

IN THE DISTRICT COURT OF APPEAL  
FIRST DISTRICT, STATE OF FLORIDA

JOHN O'CONNOR,

Appellant,

v.

NOT FINAL UNTIL TIME EXPIRES TO  
FILE MOTION FOR REHEARING AND  
DISPOSITION THEREOF IF FILED

CASE NO. 1D15-4986

INDIAN RIVER COUNTY  
FIRE RESCUE/JOHNS  
EASTERN COMPANY, INC.,

Appellees.

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Opinion filed May 20, 2016.

An appeal from an order of the Judge of Compensation Claims.  
Robert L. Dietz, Judge.

Date of Accident: January 10, 2015.

Michael J. Winer of the Law Office of Michael J. Winer, P.A., Tampa, and Geoffrey Bichler of Bichler, Kelley, Oliver, Longo & Fox, PLLC, Maitland, for Appellant.

William H. Rogner of Hurley, Rogner, Miller, Cox, & Waranch, P.A., Winter Park, for Appellees.

PER CURIAM.

In this workers' compensation appeal, we affirm the cost order issued by the judge of compensation claims (JCC) and, for the reasons discussed below, award

attorney's fees to Appellees and against Appellant's counsel in an amount to be determined by the JCC.

### *Factual Background*

This case resembles the proceedings described in Miles v. City of Edgewater, 41 Fla. L. Weekly D985 (Fla. 1st DCA April 20, 2016). Appellants – through the same attorneys who represented the claimant in Miles – challenged the constitutionality of aspects of the attorney fees provisions in sections 440.34 and 440.105, Florida Statutes, by requesting the JCC to approve two retainer agreements, one between Appellant and his attorneys' law firm (the Firm), and another between Appellant and his union. In the latter agreement, Appellant and the union agreed to pay Appellant's attorney's fees to prosecute his workers' compensation exposure claim regardless of whether the attorneys were successful in obtaining any benefits. They requested approval of the union's payment of \$1,500 in fees on Appellant's behalf to pay for the first ten hours of the Firm's services. The JCC entered an order (hereafter "the retainer and fee order") denying the request, and the Firm subsequently withdrew from representing Appellant. Appellant then dismissed his pending petition for benefits and filed a petition for writ of certiorari challenging the retainer and fee order on the same basis as in Miles.<sup>1</sup>

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<sup>1</sup> A petition for writ of certiorari was the only possible way for Appellant to challenge the retainer and fee order in this case because he had dismissed the PFB and, consequently, there was no final order that could be appealed in order to obtain

After Appellant dismissed his PFB, Appellee sought prevailing-party costs, which the JCC granted. Appellant then appealed the cost order through his trial counsel, who twice amended the notice of appeal, each version indicating that he was appealing the final order assessing *costs*. Nothing in the notices indicated that the real reason for his appeal was to challenge the earlier-entered retainer and fee order. This court did not become aware of the true reason for his appeal until the initial brief. Bypassing the cost order altogether, the initial brief set forth the same basic fee-related arguments that Appellant’s counsel had made in Miles, challenging only the retainer and fee order and not the order on costs.<sup>2</sup> Thus, Appellant’s counsel attempted to use this cost appeal to gain a second presentation of his argument concerning the retainer and fee order.

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review of the interlocutory retainer and fee order. By contrast, in Miles, because the claimant proceeded pro se to a merits hearing on her PFBs after the JCC denied approval of the retainer and fee agreements in that case, she was able to obtain review of the interlocutory retainer and fee order as part of her appeal of the final order denying the PFBs on the merits.

<sup>2</sup> Appellate counsel had amended an earlier docketing statement to refer to the petition for certiorari and the Miles case that were pending before this court. In this filing, counsel simply stated that the cases “involve the exact same issues” and nothing more. Appellate counsel later moved to consolidate this case with the petition for certiorari and Miles, again asserting a commonality of issues. In no place did he indicate that he was not actually challenging the cost order on appeal but only the order addressing the retainer agreement attorney’s fees. There being no clear indication that there was commonality in these claims, the court denied consolidation.

After the initial brief was filed, the Court became aware of the tactic and issued an order to show cause why the purported appeal of the cost order should not be dismissed and sanctions imposed pursuant to Florida Rule of Appellate Procedure 9.410(a).<sup>3</sup> Appellate counsel's response indicated that nothing in the rules required him to indicate in his notice of appeal that he was actually appealing the retainer and fee order, not the cost order. He believed that his notice of appeal included earlier interlocutory order, and that the order at issue did not need to be described because no "benefits" as such were at issue. See Fla. R. App. P. 9.180(b)(4) (requiring the notice of appeal to include a "brief summary of the type of benefits affected"). Counsel noted that he filed an amended docketing statement and a motion for consolidation shortly after he appeared as appellate counsel. He also stated that trial counsel "reasonably expected" that this court would consolidate the certiorari petition and this appeal on its own because the original docketing statement indicated that his certiorari petition had arisen from the same case below. Finally, with respect to the suggestion that Appellant could have moved to dismiss the certiorari petition upon filing this appeal, appellate counsel asserted that there was no reason to do so because the arguments and facts "provided this Court with a justifiable basis to grant the relief requested therein." In other words, because counsel believed Appellant

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<sup>3</sup> The petition for writ of certiorari was denied without comment on March 15, 2016, the day before the show cause order issued. See O'Connor v. Indian River Fire Rescue, 2016 WL 1252362 (Fla. 1st DCA March 15, 2016).

was entitled to a writ of certiorari, they decided not to withdraw the petition despite also pursuing an appeal of the very same retainer and fee order under the guise of appealing the cost order.

### *Discussion*

None of Appellant's arguments persuade us that sanctions are not justified. The sole purpose of this appeal was not to challenge the ancillary cost order identified in the notice of appeal, but to use it as a pretext for making constitutional arguments about the fee statute despite the fact that counsel knew or should have known that the retainer and fee order was not reviewable in an appeal of an order arising out of an ancillary proceeding. See Guckenberger v. Seminole Cty., 979 So. 2d 407, 408-09 (Fla. 1st DCA 2008) (“Costs are statutory allowances recoverable by the successful party as an incident to the main adjudication. They are neither part of the damages claimed nor a penalty and need not be specially pleaded or claimed.” (quoting Golub v. Golub, 336 So. 2d 693, 694 (Fla. 2d DCA 1976))). At every opportunity Appellant's counsel had prior to filing the initial brief, they failed to make it clear to this court that the appeal solely involved the retainer and fee order.

As noted, in all three versions of the notice of appeal, Appellant expressly indicated that the nature of the order on appeal involved a cost order. Appellate counsel points to the initial docketing statement in which trial counsel noted the concurrently pending petition for writ of certiorari as another matter pending before

this court arising out of the same case. But review of the petition at that juncture would have revealed only that there was a pending challenge to the retainer and fee order which, from all appearances, was unrelated to the cost order that was purportedly the subject of the appeal in this case. If this appeal was in fact challenging the same order being reviewed via the petition, counsel should have sought consolidation at the onset of the appeal.

Nor did the amended docketing statement and later motion to consolidate rectify the problem. From the court's perspective, despite counsel's assertion about common issues, the notice of appeal, amended notice, and second amended notice, all identified only the cost order as the order on appeal. Again, that cost order did not mention the retainer and fee order issue. Appellate counsel's statement in the amended docketing statement showed that he was fully aware that, at that point, he had two cases involving the same parties and same issues pending in this court at the same time, both of which made the same legal arguments.

Furthermore, the amended docketing statement simply noted Miles and the certiorari petition as other cases that involved the "exact same issues" when, again, all indications in this case were that the "nature of the order on appeal" was a cost order. The docketing statement form instructs the person completing it to identify similar issues; yet, counsel simply cited the petition and Miles, followed by the assertion they involved the "exact same issues."

It is incumbent upon every member of the Bar to be honest and open with the courts of this state. Although we are not of the view that counsel was deliberately trying to mislead the court (indeed, there would be no reason to do so under the circumstances), this was the net effect of their actions. There simply is not a valid reason for Appellant's counsel to have pursued two separate proceedings arguing the exact same issue (one under the guise of appealing a separate issue), and involving the same parties. Likewise, counsel chose to appeal a cost order for which they advanced no argument in support of reversal, suggesting either that they put their interest in invalidating the fee statute ahead of their client's interest in having the cost order reversed or reduced, or they appealed the cost order without having a valid argument in favor of reversal. Either way, counsel's actions and lack of candor required the court (and Appellees) to expend unnecessary time and effort on this appeal.

For these reasons, we find it appropriate to award attorney's fees against Appellant's attorneys, in favor of Appellees for their attorney's time spent on this appeal. See Fla. R. App. P. 9.410(a) (allowing the imposition of attorney's fees on the court's own motion and after ten days' notice).

*Conclusion*

Based on the foregoing, the cost order is AFFIRMED, and this matter is REMANDED to the JCC for a determination of the amount of attorney's fees to be assessed against Appellant's trial and appellate counsel for this appeal.

WETHERELL, ROWE, and OSTERHAUS, JJ., CONCUR.