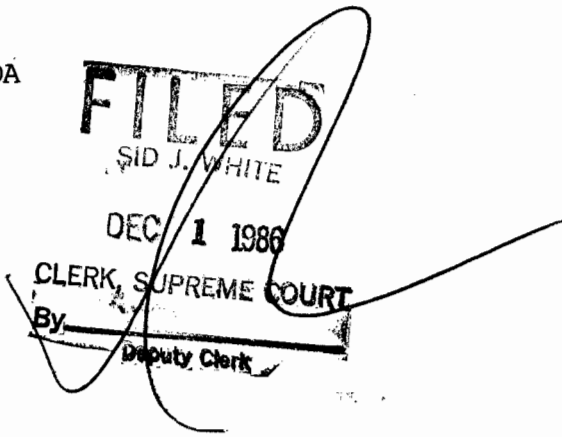
IN THE SUPREME COURT OF FLORIDA



CASE NO. 66,731

MARSHA L. LYONS and the CIRCUIT COURT
FOR THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA,
CRIMINAL DIVISION (03),

Petitioners,

vs.

METROPOLITAN DADE COUNTY,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THIRD DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONERS ON THE MERITS

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PRELIMINARY STATEMENT

For the purposes of this brief, the references previously set out in Petitioners' Initial Brief and Respondent Metropolitan Dade County's Answer Brief will be utilized.

REPLY TO RESPONDENT'S STATEMENT OF THE FACTS AND CASE

Respondent's Statement of the Case and Facts only addresses and compares the length of time which has transpired between the entry of the trial court's Order (June 15, 1984)(P.App. 3) and this Court's decisions in Makemson v. Martin County, 491 So.2d 1109 (Fla. 1986) petition for cert. filed, and Dennis v. Okeechobee County, 491 So.2d 1115 (Fla. 1986) petition for cert. filed.

The basis upon which Petitioners sought review in this Court on March 20, 1985, was a perceived conflict in the law as to whether or not the language of Florida Statute § 925.036 was mandatory in all circumstances and whether or not a court had the inherent authority to award fees in excess of the statutory amount provided under demonstrably extreme circumstances.

It was the position of the trial court and the Petitioners before the Third District Court of Appeal that a trial judge did have such inherent authority.

SUMMARY OF ARGUMENT

The Petitioners in their Statement of Issues contend that:

> "The Third District Court of Appeals erred in quashing the trial court's Order Awarding Attorney's Fees in excess of the statutory amount since the trial court had found that the amount designated under 925.036 Fla. Stat. was unreasonably insufficient under the extraordinary circumstances of the case and invoked its inherent authority to award fees in excess of the statutory guidelines.

It was the perceived conflict in the law concerning that issue upon which certiorari was sought and granted by this Court.

The Respondent has failed to address this issue at all and instead has framed four new issues, none of which were raised or addressed by the original briefs on jurisdiction or Petitioners' Brief on the Merits. Although Petitioners submit that none of these issues are properly before the Court, each will be addressed in this brief.

Respondent argues in Point I of its Issues that this case should be stayed until the United States Supreme Court decides whether or not to accept certiorari, and if it does accept certiorari, renders a decision on the County's Petition for Certiorari in the Dennis and Makemson cases. The Respondent has filed a separate Motion for Stay asking for the same relief. Petitioners have filed a separate response objecting to that motion. Petitioners strongly object to such a stay in that it would be both burdensome on

this Court and the litigants to wait for a decision in other cases, when it is pure speculation that that decision might be dispositive of this petition.

In their Point II Respondent argues that the Dennis and Makemson decisions should not be applied retroactively to this case. Petitioners contend that the general rule of law is that judicial decisions have retrospective as well as prospective application, absent a decision by the court to the contrary, and that the law which should be applied is that in effect at the time of the appeal.

In Point III the County contends that any fee in excess of the amounts set forth in Florida Statute § 925.036 should be paid by the State of Florida, not Dade County. Petitioners contend that Respondent has waived this issue by never having raised it previously in these proceedings.

Respondent contends in Point IV that this matter should be remanded for hearing in light of this Court's decisions in Makemson and Dennis, since the County never considered the extraordinary circumstances of this case relevant prior to those decisions. Petitioners contend that that issue was clearly raised and could and should have been disputed by the Respondent in the lower courts if they had chosen to do so, but in fact conceded that the amount of time spent by counsel was reasonable and necessary. Furthermore the trial court clearly set forth in his Order numerous relevant facts surrounding the representation which were the basis for his awarding fees in excess of the statutory amount.

ARGUMENT

Issue as Framed by Petitioners

> WHETHER THE THIRD DISTRICT COURT OF APPEAL ERRED IN QUASHING THE TRIAL COURT'S ORDER AWARDING ATTORNEY'S FEES WHEN THE TRIAL COURT FOUND THAT THE MAXIMUM AMOUNT DESIGNATED UNDER 925.036 FLORIDA STATUTE WAS UNREASONABLY INSUFFICIENT UNDER THE EXTRAORDINARY CIRCUMSTANCES OF THE CASE AND INVOKED ITS INHERENT AUTHORITY TO AWARD FEES IN EXCESS OF THE STATUTORY GUIDELINES.

Respondent fails to address either the factual statements or legal arguments set forth in the Argument in the Petitioners' Brief on the Merits. As a result, Petitioners must assume that Respondent does not disagree with the position taken therein.

Issues as Framed by Respondent

POINT I

> A DECISION ON THIS PETITION SHOULD NOT BE STAYED UNTIL THE UNITED STATES SUPREME COURT RULES ON THE RESPONDENT'S WRIT OF CERTIORARI IN THE DENNIS AND MAKEMSON CASES.

The Respondent argues that the Florida Supreme Court should stay all proceedings in this matter pending a ruling by the United States Supreme Court on a Petition for Certiorari filed by Metropolitan Dade County in the Dennis and Makemson cases.

The Respondent has simultaneously with the filing of its brief in these proceedings filed a separate Motion for Stay,

which the Petitioners have opposed in a separate pleading entitled Petitioners' Response in Opposition to Metropolitan Dade County's Motion for Stay. All arguments made in that response are adopted and incorporated herein by reference. Petitioners contend it is inappropriate to address this matter in the Briefs on the Merits.

As pointed out in the response, there is nothing on the face of Dade County's Petition for Certiorari that indicates that the Supreme Court of the United States will take certiorari in connection with those matters. Even assuming that the Court accepts certiorari, there is no indication when a final decision would be rendered.

The trial court's Order in this case was entered well over two years ago. It is an unreasonable burden on both this Court and the litigants to wait for a United States Supreme Court decision concerning a Florida law, when it is pure speculation as to how such a decision might affect this case.

POINT II

THE RULING OF THIS COURT IN DENNIS AND MAKEMSON SHOULD BE APPLIED TO A DECISION HEREIN.

The Respondent Dade County contends that this Court's pronouncements in the Dennis and Makemson decisions should only apply to any court appointment of an attorney in extraordinary circumstances occurring after July 17, 1986.

This argument is based on the County's position that prior to those decisions they were entitled to rely on the fee amounts set forth in the statute and on cases which suggests that a pronouncement of a new constitutional principle does not automatically mandate retroactive application.

At the time the trial court awarded attorney's fees in excess of the statutory amounts and at the time the Third District Court of Appeal entered its decision quashing that Order, there was conflicting authority concerning a trial court's inherent authority to exceed the statutory limits in extraordinary circumstances.

There was obviously reliance by court appointed attorneys and trial court judges on one side of that issue, although Respondent Dade County contends it relied on the statute.

It is the general rule that a decision of a court of last resort overruling a former decision is retrospective as well as prospective unless specially declared by the opinion to be prospective only. International Studio Apartment Association, Inc. v. Lockwood, 421 So.2d 1119 (4th DCA 1982); Florida Forest & Park Service v. Strickland, 18 So.2d 251, 253 (Fla. 1944); Aronson v. Congregational Temple de Hirsch of Seattle, Washington, 123 So.2d 402 (3d DCA 1960).

In Makemson v. Martin County, 491 So.2d 1109 (Fla. 1986) petition for cert. filed, this Court receded from that

portion of its decision in Metropolitan Dade County v. Bridges, 402 So.2d 411 (Fla. 1981), which found the then-existing predecessor statute mandatory rather than directory. It did not find the statute facially unconstitutional, but only unconstitutional "when applied in such a manner to curtail the court's inherent power to assure adequate representation of the criminally accused."

Furthermore, it is decisional law in effect at the time of appeal which governs the disposition of the case. McGoff v. State, 450 So.2d 321 (2nd DCA 1984); Lowe v. Price, 437 So.2d 142 (Fla. 1982); Wheeler v. State, 344 So.2d 244 (Fla. 1977) cert. denied, 440 U.S. 924 (1979).

In State of Florida v. Jones, 485 So.2d 1283, 1284 (Fla. 1986), this Court reviewed the question of the retroactive application of its decision in State v. Neil, 457 So.2d 481 (Fla. 1984). In that case trial counsel made the appropriate and timely objections later prescribed by Neil. The Court pointed out that "had Jones' case arrived here first it would be decided the same way as Neil because his contention was the same as Neil's." The Court also pointed out that "we generally apply the law as it exists at the time of appeal", and that the Court's statement in Neil that "it was to have no retroactive application was intended to apply to completed cases". See also, Dougan v. State, 470 So.2d 697 (Fla. 1985).

This Court's decisions in Makemson and Dennis clearly should apply to the decision herein, as the contentions

raised in this petition are the same as those considered by the Court in the prior opinions.

POINT III

THE SUPREME COURT SHOULD NOT HEAR THE COUNTY'S CONTENTION THAT THE STATE OF FLORIDA SHOULD PAY ANY FEE EXCEEDING THE LIMITS OF FLORIDA STATUTE § 925.036, SINCE THIS ISSUE HAS BEEN RAISED FOR THE FIRST TIME IN METROPOLITAN DADE COUNTY'S ANSWER BRIEF ON THE MERITS IN THE FLORIDA SUPREME COURT.

At the time the Petitioner filed a Motion for Attorney's Fees before the trial court judge, Metropolitan Dade County filed an objection to the motion based solely on the argument that Petitioner could not be paid in excess of the statutory limits pursuant to Florida Statute § 925.036. (P.App. 4)(P.App. 12).

After Judge Scott entered his Order on June 15, 1984, awarding and certifying fees in the sum of $25,000.00, Metropolitan Dade County filed a Petition for Writ of Common Law Certiorari in the Third District Court of Appeal again based on the grounds that the trial court had no authority to award attorney's fees in excess of the statutory maximum. (Supp.P.App. 1).[1]

The Third District Court of Appeal Order now under review deals solely with that issue. (P.App. 2).

The scope of certiorari review does not and cannot extend to the review of questions not raised in the lower court. Rivitz v. Bayer, 355 So.2d 1170 (Fla. 1978). As a

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1/ "Supp.P.App." is the designation to Petitioners' Supplemental Appendix.

result, this Court should not consider this issue being raised for the first time in these proceedings.

POINT IV

THIS MATTER SHOULD NOT BE REMANDED FOR A HEARING IN LIGHT OF THE DECISIONS IN MAKEMSON AND DENNIS, ESPECIALLY IN VIEW OF THE TRIAL COURT'S FACTUAL FINDINGS WHICH CLEARLY SET FORTH EXTRAORDINARY CIRCUMSTANCES OF THE REPRESENTATION IN THIS CASE.

Respondent Dade County contends that at the very least this Court should remand this case for hearing to consider whether or not the representation by Petitioner Lyons fell within the extraordinary circumstances criteria enumerated in Makemson and Dennis. The County contends that this was not litigated previously because the County did not believe it was relevant.

Whether or not the County Attorney thought the circumstances relevant, it is clear that the trial court and counsel for Patton took the position that it was, as evidenced by the Petitioner Lyons' extensive motion and affidavit, supporting affidavits, and the court Order. (P.App. 3, 4, 5, 6, 7, 8, 8A).

Furthermore, although the County had the opportunity before Judge SCott to dispute the facts surrounding the representation, they clearly chose not to do so, a fact which is reflected by the court Order:

> "The Court finds, and the County does not disagree, that the amount of time contained in the Motion for

> Attorney's Fees was reasonable and necessary for providing representation in this case, and that the fee requested of $30,313.00 is reasonable. Nevertheless, the County has objected to any payment in excess of $3,500.00." (P.App. 3, para. 9).

The issue was also clearly raised before the Third District Court of Appeal and Petitioners argued that the court's decision was supported by the Supreme Court's decision in Metropolitan Dade County v. Bridges, 402 So.2d 411 (Fla. 1981), and on the inherent power of the court to "do all things that are reasonably necessary for the administration of justice". Rose v. Palm Beach County, 361 So.2d 135, 137 (Fla. 1978). (Supp.P.App. 2).

The Respondent has had ample opportunity to question the extraordinary circumstances of the representation in this case, and having chosen not to do so, cannot now ask this Court for a remand for a hearing, especially in light of the trial court's extensive factual findings which clearly met the extraordinary circumstances criteria of Makemson. (P.App. 3).

CONCLUSION

For the above reasons, the Petitioners ask that this Court deny Respondent's Motion to Stay Proceedings herein and quash the Third District Court of Appeal's quashal of the trial court's Order awarding just compensation for Petitioner's service and reinstating the trial court Order Certifying and Awarding Attorney's Fees.

Respectfully submitted,

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By: _____
MARSHA L. LYONS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been mailed to: ERIC K. GRESSMAN, ESQ., Assistant County Attorney, Suite 2810, Metro Dade Center, 111 N.W. First Street, Miami, FL 33128; and THE HONORABLE GERALD T. WETHERINGTON, Chief Judge, Dade County Circuit Court, 73 W. Flagler St., Miami, FL 33130, this ____ day of November, 1986.

By: _____
MARSHA L. LYONS