup>1</sup> Harwell introduced a signed contingency agreement at the May 8, 2015 hearing on attorney's fees, which was dated August 4, 2014 by Harwell.

<sup>2</sup> After the hearing, but before an order was rendered, Harwell filed a notice of appearance as additional counsel.



amount of Harwell's attorney fees. On August 29, 2016, the court rendered the "Order Granting Defendant's Motion for Award of Attorney's fees, Costs, and Expenses." Thereafter, Portfolio filed the instant appeal challenging the Order denying its Motion to Strike, the Order granting Harwell's entitlement to fees, and the Order granting Coakley's Motion for attorney's fees. Harwell, on behalf of Coakley, cross-appealed the Order granting the Motion for attorney's fees, asserting the lower court erred by omitting costs for the expert fee witness.

### **Standard of Review**

"The standard of review for an order granting a motion to strike is abuse of discretion." Upland Dev. of Cent. Fla., Inc. v. Bridge, 910 So. 2d 942, 944 (Fla. 5th DCA 2005) (citation omitted). "The standard of review of an award of attorney's fees is abuse of discretion." Shirley's Pers. Care Services of Okeechobee, Inc. v. Boswell, 165 So. 3d 824, 827 (Fla. 4th DCA 2015) (citation omitted).

### **Analysis**

Portfolio asserts various arguments on appeal, each of which purports to be a reason why the trial court abused its discretion by denying Portfolio's Motion to Strike, granting Harwell's entitlement to fees, and awarding Harwell attorney's fees. "[T]he award of attorney's fees is a matter committed to sound judicial discretion which will not be disturbed on appeal, absent a showing of clear abuse of discretion." DiStefano Constr., Inc. v. Fid. & Deposit Co. of Md., 597 So. 2d 248, 250 (Fla. 1992). "To determine an abuse of discretion, the court must ask if reasonable men could differ as to the propriety of the action taken by the trial court." Raza v. Deutsche Bank Nat. Tr. Co., 100 So. 3d 121, 126 (Fla. 2d DCA 2012) (internal citation and quotations omitted).

Portfolio first maintains that the trial court erred by not striking Harwell's Motion for Attorney's Fees because it was both a nullity and untimely. Although this argument initially seems meritorious, it is ultimately irrelevant because it is the party that moves for fees, not the attorney. See Fla. Sm. Clm. R. 7.175 ("Any party seeking a judgment taxing costs or attorneys' fees, or both, shall serve a motion no later than 30 days after filing of the judgment . . . or the service of a notice of voluntary dismissal."). Here, a timely motion for attorney's fees was filed by Coakley through her attorney of record, Tierney. Thus, while it is true that a motion filed by an attorney prior to filing a notice of



appearance is a nullity, see Pasco Cnty. v. Quail Hollow Properties, Inc., 693 So. 2d 82, 84 (Fla. 2d DCA 1997), the trial court correctly determined that the small claims rules of procedure do “not require each attorney representing a party in an action to file a separate motion for attorney’s fees.” Therefore, whether Harwell’s motion was a nullity or untimely is irrelevant to the determination of attorney’s fees.

Portfolio asserts that even if only one motion for fees was required, Harwell could not participate in the timely Motion filed by Tierney because she was not an attorney of record when that Motion was filed. The trial court held that “[Portfolio] had sufficient notice that [Harwell] would be seeking attorney’s fees . . . due to the appearance of [Harwell] at three pre-trial conferences, a trial, and a motion hearing,” and that Portfolio waived its objection to Harwell appearing without filing a notice of appearance. The trial court did not abuse its discretion in allowing Harwell to proceed under the timely filed Motion without filing of a notice of appearance. See Paul v. Paul, 807 So. 2d 191, 193 (Fla. 3d DCA 2002) (“Although counsel did not file a formal notice of appearance, an appearance may be found even in the absence of any filings when an attorney shows up for a hearing and participates in the proceedings.”).

Portfolio further maintains that at the time the Motion was filed, Coakley was under no obligation to pay Harwell anything because the contingency agreement would not exist for another ten months; therefore, Portfolio alleges that it is not required to pay fees to a non-record attorney who was not legally responsible to Coakley or officially authorized to represent her. Portfolio also questions the trial court’s admission of the contingency agreement between Harwell and Coakley because Harwell only produced an unsigned agreement during discovery, and Portfolio was “ambushed” when Harwell produced a signed document at the hearing. Finally, Portfolio contends that the trial court erred in awarding attorney’s fees to Harwell pursuant to the contingency agreement because the agreement did not exist until over a year after the case was dismissed, and thus is void. All of Portfolio’s contingency agreement arguments are without merit because the parties stipulated to the entitlement of fees. “[S]tipulations should not be ignored or set aside, without a showing of fraud, overreaching, misrepresentation, or some other basis that would void the agreement.” Salzman v. Reyes, 198 So. 3d 1068, 1070 (Fla. 1st DCA 2016) (internal citations and quotations

omitted). Portfolio insists that the trial court abused its discretion in allowing fees under the stipulation because it was misled when Tierney provided limited fee information that it relied upon. Portfolio maintains that it would not have entered into the stipulation had it know Harwell would also be filing for fees.<sup>3</sup> The trial court properly found Portfolio's argument to be unpersuasive because the stipulation was only for the entitlement to fees and not the amount of fees. Therefore, the trial court did not abuse its discretion in relying on the stipulation to award attorney's fees for Harwell's time.

#### Cross-Appeal

Coakley contends that she is entitled to costs for her expert fee witness, which the trial court omitted in the Order awarding fees and costs. "Expert witness fees . . . are not discretionary if the attorney expects to be compensated for his testimony." D'Alusio v. Gould & Lamb, LLC, 36 So. 3d 842, 847 (Fla. 2d DCA 2010) (remanding because of "the omission in the circuit court's order of any finding that [the party] was entitled to a cost award for his expert witness's fees"). Because the Order granting attorney's fees is silent on the subject of expert witness fees, the issue must be remanded.

#### Conclusion

The trial court did not abuse its discretion in awarding attorney's fees for Harwell's time based on the parties' unchallenged stipulation and Coakley's initial timely Motion for Fees. However, the Order granting attorney's fees is silent on the subject of expert witness fees and the issue must be remanded. Accordingly, it is

#### **ORDERED AND ADJUDGED** that:

1. The "Order Denying Portfolio Recovery Associates, LLC's Motion to Strike Heather A. Harwell's Motion for Attorney's Fees" is **AFFIRMED**.
2. The "Order Granting Heather A. Harwell's Entitlement to Attorney's Fees" is **AFFIRMED**.
3. The "Order Granting Defendant's Motion for Award of Attorney's Fees, Costs, and Expenses" is **AFFIRMED** in part and **REVERSED** in part. The issue of expert witness fees is **REMANDED** back to the trial court.

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<sup>3</sup> Of note, at the hearing on the Motion to Strike, the trial court alluded to the idea that it would entertain a motion to set aside the stipulation. Portfolio never filed one, instead insisting that the stipulation only applied to Tierney.



4. The Court shall retain jurisdiction to address Coakley's Motion for Attorney's Fees on Appeal.

**DONE AND ORDERED** in Chambers in Clearwater, Pinellas County, Florida, this \_\_\_\_\_ day of \_\_\_\_\_, 2018.

Original order entered on January 4, 2018, by Circuit Judges Linda R. Allan, Jack R. St. Arnold, and Keith Meyer.

Copies furnished to:

HEATHER A. HARWELL, ESQ.  
27446 CASHFORD CIRCLE, STE 101  
WESLEY CHAPEL, FL 33544

ROBERT E. SICKLES, ESQ.  
JOHN P. GASET, ESQ.  
BROAD AND CASSELL LLP  
100 N. TAMPA STREET, STE 3500  
TAMPA, FL 33602

CHANTEL WONDER, ESQ.  
PORTFOLIO RECOVERY ASSOCIATES, LLC  
120 CORPORATE BLVD  
NORFOLK, VA 23502