ORIGINAL

SUPREME COURT OF FLORIDA

CASE NO. 83,383
DISTRICT COURT OF APPEAL,
4TH DISTRICT NO. 93-0303

MARY BARNER, as guardian and natural parent of JOSEPH BURKES, a minor, and MARY BARNER, individually,

Petitioner,

v.

SEARCY, DENNEY, SCAROLA, BARNHART & SHIPLEY, P.A.,
Respondents.

FILED
SID J. WHITE
SEP 12 1994
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

PETITIONERS REPLY BRIEF ON MERITS

On Notice to Invoke Discretionary (Conflict) Jurisdiction to Review Decision of Florida District Court Of Appeal, Fourth District

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PRELIMINARY STATEMENT

Reference is to be made as is was in the Main Brief. Additional reference is made to the Brief of Respondent (R).

STATEMENT OF THE CASE AND FACTS

The Petitioner re-adopts and incorporates statements made of case and facts in Petitioner's Main Brief on the Merits

SUMMARY OF THE ARGUMENT

Where there is no substantial performance by Respondent, the measure of it's entitlement to a fair award of fees is set forth in §52(2) of the *Restatement of the Law Governing Lawyers* (tentative draft No. 4, April 10, 1991). Such *Restatement* provides for payment of "the fair value of the lawyer's services". A substantial body of case law applies such standard based upon an hourly fee approach. This approach is consistent with the measure of recovery provided for in ***Boyette v. Martha White Foods, Inc.***, 528 So.2d 539 (Fla. 1st DCA 1988) and it's adoption is urged here. The "market price" standard of valuation advocated by Respondent has not been endorsed by this Court, which has declined to do so despite opportunity presented in ***Standard Guaranty Ins. Co. v. Quanstrom***, 555 So.2d 828 (Fla. 1990). The "market price" is not an acceptable alternative to basic lodestar valuation based on hours where the market price standard is calculated to involve extensive litigation of uncertain outcome, where many contingency fee cases are not amenable to "market treatment", where such approach is incapable of achieving the supposed goal of mirroring market incentives, where it is not otherwise applicable in this cause given the absence of substantial performance by Respondent, and where services rendered by the predecessor and successor counsel are not severable. In addressing Respondent's understandable interest in receiving fair compensation the court is to additionally bear in mind it's role as the minor child's protector.

POINTS ON APPEAL

POINT I

WHETHER THE FOURTH DISTRICT ERRED IN AFFIRMING APPLICATION OF ROSENBURG IN VALUATION OF RESPONDENT'S CLAIM FOR FEES, WHERE IT FAILED TO FOLLOW BOYETTE AND ADDITIONALLY FAILED TO GIVE EFFECT TO ROWE AND STANDARD GUARANTEE

ARGUMENT

Respectfully, there is inability to accept Respondents' attempt to re-state the essential issue in this cause, which Respondent characterizes as involving a predecessor firm which, ". . . has been discharged without cause after ***substantially performing***, but before fully completing, it's contingent fee contract." (R-1) (e.s.). What is not open to fair question here is the lack of "substantial performance" by Respondent "Searcy", at least as this term is defined and used in the *Restatement of the Law governing Lawyers* (tentative draft No. 4, April 10, 1991). Services are to be found substantially complete only when the client has no significant reason for discharging the lawyer other than avoidance of the contractual fee. Comment, §52, *Restatement of the Law Governing Lawyers* (tentative draft No. 4, April 10, 1991, pg. 264, citing *Restatement, Second Agency* §§445 & 454 (recovery of contractual compensation by agent when compensation depends on specified result and principal discharges agent in bad faith). Nothing in the Record at hand suggests that avoidance of fee obligation was the motivating force behind Mary Barner's decision to switch counsel: she promptly obligated herself to successor counsel (T-308, 414, 464) and there was

significant cause for dissatisfaction with how her case was progressing under "Searcy's" handling (See ex. T-285, 229, 420, 437-8, 448-9). Only after Mr. Montgomery became involved did the case finally settle, for a figure greatly in excess of anything offered while "Searcy" was counsel.

This is significant for the drafters of the *Restatement* make a distinction between those instances where there is "substantial performance" and those where there is not. Section 52(1) is seen to apply to the former whereas §52(2) governs the latter. Absent such performance, the tentative *Restatement* provides the following as the controlling measure of recovery, supra at §52(2):

> (2) When a lawyer's compensation is not forfeited under §49 and the lawyer is not entitled to recover under subsection (1), the lawyer may recover the **lesser of the fair value of the lawyer's services as determined under §51 and the compensation provided by any otherwise enforceable agreement between lawyer and client for the services performed. (e.s.)**

The drafters note that this "fair-value standard" is measured through an hourly fee approach by a large body of cases, citing e.g. ***Dean v. Holiday Inns Inc.***, 860 F2d 670 (6th Cir 1988); ***IN RE: Estate of Marks***, 74 Ill. App. 3rd 599, 393 NE2d 538 (Ill App. Ct. 1979); ***Heniger & Heniger P.C. v. Davenport Bank & Trust Co.***, 341 NW2d 43 (Iowa 1983); ***IN RE: Estate of Larson***, 694 P2d 1051 (Wash 1985); ***c.f. Hensley v. Eckerhart***, 461 US 424, 103 SCT 1933, 76 Led2d 40 (1983) (hourly fee approached for statutory attorney fee paid by loosing party to prevailing one). Reporters note to comment C, §51 of the *Restatement of the Law governing Lawyers*, tentative draft No. 4 (April 10, 1991). See also ex. ***Ecclestone, Moffett & Humpfry, P.C. v. Ogne, Jinks, Alberts & Stuart, P.C.***, 441 NW2d 7 (Mich app 1989).

That is, of course, the position at hand of Mary Barner and such approach is

fully consistent with the First District's holding in ***Boyette v. Martha White Foods, Inc.***, 528 So.2d 539 (Fla. 1st DCA 1988).

Respondent argues, however, that this Court intended instead to adopt through ***Rosenburg v. Levin***, 409 So.2d 1016 (Fla. 1982) a "market price" standard of valuation (R-18). In so doing, Respondent imbues the Court with a most remarkable degree of prescience for the authorities ***Rosenburg*** is said to have followed in this respect are all seen to postdate the decision by a period of years (see R-21). It cannot with any measure of credibility be suggested that ***Rosenburg*** ever intended to endorse such an approach, which presents at least five fundamental difficulties here: first, it requires abandonment of the objectivity which this court finds to be the advantage of using Lodestar methodology. See ***Florida Patient's Compensation Fund v. Rowe***, 472 So.2d 1145, 1150 (Fla. 1993) It's invocation requires treatment of two distinct, highly subjective issues, overall "market price" of the attorney's fee and how that is then to be divided between the discharged firm and successor counsel; resolution of these issues may guarantee to generate a second, major litigation between the competing law firms in a proceeding of uncertain outcome -- this is an ill deplored by the United States' Supreme Court in ***City of Burlington v. Dague***, 505 US _____, 120 Led2d 449, 459, 112 SCT 2638 (1992), and feared by this Court. cf. ***Rosenburg v. Levin***, supra at 1021. Second, for a very large proportion of contingency - fee cases -- those seeking not monetary damages but injunctive or other equitable relief -- there is no "market treatment". ***City of Burlington v. Dague***, 112 SCT 2638, 2642. Third, any such approach that applies uniform treatment to the entire class of contingent-fee cases, or to any conceivable subject-matter-based subclass cannot possibly achieve the supposed goal of mirroring market incentives.

City of Burlington v. Dague, id. Fourth, the supporting rational for such approach presupposes "substantial performance" by the predecessor firm, an assumption having no application here; that is, it is designed to respond to situations covered by §52(1) of the *Restatement* where there is "substantial performance" by the initial firm in those instances when:

> . . . there is no need to protect the clients right to change lawyers during the case, because the case is in substance finished and a new lawyer is either unnecessary or could be hired for a small fee.

Comment to §52. As noted heretofore, that is not the situation at bar when the case certainly was not concluded and where Mary Barner's decision to switch had nothing to do with her obligation to pay a reasonable fee to "Searcy" so that this cause is better described by §52(2) of the *Restatement*, rather than §52(1). Fifth, services rendered by the two firms in questions are not severable in any event: Montgomery had to start "from scratch" (T-450); "Searcy" did not allow use of it's file until after settlement had been effected (T-430), denied request for information (T: 418-419), and attempted to prevent access to it's experts (T-431); Montgomery did not use Searcy's work product (T-430) and hiring of Mr. Taylor by Montgomery's firm did not have anything to do with either the settlement or how Montgomery conducted the case (See T: 435-437). In short, Montgomery received no cooperation whatsoever from "Searcy" (T-487), Hence, for any one or all of these five reasons, Mary Barner respectfully argues that the "market price" is not an acceptable alternative to the basic Lodestar method of computing fair compensation for predecessor counsel.

In further support of it's "market price" argument Respondent cites a Louisiana case, ***Saucier v. Hayes Dairy Products, Inc.***, 373 So.2d 102 (LA 1979) (R-30, 31) but that is seen to be premised upon a holding that, "the amount prescribed in the contingency fee contract, not quantum merit, is the proper frame of reference . . .", supra at 118. Such approach is sufficiently at odds with the modified quantum meruit doctrine favored by this court as to completely distinguish it and identify it as alien to this proceeding, though there is otherwise agreement with it's expression of the underlying problem, which echoes what Mary Barner finds to inhere in ***Rosenburg***, discussed at pg. 13 of the Main Brief:

> These considerations have given rise to the generally accepted rule that a client may discharge his attorney at any time with or without cause. In order for the right to discharge to be of any value the client must not be forced to risk paying the full contract price for services not rendered upon a determination by a court that the discharge was without legal cause. Otherwise, the client would frequently be forced to choose between continuing the employment of an attorney in whom he has lost faith, **or risking the payment of double contingent fees equal to the greater portion of any amount eventually recovered.** Op. cit. (e.s.)

See also, ***Milton Kelner, P.A. v. 610 Lincoln Rd., Inc.***, 328 So.2d 193 (Fla. 1976) (dictum); ***Sohn v. Brockington***, 371 So.2d 1089, 1093 (Fla. 1st DCA 1979).

Respondent denies applicability of ***Standard Guaranty Ins. Co. v. Quanstrom***, 555 So.2d 828 (Fla. 1990) upon assertion that, ". . . it's entire discussion is limited to statutorily-authorized prevailing-party attorney's fees" (R-35). Respectfully, this is a mis-reading of ***Standard Guaranty***, which is not so narrowly limited in it's scope. ***Standard Guaranty*** expressly identifies and discusses three major case categories, only the first group

of which involves fee-authorizing statutes in public policy enforcement cases of the kind which specifically gave rise to the development of the Lodestar approach. id. at 833. The remaining categories are comprehensive and go well beyond the Lodestar's original setting and by enumerating them thusly the court points out that such categories, ". . . are not intended to be all-inclusive." id. at 833. Significantly, ***Standard Guaranty*** does not respond to an invitation that it adopt "market price" valuation, which it recognizes as being the preferred approach of the dissenting justices in ***Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air***, 483 US 711, 107 Sct 3078, 97 Led.2d 585 (1987). ***Standard Guaranty***, supra at 831.

There cannot be ignored here Respondent's attempt to dismiss as irrelevant Mary Barner's reference to her child's medical problems where this is characterized as a mere attempt to "poison the well" (R-8). That must be of vital concern to the court, a point made forcefully in ***Dean v. Holiday Inns, Inc.***, supra at 673:

> The District court gave no apparent consideration to it's necessary role as arbiter to decide in the case of a minor's claim what is fair and reasonable and ***in the best interest of the minor.*** (court's emphasis)
>
> As stated in ***Centala v. Navrude***, 30 Mich. App. 30, 32-33, 186 NW2d 35, 36 (1971):
>
> > Fairness of the settlement must be determined by the trial court in every case . . . since they are unable to care for themselves, [minors] deserve the court's protection.
> >
> > Courts are charged with the protection of rights of infants and incompetents and should always give due regard to such rights 3 Callagan, ***Mich. Pleading and Practice***, §32.35, P. 97.

> The agreement to a contingent fee contract by a parent or next friend on behalf of a minor is not necessarily binding on the minor whose interests are subject to the court op.cit. These cases in the general rule hold that settlement of a minor's claim or agreements or waivers affecting a minor's rights or interests are always subject to approval or amendment by the court with jurisdiction to pass on such agreements or actions. 43 CJS ***Infants*** §§237, 238. Independent investigation by the court as to the fairness and reasonableness of a fee to be charged against a minor's estate or interest is required. See ***Dixon v. United States***, 197 F.sub. 798, 802 (W.D.S.C. 1961).
>
> > It is an ancient precept of Anglo-American Juris Prudence that infant and other incompetent parties are wards of any court called upon to measure and weigh their interest.
> >
> > While the infant sues or is defended by a Guardian Ad Litem or next friend, every step in the proceeding occurs under the aegis of the court.
>
> ***Decanay v. Mendosa***, 573 F.Sup. 1075, 1079 (9th Cir. 1978).
>
> The interest of an attorney seeking to be awarded a fee from the settlement proceedings effectuated for a minor must always, by the nature of the relationship in the dependency of the minor, be in tension. When a court is called upon to approve the settlement as is in the best interest of the minor, it must consider and then determine, what constitutes fair and reasonable compensation to the attorney regardless of any agreement specifying an amount, whether contingent or otherwise.

See also ex. ***Nixon v. Bryson***, 488 So.2d 607 (Fla. 3rd DCA 1986); ***Loper v. Apfelbeck***, 541 So.2d 1222 (Fla. 2nd DCA 1989).

Dean, as here, involved a claim for compensation by predecessor counsel who was discharged and the court determined that such discharged attorney was to be

compensated in quantum meruit based upon the number of hours worked times a reasonable hourly rate. Mary Barner thus offers no apology for referencing, indeed emphasizing, this aspect of the case. Inevitably, there must be tension between the competing goals of providing "Searcy" with fair compensation and protecting the best interest of a badly injured little boy. Respondent wishes to focus only on the first half of this equation. It can hardly be blamed for so doing. But Petitioner respectfully submits that five year old Joseph Burkes is a ward of the court and that such consideration is intertwined with anything else which may be said of this cause. She thus prays that this court address Respondents' entitlement in a manner which is consistent with that role.

In sum, where there is no substantial performance by Respondent, the measure of it's entitlement to a fair award of fees is set forth in §52(2) of the *Restatement of the Law Governing Lawyers* (tentative draft No. 4, April 10, 1991). Such *Restatement* provides for payment of "the fair value of the lawyer's services". A substantial body of case law applies such standard based upon an hourly fee approach. This approach is consistent with the measure of recovery provided for in ***Boyette v. Martha White Foods, Inc.***, 528 So.2d 539 (Fla. 1st DCA 1988) and their adoption is urged here. The "market price" standard of valuation advocated by Respondent has not been endorsed by this Court, which has declined to do so despite opportunity presented in ***Standard Guaranty Ins. Co. v. Quanstrom***, 555 So.2d 828 (Fla. 1990). The "market price" is not an acceptable alternative to basic lodestar valuation based on hours where the market price standard is calculated to involve extensive litigation of uncertain outcome, where many contingency fee cases are not amenable to "market treatment", where such approach is incapable of achieving the supposed goal of

mirroring market incentives, where it is not otherwise applicable in this cause given the absence of substantial performance by Respondent, and where services rendered by the predecessor and successor counsel are not severable. In addressing Respondent's understandable interest in receiving fair compensation the court is to additionally bear in mind it's role as a the minor child's protector.

CONCLUSION

For all of the reasons discussed heretofore, Petitioner herein, Mary Barner, respectfully prays that there be quashed the Fourth District's decision in ***Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Barner***, 632 So.2d 1071 (Fla. 4th DCA 1991) and that such Court be ordered to affirm judgement of the Trial Court, based upon adoption of ***Boyette v. Martha White Foods, Inc.***, 528 So.2d 539 (Fla. 1st DCA), rev. den., 538 So.2d 1255 (Fla. 1988).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing has been furnished by U.S. Mail on this 9th day of September, 1994, to Robert M. Montgomery, Jr., Esquire, Post Office Drawer 3086, West Palm Beach, Florida 33402, John W. Mauro, Esquire, 888 S.E. 3rd Ave., Suite 301, Ft. Lauderdale, Florida 33316, Joel D. Eaton, Esquire, 25 West Flagler Street, Suite 800, Miami, Florida 33130, SEARCY, DENNEY, SCAROLA, BARNHART & SHIPLEY, P.A., Post Office Box 3626, West Palm Beach, FL 33402.

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