NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

EVE'S GARDEN, INC., EUGENE MANSON JOHNSON, and EVIE JOHNSON,	)	
Appellants,	)	
v.	)	Case No. 2D00-4930
UPSHAW & UPSHAW, INC., REGAN UPSHAW, and AYESHA UPSHAW,	)	
Appellees.	)	

Opinion filed August 29, 2001.

Appeal from the Circuit Court for Pasco County; Maynard F. Swanson, Jr., Judge.

Robert V. Williams and John A. Schifino of Williams, Schifino, Mangione & Steady, P.A., Tampa, for Appellants.

Marie Tomassi and Michael K. Green of Trenam, Kemker, Scharf, Barkin, Frye, O'Neill & Mullis, P.A., St. Petersburg, for Appellees.

PER CURIAM.

The defendants, Eve's Garden, Inc., Eugene Manson Johnson, and Evie Johnson, appeal a judgment awarding attorneys' fees in the amount of $18,000 to the plaintiffs, Upshaw & Upshaw, Inc., Regan Upshaw, and Ayesha Upshaw, as a sanction for violating an order compelling discovery. The defendants challenge only the amount of the award. We conclude that both the hourly rate and the number of hours used to calculate the award must be reduced.

On March 8, 1999, the trial court entered an order compelling the defendants to provide to the plaintiffs certain discovery requested by the plaintiffs. The order required the defendants to comply on or before March 23, 1999. When the defendants failed to comply with this order, the trial court entered a second order, finding that the plaintiffs were entitled to the "reasonable attorneys' fees incurred in connection with efforts to obtain compliance with and enforce this court's order of March 8, 1999." The judgment on appeal is a result of the quantification of these fees. The detailed facts involved in this discovery dispute are not important, except perhaps to note that the defendants' current counsel played no role in the conduct that resulted in this sanction.

In awarding fees, the trial court relied in part upon an affidavit from plaintiffs' counsel reflecting 94.1 hours of work. The client had been charged $200 per hour for most of this work. At the hearing to set the amount of the fees, the defendants challenged, among other things, the reasonableness of the hourly rate charged, the time charged by the plaintiffs' attorney for traveling to Dade City for hearings, and the time charged by the

plaintiffs' attorney between March 8, 1999, and March 23, 1999. The trial court rejected these challenges and held that plaintiffs' counsel had reasonably expended 90 hours of time at the reasonable hourly rate of $200 in enforcing the March 8, 1999, order. This amount was reduced to judgment.

At the hearing, the plaintiffs presented the testimony of a lawyer from Tampa, who opined that the services provided and the time spent by the plaintiffs' counsel were reasonable and necessary, and that the hourly rate charged was reasonable and an amount customarily charged for similar services. The Tampa lawyer did not believe the hourly rate should be reduced because the lawsuit was pending in Dade City. His own firm charged similar or higher rates whether a lawsuit was filed in Hillsborough County or in neighboring Pasco County. The defendants responded with testimony from a Dade City lawyer that the maximum reasonable fee for such work in the locality of Dade City was $175 per hour for in-court services and $150 per hour for out-of-court services. In accepting the plaintiffs' assertion that $200 per hour was a reasonable hourly rate, the trial judge noted that Dade City was part of the Sixth Judicial Circuit, encompassing both Pasco and Pinellas Counties, and that the circuit included metropolitan areas in which attorneys often charged higher rates similar to the amount requested by the plaintiffs. Therefore, the trial judge based his finding of a reasonable hourly rate not on the rates customarily charged in Dade City, but on the rates customarily charged in the Sixth Judicial Circuit as a whole.

In Chandler v. Chandler, 330 So. 2d 190 (Fla. 2d DCA 1976), this court held that fees in a Pasco County divorce could not be based on the reasonable rate in

Sarasota County. Rule 4-1.5(b)(3) of the Rules Regulating the Florida Bar establishes as a factor to be considered in calculating a reasonable fee, "the fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature." See also Centex-Rooney Constr. Co. v. Martin County, 725 So. 2d 1255, 1258 (Fla. 4th DCA 1999). We recognize that the bar is more mobile today than it was in 1976, but communities within our appellate district continue to experience significant differences in the fees customarily charged by local attorneys. Attorneys in smaller communities still tend to charge less than those in larger communities. In addition, in a circuit like the Sixth Judicial Circuit, which encompasses both rural and metropolitan areas at some distance from each other, the "locality" does not always encompass the entire circuit. This litigation does not involve any extraordinary matter requiring a party to retain counsel with unusual expertise. The parties admit that the litigation could have been handled by competent counsel retained in Pasco County. Accordingly, the trial court erred when it accepted the higher regional hourly rate. Based on the evidence before the trial court, the maximum rate that could be used for this award was $175 per hour for in-court work and $150 per hour for all remaining work.

The parties also disputed whether travel time should be included within the award. The trial court ultimately concluded that, in this case, travel time could be included because travel was necessitated by the wrongful conduct of the defendants. We agree.

We recognize that travel time is generally not compensable in this district when setting a reasonable fee. See Belmont v. Belmont, 761 So. 2d 406 (Fla. 2d DCA 2000); Gwen Fearing Real Estate, Inc. v. Wilson, 430 So. 2d 589 (Fla. 4th DCA 1983);

Chandler, 330 So. 2d 190. We conclude, however, that travel time may be awarded when fees are awarded as a sanction under circumstances similar to this case. The defendants were aware that the failure to provide discovery could result in unnecessary hearings and that those hearings would require the plaintiffs' counsel to travel to Dade City. Accordingly, the trial court could exercise its discretion to award travel time in this context.

Finally, we conclude that the trial court erred when it calculated the fees from a date prior to March 23, 1999, because until that date, the discovery required by the March 8, 1999, order was not due and could not be enforced. Therefore, the award of fees for time prior to March 23, 1999, was beyond the scope of the plaintiffs' entitlement. Of the 90 hours of time that the trial court determined to be reasonable, approximately 6 hours were for services rendered prior to March 25, 1999. Accordingly, we conclude that the maximum number of hours that should be included in the award is 84.

On remand, the parties should review the fee affidavit and attempt to settle upon an appropriate award based on the maximum hourly rates and the maximum hours of time established by this opinion. If the parties cannot amicably agree upon this calculation, the matter should be set for hearing before the trial court.

Affirmed in part, reversed in part, and remanded.

WHATLEY, J., and ELLIS, CYNTHIA A., ASSOCIATE JUDGE, Concur.
ALTENBERND, A.C.J., Specially concurring.

ALTENBERND, Acting Chief Judge, Concurring.

I agree that Chandler v. Chandler, 330 So. 2d 190 (Fla. 2d DCA 1976), holds that attorneys' fees for cases filed in Dade City should be calculated based on the customary hourly rate charged in Dade City. In this case, where the fees were imposed as a sanction in a discovery dispute between two parties represented by Tampa law firms, it seems unnecessary to use a Dade City rate to calculate the fees owed.

The primary plaintiff, Upshaw & Upshaw, Inc., is a corporation located in Lutz, Florida, inside Hillsborough County and a short distance south of the Pasco County line. The primary defendant is Eve's Garden, Inc., a corporation located in Land O' Lakes, Florida, a short distance north of the Pasco County line. When Eve's Garden was sued by a Tampa law firm in Dade City, Eve's Garden hired a Tampa law firm. When discovery problems arose, it replaced that law firm with another Tampa law firm. The purpose of this type of legal sanction is both to punish the recalcitrant party and to reimburse the victim. When both corporate parties have reasonably selected metropolitan law firms to litigate this matter, it seems odd to require testimony about the fees charged by a hypothetical Dade City lawyer.

The experienced Dade City lawyer who testified in this case could ably litigate this discovery matter for either side at less cost, but both parties hired more expensive Tampa law firms. If the sanction is a form of restitution, it really ought to be calculated at the actual rates charged so long as those rates are reasonable in light of all

the circumstances. But for the application of Chandler, I would affirm the trial court's decision to use the higher regional hourly rate.