

TABLE OF CONTENTS

Table of Authorities Cited ii
Statement of Case 1
Statement of Facts 2
Jurisdictional Argument 3
Conclusion 4
Certificate of Service 5
Appendix

TABLE OF AUTHORITIES CITED

Burton v. GOV Contracting Corp.
552 So. 2d 293 (Fla. 2d DCA 1989) 3

STATEMENT OF CASE

The Third District Court of Appeals in affirming the trial court's Summary Judgment, held that appellants affidavit in opposition to Summary Judgment was untimely filed and made no ruling as to the other points on appeal.

STATEMENT OF FACTS

On August 20, 1991, Appellant, ALMA E. **SILVA**, executed her Affidavit in Opposition to Summary Judgment. On the same day, prior to the day of the hearing, the Appellant hand delivered a copy of the Affidavit upon Appellee's attorney. The original affidavit was filed with the presiding Judge on August 21, 1991 prior to the commencement of the Hearing upon the Motion for Summary Judgment.

JURISDICTIONAL ARGUMENT


The Third District Court of Appeals by its holding in the instant case interprets Rule 1.510(c), Florida Rules of Civil Procedure, to require the filing of Affidavits in Opposition to Summary Judgment prior to the date of hearing notwithstanding service of the affidavit having been achieved on the day prior to the hearing.

In its order, the Third District specifically conflicts with and cites Burton v. GOV Contracting Corp., 552 So. 2d 293 (Fla. 2d DCA 1989), in which **the** Second District Court of Appeals, sitting En Banc, receded from its prior holdings and held that **the** affidavit must be served prior to the date of hearing, but the filing may be done immediately thereafter upto prior to the start of the hearing on the motion.

CONCLUSION

The Court has discretionary jurisdiction pursuant to Rule 9.030 (a)(2)(A), Florida Rules of Appellate Procedure and should review this matter concerning a direct conflict interpreting the Florida Rules of Civil Procedure.

Respectfully Submitted;



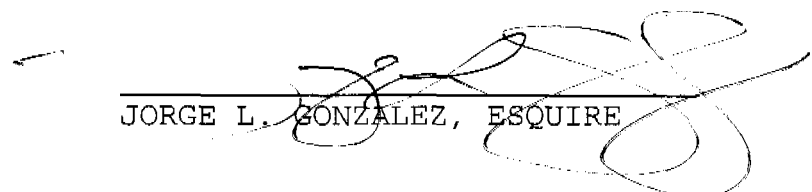
JORGE L. GONZALEZ
Attorney for Appellants

Gonzalez & Vidal, P.A.
3934 S.W. 8th Street
Suite 302
Coral Gables, Florida 33134
(305) 445-1457

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the above and foregoing was mailed to Michelle Alvarez, Esquire, on May 18, 1992.

GONZALEZ & VIDAL P.A.
3934 S.W. 8 Street
Suite 302
Coral Gables, Florida 33134
(305) 445-1457
Attorney for Appellants



JORGE L. GONZALEZ, ESQUIRE

IN THE SUPREME COURT

STATE OF FLORIDA

CASE NO: 79,835

THIRD DISTRICT COURT OF APPEAL CASE NO: 91-2240

JOSE V. SILVA and ALMA E. SILVA

Appellants

vs.

SERAFIN HERNANDEZ

Appellee

APPENDIX

JORGE L. GONZALEZ, ESQUIRE
Attorney for Appellant
3934 S.W. 8th Street
Suite 302
Coral Gables, Florida 33134
(305) 445-1457

TABLE OF CONTENTS

Conformed Copy of decision of the District
Court of **Appeal**, Third District 1

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 1992

JOSE V. SILVA and ALMA E. SILVA, **
Appellants, **
vs. ** CASE NO. 91-2240
SERAFIN HERNANDEZ, **
Appellee. **

Opinion filed March 3, 1992.

An Appeal from the Circuit Court for Bade County,
Rosemary Usher Jones, Judge.

Gonzalez & Vidal and Jorge L. Gonzalez, for appellants.
Michelle B. Alvarez, for appellee.

Before NESBITT, BASKIN and FERGUSON, JJ.

PER CURIAM.

We affirm the summary final judgment in favor of appellee. The trial court properly disregarded appellants' untimely affidavit. Hartford Accident & Indem. Co. v. Gillette, 519 So.2d 1059 (Fla. 1st DCA 1988); Auerbach v. Alto, 281 So.2d 567 (Fla. 3d DCA 1973); cert. denied, 297 So.2d 31 (Fla. 1974); Hardeastle v. Mobley, 143 So.2d 715 (Fla. 3d DCA 1962); contra Burton v. GOV Contracting Corp., 552 So.2d 293 (Fla. 2d DCA 1989).

we reverse the award of attorney's fees, however. "[I]t is well settled that the testimony of an expert witness concerning a reasonable attorney's fee is necessary to support the establishment of the fee." Crittenden Orange Blossom Fruit v. Stone, 514 So.2d 351 (Fla. 1987); see Hemmerle v. First Fed. Sav. & Loan Ass'n, 338 So.2d 82 (Fla. 2d DCA 1976). Here, the record contains no testimony other than that of the attorney seeking the fees. An award of fees on that record is error. Palmetto Fed. Sav. & Loan Ass'n v. Day, 512 So.2d 332 (Fla. 3d DCA 1987); Walker v. Kremer, 382 So.2d 338 (Fla. 4th DCA 1980); ~~Redin v. Auto-Train Corp.~~, 377 So.2d 810 (Fla. 3d DCA 1979); ~~Mullane v. Lorenz~~, 372 So.2d 168 (Fla. 4th DCA 1979). The cause is remanded for the trial court to conduct a hearing on the attorney's fee issue.

Affirmed in part; reversed in part.