

087

IN THE SUPREME COURT OF FLORIDA

BOARD OF COUNTY COMMISSIONERS,  
PINELLAS COUNTY, FLORIDA,

Petitioner,

vs.

TOM F. SAWYER,

Respondent.

\_\_\_\_\_

Case No. 79,839

Second District Court of  
Appeal Case No. 91-1332

**FILED**

SID J. WHITE

DEC 1 1992

CLERK, SUPREME COURT.

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Chief Deputy Clerk

AMICUS CURIAE BRIEF  
BOARD OF COUNTY COMMISSIONERS  
HILLSBOROUGH COUNTY

Discretionary Review from the  
Second District Court of Appeals

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PRELIMINARY STATEMENT

In this Amicus Curiae Brief, Hillsborough County will be referred to as "Hillsborough County". The Respondent will be referred to as "the respondent". Florida State Attorney's will be referred to as "the State". References to the Respondent's brief will be indicated by "RB" and the appropriate page number.

STATEMENT OF THE CASE AND FACTS

This is an appeal from an Order of the Second District Court of Appeal holding that investigative costs are recoverable against Florida counties under Section 939.06, Florida Statutes (1989).

The Second District reversed the trial court ruling which denied Mr. Sawyer, who is a solvent acquitted criminal defendant, the right of reimbursement of approximately \$9,000 from Pinellas County for the investigative costs he incurred in his defense. (R.29) The Second District resolved the case under statutory interpretation and certified that its holding was in conflict with decisions of the Third and Fifth District Courts of Appeal. Pinellas County invoked the discretionary jurisdiction of this court and this court accepted jurisdiction on September 23, 1992. On November 16, 1992, this court granted Board of County Commissioners of Hillsborough County leave to file this Amicus Curiae Brief.

### SUMMARY OF ARGUMENT

The civil "mutuality concept" which the Second District grounded its decision in Sawyer v. Board of County Commissioners of Pinellas County, Florida, 596 So.2d 475 (Fla. 2d DCA 1992), does not favor absolute recovery of attorney's fees or costs in favor of the prevailing party. The civil mutuality concept is not even appropriate in criminal prosecutions and the recovery of costs to solvent acquitted or discharged criminal defendants.

Furthermore, unlike other costs incurred in a criminal defense, investigative costs are generally not verifiable as having served a useful purpose and are subject to the discretion of the defense counsel. In fact, acquitted or discharged solvent criminal defendants are already entitled to the underlying costs incurred through private investigation efforts. Finally, investigative costs that are taxed against convicted criminal defendants are imposed by the appropriate investigative agency not Florida counties. Investigative costs are also not provided to the State by Florida counties but are awarded by the governor to the State as an "operational expense". Accordingly, it is not proper to allow acquitted or discharged solvent criminal defendants to recover investigative costs from Florida counties as "taxable costs". This court should reverse the Second District decision as unconstitutional judicial legislation.

## ARGUMENT

### I.

#### THE SECOND DISTRICT COURT OF APPEAL'S APPLICATION OF THE CIVIL CONCEPT OF MUTUALITY IS NOT APPROPRIATE IN THE CRIMINAL COST CONTEXT

The Second District relied upon the 1988 amendment of subsection (2) to Section 57.105, Florida Statutes (1991) to illustrate the legislature's "favor of mutuality". Sawyer v. Board of County Commissioners of Pinellas County, Florida, 596 So.2d 475, 476 (Fla. 2d DCA 1992). Section 57.105 reads:

(1) The court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party's attorney in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the complaint or defense of the losing party; provided, however, that the losing party's attorney is not personally responsible if he has acted in good faith, based on the representations of his client. If the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the defense, the court shall also award prejudgment interest.

(2) If a contract contains a provision allowing attorney's fees to a party when he is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract. This act shall take effect October 1, 1988, and shall apply to contracts entered into on said date or thereafter. [Emphasis added.]

Section 57.105 explicitly deals with the recovery of attorney's fees under contracts between private parties who have

mutually agreed to enter into a written agreement. Furthermore, the amendment of subsection (2) allows recovery to the plaintiff or defendant only if the contract contains a provision allowing attorney's fees to a party when he is required to take any action to enforce the contract.

In order to recover under section 57.105(1) the court must find that there was a complete absence of a justiciable issue of either law or fact raised by the complaint or defense of the losing party. For example, Florida courts do not assess attorney fees against unsuccessful plaintiffs if they engaged in a good faith, soundly based, and nonfrivolous claim. Muckerman v. Burris, 553 So.2d 1300, rev denied, 567 So.2d 435 (1989); Lambert v. Nelson, 573 So.2d 54 (Fla. 1st DCA 1990). In Disposall Inc. v. Wilson, 547 So.2d 1299 (1989), the court did not award attorney fees based on a technical error, such as an error in a party's name. Similarly, prevailing on motion for summary judgment does not mean an action was frivolous for purposes of award of attorney fees. Rojas v. Drake, 569 So.2d 859 (1990). Thus, successful civil defendants do not even recover attorney's fees unless they show that the action was totally without merit on the facts and law as to be completely frivolous. (RB 10)

In Florida thousands of criminal cases are filed daily where among other factors the outcome is dependent on law enforcement procedures, witness location, physical evidence, and sworn testimony. It is therefore, impossible for the State to obtain a 100 percent conviction rate since absolute verification of the

above factors is not possible. See In Interest of A.C., 580 So.2d 884 (Fla. 1st DCA 1991).

Because there is no contract dispute between the State and a criminal defendant Hillsborough County rejects the respondent's assertion that the Legislative intent is or should be to penalize the State for bringing criminal defendants to trial by imposing liability on Florida counties for all expenses reasonably incurred by an acquitted or discharged criminal defendant. (RB 9) Recognizing the ultimate fiscal burden on the public treasury that could result from adopting the civil mutuality concept, the Third District stated, "We are impelled to note that appellant's reasoning would place an incalculable burden upon the State in the prosecution of criminal offenses . . . Such costs may well include attorney's fees, loss of time and remuneration for the strain of a criminal trial". Benitez 350 So.2d at 1100, note 3.

Hillsborough County rejects the respondent's assertion that acquitted or discharged criminal defendants (successful defendants) are by definition "weak" or are "victimized by the prosecution". (RB 9) In reality, criminal defendants are brought to trial because the State believes that the defendant is guilty of violating a criminal statute. Accordingly, the prosecution (successful or unsuccessful) of criminal defendants is a legitimate exercise of the State's interest in protecting the citizens of this state and its duty to enforce the laws of this state.

The respondent further suggests that if investigative costs are imposed against Florida counties, the State would screen cases

and select criminal defendants who can not pour exorbitant funds towards their defense. Deterrence of unfounded prosecutions should always be a public policy but, as a result of Sawyer v. Pinellas County, 596 So.2d 475, Florida counties not the State must reimburse investigative costs as "taxable costs". Yet, Florida counties are not even a party to criminal proceedings and certainly have no input at the inception of a criminal case. Thus, as a practical matter, Sawyer will not deter meritless prosecutions. More importantly, it would be unfair and illogical to require Florida county treasuries reimburse acquitted or discharged criminal defendants virtually all reasonable expenses, including costs for private investigation services. Indeed, if not barred due to prosecutorial immunity, some acquitted or discharged criminal defendants may recover reasonable costs under a civil malicious prosecution action against the State or another party. See, Mueller v. The Florida Bar, 390 So. 2d 449 (Fla. 4th DCA 1980); Orr v. Belk Lindsey Stores, Inc., 462 So.2d 112 (Fla. 5th DCA 1985).

As noted in Benitez, 350 So.2d at 1102, another logical extension of the "mutuality concept" adopted by the Second District would be that acquitted or discharged criminal defendants are entitled to recover attorney's fees as taxable costs. When presented the issue Florida courts have consistently followed the statute and prior decisions and disallowed attorney's fees. See, Short v. State, 579 So.2d 163 (Fla. 2d DCA 1991); Hillsborough County v. Martinez, 483 So. 2d 540 (2d DCA 1986); Goldberg v.

County of Dade, 378 So.2d 1242 (Fla. 3rd DCA 1979), appeal dismissed, 389 So.2d 1110 (Fla. 1980).

The Second District also relied on White v. Board of County Commissioners of Pinellas County, 537 So.2d 1376 (Fla. 1989) to illustrate the mutuality concept relative to an effective defense in criminal litigation. Sawyer, 596 So.2d at . In White an expert witness testified that an appropriate fee would be \$12,135 and White requested \$6,700. Hillsborough County asserts that White's sole concern was whether all indigent capital murder cases are extraordinary and complex as a matter of law. This court expressly addressed fair compensation for court-appointed counsel in extraordinary and unusual prosecutions, as not to deprive an indigent capital defendant of effective assistance of counsel by limiting counsel to the statutory maximum (\$3,500). Id at 1379-1380; § 925.036(1), Florida Statutes (1989). Because of limited resources, this court also held that appointed-counsel are only entitled to reasonable compensation for their services. See, Hillsborough County v. Marchese, 519 So.2d 728 (Fla. 2d DCA 1988) Despite the compelling facts and this court's rationale in White, the statutory maximum compensation for indigent capital murder cases remains at \$3,500. § 923.036(1), Florida Statutes (1991).

## II.

### INVESTIGATIVE COSTS SHOULD NOT BE TAXED AGAINST FLORIDA COUNTIES

Florida courts have consistently disallowed recovery of costs for investigative services to acquitted or discharged criminal defendants. Benitez v. State, 350 So.2d 1100 (Fla. 3d DCA 1977), cert denied, 359 So.2d 1211 (Fla. 1978); Osceola County v. Otte, 530 So.2d 478 (Fla. 5th DCA 1988).

Unlike expert witnesses who are retained to evaluate the defendant, evaluate evidence, or testify at trial on evidentiary issues, private investigative services are generally discretionary and confidential and are therefore not easily verifiable as having served a useful purpose to the defense. But see, Goldberg v. County of Dade, 378 So.2d 1242 (The court did not award costs for a forensic expert who assisted with jury selection). Private investigators frequently follow leads on issues that are not in dispute or simply gather information and records relative to the defendant, witnesses, or the victim. In fact, at the inception of the case many investigators go on fishing expeditions that require numerous consultations and updates with defense counsel. It is also not uncommon for investigators to be on "stand by" during the trial or transport witnesses to trial. Finally, regardless of what the private investigator discovered, the defendant may be found guilty or innocent.

Although the facts in Benitez supported the necessity of an independent investigator, the court held that, as a matter of law, investigative costs are not recoverable as taxable costs. 350

So.2d at 1101. Benitez was indicted for first degree murder for causing the death of Mario Pineiro by shooting him with a pistol. The charge carried a maximum sentence of life imprisonment and Benitez was acquitted on a defense of self-defense. The investigative reports were used extensively in defense counsel's cross-examination of the State's witnesses and the witnesses produced were instrumental in the ultimate verdict of not guilty. Benitez admitted that there was no specific statutory authority, case law, or authority from any jurisdiction holding that investigative costs are taxable costs. Id.

The court noted that Benitez was solvent and despite the beneficial investigative services was reluctant to read into the law the recovery of investigative costs as "taxable costs". The court stated:

The enforcement of criminal laws is for the benefit of all and the fact that some citizens are financially burdened by this enforcement is not a sufficient reason to further handicap the processes of criminal law enforcement at this critical time in the struggle of the State to control the criminal element in society.

Id. at 1102.

Again, despite the favorable facts of Benitez, the Legislature has not amended Section 939.06, Florida Statutes (1991) in the fourteen (14) years that followed to allow recovery of costs for private investigative services. Apparently the Legislature agreed with the rationale of Benitez and Osceola and the myriad of cases that followed these opinions. It can be further argued that because of limited public funds solvent acquitted or discharged

criminal defendants should bear some portion of the costs incurred in a criminal prosecution as a deterrence for engaging in activity that is subject to prosecution. In fact, as a matter of law, Benitez was entitled to recover practically all of the costs related to the services performed by the private investigator. See, Dinaur v. State, 317 So.2d 792 (Fla. 1st DCA 1975); Powell v. State, 314 So.2d 788 (Fla. 2d DCA 1975); Hayes v. State, 387 So.2d 539 (Fla. 5th DCA 1980) (Solvent acquitted or discharged criminal defendants are entitled to subpoena fee, witness fee, mileage costs, court reporter and deposition costs as "taxable costs").

Sawyer, 596 So.2d at 476, relies on Powell to support Florida counties liability for costs for private investigative services. In Powell, 314 So.2d at 789, the Second District had the benefit of explicit statutory authority for Florida counties to impose expert costs on convicted criminal defendants. § 914.06, Florida Statutes (1991). (RB 11) However, Section 939.01(9), Florida Statutes (1991), is equally explicit in stating that convicted criminal defendants are taxed investigative costs by the appropriate investigative agency which incurred the expense and not by Florida counties. Moreover, pursuant to Section 27.33(1)(d), Florida Statutes (1991) the imposition on Florida counties of costs for investigative services would be inconsistent with the budgetary provisions for State attorneys since salaries and travel for investigators are included in the State attorney's annual budget as an operational expense. See, Attorney General Opinion 84-95, p. 250.

CONCLUSION

For the above stated reasons, HILLSBOROUGH COUNTY respectfully requests this court reverse the decision of the Second District Court of Appeal as unconstitutional judicial legislation.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to James T. Miller, Esquire, 407 Duval County Courthouse, Jacksonville, Florida 32202; Sondra Goldenfarb, Esquire, 2454 McMullen Booth Road, Suite 501-A, Clearwater, Florida 34619; Susan Daly, Esquire, 315 Court Street, Clearwater, Florida 34616; and Augusto E. Maxwell, Esquire, Jackson Memorial Hospital, 1611 N.W. 12th Avenue, West Wing 109, Miami, Florida 33136; Julie Lovelace, Esquire, 301 South Monroe Street, 5th Floor, Leon County

Courthouse, Tallahassee, Florida, 32301; John J. Copelan, Jr., Esquire, Governmental Center, Suite 423, 115 South Andrews Avenue, Fort Lauderdale, Florida, 33301; Cory J. Ciklin, Esquire, P. O. Box 1989, West Palm Beach, Florida 33402, this 30th day of November, 1992.

  
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