IN THE SUPREME COURT OF FLORIDA

THE GLADES, INC.
a Florida corporation,

Appellant,

vs.

THE GLADES COUNTRY CLUB APTS. ASSOCIATION, INC., a non-profit Florida corporation,

Appellee.

_____/

Case No. 73,467

(Appeal from the Second District Court of Appeals)

APPELLEE'S ANSWER BRIEF ON JURISDICTION

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APPELLEE'S RESTATEMENT OF THE CASE AND THE FACTS

Appellee restates the case and the facts in that Appellant's is incomplete, partially inaccurate, and contains argument.

This action was tried before the trial Judge and a Final Judgment was entered on the merits for the Defendant/Appellee, THE GLADES COUNTRY CLUB APTS. ASSOCIATION, INC., on January 21, 1986.

The trial Court by Order dated May 6, 1986 awarded Appellee the sum of $150,000.00 as and for attorney's fees incurred in the defense of the action, together with costs in the sum of $2,102.47. (Appendix 1, Page 1) The Order did not contain findings.

Both the Judgment on the merits and the Judgment for costs and attorneys' fees were appealed. (Case Nos. 86-459; 86-1180 consolidated) The Second District affirmed the Judgment on the merits and for costs by opinion filed February 27, 1987. (Appendix 2, Pages 2 and 3)(502 So.2d 1368 (Fla. 2d DCA 1987). The Court in said opinion however stated:

> "The only issue with merit concerns the trial court's findings regarding the amount of attorney's fees awarded to appellee.", And that, "Neither in the order awarding judgment for attorney's fees, nor in the transcript of the hearing to establish the reasonable amount of those fees, does the trial judge comply with the requirements of Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) and Lake Tippecanoe Owners Association, Inc. v. Hanauer, 494 So.2d 226 (Fla. 2d DCA 1986)."

The Court then remanded

> "for the purpose of determining the amount of attorneys' fees to be awarded Appellee, THE GLADES COUNTRY CLUB APTS. ASSOCIATION, INC., after compliance with the dictates of Rowe."

Upon remand the trial Court, after hearing held June 8, 1987, entered its Order on said date (Appendix 3, Pages 4 and 5) awarding

Appellee an Attorneys' Fee of $150,000.00 (lodestar $66,000 i.e. 400 x $165)(enhancement $84,000.00) and costs of $2,102.47, the same as it had in its Order of May 6, 1986. The trial Court however enlarged its June 8, 1987 Order to include a recitation of the evidence, documentation, and argument of counsel relied upon by the Court in the making of its Order, and made specific findings as dictated by Rowe, to-wit: the minimum number of hours reasonably expended by Appellee's attorneys on the litigation, a reasonable hourly rate for the services of Appellee's attorneys, the basis of the enhancement of the lodestar figure, and whether the fee was fixed or contingent.

By Notice dated June 17, 1987, Appellant appealed the Order of June 8, 1987 awarding Appellee $150,000.00. (Appendix 4, Page 6)(Case No. 87-1757)

On July 7, 1987, the trial Court on its own initiative issued a letter to counsel for the parties (Appendix 5, Page 7) indicating its intention to amend its Order dated June 8, 1987 awarding attorneys' fees for the defense of the action. The Court in its letter stated:

> "it is my conclusion that the Second District Court of Appeals has made an attempt to clarify the somewhat ambiguous language contained in the Rowe case, and it appears that the 'lodestar' approach is the only thing available in this particular case." and that, "Therefore, by copy of this letter to you I am requesting the Mr. Siesky prepare an amended order regarding attorneys fees to reflect that only the first two elements, to-wit: hours times hourly rate would appear to be compensable in this particular case, and give the final amount due and owing for attorneys' fees." (Appendix 5, Page 7)

Based upon the letter, Appellant, THE GLADES, INC., moved The Second District to relinquish jurisdiction to the trial Court so

that an Amended Order could be entered. Jurisdiction was relinquished and the trial Court on November 17, 1987 entered an Amended Order awarding Appellee an attorneys' fee in the sum of $66,000.00 i.e. lodestar, thereby deleting enhancement ($84,000.00). (Appendix 6, Pages 8 through 10)

The trial Court in its Order of November 17, 1987 made the same findings as contained in its order of June 8, 1987, but additionally made specific findings in Paragraph 4 thereof as to the basis for enhancement, but only awarded $66,000 (lodestar) based upon its interpretation that the Second District's opinion filed February 27, 1987 mandated that Rowe and Tippecanoe precluded enhancement in the instant case.

On December 16, 1987, Appellee, THE GLADES COUNTRY CLUB APTS. ASSOCIATION, INC., filed a Notice of Appeal of the trial Court's Amended Order dated November 17, 1987 awarding Appellee an attorneys' fee of $66,000.00 (Case No. 87-3553) and moved the Court for an order consolidating Appellant's and Appellee's respective Appeals, i.e. Case Nos. 87-1757 and 87-3553, which was granted January 25, 1988.

The Second District's final Order, after denial of Appellant's Motion for Rehearing or Clarification, affirmed the award of the lodestar figure ($66,000.00) reversed the failure to award the enhanced figure ($84,000.00) to which the trial Court found Appellee would have been entitled, but for Lake Tippecanoe, and remanded for the entry of an Order awarding the total of the lodestar figure and the enhanced figure.

Appellant, in addition to its Motion for Rehearing or Clarification, filed a Motion For Rehearing En Banc, which was denied, and suggestions to the Court that it certify its decision to this Court, on the grounds same was in conflict with Rowe and certain District Court opinions, and was of great public importance. The Second District did not act on said suggestions.

SUMMARY OF THE ARGUMENT

I. The finding and determination of the trial Court as to the number of hours of attorneys time reasonably expended on the litigation and affirmed by the Second District was based on objective and detailed documentation, records and evidence and does not conflict with the statement in Rowe that: ". ., the attorney fee applicant should present records detailing the amount of work performed". (emphasis supplied)

II. Rowe not only does not preclude the use of the criteria set forth in Rule 4 - 1.5(B)(4) in determining a reasonable fee in an appropriate case, but to the contrary, Rowe provides "in determining reasonable attorney fees, Courts of this State should utilize the criteria . . ." (Appendix 7, Page 16)

JURISDICTIONAL ARGUMENT

Appellee responds to Appellant's POINT I, to-wit:

IN THE INSTANT CASE, THE SECOND DISTRICT RENDERED A DECISION WHICH HOLDS THAT AN APPLICATION FOR ATTORNEY'S FEESNEED 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)., as follows:

Rowe does not say, as suggested by Appellant that a trial Court must have before it specific written time records in order to

find and determine the number of hours reasonably expended in the litigation.

Rowe does say and requires "the Court to determine the number of hours reasonably expended on the litigation.", and provides that "Inadequate documentation may result in a reduction in the number of hours claimed." (emphasis supplied)

As properly stated by the Second District Court in this case,

> "in a particular case like this, evidence sufficient to support a finding of the number of hours reasonably expended by an attorney need not necessarily include specific, written time records, although such records are highly preferable and the lack thereof may in certain cases justify a reduction in the number of hours claimed."

The trial Court twice found and determined (paragraph 1, Court Orders of June 8, 1987 and November 17, 1987(Appendix 3, Page 4 and Appendix 6, Page 8) that the minimum number of hours reasonably expended on the litigation was 400 hours and that the Court had considered the adequacy of Appellee's attorneys documentation in determining the number of hours. The trial Court specifically set forth on Page 1 of its Order (Appendix 6, Page 8) the voluminous documentation and evidence considered by it in determining the number of hours reasonably expended. The Second District in its Order stated:

> "The order awarding the fee recites that the trial judge who had tried the case, in determining the hours reasonbly 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 untransacribed testimony at the fee hearing. That testimony included that of two expert witnesses on behalf of defendant as to a reasonable attorney's fee based upon their review of the work done by defense counsel." and that,

"We do not conclude that the evidence for the lodestar figure equation as to the number of hours reasonably expended has been shown to have been insufficient in this case or that there was an abuse of discretion in that regard"

Appellant by its petition for review simply seeks to reargue the sufficiency of the evidence and documentation as to the number of hours reasonably expended.

Appellant's reliance on the following cited cases is misplaced for the reasons stated following the cite. In M. Serra Corp v. Garcia, 426 So.2d 1118(Fla. 1st DCA 1983), as distinguished from the instant case, no evidence of the time and labor expended was ever produced at the fee hearing. (Appendix 8, Page 20).

In City of Miami v. Harris, 490 So.2d 69 (Fla. 3d DCA 1986), as distinguished from the instant case, the Order awarding fees set forth no specific findings concerning its fee determination (Appendix 9, Page 26).

Lee Engineering & Construction Company v. Fellows, 209 So.2d 545 (Fla. 1968). The opinion is not in conflict, as suggested by Appellant, as the instant case does not shift the burden of proof of establishing fees from the fee claimant to the fee defendant, nor shift from objective to subjective criteria.

In Brevard County School Board v. Walters, 396 So.2d 1197)(Fla. 1st DCA 1981), as distinguished from the instant case, the fee award was reduced by the First District from $37,000.00 to $25,000.00 "because of legitimate questions not answered on this record, . . ." and because the fee award equaled 74% of the compensable award and therefore was excessive. (Appendix 10, Page 30)

In Orange County School Bd. v. Van Zant, 400 So.2d 1019 (Fla. 1st DCA 1981), as distinguished from the instant case, the

determination of hours was not supported, was based on a mere estimate, and the fee allowed was in the sum of $4,000.00 for the recovery of $49.75. (Appendix 11, Page 35)

There is no conflict in the instant case as the cases cited by Appellant have been distinguished and as all of said cases stand for the proposition that adequate documentation should be presented, or the number of hours may be reduced. In the instant case, the trial Judge determined and found there was adequate documentation and this was affirmed by the Second District in its opinion.

Appellee responds to Appellant's POINT II, to-wit:

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)., as follows:

Rowe involved a totally contingent fee agreement in a medical malpractice action, where a reasonable fee was to be awarded to the prevailing party by statute. This Court concluded that in contingent fee cases, the lodestar figure calculated by the Court is entitled to enhancement by an appropriate risk multiplier in a range from 1.5 to 3, and further, in that instance, the "results obtained" may provide an independent basis for reducing the fee.

The "results obtained" factor involved in the lodestar process used in contingent fee cases where enhancement by the contingency risk multiplier is included as a part of the process may limit further enchancement in such a case because the enhancement has already been figured in through the use of the risk multiplier and

therefore, if the results obtained were less than total, it makes sense that considering results obtained, in that instance, may provide an independent basis for reducing the total fee as enhanced.

Rowe did not speak to a basis for enhancement in a non contingent or partially contingent fee case involving exceptional success in the defense of a complex, multi count action where the prevailing party was to be indemnified for its reasonable fee by contract and the fee agreement between attorney and client was for a reasonable fee to be determined after the trial taking into consideration the criteria set forth in Rule 4-1.5(B), such as the instant case.

In the instant case, the risk multiplier was not included in the process of determining a reasonable fee because it was not a contingency fee case. The trial Court, affirmed by the Second District, based enhancement on the criteria set forth in Rule 4-1.5(B) and more specifically (B)(4) involving not just the "results obtained", but

> "the significance of, or amount involved in, the subject matter of the representation, the responsibility in the representation, and the results obtained."

The Second District's opinion is not only not in conflict with Rowe, but is in harmony with the holdings of Rowe that:

1. "the amount of an attorney's fee awarded must be determined on the facts of each case."

2. "In determining reasonable attorney fees, Courts of this state should utilize the criteria set forth in Disciplinary Rule 2-106(b) of the Florida Bar Code of Professional Responsibility:. . ." including"(4) the amount involved and the results obtained." (Emphasis supplied)

The Second District's opinion is further in conformity with the provision of Rule 4-1.5(C): (Appendix 12, Pages 37 and 38)

> "In determining a reasonable fee, the time devoted to the representation and customary rate of fee need not be the sole or controlling factors. All factors set forth in this rule should be considered, and may be applied, in jurisdiction of a fee higher or lower than that which would result from application of only the time and rate factor."(emphasis supplied)

Rule 4-1.5(D):

> "Contracts or agreements for attorney's fees between attorney and client will ordinarily be enforceable according to the terms of such contracts or agreement, unless found to be illegal, prohibited by this rule, or clearly excessive as defined by this rule."

Neither the trial Court, nor the Second District found the fee to be clearly excessive, to the contrary, the trial Court stated that enhancement was limited to $84,000.00 because that figure when added to the lodestar figure would equal a $150,000.00 fee agreed upon by attorney and client.

Appellant's reliance on the following cited cases is misplaced for the reasons stated following the cite.

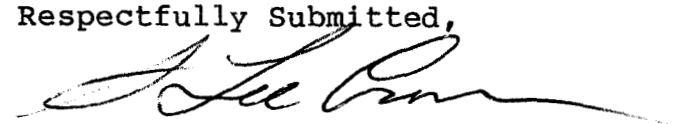
Multitech Corp. v. St. Johns Bluff Investment Corp., 518 So.2d 427 (Fla. 1st DCA 1988).(Appendix 13, Page 46) The First District held the same as in the instant case that the contingency risk multiplier in Rowe would not be appropriate where the action had not been handled on a contingency basis. The Court further held that the Order determined the hourly fee in excess of the agreed upon fee, which was not the fact in the instance case, where the Court indicated it would have awarded more, except for the agreed upon fee. Further in Multitech as distinguished from the instance case, the Order on attorneys fees contained no express finding that

the case involved a contingent fee agreement. Multitech is distinguishable from and not in conflict with the instant case. Lake Tippecanoe v. Hanauer, 494 So.2d 226. Lake Tippecanoe involved a dispute over an alleged violation of condominium documents and presumably was not a case which would have been entitled to enhancement by use of the lodestar procedure, as that procedure pertains to a contingency fee case and therefore there was no risk factor to be considered in Lake Tippecanoe. Additionally, the fee would not have been entitled to enhancement pursuant to Rule 4-1.5(B)(4), because the facts of the case didn't warrant it. The Second District which decided Lake Tippecanoe clarified same in its instant opinion so as to remove any potential conflict between its opinions should such have been perceived and further clearly states in its opinion that in any event, Lake Tippecanoe is not controlling.

CONCLUSION

Respondent requests the Court not to exercise its discretionary jurisdiction to review the decision of the Second District Court of Appeal on the grounds that the decision does not expressly and directly conflict with the decision of Rowe by this Court or of other Florida District Courts of Appeal in that the case at bar is readily distinguishable from the cases cited by the Petitioner as shown herein and further the Petitioner seek no more than a review by this Court of the sufficiency of the evidence.

Respectfully Submitted,



S. LEE CROUCH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's (Appellee's) Jurisdictional Brief has been furnished to JAMES H. SIESKY, ESQUIRE, Siesky and Lehman, P. A., 700 Eleventh Street South, Suite 203, Naples, Florida 33940 BY REGULAR U.S. MAIL THIS 21ST DAY OF JANUARY 1989.

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