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IN THE SUPREME COURT OF FLORIDA

PATRICIA THORNBER, et al.

Petitioners1
Cross-Respondents,

v. Case No. *74,494*

CITY OF FORT WALTON BEACH,

Respondent/
Cross-Petitioner,

RESPONDENT/CROSS-PETITIONER'S REPLY BRIEF

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

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INTRODUCTORY STATFNT

As used within the text of Respondent/Cross-Petitioner's Reply Brief, the abbreviations below shall mean the following:

"City" - the City of Fort Walton Beach, Florida, Respondent/Cross-Petitioner

"Day" - George E. Day, Esq., attorney for Petitioners/Cross-Respondents

"DCA" - District Court of Appeal

"Franklin" - John R. Franklin, Petitioner/Cross-Respondent

"Grant" - A1 Grant, Petitioner/Cross-Respondent

"Petitioners" - John R. Franklin, A1 Grant, Patricia Thornber

"Ray" - Thomas B. Ray, former City Police Chief and Director of Public Safety, Plaintiff in federal civil rights action Ray v. Bagley, Case No. PCA 81-521 (N.D. Fla. 1981)

"R" - Record on Appeal

"Thornber" - Patricia Thornber, Petitioner/Cross-Respondent

"Tr" - Transcript of the hearing before the Honorable Erwin Fleet, Circuit Judge, in and for the First Judicial Circuit of Florida on February 20, 1987

POINT ON CROSS-APPEAL NO. I

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 DCA 1985), WITH REGARD TO WHEN A PARTY IS A "PREVAILING PARTY" FOR PURPOSES OF AN AWARD OF ATTORNEY'S FEES.

Petitioners urge that the City's reliance on Simmons is misplaced; that Simmons is factually distinguishable from the present case is stressed. The City fully agrees with Petitioners that Simmons is not on all fours with the present case. It is not factual similarity for which Simmons is cited in the City's Initial Brief but rather for that opinion's analysis of the non-statutorily defined term "prevailing party." While many decisions have made determinations as to whether a party was "prevailing" in the specific circumstances of the case *so* as to justify the award of attorney's fees, Simmons is the only one to attempt a general definition of that statutory term; therein lies the value of the Simmons opinion.

Admittedly Simmons involved a voluntary dismissal without prejudice whereas the present case was dismissed with prejudice. If it is factual similarity on which Petitioners hang their hat, no case cited in any brief filed *so* far would be controlling. The instant case appears truly factually unique. The underlying action for which attorney's fees are sought was a federal action based on 42 U.S.C. Section 1983. Assuming for the sake of argument that Petitioners prevailed in that action, it must be recognized that they forewent their entitlement to attorney's fees as prevailing parties under 42 U.S.C. Section 1988 and instead turned to state court to recover attorney's fees as prevailing defendants under Section 111.07 of the Florida Statutes. (R. at p. 765-766.) Even Metropolitan Dade

County v. Evans, 474 So.2d 392 (Fla. 3d DCA 1985), which Petitioners deem "indistinguishable" does not appear to fit that factual pattern. (Answer Brief of Petitioners/Cross-Respondents at p. 8.)

Petitioners' reliance on Evans is blindly placed. The Third DCA's one paragraph opinion therein gives little background on the case upon which the broad conclusion that Evans and the present case are factually "indistinguishable" could be validly founded. While there may be some superficial factual resemblance between the two based on the fact that both involve a defendant political subdivision which settled with the plaintiff and a co-defendant which was dismissed with prejudice, it is a quantum leap to find the two cases factually "indistinguishable." Unanswered questions about Evans include whether the underlying action was brought in state or federal court, the precise terms of the settlement and how the co-defendant was sued-individually? in his official capacity? in both capacities? A key factor in the present case is that Petitioners were sued both individually and in their official capacities as City Council members.

Petitioners attack the City's alleged position that there must be some merits determination as a prerequisite to an award of statutorily provided attorney's fees in a case where there has been a voluntary dismissal with prejudice. Obviously, Petitioners misunderstand the City's position. The case law, including Simmons, recognizes that

> "a formal merits determination is not necessary to support a fee award made pursuant to a statute allowing the award to the prevailing party ...." Simmons, supra, at p. 1345; 51 Island Way Condominium Assn., Inc. v. Williams, 458 So.2d 364, 366 (Fla. 2d DCA 1984); State Dept. of Health and Rehabilitative Services v. Hall, 409 So.2d 193, 195 (Fla. 3d DCA 1982), Evans; supra, at p. 393 (citing Hall).

What the City is urging is the appropriate test is merely that there be

some end to the litigation (for example a judgment or a dismissal with prejudice pursuant to settlement) *so* that it is possible to determine whether the party seeking attorney's fees has successfully maintained its claim. Such a test allows the statutory word "prevailing" to be construed in accordance with its plain and ordinary meaning. Simmons, supra, at p. *1344.*

Although Petitioners label the City's position on this first point on cross-appeal as "logic-defying," what is truly logic-defying is Petitioners' statement that:

> "Ray did not prevail against Mayor Bagley and the City in his federal civil rights action because he dismissed them with prejudice, just as he dismissed Thornber, Franklin and Grant. ***Respondent did not prevail against the City of Fort Walton Beach in that he sued for a total of *$1,350,000.00* in damages and a permanent injunction and received less than two years salary and a disability stipulation from the City in his agreement with defendants Bagley the City (sic) (See R. *438-439, 770-774).*" [Answer Brief of Petitioners/Cross-Respondents at pp. *8* and *11.1*

It should be noted that *$1,000,000.00* of the *$1,350,000.00* sought from the City was a punitive damages claim. (See Appendix Document "A" at p. 10.) While Ray certainly did not "prevail" in any sense of the word against the City on the punitive damages claim, he did prevail on the compensatory damages claim by recovering pursuant to the May *2, 1984* Stipulation and Agreement:

> -total salary and entitlements through *8/8/83*
> *-160* hours vacation and sick leave time
> -$150.00/month expense allowance
> -additional three months salary and entitlement covering period from *8/8/82* to *11/8/82*
> -disability retirement until such time as Ray received his first check from the City's Police Retirement Fund (See Appendix Document "B".)

That these sums may not have totaled exactly *$350,000.00* does not make Ray

any less of a prevailing party; the fact is that Ray was successful in recovering on his claim for compensatory damages.

Furthermore, Ray sought a permanent injunction to prevent the City from continuing to deny plaintiff his employment with the City's Police Department. (See Appendix Document "A" at p. 11.) The goal of this prayer for relief was met in essence by the terms of the May 2, 1984 Stipulation and Agreement, specifically Section 1, whereby the City rescinded and vacated Ray's termination and expunged the fact of termination from all records. (See Appendix Document "B" at p. 1.)

Petitioners stress the fact that Ray could not have prevailed against them because they did not participate in nor were they signatories to the May 2, 1984 Stipulation and Agreement. Such an argument elevates form over substance. It should not be forgotten that Petitioners were sued both individually and in their official capacities in the federal civil rights action brought by Ray. (See Appendix Document "A" at p. 1.) For purposes of this appeal, the Court need only be concerned with Petitioners' liability in their official capacity; in the trial court below Petitioners were seeking attorney's fees pursuant to Section 111.07, Fla. Stat. (1983), which only authorizes such fees where the civil action is based on acts or omissions "arising out of and in the scope of" a public employee/official's "employment or function," i.e. where acting in his official capacity. The statutory language of Section 111.07 does not authorize reimbursement where a public officer exceeds the scope of his function and is thus acting as an individual.

Undeniably, any award obtained by Ray against Petitioners in their official capacity would be paid out of the City's coffers and not Petitioners' pockets; the City would bear the ultimate financial liability

for recovery against a public official based on acts taken within the scope of his official function. Sections 111.071 and 111.072, Fla. Stat. (1982). Thus, in negotiating a settlement with Ray, the only reasonable conclusion that can be drawn is that the City's goal was to get itself dismissed from the lawsuit after payment of a bottom line figure representing its ultimate liability including any financial liability based on acts of its public officials acting within the scope of their official function.

In negotiating this settlement the City was addressing its ultimate financial liability which of necessity included liability based on acts of Petitioners within the scope of their official function. As a result of the City's financial agreements with Ray in the Stipulation and Agreement, then, the Petitioners were entitled to dismissal from the federal lawsuit in their official capacities.

On June 1, 1984 the federal court held a hearing on the Stipulation and Agreement dated May 2, 1984; after consideration of and on the basis of this Stipulation and Agreement, the Court ordered the dismissal of the City and Petitioners in their official capacities. (See Appendix Documents "C" and "D".) It was the Court's understanding that the settlement was to the City, its Mayor individually and to all defendants in their official capacity. (See attachments to Appendix Document "C".) Therefore, the conclusion is compelled that Petitioners in their official capacity were parties to the Stipulation and Agreement and that Ray prevailed against them, albeit their financial liability was to be taken care of by the City.

The Answer Brief of Petitioners/Cross-Respondents at page 8 points out that the May 2, 1984 Stipulation and Agreement specifically excluded "those other individual defendants who do not join in this agreement." [Emphasis added.] Petitioners apparently fail to grasp the significance of this

language which indicates that Petitioners were included in the agreement in their official but not their individual capacities.

Finally, Petitioners attempt to cast doubt on the existence of a conflict as to who is a "prevailing" party between the Third DCA in Simmons and the First, Fourth and Fifth DCA's. The allegation is made that Simmons is factually distinguishable from the cases in the other DCA's. Nevertheless both Stuart Plaza, Ltd. v. Atlantic Coast Dev. Corp. of Martin County, 493 So.2d 1136 (Fla. 4th DCA 1986) and Vidibor v. Adams, 509 So.2d 973 (Fla 5th DCA 1987), as does Simmons, involves the dismissal of an action without prejudice by the plaintiff. Admittedly, the present case considered by the First DCA below involved a dismissal with prejudice, but that fact was not viewed as decisive by the court; the First DCA noted that:

> "In general, when a Plaintiff takes a voluntary dismissal the defendant is the prevailing party." City of Fort Walton Beach v. Grant, 544 So.2d 230, 235 (Fla. 1st DCA 1989).

No distinction was made between voluntary dismissal with or without prejudice.

POINT ON CROSS APPEAL NO. II

> THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FLORIDA SUPREME COURT IN FLORIDA PATIENTS COMPENSATION FUND v. ROWE, 472 So.2d 1145 (Fla. 1985), WITH REGARD TO THE EFFECT OF A FEE AGREEMENT BETWEEN THE ATTORNEY AND CLIENT ON THE AMOUNT OF ATTORNEY'S FEES WHICH MAY BE AWARDED BY THE COURT.

The City's Point on Cross Appeal Number II is initially attacked by

Petitioners as an improper attempt to raise a "new issue" at the Supreme Court level. It is difficult to imagine how this point on appeal is a "new issue" when Petitioners clearly and explicitly admit themselves that the correct application of the decision in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), was addressed in the City's Initial Brief at page 16 et seq. in Case No. 87-1900 before the First DCA below.

Further, Petitioners reach the conclusion that simply because the City has focused in on the application of Rowe as a separate point on appeal before the Supreme Court rather than as a subsection of the point on appeal as to the prevailing party issue that a new issue has been raised. Such a position is an excellent example of the elevation of form over substance. Rather than undertaking a "misleading and an oblique effort to raise a new issue," the City, for clarity's sake, has merely organized its discussion of the issues raised below in a manner which it hoped would simplify this rather complicated case.

The awarding of attorney's fees to Petitioners is a two-step process. First, it must be determined if the Petitoners were prevailing defendants in the underlying federal action in which case reimbursement of attorney's fees is authorized by Section 111.07. Second, if Petitioners are entitled to an award of statutory attorney 's fees, the amount thereof must be determined; Rowe, of course, provides guidelines as to how the calculation is to be made. Accordingly, breaking the case down to the two issues on appeal is appropriate and justified.

Petitioners place great reliance on the characterization of their fee arrangements with Day as contingent. However, their argument as to the contingency nature of the fee agreements with Day misses the mark entirely. They proceed from the mistaken assumption that the contingency at issue was

the Petitioner's prevailing against the City. Id. The Answer Brief specifically states that "Day had to prevail against the City to collect his fees." Id. at p. 17. This focus is entirely wrong. In order for attorney's fees to be awarded in the trial court below pursuant to Section 111.07 of the Florida Statutes, it had to be established that Petitioners were the prevailing defendants in the federal Section 1983 action instituted by Ray against Petitioners and the City. Petitioners and Day could not have prevailed against the City therein as both Petitioners and the City were defendant targets of Ray's Section 1983 action; Petitioners had no claim against the City nor did the City have a claim against them.

In any event, Day's representation of Petitioners is not appropriately characterized as a contingency fee arrangement. A contingent fee is an arrangement whereby the only practical method one having a claim against another can economically afford, finance and obtain the services of a competent lawyer to prosecute his claim; and a successful prosecution produces a res out of which the fee can be paid. Ethical Consideration 2-20, Code of Professional Conduct (as amended effective October 1, 1970) [in effect when 42 U.S.C Section 1983 and F.S. Section 111.07 actions instituted]. Day's representation of Petitioners in the federal action on which the request for attorney's fees is predicated involved his defense of Petitioners from the claims of Ray; Petitioners were asserting no claims in that action and no res was produced by their dismissal with prejudice from which Day could be paid. Petitioners could have requested attorneys fees pursuant to 42 U.S.C. Section 1988 in the federal court but waived their right to do so by terms of their settlement with Ray.

Assuming for purposes of argument that these arrangements were indeed contingent, such arrangements would not be valid. It is well established

that a contingent fee contract must be reduced to writing. Ethical Consideration 2-20, supra; Rule 4-1.5(F), Rules of Professional Conduct, Rules Regulating the Florida Bar (effective January 1, 1988); 4 Fla. Jur2d Attorneys at Law Section 143 (1978); The Florida Bar Attorneys Handbook, Bridge-The Gap, March 1990, "Attorneys Fees," p. 28. The record is absolutely devoid of any concrete evidence of a written contract between any of the Petitioners and Day.

For example, at trial the following exchange took place when Petitioner Grant was on the stand:

> "Q. All right. And who did you engage?
> A. George Day.
> Q. Now did you have an oral contract with me concerning representation?
> A. An oral contract."
> [Tr. at p. 45 lines 2-6.]

Likewise, Petitioner Franklin testified about his oral contract with Mr. Day. (Tr. at p. 87 line 22- p. 88 line 6.) While Petitioner Thornber stated at trial "I believe so" when asked if she had a written contract with Mr. Day, no such written contract has ever been produced or appears anywhere in the record. (Tr. at p. 35 lines 7-9.) Since the Petitioners cannot substantiate the existence of a valid contingency contract, the City's "bald assertion" as to the non-contingent fee agreements between Day and Petitioners is justified.

With regard to Grant's testimony, Petitioners note that the City's brief failed to mention that Grant stated he had an attorney/client relation with Day. (Petitioner's Answer Brief at p. 15). The City does not dispute the existence of an attorney/client relationship between Day and each of the Petitioners. In fact, the crux of the City's second point on appeal is that the First DCA erred in failing to cap the award of

attorney's fees with the fee agreement between Day and each Petitioner; to have a fee agreement, of course, presupposes the existence of an attorney-client relationship.

The recent case of Ganson v. State Dept. of Administration, 554 So.2d 522 (Fla. 1st DCA 1989), is cited by Petitioners for the proposition that the Rowe multiplier must be considered in determining a reasonable attorney's fee in contingency arrangements such as the present one. The value of the Ganson opinion has been considerably undermined by the Florida Supreme Court's recent decision in Standard Guaranty Ins. Co. v. Quanstrom, 15 F.L.W. 23 (Fla. Jan. 11, 1990); therein this Court directly addressed the issue of whether a contingency fee multiplier must be utilized when determining the appropriate attorney's fee to be awarded by a court and also clarified the Rowe opinion.

Neither Rowe nor Quanstrom require the use of a multiplier in determining the amount of attorney's fees to be awarded under the circumstances of this case. Both opinions speak in terms of a "contingency risk multiplier" or a "contingency fee multiplier," the decisions do not authorize application of a multiplier in non-contingency fee cases. As fully discussed above, the arrangements between Day and Petitioners for Day's defense of Petitioners in the federal action was simply not a contingency fee agreement; accordingly, no multiplier may be utilized.

If it should somehow be determined by this Court that a contingency fee arrangement did exist between Day and Petitioners and that a multiplier should be applied, Petitioners' request for a 2.5 multiplier is totally unjustified. At trial, expert witness Pat Maney testified that a reasonable fee for services was $35,000.00. Grant, supra, at p. 230. This figure was reached by utilizing a 1.5 multiplier. (Answer Brief at p. 19.)

Petitioners now reject this "unrefuted" testimony of their own witness and urge that 2.5 rather that 1.5 is the proper multiplier to be used in the calculations. This position is based on the fallacious proposition that since the trial court ruled against Petitioners at the trial level then success was unlikely at the outset of the case. The chance of success at the outset is not determined by hindsight. By Petitioners' logic the fact that Buster Douglas knocked out Mike Tyson meant that Tyson's success was obviously unlikely at the outset of the match.

Moreover, Petitioners' view of the effect of Quanstrom on this case is faulty in that it fails to recognize that the fee agreement between Day and Petitioners serves as a cap in determining a reasonable fee. Quanstrom placed attorney's fees cases into three categories which were not intended to be all-inclusive. Petitioners believe that the present case comes within the first category of cases, public policy enforcement cases, for which a contingency fee agreement does not serve as a cap. Quanstrom at p. 525. In discussing this category, both the Quanstrom opinion and Petitioners cite Blanchard v. Bergeron, *103* L.Ed.2d *67, 109* S.Ct. *939 (1989).* Nevertheless, a careful reading of both Blanchard and Quanstrom indicate that the facts of this case simply do not fit into the first category identified in Quanstrom.

In Blanchard the U. S. Supreme Court was concerned with the Civil Rights Attorney's Fees Awards Act *(42* U.S.C. Section *1988)* which authorizes attorney's fees to the prevailing party in the public enforcement case context of *42* U.S.C. Section *1983* and similar federal statutes. The Court expressly held that therein a contingency fee agreement did not serve as a cap in determining a reasonable fee under Section *1988.* Blanchard, supra, at p. *77; 946.* However, the Supreme Court clearly noted that the purpose

of Section 1988 was to make sure that competent counsel was available to civil rights plaintiffs and to encourage individual citizens to bring civil actions to enforce statutory policy, benefitting not only the named plaintiff but also society at large. Id. at pp. 75, 77; 945, 946. The Blanchard opinion recognizes that:

> " ...Congress implemented its purpose by broadly requiring all defendants to pay a reasonable fee to all prevailing plaintiffs, if ordered to do so by the court." [Emphasis added.] Id. at p. 75; 945.

That the circumstances of this case do not come within this first category identified in Quanstrom, public policy enforcement cases, is obvious. Petitioners did not institute a civil action in order to enforce statutory policy. Quite the opposite, Petitioners were the target of Section 1983 litigation instituted by Ray. Given the Blanchard rationale for the awarding of statutory attorney's fees (i.e. to encourage the bringing of meritorious claims), the conclusion is compelled that this first Quanstrom category applies only to awards of attorneys' fees to plaintiffs in public policy enforcement cases such as Section 1983 actions.

The facts of the present case more appropriately fit within the second category identified in Quanstrom–tort and contract claims; Ray's complaint in the federal court action alleged wrongful termination from employment by Petitioners acting collectively as the City. (See Appendix Document "A".) Under this category of cases the caps imposed by Rowe remain applicable. Quanstrom, supra, at p. 26. One of these caps is the fee agreement reached by the attorney and his client. Id. at p. 24.

CONCLUSION

The awarding of attorney's fees to Petitioners is a two-step process. First, under Section 111.07, the Petitioners must have been prevailing defendants in the underlying action. Because the settlement in the federal action in essence gave Ray the relief sought, he, and not the Petitioners, prevailed. Although Petitioners were not signatories to the Stipulation and Agreement, the substance and language of the agreement was such as to give the federal court the understanding that it included Petitioners in their official capacities. The First DCA erred below in focusing solely on the fact that litigation against Petitioners was terminated; in order to give effect to the common meaning of the term "prevailing" as used in Section 111.07, not only must there be some finality to the litigation but the party seeking attorneys fees must have successfully maintained its claim. Petitioners fail to meet this second part of the test.

Second, once entitlement to attorney's fees is established, the amount to be awarded must be determined. Rowe places a cap on any such award here to the extent of the fee agreements between Day and Petitioners. Therefore, the award of attorney's fees to Grant was erroneous in that Grant testified at trial that he never agreed to pay any fees to Day.

Accordingly, the decision of the First DCA must be reversed and the matter remanded. In particular, this Court should adopt the two-part test of a "prevailing" party urged by the City (finality to litigation and successful maintenance of claim) and reaffirm the Rowe cap of the extent of the attorney fee agreement,

CERTIFICATE OF SERVICE

THE UNDERSIGNED hereby certifies that a true and accurate copy of the foregoing Respondent/Cross-Petitioner's Reply Brief was furnished to George E. Day, Esq., *32* Beal Parkway, S.W., Fort Walton Beach, Florida *32548* by regular U.S. Mail, postage prepaid, this 31st day of March, 1990.

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