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
_____/

REPLY BRIEF ON THE MERITS

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

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PRELIMINARY STATEMENT

In this Reply Brief on the Merits, Petitioner First Baptist Church of Cape Coral, Florida, Inc. will be referred to as First Baptist Church. Respondent Compass Construction, Inc. will be referred to as Compass. Other parties to the action will be referred to by their proper names. The Record on Appeal will be referred to by "R." with the volume and page number(s). References to the Appendix will be by "App." with the page number(s). The four volume record Concerning the Second DCA briefs will be referred to as "2 DCA R." with the appropriate page number(s).

SUMMARY OF THE ARGUMENT

Because this case involves the amount of attorney's fees, the proper standard of review is abuse of discretion. This case did not involve entitlement to attorney's fees. The specific issue concerned the amount of the reasonable hourly rate component of the lodestar equation.

Beginning with Florida Patient's Compensation Fund v. Rowe, the weight of authority supports the conclusion that a noncontingent fee agreement with an alternative fee recovery clause is enforceable. The Rowe principle that a court-awarded attorney's fee can never exceed the amount of the fee agreement is not violated when a noncontingent fee agreement contains an alternative fee recovery clause. Furthermore, there are compelling policy reasons to reverse the Second DCA's blanket prohibition of the enforceability of a noncontingent fee agreement with an alternative fee recovery clause.

A R G U M E N T

THE SECOND DCA SHOULD HAVE REVIEWED THIS CASE FOR ABUSE OF DISCRETION, NOT DE NOVO.

The Proper Standard of Review on Appeal in this Case is Abuse of Discretion

As First Baptist Church argues in its Initial Brief, the proper standard of review here is abuse of discretion. (Initial Brief on the Merits, at 10-11) Despite both Compass and First Baptist Church agreeing that the proper standard of review is abuse of discretion, the Second DCA applied the improper de novo standard of review. Compass Construction, Inc. v. First Baptist Church of Cape Coral, Inc., 61 So.3d 1273, 1275 (Fla. 2nd DCA 2011)

The de novo standard of review on appeal applies only to issues concerning entitlement to attorney's fees. Ware v. Land Title Co. of Fla., Inc., 582 So.2d 46 (Fla. 2nd DCA 1991) Entitlement is the right to recover attorney's fees from one's opponent in litigation. 12 Fla. Jur 2d Costs, Section 86.

On the other hand, issues concerning the amount of a court-awarded attorney's fee activate review for abuse of discretion. Gibbs Const. Co. v. S. L. Page Corp., 755 So.2d 787 (Fla. 2nd DCA 2000) Amount means the actual dollar

figure of the fee award, not the right to recover the amount of fees from one's opponent. 12 Fla. Jur 2d Costs, Section 86.

Despite agreeing at the DCA level that abuse of discretion was the proper standard of review, Compass now erroneously argues that the Second DCA correctly applied the de novo standard of review. (Respondent's Answer Brief on the Merits, at page 5) No authority supports this position.

At the trial court level in this case, there was no dispute about First Baptist Church's entitlement to attorney's fees. (R. Vol. 1, 1) Rather, the sole issue in this case concerns the amount of fees. Specifically, the sole issue here is the amount of the reasonable hourly rate. (R. Vol. 1, 8) Even the case the Second DCA cites in its Opinion as support for de novo review does not support this conclusion. Ware, 582 So.2d at 46. The real issue in that case concerned entitlement, not amount.

THE TRIAL COURT'S DECISION VIOLATED NO ROWE PRINCIPLES AND WAS WITHIN ITS DISCRETION

A Noncontingent Fee Agreement with an Alternative Fee Recovery Clause is Enforceable

As explained in the Initial Brief on the Merits, the holdings of Rowe, Perez-Borroto, and Kaufman compel the conclusion that a noncontingent fee

agreement with an alternative fee recovery clause is enforceable. In Florida Patients Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), this court established the federal lodestar approach when determining a reasonable attorney's fee. Rowe, 472 So.2d at 1146. The lodestar figure is composed of the number of hours reasonably spent multiplied by a reasonable hourly rate. Id., at 1150-51. Rowe also established that a court-awarded attorney's fee cannot exceed the fee agreement between the attorney and the client. Id, at 1151.

In Perez-Borroto v. Brea, 544 So.2d 1022 (Fla. 1989), this court clarified that the Rowe principles apply equally to both contingent and noncontingent fee agreements and equally to plaintiffs and defendants. Perez-Borroto, 544 So.2d at 1023. In Kaufman v. MacDonald, 557 So.2d 572 (Fla. 1990), this court held that a contingent fee agreement with an alternative fee recovery clause does not violate the Rowe principle that a court-awarded fee not exceed the fee agreement. Kaufman, 557 So.2d at 573. Specifically, a contingent fee agreement providing that the fee would be the higher of the percentage amount of the contingency or the amount awarded by the court is enforceable. Id. The alternative fee language is consistent with the Rowe principle that a court-awarded fee not exceed the fee agreement. Id.

Compass Misstates the Facts of Wolfe v. Nazaire

Compass misstates the facts of Wolfe v. Nazaire, 758 So.2d 730 (Fla. 4th DCA 2000) (Wolfe II), applicable to this case. First, Compass states that Wolfe involved a contingency contract. (Respondent's Answer Brief on the Merits, at page 11) This is incorrect. Both Wolfe I and II describe the fee agreement in that case as hourly with an alternative fee recovery clause. Wolfe v. Nazaire II, 758 So.2d at 732; Wolfe v. Nazaire I, 713 So.2d 1108 (Fla. 4th DCA 1998)

Second, Compass states that the Wolfe fee agreement specifically referred to an award of fees by the trial court under a prevailing party statute. (Respondent's Answer Brief on the Merits, at page 11) This is also inaccurate. Wolfe I and II state that the fee agreement was for a specified hourly rate "or whatever may be awarded by the trial court." Wolfe I, 713 So.2d at 1108; Wolfe II, 758 So.2d at 732. While it is accurate that the Wolfe II Opinion acknowledges a fee award by the court under the prevailing party statute, this statement appears to lump together the contents of the fee agreement and the basis of the fee award. Wolfe II, 758 So.2d at 732.

Even if Compass had accurately described the actual terms of the fee agreement in Wolfe, the source of the fee award is irrelevant to the issues in the present case. In reviewing the lodestar procedure established in Rowe

this court noted that the lodestar approach does not differentiate between a statutorily authorized award of fees and court-awarded fees authorized by contract. Bell v. USB Acquisition Co., Inc., 734 So.2d 403, 406 (Fla. 1999).

Third, Compass mistakenly states that the Wolfe fee agreement did not include a "second, arbitrary" amount as the fee agreement in this case does. (Respondent's Answer Brief on the Merits, at page 12) Both Wolfe I and II describe the fee agreement there as requiring a specified hourly rate or a court-awarded fee, whichever is higher. Wolfe I, 713 So.2d at 1108; Wolfe II, 758 So.2d at 732. Thus, there is no substantive difference between the fee agreement in Wolfe and the fee agreement in this case.

A Multiplier Has Never Been an Issue in this Case

A statement made in the Initial Brief concerning the absence of any issue concerning a multiplier in this case requires clarification. The second to the last sentence on the bottom of page 15 of the Initial Brief on the Merits is wrong. It should have read "It is undisputed in the present case that the trial court neither applied a multiplier nor that a multiplier was ever an issue."

So, to clarify, no multiplier was ever involved in this case. It is clear in Florida that only contingent fee agreements can benefit from a multiplier.

Rowe, 472 So.2d at 1151. The present case deals only with a noncontingent fee agreement.

"Risk of nonpayment" is also not an issue in this case. The "risk of nonpayment" is an issue only when a contingent fee agreement is involved. Bell, 734 So.2d at 408-09. It is also not an issue here because the Rowe lodestar principles apply equally to both contingent and noncontingent fee agreements. Perez-Borroto, 544 So.2d at 1023.

Contrary to Compass's argument, Daniels v. Bryson, 548 So.2d 679 (Fla. 3rd DCA 1989), does not apply to the present case. Bryson was properly decided on its facts, as the Third District Court of Appeal properly limited an attorney's fee award to the hourly rate in a noncontingent fee agreement containing no alternative fee recovery clause. Bryson, 548 So.2d at 682. In Bryson, the trial court had also awarded a "contingency risk factor" of 2.5. Id. The Third District Court of Appeal also properly reversed this in light of the absence of a contingent fee agreement. Id.

That Kaufman involved a contingent fee agreement does not mean that it supports the Second District Court of Appeal decision in this case. As noted above, Perez-Borroto requires that decisions like Kaufman apply to both

contingent and noncontingent fee agreements containing alternative fee recovery clauses.

The Second DCA's Decision Would Adversely Impact Pro Bono Work

As discussed in the Initial Brief on the Merits, the Second District Court of Appeal's blanket prohibition of an alternative fee recovery clause in a noncontingent fee agreement affects not just insurance defense counsel, but also counsel representing defendants (who are not seeking affirmative relief) with limited resources. As catalogued in the Initial Brief, there are other types of cases in which a noncontingent fee agreement with an alternative fee recovery clause could provide a basis for competent counsel to represent defendants who could otherwise not afford the representation.

Taking the Second District Court of Appeal's blanket prohibition to its logical conclusion, a pro bono fee agreement with an alternative fee recovery clause is, as a matter of law, unenforceable. A civic-minded attorney may wish to help a less fortunate defendant through a pro bono fee agreement containing an alternative fee recovery clause. Under the Second District Court of Appeal's reasoning, this attorney could never recover attorney's fees from the opponent. No contingent fee agreement? No fees. What if a contingent fee agreement is not an option? Too bad.

CONCLUSION

This Court should reverse the decision of the Second DCA, reinstating the trial court's decision in this case. This Court should also clear up any confusion by holding that a noncontingent fee agreement may contain an enforceable alternative fee recovery clause.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Reply Brief on the Merits has been furnished by regular U.S. mail to:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Reply Brief on the Merits complies with the font requirements of Rule 9.210(a)(s) of the Florida Rules of Appellate Procedure.

Dated this 13th day of April, 2012.

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