IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA.

APPELLATE DIVISION (CIVIL): AY
Case No.: 502012AP000010XXXXMB

DANIELLE DUX AND
ALTERRAON PHILLIPS, ESQ.,

Appellant,

v.

DICKER, KRIVOK & STOLOFF, P.A.,
a Florida Corporation

Appellee.

_____/

Opinion filed: DEC 2 1 2012

Appeal from the County Court in and for Palm Beach County, Judge Sandra Bosso-Pardo

For Appellants: Alterraon Phillips, Esq., Cousins Law, a Professional Association, 319 Clematis Street, Suite 701, West Palm Beach, Florida 33401

For Appellee: James N. Krivok, Esq., Dicker, Krivok & Stoloff, P.A., 1818 Australian Avenue South, Suite 400, West Palm Beach, Florida 33409

Upon consideration of the Appellee's pending motion for rehearing and/or clarification, the Court grants the motion, withdraws its prior opinion issued November 1, 2012, and substitutes the following opinion.

Danielle Dux and Alterraon Phillips ("Appellants"), appealed to this Court from the entry of a final judgment for attorney's fees and costs as a sanction pursuant to § 57.105, Fla. Stat. (2010), in favor of Dicker, Krivok & Stoloff, P.A. ("Appellee"). This Court now addresses the dispositive issues on this appeal—the county court's failure to find a lack of good faith and the award of costs to Appellee—and reverses the final judgment as to these issues.

Specifically, the trial court's written final judgment does not make a finding that Appellants failed to act in good faith. "When a trial court imposes liability against counsel for a

fee award entered under section 57.105, it '*must* make [1] an express finding that the claim was frivolous *and*, ... [2] an express finding that the attorney was not acting in good faith based upon the representations of his client." *Ferdie v. Isaacson*, 8 So. 3d 1246, 1250 (Fla. 4th DCA 2009) (emphasis in original.) It seems apparent that such a finding would have to be a *written* finding:

> [i]n awarding fees pursuant to section 57.105, Florida Statutes, the trial court must make an express finding that the claim was frivolous and, where the trial court imposes liability for the fee award against counsel, an express finding that the attorney was not acting in good faith based upon the representations of his client. *See, e.g., Valdes v. Lovaas*, 784 So. 2d 474, 475 (Fla. 3d DCA 2001); *Weatherby Assocs., Inc. v. Ballack*, 783 So. 2d 1138, 1143 (Fla. 4th DCA 2001). *No such finding is included in the orders appealed.* We thus reverse the fee judgments to the extent that they require Perlman to pay half of such award and remand the matter to the trial court to either make the required finding regarding Perlman's lack of good faith reliance or deny the imposition of fees as to counsel.

Perlman v. Ameriquest Mort. Co., 987 So. 2d 1292 (Fla. 4th DCA 2008) (emphasis added); *and see Santini v. Cleveland Clinic Florida*, 65 So. 3d 22 (Fla. 4th DCA 2011). Although it is entirely possible that the trial court made this finding orally in the case at bar, this Court does not have a transcript of the hearing and a conservative interpretation of the language of *Perlman* would imply that such finding should have been made in the written order. For this reason, this Court now reverses and remands the final judgment as to Appellant Phillips, with instruction to the trial court to consider this issue at an evidentiary hearing and render its findings in a written order.

Additionally, an award of costs is not permissible under § 57.105, Fla. Stat. (2010) because the statute does not permit an award of costs, only fees. The trial court clearly states in the final judgment at paragraph 19 that "[t]he Court further finds that DKS incurred reasonable costs for its expert witness in the sum of $1,457.50 and Court Reporter fees of $145.00 for which DKS is entitled to recovery of such amounts." However, "an award of costs is not allowed under § 57.105." *Ferere v. Shure*, 65 So. 3d 1141, 1145 (Fla. 4th DCA 2011). The Fourth District

based this finding on the fact that "Section 57.105, Florida Statutes (2006) provides that the court shall award a reasonable attorney's fee to be paid to the prevailing party, but makes no mention of costs." *Ferdie*, 8 So. 3d at 1251.

Finally, Appellants move for fees and costs pursuant to Fla. R. App. P. 9.400(b), Fla. R. Civ. P. 1.442(g), Fla. Stat. 57.041, and Fla. Stat. 59.46. Clearly, the appellate rule provides for an award of fees pursuant to a specific articulable ground. While Appellants move for fees pursuant to civil rule of procedure 1.442(g) that provides for attorneys fees where there is a failure to propose a settlement agreement in good faith, this argument must fail where the contracting parties to the settlement agreement are not the same parties on appeal. Appellants also cite to § 59.46, Fla. Stat. which states that "any provision of a statute or of a contract entered into after October 1, 1977, providing the payment of attorney's fees to the prevailing party shall be construed to include the payment of attorney's fees to the prevailing party on appeal." Again, because there is no independent statutory provision that could otherwise properly grant attorney's fees to Appellants and because they are unable to seek attorney's fees pursuant to a contract, this Court denies Appellants' request for fees on appeal. Appellants may seek relief as to costs at the trial court level pursuant to a favorable ruling on the issue of good faith; however, that matter is not appropriate for this Court's review at this time.

Because this Court finds that the trial court did not make a finding that Appellant Phillips failed to act in good faith and because the trial court improperly awarded Appellee costs, the final judgment is REVERSED as to the award of costs. As to the award of attorney's fees against Appellate Phillips, the final judgment is REVERSED and REMANDED for further proceedings consistent with this opinion.

MCCARTHY, SASSER, AND HOY, JJ. concur.