

IN THE SUPREME COURT
STATE OF FLORIDA

FIRST BAPTIST CHURCH OF
CAPE CORAL, FLORIDA, INC.

Petitioner

vs.

Appeal Case No. SC11-1278
L.T. Case Nos. 2D09-5444
06-CA-000179

COMPASS CONSTRUCTION, INC.

Respondent

_____ /

PETITIONER'S JURISDICTIONAL BRIEF

ON REVIEW FROM THE SECOND DISTRICT COURT OF APPEAL
IN AND FOR THE STATE OF FLORIDA

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Statement of the Case and Facts

First Baptist of Cape Coral obtained a Final Judgment for attorney's fees against Compass Construction. The amount of the attorney's fees exceeded the amount actually charged by counsel for First Baptist of Cape Coral. This was due to language in the fee agreement between counsel for First Baptist of Cape Coral and its insurer stating that if someone other than the insurer paid the fees, then the amount due would be the greater of the actual amount charged or the amount determined as reasonable by a court.

A worker injured during a construction project sued First Baptist of Cape Coral (the owner) and Compass Construction (the general contractor) for damages. First Baptist of Cape Coral cross-claimed against Compass Construction for indemnity. Compass Construction agreed that First Baptist of Cape Coral was entitled to attorney's fees.

Citing Kaufman v. MacDonald, 557 So.2d 572 (Fla. 1990); and Wolfe v. Nazaire, 713 So.2d 1108 (Fla. 4th DCA 1998), the trial court awarded First Baptist of Cape Coral attorney's fees against Compass Construction in an amount greater than actually charged by counsel for First Baptist of Cape Coral. Compass Construction then sought review by appeal to the Second District Court of Appeal.

At the appellate level, this case traveled with a companion case containing the identical issue, Compass Construction, Inc. v. First Baptist Church of Cape Coral, Florida, Inc., Second DCA case no. 2D09-5455. Both cases traveled together at the Second DCA so that the same panel could decide both cases.

The Second District Court of Appeal reversed the award of attorney's fees against Compass Construction, holding that the noncontingent fee agreement between First Baptist of Cape Coral's liability insurer and counsel limited the trial court to an award of the fees actually charged. Although acknowledging that Wolfe v. Nazaire, 758 So.2d 730, 732-33 (Fla. 4th DCA 2000), supports First Baptist of Cape Coral's position, the Second District Court of Appeal noted that portions of the Wolfe opinion are inconsistent. The Second District Court of Appeal, however, was unable to reconcile the Wolfe majority opinion with the prevailing law in Florida on this issue.

In its opinion, the Second DCA certified its decision to be in direct conflict with the Fourth DCA's decision in Wolfe.

First Baptist of Cape Coral timely filed with the Second DCA on June 23, 2011 its notice to invoke the discretionary jurisdiction of this court.

Jurisdictional Statement

The Florida Supreme Court has discretionary jurisdiction to review a decision of a District Court of Appeal that expressly and directly conflicts with a decision of the Supreme Court or another District Court of Appeal on the same point of law. Art. V Section 3(b)(3) Fla. Const. (1998); Fla. R. App. P. 9.030 (a)(2)(A)(IV).

Jurisdictional Issue

The decision of the Second District Court of Appeal in this case expressly and directly conflicts with the decision of the Fourth District Court of Appeal in Wolfe v. Nazaire, 758 So.2d 730 (Fla. 4th DCA 2000).

Summary of the Argument

The Second DCA acknowledges that Wolfe supports the award of attorney's fees to First Baptist of Cape Coral that exceeds what was actually charged. Because of internal inconsistencies in the Wolfe opinion, the Second DCA could not square the majority opinion in Wolfe with the prevailing law in Florida on this issue.

Because there are now different rules on this issue in the Second and Fourth Districts, inconsistent results will occur. It is unknown how the First, Third, and Fifth Districts would rule. This court's guidance is needed on this significant issue.

Argument

The decision of the Second District Court of Appeal in this case expressly and directly conflicts with the decision of the Fourth District Court of Appeal in Wolfe v. Nazaire, 758 So.2d 730 (Fla. 4th DCA 2000).

The Second DCA held that the award of attorney's fees to First Baptist of Cape Coral in an amount higher than actually charged is inconsistent with the prevailing law in Florida on the amount of attorney fee awards. Specifically, the Second DCA stated that a noncontingent fee agreement can never be the source of an attorney's fee award that is higher than actually charged. Under the Second DCA's view, wording in a noncontingent fee agreement authorizing a higher amount of fees (if a court determines the higher fee is reasonable) is unenforceable.

It is important to note that the higher fee award by the trial court was based on a higher hourly rate than specified in the noncontingent fee agreement. The trial found that the higher hourly rate was reasonable.

In its opinion, the Second DCA confirms that Wolfe v. Nazaire, 758 So.2d 730 (Fla. 4th DCA 2000) (Wolfe II), appears to support a higher fee award under a noncontingent fee agreement. Under its analysis, however, the Second DCA finds the Wolfe II opinion inconsistent by indiscriminately referring to contingent and noncontingent fee agreements without explanation.

The bottom line for the Second DCA is that it is unable to reconcile the Wolfe II majority opinion with prevailing Florida law.

As the Second DCA notes in its opinion, the starting point in Florida for an award of attorney's fees is Florida Patients Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985). Under Rowe, a court-awarded attorney's fee cannot exceed the attorney/client fee agreement. Rowe, 472 So.2d at 1151.

As it now stands, courts subject to the jurisdiction of the Second DCA are prohibited from enforcing a noncontingent fee agreement authorizing a higher fee. Courts subject to the jurisdiction of the Fourth DCA are free to award the higher fee if authorized in the noncontingent fee agreement. Counsel for First Baptist of Cape Coral has not located any definitive ruling in the First, Third, or Fifth DCAs on this issue. Whether those courts would side with the Second DCA or Fourth DCA's view on this issue is unknown.

What is known is that without guidance from this court on this issue, the probability is great that there will be tactical litigation decisions that cannot be made, wide variations in attorney's fee awards under noncontingent fee agreements like the one involved in this case, and the unnecessary waste of time and money spent litigating the amount of fees. Lower courts, the trial bar, and litigants would all benefit from a uniform statewide rule on this issue.

Conclusion

The conflict between the Second DCA's decision in this case and Wolfe is both express and direct. This court should exercise its discretionary jurisdiction to consider the merits of First Baptist of Cape Coral's argument on this issue.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Petitioner's Jurisdictional Brief has been furnished by U. S. mail to:

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this _____ day of July, 2011.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Petitioner's Jurisdictional Brief complies with the font requirements of Rule 9.210(a)(s) of the Florida Rules of Appellate Procedure.

Dated this ____ day of July, 2011.

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Second District Court of Appeal's Opinion
filed May 27, 2011

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