087

FILED
SID J. WHITE
JUL 1 1991
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

BEFORE THE FLORIDA SUPREME COURT

MARJORIE AND ROBERT SCHICK, BUCK HULL and DOT HULL SHAW

Plaintiffs/ Appellees/ Petitioners

vs.

FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

Defendant/Appellant/ Respondent

CASE NO: 77,906

PETITIONERS' REPLY BRIEF

On appeal from the First District Court of Appeal as a Question of Great Public Importance- Case No: 90-1921

Randall E. Denker
Lehrman and Denker
3425 Woodley Road
Tallahassee, Fl. 32312
(904) 893-6753
Fla . Bar No:273082
Attorney for Petitioners

TABLE OF CONTENTS

TABLE OF CITATIONS

I. QUANSTROM DOES NOT ABOLISH RISK-MULTIPLIERS IN CONDEMNATION CASES BUT MERELY LIMITS THEM TO CASES INVOLVING EXTRAORDINARY CIRCUMSTANCES

The Department mischaracterizes the decision in Standard Guaranty Insurance Company v Quanstrom, 555 So. 2d 828 (Fla. 1990), as abolishing risk-multipliers in eminent domain cases. Quanstrom does not advocate a wholesale abolition of risk multipliers in condemnation cases; it merely limits their application to those cases which present "truly special circumstances." Quanstrom at 835.

The Department also cites City of Orlando v Kensington , 16 F.L.W. D1392 (Fla. 5th DCA May 23,1991) for the proposition that risk multipliers may not ever attach to condemnation cases. This is definitely not the holding in Kensington. In fact, Kensington acknowledged that the Supreme Court's decision in Platt[1]. makes Rowe[2]. applicable in eminent domain cases. The attorney's fee in Kensington was reversed not because of Rowe considerations but because the trial judge failed to delineate a reasonable number of hours and a reasonable hourly rate. Kensington was a straight eminent domain case and not an inverse condemnation case so Rowe multipliers were not appropriate.

Petitioners, in their initial brief, have argued to this court that regular condemnation and inverse condemnation cases

1. In re Estate of Platt, 16 F.L.W. S237 (Fla. April 4,1991).

2. Florida Patients' Compensation Fund v Rowe, 472 So.2d 1145 (Fla. 1985).

are inherently different. In the former, a fee is guaranteed by the statute whether the attorney wins, loses or draws and regardless of how miserably he performs for the client. In the latter, the attorney recovers nothing if he does not prevail and the skill of the attorney can mean the difference between victory and defeat.

The Department fails to address this salient difference, preferring instead to lump all condemnation cases in one large judicial basket.

In Estate of Platt, supra, the court held that risk multipliers were created to compensate attorneys:

> ... for those cases where there was a risk of non-payment. In other words, this factor was added to the lodestar formula to compensate attorneys who receive no fees if they do not prevail.

Platt rejects the DCA's assertion that Rowe cannot ever apply in worker's compensation or eminent domain cases. Platt at S240. Platt also agrees with Quanstrom that in eminent domain cases the lodestar approach (i.e. hourly rate x reasonable number of hours) is only a starting point and then other factors should be taken into account to increase or decrease the fees. Undoubtedly, the instant case would have been entitled to a fee enhancement under §73.092,F.S. with or without Rowe because of its judicially recognized uniqueness, length and difficulty.

Dicta in Platt indicates that the Supreme Court understands that in some unique cases, risk multipliers are appro-

priate. However, Platt is not a condemnation case and since there was no contingency risk to the attorney's fees in Platt, risk multipliers were inappropriate.

Nonetheless, Quanstrom, Platt and Kensington all agree that a risk multiplier is appropriate in certain "extraordinary circumstances." The question then remains: What exactly are those extraordinary circumstances and is this case one of them?

The Supreme Court has already decided the threshold issue that multipliers can be appropriate in condemnation cases. However, this court has never defined with any specificity what those extraordinary circumstances are.

The Department has failed to address this central issue. The Department does not argue that this case is not extraordinary; instead , the Department continues to inexplicably argue that a risk multiplier is never appropriate in any condemnation case. Since this legal point has already been squarely decided against the Department in Quanstrom (and in dicta in Platt and Kensington[3] ,the Department's argument must fail.

Petitioners would argue, by contrast, that all inverse condemnation cases are extraordinary by their very nature, particularly if (as here) the attorney would have gotten a fee of zero dollars if she had not prevailed.

In its answer brief, the Department misrepresents to this

3. Note that even Schick IV. (Dept. of Agriculture v Schick, 16 F.L.W. D1217(April 29,1991) did not hold that risk multipliers are never appropriate. Schick IV. opined that multipliers could be appropriate in "extraordinary cases" but the court didn't know if this case was the type contemplated by Quanstrom.

court that the attorney's fee exceeds the award given to the landowners. This is false and is a deliberate distortion. Petitioners have attached a copy of the court's award to the landowners. The judgment was in the amount of $326,700. Since it took a mandamus action and two years for the Department to pay off the award, the total pay-off to the clients was actually around $400,000. with the accruing interest.

The Department also erroneously continues to characterize the fee enhancers as a "windfall." The Department claims that Petitioners' attorney is receiving a $180,000. windfall (the difference between the lodestar fee of $150./hr. versus the enhanced fee of $375./hr. when multiplied by the 800 hours awarded by the court.) The Department's math is excellent but the Department's logic is poor. The Department's perceived "windfall" theory is based upon the assumption that Petitioners' attorney would not have been entitled to enhancement of her fees under §73.092,F.S. This is contrary to case law. Rowe and all the cases decided since Rowe (including some of the cases cited by the Department in its own answer brief e.g. Platt, Quanstrom) have held that the lodestar approach is only a "starting point" not an endpoint and that if other statutory factors are present such as novelty, difficulty and important questions of law, the fee may be enhanced. The skill of the attorney and the responsibility undertaken and fulfilled are also a statutory basis for enhancement. Since the trial court found that this was a novel, difficult case raising questions of first impression and the attorney exercised great skill and took on a con-

siderable responsibility in undertaking this case (see attached Final Judgment on Fees) an enhanced fee would have been required under the statute. Since $150./hr. was only the starting point, it is highly probable that the court would have arrived at an hourly rate equal to or greater than the fee of $375./hr that it eventually came up with by using Rowe multipliers. If the judge had known he was not supposed to use Rowe multipliers, he would have based enhancement on other applicable statutory factors. The Department is assuming that the court would not have enhanced the basic lodestar fee of $150./hr which, given the facts of the instant case, is unrealistic and not in line with customary fees in eminent domain cases. For instance, in the Kensington case cited by the Department, there was testimony that a senior attorney, even though inexperienced in condemnation, would be entitled to $700./hr. In Platt, also cited by the Department, there was evidence that $526.64/hr. was a reasonable fee in a complex case and in What an Idea,Inc. v Sitko, 505 So.2d 497(Fla. 1st DCA 1987), also cited by the Department, the court upheld an attorney's fee of $2,700./hr!

In the evidentiary hearing, Charles Stratton, an attorney with specialization in eminent domain, said he personally knew of two cases where condemnation awards of $900./hr. and $1,200./hr. were upheld. Mr. Stratton's fee in a straight non-contingent condemnation case against the City of Tallahassee where fees were guaranteed from the outset was $300./hr. (T.33-34).

Petitioners must conclude that their attorney's fee would have been enhanced under either scenario, whether they had Rowe multipliers or statutory enhancement. Since the fees, in all

likelihood would have been similar regardless of the method of calculation, the Department's inflammatory discussion of "windfall" fees is without merit.

Additionally, it has been held in State Farm Fire & Casualty Co. v Palma, 524 So. 2d 1035 (Fla. 4th DCA 1988), that a risk multiplier is sustainable even where the attorney's fees exceed the amount obtained for the client if the losing party's "miltitant resistance increased the exertions required of their opponents." The Department wished to make a test case of this EDB claim and, like Palma, decided to "go to the mat" (Palma at 1036). This is the seventh appeal involving this case. It is the Department's militancy that is causing such high fees. Equity requires that the Department pay for what it has caused.

II. THE DEPARTMENT'S FAILURE TO PRESERVE BARS RE-LITIGATION ON POINTS II.THROUGH V. OF ITS ANSWER BRIEF

It is black letter law that a party must preserve issues that he wishes to raise on appeal. The job of the appellate court is to review. An appellate court will not rule upon a question of law where the question was never presented to the trial court for its ruling. Bryant v Schmoor,393 So.2d 41 (Fla. 3d DCA 1981); Sparta State Bank v Pape, 466 So. 2d 3 (Fla. 5th DCA 1985).

The rule requiring preservation of issues is founded on considerations of practical necessity and fairness to the trial court and the opposite party. International Assoc. of Machinists v. St. Regis Paper Co., 125 So. 2d 337 (Fla. 1st DCA 1960).

In its answer brief, in Points II. through V., the Department raised the following points:

1) That Rowe risk multipliers did not lure the Plaintiffs' attorney.

2) That Plaintiffs' attorney is barred by laches from getting Rowe multipliers because she did not request them soon enough.

3) That Plaintiffs' attorney cannot get Rowe multipliers because she began representing her clients pre-Rowe and;

4) Even if risk-multipliers are appropriate, they should not apply continuously throughout the case.

A review of the transcript of the attorney's fee hearing held on March 21,1990, shows that the Department did not raise the first three issues at the hearing. The Department did not put on a scintilla of evidence on Points II-IV nor did their attorney make a single legal argument. If the Department had, Petitioners' attorney would have had the opportunity to put on rebuttal evidence and to make legal arguments against such propositions.

Thereafter, the Department appealed the trial court's order awarding attorney's fees and raised the issues in Points II.-IV for the very first time. The issue raised in Point V. was argued by the parties at the trial level but the Department did not appeal that issue to the 1st DCA. It was Petitioners who cross-appealed on that issue .

Since Petitioners had no warning that these issues were in contention until they were raised before the 1st DCA, they objected by filing a motion to strike (which was taken under advisement and made moot by the DCA's eventual decision) and

by again objecting in their answer brief before the 1st DCA. The DCA exercised judicial restraint and decided the case on other grounds.

Now, the Department resuscitates its non-preserved issues before this court. Petitioners object to the Department's attempt to go beyond the question certified by the DCA and to inject new issues into this appeal. It is wholly unfair to expect Petitioners' attorney to defend herself when she has had no opportunity to place the necessary evidence before the trial judge and to argue the points below. It is equally unfair to the trial judge to face reversal on issues that he never had the chance to rule on. The absence of a record below has emboldened the Department's attorney to speculate on many matters impermissibly without fear of contradiction by record evidence. Since the undersigned had no opportunity to create a record and cannot now go outside the record, this creates an inherent injustice.

Additionally, the Department should be barred from raising Points II. through V. because such issues could have been raised in the intermediate appeal, Schick III. (Department of Agriculture v Schick,553 So.2d 360(Fla. 1st DCA 1989)but it failed to do so. Where parties have the right to appeal an issue but do not do so, that point cannot be revisited on a subsequent appeal. Tillman v Smith,560 So. 2d 344(Fla 5th DCA 1990); Marine Midland Bank Central v Cote, 384 So.2d 658 (Fla. 5th DCA 1980).

III. ROWE DOES NOT REQUIRE THAT RISK MULTIPLIERS BE A LURE OR INCENTIVE IN ORDER FOR THEM TO APPLY AND, EVEN IF ROWE DID HAVE SUCH A REQUIREMENT, THERE WAS COMPETENT AND UNCONTRADICTED EVIDENCE THAT RISK MULTIPLIERS WERE AN INCENTIVE IN THIS CASE

The Department argues that Petitioners' attorney should not be entitled to a risk multiplier because Rowe was not a "lure" or incentive for her to take the case because Rowe had not been decided when Petitioners' attorney first met with the clients.

In addition to being legally irrelevant, the Department's thesis has the additional stigma of being factually wrong. To begin with, Rowe does not require that risk multipliers be a "lure" or incentive. Nowhere in Rowe is this set up as a requirement. The court is Rowe held:

> Once the court arrives at the lodestar figure, it may add or substract from the fee based upon a "contingency risk" factor and the results obtained. Id. at 1151.

In other words, the risk factor is of primary importance and not whether the attorney was lured by visions of risk multipliers dancing in his head. The Rowe court opined that if the attorney is willing to work for years and possibly gain nothing by his labors, then remuneration in the form of fee enhancers are appropriate. The attorney's motivation is never mentioned as a factor in determining fees.

The Rowe decision concludes:

> In summary, in computing an attorney fee, the trial judge should(1) determine the number of hours reasonably expended on the litigation; (2) determine the reasonable hourly rate for this type of litigation; (3) multiply the result of (1) and (2); and when appropriate (4) adjust the fee on the basis of the contingency nature of the litigation or the failure to prevail on a claim or claims. Id. at 1151-1152. (emphasis supplied).

In any event, Rowe was in effect at the time the inverse condemnation case was filed. The Department now proffers the outre proposition that when Rowe talks of multipliers attaching "at the outset", it means the date the attorney first made the acquaintance of the clients instead of the date the lawsuit was filed. This is a substantial departure from Rowe which equates "at the outset" with "the time the case was initiated."(Id. at 1151). In Lane v Head,566 So.2d 508 (Fla.1990),the court held:

> Rowe recognized that attorneys taking contingency fee cases are entitled to a higher than usual reimbursement in successful contingency fee cases, which would offset their other losses. One result was the endorsement of the use of a multiplier of no less than one and a half and no more than three, depending on the likelihood of success at the outset of the suit.Lane at 510.

Lane specifically states that the multiplier attaches at the" outset of the suit" not at the outset of the first client meeting. One wonders how a trial judge would assess the likelihood of success of a contingency lawsuit without the benefit of a filed complaint to evaluate? As a practical matter, when an attorney first meets a client, he does not know what suits he may eventually file. In fact, he does not even know whether he will file a lawsuit. Afterall, most cases are settled out-of-court. Typically, the attorney researches the law and investigates the facts. At some later date, a decision is made whether to file a lawsuit and under what theories to file.Often, as in this case, the decision to file a lawsuit is made a considerable time after the initial meeting with the clients. There could even be changed circumstances occurring after the first meeting that could alter the decision on whether to

actually file a lawsuit such as; favorable new case law, a change in a statute or procedural rule , newly discovered evidence, etc. The judge, who must set the multiplier, cannot be asked to look back in time before the matter even came before his court.

Finally, the Department's fatal flaw in its argument, is the fact that there was competent, substantial and uncontradicted evidence in the record and in the trial judge's specific findings that Rowe multipliers were an incentive for the attorney in taking the case. Even though such evidence was unnecessary under Rowe, the undersigned did testify under oath at T.15:

> ... without a substantial risk multiplier as an incentive it is pretty doubtful that they [the clients] would have been able to attract an attorney, particularly one with a high level of specialization in this type of law.

The trial court made specific findings on this very point (see p.6 of attached order):

> Without a substantial risk multiplier as an incentive it is doubtful that these landowners could have attracted an attorney, particularly one with a high level of specialization in environmental law, to represent them on this matter. In fact, the evidence shows that (even with the statutory guarantee of attorney's fees under Chapter 73, Florida Statutes), these same landowners spent a great deal of time trying to find a knowledgeable attorney who was willing to help them. It is known that at least two attorneys passed over the case prior to their obtaining the services of their current attorney.

Rowe was in existence at the time the lawsuit was filed and the attorney stated under oath that it was an incentive. Like every trial lawyer in Florida, the undersigned was aware of Rowe and it was a powerful incentive. The Depart-

ment has taken a quotation from the undersigned's fee testimony and doctored it up by use ofa misleading insertion of words in brackets that were never spoken by her. Having accomplished the sleight-of-hand of placing words into the quotation that were never spoken, the Department then goes on to offensively insinuate that perjured testimony was given. This unsavory creation of evidence to impugn the integrity of a fellow attorney is inexcusable.

IV. DECISION BY PETITIONERS' ATTORNEY NOT TO ARGUE ROWE ENHANCERS UNTIL ATTORNEY'S FEE MOTION WAS FILED WAS PROPER

The Department argues that Petitioners' decision not to mention the magic word "Rowe" until the memoranda and argumentation phase of the suit somehow acted as a waiver of the attorney's right to do so. This is essentially a laches argument. Again, it must be stressed that the Department never objected to this perceived "problem" at the fee hearing, thus depriving the trial judge of an opportunity to dispose of the issue. Appellants' failure to object must be deemed acquiescence.

If the Department had objected, no doubt the trial court would have allowed the landowners' attorney the privilege of amending her pleadings,if such was deemed necessary. Courts have liberal rules on amendment. The Department cites no cases that would bolster its laches argument. The Department fails to explain how it was prejudiced since the Department knew about the request for multipliers at the hearing and argued against them. There was no prejudice because the Department was not arguing about fees until the fee hearing.

The Petitioners' attorney was under no legal obligation to provide a detailed description of the underlying case law entitling her to attorney's fees. The Petitioners' attorney made a request for attorney's fees in her very first pleading and the Department was on notice that fees would be requested under §73.092,F.S. Even without Rowe, the Petitioners' attorney would have been seeking enhancement under the statutory factors which very likely would have resulted in the identical or a greater fee. The "bare bones"request for attorney's fees citing to an appropriate statute was all that was legally required and Petitioners complied with that requirement. Petitioners' attorney was not required to give away her case strategy in the early stages of the game.

V. RISK MULTIPLIERS ATTACH AT THE BEGINNING OF THE CASE AND THEY ADHERE UNTIL THE CASE IS CONCLUDED

The Department argues that even if the risk multipliers do apply, they should not apply to the whole case but only to bits and pieces of it. This argument ignores the language in Rowe and Lane, supra, that states that the fee attaches "at the outset of the suit". In the absence of any contrary case law, it is reasonable to assume that Rowe did not contemplate lowering or eliminating the multiplier at some future point in the litigation.

This opinion was likewise shared by Charles Stratton, recognized by the trial court as an expert in condemnation and fees in condemnation cases. Mr. Stratton testified on this exact matter:

My feeling is in an inverse condemnation case the risk-multiplier would apply to the entire case even if the condemning authority agreed after the suit has been filed that, yes, there was a condemnation because at the outset of the case the risk is there.(emphasis added)

Q:[by Department attorney] And it never changes?

A:And I don't think it changes.(T.41).

Petitioners' interpretation is sensible because:

1) It confers a social benefit by acting as an incentive to attract competent lawyers to take risky and difficult cases for clients without the means to pay;

2) If the court is allowed to lower or eliminate a risk-multiplier at a later point in the litigation, it acts as a penalty for the lawyer who has worked hard to achieve a good result. Risky cases will be less attractive if lawyers know that the better they do for their clients, the lower their fees will be because they have shifted the risk. If the multipliers do not attach to pre-filing hours, then lawyers will rush into the courthouse before their cases are really ready. This is not good policy.

3)The court's job will be greatly complicated if the court must reassess the shifting of risk at each stage of the litigation.

4) Under the facts in this particular case, the risk has never shifted and the attorney's fees are still at risk because the Department has refused to pay any fees.(cf.T.41)

5) A risk-multiplier helps to equalize the monetary losses to the attorney for those years when there were no fees at all and no interest on those delayed fees.

Therefore, the risk multiplier should attach at the

beginning of a risky case and carry through the entire case until its ultimate conclusion.There have been over 1,000 cases decided under Rowe since its appearance in 1985. No case in Florida has ever given comfort to the Department's suggestion that the risk multiplier can be arbitrarily extinguished in mid-case.

Randall E. Denker
Lehrman and Denker
3425 Woodley Road
Tallahassee, Fl. 32312
(904) 893-6753

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief was hand-delivered to Clinton Coulter, Dept. of Agriculture, Mayo Building, Rm 513, Tallahassee, Fl. 32399-0800 on this 1ST day of July,1991.

Randall E. Denker