

SUPREME COURT OF FLORIDA

SUN BANK OF OCALA,

Petitioner,

Case No. 75,299

vs.

Fifth District - No. 89-507

JACQUES FORD,

Respondent.

FILED
MAY 10 1989
CLERK OF THE COURT
TALLAHASSEE, FLORIDA

REPLY BRIEF OF PETITIONER

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

Wayne C. McCall, Esquire
Florida Bar No. 157090
AYRES, CLUSTER, CURRY,
McCALL & BRIGGS, P.A.
Post Office Box 1148
Ocala, Florida 32678
(904) 351-2222

TABLE OF CONTENTS

	<u>Page</u>
Table of Citations	i
Preliminary Statement	ii
Point On Appeal	iii
<p style="text-align: center;">WHETHER THE RECORD IS INCOMPLETE WHEN RESPONDENT DID NOT DIRECT THE COURT REPORTER TO PROVIDE THE TRANSCRIPT OF THE PROCEEDINGS AND WHEN THE CORRECTNESS OF THE TRIAL COURT'S RULINGS WHICH IS THE SUBJECT OF THIS APPEAL DOES NOT DEPEND ON THE EVIDENCE PRESENTED TO THE TRIAL COURT AND WHETHER THE RECORD SHOWS THAT THE TRIAL COURT ERRED IN NOT CONSIDERING THE CONTINGENCY RISK FACTOR IN DETERMINING WHETHER TO APPLY A CONTINGENCY FEE MULTIPLIER UNDER THE CIRCUMSTANCES.</p>	
Summary of Argument - Point On Appeal	1
Argument - Point On Appeal	3
Conclusion	6
Certificate of Service	7

TABLE OF CITATIONS

	<u>Page</u>
<u>Cases:</u>	
<u>Carter v. Carter,</u> 504 So.2d 418 (Fla. 5th DCA 1987)	4
<u>Ed Ricke and Sons, Inc. v. Green,</u> 468 So.2d 908 (Fla. 1985)	3, 5
<u>Trans-Continental Finance Corporation v. Baxter,</u> 402 So.2d 1289 (Fla. 5th DCA 1981)	5
 <u>Rules:</u>	
9.200 (b) (1), Fla.R.App.P.	3
9.200 (f) (2), Fla.R.App.P.	5

PRELIMINARY STATEMENT

In this brief, Petitioner, SUN BANK OF OCALA, has:

- (a) Referred to the Respondent, JACQUES FORD, as "Respondent"; and
- (b) Referred to Sun Bank of Ocala as "Petitioner".

POINT ON APPEAL

WHETHER THE RECORD IS INCOMPLETE WHEN RESPONDENT DID NOT DIRECT THE COURT REPORTER TO PROVIDE THE TRANSCRIPT OF THE PROCEEDINGS AND WHEN THE CORRECTNESS OF THE TRIAL COURT'S RULINGS WHICH IS THE SUBJECT OF THIS APPEAL DOES NOT DEPEND ON THE EVIDENCE PRESENTED TO THE TRIAL COURT AND WHETHER THE RECORD SHOWS THAT THE TRIAL COURT ERRED IN NOT CONSIDERING THE CONTINGENCY RISK FACTOR IN DETERMINING WHETHER TO APPLY A CONTINGENCY FEE MULTIPLIER UNDER THE CIRCUMSTANCES.

SUMMARY OF ARGUMENT
Point On Appeal

SINCE RESPONDENT HAD THE OPPORTUNITY TO DIRECT THE COURT REPORTER TO PROVIDE THE TRANSCRIPT OF THE PROCEEDINGS AND SINCE THE CORRECTNESS OF THE TRIAL COURT'S RULINGS DOES NOT DEPEND ON THE EVIDENCE PRESENTED TO THE TRIAL COURT, THE RECORD IS COMPLETE AND SHOWS THAT THE TRIAL COURT ERRED IN NOT CONSIDERING THE CONTINGENCY RISK FACTOR IN DETERMINING WHETHER TO APPLY A CONTINGENCY FEE MULTIPLIER UNDER THE CIRCUMSTANCES.

Respondent contends that the trial court should be affirmed because Petitioner did not provide a transcript of the proceedings and the incomplete record fails to show what factors the trial court considered. The Respondent's contention is without merit.

First, by failing to direct the court reporter to provide a transcript of the proceedings, Respondent admitted that nothing other than what Petitioner designated is necessary. Second, the transcript of the proceedings is only necessary when the correctness of the trial court's ruling depends on the evidence presented to the court. The issues on appeal are whether the fee arrangement when the trial court found Petitioner entered with its attorneys is contingent or partially contingent under the law and a trial court, as a matter of law, must consider the contingency risk factor in determining whether to apply a contingency fee multiplier under the circumstances. Rulings on these issues of law do not depend on the evidence presented. Finally, if an appellate court feels a transcript of the

proceedings is necessary, the appealing party must be given the opportunity to provide one.

The record is complete and, for the reasons demonstrated, the trial court erred in not considering the contingency risk factor in determining whether to apply a contingency fee multiplier under the circumstances.

ARGUMENT

Point On Appeal

SINCE RESPONDENT HAD THE OPPORTUNITY TO DIRECT THE COURT REPORTER TO PROVIDE THE TRANSCRIPT OF THE PROCEEDINGS AND SINCE THE CORRECTNESS OF THE TRIAL COURT'S RULING DOES NOT DEPEND ON THE EVIDENCE PRESENTED TO THE TRIAL COURT, THE RECORD IS COMPLETE AND SHOWS THAT THE TRIAL COURT ERRED IN NOT CONSIDERING THE CONTINGENCY RISK FACTOR IN DETERMINING WHETHER TO APPLY A CONTINGENCY FEE MULTIPLIER UNDER THE CIRCUMSTANCES.

Respondent contends that the trial court should be affirmed because Petitioner did not provide a transcript of the proceedings and the incomplete record fails to show what factors the trial court considered. The Respondent's contention is without merit.

Respondent had the opportunity to designate those portions of the transcript of the proceedings not on file which he felt were necessary for inclusion in the record. Rule 9.200(b)(1), Fla.R.App.P. An appellee who fails to designate portions of the transcript under the rule admits nothing other than what is designated by the appellant is necessary to support a finding of reversible error. Ed Ricke and Sons, Inc. v. Green, 468 So.2d 908, 911 (Fla. 1985). Since Respondent did not direct the court reporter to provide the transcript of the proceedings, he admitted that nothing other than what Petitioner designated is necessary.

Further, an appellant must provide the appellate court with a report of the evidence considered below, by transcript of proceedings or otherwise, only where the correctness of the

trial court's ruling depends on the evidence presented to the trial court. Carter v. Carter, 504 So.2d 418, 419 (Fla. 5th DCA 1987). Petitioner agrees with the trial court's findings that Petitioner agreed to pay its attorneys a reasonable fee for the services rendered in this action, that Petitioner and Ayres, Cluster, Curry, McCall & Briggs, P.A., agreed that such fee would be set by the court, that Ayres, Cluster, Curry, McCall & Briggs, P.A., would periodically bill Petitioner at the rate of \$100.00 per hour to be applied against the fee awarded by the court, that Ayres, Cluster, Curry, McCall & Briggs, P.A., would be paid no less than \$100.00 per hour, and that payment of fees in excess of \$100.00 per hour would be contingent upon success, an award by the court and recovery from Respondent. The court then conceded that such a fee arrangement is neither contingent nor partially contingent and Petitioner's attorneys are not, therefore, entitled to enhancement of the fees on the grounds of contingency.

Petitioner disagrees with the conclusions, not the finds of fact. Whether the trial court's conclusions are correct are questions of law, not fact, and the correctness of the trial court's ruling does not depend on the evidence presented to the trial court.

Finally, if an appellate court, after considering the record on appeal and briefs of the parties, feels a transcript of the proceedings is necessary, the ruling should not be affirmed unless the appellant (Petitioner) is first given the

opportunity to supplement the record. Rule 9.200(f)(2),
Fla.R.App. P.; Ed Ricke and Sons, Inc. v. Green, supra;
Trans-Continental Finance Corporation v. Baxter, 402 So.2d 1289,
1290 (Fla. 5th DCA 1981).

For the reasons stated in its initial brief, the Record demonstrates that the trial court erred in not considering the contingency risk factor in determining whether to apply a contingency fee multiplier under the circumstances.