IN THE SUPREME COURT OF FLORIDA

THE GLADES, INC.,
a Florida corporation,

Appellant,

vs.

THE GLADES COUNTRY CLUB APARTMENTS ASSOCIATION, INC., a nonprofit Florida corporation,

Appellee.

Case No.: ~~73,476~~ 73,467

(Appeal from the Second District Court of Appeals)

APPELLANT'S AMENDED BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND OF THE FACTS

Appellee, the Glades Country Club Apts. Association, Inc. (Country Club), as the prevailing party at trial was granted an award of attorney's fees pursuant to contract. The initial award of attorney's fees in the amount of $150,000.00 was reversed by the Second District Court of Appeal in The Glades, Inc., v. The Glades Country Club Apts. Association, Inc., 502 So.2d 1368 (Fla. 2d DCA 1987). After remand, the trial court entered a new order awarding Country Club attorneys fees of $66,000.00 based upon the lodestar portion of the Rowe formula. (A-3) However, the trial court added that but for Lake Tippecanoe v. Hanauer, 494 So.2d 226 (Fla. 2d DCA 1986) it would have enhanced the fee by $84,000.00 on the basis of "the amounts involved and the results obtained" for a total award of $150,000.00.

No new testimony or evidence regarding reasonable attorney's fees were submitted by Country Club after remand. (A-3) Instead, Country Club relied upon the previously established record. That record included evidence that the agreement between Country Club and its counsel was that said counsel would receive a reasonable fee. After the litigation was successfully defended, Country Club and its counsel established the fee at $150,000.00. (R-1162) Country Club also presented two expert witnesses who stated that they had not reviewed any time records of Country Club's counsel but offered opinions that a reasonable fee would range between $150,000.00 and $250,000.00. One expert estimated the number of hours expended at between 400 and 450. (R-1161, 1162)

Counsel for Country Club testified that he did not keep time records in this case and did not do so as a matter of course. He also testified that in his estimate he had spent more than 400 to 450 hours on this case and that the estimate of 300 hours contained in his response to interrogatories had merely been a conservative estimate. (R-1163)

Appellant, The Glades, Inc., appealed the award of the $66,000.00 lodestar amount and Country Club cross-appealed the trial court's failure to

award the enhancement of $84,000.00. In its corrected opinion on the second appeal, the Second District affirmed the award of the lodestar amount and reversed the trial court's failure to enhance the lodestar by the amount of $84,000.00. (A-1)

Appellant filed its Notice of Appeal pursuant to Article V, section 3(b)(3) of the Florida Constitution on December 20, 1988. Appellant seeks the exercise of this Court's discretionary jurisdiction to review the decision of the Second District which expressly and directly conflicts with decisions of this Court and other district courts of appeal.

SUMMARY OF THE ARGUMENT

I. The instant decision's reliance on subjective, general, and non-detailed criteria to establish the number of hours of attorneys time expended for the purposes fo the lodestar calculation conflicts with the rule announced in Rowe which requires "records detailing the amount of work performed."

II. The instant decision permits enhancement of the lodestar fee on the basis of "amounts involved and results obtained." Rowe does not permit adjustment of the lodestar on the basis of "amounts involved" and only permits a downward adjustment on the basis of "results obtained."

JURISDICTIONAL ARGUMENT

POINT I: IN THE INSTANT CASE, THE SECOND DISTRICT RENDERED A DECISION WHICH HOLDS THAT AN APPLICATION FOR ATTORNEY'S FEES NEED NOT INCLUDE SPECIFIC, WRITTEN TIME RECORDS. THAT DECISION CONFLICTS WITH OR MISAPPLIES THE RULE OF LAW STATED BY THIS COURT IN FLORIDA PATIENT'S COMPENSATION FUND V. ROWE, 472 So.2d 1145 (Fla. 1985).

In Rowe, this Court specifically stated:

> to accurately assess the labor involved, the attorney fee applicant should present records detailing the amount of work performed. (Rowe at page 1150) (emphasis added)

The theory and purpose behind Rowe is to award attorney's fees on an objective rather than a subjective basis in order to permit "meaningful appellate review." (Rowe at p. 1152). Rowe's requirement that the fee claimant present specific, detailed proof of the nature of and the necessity for the legal

services rendered in not new to Florida law. (Lee Engineering & Construction Company v. Fellows, 209 So.2d 454 (Fla. 1968)). The instant decision is in express and direct conflict since the effect of it is to shift the burden of proof from the fee claimant to the fee defendant and to shift from objective to subjective criteria.

On the issue of the number of hours expended, Rowe relied on the opinions of M. Serra Corp v. Garcia, 426 So.2d 1118 (Fla. 1st DCA 1983) and Brevard County School Board v. Walters, 396 So.2d 1197 (Fla. 1st DCA 1981). In Brevard, the fee claimant estimated that a total of 300 hours of lawyer time had been expended in that case. (138 hours had been recorded contemporaneously.) This is in contrast to the instant case where no time was recorded. The court in Brevard held that "[b]ecause of legitimate questions not answered on this record, the fee awarded of more than $100 for every hour claimed cannot be sustained." (emphasis added) (at p. 1198). Both Brevard and Rowe state the guiding principle that "Florida courts have emphasized the importance of keeping accurate and current time records of work done and time spent on a case, particularly when someone other than the client may pay the fee." (Rowe at 1150; see also Brevard at 1198)

Brevard was also relied upon by the First District when it decided Orange County School Bd. v. Van Zant, 400 So.2d 1019 (Fla. 1st DCA 1981). There, the court reversed the award of attorney's fees where the testimony submitted by the fee claimant's counsel "was merely an estimate." (at p. 1020)

Rowe does say that "[i]nadequate documentation may result in a reduction of the number of hours claimed." (at p. 1150) This is not an invitation by this Court to dispose of record keeping nor a sanction of the practice of not submitting written records. Rather, it is a recognition that specific, detailed evidence of time expended may come in other forms. In contrast, the case at bar stands for the proposition that written time records need not be submitted even in the absence of other specific, detailed evidence as to time spent.

Perhaps the most obvious conflicts with the instant case are contained in two cases cited in the opinion of the Second District: City of Miami v. Harris, 490 So.2d 69 (Fla. 3d DCA 1986) and Multitech Corp. v. St. Johns Bluff Investment Corp., 518 So.2d 427 (Fla. 1st DCA 1988). City of Miami is cited as authority for the proposition that Rowe does not require "written time records." In this regard, the Second District misreads both its holding and its conclusion. The Third District, in City of Miami, recognized the distinction between "contemporaneous" time records and "reconstructed" time records. Although the Third District holds that "contemporaneous" time records are not necessary to support a fee award, it also holds that their absence will require a reversal of any award so that the trial court may consider some substantial competent evidence which may include "reconstructed" time records. (at p. 73) An insubstantial factual difference exists between City of Miami and the instant case in that in City of Miami the trial court did not make the findings required by Rowe. In the instant case, the trial court made the required findings but they were unsupported by specific written records. However, the only portion of the record supporting the finding of the number of hours was the estimate of the fee claimant's counsel and the estimate of one of his expert witnesses. (R-1161, 1163)

In Multitech, the trial court was presented with three expert witnesses testifying as to the amount of a reasonable attorney's fee to be awarded to the fee claimant (the same is true in the instant case although the opinion of the Second District refers only to two). In contrast to the instant case, the Multitech court received written time records "documenting" the time expended on the case. Even though the fee claimant had submitted written records, which were not based merely on a blanket estimate, the court reversed the award of attorneys fees for, among other reasons, lack of specificity. This application of the requirements of Rowe is clearly in conflict with the Second District's application of those same requirements in the instant case since

the records submitted in Multitech were clearly more specific than the estimates in this case.

Barr v. Pantry Pride, 518 So.2d 1309 (Fla. 1st DCA 1987) represents another rejection of a mere estimate by a fee claimant's counsel as to the number of hours expended on the litigation. The trial court noted that the fee claimant's counsel did not submit "any time sheets or a time affidavit to verify" the estimated hours. (at p. 1314) On the basis of this failure on the part of the fee claimant to submit written time records, the First District remanded the case "to be revisited to the extent of any evidence presented by Mr. Sicking verifying his hours." (at p. 1315) To this statement, the court attached a footnote directing the parties to be cognizant of Crittenden Orange Blossom Fruit v. Stone, 514 So.2d 351 (Fla. 1987). Crittenden eliminates the need of an expert witness as to attorneys fees in worker's compensation matters but still, consistent with Rowe, requires specific, detailed and written documentation as to the time spent on the case. (at p. 353). Crittenden also recognizes that specific, detailed, written records serve the purpose of permitting opposing counsel the opportunity to challenge the reasonableness of the time spent as well as the other factors contained in the lodestar equation. (at p. 353, note 2).

In its opinion in the instant case, the Second District Court of Appeals states the following as the basis for determining the number of hours expended

> The trial judge who had tried the case, in determining the hours reasonably expended, considered defense counsel's testimony, the testimony and exhibits at the trial, defendant's memorandum in support of the motion for attorney's fee, and "the adequacy of [defense counsel's] documentation" of his work, including the pleadings, discovery, other contents of the court file, the settlement agreement, the mortgage and note which were incident to the settlement agreement, and a stipulated statement of untranscribed testimony at the fee hearing. (A-2)

In M. Serra, the court reversed the award of attorney's fees even through the trier of fact was thoroughly familiar "with the time, effort and skill

exhibited by claimant's attorney in the actual presentation of the case." (at p. 1119) M. Serra also states the need for both adequate time records and the need for evidence on that factor.

> [t]his court has often alluded to the necessity for the keeping of adequate time records by counsel, and the need for evidence on this factor, in keeping with the legislative mandate requiring consideration, among other factors, of the "time and labor required, in performing legal service for the claimant. (at p. 1119) (emphasis added)

In the bedrock federal cases cited by Rowe, the following reasoning and holdings are found:

> 1) Where the only information furnished to the trial court is that counsel had spent "in excess of 6,000 hours in connection with this litigation." That information was insufficient to support a fee award. Lindy Bros. v. American R. & S. Corp., 487 F.2d 161 (3d Cir. 1973) (Lindy I) (at p.167)
>
> 2) "[T]ime records, although highly desirable, are not the only means of proving time spent in multidistrict litigation of this sort... Although mere estimates of time are not acceptable, an allowance of attorneys' fees may be based on a reconstruction, provided that the time records are substantially reconstructed and are reasonably accurate." Lindy Bros v. Am. Radiator, etc., 540 F.2d 102, 109 (3d Cir. 1976) (Lindy II) (emphasis added) (at p.109)

POINT II: THE DECISION IN THE CASE ON APPEAL STATES THE RULE OF LAW THAT AN ATTORNEY'S FEE AWARD BASED ON A NON-CONTINGENT FEE AGREEMENT MAY BE ENHANCED BEYOND THE LODESTAR AMOUNT "BASED UPON THE AMOUNT INVOLVED IN THE CASE AND THE RESULT OBTAINED." THIS STATED RULE CONFLICTS EXPRESSLY AND DIRECTLY WITH THE DECISION OF THIS COURT IN FLORIDA PATIENT'S COMPENSATION FUND V. ROWE, 472 So.2d 1145 (Fla. 1985) AND WITH THAT OF MULTITECH CORP. V. ST. JOHNS BLUFF INVESTMENT CORP., 518 So.2d 427 (Fla. 1st DCA 1988).

This Court said very clearly in Rowe that

> [t]he "results obtained" may provide an independent basis for reducing the fee when the party prevails on a claim or claims for relief, but is unsuccessful on other unrelated claims. (emphasis added) (at p. 1151)

The rule that "results obtained" could only be used for reducing the fee award was further emphasized by this Court when in summarizing the stated rules it said that the lodestar was first to be calculated and then:

> when appropriate, (4) adjust the fee on the basis of the contingent nature of the litigation or the failure to prevail on a claim or claims. (at p. 1151)

Certainly, the portion of the statement which provides that the fee may be adjusted on "the failure to prevail on a claim or claims" relates to the "results obtained." Thus, the options granted by the court for adjusting the fee are only two. The first is an upward adjustment on the basis of contingency and the second is a downward adjustment on the basis of "results obtained." Of course, Appellee will point to the Court's statement in Rowe that

> [o]nce the court arrives at the lodestar figure, it may add or subtract from the fee based upon a "contingency risk" factor and the "results obtained." (at p. 1151)

Appellant suggests to the Court that this statement must be read in the context of the other two statements and in a logical fashion. Certainly this Court did not mean by the above statement that the fee could be **reduced** based on the "contingency risk" factor! Consequently, the statement must be read in a manner which mates the word "add" to "contingency risk" and the word "subtract" to "results obtained." Any other reading would yield the illogical result of a potential fee reduction where an attorney assumed the risk of litigation and would be inconsistent with the remainder of the opinion. Nothing in a logical reading of the express language of Rowe even suggests that the lodestar fee may be enhanced on the basis of "results obtained."

A further conflict exists in the case at bar since, the Second District affirmed the enhancement of the lodestar amount not only on the basis of "results obtained" but also "in light of the multimillion dollar amount involved." (A-1) The use of the "amount involved" factor as a basis for increasing the lodestar is clearly inappropriate under the teachings of Rowe. Rowe requires that the reasonable hourly rate which is established for the prevailing party's attorney is to

> take into account all of the Disciplinary Rule 2-106 factors except the "time and labor required," the "novelty and difficulty of the question involved," the "results obtained," and "[w]hether the fee is fixed or contingent." (at p. 1150, 1151)

Since the "amount involved" is one of the factors of Rule 2-106 which is not excepted, it is subsumed in the hourly rate calculation. Consequently, the opinion of the Second District expressly and directly conflicts with the rule of law enunciated by this Court when it uses the "amount involved" as a basis for enhancing the lodestar fee. Such a practice results in unacceptable "double counting."

In Lake Tippecanoe, the Second District held unmistakably that "[e]nhancement under Rowe is only applied where a contingency risk multiplier is appropriate." (emphasis added) (at p. 227) In the case at bar, the Second District has "clarified" Lake Tippecanoe as not involving "the aspect of exceptional success by defense counsel which was in effect found to be present in this case." (emphasis added) (A-2) Even if the "clarified" opinion is assumed, for argument, to be correct in its reading of Rowe, it misapplies the requirements of Rowe since Rowe does not permit an **"in effect"** justification of an enhanced fee. Rowe requires the awarding court to "state the grounds upon which it justifies the enhancement." Obviously, the trial court did not state that counsel for the attorney's fee claimant had achieved an "exceptional result." Otherwise, the Second District would not have had to "read between the lines" to determine the trial court's conclusion. The Second District apparently concluded that enhancement "in light of the multimillion dollar amount involved in this complex litigation and the completely successful result obtained on behalf of defendant" (A-2) was the equivalent of the trial court saying that the result was "exceptional." The trial court's conclusion is composed of three factors: 1) the amount involved, 2) the complexity of the litigation, and, 3) the completely successful result. Once the factors of the "amount involved" and "complexity of litigation" (factors which, according to Rowe, are subsumed in the number of hours and hourly rate) are removed from the justifying language, the basis remaining for concluding that this was an "exceptional success" is that the

success was simply "complete." There is no breath of support in Rowe for the proposition that the lodestar amount may be enhanced merely because the result has been "complete." Therefore, even if Rowe permitted enhancement based upon an exceptional result, the Second District has misapplied that rule by permitting enhancement where the result was only "complete."

Multitech, presents a parallel fact pattern. In both Multitech and the instant case:

1) The contract between the fee claimant and its counsel was not a contingent fee contract;
2) Both fee claimants claimed a reasonable fee would be established at the conclusion of the case "in light of results obtained." (Multitech at p. 429) (A-1)
3) The trial court received testimony from three expert witnesses as to the proper fee award. (Multitech at p. 429; R-1161, 1162)

Although in each case the parties and their counsel contemplated that the ultimate fee would depend on the outcome of the case, Multitech refused to approve the enhancement of the lodestar fee on the basis of "results obtained" while the Second District approved the enhancement based upon the same factor. The Multitech court, in apparent agreement with Lake Tippecanoe in its interpretation of Rowe, said "the litigation was not handled on a contingency basis, so application of the Rowe contingency multiplier would be inappropriate." (at p. 434) Of course, it may be argued that Multitech means only that the use of the "contingency multiplier" was disapproved and that the court did not disapprove an otherwise proper enhancement. However, it is important to recognize the context in which the Multitech court spoke of the "contingency risk multiplier." At page 434 of its opinion, it included the following language from Rowe when discussing Rowe's instructions regarding "the contingency risk multiplier":

> [w]hen the trial court determines that success was more likely than not at the outset, the multiplier should be 1.5; when the likelihood of success was approximately even at the outset, the multiplier should be 2; and, when success was unlikely at the time the case was initiated, the multiplier should be in the range of 2.5 and 3.

> The "results obtained" may provide an independent basis for reducing the fee when the party prevails on a claim or claims of relief, but is unsuccessful on other unrelated claims.

The inclusion of the "results obtained" factor under the heading of "contingency risk multiplier" by the Multitech court shows that it had concluded that "results obtained" was not a factor which could be used to enhance the lodestar amount. The conflict on this point between Multitech and the case at bar is direct, express, and irreconcilable.

STATEMENT OF REASONS FOR THE SUPREME COURT'S EXERCISE OF JURISDICTION

The award of attorney's fees incident to litigation is becoming more commonplace. With the adoption of new laws such as Florida Statute section 45.061, there exists in every case the potential for the award of fees. Any resolution of existing conflicts will assist in reducing appeals on this pervasive issue.

The decision of the Second District is one which endorses subjectivity rather than the bedrock objectivity that Rowe seeks to foster. Favoring subjectivity will reap only negative consequences for the citizens and the judicial system. These consequences will include but not be limited to:

1. a shifting of the burden of proof to the party opposing the fee, and in some cases making attorney fee requests impossible to challenge because there is little or no objective evidence,
2. an avoidance of meaningful appellate review,
3. the payment of windfalls to those attorneys who fail to keep adequate time records.

This case is already being cited as precedent for the award of attorney's fees based only on estimates. A review of the instant case would also permit this Court to clarify elements of Rowe which are begetting conflicting interdistrict decisions.

Respectfully Submitted,

James H. Siesky

James H. Siesky

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Amended Jurisdictional Brief has been furnished to S. LEE CROUCH, ESQUIRE, Crouch & Miner, 1001 N. Federal Highway, Suite 206, P.O. Box 700., Hallandale, Florida 33009, by regular U.S. Mail, this 5th day of January, 1989.

James H. Siesky

JAMES H. SIESKY