D-87

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

ROOSEVELT U. PAULK,

Petitioner,

v.

PALM BEACH COUNTY SCHOOL BOARD
and **CRAWFORD & COMPANY,**

Respondents.

_____ /

SUP. CT. CASE NO. 92,030
CLAIM NO. 261-56-0310
D/A: 4/11/90
1DCA CASE NO. 96-04913

RESPONDENT'S ANSWER BRIEF ON THE MERITS

On Certified Question From The
First District Court of Appeal

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES

PREFACE

Petitioner, Roosevelt U. Paulk, Appellee below, shall be referred to as "Paulk" in this brief. Respondents, Palm Beach County School Board and Crawford & Company, shall be referred to as "the School Board."

All references to the record on appeal will be indicated by "R" followed by the appropriate page number. All references to Respondents' Appendix will be indicated by "A" followed by the appropriate document letter and page number.

The Attorney Fee Hearing, held on August 14, 1996, certified to the First District Court of Appeal as "volume 3" or "V3" will be separately referenced herein as "V3."

This Court has presently pending before it the same issue certified by the First District Court of Appeal in Lee v. Wells Fargo Armored Services, Supreme Court Case Number 90,455.

In this case, the First District Court of Appeal certified the same question certified in Wells Fargo:

> Does the court's deicision in Quality Engineered Installation, Inc. v. Higley South, Inc., 670 So.2d 929 (Fla. 1996), extend to permit the accrual of prejudgment interest on attorney's fees, authorized pursuant to the Workers' Compensation Law, from the date entitlement to the fee is determined, when an amount for same has not yet been established?

STATEMENT OF THE CASE AND FACTS

Paulk's counsel secured an award determining compensability and various indemnity and medical benefits for Paulk through a Merit Order dated September 17, 1991. (R. 314). For the issue of compensability and benefits, the Order entitled Paulk's counsel to an attorney's fee. (R. 314, V3. 19).

Several years later, the School Board accepted Paulk as being permanently and totally disabled. (V3. 19). As a result, the School Board's counsel wrote a letter on January 11, 1996, agreeing that Paulk's counsel was entitled to an attorney's fee for obtaining the past compensability award and corresponding benefits, as well as a fee on obtaining permanent and total disability benefits. (R. 155). In that correspondence, the School Board requested time records and a list of costs without the necessity of a formal Request for Production. (R. 155).

At the April 16, 1996 Pretrial Hearing on attorney's fees and costs, the School Board stipulated and agreed that Paulk's counsel was entitled to attorney's fees and costs regarding benefits secured. (R. 315). However, jurisdiction was reserved at to the amount of the attorney's fees and costs, the value of benefits obtained, and the reasonableness of the hours spent by Paulk's counsel in obtaining those benefits. (R. 315).

Approximately one month after this Court's decision in Quality Engineered Installation, Inc. v. Higley South, Inc., 21 F.L.W. S141

(March 28, 1996), on April 25, 1996 and June 19, 1996, Paulk's counsel filed amendments to the Pretrial Stipulation, claiming for the first time prejudgment interest on the entire attorney fee award pursuant to Quality Engineered. (R. 315).

At the hearing on attorney's fees, on August 14, 1996, Paulk's counsel asserted that the attorney's fees became fixed on September 17, 1991, when an award was entered regarding benefits and awarding entitlement to fees. (V3. 18, 106). The School Board presented evidence that Paulk's counsel knew he was entitled to a fee in 1991 and knew he could have filed an application for a hearing on fees, but never did so. (V3. 134-136). There was no evidence in the record to suggest that the School Board delayed any attorney's fee amount hearing.

Instead, the School Board argued to the JCC and the First District Court of Appeal that an Employer cannot pay a fee award prior to approval by the JCC. (V3. 153). The School Board's counsel pointed out that it would be illegal for him to have sent a check for attorney's fees to Paulk's counsel when the JCC had not yet approved a fee. (V3. 154). The School Board asserted that section 440.34, Florida Statutes makes it a crime if you accept a fee without court approval. (V3. 157). Thus, tendering a fee without court approval is tantamount to being an accessory to a crime. (V3. 157).

The JCC ruled, *inter alia*, that the School Board pay

prejudgment interest to Paulk's counsel as follows:

> 1. Prejudgment interest on $29,794.49 of the attorney fee beginning from 9/17/91 onward.
>
> 2. Prejudgment interest on $59,209.90 of the attorney fee beginning from 1/11/96 onward.

(R. 327).

The School Board appealed the prejudgment interest award and Paulk cross appealed the failure of the JCC to calculate all interest from the 1991 order.

The First District Court of Appeal reversed the JCC's order granting prejudgment interest and expressly followed its recent ruling in Wells Fargo Armored Services v. Lee, 692 So.2d 284 (Fla. 1st DCA 1997). See Palm Beach County School Board v. Paulk, 22 Fla. L. Weekly D2734 (Fla. 1st DCA December 3, 1997)(Appendix A). The appellate court recognized that it had certified a question of great public importance to this court in Wells Fargo and thus certified the same question to this court in this case. (Appendix A).

This Court granted review of the certified question in Wells Fargo on September 2, 1997. (Fla. Sup. Ct. Case No. 90,455). The School Board has filed a motion to consolidate this appeal with Wells Fargo in the interest of judicial economy and uniformity of law. In this case, Paulk filed his notice to invoke this Court's discretionary jurisdiction and this court entered an order postponing decision on jurisdiction and directing briefs on the merits.

SUMMARY OF ARGUMENT

Recognizing the inherent factual difference between the contract case in Quality Engineered Installation Inc. v. Higley and the workers' compensation case in Wells Fargo Armored Services v. Lee, the First District Court of Appeal was correct in declining to extend the rule announced in Quality Engineered to the workers' compensation case, Wells Fargo. Additionally, the First District Court of Appeal correctly recognized that the decision to not apply Quality Engineered to workers' compensation cases is further bolstered by the statutory misdemeanor imposed in section 440.34(6), Florida Statutes (1989), (transferred to section 440.105(3), Florida Statutes (Supp.1994)), which provides criminal penalties for anyone who receives a fee in a workers' compensation case for services rendered unless the JCC has approved the fee.

Numerous public policy reasons exist to explain why the burden should not fall to the employer/carrier to be the party to either a) tender a fee without JCC approval or b) strive to obtain JCC approval for fee tendering. Workers' Compensation Law is a special statutory creation governed by its own rules of procedure (Florida Rules of Workers' Compensation Procedure) and statutory chapter (Chapter 440, Florida Statutes). As such, the problem of prejudgment interest certified to this Court should be addressed by Rule of this Court or by the Legislature.

ARGUMENT

THE DETERMINATION OF THE FIRST DISTRICT COURT OF APPEAL, THAT PREJUDGMENT INTEREST IS INAPPLICABLE TO ATTORNEYS' FEES IN WORKERS' COMPENSATION CASES, SHOULD BE AFFIRMED.

Paulk relies primarily on the previously briefed Wells Fargo case, conceding that this issue is identical to the Wells Fargo issue. (Init. Br. 3). Regarding the additional basis articulated by the First District Court of Appeal in Palm Beach County School Board v. Paulk, Paulk argues that there is nothing in the Workers' Compensation Act to prevent the parties from obtaining the JCC's approval to offer, or accept, a tender of payment on an attorney's fee to stop the running of interest. (Init. Br. 4).

The School Board agrees with Paulk that disposition of this case will ultimately by governed by this Court's decision in Wells Fargo. However, the School Board posits that Wells Fargo briefing does not contain the additional argument regarding "tender" raised by the School Board before the First District Court of Appeal and now before this Court. Section 440.34(1), Florida Statutes (1989), prohibits payment of a fee unless approved as reasonable by the JCC. Section 440.34(6), Florida Statutes (1989), commands criminal penalties of a second degree misdemeanor for anyone who receives a fee not approved by the JCC. Finally, public policy concerns support affirmance of the First District Court's decisions in Wells Fargo and Paulk.

1. Quality Engineered Installation, Inc. v. Higley South, Inc. is inapplicable to workers' compensation cases.

In Quality Engineered Installation, Inc. v. Higley South, Inc., 670 So.2d 929 (Fla. 1996), this Court accepted jurisdiction to resolve a conflict between the districts. Quality Engineered, 670 So.2d at 903. In doing so, this Court reaffirmed its prior ruling in Argonaut v. May Plumbing Co., 474 So.2d 212 (Fla. 1985), that prejudgment interest should be granted when a party has suffered a loss. Specifically, Argonaut held that prejudgment interest should not be awarded as a penalty. Id. at 215. Thus, the "loss theory" evolved from Argonaut and was reinforced by this Court in Quality Engineered. Argonaut and Quality Engineered appropriately apply in contractual or vested property right cases where one party suffers a loss.

However, Argonaut and Quality Engineered do not apply to this case because there is no evidence that Paulk suffered a an "out-of-pocket, pecuniary loss."[1] Paulk continues to receive benefits, medical or indemnity, irrespective of his counsel's receipt of an attorney's fee. The two are not linked. Paulk's counsel can continue to file petitions and obtain benefits for Paulk regardless of whether he receives a fee on past secured benefits. Unlike the parties in Argonaut and Quality Engineered, Paulk, or any claimant,

[1] It certainly could be argued that Paulk's *attorney* suffered a pecuniary loss by not receiving the fee. However, the attorney is not a party and could have prevented his "loss" by pursuing a hearing for same.

is not affected and does not suffer a "loss" when counsel is not paid the attorney's fee. Paulk's Initial Brief is void of any argument that Paulk has either suffered a loss or that payment of prejudgment interest would make Paulk whole.

Furthermore, Quality Engineered simply is inapplicable to workers' compensation cases. Perhaps the most significant distinction between Quality Engineered and the case at bar is that Quality Engineered involved a fee based upon contract and not statutory application. 632. So.2d at 615. Clearly, an attorney's fee in the workers' compensation setting is based upon application of a statute, section 440.34, Florida Statutes.

In cases where the First District Court of Appeal has dealt with attorney's fees in workers' compensation cases, the appellate court has never awarded prejudgment interest on fees. See Spaulding v. Albertson's, Inc., 610 So.2d 721 (Fla. 1st DCA 1992); Mirlisena v. Chem Lawn Corp., 597 So.2d 877 (Fla. 1st DCA 1992); Okaloosa County Gas District v. Mandel, 394 So.2d 453 (Fla. 1st DCA 1981); St. Regis Paper Co. v. Pellizeri, 394 So.2d 234 (Fla. 1st DCA 1981). These cases provide a long history of not applying prejudgment interest in workers' compensation cases.

Spaulding is perhaps the most analogous of these cases. The First District Court of Appeal ruled that the claimant did not become obligated to pay her appellate attorney a fee at the time the appellate court determined to award fees. 610 So.2d at 724. The appellate court's order merely granted appellant's motion for

an award of fees, leaving the determination of amount and entry of an order for payment as matters for the JCC. Id. The School Board contends that there is no distinction in that Spaulding involved appellate fees and the instant case involves trial fees. In both cases, fees were granted, leaving the amount to be determined by the JCC at a subsequent hearing. Interest, therefore, should accrue only on the date of the JCC's order determining an amount and entry of an order for payment. Spaulding, 610 So.2d at 724.

In the instant case, at no time prior to the Final Order on Attorney Fees and Costs, dated December 2, 1996, had the JCC made a determination of *amount* and entry of an order for payment. (R. 313-27). In fact, this was due to Paulk's counsel's admitted failure to file an application for a hearing on attorney's fees. (V3. 135). Paulk's counsel admitted that this was never pursued by his office in the five years which passed from the JCC's order of entitlement in September of 1991. (V3. 136). Further, there is no evidence in the record to support that the School Board delayed any attorney's fee amount hearing.

Without evidence of a fee based upon contract, or JCC approval of a fee amount, Quality Engineered cannot and should not apply in this setting. There is no indication that prejudgment interest would make Paulk whole, or that Paulk suffered a pecuniary loss because his attorney did not pursue and receive an attorney's fee.

2. Criminal penalties pursuant to section 440.34, Florida Statutes (1989), later transferred to section 440.105(3), Florida Statutes (Supp.1994), prohibit the tendering of an attorney's fee.

An additional consideration for this Court to consider is section 440.34(6), Florida Statutes (1989), applicable to this case and this attorney fee entitlement.[2] Section 440.34(6) provides, in pertinent part:

> (6) Any person:
>
> (a) **Who receives any fees** or other consideration or any gratuity on account of services so rendered, **unless such consideration or gratuity is approved by the judge of compensation claims** or the court; or
>
> (b) Who makes it a business to solicit employment for a lawyer or for himself in respect of any claim or award for compensation, is **guilty of a misdemeanor of the second degree**, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. [e.s.]

Thus, section 440.34, Florida Statutes (1989), provides *criminal penalties* for the Claimant's counsel who accepts any fee from the Employer/Carrier until such fee is approved by the JCC. Approval by the JCC does not take place until an amount is determined. The Legislature clearly felt it necessary to impose criminal sanctions against a practicing workers' compensation attorney for receiving a fee for services rendered without judicial approval. § 440.34, Fla. Stat. (1989).

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[2] Section 440.34(6), Florida Statutes (1989) has since been transferred to section 440.15(3), Florida Statutes (Supp. 1994).

Intent on monitoring this special area of the law and ensuring that justice and ethics prevail, the Legislature enacted a special reporting requirement, that all fees paid to attorneys for services rendered be reported to the division and annually summarized by the division in a report to the Workers' Compensation Oversight Board. § 440.345, Fla. Stat. (Supp.1994). This additional mechanism guarantees that attorney's fees are approved as reasonable by a JCC pursuant to Workers' Compensation Law.

The award of prejudgment interest in Quality Engineered Installation was supported under the theory that the accrual of prejudgment interest could be avoided by tendering the fee. Palm Beach County School Board v. Paulk, 22 Fla. L. Weekly D2734 (Fla. 1st DCA December 3, 1997). However, under section 440.34(6), Florida Statutes (1989), it is a misdemeanor for anyone to receive a fee in a workers' compensation case for service rendered unless the JCC had approved the fee. As such, this criminal penalty provision clearly prohibits any employer/carrier from tendering a fee prior to final approval by the JCC. Paulk, supra.

3. Public policy reasons exist to support and affirm the First District Court of Appeal's decisions in Wells Fargo Armored Services v. Lee and Palm Beach County School Board v. Paulk.

Paulk contends in his Initial Brief that there is nothing in the Workers' Compensation Act that stops the parties from obtaining the JCC's approval to offer, or accept, a tender of payment on an attorney's fee to stop the running of interest. While true, Paulk

is silent regarding who should be responsible for requesting the JCC's approval, or moving forward with the hearing on "reasonableness" of the fee.

Practically speaking, there is no short circuit procedural route to having a fee approved as reasonable. A JCC cannot say a proposed tender is "reasonable" without seeing the relevant documents (timesheets) and hearing testimony concerning hourly rate, lawyer experience, or novelty of issues involved. The question then turns to who has the burden of requesting the attorney fee hearing and moving forward with obtaining an order approving the fee as reasonable pursuant to section 440.34, Florida Statutes.

It is the School Board's position that unless the employer/carrier has in some way *prevented* the claimant from having a fee amount approved by the JCC, the employer/carrier should not be penalized with prejudgment interest because the claimant's counsel has decided to allow entitlement to languish. In almost all other areas of the law, the duty to request and move forward with an attorney's fee hearing or to request a fee is placed upon the prevailing party, or the one who would be the recipient of the fee award.

Under section 768.79(6), Florida Statutes (1995), provides that upon motion made by the offeror within 30 days after the entry of judgment or after voluntary or involuntary dismissal, the court

shall determine if the defendant should receive an award of costs, expenses and attorney's fees pursuant to his offer of judgment unaccepted by the plaintiff. Thus, under chapter 768 governing negligence cases, the onus to obtain a judicial approval for fees is upon the party who stands to benefit. If that party fails to move the court for such fees within 30 days after judgment, voluntary or involuntary dismissal, he has waived his right to any costs, expenses or attorney's fees. See Gulliver Academy, Inc. v. Bodek, 694 So.2d 675, 678 (Fla. 1997)(absent reservation of jurisdiction, motion for attorney fees must be filed within thirty days pursuant to the rule, or entitlement to fees based on section 768.79 is waived unless relief under rule 1.090(b)(2)).

Likewise, attorney's fees under section 57.105, Florida Statutes must be pursued by the "prevailing party." Section 57.105 provides as follows:

> (1) The court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney in any civil action . . . . 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.

As such, prejudgment interest and an award of a reasonable attorney's fee may be sought by the recipient of that fee under section 57.105. There is no burden for the "losing party" to ask the court to impose either the reasonable attorney's fee or the award of prejudgment interest.

Also in Chapter 57, section 57.041 provides for the party

recovering judgment to recover all his or her legal costs and charges which shall be included in the judgment. The statute allows costs to be collected by execution on the judgment or order assessing costs. Obviously, the party who lost would not move to have such penalties included in the judgment or an order assessing costs. The prevailing party must request the court to assess legal costs and charges.

Similarly, in the area of domestic relations and dissolution, courts have the authority, under section 61.16, Florida Statutes, to consider the financial resources of both parties, order one party to pay a reasonable amount for attorney's fees, suit money, and the cost to the other party of maintaining or defending any proceeding under chapter 61.

Further, an award which orders payment directly to an attorney is personal and cannot be voided without the attorney's consent. Lapidus v. Weil, 672 So.2d 58, 59 (Fla. 4th DCA 1996), citing Irwin v. Marko, 408 So.2d 677 (Fla. 4th DCA 1981). Usually, the party, or attorney, seeking attorney's fees under section 61.16, is responsible for filing a petition for such fees. See generally, Spano v. Spano, 698 So.2d 324, 326 (Fla. 4th DCA 1997); Logan v. Logan, 666 So.2d 1040, 1041 (Fla. 1st DCA 1996).

In eminent domain proceedings, section 73.032(8), Florida Statutes (1995), provides:

> (8) Evidence of an offer of judgment is admissible only in proceedings to enforce an accepted offer or to determine the costs to be awarded a Defendant pursuant to

subsection (5) or a reasonable attorney's fee pursuant to subsection (6).

This offer of judgment statute may be enforce by the party who would benefit from the determination of costs or reasonable attorney's fee.

The above statutes are only a few examples of the common sense proposal that the burden for requesting approval by the JCC of an attorney's fee rest with the recipient of the fee. The School Board respectfully suggests that perhaps the time is ripe for this Court to enact a procedural Rule of Workers' Compensation Procedure which would fix the "timing" for the claimant's counsel to request a fee hearing. For example, claimant would be required to move within thirty (30) days following an order granting entitlement to fees, or an agreement to entitlement, or a mediation order agreeing to entitlement. Once such motion for determination of reasonable attorney's fee is filed, discovery can take place and a pretrial hearing set. Mediation is scheduled on the attorney's fee issue and Merits Hearing, or trial, is held if the same is not settled. This would occur at a normal litigation pace - once claimant files a motion to determine reasonable fee. By approving this procedure, this Court would "allow decisions on attorney fees to proceed in a manner consistent with judicial efficiency and economy." See Gulliver Academy, Inc. v. Bodek, 694 So.2d 675, 677-678 (Fla. 1997).

In conclusion, there can be no prejudgment interest running

when there exists no prior approval of an attorney's fee as being "reasonable" by the JCC. §440.34, Fla.Stat.(1989). To adjudge the School Board as delinquent in paying attorney's fees and thus owing prejudgment interest would be tantamount to ruling that the School Board should have either a) violated section 440.34, Florida Statutes (1989) and subjected claimant's counsel to a second degree misdemeanor by tendering a fee, or b) perfected claimant's counsel's attorney's fee for him by filing for a hearing on reasonableness and amount. The burden for filing a motion for determination of amount and acceptance of reasonableness should rest with Paulk, or any claimant. A rule establishing the burden to rest with the recipient of the benefit would be consistent with statutes in other areas of the law.

CONCLUSION

For the above reasons, the School Board requests that this Court not accept voluntary jurisdiction and let stand the opinion of the First District Court of Appeal.

Alternatively, the School Board requests that this Court find that there is a legal and reasonable basis to exclude workers' compensation law from the effect of Quality Engineered Installation, namely that prejudgment interest cannot run in a workers' compensation case until there is JCC approval of a fee amount. The burden for filing a motion for determination of amount, so that a tender can be made, should rest with the

recipient of the award, claimant's counsel. This Court should answer the certified question in this case by finding the First District Court of Appeal correctly reasoned the inapplicability of Quality Engineered Installation, Inc. in Wells Fargo v. Lee and Palm Beach County School Board v. Paulk.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been furnished by regular U.S. mail this 27th day of January, 1998 to: RICHARD A. KUPFER, ESQ., 1655 Palm Beach Lakes Boulevard, The Forum - Tower C - Suite 810, West Palm Beach,

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