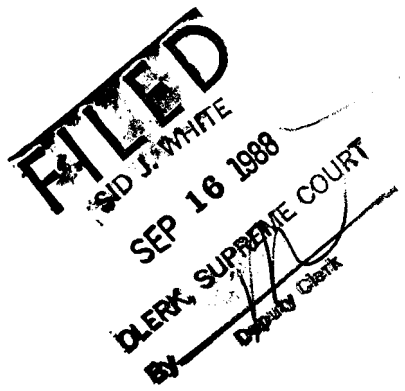
OA 10-5.88

IN THE SUPREME COURT OF FLORIDA



JOHN THOR WHITE,

Petitioner,

vs.

Case No. 72,170

PINELLAS COUNTY, a political subdivision of the State of Florida,

Respondent

AMICUS CURIAE FLORIDA ASSOCIATION OF COUNTIES, INC.'S ANSWER BRIEF

On Appeal from the Second
District Court of Appeal
Appeal No. 87-11136

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STATEMENT OF THE CASE

Amicus Curiae, Florida Association of Counties, Inc., adopts Petitioner's recitation of the case and facts.

INTEREST OF AMICUS CURIAE

Amicus Curiae, Florida Association of Counties, Inc., represents the 67 counties of Florida whose financial interests are directly affected by this appeal.

SUMMARY OF ARGUMENT

All courts possess is inherent judicial power to do what is necessary to insure the administration of justice in cases of clear necessity. This power is exercised in the sound discretion of the trial court. Because this power is discretionary, the exercise thereof may not be overturned absent a clear showing that it was abused. Furthermore, the District Court has broad discretion to review petitions for certiorari and accept or reject the same. When reviewing a trial court's exercise of discretion, the District Court is well within its authority to deny a writ of certiorari absent a clear showing by Petitioner that the trial court abused its discretion. The trial court did not abuse it discretion in this case when it held this case was not extraordinary and unusual despite Petitioner's assertion that it was confiscatory of his time, energy, and talent.

ARGUMENT

I. THE EXERCISE OF "INHERENT JUDICIAL POWER" IS A DISCRETIONARY ACT WHICH WHEN USED TO LIMIT THE POWER OF THE LEGISLATIVE BRANCH MAY BE INVOKED ONLY WHERE CLEARLY NECESSARY.

A court possesses "inherent judicial power" as a necessary element of its existence. Rose v. Palm Beach Cty., 361 So.2d 135, 136-37 and notes (Fla. 1978); Petition of Florida State Bar Asso. 40 So.2d 902, 905 (Fla. 1949). This power enables a court to do all things necessary to ensure the administration of justice, without an express grant of power, as an element of "separation of powers". Id. As the power is inherent, it is exercised within the sound discretion of the court. Petition of Florida State Bar Asso., 40 So.2d 902, 905 (Fla. 1949); Shurden v. Thomas, 134 So.2d 876, 879 (Fla. 1st DCA 1961). But here, where the invocation of the doctrine of inherent judicial power involves interference with the legislature's power to appropriate public funds under Article III, Section 12 of the Florida Constitution, the doctrine may be invoked only in cases of "clear necessity". Makemson v. Martin County, 491 So.2d 1109, 1113 (Fla. 1986), cert. denied, ___U.S.__, 107 S.Ct. 908, 93 L.Ed.2d 857 (1987); Rose v. Palm Beach Cty., 361 So.2d 135, 138 and note 8 (Fla. 1978). Moreover, the court using its inherent judicial power must justify its exercise by affirmatively showing "clear necessity" for its use. Rose, at 139.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING CERTIORARI ABSENT A SHOWING BY THE PETITIONER THAT THE TRIAL COURT CLEARLY ABUSED ITS DISCRETION.

The District Court below held, "that the trial court did not depart from the essential requirements of law in either substance or procedure." White v. Board of County Comm'rs, 524 So.2d 428 (Fla. 2nd DCA 1988). The District Court has wide

discretion to review or not review cases on a Writ of Certiorari. Combs v. State, 436 So.2d 93, 96 (Fla. 1983). However, "[t]he district courts should exercise this discretion only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice." Id. Obviously the District Court found no violation of law or miscarriage of justice apparent in the record or petition for certiorari. This is hardly surprising considering the heavy burden on Petitioner to show abuse of discretion by the trial court.

The test for review of a judge's discretion adopted by by this Court states:

> Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it can not be said that the trial court abused its discretion.

Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980). Here, a review of the trial court's Order Awarding Attorney's Fees reveals that the trial court carefully considered the undisputed facts of the case, the fee statute, and this Court's decision in Makemson after a full evidentiary hearing and decided reluctantly not to exercise his discretionary, inherent judicial power to exceed the statutory fee limits. [R:12-14]. In addition, any challenge to the trial court's decision must acknowledge Makemson's admonishment that trial and appellate courts "know best those instances in which justice requires departure from the statutory guidelines." Makemson, at 1115. Amicus Curiae respectfully suggests that if if the discretion of the trial and intermediate appellate courts may be "second-guessed" in all hard cases, this Court will become the only arbiter of which facts, in an infinite number of circumstances, justify exceeding the fee guidelines.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY FAILING TO FIND THAT THE CASE AT ISSUE WAS EXTRAORDINARY AND UNUSUAL.

In Makemson this Court held:

> [I]t is within the inherent power of Florida's trial courts to allow, in extraordinary and unusual cases, departure from the statute's fee guidelines when necessary in order to ensure that an attorney who has served the public by defending the accused is not compensated in an amount which is confiscatory of his or her time, energy and talents.

Makemson, at 1115 (Emphasis added). It has been further recognized by this Court that attorney's fee awards must be determined on the facts of each case. Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145, 1150 (Fla. 1985). Petitioner reasonably believes that the fee awarded in this case was confiscatory. Initial Brief p. 4. The trial court, from a more objective position, reasonably believed that the fee was not confiscatory. [R:12-14]. Assuming that both the Petitioner and the Circuit Judge are reasonable men it can not be said that the trial court abused its discretion under the test approved by this Court in Canakaris.

Petitioner also asserts that the trial court misconstrued Makemson by focusing on the requirement that the case be "extraordinary and unusual". Initial Brief pp. 3-4. Petitioner's argument would read those words out of Makemson in favor of a standard which concentrates on the hourly rate of compensation for the attorney as compared to another statutory rate. Initial Brief p. 3. Petitioner's interpretation of Makemson could work if all Attorneys possessed identical skills, charged identical rates, and spent identical time on equivalent cases. For example: An attorney who charges two hundred dollars ($200.00) per hour and has a large office with high overhead would be more egregiously affected by the fee statute than a sole practitioner with low overhead who charges one hundred dollars ($100.00) per hour because his opportunity costs per hour of

court appointed representation are at least twice as high. Paying both attorneys equivalent fees for equivalent cases hurts the higher paid attorney twice as much assuming they both accomplish the same amount of work in the same time (an unrealistic assumption which further illustrates the difficulty of applying the standard urged by Petitioner). Without the requirement that the case be "extraordinary and unusual" any case in which the attorney was compensated at less than the low reasonable rate would justify departure from the statute.

CONCLUSION

Amicus Curiae believes that this Court recognizes the problems which might arise should the discretion of the trial courts to award a fee they reasonably believe balance the interests of the state, the attorney and the defendant. The trial courts must be free to tailor their decisions to the individual and infinite situations which present themselves for resolution under the fee statute. The courts must have the discretion to fashion appropriate remedies when necessary to effect equity. Limiting this discretion by imposition of an inflexible rule or by review of every hard case in this Court does not serve the ends of justice. Amicus Curiae urges the Court to affirm the Second District's denial of certiorari.

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