

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT COURT  
IN AND FOR SARASOTA COUNTY, FLORIDA

KELMAR REALTY HOLDINGS  
LLC,  
Plaintiff,

v.

CASE NO. 2023 CA 004728 NC  
DIVISION C CIRCUIT

HOLCOMB ENERGY SYSTEMS  
LLC,  
Defendant.

---

**RECOMMENDED ORDER OF MAGISTRATE RE:  
DEFENDANT HOLCOMB ENERGY SYSTEMS, LLC'S MOTION TO TAX  
ATTORNEY'S FEES AND COSTS AGAINST PLAINTIFF [DIN 40]**

This matter came for hearing on June 12, 2024 on Defendant Holcomb Energy Systems, LLC's *Defendant Holcomb Energy Systems, LLC's motion to tax attorney's fees and costs against Plaintiff* [DIN 40]. The Magistrate has jurisdiction pursuant to Rule 1.490, *Fla. R. Civ. P.*, and Fla. 12<sup>th</sup> Jud. Cir. AO ##2024-03.4 & 2024-04.1. The Magistrate submits this *recommended order* for approval by the Court.

For the reasons stated on the Record, and as supplemented herein, the Magistrate recommends that the Court **GRANT** *Defendant Holcomb Energy Systems, LLC's motion to tax attorney's fees and costs against Plaintiff* [DIN 40], as follows:

1. The Court's August 31, 2023 *order adopting and approving Magistrate's recommended order* pertaining to *Defendant Holcomb Energy Systems, LLC's motion to tax attorney's fees and costs against Plaintiff* [DIN 21] is at [DIN 39]. Pursuant to the *order adopting* [DIN 39], Defendant is entitled to Defendant's attorneys' fees and costs pertaining to *Defendant Holcomb Energy Systems, LLC's motion to dismiss Plaintiff's complaint for eviction and damages with prejudice* [DIN 6].
2. *Defendant Holcomb Energy Systems, LLC's motion to tax attorney's fees and costs against Plaintiff* is at [DIN 40]. The *motion to tax* [DIN 40] pertains to the amount of Defendant's attorneys' fees and costs pertaining to *Defendant Holcomb Energy Systems, LLC's motion to dismiss Plaintiff's complaint for eviction and damages with prejudice* [DIN 6].
3. No response to the *motion to tax* [DIN 40] was filed.

4. The *notice of evidentiary Zoom hearing* for the June 12, 2024 hearing is at [DIN 94].
5. The *amended notice of evidentiary Zoom hearing* is at [DIN 109].
6. Defendant's *notice of filing* is at [DIN 111]. The attorney's bills for the *notice of filing* [DIN 111] is at [DIN 112]. Additionally, prior to the June 12, 2024 hearing, Defendant's counsel provided the Magistrate with a copy of the attorney's bills with the entries at issue highlighted.
7. At the June 12, 2024 hearing, it was agreed by the Parties on the Record that the law states that Defendant is also entitled to attorneys' fees for arguing the entitlement to attorney's fees, which was contested by Plaintiff's prior lawyer, but Defendant is not entitled to attorney's fees for arguing the amount of the attorneys' fees to be taxed. This is also the Magistrate's understanding of the relevant law.
8. At the June 12, 2024 hearing, Defendant's counsel put relevant time and billing records into evidence and Defendant's counsel (attorney Scott D. McKay, Esq.) provided testimony to support the time and billing records, and Defendant also called attorney Damian Ozark, Esq. as an attorney fee expert. Plaintiff did not call an attorney fee expert.
9. *See generally D'Alusio v. Gould & Lamb, LLC*, 36 So. 3d 842, 846–47 (Fla. 2d DCA 2010):

The court will find an abuse of discretion in setting an attorneys' fee award if the trial court has not identified with precision the reasonable hourly rate and the number of hours reasonably expended on the matter. *See, e.g., Highlands Carpentry Serv., Inc. v. Connone*, 873 So.2d 611, 613 (Fla. 2d DCA 2004)...When reviewing an order on appellate attorneys' fees, appellate ***judges are "not required to abandon what [they] learned as lawyers or [their] common sense in evaluating the reasonableness of an award."*** *Trumbull Ins. Co. v. Wolentarski*, 2 So.3d 1050, 1057 (Fla. 3d DCA 2009).

We find that the circuit court abused its discretion in drastically reducing the number of hours that was reasonable for this appeal, in contravention of the amount agreed to by both experts, without any specific findings. Although the judge was not bound by the expert opinions or attorney affidavits in setting the award, the record is totally devoid of any evidence to support a conclusion that the award was reasonable.

[***emphasis added***]; *D'Alusio v. Gould & Lamb, LLC*, 36 So.3d 842, 847–48 (Fla. 2d DCA 2010):

*A party who seeks an award of appellate attorneys' fees must present expert testimony* concerning the reasonable time and hourly rate or the resulting order will be overturned as an abuse of discretion. See *Snow v. Harlan Bakeries, Inc.*, 932 So.2d 411, 412 (Fla. 2d DCA 2006). D'Alusio's expert testified that he spent approximately 10.5 hours preparing for and testifying at the hearing, that he charges a rate of \$225 per hour, and that he expected to be paid for his work. Our court has held that “[e]xpert witness fees paid to the testifying expert are not discretionary if the attorney expects to be compensated for his testimony.” *Rock v. Prairie Bldg. Solutions, Inc.*, 854 So.2d 722, 724 (Fla. 2d DCA 2003) (citing *Stokus v. Phillips*, 651 So.2d 1244 (Fla. 2d DCA 1995)). On remand, the circuit court shall tax D'Alusio's expert's fee of \$2362.50 as a cost to Gould & Lamb.

[*emphasis added*]; and *Spanakos v. Hawk Sys., Inc.*, 362 So.3d 226, 242-243 (Fla. 4th DCA 2023):

“[B]lock-billing—the grouping of multiple tasks into a single billing entry—is not per se unreasonable.” *Hines v. City of Albany*, 613 F. App'x. 52, 55 (2d Cir. 2015). “*As a general proposition block billing is not prohibited so long as the Court can determine from the time entry the services that were performed.*” *Home Design Servs., Inc. v. Turner Heritage Homes, Inc.*, No. 4:08-CV-355-MCR-GRJ, 2018 WL 4381294, at \*6 (N.D. Fla. May 29, 2018).

“[T]he mere fact that an attorney has included more than one task in a single billing entry is not, in itself, evidence of [impermissible] block-billing. When those tasks are intertwined, including a thorough description of the activities performed clarifies, rather than obscures, the record.” *Williams*, 657 F.Supp.2d at 1312. Thus, *block billing does not warrant a reduction where “the entries are so well-detailed and informative that the lack of segregation does not interfere at all with the Court's task to determine the reasonableness of the time spent,” and “there are no objectionable tasks that need to be eliminated from the computation of counsel's hours.”* *Gay v. Brencorp, Inc.*, No. 3:09-CV-1002-J-JBT, 2013 WL 2683156, at \*3 (M.D. Fla. June 11, 2013).

By contrast, improper block billing occurs when the time entries are “insufficiently detailed.” *Cousins v. Duprey*, 325 So.3d 61, 76 (Fla. 4th DCA 2021). For example, in *Moore v. Kelso-Moore*, 152 So.3d 681, 682 (Fla. 4th DCA 2014), we noted that block billing “made it impossible to determine the reasonableness of the hours expended on several matters.”

...  
***“[T]asks of a clerical nature are not compensable as attorney's fees.”*** *Mobley v. Apfel*, 104 F.Supp. 2d 1357, 1360 (M.D. Fla. 2000). For example, in *Scelta v. Delicatessen Support Servs., Inc.*, 203 F.Supp.2d 1328, 1334 (M.D. Fla. 2002), the court did not award attorney's fees for “a substantial amount of claimed time that was spent doing clerical and secretarial work, such as gathering materials, copying them, mailing them and refiling them.”

We are aware that some courts have said that “work related solely to scheduling of mediation and depositions generally is clerical or secretarial.” *For Play Ltd. v. Bow to Stern Maint., Inc.*, No. 05-22002-CIV, 2006 WL 3662339, at \*8 (S.D. Fla. Nov. 6, 2006); *see also Sines v. Kessler*, 343 F.R.D. 311, 322 (W.D. Va. 2022) (describing “scheduling depositions” as a “purely clerical” task).

***But other courts have concluded that attorney time spent on scheduling is not necessarily clerical in nature.*** *See Fox v. Pittsburg State Univ.*, 258 F.Supp.3d 1243, 1256 (D. Kan. 2017) (“***It is not clerical to email opposing counsel regarding scheduling, the subject of phone conferences, and legal issues in the case.... It is not clerical to email the client to set up depositions and subpoenas.***”); *cf. also Dave’ v. Bd. of Trs. of S. Ill. Univ., Carbondale*, No. 3:18-CV-02122-GCS, 2022 WL 575614, at \*6 (S.D. Ill. Feb. 25, 2022) (ruling that fees imposed as a sanction “would include the attorney's fees for the scheduling” of the plaintiff's deposition, necessitated by the cancellation of his earlier deposition).

Similarly, some courts have suggested that time spent on exhibit preparation is clerical in nature. *See, e.g., Knight v. Paul & Ron Enters., Inc.*, No. 8:13-CV-310-T-36EAJ, 2015 WL 2401504, at \*8 (M.D. Fla. May 19, 2015) (excluding as “clerical” a paralegal's time spent “preparing trial binders and exhibits”).

A more nuanced view is that “[i]t is not clerical to determine the exhibits necessary for trial for purposes of an exhibit list.” *Fox*, 258 F. Supp. 3d at 1257. Still, time spent “collecting, scanning, and labeling” in the course of preparing exhibits is a purely clerical task. *Id.*

***Here, the trial court did not abuse its discretion in concluding that attorney time spent on scheduling and exhibit preparation was compensable. Hazouri testified that tasks like setting up depositions would have required lawyer involvement and discussions with opposing counsel, given the “degree of friction”***

*and “lack of cooperation” on both sides. He added that this was not a case where one secretary could simply “call the other secretary to see whether there was a time available.” Likewise, Attorney Bach testified that “most scheduling issues required the attention of an attorney because of the sheer number of parties involved and the substance of objections that were often lodged by the Plaintiff to various hearings or depositions proceeding.”*

[*emphasis added*].

10. *Florida Bar Rule of Professional Conduct 4-1.5 and The Florida Supreme Court’s decision in Fla. Patient’s Comp. Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) take a very similar approach to evaluating attorney’s fees, and while Defendant’s attorney was prepared to go through both requirements, the parties agreed that an analysis under Florida Bar Rule of Professional Conduct 4-1.5 would suffice. These factors were testified to by Defendant’s counsel briefly and Defendant’s expert in further detail, and the Magistrate herein expounds upon the factors. Factors to be considered as guides in determining a reasonable fee include:*

- (A) the time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill requisite to perform the legal service properly:

The Magistrate finds that for *Defendant Holcomb Energy Systems, LLC’s motion to dismiss Plaintiff’s complaint for eviction and damages with prejudice [DIN 6]*, the time and labor required were moderate, the novelty, complexity, and difficulty of the questions involved were moderate, and the skill required to perform the legal service properly was moderate.

- (B) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer:

The Magistrate finds that given the issues involved in this case and the amount of time expended on the file, it is likely that acceptance of this employment precluded other employment by Defendant’s counsel.

- (C) the fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature:

There is no single reasonable hourly rate, but rather a range. Defendant’s counsel and his expert agreed that the hourly rate sought by attorney Scott D. McKay, Esq was reasonable, but perhaps on the higher side of reasonable, but this amount is within a reasonable range. Before taking the bench on January 2, 2024, the

Magistrate worked at a law firm in Sarasota for approximately nine (9) years and has independent knowledge of the hourly rates for attorneys and paralegal typically charged in Sarasota (and more specifically being charged in Sarasota for matters involving commercial litigation). The Magistrate finds that \$575.00 an hour for attorney time and \$125-195 an hour for paralegal time are reasonable hourly rates in Sarasota for the type of work that was required in this file.

- (D) the significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained:

The Magistrate finds that the case at issue is a complicated business case between two parties that primarily involves a three million dollar (\$3million) commercial building that Defendant operates its business out of, and initially, Plaintiff attempted to evict Defendant from that building. There is a high significance to this action, and with that comes high responsibility. The results obtained, at least with regard to the eviction component of this case, were favorable for Defendant.

- (E) the time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client:

The Magistrate finds this was not a factor for the subject matter.

- (F) the nature and length of the professional relationship with the client:

The Magistrate finds this was not a factor for the subject matter.

- (G) the experience, reputation, diligence, and ability of the lawyer or lawyers performing the service and the skill, expertise, or efficiency of effort reflected in the actual providing of such services:

The Magistrate finds that attorney Scott D. McKay, Esq. has been a lawyer practicing law full-time since 1999. Mr. McKay is Martindale-Hubbell AV rated and is a member of the local Inn of Court. Mr. McKay has substantial experience and a good reputation in the local Bar. Mr. McKay exhibits a high degree of skill, expertise, and ability. Mr. McKay has worked diligently on this file. Mr. McKay's work on this file appears to have been performed efficiently.

- (H) whether the fee is fixed or contingent, and, if fixed as to amount or rate, then whether the client's ability to pay rested to any significant degree on the outcome of the representation:

The Magistrate finds this matter was an hourly representation, so this was not a factor for the subject matter.

11. The Magistrate recommends that the Court find, based on the above factors, testimony, evidence, expert testimony and the Magistrate's and Circuit Judge's own knowledge, that \$575.00 per hour for attorney Scott D. McKay, Esq.'s legal time, \$195.00 an hour for paralegal Gretchen Heidenburg's time, and \$125.00 an hour for paralegal Victoria Cornett's time, are reasonable rates for the services rendered in Sarasota County, Florida, further broken down as follows:
- a. Scott D. McKay Esq., attorney, 20.5 hours at \$575.00 per hour = \$11,787.50;
  - b. Gretchen Heidenburg, paralegal, 1.4 hours at \$195.00 per hour = \$273.00;  
*and*
  - c. Victoria Cornett, paralegal, 1.5 hours at \$125.00 per hour = \$187.50.

Total of the above = \$12,248.00, which was supported by competent, substantial evidence and testimony.


12. In determining the above amounts, the Magistrate reduced the time billed by paralegal Gretchen Heidenburg by 1.0 hours. The Magistrate finds that the June 9, 2023 time entry for 1.20 hours contained block billing wherein a matter of clerical scheduling was co-mingled with other tasks. The Magistrate finds the June 14, 2023 entry for 0.40 hours contains block billing for a matter of clerical scheduling. The Magistrate has reduced the entry for 1.20 hours down to 0.60 hours, and has wholly denied the 0.40 entry. The Magistrate finds that the remainder of the time entries contain sufficient detail, coupled with Scott D. McKay, Esq.'s testimony, to enable the Magistrate to determine that non-compensable clerical matters were not improperly included in the amounts sought to be taxed.
13. In addition, the Magistrate finds there was competent, substantial evidence and testimony that Defendant's expert Damian Ozark, Esq. was expected to be paid \$1,000.00 in connection with his services, and that amount is properly taxed against Plaintiff Kelmar Realty Holdings, LLC as well.
14. Effective as of the date the Court renders its *order adopting this recommended order*, the total award of attorneys' fees and costs (for the subject motions) in favor of Defendant Holcomb Energy Systems, LLC and against Plaintiff Kelmar Realty Holdings, LLC is a principal amount of \$13,248.00.

15. Effective as of the date the Court renders its *order adopting this recommended order*, the principal amount of \$13,248.00 shall accrue pre-judgment interest at the statutory rate(s) otherwise applicable to judgements as set by Florida's Chief Financial Officer. For clarity, the Court's *order adopting this recommended order* is not a judgment.
16. This *recommended order* does not include a mandatory payment deadline. Rather, this *recommended order* is without prejudice for **(a)** Defendant to file a subsequent motion (if appropriate) to require payment of such award (and pre-judgment interest) as a condition of Plaintiff further proceeding with its claims; *and* **(b)** for Plaintiff to seek for the award and pre-judgment interest to be applied as a setoff against Plaintiff's remaining claims.

IF YOU WISH TO SEEK REVIEW OF THE REPORT AND RECOMMENDATION MADE BY THE MAGISTRATE, YOU MUST FILE EXCEPTIONS IN ACCORDANCE WITH FLORIDA RULE OF CIVIL PROCEDURE 1.490(I). YOU WILL BE REQUIRED TO PROVIDE THE COURT WITH A RECORD SUFFICIENT TO SUPPORT YOUR EXCEPTIONS OR YOUR EXCEPTIONS WILL BE DENIED. A RECORD ORDINARILY INCLUDES A WRITTEN TRANSCRIPT OF ALL RELEVANT PROCEEDINGS. THE PERSON SEEKING REVIEW MUST HAVE THE TRANSCRIPT PREPARED IF NECESSARY FOR THE COURT'S REVIEW.

The parties are aware of their ability to serve exceptions pursuant to *Fla. R. Civ. P.* 1.490(h), and are waiving their right to serve exceptions.

RECOMMENDED in Sarasota, Sarasota County, Florida, on July 16, 2024.

  
7/16/2024 4:03 PM 2023 CA  
004728 NC  
e-Signed 7/16/2024 4:03 PM 2023 CA 004728 NC

**BRADLEY ELLIS**  
General Magistrate

COPIES FURNISHED AS PER ATTACHED SERVICE LIST:

CRITTENDEN, AARON B  
MOHAMMADBHOY, ADAM  
CRITTENDEN, AARON B  
SAINÉ, MARK B

AC@HARLLEEBALD.COM  
AM@HARLLEEBALD.COM  
BLY@HARLLEEBALD.COM  
dpc@carltonslaw.com



MCKAY, SCOTT D  
SAINÉ, MARK B  
CRITTENDEN, AARON B  
HOLCOMB ENERGY SYSTEMS  
LLC  
MCKAY, SCOTT D  
KELMAR REALTY HOLDINGS LLC  
Holcomb Energy Systems LLC  
Jerald Steven Southwell II  
Jerald Steven Southwell II

GHEIDENBURG@MCKAY-LAW.COM  
jah@carltonslaw.com  
LS@HARLLEEBALD.COM  
ROBERTH@HOLCOMBENERGYSYSTEMS.CO  
M  
SMCKAY@MCKAY-LAW.COM  
ssouthwell@realfloridalaw.com  
ellenh@holcombenergysystems.com  
eoldham@realfloridalaw.com  
adaniels@realfloridalaw.com