SUPREME COURT OF FLORIDA

THE GLADES, INC.,

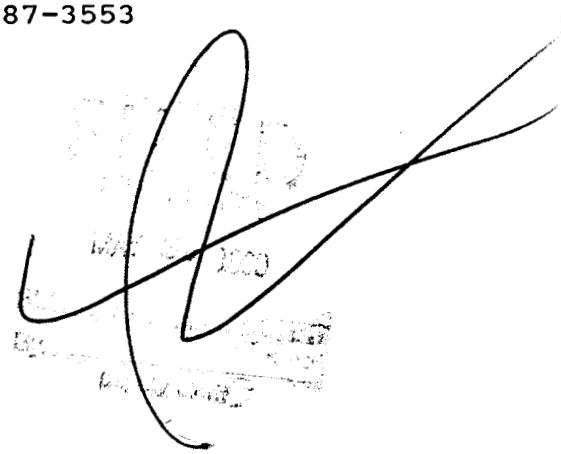
Petitioner,

vs.

GLADES COUNTRY CLUB
APTS. ASSOCIATION, INC.,

Respondent.

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



REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

SUMMARY OF THE ARGUMENT

There exists a total absence of objective record evidence to support the award of an attorney's fee in this action. Appellant never submitted contemporaneous or reconstructed time records. The lodestar award of $66,000.00 which is based upon the "considered or casual judgments" of counsel for Appellant and the trial judge are nothing more than "mere estimates."

In a contract case the payment of the prevailing party's non-contingent attorneys fee is best accomplished by use of the objective lodestar method. If the prevailing party wishes to bestow a bonus fee on its counsel, that is entirely its prerogative. However, the obligation of the non-prevailing party in that instance should only to pay the "presumptively reasonable" lodestar fee. Otherwise, the judiciary will have created an opportunity for windfall attorneys fees and for an implicit means for the prevailing party to impose a "litigation fine" both at the expense of the non-prevailing party.

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.

A. Estimates

In Country Club's Answer Brief, it agrees with Glades that "mere estimates of time are not acceptable" (Answer Brief p. 12) and that an objective basis is required for attorney's fee awards

(Answer Brief p. 18). Country Club then argues that the trial court's award is not based upon an estimate and is founded upon objective criteria. Apparently Country Club misunderstands the meanings of these two words.

"Estimate" is defined in context to mean "... to judge tentatively or approximately the value, worth, or significance of .... to determine roughly the size, extent, or nature of ...." The definition provides further that "[e]stimate implies a judgment, considered or casual, that precedes or takes the place of actual measuring or counting or testing out...." (Webster's Ninth New Collegiate Dictionary, 1985) That definition fits precisely the process employed by Country Club and the trial court. There was no "measuring or counting or testing out" such as would have been provided by contemporaneous or reconstructed time records. Instead, Country Club and the trial court substituted their "considered or casual" judgments for the actions of "measuring or counting or testing out" which are required by Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985).

Country Club and its counsel obviously knew at the time of hearing and when they filed their answers to interrogatories (R. 1100-1107) and Memorandum In Support of Motion for Assessment of Costs and Attorneys' Fees (R. 1084-1088) that the number of attorney hours claimed were nothing more than mere "estimates" because that is the word they chose in those documents to describe the basis of hours claimed. However, in its brief Country Club suggests that the number of hours claimed is somehow more than a

"mere estimate." It does this by reference to the trial court's order which substitutes

> .... the testimony and argument of counsel of May 6, 1986, having reviewed the Stipulated Statement of Evidence and the partial transcript of the proceedings of May 6, 1986, and the court further having considered the testimony and exhibits given and produced at trial, the Court files, including the pleadings, discovery, the Comprehensive Settlement Agreement, the Mortgage and Note, Defendant's Memorandum in Support of Motion for Assessment of Attorney's Fees, Defendant's Response to Interrogatories,....

for contemporaneous or reconstructed time records. If this were the standard to be applied, no award of attorney's fees would ever be reversed on appeal since all cases that proceed through trial will have pleadings, discovery and other trial related documentation. Taken individually or collectively, the items cited do not raise the level of proof above that of a "mere estimate."

With regard to the testimony of Country Club's counsel, Country Club argues that the trial court "apparently believed" (Answer Brief p. 15) his testimony as to the estimated number of hours expended. To this Glades responds, which version? The version contained in the Memorandum in Support (R. 1084-1088) or the live testimony presented to the trial court? Did the trial court weigh the credibility of counsel's written statement against his oral statement and find the written somewhat lacking? Is counsel more credible in person? Should not counsel be fundamentally estopped from increasing his estimate of hours expended by 50% when he has presented the trial court with no contemporaneous or reconstructed time records which would support either estimate, let alone the higher?

Country Club also suggests that the items upon which the trial court premised its award of hours constitutes an "objective" basis for the fee award. Webster's, supra, defines "objective" to mean, in context,

> of, relating to, or being an object, phenomenon, or condition in the realm of sensible experience independent of individual thought and perceptible by all observers: having reality independent of the mind.... expressing or dealing with facts or conditions as perceived without distortion by personal feelings, prejudices, or interpretations....

The estimates of hours made by Country Club and its counsel vary from 300 to 450 hours. Obviously, the bases of these estimates are not "perceptible by all observers" and the fact that they vary by such a large amount suggest that they are distorted by "personal feelings, prejudices, or interpretations." These prejudices and personal feelings show through in Country Club's Answer Brief when it states

> [a] successful defense of the potentially devastating action justified such an award regardless of the number of hours involved. (emphasis added) (at p. 15)

That one statement shows Country Club's disdain for the lodestar method of assessing fees and its prejudice in fashioning its estimate of the number of hours expended.

Country Club objects to Glades' raising "the straw man 'travel time'" (Answer Brief p. 14) and shows that it was the trial court's belief that he did not award fees for travel time. Glades asks that this Court note that:

1. it was counsel for Country Club (not counsel for Glades) who agreed with the trial court that fees had not been awarded for travel time;

2. the 300 hour estimate of Country Club's counsel contained in his Memorandum in Support clearly included travel time although no specific number of hours were designated;

3. if the 300 hour estimate included travel time, certainly the 400-450 hour estimate did also;

4. based upon the documentation submitted no reviewing court could conclude that travel time was not included.

B. Documentation

Glades argued in its brief (p. 7) that the Memorandum in Support submitted by Country Club was misleading since "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." Country Club has not denied this assertion.

Country Club has not attempted to argue that any of the documentation submitted equates to reconstructed or contemporaneous time records. The "documentation" simply does not meet any recognized definition of these items.

Glades attempted to assist the trial court in reaching a reasoned and reviewable attorney's fee award by requesting that Country Club's counsel produce his time records. In response to the request to produce counsel merely responded:

> Defendant's counsel does not keep time records as to time involved in actions of this nature. Time is estimated, as time is only one factor in the determination of the fee involved.... (R. 1090)

Counsel for Country Club owed a duty to the trial court, opposing counsel and the judicial system to not take this request for time records lightly. Although he kept no contemporaneous time records, counsel for Country Club made no attempt at the initial hearing or at any subsequent hearing to produce any reconstructed records as an alternative.

C. Miscellaneous

Country Club also argues that the fee award should be upheld because Country Club speculates that the fee that counsel for Glades would have charged had it won the case would have been substantially greater than the 151 hours recorded. This argument is obviously outside of the record and totally irrelevant. However, it is instructive to Country Club's thought processes. Country Club states "Glades certainly would not have determined its fee based on 151 hours at $165.00 per hour." (Answer Brief p. 15) Is Country Club suggesting that a winning party inflates the number of hours expended as a matter of course? If so, is this not an implicit admission that Country Club's estimate was inflated after it won the case?

At pages 18 and 19 of the Answer Brief, Country Club argues that the fee award is not based on speculation or conjecture and that there was meaningful appellate review by the Second District. However, Country Club fails to suggest to this Court how, in the absence of detailed reconstructed or contemporaneous time records showing a breakdown of the number of hours and the tasks performed, review can be meaningful and the award can be based on something other than speculation or conjecture.

Country Club complains that Glades seeks even to reduce "the paltry sum of $66,000.00" that has been awarded. (Answer Brief p. 19) Glades argues that "paltry" is in the eye of the beholder. If Country Club is estopped to increase the initial 300 hour estimate, then an award of $66,000.00 compensates it at the rate of $220.00 per hour. If the actual amount of time expended by

Country Club is closer to that expended by counsel for the Glades (151 hours), the hourly rate skyrockets to $437.00 per hour. In the opinion of Glades, such compensation is not "paltry." In fact, when multiplied by the hourly rate of $165.00, the result is a lodestar of approximately $25,000.00. Therefore, the "paltry" $66,000.00 award is more than 2 1/2 times a reasonable lodestar under those circumstances.

Country Club argues that "there is no logical or legal rationale" to suggest that the number of hours expended by Glades' counsel be used as a basis for its award. Certainly, the detailed, itemized records of time expended by Glades' counsel is not the best evidence of the time expended by Country Club's counsel. However, because of the unwillingness or inability of Country Club to submit either contemporaneous or reconstructed time records to support the time estimates of its counsel, the time records of Glades' counsel are the best evidence <u>available in this action</u>. Country Club was free to submit better documentation at either the first or second hearing on this matter but it chose not to do so.

The courts hold that careful scrutiny must be given to reconstructed records. What scrutiny may a reviewing court give to "mere estimates"? The number of hours reasonably expended is one of the two benchmarks in the lodestar calculation. Any surveyor surveying a parcel of property or any school child calculating the answer to a problem recognizes that an error at the beginning of such a calculation (in the location of the benchmark or in the computation of the first amount) must result in an error at the completion of the calculation. There can be no credible

lodestar in the instant case since the lodestar itself is based upon a "mere estimate" and is therefore fatally flawed.

POINT II

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.

A. Rowe

In Florida Patients Compensation v. Rowe, 472 So.2d 1145 (Fla. 1985), this Court articulated its reasons for adopting the federal lodestar approach. The reasons were several. The lodestar approach provides specific guidelines to aid trial judges in setting attorney's fees. It provides an objective structure and it utilizes all of the criteria which were established in the Florida Bar Code of Professional Responsibility. In fact, this Court recognized in Rowe that the lodestar method resulted in an objective application of all of the criteria stated in Disciplinary Rule 2-106.

In Rowe, the Court clearly stated that the lodestar amount was composed of the number of hours reasonable expended multiplied by a reasonable hourly rate for the services provided. Subsumed in this computation were all items of the Disciplinary Rule 2-106 except the "results obtained" and "whether the fee is fixed or contingent." The Court said that these two factors could then be used to add or subtract from the fee based upon the "contingency risk" factor and the "results obtained." The Court also said "the '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."

At page 23 of Country Club's brief, it argues that "results obtained" is somehow to be distinguished from the "amounts involved and results obtained" factor of Rule 4-1.5(B). Country Club cites no authority for its position and as may be seen by reference to Rowe, that position is unsupportable since Rowe holds that all factors encompassed by Disciplinary Rule 2-106 are considered within the Florida application of the lodestar computation.

Country Club argues at page 26 of its Answer Brief that the enhancement awarded by the trial court was not merely upon the basis of "results obtained" but upon the provision of Rule 4-1.5(B) which states

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

Rule 4-1.5(B) was not effective until January 1, 1987 (Rules Regulating the Florida Bar, 494 So.2d 977 (Fla. 1986)). Consequently, the award of attorney's fees in this action should be governed by the provisions of Disciplinary Rule 2-106. It is Glades' position that, under Rowe all factors other than "results obtained" and "contingency risk" are subsumed within the lodestar calculation. Country Club's further arguments at pages 26 and 27 as to the skill of Country Club's counsel, the acceptance of the employment precluding other employment, the nature and length of the professional relationship between Country Club and its counsel, and the experience, reputation and ability of Country Club's

counsel, are all irrelevant to the issue of enhancement of the lodestar amount under Rowe.

Country Club desperately argues at pages 32 through 35 of its Answer Brief for this Court to abandon the objectivity of Rowe. In its place Country Club suggests a more subjective approach which considers all of the factors and criteria set forth in Rule 4-1.5, on a global basis. Country Club argues that the lodestar approach promulgated in Rowe is not appropriate in non-contingent fee cases. However, Country Club offers no reason for abandoning Rowe and no reason why the lodestar method is not appropriate. It merely denounces the use of the "lodestar method or process" because it has "apparently created some confusion among the Bench and Bar." Glades, as may be expected, is of the opposite opinion. That is, the objectivity provided by the lodestar approach has gone far toward eliminating confusion among the bench and bar when it comes to the award of a reasonable attorney's fee against a non-prevailing party. The instant case also provides the Court with a vehicle which will permit it to refine the lodestar approach in a manner that will further eliminate confusion. Glades suggests to this Court that the Delaware Valley I approach which holds that the lodestar is "more than a rough guess" will do just that. Also, placing the requirement upon the fee applicant to show why the lodestar amount is unreasonable will further eliminate confusion among the bench and bar.

Dunn v. Sentry Insurance, 462 So.2d 107 (Fla. 5th DCA 1985) is cited as authority by Country Club. However, it fails to deal with the unique situation presented in this case whereby the fee

applicant and its counsel established the actual fee to be paid after the conclusion of the litigation. A fee established in this manner no longer has the benefit of an arms length bargain since the party making the bargain will not retain ultimate responsibility for payment of the fee. The plurality in Pennsylvania v. Delaware Valley, (Delaware Valley II) 483 US 711, 97 L.Ed.2d 585, 107 S.Ct. 3078 recognized this consideration when it said:

> Fee-shifting removes the interest a paying client would have in ensuring that the lawyer is serving the client economically; the task of monitoring the attorney is shifted to the judge in separate litigation over the fees if the plaintiff wins. (97 L.Ed.2d at p. 596)

It encourages the client to bestow a gift upon its counsel in full recognition that some or all of that gift will be paid by the non-prevailing party. In effect, it grants the fee applicant a method of imposing a fine upon its opponent in litigation.

B. Risk Enhancement

It is the position of Country Club in its Brief (pages 26 and 30) that neither the trial court nor the appellate court enhanced the fee paid to Country Club's counsel on the basis of risk of non-payment. Essentially, Country Club argues that an attorney should be entitled to receive a fee which is enhanced beyond the lodestar amount even where there is no risk of non-payment to the attorney. Although Country Club argues that the lodestar fee should be entitled to enhancement even where there does not exist a risk of non-payment, it cites no authority for this position and it cites no reason for the enhancement. That is, what purpose would be served by enhancing a fee in this situation? Where the risk of

non-payment does not exist, certainly, the award of an enhanced lodestar fee can not be used to encourage lawyers to take cases for which they might not be paid. The U.S. Supreme Court in Blum v. Stenson, 465 US 886, 79 L.Ed.2d 891, 104 S.Ct. 1541 (1984) stated that the amount involved in the litigation "can not serve as an independent bases for increasing the basic fee award." (79 L.Ed. 2d 891). In Delaware Valley I, the Supreme Court said that there was a strong presumption that the lodestar figure represented a reasonable fee. It specifically went forward and stated that fee shifting statutes

> were not designed as a form of economic relief to improve the financial lot of attorneys, nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client. (94 L.Ed.2d at 456)

In summary, the Court in Delaware Valley I stated that the use of the lodestar calculation accounted for all of the factors to be considered in awarding a reasonable attorney's fee and that the lodestar calculation itself "adequately compensates the attorney, and leaves very little room for enhancing the award based on his postengagement performance." (Delaware Valley I 92 L.Ed. 2d at p. 457). The Court also said that "because considerations concerning the quality of a prevailing parties counsel's representation normally are reflected in the reasonable hourly rate, the overall quality of performance ordinarily should not be used to adjust the lodestar, thus removing any danger of 'double counting.'" (Accord Delaware Valley II, 97 L.Ed.2d at 603, concurring opinion of Justice O'Connor). Most importantly, the Supreme Court in Delaware Valley I required "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 reasonable number of hours times the reasonable hourly rate." The Court then stated "in the absence of such evidence and such findings, we find no reason to increase the fee award.... for the quality of representation." (Delaware Valley I, 92 L.Ed.2d at 458) The plurality reached the same conclusion in Delaware Valley II when it said:

> As in that case, payment for the time and effort involved - the lodestar - is presumed to be the reasonable fee authorized by the statute, and enhancement for the risk of non-payment should be reserved for exceptional cases where the need and justification for such enhancement are readily apparent and are supported by evidence in the record and specific findings by the courts. (Delaware Valley II, 97 L. Ed. 2d at 599)

In her concurring opinion Justice O'Connor wrote:

> I would also hold that a court may not enhance a fee award any more than necessary to bring the fee within the range that would attract competent counsel. I agree with the plurality that no enhancement for risk is appropriate unless the applicant can establish that without an adjustment for risk the prevailing party "would have faced substantial difficulties in finding counsel in the local or other relevant market." (Delaware Valley II, 97 L.Ed.2d at p. 603)

The basis of the Second District's reversal of the trial court and its award of an enhanced fee was the "aspect of exceptional success by defense counsel which was in effect found to be present in this case." (Glades, Inc. v. Glades Country Club Apts., 534 So.2d 723, at 726 (Fla. 2d DCA 1988)). Enhancement merely upon the basis of exceptional success has been disapproved in Thompson v. Kennickell, 836 F.2d 616 (D.C. Cir. 1988). In Thompson, the court applied Delaware Valley I and II and concluded:

> In the instant case, the fee applicant produced no specific evidence to rebut the presumption that the lodestar figure was reasonable.....(where appellees document the efficiency of their work and the reasonableness of hours spent, but do not indicate why the lodestar is not the presumably reasonable fee with respect to the quality of representation). And, while the district court articulated the proper legal standard, ... it certainly did not "justify with particularity" why the presumption of reasonableness was rebutted. Instead, the court treated the exceptional victory as an independent factor warranting enhancement per se. (at 623, emphasis supplied).

This same rationale was utilized in Save Our Cumberland Mountains, Inc. v. Hodel, 826 F.2d 43 (D.C. Cir. 1987).

C. Quanstrom

Country Club mis-reads, mis-apprehends, and mis-argues Standard Guaranty v. Quanstrom, 555 So.2d 828 (Fla. 1990). Country Club argues that the Second District's opinion in the instant case is in conformity with the opinion in the Quanstrom case. Glades suggests that these two opinions are not closely related. That is, Quanstrom deals with the enhancement of an attorney's fee on the basis of risk of non-payment while Country Club argues that the Second District's opinion which enhances the lodestar fee is not based upon the risk of non-payment.

Country Club also argues that the Rule 4-1.5(B) is the only basis for the award of attorney's fees in this case and that the lodestar method does not apply. When the Court in Quanstrom recognized that the Legislature can, as in the case of worker's compensation, establish specific methods for an attorney's fee, it did not intend to eliminate the lodestar calculation when that calculation is based upon criteria stated in Rule 4-1.5(B) and its predecessor Disciplinary Rule 2-106. A fair reading of Rowe, the

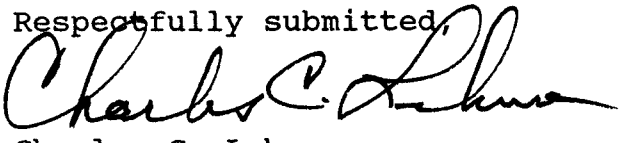
predecessor to Quanstrom, clearly shows that the lodestar calculation is designed to consider all of the factors enumerated in both Disciplinary Rule 2-106 and the current Rule 4-1.5(B). The lodestar is an objective method of utilizing the factors in the Rule to determine a reasonable attorney's fee.

If the criteria enunciated by Quanstrom for tort and contract cases is utilized to analyze the instant case, it is clear that a different reslut would be obtained. There is no record evidence of the need for a contingency multiplier in order to obtain competent counsel. The evidence is clear that counsel for Country Club did mitigate the risk of non payment since he was always entitled to receive a "reasonable fee." Also, since there was no "risk of nonpayment established" Quanstrom would appear to preclude the use of a multiplier. Even if Quanstrom would permit use of a multiplier in this instance, there is no record finding by the trial court as to the likelihood of success at the outset. Therefore it is impossible to determine a proper multiplier.

CONCLUSION

There exists insufficient record evidence in this case to justify a lodestar amount of $66,000.00. In addition, there is no basis in the record for enhancing the lodestar fee since it has not been shown to be unreasonably low.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief 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 29th day of May, 1990.

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