No Reg Case.

SUPREME COURT OF FLORIDA

THE GLADES, INC.,

Petitioner,

vs.

GLADES COUNTRY CLUB
APTS. ASSOCIATION, INC.

Respondent.

CASE NO.: 73,467
SECOND DISTRICT COURT OF
APPEAL NO. 87-1757
87-3553

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PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE

This segment of a continuing dispute between the parties began with the filing of a supplemental complaint on June 13, 1984, by the Glades, Inc., (Glades) against the Glades Country Club Apts., Inc., (Country Club). (R. 866-927). The case was tried non-jury on January 2-3, 1986. At the close of Plaintiff's case, the court granted Defendant's motion for judgment of dismissal. The order of dismissal was entered on January 21, 1986.

On May 6, 1986, the trial court assessed costs and attorney's fees against the Glades, Inc., and for Country Club. The judgment on the merits and the judgment for costs and attorney's fees were appealed. The Second District Court of Appeals affirmed the judgment on the merits and for costs but reversed as to attorney's fees and remanded for further proceedings. (Opinion field February 27, 1987.)

After remand, the trial court set a hearing on Country Club's Motion for Order Awarding Attorney's Fees and Costs for June 8, 1987. After the hearing the trial court entered an order awarding Country Club attorney's fees for the trial.

On June 17, 1987, Glades filed its Notice of Appeal as to the award of attorney's fees for the trial. Upon motion, the Second District relinquished jurisdiction to the trial court for the purpose of entering an amended order as to attorney's fees. The amended order was entered on November 18, 1987, (R. 380; App. 2) Country Club cross-appealed the amended order.

The Second District entered its opinion on December 9, 1988. (App. 1) The opinion affirmed the lodestar award of $66,000.00 for attorney's fees but reversed as to the trial court's failure to enhance the award by $84,000.00. Prior to the entry of the mandate, Glades petitioned this Court for review of the Second District's opinion. Review was granted on March 14, 1990.

STATEMENT OF FACTS

A hearing was held on May 6, 1986, for the determination of reasonable attorney's fees to be awarded to Country Club. Counsel for Country Club submitted the following into evidence (R. 1161; App. 3) at the attorney's fee hearing:

1. Defendant's Answers to Plaintiff's Interrogatories (R. 1100-1107; App. 7).
2. Response to Request to Produce (R. 1090-1097; App. 6).
3. Memorandum in Support of Motion for Assessment of Costs and Attorney's Fees (R. 1084-1088; App. 5).

Counsel for Country Club did not testify during his case-in-chief on attorneys fees. (App. 3) He did call two expert witnesses who testified that they had not reviewed the time records of counsel for Country Club. Attorney Elkins reviewed the case file of counsel for Country Club while attorney Van Koughnet reviewed the court file. (R. 1161-1162; App. 3, pages 2 and 3). Counsel for Country Club offered no contemporaneous or reconstructed time records and testified when called by Glades that he did not keep time records in this case or as a matter of course. He further testified that in his estimation he had spent approximately 400 to 450 hours in defense of the action brought by Glades. (R. 1151; App. 3, page 4). Both the previously entered answers to Interrogatories (App. 7) and the Memorandum in Support of Attorney's Fees (App. 5) stated estimates of 300 hours of time expended by Country Club's counsel.

Counsel for the Country Club submitted no evidence as to a reasonable hourly rate for the legal services provided.

Glades submitted the testimony of attorney Donald A. Pickworth. He testified that a reasonable hourly rate in Collier County for legal services of this type for attorneys with experience equivalent to Country Club's counsel would range between $100.00 per hour and $165.00 per hour. He also testified that he had reviewed the time records of Glades' counsel for this case which showed a total of 151 hours expended in prosecuting Glades' claim. Counsel for Glades' time records were accepted into evidence by the Court. (R. 1163; App. 3).

After the hearing, the trial court entered its order awarding Country Club attorney's fees in the amount of $150,000.00. That award was reversed on appeal by the Second District.

After remand, counsel for Country Club submitted no new evidence at the hearing on attorney's fees held on June 8, 1987. At that hearing, the trial court reconfirmed its prior order and awarded Defendant $150,000.00 as reasonable attorney's fees. The trial court subsequently determined that the June 8, 1987, order awarding attorney's fees should be amended by eliminating the fee enhancement of $84,000.00 which was based upon the results obtained. That amended order was entered on November 18, 1987. It awarded Defendant attorney's fees in the amount of $66,000.00 for the trial of the action. (App. 2).

SUMMARY OF THE ARGUMENT

The record before this Court shows that there was no basis upon which the trial court could determine a reasonable attorney's fee. None of the evidence even approximates the requirement of detailed, contemporaneous time records or reconstructed time records. The absence of this evidentiary predicate denied counsel for the Glades a meaningful opportunity to challenge the amount and reasonableness of the demand for fees. The absence of evidence also resulted in an arbitrary award of fees since the trial court had no way to determine how many of the estimated hours were spent on non-compensable work.

The determination of the Second District that the basic lodestar fee should be enhanced from $66,000.00 to $150,000.00 is without basis in fact or law. The fee agreement was not for a contingent fee and nothing in the record shows that the basic lodestar fee was unreasonable.

ARGUMENT

POINT I

DEFENDANT HAS FAILED TO SUBMIT DETAILED CONTEMPORANEOUS TIME RECORDS OR RECONSTRUCTED TIME RECORDS SUFFICIENT TO SUPPORT THE TRIAL COURT'S AWARD OF ATTORNEY'S FEES.

The cases are legion for the proposition that the absence of contemporaneous time records is not fatal to a claim for attorney's fees. (Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985); Lindy Bros. Builders, Inc., v. Am. Radiator, Etc., 540 F.2d 102 (1976)). When courts are confronted with this situation Lindy is usually cited for the proposition that although contemporaneous time records are highly desireable courts will accept carefully reconstructed time records. However, the opinions quickly quote the language from Lindy which states that "mere estimates of time are not acceptable." (Lindy, at p. 109). (See Amico v. New Castle County, 654 F. Supp. 982 (D. Del. 1987); Delaware Valley Citizens v. Pennsylvania, 581 F. Supp. 1412, 1420, (E. D. Pa. 1984), reversed on other grounds 478 US 546).

Since counsel for Country Club admittedly had no contemporaneous time records, it must be determined whether the information that was submitted into evidence falls into the category of "reconstructed records" or into the category of "mere estimates"? Reconstructed records should include at least the work performed, the date of performance and the specific number of hours devoted to the work on the date it was performed. (Calhoun v. Acme Cleveland Corp., 801 F.2d 558 (1st Cir. 1986)). The court in

Calhoun stated that a fee submission which listed only the different tasks performed, the total number of hours and the billing rate should be refused.

The submission made by counsel for Country Club simply does not measure up to the standard of "reconstructed records." First, the submission rarely lists the work performed by the lawyer or lawyers. Much of the submission (Memorandum in Support of Motion for Assessment of Costs and Attorney's Fees) is merely a recitation of the documents filed by both parties to the litigation and orders entered by the court. In fact, the majority of the documents listed were not prepared by counsel for Country Club; they were prepared by counsel for Glades or the trial court. Second, no specific time is attached to any of the work performed. Instead, counsel for Country Club merely estimates that a total of 300 hours was devoted to the litigation. (R 1087). Also, clearly included in counsel's estimate are uncompensable items such as "travel time", "preparation of information necessary for showing reasonable attorneys fees" (See Crittenden v. Stone, 514 So.2d 351, 353 (Fla. 1987)) and "correspondence and discussions with various bank and mortgage brokerage firms, loan officers." (App. 5, page 4). Third, although the submission includes dates which are related to the documents filed, it shows no dates upon which the attorneys performed the services such as "travel time" or "preparation for, attendance at, and taking depositions."

The cited defects were not cured by either the Response to Request to Produce or by the Answers to Interrogatories. These

documents did not further enlighten the trial court or opposing counsel. They merely reaffirmed that the time was a mere "estimate" and that counsel for Country Club estimated that 300 hours had been expended on the litigation.

At the hearing on attorney's fees counsel for Country Club did not testify as to the specific number of hours of work performed for each item of legal service or to the work itself. However, in the space of 24 hours (the difference in time between the date of service of the Answers to Interrogatories and the time of the hearing) counsel's "estimate" increased by 50%. Interrogatory number 4 provided:

> 4. State the time and labor required by the firm of Crouch & Minor, P.A. to defend this action on behalf of Defendants.

The answer to that interrogatory stated "300 hours approximately" (R. 1102; App. 7, page 3) just as the Memorandum stated "estimated hours three hundred (300)." (R. 1087; App. 5 page 4). In contrast, counsel's testimony at the hearing was that he estimated that he had expended 400 to 450 hours on the case and that his 300 hour estimate had merely been "conservative." The trial court's acceptance of 400 hours for the lodestar number of hours underscores the arbitrary character of its order.

The trial court's decision is contrary to existing case law. In Delaware Valley Citizens v. Pennsylvania, 581 F. Supp. 1412, 1421 (E.D. Pa. 1984), the court denied any time requested which did not meet the specificity required for fee petitions. This action was cited by the U.S. Supreme Court with approval in

Pennsylvania v. Delaware Valley Citizens, 478 US 546, 92 L.Ed.2d 439, 106 S.Ct. 3088, at note 2 (1986). In Amico, the court refused to award attorney's fees when the fee submission did not include contemporaneous time records and was composed only of a letter, "the equivalent of a memo," that merely outlined the request for fees.

The distinction between reconstructed time records and a global statement of hours is perhaps most clearly drawn in Keyes v. School Dist. No. 1, 439 F. Supp. 393 (D. Colo. 1977). There, the court said of one fee applicant's submission:

> [t]he affidavit merely presents this total figure and includes no attempt to tabulate the component hours in a manner meaningful to the court. This is in contrast of all other MALDEF lawyers who were able to reconstruct a day-by-day itemization through the use of daily calendars and other sources. The format of the Avila affidavit prevents the careful scrutiny which we have attempted to apply to the application of all other counsel. (at p. 412)

As a result of the defective submission, the court disallowed 80 of the 182 hours requested by the fee applicant.

There are several reasons for the judicial requirement of contemporaneous or reconstructed time records. These include:

1) The provision of an objective and uniform basis for an award. (Rowe)

2) Sensitivity to the fact that the party paying the fee has not participated in the fee arrangement. (Rowe, Hensley v. Eckerhart, 461 US 424, 76 L.Ed.2d 40, 103

S.Ct. 1933 (1983); Standard Guaranty v. Quanstrom, 555 So.2d 828 (Fla. 1990).

3) Permitting opposing counsel a full and fair opportunity to challenge the amount and reasonableness of the time spent. (Crittenden).

4) That attorney's fees as a form of "damages" may not be based upon speculation or conjecture. (Fidelity and Deposit Company of Maryland v. Krebs Engineers, 859 F.2d 501 (7th Cir. 1988)).

5) The possibility of meaningful appellate review. (Rowe).

6) That fact conclusions as to quantum meruit must be based upon competent, substantial evidence of something expended, done or accomplished. (Baruch v. Giblin, 164 So. 831 (Fla. 1935), Lee Engineering v. Fellows, 209 So.2d 459 (Fla. 1968)).

This Court now faces the task of correcting the error. The award of attorney's fees based only upon an estimate of the number of hours is clearly erroneous under established case law. Therefore, the choices for this Court are three: 1) reverse the award and remand to the trial court with specific directions for the determination of the fee; 2) reverse the award and establish the fee itself; or 3) reverse the award and withhold any attorney's fees for Defendant.

Of the three choices, it is suggested that the least acceptable is for this Court to establish a reasonable fee itself.

This option suffers from the same problem as does the trial court's award of fees --- insufficient evidentiary predicate.

Certainly there is merit to the option of returning the case to the trial court with specific directions. If this option is chosen, the directions should include a requirement that counsel for Country Club prepare reconstructed records and that these records should be subjected to strict scrutiny by the trial judge.

The last option, the elimination of the award of attorney's fee is definitely a strong sanction. However, it is suggested that perhaps the facts of this case demand such a sanction. The reasons for such a sanction are:

1) The only evidence which approximates the requirement of detailed, contemporaneous time records are those submitted by Glades' counsel which show a total of 151 hours. Application of the hourly rate of $165.00 which was established by the trial court to this number of hours yields a lodestar amount of $24,915.00.

2) The original demand of $150,000.00 is approximately six times a reasonable fee based upon 151 hours. This demand sought a windfall for Country Club's counsel at Glades' expense. The initial grant of such a fee by the trial court shocks the conscience and is a "species of social malpractice that undermines the confidence of the public in the bench and bar." (Rowe at page 1149).

3) The failure of Country Club's counsel to submit the requisite records has damaged Glades by causing it to

defend Country Club's unreasonable claim for attorney's fees, the amount of which is totally unsupported by the facts or the law.

4) Country Club and not its attorney will bear the weight of the refusal to award attorney's fees since the fee payable to counsel for Country Club is not contingent upon the outcome of these proceedings (R. 1162; App. 3, page 3). This unusual situation exists because after the trial Country Club and its attorney agreed to the fee which they would attempt to recover from Glades.

POINT TWO

NOTHING IN THE FACTS OF THIS CASE JUSTIFY THE ENHANCEMENT OF THE AWARD OF ATTORNEY'S FEES BASED UPON THE AMOUNTS INVOLVED AND THE RESULTS OBTAINED.

The U.S. Supreme Court has held that there exists a strong presumption that the lodestar figure represents a reasonable attorney's fee and that upward adjustments are unnecessary in all but the rarest circumstances. (Pennsylvania v. Delaware Valley, 478 US 546, 92 L.Ed.2d 439, 106 S.Ct. 3008 (1986)). In the case at bar, the Second District reversed the trial court and ordered enhancement of the attorney's fees awarded to Country Club. The basis for the Second District's opinion was the trial court's finding that the lodestar "unless precluded by Rowe and Tippecanoe, would be entitled to enhancement based upon the amounts involved and the results obtained..." (App. 2). The Second District based its decision to order enhancement upon "the multimillion dollar amount involved in this complex litigation and the completely successful result obtained on behalf of defendant." (App. 1, page 2). The Second District stated a further basis to be "the aspect of exceptional success by defense counsel which was in effect found to be present in this case." (App. 1, page 4).

There are several difficulties with the Second District's analysis of the case. First, although none of the U.S. Supreme Court's decisions preclude enhancement of the lodestar, Blum v. Stenson, 465 US 886, 79 L.Ed.2d 891, 104 S.Ct. 1541 (1984) and Pennsylvania v. Delaware Valley stand strongly for the proposition

that enhancement may be made only rarely. The lodestar is more than a mere "rough guess." When properly supported by evidence it is the presumptively reasonable fee. (Pennsylvania v. Delaware Valley, 92 L. Ed 2d at p. 456). Upward adjustment to the lodestar may be made only upon specific evidence and detailed findings by the lower court. (Pennsylvania v. Delaware Valley, 92 L.Ed 2d at p. 456). The order awarding attorneys fees in this instance does not measure up to the standard set by the U.S. Supreme Court. It does not set forth specific evidence or detailed findings as to "...why the lodestar amount was unreasonable, and in particular, as to why the quality of representation was not reflected in the product of the number of hours times the reasonable hourly rate." (Pennsylvania v. Delaware Valley, 92 L.Ed at p. 458) These are the findings and evidence which are necessary to justify enhancement and they simply do not exist in this case.

A. Performance Enhancement, Generally

Second, Blum, Pennsylvania v. Delaware Valley, Hensley and Rowe all stand for the proposition that "quality of performance", "novelty and difficulty" (complexity), and the "special skill and experience of counsel" are fully reflected in the lodestar amount and therefore cannot be used to enhance the fee award. (See Pennsylvania v. Delaware Valley, 92 L. Ed 2d at p. 456, and Rowe at p. 1151). In Blum, Justice Powell writing for the Court, said

> [n]either complexity nor novelty of the issues, therefore is an appropriate factor in determining whether to increase the basic fee award. (at 79 L.Ed.2d page 902)

Here, the Second District and the trial court used the alleged complexity of the litigation as one basis for enhancement. This conclusion is drawn even though the trial lasted only 2 days and Country Club's motion for judgment of dismissal was granted at the close of Glades' case. On the continuum of complex cases, it is suggested to this Court that a trial that lasts but two days is much closer to the "less complex" end than to the "more complex." Consequently, the increased award is unsupportable on the issue of "complexity" on either a factual or legal basis.

B. Performance Enhancement
"Results Obtained" - Contingency

The U.S. Supreme Court and this court differ on the issue of whether "results obtained" may be used to adjust the basic fee. The U.S. Supreme Court in Pennsylvania v. Delaware Valley holds that it cannot since "'results obtained' from the litigation are fully reflected in the lodestar amount." (92 L. Ed 2d at p. 456). This Court however permits the use of "results obtained" as a factor when considering use of a multiplier in a contingent fee case. (Quanstrom at page 834). The issue then becomes "was the fee arrangement between Country Club and its counsel one for a contingent fee?" In response to interrogatory, the president of Country Club stated

> [t]he fee charged by Crouch and Miner, P.A., was neither fixed nor contingent. The undersigned agreed to pay a reasonable fee, conditioned upon all of the circumstances recited in their Answers appearing herein.

> That subsequent to trial, the undersigned agreed with counsel, that a reasonable fee would be $150,000.00. (R. 1106; App. 7, page 6)

At the hearing on attorney's fees, the president of Country Club testified that "the payment of the $150,000.00 fee was not contingent upon the outcome of this attorney's fee hearing." (R 1162; App. 3, page 3).

The trial court's order held that the fee arrangement between Country Club and its counsel "was neither fixed, nor totally contingent, but the amount was partially contingent on the results obtained and the amounts involved." (R. 380; App. 2). The Second District held that the fee arrangement "was for a reasonable, not totally contingent fee..." (App. 1, page 2). It is suggested to the Court that an agreement for a reasonable fee, the amount of which may vary, does not meet the definition of a "contingent" fee.

In Zorovich v. Stoller, 293 So.2d 788 (Fla. 3d DCA 1974), an attorney and his client agreed to a fee that would be mutually acceptable. In testimony, the attorney stated:

> [w]e left the exact fee as to the exact money that would be due me for the rezoning to a figure that would be mutually agreeable to us. (at p. 789)

The Third District relied on McGill v. Cockrell, 101 So. 199 (Fla. 1924) and held that this did not constitute a "contingent" fee contract since there was no risk of nonpayment. The only risk was the amount of payment. The test of "contingency" was restated in

Head v. Lane, 541 So.2d 672 (Fla. 4th DCA 1989). There, the court said that the fee arrangement "was not 'nothing or something,' it was 'something or something'" and therefore not contingent.

Since Country Club and its counsel have failed to establish that there was a risk of nonpayment, enhancement under Rowe as refined in Quanstrom is not justified on the basis of contingency. Further, even if this Court were to conclude that a risk of nonpayment was established, the trial court never determined the likelihood of success at the outset. Consequently, there is no basis for enhancing the fee by a multiplier of 2.27. ($66,000 [purported lodestar] x 2.27 = $150,000).

C. Performance Enhancement
"Results Obtained" - Non-Contingency

The second issue under the heading of results obtained is "under Rowe, may results obtained be used as an independent basis for enhancing the lodestar fee when there is no risk of nonpayment for the attorney?" In Rowe, this Court reasoned that enhancement was appropriate in contingent fee cases

> [b]ecause the attorney working under a contingent fee contract receives no compensation when his client does not prevail, he must charge a client more than the attorney who is guaranteed remuneration for his services.

Since this rationale for enhancement does not exist in a non-contingent fee case, it is suggested to the Court that the U.S. Supreme Court's analysis should be accepted for those cases. That is, enhancement should be reserved for the rare and exceptional

case where the trial court makes specific supported findings which show why the lodestar amount is unreasonable. (Pennsylvania v. Delaware Valley at 92 L.Ed.2d 458) Judged by this criterion, it is clear that the Second District's finding of an "in effect" exceptional success falls far short of justification for lodestar enhancement. Nothing in the record, the amended order of the trial court or the opinion of the Second District shows why the failure to enhance the basic lodestar award is unreasonable.

Lastly, the lodestar enhancement is a massive fee constructed on the shifting sands of the "mere estimates" of Country Club's counsel. Such a structure cannot withstand the soft warm breeze of reason.

CONCLUSION

The determination of an award of reasonable attorney's fee will always be more of an art than a science. However, a clear statement from this Court which requires the submission of contemporaneous or reconstructed time records as a condition for an award of attorney's fees will add a degree of objectivity to the process. Required time records will reduce the possibility that awards, as in this case, are based solely on frail human memory, supposition, conjecture and speculation.

The trial court's award of attorneys fees to Defendant in the amount of $66,000.00 should be reversed and this Court should award a reduced fee based upon the absence of contemporaneous or reconstructed records or should deny attorney's fees to Defendant. In no event should the reduced fee exceed $25,000.00.

If the Court chooses to remand for further proceedings, it should be with specific directions regarding the submission of reconstructed time records.

Under no circumstances should this Court permit enhancement of the lodestar amount in this case based upon "results obtained." The record simply will not support such an enhancement.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Initial Brief on the Merits, has been furnished to S. LEE CROUCH, ESQUIRE, Crouch & Miner, P.A., 1001 North Federal Highway #206, Hallandale, Florida 33009, by regular U.S. Mail this 9th day of April, 1990.

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