

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

FD DESTINY, LLC, et al.
Plaintiffs,

CASE NO.: 502009 CA029903XXXXA

v.

AVP DESTINY, LLC, et al.
Defendants. /

AVP DESTINY, LLC, et al.
Plaintiffs,

CASE NO.: 502009 CA040295XXXXAG

v.

FREDERICK A. DELUCA, individually, FD
DESTINY, LLC, FD DESTINY CREDIT,
LLC, and DOCTOR'S ASSOCIATES, INC.
f/k/a SUBWAY,
Defendants. /

CASES CONSOLIDATED FOR TRIAL

**PUGLIESE PARTIES' RESPONSE IN OPPOSITION TO DELUCA PARTIES'
MOTIONS FOR ATTORNEY'S FEES ALLEGEDLY UNDER CIVIL THEFT STATUTE
AND FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT**

The Pugliese Parties hereby respond to and oppose the DeLuca Parties' motions for attorney's fees that were filed with this Court on June 29, 2017.

BACKGROUND

After asking for \$43 million in damages (six times during closing alone), which was rejected by the jury, the DeLuca Parties seek a staggering \$12 million in attorney's fees. The DeLuca Parties were paid \$1,195,280.61 through the Palm Beach County State Attorney's Office, before the trial even started. Thereafter, the DeLuca Parties' counsel were only able to convince a jury to award an additional \$1.7 million in damages after 20 days of trial. Consequently, compared to the \$43 million that they demanded but did not receive, the DeLuca Parties cannot state to this Court that the attorney's fees expended are justified by the result.

Instead, the DeLuca Parties attempt to re-cast their attorney fees as “inextricably intertwined” with their civil theft and FDUTPA claims, which were only 2 out of 21 counts in this case. The DeLuca Parties obtained summary judgment in May 2016 before the trial, based entirely on a plea obtained by the Palm Beach County State Attorney, and now attempt to claim all of their attorney’s fees as part of that endeavor. This is improper.

In the same vein, the DeLuca Parties seek fees under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) when they also placed minimal, if any, attention to pursuing those claims. Interestingly, the DeLuca Parties argued for a specific finding in the Final Judgment, that the verdict on FD Destiny’s breach of operating agreement claim against AVP Destiny “addresses *distinct wrongs and damages* from the other claims brought by FD Destiny related to theft, fraud, and other tort and statutory claims.” It strains credulity that the DeLuca Parties claim that although the **facts** are based on “distinct wrongs,” **their attorney fees** are somehow “inextricably intertwined.”

For the reasons that follow, this Court should deny awarding anything more than a minor percentage of the DeLuca Parties’ attorney’s fees because they have failed to carry their burden to prove up the amount of fees that they are due under Florida law.

ARGUMENT

A. The DeLuca Parties Failed to Separate their Fees as to the Statutory Claims Upon Which They Claim to be Entitled to Fees

As the movants, the DeLuca Parties have the burden to show that they separated their work as having been related to the statutory claims for which they claim to be entitled to attorney’s fees. On the evidence presented, it is clear that they did not do this and their recovery should be reduced substantially.

The Fourth District has clearly held that a party seeking attorney's fees has the burden to allocate fees to the issues for which fees are awardable or to show that the issues are so intertwined that allocation is not feasible. *Chodorow v. Moore*, 947 So. 2d 577, 579-580 (Fla. 4th DCA 2007). In *Chodorow*, the homeowners alleged that they were entitled to contractual attorney's fees for defending a breach of contract claim brought by a mold remediation company. The homeowners raised affirmative defenses and counterclaims to all of the claims that were brought by the company and the homeowners prevailed on their breach of contract claim. Like the DeLuca Parties in this case, the homeowners in *Chodorow* sought to recover their reasonable attorney's fees and costs for the litigation under the claim for which there was an entitlement to fees. The *Chodorow* court reviewed the record, including the fee records submitted during the hearing, and found no error in the trial court's determination that the homeowners' counsel spent "separate and distinct" time on claims and counterclaims for which fees were not awardable. Applying that reasoning to this case, and premised on the language of the Final Judgment with respect to the Breach of the Operating Agreement, the outcome should be the same.

Here, the evidence is overwhelming that the DeLuca Parties' counsel spent a substantial – if not most – of their time pursuing claims and defenses for which fees are not awardable. The DeLuca Parties did not properly allocate their time for the pursuit of the civil theft or FDUTPA claims that they now claim are the basis for the recovery of their fees. The time entries show that the DeLuca Parties spent "separate and distinct time" litigating:

- a. the defense of allegations against Fred DeLuca and FD Destiny;
- b. claims that the property could never be entitled;
- c. claims that Defendants were inept and Mr. Pugliese was 'in over his head' on this project;
- d. claims that the Destiny Property was "worthless swamp land";
- e. claims that Mr. Pugliese failed to perform due diligence prior to purchase of the land;
- f. claims that Mr. Pugliese made false representations about the status of the entitlements;
- g. electronic discovery issues (for which they were already awarded fees);
- h. sanctions motions that were not successful; and

- i. issues pertaining to whether fiduciary duties were owed and breached by Fred DeLuca and Subway.

The DeLuca Parties could and should have separated their time for litigating the civil theft and FDUTPA claims, which they did not. The majority of their time shows that there was no separation between time spent on the unsuccessful claims and time spent on the claims and defenses for which fees are not awardable.

This Court's review of the time entries should reveal that the DeLuca Parties' counsel failed to carry their burden to divide out the time they spent on unsuccessful claims, for which they are due nothing, as opposed to the time that they spent on the civil theft and FDUTPA claims for which they claim an entitlement to fees. Since the DeLuca Parties have failed to properly allocate their time in accordance with the *Chodorow* holding, the Court should reject their desired claim for fees and substantially reduce any award to them.

B. The *Rowe* Factors Do Not Justify \$12 Million in Fees in this Case

Notwithstanding the DeLuca Parties' failure to properly allocate their time, the factors recognized under Florida law also preclude them from recovering anything beyond a comparable amount they obtained for their client. The DeLuca Parties failed to recover the \$43 million that they demanded after 8 years of litigation and 20 days of trial. Thus, the \$1.7 million the DeLuca Parties were awarded, compared to the roughly \$13 million that they spent in litigating this matter, are unreasonable pursuant to the well-established holding in *Florida Patients Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985). Clearly, the fees are exorbitant and far greater than necessary to obtain the result they obtained.

The factors that the Court should examine in evaluating the fees sought in this case include the following:

- (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;
- (B) The likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
- (C) The fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature;
- (D) The significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained;
- (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;
- (F) The nature and length of the professional relationship with the client;
- (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;
- (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 key factor which cuts against any substantial award is the fourth factor: **the results obtained**. The jury ruled against the DeLuca Parties' primary claim for damages, which is the \$43 million that they sought for their fraud, breach of operating agreement, violation of Florida Statutes relating to duties of loyalty, negligent misrepresentation and breach of fiduciary duty claims. Thus, for roughly \$13 million in attorney's fees, the DeLuca Parties obtained 'very little' for their clients, because they only recovered an additional \$1.7 million in addition to the \$1,195,280.61 that they were already paid in restitution through the Palm Beach County State Attorney's Office.

Pursuant to the *Rowe* factors and Rule 4-1.5 of the Rules Regulating the Florida Bar, the fee claim put forward by the DeLuca Parties **grossly** exceeds what Florida law would allow and this Court should reduce it to \$1,537,650¹ based on the results obtained for the civil theft and FDUTPA claims.

Dated: November 10, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 10, 2017, a true and correct copy of the foregoing was served via e-mail through the Florida Court's e-Portal filing system upon the below service list.

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¹ The Pugliese Parties' expert opines that \$450 is a reasonable hourly rate and that 3,417 is a reasonable number of hours for the work performed in this action on the awardable claims to arrive at a lodestar of \$1,537,650.

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