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

CASE NO. 4D14-4826

LOWER TRIBUNAL NO. 2012CA011639XXXXMB AJ

SKENDER HOTI,

Appellant,

v,

DAVID M. GARTEN,

Appellee,

_____ /

**APPELLANT SKENDER HOTI'S MOTION FOR A REHEARING OF
THIS COURT'S DECISION ON CASE #4D14-4826 AND FOR A WRITTEN
OPINION AND CLARIFICATION OR ORDERS AND DECISIONS**

COMES NOW, THE Appellant, Skender, (hereinafter referred to as "HOTI"),
Pro-se and serves this Motion for Re-hearing of this Court's Decisions and Orders
in Case No. 4D14-4826 and for a Written Opinion and Clarification of such Orders
and Decisions, who respectfully say and plead to this Court as follows:

1. I am the Appellant herein, Skender Hoti, acting pro se and make this motion under Florida Rule of Appellate Procedure 9.330 for Re-Hearing of this Court's Decision and Orders in Case No. 4D14-4826 issued May 19, 2016 and for a Written Opinion and Clarification of such Orders and Decisions.
2. Respectfully, this Court has misapprehended or overlooked the facts in the Record on Appeal and misapplied the law of the 4th District Court of Appeals and Florida involving the factual proof required to sustain an award of attorney's fees and Rehearing is thus appropriate.
3. The 4th District Court of Appeals has a long standing line of cases on the type of proof and evidence and factual record that must be developed to support the award of attorney's fees.
4. Chief Judge Ciklin in July of 2014 confirmed in *Diwakar v. Montecito Palm Beach Condominium*, No. 4D13-915. 143 So.3d 958 (2014), that a party's argument "that there was simply no competent, substantial evidence to support the award may be raised for the first time on appeal. See Fla. R. Civ. P. 1.530(e) ("When an action has been tried by the court without a jury, the sufficiency of the evidence to support the judgment may be raised on appeal whether or not the party raising the question has made any objection thereto

in the trial court or made a motion for rehearing, for new trial, or to alter or amend the judgment.".)”

5. This case here was not tried “by the Court” but instead involved the lower Court upholding an Arbitrator’s award.
6. Appellant Skender Hoti objected to the Arbitration Award and raised factual issues regarding the total amount paid to Garten showing payments of \$35,000.00 to Garten which are unaccounted for by Garten and the Court below while also raising factual issues and objections and arguments to the reasonableness of the fees, and other objections to the fees and these objections were filed and made in the Court below and are part of the Record on Appeal in this case and part of the facts this Court may consider. See, Record on Appeal pages 136-141 (Skender Counter-Complaint.)
7. According to the many cases of the 4th DCA, “The standard of review of an award of attorneys' fees is abuse of discretion. *Glantz & Glantz, P.A. v. Chinchilla*, 17 So.3d 711, 713 (Fla. 4th DCA 2009) (citations omitted). "We will uphold a trial court's award of attorneys' fees so long as it is supported by substantial, competent evidence." *Effective Teleservices, Inc. v. Smith*, 132 So.3d 335, 341 (Fla. 4th DCA 2014) (citation omitted).
An award of attorney's fees must be supported by substantial competent

evidence and contain express findings regarding the number of hours reasonably expended and a reasonable hourly rate for the type of litigation involved. Additionally, the award must be supported by expert evidence, including the testimony of the attorney who performed the services.

Tutor Time Merger Corp. v. McCabe, 763 So.2d 505, 506 (Fla. 4th DCA 2000) (citations omitted). "Competent evidence includes invoices, records and other information detailing the services provided as well as the testimony from the attorney in support of the fee." Brewer v. Solovsky, 945 So.2d 610, 611 (Fla. 4th DCA 2006) (citations omitted)." See, Diwakar v. Montecito Palm Beach Condominium, No. 4D13-915. 143 So.3d 958 (2014).

8. The long line of cases from the 4th DCA and other District Courts of Appeal in Florida further make it clear that, "***Generally, when an attorney's fee or cost award is appealed and the record on appeal is devoid of competent substantial evidence to support the order, the appellate court will reverse the award without remand.***" *Rodriguez v. Campbell*, 720 So. 2d 266, 268 (Fla. 4th DCA 1998); *Cooper v. Cooper*, 406 So. 2d 1223 (Fla. 4th DCA 1981); *Warner v. Warner*, 692 So. 2d 266, 268 (Fla. 5th DCA 1997); *Brake v. Murphy*, 736 So. 2d 745 (Fla. 3d DCA 1999). See, FAIRCLOTH, v

BLISS, No. 4D04-2761, 917 So. 2d 1005 (2006) District Court of Appeal of Florida, Fourth District. January 4, 2006.

9. The line of cases in the 4th DCA and other District Courts of Appeal further hold that “Unsworn statements by attorneys are usually not considered as evidence by trial courts unless stipulated to by both parties. *See Leon Shaffer Golnick Advertising, Inc. v. Cedar*, 423 So. 2d 1015 (Fla. 4th DCA 1982). As this Court explained in *Leon*: [An attorney's] unsworn statements do not establish facts in the absence of stipulation. Trial judges cannot rely upon these unsworn statements as the basis for making factual determinations; and this court cannot so consider them on review of the record. If the advocate wishes to establish a fact, he must provide sworn testimony through witnesses other than himself or a stipulation to which his opponent agrees.” *Id.* at 1017; *see also Daniel v. Moats*, 718 So. 2d 949 (Fla. 5th DCA 1998) (holding that evidence did not support award of attorney fees to mother in proceedings to modify fathers child support obligation; no one testified concerning attorney fees except mother, mother merely stated what she paid, and there was no evidence as to reasonableness of hours or fees); *Clark v. Squire, Sanders & Dempsey*, 495 So. 2d 264 (Fla. 3d DCA 1986) (holding that it was error for the trial court to affix an attorneys fee without testimony

from the attorney in support of his fee other than a time sheet and without any other testimony to indicate the reasonableness of the time expended or the amount of the fee to be awarded); *Markham v. Markham*, 485 So. 2d 1299 (Fla. 5th DCA 1986) (award of attorneys fees reversed even in the absence of a timely objection where the court relied upon unsworn statements). See, *FAIRCLOTH, v BLISS*, No. 4D04-2761, 917 So. 2d 1005 (2006).

10. Appellant's Answer Brief cited to the lack of Records and proof in the Court below and the inappropriateness of the fees. See, Appellant's Answer Brief pages 2-3.

11. As I pointed out to this Court in my Motion for an Extension of time to file this motion for rehearing dated June 3, 2016, "Now that I can access and open the Record on Appeal under the Docket Entry Type "Brief" with this Court from May 28, 2015 I can say in good faith that I have scrolled through all 1353 (one-thousand -three-hundred and fifty-three) pages Certified by Clerk Sharon Bock as the Record on Appeal and the Only "Billing Statement" that is a part of the Record on Appeal for the underlying original fee dispute filed before Judge Lucy Brown provided by David Garten on this appeal is an alleged June 20, 2012 Invoice at Record on Appeal Pages

000007 to 000011 marked as Exhibit B which appears to have been filed 4 or 5 other times in this Record on Appeal at later pages.”

12. Thus, as factually shown by the Record on Appeal at pages 000007-000011 the only Billing Statement for any fees in the Original Complaint seeking \$32,952.32 are some alleged factual details for the Bill totalling \$6,413.35.

13. But even for this alleged amount, there is No Sworn Testimony from David Garten in the Record on Appeal, No full Invoice or Account History in the Record on Appeal of David Garten, and absolutely NO Factual basis in the Record on Appeal whatsoever to claim ***anything more than the \$6, 413.35.***

14. In fact, even for this amount the Record on Appeal has no Sworn Testimony, and ***no copies of Any of the work Garten allegedly did even for this amount.***

15. The Bill refers to several “Draft motions” and “Draft emails” but **none of these items are contained anywhere in the Record on Appeal as these items were not provided in the proceedings below.**

16. The Billing Statement does give this Court a strong insight into the actions of attorney David Garten, however, as seen on Record on Appeal Page 00009 where David Garten “bills” myself as Appellant on 6-5-12 \$85.00 for calling my Wife who he did NOT have a Retainer Agreement with to talk to

her about me Paying his alleged Bill and then goes on 6-8-12 to Bill both of us \$425.00 to have a Conference on Paying his Bill and then proceeds on Record on Appeal Page 000010 to Bill in excess of another \$500 plus total AFTER he had received notice that I discharged him.

17. Thus, not only is there absolutely NO Facts in the Record nor in the original Complaint filed before Judge Lucy Brown to claim the additional \$26,137.38 claimed as “Prior Balance” but even the amount where there is a Billing Statement is significantly in question.
18. There are No Invoices for the \$26,137.38 in the Record on Appeal, No Sworn Testimony from David Garten in the Record on Appeal for this amount, No Invoice Notices or Proof of Sending Invoices in the Record on Appeal, no Proof of when I allegedly received such Bills in the Record on Appeal, no documents or records to show what was done for the \$26,137.38 such as Motions or Hearings, nothing other than an attorney claiming he is owed some amount.
19. Nowhere in the Record on Appeal are there any Exhibits or Transcripts or Sworn Testimony to support the Arbitrator’s Award found at pages Record on Appeal 00153-00158.

20. Nor are any of these items contained anywhere in this Record on Appeal to support the original Order of Judge Lucy Brown upholding the Arbitrator's Award which has to be an Abuse of Discretion under the standards established by the 4th DCA and District Courts of Appeal and Supreme Court in Florida and this must now be reversed and vacated on appeal.
21. The Arbitrator's Award says nothing other than a conclusory statement based upon alleged Testimony which is **NOT shown to be sworn and in fact does not even Exist in the Record on Appeal** that somehow the case was "complex" but there are no Facts, no motions, no records to show this as a factual matter.
22. Nowhere in the Record on Appeal does it show that David Garten provided these missing invoices or records in his motions to Confirm the Arbitrator's award and in fact David Garten did not even claim that these records exist or try to provide them to this Court in response when I filed the June 3, 2016 Motion for Extension of time.
23. In fact the Record on Appeal makes it crystal clear that all David Garten did was provide further Bills to the Lower Court charged **after the Retainer Agreement was cancelled to then Bill Appellant to collect Fees which had not justified in the first instance.** See, Record on Appeal Pages 176-211.

24. As stated by this Court in Faircloth v Bliss, 917 So. 2d 1005 (2006).

“Here, the record is devoid of any competent evidence regarding the number of hours reasonably expended, the reasonable hourly rate or details of the services performed. We, therefore, reverse the fee award without remand.”

25. David Garten has had years to provide the basis for claiming these fees and thus this Court should now vacate all Orders and Decisions rendered on 5-19-2016 and reverse and vacate the Orders and Judgements below *without remand.*

26. Alternatively, this Court should *limit any remand to the only possibly claimed fees of \$6,413.35* where this Court has any factual proof in the Record and enjoin David Garten and his attorneys from any further fees beyond this amount from this case. See, Faircloth v Bliss (4th DCA 2006).

Written Opinion and Clarification

27. While the devoid absent facts in the Record on Appeal make it clear the lower Court Orders and Awards were an abuse of discretion and this Court must now vacate its Orders of May 19, 2016 on rehearing the facts and law,

the public as a whole would benefit from a Written Opinion and Clarification of the Court's Orders.

28. The Florida Supreme Court has made the issue of client's rights and attorney's fees one of exceptional importance and clearly implicates the operations of the State's justice system.
29. The Florida Supreme Court has said, "The attorney-client relationship is one of special trust and confidence. The client must rely entirely on the good faith efforts of the attorney in representing his interests. This reliance requires that the client have complete confidence in the integrity and ability of the attorney and that absolute fairness and candor characterize all dealings between them. These considerations dictate that clients be given greater freedom to change legal representatives than might be tolerated in other employment relationships. We approve the philosophy that there is an overriding need to allow clients freedom to substitute attorneys without economic penalty as a means of accomplishing the broad objective of fostering public confidence in the legal profession." See, *ROSENBERG v. LEVIN*, 409 So.2d 1016 (1982).
30. That case further outlined the factors to be considered which are not shown to have been followed by any facts or proof in the Record on Appeal such

as, “In computing the reasonable value of the discharged attorney's services, the trial court can consider the totality of the circumstances surrounding the professional relationship between the attorney and client. Factors such as time, the recovery sought, the skill demanded, the results obtained, and the attorney-client contract itself will necessarily be relevant considerations.”

29. The public at large and this case would benefit from a Written Decision and clarification of it's decisions and Orders should this Court not vacate it's prior Orders and reverse the lower tribunal without remand and the case should be appealable to the Florida Supreme Court if necessary.

31. Appellant further asserts the issues of subject matter jurisdiction raised in Appellant's Briefs and the impropriety of the process for Arbitration are sufficiently preserved and important to require a Written Decision as well.

32. The Index to the Record on Appeal and the Record on Appeal alone makes it clear that David Garten was “Litigating” from the outset and not pursuing the contractually agreed Arbitration.

33. The Record on Appeal is devoid of any proper determination that the Retainer Agreement itself was obtained under proper circumstances where a disadvantaged person such as myself who is not native to the United States

and it not a lawyer is being asked to waive important Due Process rights and substantive rights like giving up a Jury Trial.

34. In this case, all rights of Appellant were given up with no benefit of any bargain as David Garten pursued calculated litigation from the outset.

35. The entire Absence of a Record below of any Testimony, Hearings, Transcripts and Records both involving the Court and the Arbitration process creates an exceptional issue of importance in due process where a disadvantaged client pro se does not even have a Record to go by and adequately challenge actions.

36. **WHEREFORE**, it is respectfully prayed for an Order vacating all of these Court's Orders issued May 19, 2016 including the per curiam Affirmance and further reversing the Order, Decision and Judgements below as an abuse of discretion without remand for David Garten to prove any further fee or alternatively limiting any remand solely to fees no greater than \$6, 413.35 and striking and enjoining David Garten and any attorney acting on his behalf from pursuing any fees beyond that amount in this case herein. It is further alternatively prayed for an Order granting a Written Opinion and Clarification of this Court's Orders and enabling the matter to be appealed to

the Florida Supreme Court and for such other and further relief as may be
just and proper.

Dated June 21, 2016

Respectfully submitted,

/s/ Skender Hoti

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served via email to dfitzgerald@waltonlantaff.com on Walton Lantaff Schroeder & Carson LLP 110 E. Broward Blvd. Suite 2000 Fort Lauderdale, Fl 33301-3503 on this 21st day of June 2016.

/s/ Skender Hoti

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