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

CASE NO. 5D14-3730

DEMPSEY & ASSOCIATES, P.A.,

Appellant,

v. L.T. Case No. 2006-CA-002750

HAROLD DALE LINDON, ET AL.,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT, NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant's statement of the case and facts is inadequate and incomplete, and thus Appellee is compelled to restate the case and facts in their entirety.

Statement of the Case

This is the third appeal from the underlying litigation. It involves a fee dispute between Appellee Harold Dale Lindon and his prior appellate counsel, Appellant Dempsey & Associates, P.A. ("Dempsey"). The appeal arises from the trial court's denial of a motion to enforce charging lien and a motion to compel production of a confidential settlement agreement. R. 4261-67.

In the underlying litigation, Mr. Lindon had sued Dalton Hotel Corporation ("DHC") and Roy B. Dalton, Jr. in connection with a business dispute. R. 57-94. During the trial proceedings, Dempsey was not Mr. Lindon's counsel of record. *See* R. 1-3,337. After a jury returned a verdict in Mr. Lindon's favor, the trial court found Mr. Lindon's evidence insufficient and directed a verdict to DHC and Mr. Dalton, and Mr. Lindon appealed. *See* R. 3,175-76, 3,338-49. During that appeal, Dempsey represented Mr. Lindon as counsel of record and obtained reversal of some rulings but not others. *See Lindon* v. *Dalton Hotel Corp.*, 49 So. 3d 299 (Fla. 5th DCA 2010) ("*Lindon I*"). In February 2011, Mr. Lindon's attorney-client relationship with Dempsey was terminated. Tr. (Aug. 25, 2014) at 39-40. Dempsey then filed a charging lien against Mr. Lindon. R. 3,610; App. 108-09.

On remand, a successor trial judge found the jury verdict in favor of Mr. Lindon was contrary to the manifest weight of the evidence and ordered a new trial. R. 3770-79. Again, Mr. Lindon appealed. During this second appeal, Mr. Lindon, represented by the undersigned counsel, obtained reversal of the trial court's ruling. *See Lindon* v. *Dalton Hotel Corp.*, 113 So. 3d 985, 986-87 (Fla. 5th DCA 2013) ("*Lindon II*"). This Court remanded for a jury trial on damages only. *Id.* at 987.

On the second remand, Mr. Lindon settled his business dispute with DHC and Mr. Dalton in June 2013—*i.e.*, 29 months after he had terminated Dempsey. R. 4,065, 4,073. The terms and amount of that settlement agreement are confidential. Tr. (Aug. 25, 2014) at 42-43.

After Mr. Lindon settled his dispute, Dempsey filed a motion to enforce its charging lien. R. 3,990-3,998. Mr. Lindon responded. R. 4,076-87. Dempsey subsequently amended its motion. R. 4,137-48. The trial court convened two evidentiary hearings on the motion. Tr. (July 2, 2014); Tr. (Aug. 25, 2014). After the first evidentiary hearing, Dempsey moved to compel production of Mr. Lindon's confidential settlement agreement. R. 4,211-29; Tr. (Aug. 19, 2014). Mr. Lindon had objected to that discovery request eight months earlier. R. 4,222-29. The trial court denied both motions. R. 4,261-67. This appeal followed.

Statement of the Facts

A. Thomas Young's And Victor Chapman's Estimates

When he took the first appeal, Mr. Lindon needed to hire a lawyer to handle it. Tr. (Aug. 25, 2014) at 24. At the trial level, Mr. Lindon had been represented by Victor Chapman. *Id.* at 5. To litigate the appeal, Mr. Chapman quoted a fee of $50,000. *Id.* at 5-6.

When Mr. Lindon asked his neighbor, Bernard H. Dempsey, Jr., Dempsey's founding shareholder, how he should proceed, Mr. Dempsey told Mr. Lindon he needed an appellate specialist. *Id.* at 6. Specifically, Mr. Dempsey suggested Mr. Lindon should speak with his associate, Thomas Young, a board-certified appellate practitioner with 19 years' experience. *Id.*

Mr. Lindon discussed the situation with Mr. Young, and they exchanged e-mails. S.R. 10; App. 119. During these communications, Mr. Young was aware of the price Mr. Chapman had quoted: "And as I recall he had a quote for Mr. Chapman's law firm for—this is my memory, but for around 50,000 and I don't know if that was a blended fee, a flat fee, an hourly fee, I don't know what that number was, but the 50,000 sticks in my mind, and he was essentially wanting to know what it would cost for us to do it." Tr. (July 2, 2014) at 113. Mr. Young provided an estimate to Mr. Lindon: "Based on the information Victor provided, I estimate that the appeal will require around 100 hours of attorney time. Bernie bills

my work at $265 an hour, so I estimate that attorneys' fees (exclusive of costs) would run between $25,000 and $30,000." S.R. 10; App. 119. This "realistic" estimate was based on Mr. Young's 19 years' experience as an appellate specialist. Tr. (July 2, 2014) at 129-31. Additionally, Mr. Young's e-mail did not mention any contingency arrangement or that he was quoting Mr. Lindon a "minimum fee." *Id.* at 131; S.R. 10; App. 119. Moreover, according to Mr. Lindon, he never discussed a contingency arrangement with Mr. Young or Mr. Dempsey. Tr. (Aug. 25, 2014) at 7-8. In any event, based on these competing price quotes, Mr. Lindon retained Dempsey. Tr. (July 2, 2014) at 20.

B. The February 4, 2009 Engagement Letter

At the outset of the appellate engagement, Dempsey drafted an engagement letter dated February 4, 2009 and presented it Mr. Lindon. S.R. 88-89; App. 77-78. Consistent with Mr. Young's estimate, the letter provided as follows:

> Dear Dale:
>
> The purpose of this letter is to confirm in writing our agreement concerning your retaining our law firm to represent you in the above-referenced appellate matters, excluding any attorneys' fee appeal.
>
> ***You will be charged a flat fee of $26,500.00 for time spent representing you in this matter.*** The fee will consist of four (4) equal payments of $6,625.00. The first installment is non-refundable and is due upon execution of this agreement. Each subsequent installment will be due no later than ninety (90) days from the due date of the previous installment.

Work will be billed at an hourly rate of $400.00 per hour for all work performed by me, $265.00 per hour for work performed by associates in the firm, and $110.00 per hour for all work performed by paralegals and law clerks in the firm. The law firm retains the right to adjust the above-stated hourly rates the first day of January or each succeeding year hereafter.

In addition to the ***flat fee*** described above, you will be responsible for costs incurred in connection with our representation of you.

Our firm will send you monthly invoices, which will include a detailed itemization of the costs incurred and the work performed by personnel in our firm in connection with its representation of you.

You agree and understand that, ***if you are recognized as the prevailing party, this law firm will submit a complete invoice***, even if that invoice exceeds the $26,500.00 flat fee charged to you, for all fees and costs incurred in connection with our representation of you ***in any request for attorneys' fees and costs.***

The law firm makes no representations or warranties concerning the successful conclusion of its representation of you. All statements of professional personnel on these matters are statements of opinion only.

This Contract represents the entire agreement of the law firm and you. There are no promises, terms, conditions or obligations, other than those contained herein; and this Contract shall supersede all previous communications, representations, or agreements, either verbal or written, between the law firm and you.

The parties hereby have caused this Contract to be executed in the manner and form sufficient to bind them on the date first above written.

If the foregoing is agreeable to you, please sign your name where indicated below and return the original to me with your initial non-refundable installment payment of $6,625.00,

Thank you for the opportunity to be of service to you.

Very truly yours,

BERNARD H. DEMPSEY, JR.

S.R. 88-89 (emphasis added); App. 77-78.

In other words, this engagement letter repeatedly described the $26,500 fee[1] to be paid as a "flat fee," explained that "if" Mr. Lindon was "recognized as the prevailing party," Dempsey would "submit a complete invoice . . . in any request for attorneys' fees and costs," and contained a merger clause by which the parties agreed the letter "represents the entire agreement." S.R. 88-89; App. 77-78. The letter made no mention of what would happen in the event Mr. Lindon settled his case. S.R. 88-89; App. 77-78. Moreover, Angela Browning, a Dempsey paralegal, wrote in a cover e-mail attaching the engagement letter that Mr. Lindon's fee "will be capped at $26,500" and explained, "[r]eally, the purpose of the fee agreement is nothing more than to provide you with an assurance of the $26,500 flat fee." S.R. 5; App. 111. After reviewing the letter, Mr. Dempsey was "comfortable" with how it had been drafted and "didn't see anything inconsistent" between his understanding of the oral agreement and how it was reduced to writing. Tr. (July 2, 2014) at 27-28. In short, according to Mr. Dempsey, "The agreement I had with

[1] $26,500 happens to be 100 hours multiplied by Mr. Young's $265 per hour rate. *See* Tr. (July 2, 2014) at 131 ("Well, I was estimating 100 hours, and then I just plugged in the hourly rate that was billed at the time."). Recall that Mr. Young had estimated the appeal would take 100 hours. S.R. 10; App. 119.

[Mr. Lindon] was the agreement that is reflected in the February 4, 2009 document." *Id.* at 66-67.

In any event, neither Mr. Lindon nor Mr. Dempsey signed this engagement letter. *Id.* at 67. Although Mr. Dempsey was then familiar with Florida Rule of Professional Conduct 4-1.5(f)(2)[2] and believed the oral agreement and unsigned engagement letter contained a contingency provision that applied whether Mr. Lindon settled his case or was found to be the prevailing party, he did not believe Rule 4-1.5 applied in this situation. Tr. (July 2, 2014) at 44. Despite this belief, when confronted in court with the written terms of the February 4, 2009 engagement letter, Mr. Dempsey realized it said nothing about settlement:

> Q. Yes, sir. Does that say that if there's a settlement or if Dale is recognized as the prevailing party?
>
> A. I see—I don't see the settlement, no. I do see prevailing party.

Id. at 79. Mr. Young agreed with Mr. Dempsey's assessment that the engagement letter referred only to prevailing parties, not settlement, even though Mr. Young, as an appellate specialist, understood that prevailing party is a legal term of art that

[2] Rule 4-1.5(f)(2) provides: "Every lawyer who accepts a retainer or enters into an agreement, express or implied, for compensation for services rendered or to be rendered in any action, claim, or proceeding whereby the lawyer's compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof shall do so ***only where such fee arrangement is reduced to a written contract, signed by the client, and by a lawyer for the lawyer or for the law firm representing the client. No lawyer or firm may participate in the fee without the consent of the client in writing.***" Fla. R. Prof'l Conduct 4-1.5(f)(2) (emphases added).

applies to obtaining legal fees from losing parties via fee-shifting statutes, not obtaining legal fees from clients via contingency arrangements. Tr. (July 2, 2014) at 134-35 ("It—it does not specify settlement," and "I agree this is a very poorly written letter.").

Mr. Dempsey also conceded that, at the time Mr. Lindon terminated Dempsey's services, neither contingency he believed it contained (*i.e.*, settlement or determination of prevailing party) had occurred:

> Q. I'm sorry. At the time you and Mr. Lindon parted ways, that contingency that you identified as judgment in his favor or settlement in his favor, had not yet occurred, correct?
>
> A. The—let me think of that. There was no settlement and there was no judgment.
>
> Q. Right.
>
> A. So the answer would be—yes, there was no settlement at that time, but there—and there was no judgment.
>
> Q. And therefore at the time you say Mr. Lindon terminated your services—
>
> A. Yes, sir.
>
> Q. —the contingency that you claim would have entitled you to hourly fees had not yet occurred, right?
>
> A. I felt that it had. I told you as I—and I read the opinion as a whole, we did prevail—or put it this way, Mr. Lindon prevailed. He was given a second opportunity. The district court—the opinion the district court did not affirm and it took measures to make itself clear that Mr. Lindon had prevailed on certain counts and issues.

Q. Okay. But—now you've got me confused, because I thought you said the contingency for payment of hourly—of the hourly fees was a judgment in his favor or a settlement.

A. If he—if he recovered by way of settlement or judgment, yes.

Q. If that's the contingency, and that's my only question, if that's the contingency as you understood it at the time you claim Mr. Lindon fired you, that contingency had not occurred?

A. No. He hadn't given us the opportunity. I tried several times to negotiate for him, but he hadn't given us the opportunity.

Q. So am I right that at the time you and Mr. Lindon parted ways, the contingency you've identified had not yet occurred; is that true?

A. Settlement or judgment that—no, there hadn't been a settlement or a judgment.

Q. You said—

A. That's my understanding.

Tr. (July 2, 2014) at 84-86.

C. The September 29, 2009 Engagement Letter

Almost eight months after Dempsey presented Mr. Lindon with the February 4, 2009 engagement letter, Dempsey presented Mr. Lindon with an "amended" engagement letter dated September 29, 2009. App. 83-84. This letter provided as follows:

Dear Dale:

This letter follows our meeting last Saturday and several conversations before that, during which we discussed the need to

clarify and amend the fee agreement you initially entered with our firm. Upon your acceptance of the terms set forth herein, as indicated by your signature on page two, this letter agreement will supersede your prior agreement with the law firm and shall be binding in all respects.

As I have said to you many times, I grossly underestimated the amount of time that would be required to represent you in the referenced appeals. I estimated the number of hours without having been involved in the trial court proceedings and without seeing the full trial court record. The size of the record and the complexity of the issues on appeal made the case much more complex than I envisioned.

In addition to underestimating the number of hours that would be required to represent you, we have discussed the fact our initial written agreement does not accurately reflect the terms to which you and I verbally agreed. ***For instance, we did not agree that your liability for attorneys' fees would be capped at $26,500.00. Our agreement was that you would be responsible for a minimum fee regardless of the outcome and that, if you prevail on appeal, you will be responsible for paying our entire fee at the hourly rates reflected in the initial agreement.*** We also agreed that, if you are the prevailing party, we would attempt to recover the fees for which you are responsible from the defendants/appellees under the attorneys' fees provision of your contract with the defendants.

In short, our agreement has always been that you will pay an attorneys' fee in an amount equal to the greater of a minimum fee or a fee based on the number of hours expended on your behalf, if you prevail on appeal.

Because we agree that I originally underestimated the amount of time that would necessarily be expended in connection with your appeals and because additional work remains to be done, we have agreed that amendment of your initial fee agreement with the law firm is both necessary and fair. Therefore, in consideration of our continuing representation of you in the referenced appeals and in consideration of the reply brief and oral argument to be written and performed on your behalf, you and we agree as follows:

1. ***You will pay a minimum fee of $75,000*** for our representation of you in the referenced appeals;

2. In the event you prevail on appeal, you will pay a greater fee in an amount equal to the number of hours expended on your behalf multiplied by the hourly rates reflected on our invoices;

3. If you prevail on appeal, we will attempt to recover the attorneys' fees specified in the immediately preceding paragraph from the defendants/appellees under the terms of your contract with the defendants/appellees, and we will offset the amount you owe under the immediately preceding paragraph by the amount recovered from the defendants/appellees; and

4. In addition to our attorneys' fees, you will pay all costs and out-of-pocket expenses incurred in connection with our representation of you. Such costs and expenses include, but are not limited to, filing and transcription fees; copy costs at twenty-five cents per page; cost of outgoing fax transmissions at $1.00 per page; long-distance telephone charges; postage and delivery charges; and mileage, parking, and tolls.

Our firm will continue to send you monthly invoices, which will include a detailed itemization of the costs incurred and the work performed by personnel in our firm in connection with our representation of you. If you have questions or concerns about any item reflected on the monthly invoices, please contact either Mr. Dempsey or me immediately.

We make no representations or warranties concerning the successful conclusion of our representation of you in the appeals referenced above. All statements of professional personnel on these matters are statements of opinion only.

This letter agreement represents the entire agreement between the law firm and you. There are no promises, terms, conditions or obligations, other than those contained herein; and this agreement shall supersede all previous communications, representations, or agreements, either verbal or written, between the law firm and you.

> If you agree with the foregoing terms, please sign your name where indicated below and return the original to me. The agreement shall be effective as of the date of this letter.
>
> Thank you for the opportunity to be of service to you.
>
> Best regards,
>
> Thomas Wade Young

S.R. 88-89; App. 112-13.

Neither Mr. Lindon nor Mr. Young signed this "amended" engagement letter. Tr. (July 2, 2014) at 139. Indeed, Mr. Lindon "told [Dempsey] they were crazy." Tr. (Aug. 25, 2014) at 45. "No way we had a deal. It was a deal of $26,500 and we were not changing it now from $26,500 to $75,000. They wanted to up it." *Id.* at 30.

D. Mr. Young's E-Mails Regarding A Written Engagement Letter

While Dempsey continued to represent Mr. Lindon, Mr. Young wrote an e-mail in which he asserted it was imperative to have a written engagement letter. S.R. 11; App. 121. In that e-mail, Mr. Young wrote, "We absolutely must have a written agreement in order to assert a claim for fees above the flat fee Dale paid." S.R. 11; App. 121. As Mr. Young explained in his testimony, "I was concerned that a court would say the bar rules don't allow you to have a contingency agreement without it being signed and I thought that should be signed." Tr. (July 2, 2014) at 139.

E. The Motion To Enforce Charging Lien

Shortly after Mr. Lindon ended his attorney-client relationship with Dempsey, Dempsey notified Mr. Lindon it would file a charging lien. Tr. (July 2, 2014) at 51; S.R. 111; App. 106. A few days later, Dempsey filed an amended notice of charging lien. S.R. 112; App. 108-09.

After a second appeal and second remand, Mr. Lindon reached a confidential settlement with DHC and Mr. Dalton in June 2013. *See* R. 4,065, 4,073. At that point, it had been 29 months since Mr. Lindon had terminated Dempsey.

F. Expert Testimony Regarding Quantum Meruit

Dempsey's expert testified the quantum meruit value of Dempsey's services was $136,700. Tr. (July 2, 2014) at 164-65. But Mr. Lindon's expert testified that, setting aside the February 4, 2009 engagement letter, the quantum meruit value was, at most, between $45,000 and $50,000. Tr. (Aug. 25, 2014) at 52-53.

G. The Trial Court's Oral And Written Rulings

At the end of the hearing, the trial court provided an extensive explanation why it was denying the motion to enforce charging lien. *Id.* at 87-92. In particular, the trial court explained:

> My view of the evidence is this. The letter of February 4, 2009, appears from the testimony and evidence to state the agreement that was reached between Mr. Lindon and the Dempsey firm and that letter was very clear that there would be a flat fee of $26,500 plus the payment of all costs and that that would take care of all appellate matters except attorney fees appealed and that the firm would bill on

> an hourly-rate basis and would send detailed itemizations of the work performed in order to be able to have a record of the time that they actually spent in connection with the appeal.
>
> Then the agreement was that if Mr. Lindon was recognized as the prevailing party, the lawsuit [*sic*] would submit a complete invoice even if it exceeded the $26,500 flat fee in order to get all of their fees and costs potentially paid, but there was no statement in the letter about what happens if, as a prevailing party, the fees and costs aren't paid in full. There's no statement about settlement and the fact that Mr. Lindon is going to be responsible at any time for anything other than the flat fee, and unfortunately, from my view of the evidence, that is consistent certainly with what Mr. Young and Ms. Browning testified to in this case and is consistent with some of the e-mails and correspondence between the parties.

Id. at 88-89. Additionally, the trial court ruled it was impossible to enforce the February 4, 2009 engagement letter as a contingency fee agreement because Mr. Lindon had not signed it. *Id.* at 91. And even if the February 4, 2009 engagement letter could have been enforced as a contingency fee agreement, the trial court ruled the fee would be limited to the maximum contract flat fee of $26,500. *Id.*

Subsequently, the trial court reduced these rulings to a written order. R. 4,242-46. In that order, the trial court made a factual finding—which Dempsey invited the trial court to make and does not challenge here—"that the terms of the relationship between Petitioner and Plaintiff were memorialized in a letter from Petitioner to Plaintiff dated February 4, 2009." R. 4,242. The trial court then engaged in plain language interpretation of that agreement:

> According to the terms of the February 4, 2009, the Court finds that Petitioner and Plaintiff agreed to a flat fee of $26,500 plus costs

> for all appellate matters appealed and that Petitioner would bill on an hourly basis and would send detailed itemizations of the work performed in order to be able to have a record of the time that was actually spent with the appeal. If Mr. Lindon was recognized as the prevailing party, Petitioner would submit a complete invoice, even if it exceeded the $26,500 flat fee in order to get all of its fees potentially paid. However, the Court finds that there was nothing in the agreement between Petitioner and Plaintiff about what happens if, as a prevailing party, the fees are not paid in full The Court further finds that there was nothing in the agreement about settlement and that Plaintiff is going to be responsible at any time for anything other than the flat fee. The Court further finds that the only contingency contained in the agreement between Petitioner and Plaintiff was that if there was a prevailing party determination and a seeking of attorneys fees that the Petitioner was going to submit a complete invoice even if it exceeded the $26,500 amount in a request for attorneys fees but there was no contractual obligation on the part of Plaintiff to be personally obligated for any attorneys' fees in excess of $26,500. ***This finding is consistent with the evidence presented including the testimony received from Tom Young and Angela Browning who were employed by Petitioner when the agreement was reached.***

R. 4,243-44.[3] Here, Dempsey does not challenge the trial court's plain language interpretation of the contract; rather, Dempsey contends only that the final sentence of the above paragraph was not supported by competent and substantial evidence.

Finally, the trial court ruled, "Based on the foregoing, the Court finds that *Rosenberg* v. *Levin*, 409 So. 2d 1016 (Fla. 1982) [is] controlling. Under the Rules Regulating the Florida Bar, any contingency agreement needed to be in writing to be valid. Under *Rosenberg*, any attorney fee recovery by Petitioner is limited by

[3] It bears mentioning that in the last sentence of this paragraph, the trial court used the word "including," not the phrase "limited to." R. 4244.

what was required in the contract, which the Court finds to be $26,500." R. 4,244. Accordingly, the trial court denied the motion to enforce in its entirety. R. 4,245.

H. The Motion To Compel Production Of The Confidential Settlement Agreement

After the first evidentiary hearing, but before the second, Dempsey filed a motion to compel production of Mr. Lindon's June 2013 confidential settlement agreement with DHC and Mr. Dalton. R. 4,211-29. In the motion, Dempsey contended the amount and terms of the settlement were relevant to its quantum meruit argument. R. 4,211-13. Notably, Mr. Lindon had objected to Dempsey's request for production eight months earlier. R. 4,222-29. Mr. Lindon responded to the motion. R. 4,230-36. The trial court convened a motion hearing. Tr. (Aug. 19, 2014).

During the hearing, the trial court stated, "I just don't see the relevance of the settlement agreement because of the time that has passed between the end of Dempsey's representation and the entry of the settlement agreement. It seems so attenuated to me that it is difficult for me to see that it is reasonably calculated to lead to the discovery of the admissible evidence." *Id.* at 8. Shortly thereafter, the trial court orally denied the motion and explained in greater detail:

> THE COURT: Yeah. I think it is just too attenuated. I think it is too difficult to draw a line between what Mr. Dempsey did and a result two years later, almost two and a half years later. It is just too hard to draw a line between those and say it overcomes, that you can tie it up, tie a line between those.

> I find that difficult and given the fact the settlement agreement was intended to and is confidential, I think that it is just not reasonably calculated to lead to the discovery of admissible evidence.

Id. at 9-10. Following the motion hearing, the trial court entered a written order denying the motion. R. 4,240-41.

I. The Appeal

Dempsey timely appealed. R. 4,259-67.

SUMMARY OF ARGUMENT

1. The trial court did not err when it denied the motion to enforce the charging lien. It correctly followed Dempsey's invitation, which Dempsey does not challenge here, to conclude the February 4, 2009 engagement letter represented the parties' oral agreement. It correctly interpreted the plain language of that agreement, which Dempsey again does not challenge here. Its factual finding regarding the parties' intent is supported by competent and substantial evidence, which included—but was not limited to—Mr. Young's and Ms. Browning's testimony. It correctly rejected the notion that this was a contingency agreement because neither Mr. Dempsey nor Mr. Lindon had ever signed it. And it correctly ruled any quantum meruit award was limited to the contract price of $26,500.

2. The trial court did not abuse its discretion when it denied the motion to compel production of Mr. Lindon's confidential settlement. The trial court correctly exercised its broad discretion when it concluded the request to produce

the confidential settlement agreement was not reasonably calculated to lead to the discovery of admissible evidence. And even if the trial court had abused its discretion in denying the motion to compel, it was harmless: a quantum meruit recover cannot exceed the express terms of a contract, and the trial court correctly interpreted the plain terms of the February 4, 2009 engagement letter to provide for a flat fee of $26,500 without any contingency.

ARGUMENT

I. ISSUE 1: DID THE TRIAL COURT ERR WHEN IT DENIED THE MOTION TO ENFORCE THE CHARGING LIEN?

The trial court did not err when it denied the motion to enforce the charging lien. In Argument I of its initial brief, Dempsey jumbles two theories for reversal. First, Dempsey travels under a breach-of-contract theory and contends it was entitled to recover its hourly fees at full freight because the February 4, 2009 engagement letter supposedly contained a contingency provision. Second, even if there were no contingency provision, Dempsey contends in the alternative it was entitled to recover its hourly fees at full freight via a quantum meruit award. Both theories are incorrect.

Standard Of Review

"While the parties are entitled to de novo review of the trial court's rulings with respect to the legal effect of the contract, we are bound by the trial court's findings of fact in a case, like the present one, where competent, substantial

evidence supports the findings." *Craigside, LLC* v. *GDC View, LLC*, 74 So. 3d 1087, 1089 (Fla. 1st DCA 2011). "We review de novo the trial court's interpretation of a contract." *Whitley* v. *Royal Trails Prop. Owners' Ass'n, Inc.*, 910 So. 2d 381, 383 (Fla. 5th DCA 2005).

Merits

To impose a charging lien, Dempsey needed to show: (1) an express or implied contract between Dempsey and Mr. Lindon; (2) an express or implied understanding for payment of attorney's fees out of the recovery; (3) either an avoidance of payment or a dispute as to the amount of fees; and (4) timely notice. *Daniel Mones, P.A.* v. *Smith*, 486 So. 2d 559, 561 (Fla. 1986). The second element provides that there must be "an understanding, express or implied, between the parties that the payment is either dependent upon recovery or that payment will come from the recovery." *Sinclair, Louis, Siegal, Health, Nussbaum & Zavertnik, P.A.* v. *Baucom*, 428 So. 2d 1383,1385 (Fla. 1983) (citing *Miller* v. *Scobie*, 152 Fla. 328 (1943), and *Conroy* v. *Conroy*, 392 So. 2d 934 (Fla. 2d DCA 1980)). The trial court correctly concluded Dempsey failed to make this showing.

A. The Trial Court Correctly Concluded Dempsey Was Not Entitled To Recover Its Attorney Fees At Full Freight From Mr. Lindon Because The February 4, 2009 Engagement Letter Set Forth A Flat Fee Arrangement, Not A Contingency Fee Arrangement

The trial court correctly concluded Dempsey could not recover, under a breach-of-contract theory, its attorney fees at full freight from Mr. Lindon because

the February 4, 2009 engagement letter set forth a flat fee arrangement, not a contingency fee arrangement. Mr. Lindon presents four alternative arguments why this ruling is correct. *See infra* Argument I.A.1-4. To prevail on the berach-of-contract theory, Lindon needs to win on only one of these four alternative arguments. In contrast, for Dempsey to prevail on his breach-of-contract theory, he must prevail on all four arguments.

1. The Trial Court Correctly Concluded The February 4, 2009 Engagement Letter Represented The Parties' Oral Agreement And Correctly Interpreted Its Plain Language

The trial court correctly concluded the parties' oral agreement was reduced to writing in the February 4, 2009 engagement letter and correctly interpreted its plain language.

a. The Trial Court Correctly Concluded The February 4, 2009 Engagement Letter Represented The Parties' Oral Agreement

The trial court correctly followed Dempsey's invitation, which Dempsey does not challenge here, to conclude the February 4, 2009 engagement letter represented the parties' oral agreement.[4]

"[U]nder the invited error rule a party cannot successfully complain about an error for which he or she is responsible or of rulings that he or she has invited the

[4] Dempsey also does not challenge the trial court's ruling that the September 29, 2009 engagement letter "was an offer to modify" the February 4, 2009 engagement letter, not "a different agreement that was reached between the parties." R. 4,244. That ruling therefore stands.

trial court to make." *Tate* v. *Tate*, 91 So. 3d 199, 204 (Fla. 2d DCA 2012) (punctuation omitted). Dempsey invited the trial court to conclude the February 4, 2009 engagement letter represented the parties' oral agreement. As Mr. Dempsey testified, "The agreement I had with [Mr. Lindon] was the agreement that is reflected in the February 4, 2009 document." Tr. (July 2, 2014) at 66-67. This testimony was consistent with what Dempsey had previously argued in its motion to enforce and amended motion to enforce that the February 4, 2009 engagement letter reflected the parties' engagement. *See* R. 3,991, 4,138. As such, even if the trial court had erred when it concluded the February 4, 2009 engagement letter represented the parties' oral agreement, Dempsey invited it.

Moreover, even if Dempsey had not waived this issue pursuant to the invited-error rule, it still abandoned it in this Court when it failed to raise it in its initial brief. "[A]n issue not raised in an initial brief is deemed abandoned and may not be raised for the first time in a reply brief." *J.A.B. Enters.* v. *Gibbons*, 596 So. 2d 1247, 1250 (Fla. 4th DCA 1992). "An appellant who presents no argument as to why a trial court's ruling is incorrect on an issue has abandoned the issue—essentially conceding that [the ruling] was correct." *Prince* v. *State*, 40 So. 3d 11, 13 (Fla. 4th DCA 2010). Dempsey's initial brief did not argue the trial court erred when it concluded the February 4, 2009 engagement letter represented the parties' oral agreement. Accordingly, that argument has been abandoned on appeal as well.

b. The Trial Court Correctly Interpreted The Plain Language Of The February 4, 2009 Engagement Letter

The trial court correctly interpreted the February 4, 2009 engagement letter's plain language.

"The contracting parties' intent is determined from within the four corners of the document and construed in accordance with the agreement's plain meaning." *E.g., Prestige Valet, Inc.* v. *Mendel*, 14 So. 3d 282, 283 (Fla. 2d DCA 2009). "If a contract is clear, complete and unambiguous, there is no need for judicial construction." *E.g.*, *Hunt* v. *First Nat'l Bank*, 381 So. 2d 1194, 1197 (Fla. 2d DCA 1980). To the extent there is any ambiguity in these provisions, this Court must construe the February 4, 2009 engagement letter against the attorney who drafted it (*i.e.*, Dempsey). *City of Homestead* v. *Johnson*, 760 So. 2d 80, 84 (Fla. 2000) ("An ambiguous term in a contract is to be construed against the drafter."); *Arabia* v. *Siedlecki*, 789 So. 2d 380, 383 (Fla. 4th DCA 2001) ("An attorney must be clear and precise in explaining the terms of a fee agreement. To the extent the contract is unclear, the agreement should be construed against the attorney."); *Flynn* v. *Sarasota County Pub. Hosp. Bd.*, 169 F. Supp. 2d 1363, 1371 n.7 (M.D. Fla. 2001) (under Florida law, vague terms in fee agreements are construed against drafter).

The February 4, 2009 engagement letter is quite clear. It provides, "You will be charged ***a flat fee of $26,500.00*** for time spent representing you in this matter."

S.R. 88; App. 77 (emphasis added). Nowhere does it say Mr. Lindon would be responsible for additional fees on a contingency basis. Rather, it says, "You agree and understand that, ***if you are recognized as the prevailing party***, this law firm will submit a complete invoice, even if that invoice exceeds the $26,500.00 flat fee charged to you, for all fees and costs incurred in connection with our representation of you ***in any request for attorneys' fees and costs***." S.R. 88; App. 77 (emphases added).

This language allowed Dempsey to make a fee-shifting request for payment from DHC and Mr. Dalton if Mr. Lindon was "recognized as the prevailing party." S.R. 88; App. 77; *see also Bell* v. *U.S.B. Acquisition Co., Inc.*, 734 So. 2d 403, 410 (Fla. 1999) ("In a fee-shifting case the adverse party is required by statute or contract to pay attorney fees of the prevailing party." (punctuation and citation omitted)). It did not entitle Dempsey to receive a contingency payment from Mr. Lindon himself because the February 4, 2009 engagement letter does not provide any contingency "payment will come from the recovery." *Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A.*, 428 So. 2d at 1385. And Dempsey cannot argue that the "prevailing party" language made Mr. Lindon liable for Dempsey's fees when he settled his lawsuit, because "[t]here is no prevailing party when a settlement occurs." *Boxer Max Corp.* v. *Cane A. Sucre, Inc.*, 905 So. 2d 916, 918 (Fla. 3d DCA 2005). To the extent there was any ambiguity about whether Mr.

Lindon or DHC and Mr. Dalton would be liable for Dempsey's fees, the February 4, 2009 engagement letter has to be interpreted in Mr. Lindon's favor. *E.g.*, *Arabia*, 789 So. 2d at 383.

Moreover, the February 4, 2009 engagement letter contained a merger clause. S.R. 89; App. 78.

> Although the existence of a merger clause does not per se establish that the integration of the agreement is total, a merger clause is a highly persuasive statement that the parties intended the agreement to be totally integrated and generally works to prevent a party from introducing parol evidence to vary or contradict the written terms.

Jenkins v. *Eckerd Corp.*, 913 So. 2d 43, 53 (Fla. 1st DCA 2005) (citation omitted). For that additional reason, Dempsey's attempts to argue that parol evidence demonstrates the agreement was other than that reached in the express terms of the February 4, 2009 engagement letter also falls flat.

Accordingly, the trial court correctly interpreted the February 4, 2009 engagement letter in Mr. Lindon favor when it ruled Mr. Lindon's fees were capped at the $26,500 flat fee he already paid to Dempsey.

2. The Trial Court's Factual Finding Regarding The Parties' Intent Is Supported By Competent, Substantial Evidence

The entirety of Dempsey's appellate argument (*i.e.*, that one sentence of the order is not supported by competent, substantial evidence, *see* Dempsey Br. at 16-20) is based on a misreading of the trial court's order and selective quotations from Mr. Young's and Ms. Browning's testimonies.

As an initial matter, the Court need not even reach Dempsey's evidentiary argument because Dempsey does not challenge the trial court's ruling that the oral agreement was that reflected in the February 4, 2009 engagement letter or the trial court's plain language interpretation of that letter. *See supra* Argument I.A.1.a-b. Because this Court must now assume those unchallenged rulings were correct, it makes no difference whether the trial court's factual finding regarding the parties' intent was supported by competent, substantial evidence. "[I]t is a well settled principle of contract law that where the terms of a contract are unambiguous, the parties' intent must be determined from within the four corners of the document." *E.g.*, *Burns* v. *Barfield*, 732 So. 2d 1202, 1205 (Fla. 4th DCA 1999).

At any rate, in the order, the trial court concluded its interpretation of the February 4, 2009 engagement letter was "consistent with the evidence presented ***including*** the testimony received from Tom Young and Angela Browning who were employed by Petitioner when the agreement was reached." R. 4,244 (emphasis added). On appeal, Dempsey takes this to mean the trial court's factual findings were ***exclusively*** based on Mr. Young's and Ms. Browning's testimonies. *See* Dempsey Br. at 3, 16-20.

That is not what "including" means. Rather, "include" means "[t]o contain as part of something." BLACK'S LAW DICTIONARY 766 (7th ed. 1999). And "[t]he participle *including* typically indicates a partial list." *Id.* In other words, when the

trial court used the word "including," it did not limit the evidence or testimony that supported its interpretation exclusively to Mr. Young's and Ms. Browning's testimonies, but rather merely highlighted those testimonies as two examples of all the evidence supporting its ruling. And there is no question that Mr. Lindon's testimony at least supported the trial court's interpretation, so plainly there was competent, substantial evidence.

Review for competent, substantial evidence requires analysis of the "entire record." *Frederick* v. *United Airlines*, 688 So. 2d 412, 413 (Fla. 1st DCA 1997) ("Having reviewed the entire record, we find that competent substantial evidence supports the JCC's factual findings and that the claimant has not demonstrated that the JCC abused his discretion in ruling on the weight or credibility of any of the evidence."). When evidence is conflicting, "an appellate court is not entitled to reweigh the evidence which was already weighed by the trial court." *Noonan* v. *Snipes*, 569 So. 2d 1381, 1381 (Fla. 2d DCA 1990).

Here, Mr. Lindon repeatedly testified that he understood the February 4, 2009 engagement letter did not obligate him to pay Dempsey any fees beyond the agreed upon $26,500 flat fee. Tr. (August 25, 2014) at 7-8, 30-33, 35-36. Accordingly, there is no question that the record contains competent, substantial evidence supporting the trial court's ruling that the parties intended to agree to a $26,500 flat fee. Dempsey speculates that the trial court rejected Mr. Lindon's

testimony in its entirety. Dempsey Br. at 19-20. But the trial court did not so rule R. 4,242-46, so this Court cannot "reweigh the evidence," *Noonan*, 569 So. 2d at 1381, but rather must review the "entire record," *Frederick*, 688 So. 2d at 413.

In any event, the trial court was also correct that Mr. Young's and Ms. Browning's testimonies also supported its interpretation.

When Mr. Lindon discussed the situation with Mr. Young, they exchanged e-mails. S.R. 10; App. 119. During these communications, Mr. Young was aware of the $50,000 price Mr. Chapman had quoted. Tr. (July 2, 2014) at 113. In pertinent part, Mr. Young's e-mail provided an estimate to Mr. Lindon: "Based on the information Victor provided, I estimate that the appeal will require around 100 hours of attorney time. Bernie bills my work at $265 an hour, so I estimate that attorneys' fees (exclusive of costs) would run between $25,000 and $30,000." S.R. 10; App. 119. This "realistic" estimate was based on Mr. Young's 19 years' experience as an appellate specialist. Tr. (July 2, 2014) at 129-31. Additionally, Mr. Young's e-mail did not mention any contingency arrangement or that he was quoting Mr. Lindon a "minimum fee." *Id.* at 131; S.R. 10; App. 119. Mr. Young also recognized the February 4, 2009 engagement letter referred only to prevailing parties, not settlement, even though Mr. Young, as an appellate specialist, understood that prevailing party is a legal term of art that applies to obtaining legal fees from losing parties via fee-shifting statutes, not obtaining legal fees from

clients via contingency arrangements. Tr. (July 2, 2014) at 134-35 ("It—it does not specify settlement," and "I agree this is a very poorly written letter."). Mr. Young also testified he was "concerned" the February 4, 2009 engagement letter could not be enforced as a contingency agreement because neither Mr. Lindon nor Mr. Dempsey had signed it. *Id.* at 139-42.

Ms. Browning, in turn, testified:

> Well, there was a modified fee agreement on the case, and so the portion that Mr. Lindon would have had to pay in cash was capped a certain amount of money because he wanted insurances, you know—blank check, and then the excess over and above that 26,500, the excess fee that was earned, would be—***we would petition for that, request that from the court in the event that we won***. So that was the—there was a contingency aspect to the agreement.

Id. at 191 (emphasis added). Ms. Browning also explained that when she received Mr. Lindon's e-mails, her "understanding [was] that he was saying to me—the reason you're sending me these invoices, even though the flat fee is 26,500, is because when we win, this is what we're going to petition for in terms of fees." *Id.* at 194.

All the above testimonies were competent, substantial evidence that supported the order. Selectively quoting Mr. Young's and Ms. Browning's testimonies, Dempsey invites this Court to reweigh the evidence and conclude that the parties agreed that Mr. Lindon was liable to pay a contingency of all fees at full freight in the event he prevailed or settled his case. But the trial court already

weighed that evidence and concluded there was no such agreement. This Court cannot reweigh that evidence here.

3. The Trial Court Correctly Ruled The February 4, 2009 Engagement Letter Was Not A Contingency Agreement

The trial court correctly ruled the February 4, 2009 engagement letter was not a contingency agreement because neither Mr. Lindon nor Mr. Dempsey had signed it. In Florida, a contingency fee agreement must be signed by the client and the lawyer to be enforceable. *Chandris* v. *Yanakakis*, 668 So. 2d 180, 185-86 (Fla. 1995) ("a contingent fee contract entered into by a member of The Florida Bar must comply with the rule governing contingent fees in order to be enforceable"); R. Regulating Fla. Bar 4-1.5(f)(1) (requiring, among other things, that a contingency fee agreement be "reduced to a written contract, signed by the client, and by a lawyer for the lawyer or for the law firm representing the client"). Neither Mr. Lindon nor Mr. Dempsey signed the February 4, 2009 engagement letter. Accordingly, even if the February 4, 2009 engagement letter had contained a contingency fee component, it would still be unenforceable as a contingency fee agreement.

Nevertheless, Dempsey contends "several courts have enforced contingency agreements despite noncompliance with Rule 4-1.5." Dempsey Br. at 20. Dempsey is mistaken.

Dempsey cannot find any refuge in *Corvette Shop & Supplies, Inc.* v. *Coggins*, 779 So. 2d 529 (Fla. 2d DCA 2000). That case involved an adverse party seeking to avoid payment for fees under a fee-shifting provision, not a client who sought to avoid payment of a contingent fee. *Id.* at 531 ("While we recognize that strict compliance with the rule is always prudent, we nevertheless conclude that the rule is intended to protect the client and is not intended to shield a nonprevailing party from the payment of attorney's fees. Therefore, the award of attorney's fees in the present case was correct."). Here, however, Dempsey is seeking fees directly from its client, Mr. Lindon, not DHC and Mr. Dalton. Accordingly, *Corvette Shop & Supplies, Inc.* does not support Dempsey's request here.

Nor does *Lackey* v. *Bridgestone/Firestone, Inc.*, 855 So. 2d 1186 (Fla. 3d DCA 2003), help Dempsey. That case involved a client's challenge to a fee agreement that contained "offending clauses [that] are not at issue here." *Id.* at 1188. Specifically, *Lackey* was "not a case where an attorney is seeking to recover fees under a void provision in a contingent fee agreement." *Id.* Rather, the attorneys sought "to recover under the contingent fee clauses of the agreement, which are not infirm." *Id.* For that reason, *Lackey* declined to "hold that the inclusion of the unenforceable terms voids the entire contract." *Id.* Here, however, Dempsey's contingent fee provision was infirm because the February 4, 2009

engagement letter was not signed by Mr. Lindon or Mr. Dempsey. Accordingly, *Lackey* does not support Dempsey's argument.

It is unclear how Dempsey thinks it is aided by *Franklin & Marbin, P.A.* v. *Mascola*, because the resolution of that case did not involve interpretation of a contingency fee agreement in a personal injury matter in the first place; instead, it involved a fee agreement for a paternity case. 711 So. 2d 46, 51 (Fla. 4th DCA 1998), *as corrected* (May 13, 1998) ("As we saw at the beginning, the fee contract at issue in this case is neither fixed nor contingent. Instead, it is a periodic fee based on agreed hourly rates for hours billed from time to time, as to which the client had a contractual right and duty to object within a specified period of time after each billing."). Because *Franklin & Marbin, P.A.* did not involve a contingency fee agreement, it says nothing about whether a contingency fee agreement is enforceable "despite noncompliance with Rule 4-1.5." Dempsey Br. at 20.

Finally, the Southern District of Florida's nonbinding and nonprecedential decision in *State Contracting & Eng'g Corp.* v. *Condotte Am., Inc.*, 368 F. Supp. 2d 1296 (S.D. Fla. 2005), *amended on reconsideration in part*, 2005 WL 5643877 (S.D. Fla. 2005), *and aff'd*, 197 Fed. App'x 915 (Fed. Cir. 2006), does not assist Dempsey. First, that case involved a dispute between the client's lawyers about how to split the contingency fee, not a dispute between the lawyers and the

client about whether a contingency fee was owed in the first place. *See id.* at 1302-03. Second, it involved a lawyer who failed to sign a contingency agreement, not a client who did not sign it. *Id.* at 1305 n.11. Contrary to Dempsey's suggestion, it is not a "minor violation[]" (Dempsey Br. at 20) when a client does not sign a contingency fee agreement. Indeed, that is the entire purpose of Rule 4-1.5: it ensures that clients understand precisely how a contingency fee will be calculated. *Chandris*, 668 So. 2d at 186 ("the requirements for contingent fee contracts are necessary to protect the public interest"). To Mr. Lindon's knowledge, no Florida case since *Chandris* has ever enforced a contingency fee agreement against a client when the client did not sign it. This Court should not do be the first and only court to do so here.

4. Dempsey's Appellate Representation Of Mr. Lindon, Which Terminated In February 2011, Did Not Produce Mr. Lindon's Settlement In June 2013

Dempsey's charging lien is also invalid because "it is not enough to support the imposition of a charging lien that an attorney has provided services; the services must, in addition, produce a positive judgment or settlement for the client." *Walther* v. *Ossinsky & Cathcart, P.A.*, 112 So. 3d 116, 117 (Fla. 5th DCA 2013). Dempsey's services did not produce the settlement between Mr. Lindon, DHC, and Mr. Dalton in June, 2013 because almost two-and-a-half years had passed between those services and the settlement. A "lien will attach only to the

tangible fruits of the services" provided, so Dempsey's purported lien is invalid. *Id.* ("The notices failed to allege, and the record is devoid of any evidence, that Respondent's services produced monies or other tangible property for Petitioner."). The trial court recognized this problem at the hearing on the motion to compel when it stated, "Yeah. I think it is just too attenuated. I think it is too difficult to draw a line between what Mr. Dempsey did and a result two years later, almost two and a half years later." Tr. (Aug. 19, 2014) at 9. Accordingly, Dempsey's charging lien is invalid.

B. The Trial Court Correctly Ruled Any Quantum Meruit Recovery Was Limited To The Contract Price Of $26,500

The trial court correctly limited Dempsey's quantum meruit recovery to the contract price of $26,500.

In *Rosenberg* v. *Levin*, which the trial court found "controlling" R. 4,244, the Florida Supreme Court held "an attorney employed under a valid contract who is discharged without cause before the contingency has occurred or before the client's matters have concluded can recover only the reasonable value of his services rendered prior to discharge, limited by the maximum contract fee." 409 So.2d at 1021. Because the trial court correctly interpreted the February 4, 2009 engagement letter as setting forth a $26,500 flat fee, *see supra* Argument I.A, the trial court correctly limited Dempsey's quantum meruit recovery to $26,500. R. 4,244-45. Indeed, although Dempsey cites *Rosenberg* (Dempsey Br. at 23), it does

not mention that quantum meruit recoveries are "limited by the maximum contract fee." 409 So.2d at 1021. For that reason, Dempsey does not explain how, if the trial court correctly interpreted the parties' oral agreement as providing a flat fee of $26,500, it would still be entitled to a quantum meruit recovery above that flat fee. *See* Dempsey Br. at 21-24. Dempsey therefore has abandoned that argument. *J.A.B. Enters.*, 596 So. 2d at 1250.[5]

Moreover, Dempsey suggests it was undisputed that the quantum meruit value of its services, without regard to the February 4, 2009 engagement letter, was $136,700. Dempsey Br. at 23. That is not true. In fact, Mr. Lindon hotly disputed that testimony. Whereas Dempsey's expert testified the quantum meruit value of Dempsey's services was $136,700 (Tr. (July 2, 2014) at 164-65), Mr. Lindon's expert testified the quantum meruit value was, at most, between $45,000 and $50,000 (Tr. (Aug. 25, 2014) at 52-53). Accordingly, even if this Court vacated the quantum meruit calculation, it would need to remand for the trial court to make this factual determination in the first instance.

[5] Indeed, the contingency envisioned in the February 4, 2009 engagement letter—*i.e.*, that Mr. Lindon was found to be the "prevailing party"—never occurred. For that reason, any contingency provision was never triggered. *Boxer Max Corp.*, 905 So. 2d at 918 ("There is no prevailing party when a settlement occurs.").

II. ISSUE 2: DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT DENIED THE MOTION TO COMPEL PRODUCTION OF MR. LINDON'S CONFIDENTIAL SETTLEMENT AGREEMENT?

It was not an abuse of discretion when the trial court denied the motion to compel production of Mr. Lindon's confidential settlement agreement.

Standard Of Review

The denial of a motion to compel discovery is reviewed for abuse of discretion. *Am. Funding, Ltd.* v. *Hill*, 402 So. 2d 1369, 1371 (Fla. 1st DCA 1981) ("The trial court is given wide discretion in dealing with discovery matters, and unless there has been a clear abuse of discretion, the trial court's order will not be disturbed by the appellate court.").

Merits

A. The Trial Court Did Not Abuse Its Discretion When It Denied The Motion To Compel

The trial court properly exercised its wide discretion when it denied the motion to compel.

Dempsey conceded in the trial court that it "acknowledge[d] that the Court, to its sound discretion, can give whatever weight it desires to, to the ultimate results" of the settlement agreement. Tr. (Aug. 19, 2014) at 9. In exercising this wide discretion and denying the motion to compel, the trial court explained:

> THE COURT: Yeah. I think it is just too attenuated. I think it is too difficult to draw a line between what Mr. Dempsey did and a result two years later, almost two and a half years later. It is just too

> hard to draw a line between those and say it overcomes, that you can tie it up, tie a line between those.
>
> I find that difficult and given the fact the settlement agreement was intended to and is confidential, I think that it is just not reasonably calculated to lead to the discovery of admissible evidence.

Id. at 9-10. This was an appropriate exercise of the trial court's wide discretion.

When an attorney has been discharged, "a quantum meruit award must take into account the actual value of the services to the client." *Searcy, Denney, Scarola, Barnhart & Shipley, P.A.* v. *Poletz*, 652 So. 2d 366, 369 (Fla. 1995). "Thus, while the time reasonably devoted to the representation and a reasonable hourly rate are factors to be considered in determining a proper quantum meruit award, the court must consider all relevant factors surrounding the professional relationship to ensure that the award is fair to both the attorney and client." *Id.* But "[t]he determination as to which factors are relevant in a given case, the weight to be given each factor and the ultimate determination as to the amount to be awarded are matters within the sound discretion of the trial court." *Id.*

The trial court properly considered limited the evidentiary value of the confidential settlement agreement sought to be produced. It recognized that the settlement came to fruition two-and-a-half years after Mr. Lindon had discharged Dempsey and concluded the nexus between Dempsey's representation and that settlement was "just too attenuated." Tr. (Aug. 19, 2014) at 9. In fact, it would require the drawing of inference upon inference to conclude that Dempsey's work

was responsible for the amount and terms of this settlement. *Cf. Green House, Inc.* v. *Thiermann,* 288 So. 2d 566, 568 (Fla. 2d DCA 1974) ("This would amount to pyramiding an inference upon an inference, which is not permitted except where the first inference can be elevated to the dignity of an established fact because it is such that there can be no contrary reasonable inference."). Accordingly, the trial court appropriately exercised its wide discretion in denying the motion to compel.

B. Even If The Trial Court Abused Its Discretion When It Denied The Motion To Compel, It Was Harmless

Even if there were some abuse of discretion when the trial court denied Dempsey's motion to compel, it was harmless.

> No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of . . . error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice.

§ 59.041, Fla. Stat.2015. "To test for harmless error, the beneficiary of the error has the burden to prove that the error complained of did not contribute to the verdict. Alternatively stated, the beneficiary of the error must prove that there is no reasonable possibility that the error contributed to the verdict." *Special* v. *W. Boca Med. Ctr.*, 160 So. 3d 1251, 1256 (Fla. 2014), *reh'g denied* (Mar. 26, 2015).

The trial court correctly concluded that Dempsey's quantum meruit recovery was limited to the flat fee of $26,500. *See Rosenberg*, 409 So. 2d at 1021 ("limited

by the maximum contract fee"); *see also supra* Argument I.B. Accordingly, further discovery regarding the terms and amount of Mr. Lindon's settlement with DHC and Mr. Dalton was pointless, and any error would be harmless. Put otherwise, because there is no "reasonable possibility" that denial of the motion to compel "contributed to" the trial court's denial of the motion to enforce Dempsey's charging lien, this Court must affirm. *Special*, 160 So. 3d at 1256.

CONCLUSION

For the foregoing reasons, the Court should affirm both orders on appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 12, 2015, I electronically served thefollowing via e-mail: Peter F. Carr (pcarr@carrlawpa.com and reception@carrlawpa.com) and Mitzi S. Carr (mcarr@carrlawpa.com and reception@carrlawpa.com), Carr Law Firm, P.A., 203 East Livingston Street, Orlando,FL 32801; Michael Gay (mgay@foley.com) and Christina Kennedy (ckennedy@foley.com), Foley & Lardner, LLP, 111 North Orange Avenue, Suite1800, Orlando, FL 32801; and Bryan S. Gowdy (bgowdy@appellate-firm.com and filings@appellate-firm.com), Creed & Gowdy, P.A., 865 May Street, Jacksonville,FL 32204.

//s/ *Thomas A. Burns*
Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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