DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

PETER A. COLOMBO,
Appellant,

v.

ROBERTSON, ANSCHUTZ & SCHNEID, P.L.,
Appellee.

No. 4D20-1719

[May 4, 2022]

Appeal and cross-appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Janis Brustares Keyser, Judge; L.T. Case No. 50-2017-CA-000532-XXXX-MBAB.

Philip M. Burlington and Nichole J. Segal of Burlington & Rockenbach, P.A., West Palm Beach, James A. Bonfiglio of the Law Offices of James A. Bonfiglio, P.A., Boynton Beach, Louis M. Silber of Silber & Davis, West Palm Beach, and Jack Scarola of Searcy Denney Scarola Barnhart & Shipley, West Palm Beach, for appellant.

Scott G. Hawkins of Jones Foster P.A., West Palm Beach, and Raymond L. Robin and Elizabeth A. Izquierdo of Keller Landsberg P.A., Fort Lauderdale, for appellee.

LEVINE, J.

The trial court awarded a borrower his attorney's fees following dismissal in a prior foreclosure action. The bank brought a new foreclosure action and subsequently the borrower received a reinstatement letter. The borrower sued the bank's law firm for violating the Florida Consumer Collection Practices Act ("FCCPA") because the reinstatement letter required payment of attorney's fees incurred by the bank in the prior foreclosure action in order to reinstate the loan. The trial court granted summary judgment in favor of the law firm. We find the trial court did not err in determining that the law firm had not violated the FCCPA as a matter of law because the plain language of paragraph 19 of the mortgage contract gave the bank the right to seek attorney's fees from the prior foreclosure action as a condition of reinstating the loan. We affirm.

In 2006, Peter Colombo ("borrower") executed a note and mortgage on the subject property. Paragraph 19 of the mortgage provided that if the borrower defaulted and the lender accelerated the loan, the borrower would have a right to reinstate the loan if certain conditions were met. Among the reinstatement conditions, the borrower agreed to "pay[] all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees . . . ."

In 2008, U.S. Bank's predecessor-in-interest brought a foreclosure action against the borrower. The trial court dismissed the case for lack of prosecution and entered an agreed order awarding the borrower $27,500 in prevailing party attorney's fees. In 2017, U.S. Bank filed a new foreclosure action against the borrower concerning the same property. A month later, U.S. Bank sent the borrower a mortgage loan statement identifying the amount due. The borrower disputed certain charges, prompting a series of emails between the borrower and U.S. Bank, through their respective counsels. U.S. Bank's counsel, Robertson, Anschutz & Schneid, P.L. ("law firm"), ultimately suggested a reinstatement quote to assist in resolving the issues, and the borrower agreed. The law firm then sent the borrower a reinstatement letter setting forth the amount due to reinstate the loan. This amount included $3,733 in "[a]ttorney's [f]ees paid to prior counsel in the current action."

After receiving the reinstatement letter, the borrower filed an answer, affirmative defenses, and counterclaim, which he later amended. In the amended pleading, the borrower, individually and as class representative, set forth a claim against the law firm for violation of the FCCPA, section 559.72, Florida Statutes (2017), which prohibits a person from knowingly attempting to collect an illegitimate debt. The borrower argued that the reinstatement letter improperly charged for attorney's fees for "prior counsel in the current action" when there was no prior counsel in the current action. Additionally, inclusion of attorney's fees paid to prior counsel was improper because those fees were incurred in a prior unsuccessful foreclosure action that was involuntarily dismissed by the court.

The law firm filed three motions for summary judgment, arguing that (1) the law firm was entitled to collect attorney's fees and costs incurred in the prior foreclosure action pursuant to *U.S. Bank Trust, N.A. as Trustee for LSF9 Master Participation Trust v. Leigh*, 293 So. 3d 515 (Fla. 5th DCA 2019); (2) the law firm was entitled to immunity under the litigation privilege because the FCCPA claim was based on the reinstatement letter the law firm sent during the foreclosure proceedings; and (3) the borrower lacked standing to bring the FCCPA claim.

The trial court granted the first and third motions for summary judgment, finding that *Leigh* was controlling and that the borrower lacked standing. The trial court rejected the borrower's argument that section 57.105(7) was controlling, finding this argument overlooked the language in paragraph 19 of the mortgage. The trial court denied summary judgment based on litigation privilege. The borrower appeals the entry of final summary judgment for the law firm. The law firm conditionally cross-appeals the denial of its second motion for summary judgment based on litigation privilege.[1]

The borrower argues that the trial court erred in entering summary judgment in favor of the law firm because the law firm attempted to collect an illegitimate debt. The borrower contends that the law firm did not have the right to seek attorney's fees incurred by the bank in the previous foreclosure action because the borrower was awarded attorney's fees in that case under section 57.105(7).

"The standard of review for the entry of summary judgment is *de novo*." *Orlando v. FEI Hollywood, Inc.*, 898 So. 2d 167, 168 (Fla. 4th DCA 2005). "Likewise, a trial court's interpretation of the language of a contract or statute is reviewed de novo." *High Definition Mobile MRI, Inc. v. State Farm Mut. Auto. Ins. Co.*, 321 So. 3d 818, 821 (Fla. 4th DCA 2021).

"Where contracts are clear and unambiguous, they should be construed as written . . . from the words of the entire contract." *Khosrow Maleki, P.A. v. M.A. Hajianpour, M.D., P.A.*, 771 So. 2d 628, 631 (Fla. 4th DCA 2000). "Courts are required to construe a contract as a whole and give effect, where possible, to every provision of the agreement." *Anarkali Boutique, Inc. v. Ortiz*, 104 So. 3d 1202, 1205 (Fla. 4th DCA 2012) (citation omitted). Finally, "[w]here the language of a contract is clear and unambiguous, the court can give to it no meaning other than that expressed." *Wellington Realty Co. v. ColorAll Techs. Int'l, Inc.*, 951 So. 2d 921, 922 (Fla. 4th DCA 2007).

The FCCPA provides: "In collecting consumer debts, no person shall . . . [c]laim, attempt, or threaten to enforce a debt when such person knows that the debt is not legitimate, or assert the existence of some other legal right when such person knows that the right does not exist." § 559.72(9), Fla. Stat. "A claim under section 559.72(9) has three elements: an illegitimate debt, a threat or attempt to enforce that debt, and knowledge

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[1] The underlying foreclosure action brought by U.S. Bank remains pending.

that the debt is illegitimate." *Davis v. Sheridan Healthcare, Inc.*, 281 So. 3d 1259, 1264 (Fla. 2d DCA 2019).

Paragraph 19 of the mortgage provides for the following:

> 19. **Borrower's Right to Reinstate After Acceleration.** If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued . . . . Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) *pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument*; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged.

(emphasis added).

In granting summary judgment in favor of the law firm, the trial court found *Leigh* dispositive. We agree. In *Leigh*, the lender filed a foreclosure action in 2010 that was ultimately dismissed.[2] 293 So. 3d at 516. Several months later, the lender sent the borrower a demand letter seeking a "cure amount" that included money for the lender's attorney's fees and expenses from the 2010 foreclosure suit that was dismissed. *Id.* The Fifth District found that the lender was entitled to seek and recover its attorney's fees and litigation expenses from the first foreclosure action. *Id.* The Fifth District explained:

> Paragraph nineteen of the mortgage provides that in order for Appellee to reinstate the mortgage, she would be required to pay the lender all sums then due and all expenses incurred in enforcing the mortgage, including reasonable attorney's fees and specified foreclosure litigation expenses. According to the

[2] The circuit court opinion reflects that the borrower prevailed in the prior foreclosure action based upon a statute of limitations theory. *See U.S. Bank Trust, N.A. v. Leigh*, 2017 WL 3797046, at *2 (Fla. Cir. Ct. Aug. 30, 2017).

> plain language of the mortgage, Appellant was not required to be the prevailing party in the first foreclosure action in order to seek and recover its attorney's fees and expenses. *See Maw v. Abinales*, 463 So. 2d 1245, 1247 (Fla. 2d DCA 1985) (holding that even if borrower had been successful in preventing foreclosure by lender due to default by borrower, lender was still entitled by mortgage to seek and recover its reasonable attorney's fees because a default had occurred).

Id.

Leigh is factually analogous. Like in *Leigh*, in the present case the lender filed a foreclosure action that was ultimately dismissed. In both cases, the reason for dismissal could be attributed to the fault of the lender. In *Leigh*, the dismissal was based on the statute of limitations, while in this case the dismissal was due to lack of prosecution. After the dismissal, the lender in both cases commenced a new foreclosure proceeding and sought payment of attorney's fees incurred by the lender in the prior foreclosure action as a condition to reinstate the mortgage. Like in *Leigh*, paragraph 19 of the mortgage requires payment of all sums then due and all expenses incurred in enforcing the mortgage, including reasonable attorney's fees and specified foreclosure litigation expenses. In *Leigh*, the Fifth District found that "[a]ccording to the plain language of the mortgage, [the lender] was not required to be the prevailing party in the first foreclosure action in order to seek and recover its attorney's fees and expenses." *Id.* We find, under the rationale of *Leigh*, that the law firm did not violate the FCCPA because it sought to recover a legitimate expense it was entitled to recover pursuant to a contract, that being the expense of attorney's fees the lender incurred in the prior foreclosure action.

The borrower argues that *Leigh* is not controlling because it did not address the application of section 57.105(7). Section 57.105(7) provides, in relevant part:

> If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract.

The trial court correctly determined that *Leigh* is dispositive and that section 57.105(7) is not controlling. Nothing in *Leigh* conflicts with section 57.105(7). *Leigh* does not mention section 57.105(7) because it is inapplicable. "[E]ntitlement to fees under section 57.105(7) applies when

the party seeking fees prevails and is a party to the contract containing the fee provision." *Venezia v. JP Morgan Mortg. Acquisition Corp.*, 279 So. 3d 145, 146 (Fla. 4th DCA 2019). The borrower was awarded $27,500 in attorney's fees in the previous foreclosure action as the prevailing party under section 57.105(7). The reinstatement letter did not seek to take away those fees. Rather, the reinstatement letter sought $3,733 in attorney's fees incurred by the lender in the previous foreclosure action, pursuant to paragraph 19 of the mortgage contract, as a prerequisite to reinstating the mortgage. Thus, the reinstatement letter, and the attorney's fees sought by the letter, had nothing to do with section 57.105(7). Seeking attorney's fees pursuant to paragraph 19 of the mortgage does not somehow diminish or undercut the fees previously awarded to the borrower under section 57.105(7). Those fees remain untouched.

Moreover, the borrower was under no obligation to pursue reinstatement under paragraph 19 of the contract; rather, whether the borrower elected the option of reinstatement was completely voluntary. Indeed, the borrower could have sought funding from another lender. Further, if the borrower did not elect reinstatement, there could be no money owed for a past debt under the reinstatement provision of paragraph 19.

The borrower cannot use section 57.105(7) to expand or vary the parties' agreement beyond its precise terms. *See Stratton v. Port St. Lucie MGT, LLC*, 149 So. 3d 100, 102 (Fla. 4th DCA 2014) ("The statute is designed to even the playing field, not expand it beyond the terms of the agreement."). Nor can the borrower attempt to use section 57.105(7) to alter the terms of a contract. For in Florida, "[t]he right to contract is one of the most sacrosanct rights guaranteed by our fundamental law." James W. Ely, Jr., The Contract Clause: A Constitutional History 253 (2016) (quoting *Chiles v. United Faculty of Fla.*, 615 So. 2d 671, 673 (1993)). It is axiomatic that "courts may not rewrite a contract or interfere with the freedom of contract or substitute their judgment for that of the parties thereto in order to relieve one of the parties from the apparent hardship or improvident bargain." *Pudlit 2 Joint Venture, LLP v. Westwood Gardens Homeowners Ass'n*, 169 So. 3d 145, 148 (Fla. 4th DCA 2015) (citation omitted).

The borrower also argues that *Leigh* is inconsistent with the supreme court's decisions in *Ham v. Portfolio Recovery Assocs.*, 308 So. 3d 942 (Fla. 2020), and *Page v. Deutsche Bank Trust Co. Americas*, 308 So. 3d 953 (Fla. 2020). Neither of these decisions have any bearing on the instant case. Rather, they simply reinforce the existing law that makes attorney's fees

reciprocal. Neither case involves the situation where, as here, a lender seeks to recover attorney's fees it incurred in a previous foreclosure action in order to reinstate a mortgage pursuant to an agreed provision of a contract.

In sum, we conclude the trial court correctly found that the law firm did not violate the FCCPA and correctly entered final summary judgment in favor of the law firm.[3] Because we affirm the direct appeal, the law firm's conditional cross-appeal is rendered moot and dismissed. *See Zodiac Grp., Inc. v. GrayRobinson, P.A.*, 224 So. 3d 333, 334 (Fla. 3d DCA 2017).

Affirmed as to the direct appeal; dismissed as to the conditional cross-appeal.

WARNER and KLINGENSMITH, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

[3] Because we find no violation of the FCCPA, we also affirm the entry of final judgment based on lack of standing. As the trial court stated, because the borrower "no longer has a valid claim against [the law firm], he has no standing to continue this case either individually or as a class representative."

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

RAY T. MAURIELLO and TINA A. MAURIELLO,

Appellants,

v.

THE PROPERTY OWNERS ASSOCIATION OF LAKE PARKER ESTATES, INC.,

Appellee.

No. 2D21-500

April 13, 2022

Appeal from the County Court for Pasco County; Frank I. Grey, Judge.

Daniel A. Harris of Daniel A. Harris, P.A., Tampa, for Appellants.

Adam C. Gurley of Rabin Parker Gurley, P.A., Clearwater, for Appellee.

KELLY, Judge.

At issue in this appeal is whether the trial court erred when it determined The Property Owners Association of Lake Parker Estates, Inc. (the Association), was entitled to prevailing party

attorney's fees in an action in which it sought a mandatory injunction against Ray and Tina Mauriello. The Association's action alleged the Mauriellos were not maintaining their lawn and landscaping in good condition as required by the Association's Declaration and Design Review Manual. The complaint sought a mandatory injunction ordering the Mauriellos to remove the weeds and then continually treat for weeds, resod the lawn, regularly mow the lawn, and trim the bushes and hedges on the property "to a neat condition."

The Mauriellos and the Association litigated over the condition of the property for years. The Mauriellos tried unsuccessfully to have the suit dismissed or to have summary judgment entered in their favor arguing the Association was not entitled to a mandatory injunction because it had an adequate remedy at law. In support, they cited the Association's Declaration which contains the following provision:

> Section 14. Special Assessment for Maintenance Obligations of Owners. In the event an Owner obligated to maintain, replace or repair a Boundary Wall, or portion thereof, pursuant to this Declaration shall fail to do so, or should an Owner fail to perform any maintenance, repair or replacement required under the terms of this Declaration, the Association, upon ten (10)

> days prior written notice sent certified or registered mail, return receipt requested, or hand delivered, may have such work performed, and the cost thereof shall be specifically assessed against such Lot, which assessment shall be secured by the lien set forth in Section 9 of this Article VI.

They argued that under this provision, the Association had the ability to remedy the condition and assess them for the cost to do so.

The trial court rejected this argument, and the litigation continued. Eventually the Mauriellos sold the property. As a result, the Association filed a third amended complaint naming the new owner as a defendant, but it did not dismiss the Mauriellos and instead continued to seek a mandatory injunction against them requiring them to cure the violations and maintain the property.

The Mauriellos again sought summary judgment, this time adding to their previous arguments the fact they were no longer the property owners. Therefore, they were not responsible for the condition of the property, they had no right to maintain the property, and the court could not order them to do so. In response, the Association asserted that the case had become moot because the new owner had cured the violations. Because the case was

moot, the Association asserted summary judgment was improper and the "only remaining justiciable issue before the court" was who was the prevailing party for the purposes of attorney's fees.[1]

Rather than proceed to summary judgment, the Association agreed to dismiss the suit. The dismissal came nearly a year after the property was sold and was only as to the Mauriellos because the Association had never served the new owner and thus it was not a party to the lawsuit.

In support of its motion for fees the Association argued:

> Voluntary compliance obtained only after the Association is forced to commence legal action is the functional equivalent of a judgment or verdict in the Association's favor, thus making the Association the prevailing party.
>
> Here, the Mauriellos sold the Property . . . during the course of the litigation, and [the new owner] subsequently cured the violations at issue. Ultimately, the [Mauriellos'] untimely and volitional compliance as evidenced by their having substantially cured the violations noted in the Association's Complaint(s) after the commencement of this action renders the Association the prevailing party. As such, the Association is entitled to an award of reasonable attorneys' fees and costs to be paid by the [Mauriellos] pursuant to Florida law.

[1] The Association sought prevailing party fees pursuant to sections 720.305 and 720.311, Florida Statutes (2019).

The Association acknowledged that generally when a plaintiff voluntarily dismisses an action, the defendant is the prevailing party, but it asserted that it fell within an exception to that rule and that the court should look beyond the dismissal to determine whether it had succeeded on the primary issue in the litigation. *See, e.g.*, *Tubbs v. Mechanik Nuccio Hearne & Wester, P.A.*, 125 So. 3d 1034, 1040-41 (Fla. 2d DCA 2013); *Walter D. Padow, M.D., P.A. v. Knollwood Club Ass'n*, 839 So. 2d 744, 745-46 (Fla. 4th DCA 2003). The Association argued the only pertinent question was whether the violations were remedied after the litigation was commenced.

The difficulty with the Association's position is obvious. The alleged violations were *not* remedied by the Mauriellos—the new owner cured the alleged violations. This may be why the Association abandoned this argument even before the hearing on its fee motion and has not resurrected it on appeal. Instead, it now argues:

> [T]he relevant inquiry here is very limited in scope: [I]s the case moot and, if so, did the [Mauriellos'] volitional act render the case moot? If both questions are answered in the affirmative, the Association is the prevailing party such that it is entitled to an award of

> fees and costs. It is undisputed that the [Mauriellos'] decision to sell their property rendered this case moot.[2]

In ruling on the fee motion, the trial court agreed with the Association's concession that the Mauriellos should have been dismissed from the lawsuit after they sold the property. Because of this, the trial court found the Mauriellos were prevailing parties in part and awarded them fees from the time the third amended complaint was filed until the time the case was dismissed. It also found that notwithstanding the voluntary dismissal, the Association was the prevailing party under the second amended complaint because the Mauriellos' "volitional act" in selling their home rendered the action moot. Implicit in this ruling is the court's rejection of the Mauriellos' argument that none of the Association's complaints ever stated a proper claim for injunctive relief.

We address this latter argument first. The Mauriellos argue, as they did in the trial court, that neither the third amended complaint nor the second amended complaint ever stated a cause of

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[2] This stands in contrast to the argument set forth in the Association's fee motion in which it asserted that it was not the sale of the property that rendered the case moot; it was the fact the violations were cured by the new owner.

action against them and that thus, under this court's decision in *Alorda v. Sutton Place Homeowners Ass'n*, 82 So. 3d 1077 (Fla. 2d DCA 2012), the Association cannot be considered a prevailing party. We agree *Alorda* is controlling.

In *Alorda*, we reversed an award of prevailing party attorney's fees to a homeowner's association under similar circumstances. Like the Mauriellos, the defendant homeowner in *Alorda* argued the association's complaint seeking a mandatory injunction did not state a cause of action. 82 So. 3d at 1080-81. There, as here, the association's declaration gave it the option of remedying the alleged violation itself, assessing the owner for the cost, and if the owner failed to pay, placing a lien on the property and foreclosing if it remained unpaid. *Id.* at 1080. We see no meaningful distinction between *Alorda* and this case. As in *Alorda,* the Association cannot be considered a prevailing party because the trial court should have dismissed the complaint or entered summary judgment in favor of the Mauriellos at the outset.

Nor could the Association be considered a prevailing party under the reasoning adopted by the trial court. Referring to the second amended complaint, the trial court found that the

Association had prevailed up until the time the Mauriellos sold the property. The court then found that the sale of the Mauriellos' property rendered the action moot as to them. It linked the sale of the home to the eventual dismissal.

Generally, when a plaintiff voluntarily dismisses an action, the defendant is considered the prevailing party. *Thornber v. City of Fort Walton Beach*, 568 So. 2d 914, 919 (Fla. 1990). However, it is not automatic, and the court may look behind the voluntary dismissal to determine whether the party seeking fees is a "substantially prevailing party." *See Tubbs*, 125 So. 3d at 1041. The test for determining whether a party has prevailed is whether the party "succeed[ed] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Moritz v. Hoyt Enters., Inc.*, 604 So. 2d 807, 809-10 (Fla. 1992) (alteration in original) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). When an action is voluntarily dismissed because it has become moot, the court can look to the results, not simply the voluntary dismissal, to determine which party prevailed. *See Tubbs*, 125 So. 3d at 1041.

Contrary to the trial court's conclusion that the sale prompted the dismissal for mootness, the record shows the Association did not dismiss the lawsuit when the Mauriellos sold their home. Instead, it added the new owner to the complaint and continued to seek a mandatory injunction against the Mauriellos. It only dismissed the lawsuit as moot after the new owner cured the alleged violations. Thus, the Association may have obtained the relief it sought, but it came from the new owner, not the Mauriellos. Therefore, it was not a prevailing party. *Cf. Thornber*, 568 So. 2d at 919 (explaining that although the plaintiff obtained some relief, that relief did not come from the defendants he voluntarily dismissed and therefore, those defendants were the prevailing parties, not the plaintiff).

For these reasons, we reverse the portion of the final judgment awarding attorney's fees to the Association. On remand, the trial court should reconsider the award of fees to the Mauriellos in light of our decision.

Reversed and remanded with instructions.

KHOUZAM and ROTHSTEIN-YOUAKIM, JJ., Concur.

Opinion subject to revision prior to official publication.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

PHILIP MORRIS USA INC.,
Appellant,

v.

ROBERT A. GORE, SR., individually, and as Personal Representative of the **ESTATE OF GLORIA H. GORE,**
Appellee.

No. 4D20-932

[April 13, 2022]

Appeal and cross-appeal from the Circuit Court for the Nineteenth Judicial Circuit, Indian River County; Janet Croom, Judge; L.T. Case No. 312008CA010052.

David M. Menichetti and Geoffrey J. Michael of Arnold & Porter Kaye Scholer LLP, Washington, D.C., and Terri L. Parker of Shook, Hardy & Bacon LLP., Tampa, for appellant.

Andrew A. Harris and Grace Mackey Streicher of Harris Appeals, P.A., Palm Beach Gardens, and Jason L. Odom of Gould, Cooksey, Fennell, P.A., Vero Beach, for appellee.

KLINGENSMITH, J.

Appellant Philip Morris USA, Inc. ("Philip Morris") appeals numerous issues, including a final judgment awarding appellee Robert A. Gore, Sr., ("Gore") as personal representative of the Estate of Gloria H. Gore, $2,515,086.53 in attorney's fees and related expert costs in an *Engle* progeny action pursuant to a Proposal for Settlement. Gore cross-appeals the trial court's reduction in the attorney's fees and costs awarded from the sums requested. We reverse the attorney's fees award against Philip Morris and remand this matter to the trial court to award a reasonable fee pursuant to Gore's Proposal for Settlement that does not include duplicative amounts which Gore has already been paid or awarded for pursuing the claims against any co-defendants. We affirm on all other issues raised in both the appeal and cross-appeal.

Procedural History

In 2008, Gore filed an *Engle* progeny action against Philip Morris and R.J. Reynolds Tobacco Company ("Reynolds") for wrongful death damages following the death of his wife. The next year, Gore served proposals for settlement ("PFS 1") on both Philip Morris and Reynolds, offering to resolve all claims in the amount of $250,000.00. These proposals were not accepted. The case proceeded to trial in 2014; however, it resulted in a mistrial. Before the re-trial, Gore again served proposals for settlement ("PFS 2") on both defendants. Neither party accepted, and the case went to a second trial.

The jury returned a verdict in favor of Gore, awarding him compensatory damages of $2 million, which the trial court reduced by comparative fault. Philip Morris and Reynolds appealed the judgment, and Gore cross-appealed, arguing the trial court erred by applying comparative fault to reduce his compensatory damages. This Court affirmed on Philip Morris and Reynolds' appeal but reversed on Gore's cross-appeal. *See Philip Morris USA Inc. v. Gore*, 238 So. 3d 828 (Fla. 4th DCA 2018). On remand, the trial court entered judgment in favor of Gore for the original jury verdict of $2 million.

After the judgment, Gore moved for an award of attorney's fees and costs pursuant to his two rejected PFSs. He requested over $5.6 million in attorney's fees stemming from over 7,000 hours expended by his legal team. Before the evidentiary hearing on costs and fees, Reynolds settled Gore's attorney's fees claim against them ("Reynolds' settlement"). Following this settlement, Philip Morris served Gore with discovery to disclose the terms of the Reynolds' settlement.

Gore and Philip Morris stipulated to the total number of hours Gore's attorneys were entitled to recover, agreeing to 6,266.38 hours. They also stipulated to the hours of a specific attorney, Lester Kaney, agreeing he worked 198.9 hours. At the evidentiary hearing, Gore presented the testimony of six trial attorneys and an attorney's fees expert. He requested $1,100.00 an hour for four attorneys, $750.00 an hour for six other attorneys, and $500.00 for another three. However, on cross-examination, many of Gore's testifying attorneys admitted they typically charged less than the amounts sought.

The trial court awarded Gore $1,964,424.75 in attorney's fees and $69,916.78 in expert costs against Philip Morris, for a total of $2,034,341.53 ("Fees Order"). Although Gore requested the use of current hourly rates to calculate the award, the trial court stated the rates must

be "closely in line with rates in the approximate timeframe when the work was performed" and used rates from 2008 to 2015. The trial court also reduced the hourly rates of all of Gore's attorneys based on the affidavits of four of Gore's attorneys who had submitted evidence of reasonable hourly rates in an unrelated *Engle* progeny case, *R.J. Reynolds Tobacco Co. v. Koballa*, 5D11-2914, 2012 WL 4052859 (Fla. 5th DCA Sept. 11, 2012), *opinion withdrawn*, 99 So. 3d 630 (Fla. 5th DCA 2012).

When the trial court issued its Fees Order, Philip Morris moved to apply a setoff of the total fees award in the amount of the Reynolds' settlement, arguing a setoff was required under sections 46.015 and 768.041, Florida Statutes (2020), to prevent Gore from receiving an unreasonable double recovery. The trial court denied Philip Morris' motion, finding the setoff statutes did not apply to attorney's fees or costs awarded pursuant to Florida Rule of Civil Procedure 1.442 and Florida's PFS statute, section 768.79, Florida Statutes (2020). The trial court then entered a final judgment on attorney's fees and costs, including prejudgment interest, in the total amount of $2,515,086.53. This appeal and cross-appeal followed.

Application of sections 46.015 and 768.041 to motions to setoff attorney's fees

"Whether the trial court awarded a proper set-off is a pure question of law reviewed *de novo*, and 'no deference is given to the judgment of the lower courts.'" *Cornerstone SMR, Inc. v. Bank of Am., N.A.*, 163 So. 3d 565, 568 (Fla. 4th DCA 2015) (quoting *D'Angelo v. Fitzmaurice*, 863 So. 2d 311, 314 (Fla. 2003)). The issue presented is whether a non-settling defendant in a civil action is entitled to reduce an attorney's fees award pursuant to a PFS by the amount previously paid by a settling defendant toward their separate PFS. The trial court denied Phillip Morris such a reduction after analyzing sections 46.015 and 768.041.

Setoffs are generally governed by sections 46.015 and 768.041, both of which require setoffs as to amounts received from a joint tortfeasor. *Grobman v. Posey*, 863 So. 2d 1230, 1237 (Fla. 4th DCA 2003). "The set-off provision in section 768.041(2) 'was designed to prevent duplicate or overlapping compensation for identical damages.'" *Cornerstone SMR*, 163 So. 3d at 569 (quoting *Gordon v. Marvin M. Rosenberg, D.D.S., P.A.*, 654 So. 2d 643, 644 (Fla. 4th DCA 1995)).

Section 46.015 provides in relevant part:

> (1) A written covenant not to sue or release of a person who is or may be jointly and severally liable with other persons for

> a claim shall not release or discharge the liability of any other person who may be liable for the balance of such claim.
>
> (2) At trial, if any person shows the court that the plaintiff, or his or her legal representative, has delivered a written release or covenant not to sue to any person in partial satisfaction of the damages sued for, the court shall set off this amount from the amount of any judgment to which the plaintiff would be otherwise entitled at the time of rendering judgment.

§ 46.015(1)–(2), Fla. Stat. (2020).

Nearly identical in its terms, Section 768.041 provides:

> (1) A release or covenant not to sue as to one tortfeasor for property damage to, personal injury of, or the wrongful death of any person shall not operate to release or discharge the liability of any other tortfeasor who may be liable for the same tort or death.
>
> (2) At trial, if any defendant shows the court that the plaintiff, or any person lawfully on her or his behalf, has delivered a release or covenant not to sue to any person, firm, or corporation in partial satisfaction of the damages sued for, the court shall set off this amount from the amount of any judgment to which the plaintiff would be otherwise entitled at the time of rendering judgment and enter judgment accordingly.

§ 768.041(1)–(2), Fla. Stat. (2020).

The trial court correctly found the language in neither section 46.015 nor section 768.041 applied to provide a setoff for the attorney's fees paid by Reynolds. "When the statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent." *City of Parker v. State*, 992 So. 2d 171, 176 (Fla. 2008) (quoting *Daniels v. Fla. Dep't of Health*, 898 So. 2d 61, 64 (Fla. 2005)). "The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." *Advisory Opinion to Governor re Implementation of Amendment 4, The Voting Restoration Amendment*, 288 So. 3d 1070, 1078 (Fla. 2020) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012)).

Sections 46.015(2) and 768.041(2) do not support Philip Morris' motion for a setoff, because they apply only to the "satisfaction of the damages sued for." The plain language of those statutes clearly specifies an intention to apply to *damages* and not *attorney's fees*. *See Parker*, 992 So. 2d at 176; *Advisory Opinion*, 288 So. 3d at 1078. In fact, the inclusion of the word "damages" in the statute establishes that setoffs made pursuant to those statutes can only apply to the category of compensation sued for—the loss Gore sustained under his wrongful death claim. *See Advisory Opinion*, 288 So. 3d at 1078–80 (quoting *White v. Mederi Caretenders Visiting Servs. of Se. Fla., LLC*, 226 So. 3d 774, 778 (Fla. 2017)) ("[U]nder the *expressio unius est exclusio alterius* canon, 'the mention of one thing implies the exclusion of another.'"); *Bidon v. Dep't of Prof'l Regul., Fla. Real Estate Com'n*, 596 So. 2d 450, 452 (Fla. 1992). Because Gore sued for compensatory damages, not for attorney's fees, those statutes are inapplicable when seeking a setoff for fees and costs awarded pursuant to a PFS.

While we agree with the trial court's interpretation of the foregoing statutes as to whether they applied to provide a setoff for attorney's fees, the inquiry does not end there. In fact, to resolve the question presented, we must also consider the language of the PFS statute.

Reasonableness of attorney's fees awarded pursuant to section 768.79

The general rule, and one expressly recognized in the federal system, requires the trial court to consider "reasonableness" when awarding fees and costs. *See Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004) (quoting *Reed v. Rhodes*, 179 F.3d 453, 471 (6th Cir. 1999)) ("The primary concern in an attorney fee case is that the fee awarded be reasonable, that is, one that is adequately compensatory to attract competent counsel yet which avoids producing a windfall for lawyers."). Those federal courts presented with analogous cases have held that when one defendant settles with a plaintiff, but another defendant does not, the "non-settling defendant is entitled to offset attorney's fees owed by the amount already paid by settling defendants." *Corder v. Brown*, 25 F.3d 833, 840 (9th Cir. 1994); *Bravo v. City of Santa Maria*, 810 F.3d 659, 668 (9th Cir. 2016) ("[A] district court abuses its discretion when it refuses to offset an award of attorney fees by a settling defendant's payment of those same fees."). We find the logic in the holdings of these cases to be persuasive in highlighting the unfairness and unreasonableness of denying a reduction under such circumstances.

On this point, Florida's PFS statute specifically provides that any fees awarded pursuant to a rejected PFS must be "reasonable":

> **768.79 Offer of judgment and demand for judgment.—**
> (1) In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover *reasonable costs and attorney's fees* incurred by her or him or on the defendant's behalf . . . .
>
> . . .
>
> (6)(b) If a plaintiff serves an offer which is not accepted by the defendant, and if the judgment obtained by the plaintiff is at least 25 percent more than the amount of the offer, the plaintiff shall be awarded *reasonable costs, including investigative expenses, and attorney's fees*, calculated in accordance with the guidelines promulgated by the Supreme Court, incurred from the date the offer was served.

§ 768.79(1), (6)(b), Fla. Stat. (2020) (emphasis added).

Florida courts have generally viewed double recoveries and windfalls as unreasonable. This is reflected throughout our jurisprudence. *See Minotty v. Baudo*, 42 So. 3d 824, 833 (Fla. 4th DCA 2010) (quoting *Montage Grp., Ltd. v. Athle-Tech Comput. Sys., Inc.*, 889 So. 2d 180, 199 (Fla. 2d DCA 2004)) ("A double recovery based on the same element of damages is prohibited."). *MCI Worldcom Network Servs., Inc. v. Mastec, Inc.*, 995 So. 2d 221, 224 (Fla. 2008) (quoting *Coop. Leasing, Inc. v. Johnson*, 872 So. 2d 956, 958 (Fla. 2d DCA 2004)) ("[T]he purpose of compensatory damages is to compensate, not to punish defendants or bestow a windfall on plaintiffs."). "[D]amages awarded should be equal to and precisely commensurate with the injury sustained." *MCI Worldcom*, 995 So. 2d at 224) (quoting *Hanna v. Martin*, 49 So. 2d 585, 587 (Fla. 1950)); *Designs for Vision, Inc. v. Amedas, Inc.*, 632 So. 2d 614, 615 (Fla. 2d DCA 1994); *Besett v. Basnett*, 437 So. 2d 172, 173 (Fla. 2d DCA 1983); *Homes by Deltona, Inc. v. Outdoor Site Sols., LLC*, 230 So. 3d 909, 911 (Fla. 5th DCA 2017); *Makar v. Gowni*, 983 So. 2d 769, 772 (Fla. 5th DCA 2008); *P & C Thompson Bros. Constr. Co. v. Rowe*, 433 So. 2d 1388, 1389 (Fla. 5th DCA 1983).

Even the setoff statutes, though they do not apply here, were designed to further this principle by "prevent[ing] an award of double damages." *Acadia Partners, L.P. v. Tompkins*, 759 So. 2d 732, 739 (Fla. 5th DCA 2000). When a pretrial settlement with one defendant covers the very

same fees and costs a plaintiff is trying to recover from the non-settling defendant, reasonableness dictates that a party cannot recover the same costs twice. *See, e.g.*, *Regan Roofing Co. v. Superior Court*, 27 Cal. Rptr. 2d 62, 76 (Ct. App. 1994).

Gore argues that attorney's fees and costs awarded pursuant to a PFS is a sanction such that the deterrent principle at the heart of section 768.79 allows for a double recovery of fees. Although this statute was indeed designed to deter unnecessary civil litigation and encourage settlements, it was not intended to permit double reimbursement of identical litigation expenses. Though section 768.79 does not specifically address this scenario, nothing in the statute's wording supports the premise that the Legislature intended for the same litigation expenses to be paid multiple times by separate parties—even as a sanction.

Likewise, no policy reasons exist for courts to permit a double recovery in these cases. A litigant's decision to pursue a claim in the face of a rejected PFS does not hinge on the prospect of recovering attorney's fees multiple times for the same litigation activities. Nor would eliminating duplicative fees payments significantly influence an attorney's decision to settle a civil suit. The potential prejudice to a non-settling party and the perverse incentives that a double recovery would create, especially in the context of a substantial fee settlement with another party, is obvious.

To avoid such windfalls, a court may consider the time expended by the requesting party in litigating against the claims or defenses of each opposing party when deciding the proper apportionment and reduction. *See Cassedy v. Wood*, 263 So. 3d 300, 303–04 (Fla. 1st DCA 2019) (finding "a party may be awarded fees pursuant to terms in a contract and section 768.79 simultaneously" where it appears that the contractual attorney's fee provision did not fully cover the reasonable value of fees incurred for prosecuting the action); *Vargas v. Hudson Cnty. Bd. of Elecs.*, 949 F.2d 665, 677 (3d Cir. 1991) (finding the trial court properly divided a fees award "in the exercise of its discretion in appraising the respective roles of all the defendants and their participation in this complex litigation"); *Corder v. Gates*, 947 F.2d 374, 382 (9th Cir. 1991) (finding the time expended by the plaintiff in pursuing each defendant may be considered when deciding whether apportionment was proper).

We agree with Philip Morris that if a reduction is not permitted in cases where fees are paid by other parties under separate proposals, the result is an impermissible windfall which, under Florida's jurisprudence, is manifestly unreasonable. We therefore hold that because an attorney is entitled only to a "reasonable" fee under the PFS statute when an award

of fees is appropriate, the trial court must consider any fees and costs previously paid by settling parties when fashioning an award and make appropriate reductions to avoid a double recovery.

Trial court's adjustment of attorney's hours and rates

In his cross-appeal, Gore argues the trial court abused its discretion by re-setting the hourly rate for four of his attorneys based on a consideration of the hourly rates in an unrelated case. He also asserts the trial court abused its discretion by disregarding the parties' stipulation as to attorney Kaney's hours and reducing the number of his recoverable hours.

"[T]he trial court has 'broad discretion' to award fees; on appeal, this court will reverse a fee award only if there has been an abuse of discretion." *Schmitz v. Schmitz*, 891 So. 2d 1140, 1141–42 (Fla. 4th DCA 2005). Discretion is abused "when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980). "If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." *Id.*

This issue is one we have previously considered in a recent case, *El Brazo Fuerte Bakery 2 v. 24 Hour Air Service, Inc.,* 330 So. 3d 552 (Fla. 4th DCA 2021). There, the plaintiff moved to determine the amount of attorney's fees and expert costs to which it was entitled. *Id.* at 554. The county court found the plaintiff's attorneys were entitled to the hours which its expert had opined were reasonable but only at a rate one-half of what its expert believed was reasonable. *Id.* at 555.

"While trial courts are not bound by expert opinions provided at evidentiary hearings or by attorney [testimony] submitted at such hearings, they may only reduce attorneys' fees that they deem to be excessive *if they make specific findings to support that determination*." *Id.* at 556 (quoting *Lizardi v. Federated Nat'l Ins. Co.*, 322 So. 3d 184, 189 (Fla. 2d DCA 2021) (emphasis in original). We noted that in *Lizardi*, where the trial court had not made specific findings as to why it had reduced the requested number of hours or hourly rate, the Second District held:

> Had the trial court . . . made specific findings as to why it reduced the requested number of hours or hourly rate, the order would have likely satisfied *Rowe's* requirements. . . . But the order as written, merely stating the hourly rate and

> reasonable number of compensable hours without any elucidation as to why those figures were used instead of the requested figures, does not comport with the requirements of *Rowe*.

Id. (emphasis in original).

As the court in *Westaway v. Wells Fargo Bank, N.A. for Carrington Mortgage Loan Tr., Series 2007-RFC1, Asset-Backed Pass through Certificates*, 230 So. 3d 505 (Fla. 2d DCA 2017), also explained:

> [W]hen evaluating the reasonableness of a requested fee award, judges should not abandon what [they] learned as lawyers or [their] common sense. . . . [W]e cannot affirm the [circuit] court's award when the record is totally devoid of any evidence to support a conclusion that the award was reasonable. [T]he [circuit court] did not indicate that her determination of reasonable hourly rates was rooted in her experience as a lawyer, nor did she explain why the varying rates that she applied were more reasonable than the single rate that [the defendant's] attorneys proposed (and all of the evidence adduced at the fee hearing supported). [The circuit court's] only apparent justification for reducing the hourly rate was her personal opinion of what attorneys should charge based on their number of years in practice. This alone does not constitute competent, substantial evidence.

Id. at 508–09 (internal citations and quotation marks omitted) (quoting *D'Alusio v. Gould & Lamb, LLC*, 36 So. 3d 842, 846 (Fla. 2d DCA 2010)).

We find the trial court did not err in setting the attorney's fees rates by applying her experience and knowledge gained as a judge while presiding over similar cases. *See Nunez v. Allen*, 292 So. 3d 814, 820 (Fla. 5th DCA 2019); *see also Miller v. First Am. Bank & Tr.*, 607 So. 2d 483, 485 (Fla. 4th DCA 1992) ("The existence of such evidence does not require that we abandon our own expertise, much less our common sense."). However, as to attorney Kaney's hours, the parties agreed to the proper number to be considered, and nonetheless, the trial court went outside of the record evidence and disregarded this stipulation. *See Giovanini v. Giovanini*, 89 So. 3d 280, 282 (Fla. 1st DCA 2012) ("[A]bsent a stipulation by the parties, the reasonableness and the necessity of the fee sought should have been determined at a hearing."). Without a compelling reason to do otherwise, the trial court should not have disturbed that agreement. *See Lift v. Lift*, 1 So. 3d 259, 261 (Fla. 4th DCA 2009) ("Because appropriately made

stipulations entered into by the parties are generally binding on the court as well as on the parties, the court erred in failing to follow them.").

Conclusion

We reverse the attorney's fees award against Philip Morris and remand this matter to the trial court to award a reasonable fee pursuant to Gore's PFS that does not include duplicative amounts which Gore has already been paid or awarded for pursuing the claims against any co-defendants. For this determination, the trial court shall use the parties' stipulated attorney hours when making those reductions. We affirm on all other issues raised in both the appeal and cross-appeal not specifically addressed herein.

Reversed and remanded with instructions.

KUNTZ, J., concurs.
ARTAU, J., concurs in part and dissents in part with an opinion.

ARTAU, J., concurring in part and dissenting in part.

I respectfully dissent in part because the majority impermissibly reaches an issue that was not challenged on appeal—the reasonableness of the attorney fee award. The appellant made it abundantly clear on the first page of its brief that it "does not challenge the trial court's exercise of its discretion in determining the reasonable amount of fees that [the appellee] incurred." Indeed, the appellant had stipulated below to the reasonable number of hours expended by the appellee, leaving in dispute only the reasonable hourly rates of all but four timekeepers.

"A stipulation properly entered into and relating to a matter upon which it is appropriate to stipulate is binding upon the parties and upon the Court." *Gunn Plumbing, Inc. v. The Dania Bank*, 252 So. 2d 1, 4 (Fla. 1971). As this court explained in *Polyglycoat Corp. v. Hirsch Distributors, Inc.*, 442 So. 2d 958 (Fla. 4th DCA 1983), "[w]hen points, positions, facts, and supporting authorities are omitted from the brief, a court is entitled to believe that such are waived, abandoned, or deemed by counsel to be unworthy." *Id.* at 960.

While I would agree that a trial court should exercise its discretion in fashioning a reasonable attorney fee award that does not include attorney time spent litigating claims against other parties, the appellant waived this issue by stipulating below to the reasonable number of attorney hours expended by appellee in litigating this case against it. Consequently, the

appellant did not challenge the reasonableness of the attorney fee award on appeal as conceded in its brief. Instead, the appellant chose to limit its challenge on appeal to the issues upon which I concur with the majority—the enforceability of the offer of judgment and the trial court's rejection of its entitlement to a statutory setoff. We should also limit our review to those issues and affirm the trial court's judgment.

* * *

Not final until disposition of timely filed motion for rehearing.