087

FILED
FEB 26 1990
CLERK, SUPREME COURT
By
Deputy Clerk

SUPREME COURT OF **FLORIDA**

SUN BANK **OF OCALA,**

Petitioner,

v.

JACQUES FORD,

Respondent.

Case No. 7 ,299

Fifth District - No. 89-507

ANSWER BRIEF **OF RESPONDENT ON THE MERITS**

Appeal from the
District Court of Appeal
of the State of Florida
Fifth District

Michael J. Cooper, Esquire
Florida Bar No. 217956
Attorney at Law
321 Northwest Third Avenue
Ocala, Florida 32670
(904) 732 - 4500

TABLE OF CONTENTS

TABLE OF CITATIONS

IMINA STATEMENT

In this brief, Respondent, JACQUES FORD, has:

(a) Referred to the Respondent, JACQUES FORD, as "Respondent";

(b) Referred to Sun Bank of Ocala as "Petitioner"; and

(c) Cited the Petitioner's Appendix with "A" followed by the appropriate page or pages, all of which is in parentheses.

POINT ON APPEAL

THE TRIAL COURT DID PROPERLY AWARD ATTORNEYS' FEES BASED UPON THE FACTS OF THE CASE, THE TRIAL COURT'S DISCRETION AND THE AGREEMENT THAT PETITIONER GUARANTEED PAYMENT TO ITS ATTORNEYS OF AT LEAST $100.00 PER HOUR FOR EACH HOUR OF WORK ACTUALLY PERFORMED.

STATEMENT OF THE FACTS AND OF THE CASE

Respondent would adopt Petitioner's Statement Of The Facts And Of The Case except that Respondent would demonstrate that the Trial Court held an evidentiary hearing regarding the determination of attorneys' fees. The Petitioner has failed to present the testimony from this evidentiary hearing or the facts surrounding the evidentiary hearing thus resulting in a grossly incomplete record. Without the transcript of the hearing and the testimony therein contained it is impossible to make a reasonable and just decision with regard to whether or not the trial court used proper discretion in determining appropriate attorneys' fees.

SUMMARY OF ARGUMENT

Point On Appeal

THE TRIAL COURT DID PROPERLY AWARD ATTORNEYS' FEES BASED UPON THE FACTS OF THE CASE, THE TRIAL COURT'S DISCRETION AND THE AGREEMENT THAT PETITIONER GUARANTEED PAYMENT TO ITS ATTORNEYS OF AT LEAST $100.00 PER HOUR FOR EACH HOUR OF WORK ACTUALLY PERFORMED.

The Trial Court found that the Petitioner was to pay their attorneys $100.00 per hour win, lose or draw. The true question is whether or not the Trial Court used reasonable discretion in awarding an attorneys' fee in this case.

Unfortunately, the Petitioner has failed to present this Court with the transcript of the full evidentiary hearing so that this Court can properly determine what factors were actually considered in the Trial Court's determination of the attorneys' fee award.

In the final judgment on the award of attorneys' fees (A;5-7) the Court found both that the fee agreement was to pay a reasonable fee and not a contingent fee and that under the standards of the Florida Supreme Court the Petitioner was not entitled to enhancement of the fees on the grounds of contingency or results obtained. The incomplete record fails to demonstrate what factors the Court considered in determining whether or not the fee was contingent and whether or not an enhancement was required.

In any event, the Trial Court properly used its discretion

in determining that a guaranteed fee of $100.00 per hour was not contingent.

In fact, the true "contingency" alleged by Petitioner is not the contingency of the outcome of the case but the contingency of what the Court would deem a reasonable fee. Petitioner's agreement with its attorney was that the attorney could collect a reasonable fee as determined by the Court but the Petitioner would in any event pay $100.00 per hour for work actually performed. The Court determined a reasonable fee as being, based upon what the Court perceived as being the going rate in the community, of $150.00 per hour and adjusted the fee accordingly. It is this discretionary decision of the Trial Court that is Petitioner's real "contingency" upon which he now bases a claim for further loadstar enhancement. The Petitioner's situation was by no means a true contingency for the purposes of awarding attorney's fees.

The matters before this Court are insufficient to determine whether or not the Trial Court considered the relationship of the Petitioner to the attorney, the difficulty of the case, the result achieved, the arrangement that the Petitioner may have had with its attorney in other similar cases or any other factors. Without evidence of the Trial Court's consideration of such factors, the Trial Court's discretion in determining its fee award should be upheld.

The posture of this case is such that a Supreme Court determination such as Petitioner has requested, is not appropriate.

ARGUMENT

Point I

THE TRIAL COURT DID PROPERLY AWARD ATTORNEYS' FEES BASED UPON THE FACTS OF THE CASE, THE TRIAL COURT'S DISCRETION AND THE AGREEMENT THAT PETITIONER GUARANTEED PAYMENT TO ITS ATTORNEYS OF AT LEAST $100.00 PER HOUR FOR EACH HOUR OF WORK ACTUALLY PERFORMED.

The Appellant attempts to argue its entire case based upon certain limited findings of fact set forth in the Order Granting Attorneys' Fees. The decision of the Trial Court obviously involved factual determinations regarding whether or not an enhancement factor should be applied, whether or not a contingency actually existed, what hourly rate was adequate, the novelty of the case and the issues, the outcome, the difficulty of the case, the relationship of the Petitioner with its attorney, and other similar factors required by both case law and the rules of Professional Conduct, Rule 4-1.5.

In the judgment for attorneys' fees and costs, the Trial Court ruled

> "The fee is an agreement to pay a reasonable fee set by the court, not a contingent or partially contingent fee."

There is no evidence upon what basis the Court made this finding because, as is previously stated, the transcript has not been available. If this was in fact a contingent fee as alleged by Petitioner, then where is the evidence of compliance with Rule 4-1.5(f) of the Rules of Professional Conduct? Where is the

contingent fee agreement that is in writing as required by that Rule? Where is the written statement stating the outcome of the matter as required by that Rule? Was there a written contract that was signed by the client and the lawyer? Did each participating lawyer sign the contract with the client? Were other provisions of the Rule that may have been applicable to this situation complied with? Unfortunately, without the benefit of the trial transcript the answers to these questions are not known. The Trial Court in determining whether or not a fee agreement is contingent looks not just at the testimony given in Court but has to look at the totality of circumstances to decide what was the actual intent of the client and his attorney. If the simple requirements of the Rules of Professional Conduct were not otherwise complied with or at least were not proven to the Court's satisfaction, then all arguments regarding contingency could easily, within the Court's discretion, become moot.

The Trial Court should be sustained because of the absence of a real record which prevents this Court from determining whether there are alternative theories or evidence to support the Court's ruling. (Applegate v. Barnett Bank of Tallahassee, 377 So 2d 1150 (Fla 1980).

In the instant case, the record is void of a transcript despite the fact that there was a trial court reporter at the hearing. The record is further void of any proposed stipulated

statement as contemplated under Rule 9.200(b)(3) of the Florida Rules of Appellate Procedure. None of the requirements of Rule 9.200 regarding the providing of a transcript were followed. Rather, Appellant submitted to this Court an order which purports to set forth findings of fact. There is no evidence that these were the total findings of fact nor upon what evidence such facts were based.

When the findings and judgment of a Trial Court arrive at an Appellate Court, they arrive clothed with the presumption of correctness. That presumption precludes the disturbing of the Trial Court's findings and judgment in the absence of a record demonstrating errors of law. Mills v. Heenan, 382 So 2d 1317 (Fla. 5th DCA 1980). The burden of an Appellant includes the demonstration of error from the records, and the record must be supplied by the Appellant. Kauffman v. Baker, 392 So 2d 13 (Fla. 4th DCA 1980). Petitioner has not met that burden.

Without the benefit of the trial transcript, this Court cannot determine whether the lower court committed error. Mikes v. Mikes, 440 So 2d 616 (4th DCA Fla 1983); Johnson v. Leuschner, 460 So 2d 1016 (Fla 5th DCA 1984).

As was held in Beasley v. Beasley, 463 So 2d 1248 (Fla 5th DCA 1985)

> "Unless this Court is provided with all of the evidence which was before the Trial Court, either by a transcript of testimony or of stipulated statement,

then we cannot fault and reverse a Trial Judge for a purported error."

The insufficient record submitted by the Appellant in this case will not overcome the presumption of correctness of the Trial Court's acts. The Order appealed from should be affirmed.

Looking beyond the inadequate record for the moment, the real issue addressed by Petitioner is whether or not the Trial Court Judge used reasonable discretion in granting an attorney's fee of over $25,000.00 on the collection of a $150,000.00 note. The Petitioner is attempting to make this a major issue that somehow can transcend the boundaries of this case and become a hallmark for all similar cases in the future. The posture of this case is such that it simply does not lend itself to any type of detailed structuring of Florida Attorney Fee Law.

This Court recently determined the case of Standard Guaranty Insurance Company v. Quanstrom, 15 FLWS 23 (Fla 1990). In that case, this Court reviewed its prior decision in Florida Patients' Compensation Fund v. Rowe, 472 So 2d 1145 (Fla 1985). The question had to do with whether or not a loadstar should be allowed. The Petitioner cites the Quanstrom case as somehow justifying its right to obtain fees in what it claims to be a partially contingent situation. However, a review of the Quanstrom case, as well as the Rowe case, implies that this Court was discussing purely contingent fees in all instances. As this Court found in Quanstrom

> "In the instant case, Quanstrom's attorney agreed to represent her upon the understanding that, if he were successful, he would be entitled to a fee which would be set by the Court pursuant to §627.428 Fla.Stat. (1987). Implicit in this arrangement was the understanding that no fee would be paid if the attorney did not prevail." (Emphasis added.)

In the instant case win, lose or draw, the attorney gets paid. That is not a contingency. The Rowe case gives to the Trial Court a number of methods by which the Trial Court can effectively enhance the fee. One of these is simply to bring an agreed upon fee into line with fees that are consistent with other fees charged in the general jurisdiction of the Court. The Court chose to do this. The Court chose not to apply any other enhancement factors. The Court specifically found that there are no enhancement factors to which the Petitioner was otherwise entitled.

The whole purpose of contingent fees is to provide to individuals access to courts free of the worries of how to pay the legal costs associated with such access. In the instant case the Petitioner is attempting to usurp a benefit, which was originally designed to provide access to the courts, and award that benefit directly to the lawyers clear of any public policy considerations. If a lawyer chooses to take a case at $100.00 per hour then there is no public policy which would declare a reasonable need for contingency because he might otherwise be entitled to $150.00 per hour. The lawyer has his arrangement

with his client. The client will not be benefiting by any award that might be obtained.

In Ron Lee, Inc. v. Arvita Corp., 515 So 2d 372 (4th DCA Fla 1987), the Court was reviewing a very similar fact situation. The Court held that if the attorney agreed upon **$100.00** per hour he did so because

> "[m]any a lawyer views the corporate client as a bird in the hand and works for a smaller hourly rate than otherwise because of the continuity of the relationship."

In this case it is easy to imagine that Petitioner was a good client and **$100.00** per hour was a set fee. Unfortunately, the transcript of the hearing is not available from which this could be ascertained.

The Petitioner is attempting to have this Court redefine the entire meaning of the word contingency. A contingency implies a risk of loss if there is not success. Black's Law Dictionary defines contingent as

> "[p]ossible, but not assured; doubtful or uncertain, conditioned upon the occurrence of some future event which is itself uncertain, or questionable."

In the instant case it is important to examine what is the real contingency that Petitioner is alleging. The "contingency" upon which the Petitioner is basing his claim for enhancement is not the contingency of win or lose. The Petitioner pays the attorney **$100.00** per hour no matter what the outcome.

The true "contingency" is the Judge's use of his discretion in awarding attorney's fees.

The Petitioner is alleging that because the Judge chose to increase the fees to which his attorney was due on the basis of rates prevailing in the relevant market then the "contingency" was met because the fees awarded by the Judge exceeded $100.00 per hour. If the Judge on the basis of his discretion determined that the prevailing rates in the market were only $100.00 per hour, then the "contingency" would not have been met. Thus there would be no loadstar enhancement requested by Petitioner. It becomes obvious, then, that the true "contingency" is the Judge's use of his discretion as to what the Petitioner's attorney is entitled based upon the relevant market.

This type of "contingency", effectively unrelated to the outcome of the case, is certainly not the type of contingency upon which the Supreme Court of the United States has based its philosophy of allowing loadstar enhancement factors to be used to supplement attorneys' fees in contingency cases.

Because it now becomes apparent that Petitioner's "contingency" is actually the Judge's use of his discretion, the true issue proposed by the Petitioner becomes readily ascertainable. The issue is: Did the Trial Court abuse its discretion in granting attorney's fees in this case?

Once the true issue is redefined based upon an analysis of

Petitioner's position it then becomes apparent that Petitioner is asking this Court to substitute its judgment for that of the Trial Court.

It has long been held that the Appellate Courts will not disturb the order of a lower court in the exercise of its judicial discretion unless an abuse of that discretion is clearly shown. See, e.g. Astor v. Astor, **89** So 2d **645** (Fla. **1956).**

In the instant case with the total absence of a real record it is impossible for this Court to determine whether or not there has been an abuse of discretion. Such an abuse, if the basis for an appeal, as it is in this case, would be the Appellant's burden to demonstrate. The Appellant failing to have produced a record has thus failed in his burden.

To extend the attorneys' fee enhancement factor as Petitioner requests would create a wide open arena of litigation concerning attorneys' fee issues. What if Petitioner had agreed to pay his lawyer **$140.00** per hour and the Court ruled that he was entitled to **$150.00** by standards of the jurisdiction? Does this mean that he is now entitled to an enhancement factor for the additional **$10.001** What if the agreement was **$120.003** At what level does a simple agreement between parties become a contract and not a "contingency" fee agreement? If the frontiers of attorneys' fee awards are pushed to the point that the Petitioner requests, then every attorney that might in any

shape, form or manner be entitled to Court awarded attorneys' fees will be induced to execute a contract with his client stipulating that the fee will be so many dollars per hour but otherwise contingent upon what the Court awards. This would make every single fee agreement a contingency fee agreement and would impose upon the Trial Courts an entirely new burden associated with the determination of attorneys' fee issues.

The primary purpose behind the Rowe case and the Quanstrom case was to promote access to the courts by the general public in order to promote consideration of issues of great public importance. The rules laid down by this Court and the Supreme Court of the United States were not to promote greater fees for attorneys or greater opportunities for attorneys to obtain money. First and foremost, attorneys are officers of the court. The position of the Petitioner would transfer attorneys into market driven businessmen trying to wring the maximum profit for the least amount of work at the losing party's expense.

CONCLUSION

The Petitioner herein has failed to provide to this Court adequate information upon which this Court can render any type of decision or ruling which would be meaningful or significant. The instant case does not lend itself to any broad determinations or policy considerations regarding attorneys' fees.

In any event, Petitioner has failed to demonstrate that the Trial Court abused its discretion and has failed to demonstrate that the Trial Court should have absolutely found that Petitioner's attorney fee arrangement to be contingent and thus considered any additional enhancement factors.

The Petitioner's true "contingency" being the Trial Court's use of its discretion in the amount of attorney's fees being granted, and not the outcome of the case, the Trial Court should be upheld in its determination of fees as being a reasonable use of its discretion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was served by U.S. Mail to Wayne C. McCall, Ayres, Cluster, Curry, McCall & Briggs, P.A., Post Office Box **1148**, Ocala, Florida **32678**; and Robert W. Batsel, McClellen, Vostrejs & Batsel, P.A., Post Office Box **2530**, Ocala, Florida **32678**, this 26th day of February, **1990**.

MICHAEL J. COOPER
Florida Bar No. **217956**
321 Northwest Third Avenue
Ocala, Florida **32670**
(904) 732 - 4500

Attorney for Respondent