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IN THE DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA SECOND DISTRICT

CASE NO**.** 2D14-4566

PETIA B. TENEV, ESQ.,

Appellant,

v**.**

FREDERICK D. THURSTON, D.M.D., Et. Al.,

Appellee.

On Appeal from the Circuit Court in and for Polk County of the Tenth Judicial Circuit, Florida Division

L.T. No. 2011CA-000348

INITIAL BRIEF FOR APPELLANT

November 13, 2014

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PREFACE

Appellant will file a simultaneous Motion to Supplement Record with the Transcripts of Proceedings held on June 6, 2014 and August 6, 2014. This brief was due before the Record was supplemented. Therefore, Appellant is citing these transcripts under the assumption that they would be consecutively added after page 1548 of the Record. However, Appellant is also citing the actual page numbers on the transcripts, in case the page numbers do not match.

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A. TABLE OF CITATIONS

Cases

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B. STATEMENT OF SUBJECT MATTER JURISDICTION

This Court has jurisdiction to review final orders of trial courts pursuant to Fla. R. App. P. 9.030.

C. STATEMENT OF THE ISSUES

1. Did the Judge abuse his discretion when he granted sanctions while failing to make adequate findings of fact?

2. Did the Judge abuse his discretion when he granted sanctions based upon the events surrounding a request to strike a juror for cause?

3. Did the Judge abuse his discretion by assessing sanctions in the amount of $65,025.00 for attorney's fees and $5,853.83 for costs by failing to apply the "Lodestar method" and failing to specify how Appellant's conduct required counsel for Appellee to perform extra work?

D. STATEMENT OF STANDARD OF REVIEW

"The standard of review of an order granting sanctions for attorney misconduct is abuse of discretion." *Rivero v. Meister*, 46 So.3d 1161 (Fla. Dist. Ct. App. 4th Dist. 2010). "An award of fees pursuant to Fla. R. Civ. P. 1.730(c) must contain detailed factual findings describing the specific acts of conduct that justify the imposition of sanctions. In effect, the procedural requirements have been adopted for a final judgment awarding fees under the inequitable conduct doctrine, which permits an award of attorney's fees where one party has exhibited egregious conduct or acted in bad faith. The procedures a trial court must follow in exercising its power to impose attorney's fees against a party under the inequitable conduct doctrine are the same as those involved in the imposition of attorney's fees against a party's attorney." *Cox v. Great Am. Ins. Co.*, 88 So. 3d 1048 (Fla. Dist. Ct. App. 4th Dist. 2012).

"Florida caselaw requires an express finding of bad faith conduct supported by detailed factual findings describing the specific acts of bad faith conduct that have resulted in the unnecessary incurrence of attorneys' fees. The requirement of specificity ensures that the power to sanction is not exercised lightly. Judges must identify the conduct that justifies a sanction. This allows for appellate review of the sanction and the development of a body of law describing the conduct that gave rise to the sanction. In this way, Fla. R. Civ. P.

1.730(c) sanctions are applied responsibly and diligently both to penalize those whose conduct may be deemed to warrant such a sanction, and to deter those who might be tempted to such conduct in the absence of such a deterrent." *Cox v. Great Am. Ins. Co.*, 88 So. 3d 1048 (Fla. Dist. Ct. App. 4th Dist. 2012).

"To comply with the procedural requirements that the caselaw imposes for an attorney's fee award under Fla. R. Civ. P. 1.730(c), a trial court should make specific factual findings detailing a party's breach or failure to perform under a mediation agreement and identify those attorney's fees and costs that the opposing party incurred as a result of such conduct." *Cox v. Great Am. Ins. Co.*, 88 So. 3d 1048 (Fla. Dist. Ct. App. 4th Dist. 2012). "A trial court's exercise of the inherent authority to assess attorneys' fees against an attorney must be based upon an express finding of bad faith conduct and must be supported by detailed factual findings describing the specific acts of bad faith conduct that resulted in the unnecessary incurrence of attorneys' fees. Thus, a finding of bad faith conduct must be predicated on a high degree of specificity in the factual findings." *Rivero v. Meister*, 46 So.3d 1161 (Fla. Dist. Ct. App. 4th Dist. 2010).

E. STATEMENT OF THE CASE

I was sanctioned by the Trial Court with the amount of $65,025.00 for attorney's fees and $5,853.83. The Trial Court Judge failed to make express findings of bad faith conduct supported by detailed factual findings describing such conduct resulting in the unnecessary incurrence of attorneys' fees. Instead, the transcript of the hearing on June 6, 2014 reveals that the Trial Judge made the following vague findings and condescending statements to justify an award of sanctions:

- The undersigned failed to silence her cellular telephone, allowing the same to ring once during the hearing on Plaintiff's Motion for Sanctions;
- The undersigned displayed a "lackadaisical" attitude toward protocol;
- The undersigned engaged in "outrageous, willful, intentional, contumacious, unprofessional and unethical" behavior.

Subsequently, in the Order Granting in Part Plaintiff's Motion for Sanctions, the Trial Judge found that "Counsel's bad faith conduct leading up to, during, and even subsequent to the Jury Trial which began on May 5, 2014, and which mistried on May 6, 2014, reflects an intentional, consistent, deliberate and contumacious disregard for this Court's authority. In particular, the conduct of Defendant's counsel pertaining to her May 6, 2014, request to disqualify a juror for cause after the jury was sworn on May 5, 2014, well

establishes counsel's unethical and willful disregard of or gross indifference to the authority of the Court." Similarly, the Order lists a variety of demeaning statements and lacks the specificity required by the Florida case law.

It would appear that the only conduct about which the trial court made express findings of any kind were the cellular telephone incident and the request to disqualify a juror for cause. Certainly, the unintentional breach of courtroom decorum caused by a telephone ringing, during a sanctions hearing with no jury or clients present, cannot rise to the level of sanctions. As to the request to disqualify a juror for cause, this is a commonplace occurrence during trial. Absent any other details, this event cannot serve as justification for sanctions and should be grounds that the lower court be reversed.

Additionally, the amount of hours and hourly rates for fees and costs sought is unreasonable, highly excessive and outrageous and the undersigned does not have the ability to pay them. Moreover, because the Court below failed to properly utilize the Lodestar process, the decision below must be reversed, and the Order Granting in Part Plaintiff's Motion for Sanctions should be reversed.

F. STATEMENT OF THE FACTS

a. Introduction

This case involves the separation of the dental practice, Thurston and Acosta Dental Associates, P.L. I represent the Defendants, Acosta Dental Associates, P.L. and Dr. Henry Acosta, D.M.D., who were 50% co-owners of the practice. The case was originally filed in January 24, 2011. I was hired by my client on March 1, 2012. The case was in the mid-stage of litigation because my client had decided to change attorneys.

The litigation in this case has been very lengthy and highly contested on both sides. When I was hired, my client and his spouse were already stressed and discouraged because, as he told me, he was kicked out of the practice by his partner with nothing but his shirt on. As a result, he was now involved in litigation which tied up his assets and he had no idea what happened to his equipment, patient charts, or distributions. While the other co-owner, Dr. Frederick Thurston, D.M.D., continued to operate out of the same practice, using the same equipment and patients, but under a different entity. My client was never bought-out.

I took the case and since then I have been tirelessly representing his interests. We had a previous mistrial declared *sua sponte* during a bench trial on February 1, 2013. After a recusal of the prior Trial Judge, Judge Dale

Durrance was assigned as the new presiding Judge in this matter. The trial had already been bifurcated into a jury and non-jury trial. On May 5, 2014 we had just completed the new non-jury trial with Judge Durrance and proceeded to jury selection for the jury portion of the trial.

b. <u>What happened prior to the Court proceedings on May 6, 2014</u>

On May 5, 2014, we selected the jury to proceed with the jury trial. The Judge's assistant provided each person on our table with a copy of the seating chart of the jurors. My client had his own copy. Judge Durrance asked the preliminary questions of the venire regarding whether they knew or had any connection to any of the people in the Courtroom. Juror, Kristen Coker, responded negatively to this question. [R. at Pg. 992: L 14-16 Transcript of Proceedings held on May 5, 2014, P 28: L 14-16]. After we accepted the jury panel, the Judge administered the oath to the jury and gave the following instruction:

> "THE COURT: If you ladies and gentlemen in the jury box would stand and raise your right hand, our clerk will administer the juror oath to you.
> THE CLERK: Do you solemnly swear or affirm that you will well and truly this case between the plaintiff and the defendant so named and a true verdict render according to the law and the evidence, so help you God?
> THE JURORS: I do.
> THE CLERK: Thank you.
> THE COURT: Please be seated. We don't intend to leave you all spread out like that, and we're not going to leave you by yourself back there on the back row, Mr. Lipham. When you return in the

> morning, there will be a seating chart for your assigned seat throughout the trial, and so Jason will take care of informing you of that when you come back in the morning. He will familiarize you with the jury room before you leave today and then make sure that your parking is made available for you.
> I want to remind you that during this overnight recess do not discuss this case among yourselves or with any other persons, and do not permit anyone to say anything to you in your presence about the case, do not read or listen to any reports about the case, and do not do any electronic research on the Internet of any other electronic devices concerning this case or the location of this case, and do not have any conversation whatsoever with the attorneys, the parties, or any of the witnesses who are listed to appear in this case.
> Any additional instructions by the plaintiff?
> MR. CAMPBELL: No, sir.
> THE COURT: By the defense?
> MS. TENEV: No, Your Honor."

[R. at Pg. 1114-1115, Transcript of Proceedings held on May 5, 2014, P 142-143].

While Judge Durrance gave the above instruction, he was addressing only the jury when he told them that they are not allowed to perform internet research or any other kind of research. After that he looked at both parties and asked whether we had any further instructions for the jury panel. My client and I had a good faith belief that that order was applicable only to the jury. The Judge did not give an order, which stated specifically that my client was not allowed to take home the list of the jurors or to perform research on the jurors.

Following the instruction the Jury was dismissed and nothing further was done. There were no opening statements and no evidence was presented.

We adjourned at 4:21 p.m.

I drove back to Pinellas County. I was really tired and just wanted to get some sleep, so that I can be rested for the next day.

At 7:59 p.m., Ms. Katherine Loh, my client's spouse, sent me a text message stating:

"You can kick out Kristen Coker. She is Facebook friends with a hygienist who temps for our Auburndale office."

Immediately after I woke up the next morning, I met with my assistant Ralitza Hristova around 7:00 a.m. At 7:21 a.m., I responded to Ms. Loh's text message by stating "What is the name of the hygienist?" Ms. Loh responded back at 7:25 a.m. stating "Suellen Nipper Williams". Please see a screenshot of the text messages from my telephone attached as Exhibit "A". Dr. Acosta is extremely busy as he runs a dental office, so he prefers that I speak with his wife, Katherine Loh. At the start of my representation, he informed that I need to speak to his spouse regarding all matters as she is the one that handles things for him. He told me that if his spouse tells me something, I need to take it as if it came from him. As a result, during my representation of Dr. Acosta, I have primarily communicated with his spouse regarding this case. I have been assured by Dr. Acosta, that his spouse and him are communicating constantly on the matter and they make all decisions together.

My assistant and I headed toward Polk County. At that time, while driving, I opened my Facebook account and typed "Sueellen Nipper Williams" in the search button. Due to the fact that I was driving, my assistant and I decided that it was not a good idea for me to be driving and holding my telephone, so I put the telephone away. I said to my assistant that I will just let the Court know and request that we question the Juror about her relationship with Ms. Williams. I expressed to my assistant that I really wanted to call the Florida Bar hotline, as I usually do, to inquire on how to proceed. However, the hotline was closed at this time.

Due to the long drive, I arrived at the Court right at 9 a.m. and had no time to confer with my client, who was sitting at the Defense table. The Judge began addressing us with preliminary matters. As I was being respectful to the Court, I was obligated to respond to the Judge and not to interrupt him. So, I waited for the first opportunity to bring up the topic about the juror in question without disturbing the procedure that was being directed by the Judge.

I decided to bring it up to the Court as soon as possible and before the jury was called back in to the Courtroom. The Judge began with preliminary procedure and I was obligated to address the matters that the Judge requested. Twenty minutes later, the Judge indicated we are finished with preliminary procedure, and he stated that the Jury will be called in. This was the first

available moment for me to bring up the subject regarding the Juror. [R. at Pg. 904: L 20, Transcript of Proceedings held on May 6, 2014, P 20: L 20].

I stated "I would like to strike a juror for cause before we do that." [R. at Pg. 904: L 20, Transcript of Proceedings held on May 6, 2014, P 20: L 20]. The Judge responded with "Did I hear you say something about you striking a juror?" [R. at Pg. 904: L 24, Transcript of Proceedings held on May 6, 2014, P 20: L 24]. The Judge appeared angered to me and tension begin to build in the courtroom after he said that. I felt tension build up in my stomach, but I continued. I responded that the juror is friends on Facebook with an employee of Dr. Acosta. I believed I was doing the right thing by bringing to the Court's attention that the Juror may be connected to my client. However, the Judge appeared even angrier and he asked when and how I learned this. I had no idea why the Judge was angry. I did not want to respond with how I learned about this because that meant exposing my client, as I still did not know why the Judge was angry. So, I just responded with "Last night." [R. at Pg. 905: L 11, Transcript of Proceedings held on May 6, 2014, P 21: L11]. At that moment, I hoped that the Judge would stop his inquiry on how I learned it and address the issue of whether that Juror should be stricken for cause because we needed to ensure that jury is neutral and does not have any relation to any of the parties involved. Unfortunately, the Judge appeared more interested on how I found

this and I could see in his eyes that there would be repercussions for anything I would say from this point on.

At this point, I really wanted to consult with my client to find out what really happened. However, the Judge already appeared determined to find wrongdoing and any conversation with my client could have given the impression that we were collaborating a story. My instinct was right because later the Judge said that all this could have been a fabrication. [R. at Pg. 916: L 1, Transcript of Proceedings held on May 6, 2014, P 32: L 1]. Therefore, I made sure that there wasn't even a slightest appearance of collaboration. It was clear from this point on that the Judge was not so much concerned with the neutrality of the Juror in question, rather than finding a wrongdoing on my client's and on my part.

Therefore, from that point on my only concern was to protect my client. So, I stated, "I was on Facebook and I found out." [R. at Pg. 905: L 14, Transcript of Proceedings held on May 6, 2014, P 21: L14]. My statement gave the very minimum information because I wanted to protect my client. It is true that I tried I go on Facebook in the car and it is true that "I found out" but from a text message rather than Facebook. However, the Judge misinterpreted my statement and assumed that I was the one, who did the research. He seemed furious and he stated I have violated the instructions he gave to the jurors.

15 THE COURT: So the very instruction I've been
16 giving these jurors, you as an officer of this court
17 violated that and went on and started doing research
18 and stuff and doing things outside of the parameters
19 of this courtroom?

[R. at Pg. 905: L 15:19, Transcript from Proceedings held on May 6, 2014, P 21: L 15:19].

This explained to me why the Judge was angry. Yet, I was confused. He just stated that the instruction was given to the jurors and that I violated the instruction he gave to the jurors. How can the Judge believe that an instruction given only to the jurors was also automatically applicable to the attorneys and the parties, without having to specifically rule so? I was immediately perplexed as it was my belief these instructions only applied to the jury, not to me or my client. However, the Judge was under the belief that somehow I should have known that this instruction also applied to me and my client.

Next, Judge Durrance revealed to me that he misunderstood that I was the only one who was doing my own research. It was difficult to interrupt the Judge as he was speaking. I said I apologize and I wasn't aware but I could not finish my sentence. What I wanted to say was that I wasn't aware the instructions applied to all of us and not only to the jury and I was not the one who did the research. While I was trying to speak, the Judge continued to talk over me and said, "I can see where this is going." [R. at Pg. 906: L 11,

Transcript of Proceedings held on May 6, 2014, P 22: L11]. That meant to me that he now planned to refer this matter to the Florida Bar.

At this point, I still decided to protect my client as I was sure that opposing counsel would request sanctions against him and the Judge would grant whatever sanctions were requested. So, I stated at the first chance I had to speak, "I wasn't aware. I could retract that, and that's fine. I don't know the extent to it, what it is, but that did come to my attention. And I could retract that. I apologize." [R. at Pg. 906: L 13-16, Transcript of Proceedings held on May 6, 2014, P 22: L 13-16]. The reason I said that I could retract that is because this was my last attempt to protect my client. I also, wanted to correct the Judge's assumption that I was the one who did the research and that's why I said that I don't know the extent of it and it did come to my attention. My statement, "it did come to my attention," explained that someone told me and that I was not the one who did the research. However, I still tried not to disclose who told me.

The Judge then allowed opposing counsel to speak. Opposing counsel stated that he wanted to figure out how and when we came about this information and raised question to my veracity. [R. at Pg. 907: L 2, Transcript of Proceedings held on May 6, 2014, P 23: L 2]. The Judge looked at me and now appeared more determined to find out how I knew that information. "Do

you want to explain for the record just how you came about discovering this last night, Ms. Tenev?" [R. at Pg. 908: L 3-5, Transcript of Proceedings held on May 6, 2014, P 24: L3-5]. I took that as an order from the bench to disclose how I knew. I reluctantly complied and stated, "Yes, Your Honor. Actually, I was notified by Dr. Acosta's spouse that this person had a Facebook friend who worked for Dr. Acosta." [R. at Pg. 908: L 6-8, Transcript of Proceedings held on May 6, 2014, P 24: L 6-8]. Obviously, there is no way I could do this research on my own, because I don't know who works for my client.

At that moment, I realized I could have invoked confidentiality as provided by rule 4-1.6; however I didn't have time to do any research on whether I can do that for my client's spouse. So, the only thing I could surmise at that moment is that my client has already informed me a few times that he wants the case to be over with and that he just wants to get out of Polk County Court and to just appeal the whole case in the Appeals Court. If I have claimed privilege as provided by the rule, it would have resulted in an appeal of just that issue, which would have incurred further expenses to my client and protracted litigation, and all of that was in direct conflict to my client's instructions. After the Judge ordered me to disclose my source of information, I was forced to obey. I reluctantly obeyed and disclosed that it came from my clients' wife, Katherine Loh.

The Judge continued with his inquiry and I disclosed that I was notified by text massage last night at 7:59 p.m. The Judge again stated, "I see where all this is going to be going." [R. at Pg. 909: L 21-22, Transcript of Proceedings held on May 6, 2014, P 25: L 21-22]. I now had an even bigger knot in my stomach because I was certain that the Judge would file a Bar complaint against me and also sanction my client. The Judge asked me what I did once I found out the information. I said, "Nothing, I just came here and I just mentioned it." And then he asked, "So you didn't go on Facebook?" I said, "I haven't had the time to do anything. I've been sleeping." [R. at Pg. 911: L 5-9, Transcript of Proceedings held on May 6, 2014, P 27: L 5-9]. I stated," No, I did not go on Facebook…I have not confirmed that." [R. at Pg. 911: L 19-22, Transcript of Proceedings held on May 6, 2014, P 27: L 19-22]. What happened was that, I opened the Facebook application in the car, in an attempt to confirm it, but I wasn't able to do so because I was driving. Then, opposing counsel stated that "We all understand that the Court is taking this very seriously" and that I have given different stories to the Court. [R. at Pg. 912: L 16-24, Transcript of Proceedings held on May 6, 2014, P 28: L 16-24]. The Judge agreed with opposing counsel by stating that "this is a very serious matter…we are going to get to the heart of this." [R. at Pg. 913: L 7-12, Transcript of Proceedings held on May 6, 2014, P 29: L 7-12].

It was now even more certain that the Judge was going to sanction my client and file a Bar complaint. It was my expectation that the Judge would be more interested in the fact the there is a juror that has potential connection to Dr. Acosta, rather than how I obtained the information. However, the Judge was angered and appeared determined to find out how the information was obtained.

Next, opposing counsel requested, that Ms. Coker be separated from the rest of the jurors and agreed she should be dismissed as a juror. The Judge decided just to bring her in the courtroom and question her and again stated, "I know what I am going to do with this record." [R. at Pg. 915-916, Transcript of Proceedings held on May 6, 2014, P 31-32].

Instead of calling the Juror first, the Judge called my client's spouse into the Court immediately. It appeared to me, that the Judge assumed our stories would not match up. That is why I did not communicate with Mrs. Loh until she took the stand. At that point of time, I wanted to prevent the exposure and humiliation of my client but I wasn't able to do so because the Judge gave a direct order. I began to worry about her health.

While Mrs. Loh was waiting outside for the Judge to call her, opposing counsel and I were allowed to do research on the issues that arose. The first thing that I did was to consult with my client, who told me that he took the juror

list home and his wife did the research. Immediately after that, I called the Florida Bar hotline and I was informed that there is no rule that states that an attorney is not allowed to research the jury, as long as no contact occurs. However, the Bar declined to give an opinion about whether a witness or a party can research a jury member. The Bar pointed me to a few opinions from other jurisdictions that are attached hereto. For the next few minutes, I continued my research on Lexis on whether a party or potential witness can research a jury and I found nothing.

Mrs. Loh arrived within twenty-five minutes and she seemed extremely nervous and stressed. The Judge called Mrs. Loh to the stand and the Judge and opposing counsel questioned her. She stated that she just wanted to research the jury. She testified that she found the seating chart of the jury in her husband's pocket. She stated that she had no intention of contacting them and that no contact occurred. Her voice was trembling throughout her testimony. She stated to me on the following day that she felt that the Judge embarrassed and humiliated her. She indicated to me that during the questioning she felt super stressed and that later her blood pressure increased and she feared she may have another stroke.

Additionally, the Judge was saying that my client violated an order. The Judge stated that my client should have known better and not taken the jury list

home and even if he did not know, he should have asked me. [R. at Pg. 956: L 1-12, Transcript of Proceedings held on May 6, 2014, P 72: L 1-12]. However, there was no specific order from the bench that my client couldn't take home the list of the jurors. The Judge's clerk had given each person in the Courtroom a copy of the jurors' seating chart. My client had his own copy.

I also explained to the Court that I tried to go on Facebook, but I couldn't because I was driving.

> 23…Once I did receive the
> 24 name, at that time I was driving towards here and I
> 25 couldn't really use my phone and drive at the same
> Page 57
> 1 time. I did attempt to go on Facebook, but I never
> 2 did verify that those names were actually on
> 3 Facebook, so I really didn't accomplish that. So as
> 4 soon as I walked in here, I raised that with the
> 5 Court as soon as possible that I had it.

[R. at Pg. 940-941, Transcript of Proceedings held on May 6, 2014, P 56-57].

Finally, the Judge decided to call the juror in question, Ms. Kristen Coker. The remaining jurors continued to wait outside. The juror stated that she personally knows Ms. Williams because she is best friend of a family member and she is her hygienist. She testified that she sees her on a regular basis. [R. at Pg. 944: L 11-17, Transcript of Proceedings held on May 6, 2014, P 60: L 11-17]. However, she had no idea whether she worked for one of the doctors in this case. She testified that she was not contacted by anyone in the Courtroom.

"Q. Have you discussed this case with anyone? A. No, sir." [R. at Pg. 944: L 1-3, Transcript of Proceedings held on May 6, 2014, P 60: L 1-3].

After my client's spouse testified and the juror was questioned, opposing counsel moved for a mistrial. I consulted with my client, who advised me that he did not want a mistrial. I argued to the Court that there is no reason for a mistrial and that we can just replace this juror with the alternate and begin.

The jury panel, including the alternate juror, remained outside at all times. We have not had opening statements and no evidence was ever presented to the jury. However, the Judge granted opposing counsel's motion for mistrial, even though earlier he expressed his intention to "get rid of her and go ahead and get started." [R. at Pg. 917: L 3-4, Transcript of Proceedings held on May 6, 2014, P 33: L 3-4]. The Judge proceeded to give a very demeaning and embarrassing speech toward me in front of my client and everyone else present in the Courtroom. In his speech, he also suggested that Polk County was somehow different than Pinellas County by stating the following:

> "I don't know if you practice over in Pinellas County predominantly, and maybe that's the way you practice, and maybe they let you do that in Pinellas County, but this is not Pinellas County, and I am not about to let a trial proceed with that kind of conduct, but I am going to let the Florida Bar deal with it."

[R. at Pg. 957: L 4-10, Transcript of Proceedings held on May 6, 2014, P 73: L 4-10].

The Judge's statement caused my client concern. He later asked me whether the Judge was insinuating that he should have hired an attorney form Polk County and not from Pinellas County. Clearly the Judge's speech gave the impression of an emotional stake in the proceedings, and may rise to the level of raising concerns regarding his objectivity.

At the end, The Judge reserved ruling for any sanctions that opposing counsel may request. The Judge also sanctioned me by ordering that I pay for the transcript of the proceedings held on May 6, 2014. I paid $827.00.

Opposing counsel did file a Motion for Sanctions, which Judge Durrance granted in an Order dated June 23, 2014 despite my objections. [R. at Pg. 701-703]. Judge Durrance was subsequently transferred and a hearing regarding the amount of sanctions was held by Judge Keith Spoto on August 6, 2014. Opposing counsel called Neal O'Toole, Esq., as an expert witness to testify as to the reasonableness of the fees and costs requested in their Motion for Sanctions. Judge Spoto noted that he was familiar with Mr. O'Toole:

> 18 THE COURT: And obviously, for the record,
> 19 Mr. O'Toole is a local attorney, and I've been
> 20 around this area for a long time. I know
> 21 Mr. O'Toole, as I know other attorneys in this room
> 22 that are from this area.

[R. at Pg. 1563, Transcript of Proceedings held on June 6, 2014, P 14].

After direct examination by opposing counsel, I was given the opportunity to cross examine Mr. O'Toole.

Mr. O'Toole testified that he was familiar with the alleged misconduct leading to the Motion for Sanctions, but admitted that he was unfamiliar with some aspects of the case, and indeed that he had not read many of the documents regarding the underlying case. I then questioned Mr. O'Toole how he could come to a conclusion as to the reasonableness of the fees requested if he was not familiar with the facts and posture of the underlying case:

Are you familiar with the alleged misconduct that relates to the Motion for Sanctions?
A. I read the motion and I read the transcript.
Q. Could you please describe to me what was the alleged misconduct?
A. As I understand it, there was a couple of things, in general terms. One is this Facebook issue with the witness.
Q. Can you be a little bit more specific about the Facebook issue, please?
A. I can tell you what I recall. To be honest, it was not that important to me because the finding had been made. But, as anecdotal information, as I understood it, there was some attempt to identify jurors on Facebook the evening before by the defendant's wife, and that somehow you were involved in that. It's unclear to me whether it was that night, the morning of, and that then when this came to light before the Court, there was varying inconsistent stories told to the Court, to the Court's dire dissatisfaction.
Q. Do you know how this came to light to the Court?
A. No. I don't remember.
Q. Okay. Do you know whether I brought it up to

19 the judge?
20 A. Don't know.
21 Q. Did you read the accountant's report?
22 A. No.
23 Q. Did you understand the judge's partial final
24 judgment?
25 A. I don't think I read that
1 Q. You didn't read that?
2 A. I certainly didn't read it in any detail. It's
3 not among the documents I had copied.
4 Q. Well, since you aren't really sure what
5 happened, how would you be able to surmise what time
6 would be relevant to sanction me with stemming from the
7 alleged conduct out of which you weren't really sure
8 what that was?
9 A. The Court's order, what it said, all time.
10 Q. Yeah. But just because I just asked you right
11 now you weren't really sure what that was. You just
12 said you didn't read the partial final judgment, you
13 didn't -- counsel just spoke about all the things that
14 happened throughout the trial. You said you weren't
15 familiar with that. So really -- and, again, in the
16 Facebook issue, again you weren't really familiar with
17 what happened, you weren't sure whether I brought it up
18 or not. That means you didn't read the transcript. So
19 how would you be able to surmise that all of these
20 entries here are the cause of my misconduct?
21 A. I would answer --
22 Q. Alleged misconduct.
23 A. I don't think it's alleged misconduct because
24 there's an order that says it.

[R. at Pg. 1630-1633, Transcript of Proceedings held on August 6, 2014, P 21-23].

Opposing Counsel objected to this line of questioning, and Judge Spoto agreed with the objection, stating:

6 [W]hat occurred in the case that made Judge
7 Durrance make the determinations that he made is
8 not relevant to my determination today, whether
9 Mr. Campbell's telling me about it or whether you're
10 telling me about it. Judge Durrance has made the
11 determination, he has entered the order.
12 So I am -- it is my job and duty at this point
13 to determine what the reasonable fees are that
14 Judge Durrance has ordered should be assessed. And
15 so that's what I'm looking at.
16 I'm not looking to retry the order, I'm simply
17 looking at reasonable fees. To the extent that you
18 ask questions and don't just make statements about
19 trial preparation or preparation for the Motion for
20 Sanctions, you are welcome to do that.
21 But the objection is sustained in that it was
22 not a question propounded to Mr. O'Toole, it was a
23 statement that was put forth by the attorney
24 questioning Mr. O'Toole. And now you may proceed,
25 ma'am.

[R. at Pg. 1637, Transcript of Proceedings held on August 6, 2014, P 28].

G. ARGUMENT

a. ISSUE ONE - The Trial Court Judge abused his discretion when he granted sanctions because he failed to make adequate findings of fact.

Judge Durance failed to make any specific findings of bad faith conduct during his oral ruling when he assessed sanctions against me. Rather he made the following statements, which are just general and not specific:

> 19 The
> 20 Court has never muffled anyone from either side in
> 21 any case, any time, anywhere, even whenever I was
> 22 listening to immaterial, irrelevant, already ruled
> 23 on, res judicata matters, I still sat patiently and
> 24 waited and listened, not interrupting you but
> 25 letting you fully be heard.

[R. at Pg. 1594, Transcript of Proceedings held on June 6, 2014, P 45].

> 6 I think that I've made plenty of sufficient
> 7 findings in the transcript that has been filed along
> 8 with your motion that was also packaged and sent to
> 9 the Florida Bar that is some 76-pages long. I don't
> 10 need to go over and reiterate all of that again, but
> 11 I do find that the conduct from an attorney who is
> 12 an officer of the court was just simply outrageous.
> 13 It was willful. It was intentional. It was
> 14 contumacious. It was unprofessional, and it was
> 15 unethical, and it did, as a result of all of that,
> 16 it ended, resulted in a mistrial because the Court
> 17 did make a finding that there could not be a fair
> 18 trial.
> 19 So, based on all of that and my finding that
> 20 your conduct was each and every one of those, I will
> 21 grant attorney's fees and costs levied against you
> 22 to the plaintiff for that portion of the preparation
> 23 and readiness for the jury trial and for the time

24 spent for the preparation and for the attendants of
25 the jury trial. I will reserve on an amount.

[R. at Pg. 1596, Transcript of Proceedings held on June 6, 2014, P 47].

16 but at 2:00, Ms. Tenev, your cell phone that you've
17 had on the counsel table went off, it rang. I
18 didn't interrupt any --
19 MS. TENEV: I apologize.
20 THE COURT: -- of the proceedings, I didn't
21 interrupt the proceedings. I didn't do or say
22 anything, but you had to jump and scramble and it
23 was during while opposing counsel was making
24 argument, but that was rude and disrespectful, and
25 attorneys are told, turn your cell phones and
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1 electronic gadgets off when you go into court, when
2 court is in session.
3 But I just wanted this record, this transcript
4 to show that continuing kind of, I don't know how to
5 best describe it, just lackadaisical maybe -- maybe
6 that's the best description -- for protocol.

[R. at Pg. 1593-1594, Transcript of Proceedings held on June 6, 2014, P 44-45].

It seems that the only specific conduct that the Judge discussed was that my cell phone was not fully silenced during the proceedings on June 6, 2014. However, the conduct that prompted the Motion for Sanctions was the Facebook issue which occurred on May 6, 2014. The Judge did not state in any detail how the Facebook issue amounted to bad faith, which was sanctionable. Additionally, assessing attorney's fees for the whole preparation of the jury trial is an outrageous and excessive sanction.

On June 23, 2014, Judge Durrance issued an Order, prepared by opposing counsel, granting opposing counsel monetary sanctions against the undersigned. I had previously objected to opposing counsel's proposed order and proffered an alternative proposed order. [R. at Pg. 697-700]. Despite my objections, the final Order referred to "bad faith" conduct leading up to, during, and even subsequent to the Jury Trial which began on May 5, 2014. This is clear error and must be reversed.

As previously noted, Florida law requires an **express finding** of bad faith conduct supported by **detailed factual findings** describing the specific acts of bad faith conduct. In the Order at hand, the conduct so vaguely described because it simply refer to actions taken while zealously representing my client's interests as required by my Oath of the Florida Bar. My actions were taken to ensure my client could receive a fair trial.

Further, because the instant Order is vague as to the alleged bad faith conduct, it is impractical to defend against. Since the reviewing tribunal has no evidence as to what behavior the Trial Judge is referring to, the Lower Court's decision must be reversed.

I take very seriously the privilege of being an Officer of the Court, which I have earned through very hard work and determination. I deeply believe that the American Judicial System is the one system in the World where Justice is

most possible because of the Constitutional right to an unbiased and disinterested jury. I feel proud and fortunate to be a licensed attorney in the United States of America. That is why I believe it is my duty, as an attorney, to ensure that the presiding jury is neutral and has no connections to any party, attorney, or judge. Additionally, my clients hire me because they expect me to represent their interests tirelessly, fight for their rights, and to protect them. I strive every day to meet those expectations to the best of my abilities.

In this instance, I had a very short period of time to determine how to proceed. In a few of minutes, I had many different duties to weigh, which were intertwined in a very complex manner. I take all of the following duties very seriously.

First, I had a duty to disclose to the Court that a juror may be friends with an employee of my client. If that is so, then having this juror on the panel would undermine the American Judicial System because she may be biased. Additionally, since it has been brought to my attention, I had a duty to disclose it or I would have violated the Florida Bar Rules of Professional Conduct. Moreover, if it was later discovered that this Juror was not impartial due to her connection to Ms. Williams, then it may have resulted in a mistrial. I decided that I had a duty to disclose it to the Court, move to strike the juror for cause, and to ask the Court to replace her with the alternate juror. This meant to me

that I had to disclose that one of the jurors may have a connection to my client and not how I obtained the information.

As an officer of the Court, I also have a duty of candor to the Court. What that meant to me was to be honest, if asked, about how I obtained the information. However, at the same time as an attorney for my client, I had a conflicting duty to protect my client and his confidences. That means to me that I should protect my client by disclosing the very least possible information. I had been previously informed that Mrs. Loh has been diagnosed with having multiple mini strokes due to high blood pressure. These are serious health issues which become exacerbated due to the stress generated by this litigation. Increased stress levels would lead to high blood pressure, which can lead to a stroke. She had personally told me that she had already been admitted to the hospital once as a direct result from this case due to the accumulated stress. She had also told that she does not want to be a witness in this case, unless she really has to, because she fears that she may have a stroke on the stand. Therefore, this is the reason why I wanted to protect her.

Although, she was under subpoena from opposing counsel to be questioned during the jury trial, after we adjourned on May 5th, 2014, opposing counsel told me that their only witness for the jury trial will be Dr. Thurston. The Judge had limited the jury issues to a point that Mrs. Loh's testimony was

no longer needed. I had strenuously objected that the Judge had deprived my client from his Constitutional right to a trial by a jury because he disposed of the majority of the issues, which in my opinion were issues that should had been submitted to the jury, during a bench trial that was conducted before the jury trial.

I also had a duty to zealously represent my client's interests. In order to do so, I had to strike the Juror, to ensure a fair trial from an impartial jury and to prevent another mistrial.

I also considered any prior instructions given to me by my client. I knew that my client had instructed me to serve his interests and that I had the permission to disclose as much as information as I felt necessary to accomplish this goal. Yet, at the same time he wants to protect his wife from receiving another stroke.

Furthermore, I had no time to call the Florida Bar and to do any research; I had to just go by my memory of the rules. I thought of Rule 4-1.6, which states that I am allowed to disclose information in order to serve my client's interests, however, the rule also states, "when disclosure is mandated or permitted, the lawyer shall disclose no more information than is required to meet the requirements or accomplish the purposes of this rule." At that time, I was unsure what was the procedure regarding claiming privilege and

confidentiality especially in this situation, where the message was received by my client's spouse. My client through his wife's text message had given me the permission to reveal to the Court that a juror may have connection to him. I had his general permission to disclose as much information necessary to protect his interests. Invoking privilege would have resulted in an appeal of just that issue. However, I knew that my client does not want to protract the litigation any further and that he just wants this case to be over.

I believe that I made the right decision by deciding to provide the very least possible information to the Court in order to fulfill all of the above mentioned duties.

After these proceedings, I consulted two attorneys regarding my path forward. Both attorneys advised me that I had to protect my clients' interests by filing a motion to recuse the Judge due to the disparaging remarks he made on May 5, 2014. To protect my clients' interests, I followed their advice and filed the motion to recuse. Opposing counsel objected and the Judge denied the motion. I filed an amended motion to recuse, which was also denied. Opposing counsel also filed a motion for sanctions. Opposing counsel sought sanctions against me and my client. Opposing counsel wrongfully accused my client and his wife in the motion for sanctions by claiming that they made an attempt to contact the

juror. This is completely contradictory to the record because Mrs. Loh testified that she did not contact the juror and the juror stated that she was not contacted.

21 Q. And did you friend either Ms. Williams or
22 Ms. Coker?
23 A. No.
24 Q. Did you have any contact with them at all?
25 A. No.
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1 Q. Through the Internet or personal?
2 A. No.
3 Q. Are you aware of anyone that's had any contact
4 with either one of them this week?
5 A. No, not that I know.
6 Q. Ms. Williams or Ms. Coker?
7 A. No, I do not.
8 Q. Does Ms. Williams know what's going on with
9 this?
10 A. No. Like I said, she's a temp, so unless we
11 need her to fill a schedule, we wouldn't be contacting
12 her.
13 Q. And does Ms. Coker know, as far as you know,
14 about this discovery you made?
15 A. No, I don't talk to her, no.

[R. at Pg. 933-934, Transcript of Proceedings held on May 6, 2014, P 49-50].

Looking up a name on Facebook in no way, shape or form constitutes an attempt to make contact. In the Motion for Sanctions, opposing counsel accuses me and my client of a "willful disregard of the Court's order", yet there was never an order directed to me or my client

which stated that no internet research can be done on the juries. Opposing counsel alleges that my client took home the juror's background information, which suggests that he took home the jurors' questionnaires. However, it was clear on the record that Ms. Loh only found the seating chart of the jurors in her husband's pocket. "It was a one-page handout. He folded it into his pocket. And like boxes." [R. at Pg. 933: L 7-8, Transcript of Proceedings held on May 6, 2014, P 49: L 7-8]. This chart was provided to him by the Judge's clerk. There were no instructions by the Court that he could not take the seating chart home.

The Florida Bar ethics hotline was unable on May 6, 2014 to provide an opinion whether researching a juror via social media such as Facebook was permissible in Florida. The Bar did however direct the undersigned to secondary authority from other states. While a complete survey of the regarding this issue is unrealistic at this point in the proceedings, the undersigned would direct this Court's attention to *Ethical Issues that Arise from Social Media Use in Courtrooms*, New Jersey Lawyer Magazine, October 2013 (hereinafter *Ethical Issues).* [R. at Pg. 678-688]. The authors of the article discuss social media research of jurors during both the selection process and during trial. Discussing social media research of jurors during *voire dire,* the authors concluded

that support existed that online research of potential jurors is permissible in New Jersey Courts. *Ethical Issues,* at 2. Regarding social media research of jurors during trial, the authors concluded that while ethical restrictions prohibit an attorney communicating directly or indirectly with sitting jurors, "attorneys are well served to engage in unobtrusive monitoring of jurors during trial to ensure an unbiased, independent jury." *Ethical Issues, at 3.*

To sum up, my actions in this matter have consistently directed to zealously represent my client to ensure he received a fair and impartial trial. The Order Partially Granting Sanctions should therefore be reversed.

The standard of review of an order granting sanctions for attorney misconduct is "abuse of discretion". The Supreme Court of Florida noted in *Moakley v. Smallwood,* 826 So. 2d 221, 226 (Fla. 2002) that trial courts possess the inherent authority to impose sanctions for the attorneys' conduct. However, the *Moakley* court also noted that such sanctions "must be based upon an express finding of bad faith conduct and must be supported by detailed factual findings describing the specific acts of bad faith conduct that resulted in the unnecessary incurrence of attorneys' fees. Thus, a finding of bad faith conduct

must be predicated on a **high degree of specificity in the factual findings**." *Moakley,* 826 So. 2d at 227.

As noted in *Moakley*, such a high degree of specificity is imperative to permit an attorney to zealously represent his or her client: "In exercising this inherent authority, an appropriate balance must be struck between condemning as unprofessional or unethical litigation tactics undertaken solely for bad faith purposes, while ensuring that attorneys will not be deterred from pursuing lawful claims, issues, or defenses on behalf of their clients or from their obligation as an advocate to zealously assert the clients' interests". *Moakley,* 826 So. 2d at 227.

In the case at hand, the Trial Court Judge failed to make express findings of bad faith conduct supported by detailed factual findings describing such conduct resulting in the unnecessary incurrence of attorneys' fees. Instead, the transcript of the hearing on June 6, 2014 reveals that the trial judge's stated vague and general condescending statements regarding the undersigned to justify the sanctions:

- The undersigned failed to silence her cellular telephone, allowing the same to ring once during a hearing;
- The undersigned displayed a "lackadaisical" attitude toward protocol;

- The undersigned engaged in "outrageous, willful, intentional, contumacious, unprofessional and unethical" behavior.

[R. at Pg. 1593-1596, Transcript of Proceedings held on June 6, 2014, P 44-47].

Subsequently, in the Order Granting in Part Plaintiff's Motion for Sanctions [R. at Pg. 701-703], the Trial Judge found that "Counsel's bad faith conduct leading up to, during, and even subsequent to the Jury Trial which began on May 5, 2014, and which mistried on May 6, 2014, reflects an intentional, consistent, deliberate and contumacious disregard for this Court's authority. In particular, the conduct of Appellant's pertaining to her May 6, 2014, request to disqualify a juror for cause after the jury was sworn on May 5, 2014, well establishes counsel's unethical and willful disregard of or gross indifference to the authority of the Court." Similarly, the written Order, which was prepared by opposing counsel, includes merely demeaning adjectives which do not comply with the specificity of bad faith findings to justify the award of sanctions.

It would appear that the only conduct about which the Trial Court made express findings of any kind were the cellular telephone incident and the request to disqualify a juror for cause. Certainly, the unintentional breach of courtroom decorum caused by a telephone ringing, during a sanctions hearing

with no jury or clients present, cannot rise to the level of sanctions. As to the request to disqualify a juror for cause, this is a commonplace occurrence during trial. Absent any other details, this event cannot serve as justification for sanctions and should be grounds that the Lower Court be reversed.

Regarding the mistrial, the undersigned would point out that the mistrial was completely unnecessary as all events took place outside of the jury's presence. Only one juror, Ms. Kristen Coker, was potentially biased, and an alternative juror was ready to serve in her behalf. Most of the issues had been dealt with in the non jury portion of the trial, despite my objections; perhaps only one day would serve to adjudicate the remaining issues. It is the undersigned's contention that my conduct in no way required a mistrial, and any sanctions connected with the mistrial are unfound and should be reversed.

In summary, the Trial Judge abused his discretion by granting sanctions because he was either unable or unwilling to make express findings of bad faith conduct supported by detailed factual findings. The Order Granting in Part Plaintiff's Motion for Sanctions should therefore be reversed.

b. <u>ISSUE TWO - The Trial Court Judge abused his discretion in authorizing sanctions against Appellant based upon the events surrounding her request to strike a juror for cause.</u>

As noted above, the Trial Judge had a duty to strike a balance between condemning unprofessional or unethical litigation tactics undertaken solely for bad faith purposes, while at the same time ensuring that attorneys would not be deterred from pursuing lawful claims or defenses on behalf of their clients. In the instant case, I contend that the Trial Judge failed to do so.

I have argued above that the reference to "the conduct of Defendant's counsel pertaining to her May 6, 2014, request to disqualify a juror for cause . . ." does not rise to the level of specificity required to levy sanctions. But even if we assume, arguendo, that the reference does rise to that level of specificity, the conduct referred to surely does not rise to the level of bad faith required to levy sanctions.

As documented above, the undersigned was notified of a possible problem with one of the sworn jurors on the evening of May 5, 2014. I advised the court of the potential problem the morning of May 6, 2014, away from the view of the jury. While my misstatements regarding how the knowledge came into my possession caused initial confusion to the Court, I rectified the statements immediately. Additionally, during the June 6, 2014 hearing on the

Motion for Sanctions, I expressed to the Judge that I could have said it better. However, the Judge was unmoved:

> 15 Additionally, my statement, and I already said
> 16 to the Court, yes, I could have said it better. I
> 17 believe that it was inartful the way I said it due
> 18 to the short amount of time that I had to decide
> 19 what to do and from the stress that's been going on
> 20 with this case.

[R. at Pg. 1584, Transcript of Proceedings held on June 6, 2014, P 35].

At all times, I strove to exercise complete candor with the Court. Any impartial observer would conclude that my conduct on the morning of May 6, 2014 did not constitute bad faith. Any such impartial observer would have to conclude that my attempt to reveal a potential problem with a juror - which, if unaddressed, could only **help** my client's case – was evidence of good faith behavior towards the Court.

While the Trial Court Judge failed to explicitly mention in his Order how the undersigned became aware of a potential juror problem, it is worth to mention. As noted above, my client's wife in the underlying cause herein notified me of the potential problem after noting the potential conflict on a Facebook page. A review of the transcript dated May 6, 2014, shows that the Trial Judge may have taken this use of Facebook as a violation of a Court Order, and thus grounds for sanctions. However, a reading of the transcript

reveals that only *jurors* were instructed not to "research" the case, not the attorneys nor the witnesses. Indeed, although there is no pertinent Florida authority on point regarding the issue of researching jurors on Facebook, persuasive opinions from other jurisdictions indicate that such research is permissible, and at times even advisable. [R. at Pg. 669-688].

To recap: an objective look at the record as a whole reveals that the events of May 6, 2014 cannot lead to a finding of bad faith behavior. The Trial Judge therefore abused his discretion. The proper remedy in this case then is a reversal of the trial court's decision for Sanctions.

c. <u>ISSUE THREE - The amount of the attorneys' fees assessed is excessive and did not comply with the "Loadstar method."</u>

Appellees filed an Affidavit for Fees and Costs to be assessed against the undersigned in the amount of attorney's fees for $65,025.00 and costs for $5,853.83. [R. at Pg. 704-719].

The amount requested by Appellees is outrageous, excessive, unreasonable, disproportionate to the alleged wrongdoing, and it seeks compensation for activities which should not be assessed against the undersigned. Appellees are seeking to assess against the undersigned fees and costs when I was properly representing my clients and fulfilling my ethical duties.

Appellees sought to be compensated for activities which are completely irrelevant to the alleged wrongdoing, including but not limited to:

- bankruptcy research,
- meetings with their client and witnesses,
- work done in the preparation for the non-jury trial,
- pre-trial conferences, and
- fees for witnesses who were supposed to testify during the non-jury trial only

Appellees seek fees and costs which are beyond the scope of the Court's Order and the alleged misconduct. The time and costs that are assessed are not a result of the alleged misconduct. Additionally, Appellees seek to assess fees for issues that have not been ruled upon and for work that they would have had to complete regardless of the alleged wrongdoing.

Appellees did not have to incur any extra work as a result of the alleged misconduct, except to prepare a Motion for Sanctions and to appear to a hearing regarding their Motion for Sanctions.

The costs sought are inappropriate for sanctions. Appellees should only recover for expenses that directly arose from the activity for which sanctions were imposed, not for expenses incurred while engaged in other matters.

Appellees seek fees for activities that are far beyond the scope of the Court's Order and for activities they clearly would have engaged in whether or not defense counsel had brought up the juror issue. These sorts of activities do not meet the "but for" test, and no fees should be allowed for them, because this work would have likely have been done anyway.

The Court should reverse the amount of attorney's fees because it seeks fees for Matters that did not directly arise from Appellant's alleged misconduct.

Appellees wish to sanction Appellant with costs having nothing to do with the alleged misconduct asserted in the Motion for Sanctions. Appellees seek compensation for activities which cannot possibly be deemed to have arisen from the alleged misconduct. Appellees' request for these activities should be denied in total. Because the Trial Court did not make specific finding showing that Appellant's conduct caused Appellee's Counsel additional work, the Order Granting in Part Plaintiff's Motion for Sanctions should be reversed.

Finally, the amount of hours and hourly rates for fees and costs sought is unreasonable, highly excessive and outrageous and the undersigned does not have the ability to pay them.

In determining reasonable attorney fees, the courts of this state should utilize the criteria set forth in Fla. Bar. Code Prof. Resp. DR 2-106(b): (1) The

time and labor required, the novelty and difficulty of the question involved, and the skill requisite to perform the legal service properly. (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer. (3) The fee customarily charged in the locality for similar legal services. (4) The amount involved and the results obtained. (5) The time limitations imposed by the client or by the circumstances. (6) The nature and length of the professional relationship with the client. (7) The experience, reputation, and ability of the lawyer or lawyers performing the services. (8) Whether the fee is fixed or contingent. These factors are essentially the same as those considered by the federal courts in setting reasonable attorney fees. *Florida Patient's Compensation Fund v. Rowe***,** 472 So. 2d 1145 (Fla. 1985).

"The first step in the Lodestar process requires the Court to determine the number of hours reasonably expended on the litigation. The novelty and difficulty of the question involved should normally be reflected by the number of hours reasonably expended on the litigation…

The number of hours reasonably expended, determined in the first step, multiplied by a reasonable hourly rate, determined in the second step, produces the Lodestar, which is an objective basis for the award of attorney fees. Further, in no case should the court-awarded fee exceed the fee agreement

reached by the attorney and his client…

In determining the hourly rate, the number of hours reasonably expended, and the appropriateness of the reduction or enhancement factors, the trial court must set forth specific findings. If the Court decides to adjust the Lodestar, it must state the grounds on which it justifies the enhancement or reduction." *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985).

In the dispute currently before this Court, the Court below failed to follow the above described Lodestar approach. Judge Spoto did not set forth specific findings regarding the time and labor required, the novelty and difficulty of the question involved, and the skill requisite to perform the legal service properly; the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; the fee customarily charged in the locality for similar legal services; the amount involved and the results obtained; the time limitations imposed by the client or by the circumstances; the nature and length of the professional relationship with the client; the experience, reputation, and ability of the lawyer or lawyers performing the services; or whether the fee was fixed or contingent. The Judge simply listed hours expended and hourly rates for opposing counsel and employees of his firm, and made a finding of costs incurred by opposing counsel. While Judge Spoto noted at the hearing on August 6, 2014 that he

knew expert witness Mr. O'Toole, and knew other attorneys present at the hearing, the undersigned respectfully submits that this familiarity of those attorneys practicing in Polk County is not a proper substitution for following the Lodestar process as described in *Florida Patient's Compensation Fund v. Rowe.*

Because the Court below failed to properly utilize the lodestar process, the decision below must be reversed, and the Order Granting in Part Plaintiff's Motion for Sanctions should be reversed.

H. CONCLUSION

The Trial Court Judge failed to make express findings of bad faith conduct supported by detailed factual findings describing such conduct resulting in the unnecessary incurrence of attorneys' fees.

It would appear that the only conduct about which the trial court made express findings of any kind were the cellular telephone incident and the request to disqualify a juror for cause. Certainly, the unintentional breach of courtroom decorum caused by a telephone ringing, during a sanctions hearing with no jury or clients present, cannot rise to the level of sanctions. As to the request to disqualify a juror for cause, this is a commonplace occurrence during trial. Absent any other details, this event cannot serve as justification for sanctions and should be grounds that the lower court be reversed.

Additionally, the amount of hours and hourly rates for fees and costs sought is unreasonable, highly excessive and outrageous and the undersigned does not have the ability to pay them. Moreover, because the Court below failed to properly utilize the lodestar process, the decision below must be reversed, and the Order Granting in Part Plaintiff's Motion for Sanctions should be reversed.

Throughout the whole process my goal was to protect my client and to zealously represent his interests to the best of my abilities. The issues that I had

to consider were very complex and I had no time to do any research before I decided what to do. My intention was to protect my client by giving the least information possible to the Court as required by rule 4-1.6, yet at the same time to let the Court know that a juror may have a Facebook friend who works for my client. My client, his wife and I just wanted to make sure that everyone gets a fair trial. This juror could have potentially favored my client, if she found that that her Facebook friend worked for my client. Yet, my client and his wife were honest in disclosing this to me and to the Court. We felt that it was our duty to disclose this to the Court and strike her as juror.

Opposing counsel and Judge Durrance felt that I gave different versions of the events and that I made misrepresentations. However, I believe that I complied with the Florida Bar Rules of Professional Conduct. Before the Judge ordered me to fully disclose where the information came from, my statements were truthful and, yet, succinct. At first, what I said was extremely limited because I had a duty to protect my client. This is the only way that I could let the Court know that a juror might have a connection to my client and at the same time protect my client. As soon as possible, I corrected the Judge's misunderstanding that I was the only one that did the research on Facebook by stating that the information was brought to my attention. Once the Judge ordered full disclosure, I obeyed the order and candidly told the Judge that my

client's wife did the research, notified me by a text message and that later I attempted to go on Facebook but wasn't able to do so. I also, told the Judge I wasn't able to confirm the information. I only presented as little from the events as possible in order to protect my client and I provided more details of the events as the Judge further inquired for more details. It is my belief that I complied with the Florida Bar Rules of Professional Conduct and that there was no need for a mistrial as we could have just used the alternate juror and continued.

Finally, I feel that the Judge was more concerned with finding wrongdoing on my part, than with the fact that a juror may have a connection to my client. The judge's statements has caused unnecessary stress and humiliation to my client and his wife, which only adds to the prolonged distress that they have had to endure during this litigation. My client, his wife, and I hope that the 2nd District Court of Appeals will determine that there was no wrongdoing and that I have not violated the Florida Bar Rules of Professional Conduct. We are just looking forward to the appeal of the underlying case, which will address all the issues pertinent to the original case which are not relevant here.

I. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 13, 2014 I electronically filed the foregoing with the Clerk of the Court using Florida Courts E-Filing Portal system which will send a notice for electronic filing to **Henry B. Campbell, Esq., Robert Aranda, Esq.** and **William T. McKinley, Esq.** (attorneys for the Thurston Parties), 1701 South Florida Ave., Lakeland, Florida 33803 via e-mail at h.campbell@vcttalawyers.com, r.aranda@vcttalawyers.com, and b.mckinley@vcttalawyers.com.

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J. CERTIFICATE OF COMPLIANCE

I certify that this brief was typed in 14-point Times New Roman font.

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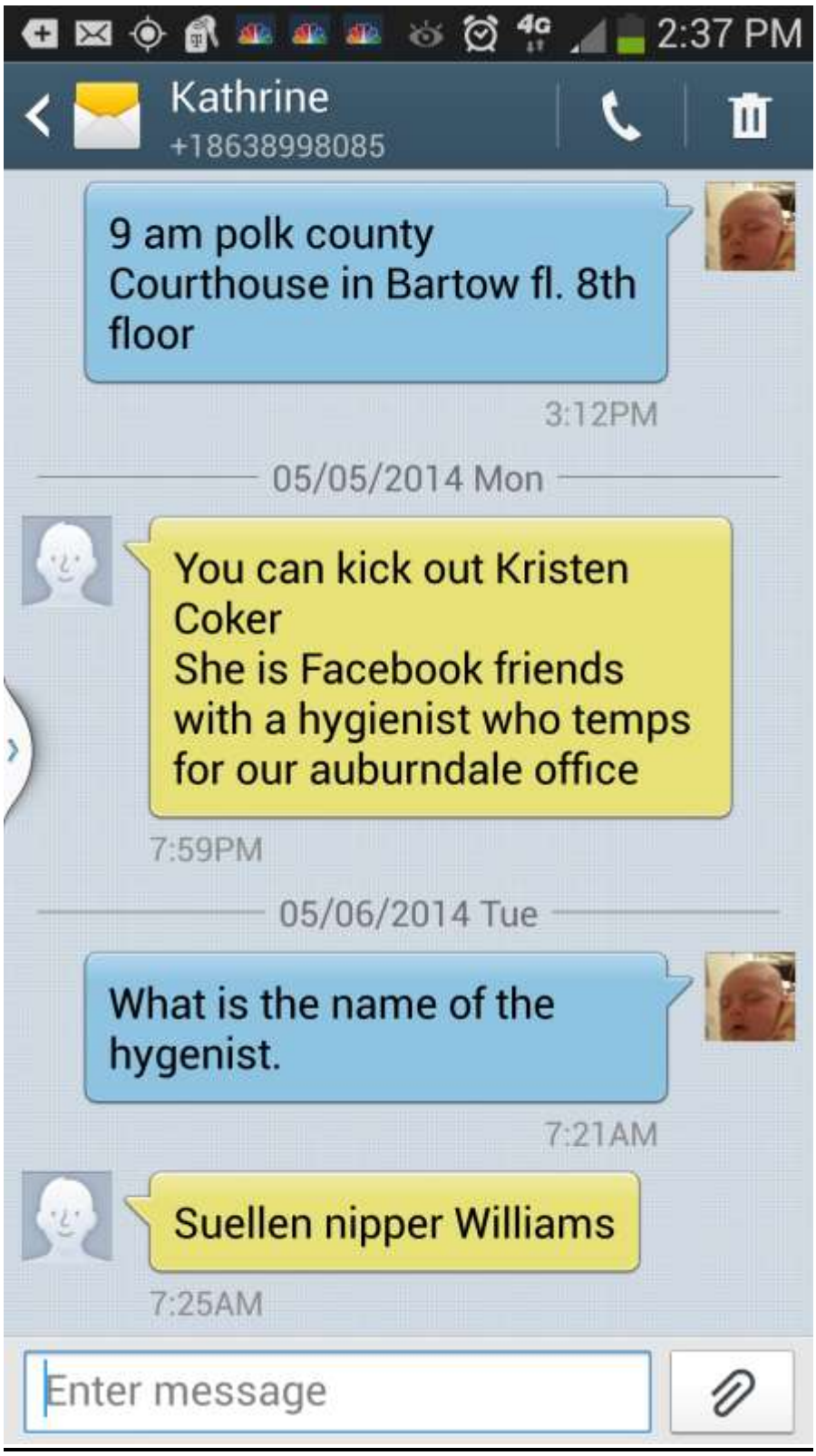
K. EXHIBIT "A"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9 am polk county Courthouse in Bartow fl. 8th floor
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