FILED
SID J. WHITE
AUG 10 1995
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

SUPREME COURT OF FLORIDA

CASE NO. 85,618

FLORIDA DEPARTMENT OF REVENUE, et al.

Petitioners,

v.

DAVID KUHNLEIN, et al.,

Respondents.

AN APPEAL FROM THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA.

ANSWER BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF FLORIDA, INC.

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SUMMARY OF THE ARGUMENT

Florida courts have inherent equitable powers to award attorneys' fees to successful plaintiffs in litigation vindicating constitutional rights and civil liberties.

ARGUMENT

POINT I

FLORIDA COURTS HAVE THE POWER IN EQUITY TO AWARD FEES TO SUCCESSFUL PLAINTIFFS IN CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION.

The power of a court in equity to award fees "is part of the original authority of the chancellor to do equity in a particular situation." Sprague v. Ticonic National Bank, 307 U.S. 161, 166 (1939). Whether relying on the equitable maxim that "equity will not suffer a wrong without a remedy," or that the court in equity "will endeavor to do complete justice and never do anything by halves," or that "equality is equity," courts in equity have long shifted attorneys' fees when the "interests of justice" so require. State courts are viewed as having greater equitable powers than federal courts, the latter being courts of limited jurisdiction. Reynolds v. First Alabama Bank of Montgomery, 471 So.2d 1238, 1243 (Ala. 1985).

Cases awarding attorneys' fees on an equitable basis generally fall within several broad categories, as summarized in Miotke v. City of Spokane, 101 Wash.2d 307, 337-41, 678 P.2d 803 (1984). Two are particularly relevant here:

1. The "private attorney general" theory, typically requiring the successful litigant to show that because of governmental inaction to protect the rights in issue he incurred considerable expense to

bring litigation which vindicated important public policies and thereby benefited a large class of people. E.g., Miotke v. City of Spokane, supra, Serrano v. Priest, 20 Cal.3d 25, 141 Cal. Rptr. 315, 569 P.2d 1303 (1977); Hellar v. Cenarrusa, 106 Idaho 571, 577-78, 682 P.2d 524 (1984);[1] and,

2. The "substantial benefit" theory, typically requiring a successful litigant to show that the litigation conferred a substantial benefit, monetary or otherwise, on an ascertainable class. E.g. Silva v. Botsch, 121 N.H. 1041, 437 A.2d 313 (1981); Irwin Marine, Inc. v. Blizzard, Inc., 126 N.H. 271, 490 A.2d 786 (1985); Deras v. Myers, 272 Or. 47, 535 P.2d 541 (1975).

In this case, the trial court correctly employed the latter, but rejected the former, concluding:

> [T]his court has no authority to request the losing party, i.e., the State of Florida, to pay the winners, i.e. the Class Plaintiffs anything. [T]he Legislature has passed no law and no constitutional amendment has been successful to require the losing party to pay. This must be implemented by the Legislature or the people by a constitutional amendment. The only way this court can respond to these objections is to reduce the amount of the percentage and establish a refund plan that attempts to make the Class Plaintiffs whole.

Final Judgment on Class Plaintiffs' Petition for Fees and Expenses ("Final Judgment on Fees"), at p. 14. As will be demonstrated

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[1] Such decisions have found strong support in the scholarly commentary. See especially R. Falcon, Award of Attorneys' Fees in Civil Rights and Constitutional Litigation, 33 Md. L. Rev. 379 (1973) (attorneys' fees should be awarded as a matter of course in all civil rights and constitutional litigation as such litigation is one area where there is a close confluence of the private attorney general and the "benefit to the class" rationales for attorneys' fees awards); J. Friesen, Recovering Damages for State Bill of Rights Claims, 63 Tex.L.Rev. 1269, 1303-1306 (1985); Nussbaum, Attorney's Fees in Public Interest Litigation, 48 N.Y.U.L. Rev. 301 (1973); Comment, Court Awarded Attorney's Fees and Equal Access to the Courts, 122 U. Pa. L. Rev. 636 (1974); Note, Important Rights and the Private Attorney General Doctrine, 73 Cal. L. Rev. 1929 (1985); McDermott and Rothschild, Foreward: The Private Attorney General Rule and Public Interest Litigation in California, 66 Cal. L. Rev. 138 (1978); Note, Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest, 24 Hastings L.J. 733 (1973).

below, the trial court's rejection of the "private attorney general" doctrine was incorrect.

A. The Trial Court Properly Awarded Fees Under The Common Fund Doctrine.

In this case, the trial court properly found that plaintiffs' counsel generated a common fund for the benefit of the class, thereby entitling them to fees to be paid by class members. Final Judgment on Fees, p. 4.

Known as the "common fund" doctrine, this rule is an exception to the "American Rule" which requires parties of a lawsuit to bear their own expenses.

> A litigant or lawyer who recovers a common fund for the benefit of a person other than him or his client is entitled to a reasonable attorneys' fee from the fund as a whole.

Boeing Co. v. Van Gemmart, 444 U.S. 472, 478 (1980). The Eleventh Circuit, in its landmark opinion, Camden I Condominium Ass'n., Inc. v. Dunkle, 946 F.2d 768 (11th Cir. 1991) ("Camden I"), endorsed the doctrine that attorneys who create a common fund are entitled to be compensated for their efforts from a percentage of that fund. The state of Florida has similarly recognized this exception to the "American Rule" and has awarded recovery of attorney's fees from the common fund. See Tenney v. City of Miami Beach, 11 So.2d 188 (Fla. 1942); City of Miami Beach v. Jacobs, 341 So.2d 236 (Fla. 3d DCA 1976); City of Miami Beach v. Florida Retail Federation, Inc., 423 So.2d 991 (Fla. 3d DCA 1982). See also Ressler v. Jacobson, 149 F.R.D. 651, 652 (M.D. Fla. 1992).

Allowing recovery of attorneys' fees from common funds is an

important equitable power. The common fund doctrine allows individuals to bring suits who, for economic or other reasons, would not find it otherwise worthwhile to litigate. Deposit Guaranty Nat'l. Bank v. Roper, 445 U.S. 326, 338 (1980). As the Furman study[2] of The Florida Bar made clear, there is a large portion of the Florida citizenry that is not presently served by the Bar. Without a common fund doctrine or other means of generating attorneys' fees, many citizens would not have access to courts to litigate lengthy, expensive cases against most defendants, let alone a tenacious resource-laden adversary like the State. The common fund doctrine serves to assist those people whose claims would not otherwise be brought by making it economically viable for attorneys to undertake such cases. Through class action/common fund cases, the claims of thousands of persons may be asserted efficiently and expeditiously. Class actions provide a vehicle for the average citizen to have access to superior legal talent commensurate with that available to large institutional defendants without incurring any cost or risk in the event of non-recovery. The attorneys who bring such cases with their substantial attendant risks and who prevail should be rewarded.

The percentage approach can be a more accurate reflection of

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[2] See The Florida Bar, The Legal Needs of the Bar and Underrepresented Citizens of Florida, An Overview 1980, filed with the Court February 1, 1980. In The Florida Bar v. Furman, 376 So.2d 378, 382 (Fla. 1979) this court recognized its "responsibility to promote the full availability of legal services" and directed The Florida Bar "to begin immediately a study to determine better ways and means of providing legal services to the indigent."

the market rate in contingency cases like this one. For many individuals, contingency arrangements are the only key to the courthouse door. See Florida Bar Re Amendment to the Code of Professional Responsibility (Contingent Fees), 494 So.2d 960 (1986) ("The legal profession has generally viewed contingent fees as the 'poor man's keys to the courthouse'"). In the words of former Chief Justice Barkett, "[w]ithout the contingency fee system, the vast majority of our citizens would be unable even to enter the arena, much less to fight evenly against those who, knowing their advantage, would (by virtue of human nature alone, never mind malice or bad motives) not hesitate to press it." Id. at 969.

The trial court's fee award is within the range of common fund fee awards in Florida and other jurisdictions. In the Florida tax refund cases of Tenney, Jacobs, and Florida Retail Federation, for example, the courts awarded at least thirty percent of the common fund to attorneys for their successful efforts. The Camden I decision by the Eleventh Circuit similarly established twenty-five percent as an appropriate benchmark. Camden I, 946 F.2d at 774, and noted:

> The majority of common fund fee awards fall between 20% to 30% of the fund . . . [and] an upper limit of 50% of the fund may be stated as a general rule, although even larger awards have been awarded.

B. The Trial Court's Conclusion That It Had No Authority To Order The State Of Florida To Pay Fees Was Erroneous.

Although the so-called "American rule," the product of an

anomalous quirk of history[3], dictates that each party bear its own attorneys' fees in the absence of contrary statutory or contractual authorization, even the "American rule" has its exceptions.

In Serrano v. Priest, 20 Cal.3d 25, 141 Cal. Rptr. 315, 569 P.2d 1303 (1977), for example, the California Supreme Court created a nonstatutory exception to the "American rule" when it affirmed a trial court's award of fees to plaintiffs' counsel, who were public interest law firms. In Serrano, plaintiffs had challenged the California public school financing system as violative of state constitutional provisions guaranteeing equal protection of the law. The court held that the "private attorney general" theory was applicable to the prevailing plaintiffs because (1) plaintiffs' attorneys' efforts protected state constitutional rights; (2) citizens of the state would enjoy the benefits of the litigation; and (3) these rights could be protected only through private enforcement.

In so doing, the California Supreme Court discussed the holding in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), wherein the United States Supreme Court held that federal courts do not possess the equitable power to award attorneys' fees under a "private attorney general" theory. The Serrano court rejected the application of Alyeska to California courts, recognizing that "the fashioning of equitable exceptions to the statutory rule to be applied in

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[3] Comment, Court Awarded Attorney's Fees and Equal Access to the Court, 122 U.Pa. L. Rev. 636, 640-44 (1974) (tracing the origins of the "American rule" to an 1876 decision which admitted the possible unsoundness of its own position).

California is a matter within the sole competence of this court." Id. at 1313. Similarly, as this Court recognized earlier in this case, "[u]nlike the federal courts, Florida's courts are tribunals of plenary jurisdiction . . . They have authority over any matter not expressly denied them by the constitution or applicable statutes." Department of Revenue v. Kuhnlein, 646 So.2d 717, 720 (Fla. 1994).

The Furman study commissioned by this Court specifically relied on Serrano when it urged the Court to consider creating a nonstatutory exception to the general rule against awarding attorneys' fees to the winning party in public interest cases. R. Berg, Financing Public Interest Litigation in Florida's Courts: Proposals for Legislative and Judicial Action, 54 Fla. B.J. 287 (1980).

In Thomas v. Croft, 614 P.2d 795, 799 (Alaska 1980), the Alaska Supreme Court similarly affirmed an award of attorneys' fees to a successful defendant in an election contest brought by primary election losers. Notably, the award was to be paid not by the losing plaintiffs but by the state, a co-defendant and co-prevailing party. The court rested its decision on the "inherent equitable power of the court to award attorneys' fees when the interests of justice so require." 614 P.2d at 799. It reasoned that the state, being responsible for the irregularities in the conduct of the election that precipitated the challenge, must be held liable for the election winners' costs in defending against the challenge.

In Watkins v. Labor and Industry Review Commission, 117 Wis.2d 753, 764-65, 345 N.W.2d 482 (1984), the Wisconsin Supreme Court affirmed an award of counsel fees in a discrimination case brought under the Wisconsin Fair Employment Act, though the Act contained no express language authorizing attorneys' fees as part of the relief available. Central to the courts' reasoning in Watkins was the equitable rule that each right must have a remedy:

> Without the assistance of counsel, the ability to vindicate one's rights under the Act is so impaired that it renders the existence of those rights nearly meaningless.

345 N.W. 2d at 488.

In Deras v. Myers, 535 P.2d 541 (Or. 1975), the Oregon Supreme Court held:

> The "American rule" is modified by the inherent power of courts of equity to award attorney fees. This power, the Oregon court said, "frequently has been exercised in cases where the plaintiff brings suit in a representative capacity and succeeds in protecting the rights of others as much as his own." Deras was awarded fees because his victory benefitted "all members of the public" by enforcing "the interest of a public in preservation of the *individual liberties* guaranteed against governmental infringement of the constitution."

Id. at 550 (emphasis added.) See also Public Utility Dist. 1 v. Kottsick, 545 P.2d 1 (Wash. 1976); Miotke v. Spokane, 678 P.2d 803 (Wash. 1984) (adopting private attorney general rule in action by waterfront property owners to restrain defendant's illegal discharge of sewage).

In Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), the court recognized that it

> had refused to accept the "English Rule" that attorney fees are part of the cost to be charged by a taxing master, adopting instead the "American Rule" that attorney fees may be awarded by a court only when authorized by statute or by agreement of the parties.

Id. at 1148. However, Rowe was an action at law, not in equity, and its limitation on fee shifting to statutes or agreements should not apply to constitutional rights or civil liberties cases.

Subsequent to Rowe, this court recognized, albeit in a different context, that there are circumstances meriting equitable entitlement to attorneys' fees at public expense "independent of statute, ordinance or charter." Thorben v. City of Ft. Walton Beach, 568 So.2d 914, 916, 917 (Fla. 1990) (recognizing common law entitlement of public officials to attorneys' fees at public expense when litigation arises (1) in connection with performance of official duties and (2) serves public purpose.) The circumstances warranting equitable entitlement to attorneys' fees, under the Court's inherent authority, are equally compelling when private attorneys general, acting in the public interest, (1) successfully challenge state action that is unconstitutional and (2) advance an important and substantial public purpose.

CONCLUSION

For centuries, the equitable powers of a court have been viewed as expansive, flexible, adaptable, and not dependent on express statutory authority.[4] Absent a 42 U.S.C. §1988 state counterpart, this Court should recognize the power of Florida

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[4] See generally Pomeroy, 1 Equity Jurisprudence, §§ 60, 109 (5th ed. 1941).

courts to award fees in public interest cases, thereby assuring that all persons, regardless of individual economic means or stake in the controversy, have access to state courts to right state constitutional wrongs. Satz v. Perlmutter, 379 So.2d 359, 360 (Fla. 1980) ("Legislative inaction cannot serve to close the doors of the courtrooms of this state to its citizens who assert cognizable constitutional rights.")

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by U.S. Mail, this 9th day of August, 1995, to the following counsel of record:

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