OA 8-24-95

SUPREME COURT OF FLORIDA

DEPARTMENT OF REVENUE,
STATE OF FLORIDA, et al.,

Appellants/Defendants, CASE NO. 85,618

vs.

DAVID KUNHLEIN, et al.,

Appellees/Plaintiffs.
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APPELLANTS' REPLY BRIEF ON THE MERITS

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I.

THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING ATTORNEYS' FEES FAR OUT OF PROPORTION TO THE AMOUNT OF WORK DONE IN THE CASE AND THE COMPLEXITY OF THE ISSUES. ACCORDINGLY, THE AWARD IS AGAINST THE MANIFEST WEIGHT OF THE LAW.

After hundreds of pages of legal argument, class counsels' plea for an $18 million award of attorneys' fees remains fatally flawed for two compelling reasons. First, their effort to be compensated on the basis of 10 percent of the $188 million common fund is premised on the legally impermissible severing of the most fundamental of lodestar considerations, an attorney's time and labor. Indeed, after justifying their claim for entitlement to a percentage of the common fund based on the doctrines of quantum meruit and unjust enrichment (page 22 of Answer Brief), class counsel promptly proceed to disassociate themselves from these time-honored doctrines by declaring the number of hours reasonably expended is of no force and effect in determining the correctness or proprietary of the fee award here.

Second, class counsel continue to impermissibly equate this straightforward statutory challenge with fact-intensive, multi-issue complex cases in support of their fee demand. Their own representations, and those of their own witnesses, however, belie their claim of case complexity. Thus, their apples-and-oranges comparison is of no import here.

In support of their claim that the award of attorneys' fees from a common fund is to be based on the size of the fund alone, class counsel rely on Camden I Condominium Associates, Inc. v. Dunkle, 946 F.2d 768 (11th Cir. 1991). But Camden I contains no such language supportive of class counsels' plea that the award must be based ultimately and solely on the size of the fund created. Rather, Camden I endorses the "percentage of the fund" approach in awarding fees premised on an explanation of how lodestar-type factors support or justify the ultimate percentage determined and amount awarded. As the Eleventh Circuit Court Appeals specifically said in Camden I:

> We agree with the Tenth Circuit that the Johnson factors continue to be appropriately used in evaluating, setting, and reviewing percentage fee awards in common fund cases.

946 F.2d at 775. Class counsel simply cannot deny Camden I's instruction.

The first and most fundamental factor in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-719 (5th Cir. 1974), is the time and labor required, which inquiry is necessary to see if the time spent is appropriate; to distinguish between the types of work done (i.e., research, trial time, investigation, etc.); and to see what is required by a lawyer as opposed to a non-lawyer so that a court, in reviewing an application for attorneys' fees, can exercise its judgment as to the proprietary of the award based in substantial part on hours reasonably expended in the furtherance of the prosecution of a cause. See Norman v. Housing Authority of City of Montgomery, 836 F.2d 1292, 1303 (11th Cir. 1988).

Yet, class counsel would have this Court excise from common fund attorneys' fees jurisprudence the salient and supreme importance of hours reasonably expended, which crucial factor is considered and weighed in the more than 30 cases cited in Appellants' Initial Brief and Defendants' Response in Opposition to Award of Attorneys' Fees In The Requested Amount (Tab 2 of Appellants' Appendix).

In each of those cases where the court discussed the lodestar factors, specifically and particularly the number of hours reasonably expended, the highest ratio between the lodestar and amount awarded from the common fund was less than a factor of 5. (As against the overwhelming weight of precedent, class counsel here seek an award 14 times greater than their self-professed lodestar!)

Nevertheless, in avoidance of this singular fact as to ratio, and in an effort to camouflage their claim for an award of fees detached from lodestar factors, class counsel cite to carefully selected portions of the Southern Bell litigation which appear as Tab 2 of Appendix to their Answer Brief. It is unnecessary to address their bare representations devoid of analysis, or compare this complex five-year antitrust case with the statutory challenge here, because the court awarded a total of $11 million in attorneys' fees, costs and expenses. See Tab J to Appendix to this Brief. After deducting $3.8 million in costs and expenses, plaintiffs' share of the fee, and approximately $448,000 to the Thomson law firm, the State's share is approximately $1.4 million to be deposited to the benefit of the

State, rather than counsels' pockets. Class counsel, in their glee, fail to apprise this Court of the following facts pertaining to this antitrust litigation. First, benefits to the class are estimated at $262.9 million (Tab 2, page 24, Appellees' Appendix); second, the lodestar totalled $13.3 million (Tab 2, page 29, Appellees' Appendix); third, counsel do not discuss the specific statutory authority vested in the Attorney General under § 16.53, Fla. Stat., regarding recovery of attorneys' fees in antitrust actions (Tab 2, page 7, Appellees' Appendix); and fourth, that fees, costs and expenses are to be paid by Southern Bell, not the consumers. It is also noted that plaintiffs' claim for fees is based on "84,981.57 hours of work by plaintiffs' counsel and paralegals" . . . (page 3), which "represents a multiplier for private counsel of 4.77 times their total lodestar." (p. 6.) The amount awarded is less than the lodestar, seven times less than requested, and equates to less than 5 percent of the benefits amount.

Thus, rather than serving as the great boon to class counsels' claim for a fee in excess of 14 times their own self-professed lodestar, the Southern Bell litigation is consistent with the many cases cited by Appellants throughout this attorneys' fees dispute demonstrative of the symbiotic relationship between the supreme lodestar factor meshed with the size of the common fund created by the litigation. In fine, Southern Bell is wholly consistent with the law which recognizes that an award of fees from a common fund may reach as high as four to five times the lodestar amount, but certainly not 14

times the lodestar.[1] Southern Bell thus drives a stake into the heart of class counsels' claim.

Of course, additional factors must be considered in determining the reasonableness of an award of attorneys' fees. Among them is the difficulty of the case and risks inherent in the litigation. To this, class counsel now claim that the case was difficult, complex, weighty and fraught with a high degree of risk. These late-made claims are a far cry from what they represented during the trial and earlier appeals of this case. Filed with the trial court are excerpts of pleadings, memoranda and briefs filed by class counsel which belie their claim of complexity, novelty and difficulty. Indeed, by their own words, this was a simple, straightforward statutory challenge in which the overwhelming weight of the law supported their argument. Note the following representations:

> Defendants' inability to support their argument is not surprising because case after case has upheld taxpayer class actions.
>
> Class Counsels' Memorandum in Opposition to Defendants' Motion for Summary Judgment, p. 20.
>
> This conclusion follows the application to § 319.231 of a long line of United States Supreme Court and Florida court decisions invalidating similar statutes that facially discriminate against interstate commerce.

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[1] This assumes the correctness of class counsels' self-professed lodestar figure devoid of analysis under Norman, supra, or Florida Patient's Compensation Trust Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985).

Reply Memorandum by Class Counsel In Support of Their Motion for Summary Judgment, p. 4.

And, in their unsuccessful efforts to obtain pre-judgment and post-judgment interest in this cause, class counsel railed against the State in their briefs before this Court, accusing State officials of knowingly violating clearly established constitutional law. Appellants' Initial Brief, pp. 31-33, Appellants' Reply Brief, p. 13-15. Appellant's Initial Brief on the Merits, pp. 21-22.

Class counsels' claim that they were faced with unanticipated collateral issues leading up to their singular commerce clause challenge is likewise refuted by the testimony of their own expert witnesses. Their so-called "roadblocks" issues of dismissal, exhaustion of administrative remedies, procedural exclusivity, standing, proper party determination, sovereign immunity, and retroactivity were not considered novel, complex, or difficult during litigation on the merits. These eleventh-hours contentions --- designed to support their fee demand --- are refuted by the testimony of their chief expert witness and now co-counsel, former Chief Justice Raymond Ehrlich of this Court. During his testimony, former Chief Justice Ehrlich recognized that when attorneys litigate against the State, the issues for which class counsel profess overwhelming complexity and surprise are frequently raised (Tr., final hearing July 6, 1995, p. 154). Former Chief Justice Ehrlich's testimony on the expectancy of having to deal with these issues is echoed by yet another expert witness submitted by class counsel, James K. Green (Tr., final hearing, July 6, 1995, pp. 192-193).

And Former Chief Justice Ehrlich rejects class counsels' claim that the size of the fund created is the sine qua non for the award of attorneys' fees, saying that such an award must be based on more than the size of the fund; both the 12 Johnson factors and the those contained in Florida Patient's Compensation Trust Fund v. Rowe must be considered (Tr., final hearing, July 6, 1995, p. 137), emphasizing that a court is not bound solely by the size of a common fund in awarding attorneys' fees. (Tr., final hearing, July 6, 1995, p. 138).

In an effort to avoid having to address the issues raised by the Appellants in their brief, class counsel maintain that the because no evidence was offered to counter the testimony presented by their expert witnesses, there can be no abuse of discretion. Of course, facts were gleaned from class counsel and their witnesses which refute their claim for $18 million in fees. However, it axiomatic that actions taken by a court which are against the manifest weight of the law are correctable by an appellate court. Because the numerous cases cited by Appellants throughout the attorneys' fees proceedings demonstrate the unwavering symbiotic relationship between the amount of fees to be awarded from a common fund and the number of hours reasonably expended, the award by the circuit court which irrevocably severs that symbiotic relationship is against the manifest weight of the law.

Such action taken by the trial court is reviewable by this Court because it is against the manifest weight of the law and, of particular significance here, this Court has specifically

retained jurisdiction to review the attorneys' fees award. For class counsel to contend that this Court does not have anything to review in light of this Court's specific retention of jurisdiction to review the fee award is simply a disingenuous argument. Suffice it to say that 10 experts attesting to the number of angels on the head of a pin does not make it so. Where an action defies common sense and is against the manifest weight of the law, that action is reviewable by a court that has specifically retained jurisdiction to consider an erroneous lower court determination. This is precisely the case here.

Finally, this Court has been most sensitive to the image of the legal profession, quick to act to prevent any action which may reflect poorly on the profession. Indeed, in the recent United States Supreme Court decision of The Florida Bar v. Went For It, Inc., _____ U.S. _____ (1995), 63 LW 4644, 4646, Opinion issued June 21, 1995, that Court upheld as against a First Amendment challenge certain rules adopted following a two-year study of lawyer advertising and solicitation, pointing out that there were numerous examples of activity by Florida lawyers which reflected poorly on the legal profession.

This Court's historical constant vigil protective of the image of the legal profession must also include the issue of attorneys' fees.[2]

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[2] See newspaper editoral and columnist commentary addressing the specific attorneys' fees issue here at Tab 2, Appendix to Reply Brief.

Class counsel intimate that the severance of the award of fees from hours reasonably expended is mandated here to eliminate the need for courts to second-guess fee applicants' reasonableness of hours expended on a cause. See pg. 27 of Answer Brief. What class counsel are really saying is that, under their approach, it is not necessary to inquire into the veracity of claimed hours. In fact, they intimate that whether the listing of hours is truthful or not is of no consequence. Thus, since lawyers cannot uniformly be trusted with presenting an accurate recounting of the time reasonably expended, they say, let us simply do away with this factor. The logical extension of the incredible argument justifies its summary rejection.

At bottom, class counsels' bold stand calling for removal of the necessary infusion of hours reasonably expended into the common fund attorneys' fees equation in ultimately awarding a reasonable fee must be categorically rejected.

II.

CLASS COUNSEL CANNOT RECEIVE AN ADDITIONAL AWARD OF ATTORNEYS' FEES BECAUSE SUCH AN AWARD WOULD CONSTITUTE IMPERMISSIBLE DOUBLE-DIPPING INTO A SINGLE COMMON FUND.

If class counsels' representation of the holding in Boeing Co. v. Van Gemert, 444 U.S. 472 (1980) is correct, then they are entitled only to an award of attorneys' fees from the entire common fund created by the litigation. There is nothing in that case which entitles them to a further equitable interest in any residual portion of that entire fund.

In fine, nothing in Boeing Co. is supportive of the view that class counsel have some equitable interest beyond the initial common fund. The thrust of the trial court's decision and class counsels' argument is that they are entitled to 10 percent of the initial $188 million and, if no class member seeks reimbursement, they are further entitled to a percentage of the "residual" fund of that same amount! Such a view is facially outrageous. Class counsels' reliance on Wilson v. Southwest Airlines, Inc., 880 F.2d 807, 816 (5th Cir. 1989), as supportive of an allocation of a portion of the residual fund to class counsel is inapposite as that court specifically based that allocation on a finding of about 600 hours of additional work performed by class counsel supportive of their equitable claim. No such determination has been made in this cause.

CONCLUSION

Class counsels' request for fees continues to suffer the glaring fundamental flaw of excising the common sense reasonable number of hours expended lodestar factor from the award of fees from a common fund. The award of attorneys' fees must not equate to winning the lottery or hitting the jackpot; it must continue to be based upon those factors directed to the work ethic and not the size of the pie. To remedy that flaw, this Court, based on the cited legal authorities contained in the Appellants' Initial Brief and above, should order the following:

1. A reduction of the award of attorneys' fees to class counsel consistent with the non-complexity of the case, its value to the public and the valid relationship between traditional lodestar factors in harmony with Camden I.

2. Declare that the attorneys' fees award percentage applies only to those monies actually refunded in the first distribution and that class counsel cannot receive any additional award of fees from the residual fund.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 15th day of August, 1995, to: JOSEPHINE A. SCHULTZ, Assistant General Counsel, Office of the Comptroller, 400 W. Robinson St., Ste. 225, Orlando, FL 32801; CHRISTOPHER K. KAY, Esq., Foley & Lardner, P.O. Box 2193, Orlando, FL 32802-2193 and KIMBALL R. ANDERSON, Esq., Winston & Strawn, 35 W. Wacker Dr., Chicago IL 60601.

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