

325 Fed.Appx. 873, 2009 WL 1291769 (C.A.11 (Fla.))
(Not Selected for publication in the Federal Reporter)
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This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Eleventh Circuit Rules 36-2, 36-3. (Find CTA11 Rule 36-2 and Find CTA11 Rule 36-3)

United States Court of Appeals,
 Eleventh Circuit.

Janice MURRAY, Plaintiff Cross-Appellee,
 Cathleen Scott, P.A., Appellant Cross-Appellee,
 Cathleen A. Scott, Esq., Appellant,

v.

PLAYMAKER SERVICES, LLC, a Florida corporation,
 Joel Joel "Brill" Maxwell, an individual,
 Way Cool Playgrounds, Inc., Defendants-Appellees
 Cross-Appellants.

No. 08-12908

Non-Argument Calendar.

May 8, 2009.

Background: Plaintiff brought action against defendants pursuing damages on four counts under Fair Labor Standards Act (FLSA) and two counts under Florida wage statute. After their motion for summary judgment was granted, defendants sought recovery for attorney fees. The United States District Court for the Southern District of Florida, [Kenneth L. Ryskamp, J., 548 F.Supp.2d 1378](#), granted motion in part and denied it in part. Plaintiff appealed and defendants cross-appealed.

Holdings: The Court of Appeals held that:

(1) issue of whether district court should have held evidentiary hearing before imposing sanctions on plaintiff's counsel under federal statute, raised for the first time on appeal, would not be considered;
 (2) district court did not abuse its discretion by sanctioning plaintiff's counsel for unreasonable and

vexatious multiplication of proceedings; and
 (3) district court did not abuse its discretion by denying sanctions against plaintiff, who was an independent contractor.

Affirmed.

West Headnotes

[1] Federal Courts 170B 611

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(D) Presentation and Reservation in Lower Court of Grounds of Review

170BVIII(D)1 Issues and Questions in Lower Court

170Bk611 k. Necessity of Presentation in General. [Most Cited Cases](#)

Court of Appeals does not consider on appeal issues not raised in district court.

[2] Federal Civil Procedure 170A 2771(9)

170A Federal Civil Procedure

170AXX Sanctions

170AXX(B) Grounds for Imposition

170Ak2767 Unwarranted, Groundless or Frivolous Papers or Claims

170Ak2771 Complaints, Counterclaims and Petitions

170Ak2771(9) k. Labor and Employment Cases. [Most Cited Cases](#)

Federal Civil Procedure 170A 2800

170A Federal Civil Procedure

170AXX Sanctions

170AXX(C) Persons Liable for or Entitled to Sanctions

170Ak2800 k. In General. [Most Cited Cases](#)

In action under FLSA and Florida wage statute, district court did not abuse its discretion by sanctioning plaintiff's counsel for unreasonably and

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vexatiously multiplying proceedings, holding plaintiff's counsel responsible for defendant's attorney fees incurred after conclusion of discovery, the point at which counsel should have been aware the suit was meritless. 28 U.S.C.A. § 1927; Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C.A. § 216(b); West's F.S.A. § 448.08.

[3] Labor and Employment 231H ↪ 2204

231H Labor and Employment

231HXIII Wages and Hours

231HXIII(A) In General

231Hk2192 Actions

231Hk2204 k. Costs and Attorney

Fees. Most Cited Cases

District court did not abuse its discretion by denying sanctions against plaintiff, an independent contractor, under Florida wage statute; attorney fees did not apply to claims brought as independent contractors. West's F.S.A. § 448.08.

*874 Cathleen A. Scott, Jupiter, FL, for Cathleen Scott, P.A.

Chris Kleppin, Glasser, Boreth & Kleppin, P.A., Plantation, FL, for Playmaker Services, LLC/Joel "Brill" Maxwell/Way Cool Playgrounds, Inc.

Appeals from the United States District Court for the Southern District of Florida. D.C. Docket No. 05-80885-CV-KLR.

Before TJOFLAT, CARNES and WILSON, Circuit Judges.

PER CURIAM:

**1 This is an action brought by Janice Murray against Playmaker Services, LLC (Playmaker), Joel Joel "Brill" Maxwell, and Way Cool Playgrounds, Inc. (Way Cool) under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b) and Florida law. The district court granted the defendants' motion for summary judgment on September 25, 2007, and entered a final judgment pursuant to that order on

October 23, 2007. On November 19, 2007, the defendants moved the court to impose sanctions against Murray, pursuant to Fla. Stat. § 448.08, and against her counsel, Cathleen Scott, P.A. and Cathleen Scott (collectively "Scott"), pursuant to 28 U.S.C. § 1927.^{FN1} In an order entered on April 23, 2008, the court denied the motion as it applied to Murray, but granted the motion as it applied to her counsel and ordered counsel to pay the defendants \$23,375 in attorney's fees.^{FN2} Scott now appeals the court's imposition of the § 1927 sanctions; the defendants cross-appeal the court's denial of sanctions against Murray. We consider first Scott's appeal, then the defendants' cross-appeal.

FN1. Section 1927 provides:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

FN2. The court held that "plaintiff's counsel ... responsible for defendants' attorney's fees incurred after the conclusion of discovery, the point at which [counsel] should have been aware that the suit was meritless." Order at 6.

[1][2] Scotts argues that the court abused its discretion in imposing sanctions under § 1927 without holding an evidentiary hearing. In the district court, Scott did not object to the court's failure to hold an evidentiary hearing; rather, she raises the issue for the first time on appeal. We do not consider on appeal issues not raised in the district court. See e.g., *BUC Int'l Corp. v. Int'l Yacht Council Ltd.*, 489 F.3d 1129, 1140 (11th Cir.2007). The issue before us, then, is whether the district court abused its discretion in holding Scott amenable to sanction under § 1927. *Schwartz v. Millon Air, Inc.*,

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341 F.3d 1220 (11th Cir.2003). We find no abuse of discretion. The record fully supports the reasons the court articulated in its April 23, 2008 order as the bases for the action it took, and therefore affirm its decision.

[3] We likewise find no abuse of discretion in the court's decision denying sanctions against Murray. Under § 448.08, “[t]he court may award to the prevailing party in an action for unpaid wages costs of the action and a reasonable attorney's fee.” Fla. Stat. § 448.08. “Section 448.08 is clear and unambiguous on its face: there must be ‘an action *for back wages*’ to implicate the statutory entitlement.” *875 *Dade County v. Pena*, 664 So.2d 959 (Fla.1995) (citation omitted). Unpaid commissions are considered wages under § 448.08. *Gulf Solar, Inc. v. Westfall*, 447 So.2d 363, 367 (Fla.Dist.Ct.App.1984).

“[B]y virtue of [a] summary judgment [order] entered adverse to [an employee] on his claim for unpaid wages or salary, [the employer] is [the] prevailing party under [Fla. Stat. § 448.08], and is, therefore, entitled to attorney's fees”. *Sentinel Enters., Inc. v. Stankiewicz*, 545 So.2d 288, 289 (Fla.Dist.Ct.App.1989). However, “[Fla. Stat. §] 448.08 attorney's fees do not apply to [claims brought as] independent contractors.” *Goodwin v. Blu Murray Ins. Agency, Inc.*, 939 So.2d 1098, 1102-03 (Fla.Dist.Ct.App.2006); *see also Caldwell-Davis Constr. Corp. v. Hoover*, 461 So.2d 973, 973 (Fla.Dist.Ct.App.1984) (holding that Fla. Stat. § 448.08 only applies to actions brought by an “employee” to recover “unpaid wages”). As the district court properly found, Murray was an independent contractor.

****2 AFFIRMED.**

C.A.11 (Fla.),2009.
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