IN THE SUPREME COURT OF FLORIDA

CITY OF FORT WALTON BEACH,
Appellant/Petitioner,

vs.

PATRICIA THORNBER, JOHN FRANKLIN, and AL GRANT,
Appellee/Respondent
_____/

Case No. 89-1900/88-99 74,494

CROSS-PETITIONERS' JURISDICTIONAL BRIEF

On Review from the District Court of Appeal,
First District, State of Florida

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STATEMENT OF THE CASE AND THE FACTS

This appeal stems from a multi-count complaint filed by Fort Walton Beach Councilmen John Franklin ("Franklin"), Patricia Thornber ("Thornber"), and Al Grant ("Grant") against the City of Fort Walton Beach ("City"). The action was brought pursuant to Section 111.07, Fla. Stat. (1983) for reimbursement of attorney's fees for private representation in several legal and administrative proceedings resulting from the City Council's dismissal of the City Manager, Winston Walker, and the Police Chief and Director of Public Safety, Thomas B. Ray ("Ray").

The Councilmen's Amended Complaint contained six counts; each count sought statutory attorney's fees. In Count IV, reimbursement was sought for the defense of a federal civil rights action brought against the City and the Councilmen in their individual and official capacities. *

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* Ray sought both compensatory and punitive damages in his federal civil rights action. Ray v. Bagley, et al, Case No. PCA 81-521 (N.D. Fla. 1981). In May 1984, he settled with the City, Mayor (officially and in her individual capacity), and the Councilmen in their official capacities; said Defendants were voluntarily dismissed in exchange for Ray's reinstatement to his job. Thereafter in July 1984 the Councilmen in their individual capacities settled with Ray and were dismissed.

The trial court entered summary final judgment for the City on Count I and dismissed Counts 11, 111, V and VI. The case proceeded to trial on Count IV; at trial expert testimony was presented by the Councilmen as to the amount of reasonable attorney's fees applying the standards of Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985). A final judgment was entered in October 1987 awarding $7,500.00 in attorney's fees to Grant but denying such fees to Franklin and Thornber because of their violations of the Sunshine Law.

Two separate appeals to the First District Court of Appeal followed the decision of the trial court. In Case 87-1900 the City appealed from the award of attorney's fees to Grant on Count IV. In Case 88-99 Thornber, Franklin and Grant appealed the dismissal of Counts 11, 111, and V of their Amended Complaint and Thornber and Franklin appealed from the judgment in favor of the City on Count IV. These two cases were consolidated on appeal for record purposes only.

In an Opinion filed April 14, 1989, the First District Court of Appeal affirmed the judgment in favor of Grant in Case 87-1900 finding that Grant was a "prevailing" party pursuant to Section 111.07 simply by reason of his voluntary dismissal upon settlement. The judgment in Case 87-1900 was affirmed in part and reversed in part; specifically, the dismissal of Counts 11, III and V was affirmed but the denial of reimbursement to Thornber and Franklin on Count IV was reversed and the case remanded for entry of judgment consistent with the award of attorney's fees to Grant. The City's Motion for Rehearing was denied by an Order dated July 3, 1989, and the City filed its Cross-Notice To

Invoke Discretionary Jurisdiction on August 1, 1989.

SUMMARY OF THE ARGUMENT

The First and Third District Courts of Appeal utilize different tests which lead to inconsistent determinations as to who is a "prevailing" party for purposes of awarding statutory attorney's fees. In the decision below, the First District Court of Appeal looked only to whether there was some finality to the litigation; voluntary dismissal by the Plaintiff alone was found sufficient to make a Defendant a "prevailing" party. The Third District Court of Appeal, on the other hand, requires not only finality to the litigation but goes further and requires also that the party making the claim be successful in maintaining it. Simmons v Schimmel, 476 So.2d 1342 (Fla. 3d DCA 1985). Because of this direct conflict between District Courts of Appeal in how a "prevailing" party is to be determined, the Florida Supreme Court has discretionary jurisdiction to review the First District Court of Appeal's decision below. The decision in Rowe, supra, expressly limited the amount of attorney's fees to be awarded to the fee agreement between the attorney and his client; the decision below completely disregarded this limitation. Because of this direct conflict between the First District Court of Appeal and this Court, discretionary jurisdiction may be invoked here.

JURISDICTIONAL STATEMENT

The Supreme Court of Florida has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the Supreme Court or another

district court of appeal on the same point of law. Art. V, Section 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv).

ARGUMENT

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN SIMMONS V. SCHIMMEL, 476 So.2d 1342 (Fla. 3d 1985)

By their multi-count Amended Complaint the Councilmen herein sought reimbursement for attorney's fees statutorily authorized pursuant to Section 111.07, Fla. Stat. (1983). This statute provides in pertinent part:

> "If any ... municipality ... is authorized pursuant to this section to provide an attorney to defend a civil action arising from a complaint ... as a result of any act or omission of action of any of its officers ... and fails to provide such attorney, then said ... municipality ... shall reimburse any such Defendant who prevails in the action for court costs and reasonable attorney's fees." [Emphasis added.]

This statute, as do others authorizing attorney's fees, contains no explicit definition of the term "prevails"; accordingly, the issue of whether a party has "prevailed" for purposes of an award of attorney's fees has become a bone of contention upon appeal in a number of cases, including the present one.

The First District Court of Appeal specifically addressed the "prevailing" party issue in its opinion filed April 14, 1989. In affirming the award of attorney's fees to Grant on Count IV, the appellate court reasoned that:

> "Grant prevailed because the dismissal with prejudice in the federal lawsuit signalled an end to the litigation against him and under these circumstances a merits determination was not necessary." Opinion at page 13. [Emphasis added.]

Although the "prevailing" party issue was not specifically addressed with regard to Franklin and Thornber, the appellate court implicitly embraced this same rationale in reversing the denial of attorney's fees to them. The case was remanded to the trial court for entry of judgment "consistent with Grant's award". Id. at page 20.

From the Court's analysis outlined above it would appear that the mere fact of dismissal of a defendant, regardless of the circumstances under which such dismissal occurs, elevates that defendant to a "prevailing" party. That this analysis lacks any logic whatsoever is amply illustrated by the very facts of the present case. *

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* The trial court awarded Grant attorney's fees on Count IV of the Amended Complaint with regard to the federal civil rights action initiated by Ray. In this suit Ray sought money damages as well as reinstatement. A formal merits determination was never reached as the parties settled the litigation in mid-1984. Pursuant to this settlement, Ray received both reinstatement and money damages, exactly what he had sought in the lawsuit.

Not only does the decision of the First District Court of Appeal defy logic, but it also expressly and directly conflicts with the position of the Third District Court of Appeal as set forth in Simmons, supra. In Simmons the plaintiff voluntarily dismissed his wrongful death action prior to the empanelling of the jury; this move allegedly was a strategic one in an attempt to reduce the possibility of jury confusion from multiple defendants. Thereafter the defendant filed a motion seeking attorney's fees pursuant to Section 57.105, Fla. Stat. (1981) and Section 768.05, Fla. Statutes (1981). [Each of these statutes, as does Section 111.07, authorized the court to award attorney's fees to the "prevailing" party.] Based on the plaintiff's dismissal of the lawsuit, the trial court awarded defendant attorney's fees. An appeal followed.

The sole issue on appeal in Simmons was whether the defendant was a "prevailing" party within the meaning of the statutes. Since the term "prevailing" party was not statutorily defined, the court construed the words in accordance with their plain and ordinary meaning pursuant to well established rules of statutory construction. In particular, the meaning ascribed by Black's Law Dictionary was considered:

> "The party ultimately prevailing when the matter is finally set at rest... To be such does not depend upon the degree of success at different stages of the suit, but whether, at the end of the suit, or other proceeding, the party who has made a claim against the other, has successfully made it." Simmons, supra, at page 1344.

In light of this definition, the Simmons court stated that there must be some end or finality to litigation on the merits *so* that a determination could be made if the party making the claim had been successful. A formal merits determination was not found to be necessary as long as there was some end to the litigation *so* the court could determine whether the party requesting fees had "prevailed." In Simmons, there was no basis to conclude that defendant was a "prevailing" party as the plaintiff's voluntary dismissal was not related to the merits of the case.

The Simmons opinion implicitly sets forth a two-part test for determining whether a party has "prevailed":

> 1. Whether there was some end or finality to the litigation on the merits; and
>
> 2. Whether the party making the claim had successfully maintained it.

According to Simmons, both of these questions must be answered in the affirmative in order for a party to be considered as "prevailing". In that case part one of the test could not be answered affirmatively since the dismissal was unrelated to the merits of the case and without prejudice to the suit's being reinstituted.

The position of the First District Court of Appeal as enunciated in its April *14, 1989* opinion concurs with Simmons only to the extent of the first part of the Simmons test. The First District Court of Appeal requires only that there be finality to the litigation; it disregards the second part of the Simmons test. Thus, the defendant Councilmen were characterized as "prevailing" parties simply because

they were dismissed with prejudice. Opinion at page 13. No consideration was given to whether plaintiff Ray had successfully maintained his claim. Had this aspect been considered, the court would have been able to conclude Ray obtained the relief he sought although not via a formal merits determination. State of Florida, Dept. of Health and Rehabilitative Services v. Hall, 409 So.2d 193 (Fla. 3d DCA 1985).

These differing tests for a "prevailing" party lead to inconsistent determinations among the District Courts of Appeal. In the First District Court of Appeal the Councilmen are prevailing parties but would not be under the Third District Court of Appeal's Simmons two-part test.

11. THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FLORIDA SUPREME COURT IN FLORIDA PATIENT'S COMPENSATION FUND v ROWE, 472 So.2d 1145 (Fla. 1985)

The Florida Supreme Court in Rowe, supra, stated with regard to the award of statutory attorney's fees that:

> "...in no case should the court-awarded fee exceed the fee agreement reached by the attorney and his client." Id. at page 1151.

This limitation was expressly ignored by the First District Court of Appeal below by its affirmance of the trial court's award of $7,500.00 in attorney's fees to Grant. It was established at trial and noted by the First District Court of Appeal that:

> "Grant also hired Day, but he never agreed to pay the attorney any fees..." Opinion at page 8.

Clearly, then, the award of statutory attorney's fees exceeded the fee agreement reached between Grant and his attorney in conflict with Rowe's holding.

CONCLUSION

Different tests are utilized by the First and Third District Courts of Appeal to determine who is a prevailing party for the award of statutory attorney's fees. Simmons, supra. The former considers only whether there is finality to the litigation while the latter requires finality as well as the success of the party making the claim, Use of these different tests results in inconsistent results from district to district. The First District Court of Appeal and the Florida Supreme Court take contrary positions with regard to the limitations on the award of statutory attorney's fees. Rowe, supra. These conflicts give this Court discretionary jurisdiction pursuant to Art. V, Section 3(b)(3), Fla. Constitution and Fla. R. App. P. 9.030(a)(2)(A)(iv).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Jurisdictional Brief was furnished to George E. Day, Esq. 32 Beal Parkway S.W., Ft. Walton Beach, Florida 32548 by regular U.S. mail, postage prepaid, this 5th day of August, 1989.

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