IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

TRIAL PRACTICES, INC.,

Petitioner,

vs.

CASE NO.: SC17-2058

Lower Tribunal No(s).:

HAHN LOESER & PARKS, LLP, as substitute party for Jack J. Antaramian,

2D13-6051; 2D14-86; 292006CA005366A001HC

Respondent.

_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

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July 10, 2018

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PRELIMINARY STATEMENT

Petitioner, Trial Practices, Inc., is referred to as "TPI." Respondent, Hahn Loeser & Parks, LLP, the substitute party for Jack J. Antaramian ("Antaramian"), is referred to as "Hahn Loeser."

The Circuit Court's record in Case No. 2006-CA-005366 will be cited to with the abbreviation "R." followed by the record page number. Record of the Second District Court of Appeal (Case Nos. 2D13-6051) will be cited to with the abbreviation "DCA R." followed by the record page number. References to the Initial Brief or the Answer Brief will be cited to with abbreviations "IB" or "AB," respectively, followed by the brief's page number.

The "TPI trial" refers to the 10-day jury trial in March 2011 on Antaramian's breach of the Consulting Agreement between TPI and Antaramian. (IB at 1-2). The "seven witnesses" refers to seven paid fact witnesses at the TPI trial: Messrs. Tripp, Farese, Stewart, Manning, Medwed, Weinstein, and Ms. Nolan. (IB at 5-7). The "Fee Judgment" refers to the Order and Judgment awarding $2,467,142.39 to Antaramian against TPI for prevailing party attorneys' fees, costs, and pre-judgment interest. (IB at 15). TPI appealed the Fee Agreement in 2D13-6051 and 2D14-86. (IB at 16). The Second District certified to this Court a question of great public importance in *Trial Practices, Inc. v. Hahn Loeser & Parks, LLP*, 228 So. 3d 1184, 1190-1191 (Fla. 2d DCA 2017). (IB at 18)

ARGUMENT

This case presents questions of law on (1) the extent a fact witness may be compensated, (2) the penalty for violating the rule on witness compensation, and (3) whether a party who has paid witnesses at expert witness rates while presenting them at trial as unpaid fact witnesses is entitled to recover millions of dollars in prevailing party fees and costs. Questions of law are reviewed de novo. *E.g. D'Angelo v. Fitzmaurice*, 863 So. 2d 311 (Fla. 2003).

Hahn Loeser begins its Answer Brief with a 35-page statement of the "facts" that is replete with improper argument and often lacks record citations for its assertions. Much of that "fact" argument is misleading. For example, the Answer Brief argues TPI's position below was that Antaramian was "entitled" to more than $1.3 million in attorneys' fees. (AB 33). TPI's position below, however, indisputably was that Antaramian should *not be awarded any fees or costs* because he prevailed *unlawfully* by improperly paying his fact witnesses. (*See*, TPI's written closing after fee hearing at R.13088-13089, 13094-13110). TPI argued, alternatively, for a lesser fee (not $1.3 million) in the event the court found entitlement. (R.13088, 13116-13134).

Hahn Loeser's response in this Court to TPI's motion to strike portions of its Answer Brief dated June 12, 2018, admits Hahn Loeser made unsupported assertions. Space limitations preclude TPI from addressing them all – many of

which have nothing to do with the merits and appear designed to distract or to prejudice the Court against TPI.

Hahn Loeser's Answer Brief is silent on almost every major issue in this appeal. First, Hahn Loeser fails to answer the certified question of whether Rule 4-3.4(b) permits payment of a "fact" witness for case assistance, answering instead the question whether payments to "expert" witnesses are allowed. Hahn Loeser also fails to mention, much less address, the trial court's findings that: (1) Antaramian violated Section 92.142 and this Court's decision in *Moakley v Smallwood* by paying fact witnesses excessive rates to testify for him; and (2) TPI could not have foreseen Antaramian would so violate Florida law. (R.13301 at ¶¶17-18). Third, Hahn Loeser fails to offer any substantive response on the penalty for Antaramian's improper witness payments (IB, Issue III), arguing only that this Court should not consider the issue. (AB 46-48).

I. Hahn Loeser failed to answer the certified question of whether Rule 4-3.4(b) of the Rules Regulating the Florida Bar permits a party to pay a "fact" witness for the witness's assistance with case and discovery preparation.

The Answer Brief does not discuss whether a party may pay a "fact" witness for case and discovery preparation assistance. In fact, Hahn Loeser fails to address even one of the many cases cited in TPI's Initial Brief holding that fact witnesses may not be paid unless the payments fall within the clearly delineated exceptions in Rule 4-3.4(b). (IB 24-33). Instead, it argues the seven paid witnesses at issue were

not "fact" witnesses, but were "skilled, professional" witnesses providing "professional services" and entitled to recover a reasonable fee. Rule 4-3.4(b), however, does not provide for payments to, or even mention, "skilled, professional witnesses," and instead permits payment for "professional services" only to an "expert witness." Hahn Loeser has not tried to interpret Rule 4-3.4(b); it implicitly argues for a change in the Rule to create a new exception.

There is no question Antaramian represented at the TPI v. Antaramian trial that the seven paid witnesses were fact and not expert witnesses. In Antaramian's counsel's closing argument at trial, he characterized the seven paid witnesses as "fact witnesses," as follows:

> *On their side, no fact witnesses* documenting any of their theories. *On our side, every fact witness* that came in said it was a walk-away, it was litigation fatigue, it was turned over to business lawyers for equal division with nobody getting the better of the other. *Their fact witnesses* had nothing to do with the litigation. (R.9318 at lines 6-12) (emphasis added)

The TPI trial judge, the fee hearing judge, and the district court of appeal found these seven paid witnesses testified as fact witnesses. The fee hearing judge made a written finding that the seven paid witnesses were testifying as fact, not expert witnesses, stating: "[t]he substance of the attorneys' [the witnesses at issue] testimony was factual in nature, however, and they were not called upon as expert witnesses at trial." (R.13301 at ¶17). The district court of appeal, likewise, referred

to these paid witnesses as the "attorney fact witnesses." *Trial Practices, Inc. v. Hahn Loeser & Parks, LLP*, 228 So. 3d 1184, 1190-1191 (Fla. 2d DCA 2017).

Judge Nielsen, who presided over the Trial Practices v. Antaramian trial, also treated these witnesses as fact witnesses. He stated during the trial that Theodore Tripp was a fact witness. (R.7403-7404) ("This witness, as I understand it, is not an expert in this case. Is that correct? This is a fact witness.") He insisted that questions to witness Nolan be framed in the proper context and time so that "we don't get into the issue of her expertise." (R.8695 at line 25—8696 at line 3). Judge Nielsen also reminded Antaramian's counsel that Howard Medwed was a fact, not an expert, witness. (R.8214 at lines 17-22) ("He cannot comment on the expert's testimony; he is a fact witness unless you so qualify him as an expert."). Antaramian's counsel agreed that Medwood is "not an independent expert that was brought here as an expert.") (R.8283 at lines 24-25). None of these paid fact witnesses were called upon to testify as experts.

Judge Nielsen further explained during the 2011 trial that "experts give opinions as stated in reports in this division," (R.8146). The parties acknowledged that "*experts* issued reports." (R.8282; R.3783, *See*, Hawkins Report -Exhibit 395, Simon Report - Exhibit 396, Woodward Report - Exhibit 397, Phillip Report - Exhibit 398, Anderson Report - 399 and Hughes Report - Exhibit 400).

During the trial, Judge Nielsen explained the procedure for presenting expert witness testimony at trial: "I don't announce that this person is being accepted ... as an expert by the Court. You present, do your *voir dire*, and then you do your *voir dire*, and if there are objections, we'll address them at the bench." (R.7466). The expert witnesses in the trial were subjected to *voir dire*. (R.7473, 7657). None of the seven paid fact witnesses, however, were subjected to this *voir dire* procedure.

Antaramian did not identify any of the seven paid witnesses as experts in pretrial disclosures. The Order Setting Cause for Trial and Pretrial required the parties to strictly comply with the Case Management Conference Order ("CMC Order"), and to "disclose [the] fact and expert witnesses" pursuant to the CMC Order. (R.1596 at ¶3). Judge Nielsen's CMC Order required the parties to designate expert witnesses pursuant to the CBP (Complex Business Procedure), Section 7.5. (R.1064 at ¶6). CBP §7.5 required parties exchanging reports relating to experts to *disclose "the compensation to be paid for the study and testimony*." (emphasis added). Antaramian did not disclose the compensation paid to these seven witnesses, which confirms Antaramian presented them as fact, not expert, witnesses.

These indisputable facts are fatal to Hahn Loeser's argument that Antaramian lawfully paid these seven witnesses at expert witness rates. *See Moakley v. Smallwood*, 826 So. 2d 221, 223, F.N. 1 (Fla. 2002). In *Moakley*, this Court rejected the argument that an attorney who testified at a proceeding could be awarded an

expert witness fee of $1,125 under Section 92.231 Florida Statutes, explaining that the attorney was not offered as an expert or permitted to qualify and testify as an expert. *Id.* Nor was such an expert witness fee authorized by Section 92.142, Florida Statutes, because that statute provides for payment to a witness of only $5 per day. *Id*. Hahn Loeser failed to address *Moakley*, which TPI discussed in the Initial Brief.

Hahn Loeser similarly ignored this Court's decision in *The Florida Bar v. Wohl,* 842 So. 2d 811, 815 (Fla. 2003), which holds that "a witness may not be paid, unless the payments fall within the clearly delineated exceptions in Rule 4-3.4(b)" of the Rules Regulating The Florida Bar. Hahn Loeser never identifies which of the clearly delineated exceptions in Rule 4-3.4(b) it contends permitted Antaramian to make large payments to "fact witnesses" for case and discovery preparation assistance. None of the three exceptions permit such payments. (IB 21-27). Rule 4-3.4(b) is part of the rule titled "fairness to opposing party and counsel." Antaramian's undisclosed extensive payments to fact witnesses were not fair to TPI or to the trial court to whom it portrayed the witnesses as fact witnesses.

Hahn Loeser's argument that the lawyer fact witnesses were acting as Antaramian's lawyers providing professional legal services conflicts with the Fee Judgment. Antaramian and the fee hearing judge treated these fees as taxable costs and did not include them in the Fee Judgment's analysis of the reasonableness of

legal fees under *Florida Patients Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985). (R.13283-13288).

Hahn Loeser's argument that "all indications and evidence demonstrate" the seven witnesses testified truthfully (AB 9) misses the point. As explained in *Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Association*, 865 F. Supp. 1516, 1524, 1526 (S.D. Fla.1994), the law forbids payment to witnesses for their testimony, "be it truthful or not, because it violates the integrity of the justice system and undermines the proper administration of justice."

Moreover, as the Fifth Circuit recently held in *In re Depuy Orthopaedics, Inc.*, 888 F. 3d 772, 773 at n. 82 (5th Cir. 2018), when considering undisclosed payments to fact witnesses, "the central question is not whether the non-disclosure [of the payments to the fact witnesses] was outcome-determinative but, instead, whether disclosure would have opened up potentially promising impeachment tactics on cross-examination, which it patently did."

The premise of Hahn Loeser's argument is also wrong because the testimony of TPI's expert witnesses contradict the testimony of Antaramian's seven paid witnesses on material issues, indicating the seven witnesses did not tell the truth. Hahn Loeser, in any event, bears the burden of showing the error was harmless. *Special v. West Boca Medical Center*, 160 So. 3d 1251, 1256-57 (Fla. 2014). It does not contend it carried that burden.

Hahn Loeser's argument that TPI could have discovered the payments through cross examination at trial is no defense to making unlawful payments to fact witnesses. Neither Rule 4-3.4(b) nor Section 92.142(1), permits the payment of expert witness fees to fact witnesses so long as the payments are undiscovered by the opposing party. The payments were unlawful regardless of whether TPI could have discovered them sooner.

Moreover, Hahn Loeser stands in the shoes of Antaramian, who is estopped from making this argument. Antaramian had an affirmative duty under the CMO to disclose experts and their compensation but did not identify any of the seven fact witnesses as expert witnesses providing professional services or disclose that they were being compensated. He identified only two paid experts during pretrial and trial, yet now argues to this Court that the seven fact witnesses were essentially expert witnesses entitled to be paid an expert witness fee and more. The duty was on Antaramian to disclose the compensation, not on TPI to uncover it.

The failure to disclose is particularly egregious here, where the trial judge repeatedly confirmed with Antaramian's trial counsel that these witnesses were testifying as "fact witnesses." *See*, p. 4, *supra*. Yet, in disregard of their duty of candor to the tribunal, neither Antaramian, his counsel, nor his paid witnesses disclosed Antaramian had retained them as professionals and was paying them at expert witness rates for case assistance and testimony.

Hahn Loeser's argument that it disclosed the witness payments in November 2011 in the Frazitta affidavit is not correct. (AB 31). The Frazitta affidavit discussed Antaramian's obligation to pay law firms but characterized them simply as "payments . . . Antaramian has expended, paid or is indebted for . . . as a direct result of [Antaramian's] dispute with Trial Practices, Inc." (R.11849). Frazitta did not disclose Antaramian was paying fact witnesses for testimony or case assistance or provide any detail about the charges. *Id.* Antaramian made no such disclosure for another fourteen months, when he finally produced detailed billing statements in February 2013 identifying for the first time individual witness payments. (R.9635-9639; 9615-9621; 9660-9663)

Hahn Loeser also fails to adequately explain the "big fee" Nolan charged based upon the value of her testimony to Antaramian winning the trial and conditioned upon Antaramian getting paid by TPI. (IB 10). Hahn Loeser's explanation that Antaramian never agreed to this fee arrangement (AB 26, 29-30, 43) is contradicted by Antaramian's representation to the lower court that he paid Nolan's invoice. (R.9873, p. 20 at lines 24-25). Moreover, Antaramian included this fee as one of his trial costs that should be taxed against TPI, and Nolan's fee was among the costs testified to by Frazitta that the fee hearing judge ordered to be taxed against TPI. (R.13310, ¶43(vii)).

Hahn Loeser's argument that the paid fact witnesses "lost compensation" by reason of testifying, or preparing to testify, is not supported by the record. Five of the fact witnesses Antaramian paid, or promised to pay, testified they did not lose compensation. (IB 14). For example, Nolan testified she used vacation time and did not lose pay by testifying. (R.11290-11291, p. 12 at line 17—p. 16 at line 7). Tripp testified Hahn Loeser did not decrease his compensation for time he spent testifying for Antaramian. (R.11243-11244, p. 28 at line 18—p. 29 at line 11)

Hahn Loeser hopes to mask the egregious violations and misrepresentations in the TPI trial by arguing a party should be able to hire professionals familiar with the party's case if necessary to prepare for trial (*e.g.*, AB 20, 22, 38). That is a nonissue and is not the problem. The offenses here occurred when Antaramian hired and paid the witnesses as professionals and then presented all seven before the court and jury as (unpaid) fact witnesses. For this same reason, the cases on burdening nonparties with excessive discovery are irrelevant (AB 43-44).[1]

Many courts have rejected Hahn Loeser's argument that a party may pay a fact witness when the witness is a professional or skilled witness who participated in the events being litigated and his or her services are necessary to defend or prosecute the case. *Florida Bar v. Wohl*, 842 So. 2d at 812-813 (improper to pay

[1] Fees for experts who do not testify as experts should not be taxed. *See Albanese Popkin Hughes Cove, Inc. v. Scharlin*, 141 So. 3d 743, 746 (Fla. 3d DCA 2014).

fact witness/former employee of diamond business hired by party to help him "understand the business practices of the company"); *U.S. v. Cinergy Corp.*, 2008 WL 7679914 *9 (S.D. Ind. Dec. 18, 2008) (improper to pay fact witness/former employee hired by party as a consultant to assist with the litigation and testify because of his "personal knowledge and expertise" regarding the matters in litigation); *Goldstein v. Exxon Research & Engineering Co*., 1997 WL 580599 *2, 4-5 (D. N.J. February 28, 1997) (improper to pay fact witness/former employee hired by party as a consultant to assist with the litigation and testify due to his knowledge of the facts, ability to explain company documents and expertise); *Alexander v. Watson*, 128 F. 2d 627, 630 (4th Cir. 1942) (agreement to pay party's former attorney and accountant for trial testimony regarding facts about issues in the litigation they knew through previous service to the party held to be void as contrary to public policy).

Hahn Loeser's argument that hiring and paying "professional witnesses" was necessary to secure their testimony for trial (AB 38) is wrong. Antaramian did not hire or pay George Knott, lead counsel for Nassif, yet deposed him and read his deposition transcript at trial. (R.8521-8557) He could have done the same with the seven paid fact witnesses. *Thomas v. City of New York*, 293 F.R.D. 498, 506 (S.D. N.Y. 2013) (rejecting excuse that plaintiff had to hire and pay fact witness so that

she would appear to testify because "that has been the purpose of subpoenas since time immemorial.")

Hahn Loeser also seeks to rely on Bar staff opinions (which have not been authored by any court and have limited application here). (AB 39-40). Opinion 23940 addresses paying a lawyer for representing a witness while that lawyer is acting in his capacity as a lawyer for that witness. It had nothing to do with presenting a paid lawyer as an unpaid fact witness. Similarly, in Opinion 20542, there was no suggestion the compensation to the lawyer would not be disclosed to the tribunal, or the lawyer's role portrayed as a contrast to the other side's paid experts. The opinion emphasized the compensation would have to be reasonable and reimburse the witness for a "loss of compensation" – a requirement under Rule 4-3.4(b) then, as it was when Antaramian paid his lawyer witnesses. The evidence here demonstrates Antaramian failed to meet that burden.

II. Antaramian's payment to fact witnesses also violated the Florida Statute governing payments to witnesses.

Hahn Loeser also fails to address Antaramian's violation of the statutory limit in Section 92.142(1) on paying fact witnesses, arguing instead that they were expert or skilled witnesses (AB 48). Antaramian's witnesses did not testify as experts and, therefore, could not be paid expert witness fees. *Moakley v. Smallwood*, *supra*. (IB 36). Hahn Loeser's statement that the "professional" witnesses were over 100 miles from the court (AB 48) is also irrelevant and does not excuse the statutory violation.

III. The violations of Rule 4-3.4(b) and Section 92.142(1), Florida Statutes should not be further rewarded by awarding nearly two million dollars in prevailing party attorneys' fees and costs against TPI.

Hahn Loeser urges this Court turn a blind eye to what should be done about Antaramian's illegal and unethical payments to fact witnesses – arguing these issues are beyond the certified question. First, because the Second District concluded fact witnesses could be paid not just for their own deposition, trial testimony, and preparation to testify -- but also for the client's case preparation and discovery -- it did not address the appropriate penalty for these violations.

Second, this Court holds when it accepts jurisdiction over a case, it "may review the district court's decision for any error." *Hooker v. Hooker*, 220 So. 3d 397, n. 1 (Fla. 2017). This Court's review of the actions here – including appropriate remedies for violations that led to a multi-million-dollar prevailing party fee and cost award – is particularly within this Court's role to oversee the conduct of litigation in Florida courts. *See, e.g.,* Art. V, §2, Fla. Const.; *Wohl,* 842 So. 2d 811; *Moakley,* 826 So. 2d 221; *Florida Bar v. Jackson,* 490 So. 2d 935 (Fla. 1986). [2]

[2] Hahn Loeser notes this Court did not also grant review based on conflict with *Wohl* (AB 1). That is understandable – *Wohl* was a disciplinary case and this is not. But cases like *Wohl, Jackson* and *Moakley* make clear this Court's lack of tolerance for the misconduct here. Courts across the nation condemn and strongly sanction such conduct. *See, In re Kien,* 69 Ill. 2d 355 (Ill. 1977); *In re Telcar Group, Inc.,* 363 B.R. 345, 354-355 (E.D. N.Y. 2007); *Thomas,* 293 F.R.D. 498. Each of these cases concern the misconduct of a *single* witness. The Answer Brief fails to deal with six witnesses and two members of the Antaramian team, all attorneys, and each directly

While suggesting this Court should not reach the question, Hahn Loeser offers no substantive response to the authorities TPI cites at IB 37-44. (AB 47). These cases show this Court can stop Antaramian (and Hahn Loeser) from being further rewarded for these unconscionable violations.

TPI is not collaterally attacking the fee judgment. (AB 47). TPI raised these arguments in the fee hearing and in the Second District. Nor has TPI requested the underlying verdict be set aside, although courts have provided such relief when the unlawful payments are not discovered until after trial. *U.S. v. Cinergy Corp.*, 2008 WL 7679914 *14 (S.D. Ind. Dec. 18, 2008); *Thomas*, 293 F.R.D. at 507; *In re Depuy Orthopaedics*, 888 F. 3d at 792. Rather, TPI seeks to prevent Hahn Loeser, as Antaramian's successor, from being further rewarded with a prevailing party fee award when Antaramian unlawfully paid seven fact witnesses to help him prevail.

TPI does not dispute a party can assign a fee judgment. (AB 49). But Hahn Loeser as assignee takes that judgment subject to the defense that Antaramian prevailed only after unlawfully paying his fact witnesses. Moreover, Hahn Loeser is not an "innocent" assignee. Hahn Loeser, through its employee/fact witness Tripp, participated in the pretense that the seven witnesses were unpaid fact

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involved in the improper payment for fact testimony. Sanctions in these cases ranged from exclusion of testimony or disqualification of counsel when the unlawful payments were discovered before or during trial, to reversal and remand for retrial when the payments were discovered after trial.

witnesses rather than highly paid expert or professional witnesses, hired to assist in case and discovery preparation and to testify for Antaramian at trial. Hahn Loeser also had an undisclosed financial interest in helping Antaramian win the case, as revealed by its claim for $6.3 million in Antaramian's bankruptcy case, which Antaramian partially satisfied by assigning his fee judgment against TPI to Hahn Loeser. (DCA R.572; DCA R.634). Allowing Hahn Loeser to recover millions from TPI in prevailing party fees and costs under these circumstances would reward unlawful conduct and perpetuate a miscarriage of justice.

The authorities TPI cites in issue III show this Court has the authority to prevent a further injustice. (IB 37-44). Hahn Loeser's silence confirms such action is warranted.

CONCLUSION

Petitioner, TPI, respectfully requests the certified question be answered as follows: Rule 4-3.4(b) of the Rules Regulating the Florida Bar does *not* permit a party to pay a fact witness for the witness's assistance with case and discovery preparation.

Petitioner further requests the Court to set aside the Fee Judgment, in its entirety, and bar Hahn Loeser from enforcing the Fee Judgment. Florida law should condemn and punish, not reward, Antaramian's "extremely serious misconduct." *Wohl*, 842 So. 2d at 816.

Dated: July 10, 2018.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of July, 2018, a true and correct copy of the above and foregoing has been filed via the Florida Court's E-Filing Portal which will send an Electronic Mail notification of same to the following:

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CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing computer-generated brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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