IN THE SUPREME COURT
STATE OF FLORIDA

FIRST BAPTIST CHURCH OF CAPE CORAL, FLORIDA, INC.

PETITIONER,

v.

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

COMPASS CONSTRUCTION, INC.,

RESPONDENT,
_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

In this Answer Brief on the Merits, Petitioner, First Baptist Church of Cape Coral, Florida, Inc. will be referred to as "First Baptist". Respondent, Compass Construction, Inc. will be referred to as "Compass". References to the Record on Appeal will be designated by the symbol "(R__)" followed by the appropriate page number. References to the Supplemental Record on Appeal will be designated by the symbol "(Supp. R. __)" followed by the appropriate page number. References to the Appendix will be designated by the symbol "(App. __)" followed by the appropriate page number.

STATEMENT OF THE FACTS

First Baptist correctly indentifies the salient facts that the trial court awarded attorneys fees in an amount higher than that charged and paid pursuant to an "enhancement" agreement between the attorneys for First Baptist and its insureds.

This appeal stems from a wrongful death lawsuit which was a result of a fatal construction accident at First Baptist Church of Cape Coral Florida. First Baptist and Compass were both named as defendants in an action arising from this construction accident. App. 2. First Baptist brought a cross-claim for contractual indemnity against Compass. App. 2. The insurance company for First Baptist assigned an attorney to represent First Baptist for the claims in the main action. App. 2. First Baptist's attorney had a written fee agreement with the insurance company for the defense of the claim, such that the attorney would bill the insurance company for his services at the rate of $170 per hour. App. 2, 3. It follows that the insurance company pursuant to the fee agreement was obligated to pay the agreed hourly rate, an obligation which was not contingent on the outcome of the case. App. 2, 3.

The subject agreement contained a provision which provided " if someone other than the insurance company is to pay the fees, then the amount will be the greater of the amount charged the insurance company and the amount to be determined by the Court." App. 3.

The trial court determined that First Baptist could recover fees at a rate of $350 per hour for his services, instead of the agreed upon rate of $170 per hour. App. 3. Compass argues that the appropriate hourly rate at for the fees of First Baptist's attorney should be limited to the hourly rate charged and billed to the client. App. 2. First Baptist argues its attorney was entitled to the substantially higher hourly rate. App. 2.

On appeal, the Second District, reversed the trial court's ruling, and held that the attorney's fees awarded to First Baptist were limited to the agreed upon hourly rate of $170.00. App 2. The Court stated the trial court was limited by the noncontingent fee agreement between First Baptist and its attorney in making the award of fees against Compass. App. 2. In doing so, the Second District determined its decision was in conflict with Wolfe v. Nazaire, 758 So.2d 730 (Fla. 4th DCA 2000). App. 7-10.

SUMMARY OF ARGUMENT

Petitioner, First Baptist, has petitioned this Court to review the Second District's opinion in Compass Const., Inc. v. First Baptist Church of Cape Coral, Florida, Inc., 61 So. 3d 1273 (Fla. 2d DCA 2011), following the district court certifying the decision in direct conflict with the Fourth District's decision in Wolfe v. Nazaire, 758 So. 2d 730 (Fla. 4th DCA 2000).

The issue to be decided is whether a party is entitled to attorney fees in excess of those actually charged. The Second District correctly applied the long-standing law in this state, embodied in Florida Patient's Comp. Fund v. Rowe, 472 So. 2d 1145(Fla. 1985), holding that in no case should the court-awarded fee exceed the fee agreement reached by the attorney and his client.

ARGUMENT

DE NOVO STANDARD OF REVIEW, AS USED BY THE SECOND DISTRICT COURT OF APPEALS WAS THE PROPER STANDARD OF REVEW

The issue presented before the Second District was whether First Baptist was entitled to attorney fees in excess of those actually charged and paid pursuant to a fee agreement. As the Second District correctly stated, this issue is a matter of law. Compass Const., Inc. v. First Baptist Church of Cape Coral, Florida, Inc., 61 So. 3d 1273 (Fla. 2d DCA 2011). The facts in this case are not in dispute, therefore, this case involves solely an application of the law. A question of law is subject to the standard of review of de novo. D'Angelo v. Fitzmaurice, 863 So. 2d 311, 314 (Fla. 2003); Armstrong v. Harris, 773 So. 2d 7, 11 (Fla. 2000).

The Petitioner relies on Gibbs Const. Co. v. S. L. Page Corp., 755 So. 2d 787 (Fla. 2d DCA 2000), to argue the standard of review is abuse of discretion. The issue in Gibbs, was regarding the amount of fees to be awarded. The court in Gibbs stated appellate courts apply an abuse of discretion standard in reviewing a trial court's award of attorney's fees, most often in regard to the amount of an award rather than the actual entitlement to an award. Id. at 790. The court went on to say when entitlement to attorney's fees is based on a pure matter of law,

however, the proper standard of review is de novo. Gibbs at 790 (Fla. 2d DCA 2000).

The Second District correctly applied the proper standard of review for the question of law presented.

PETITIONER IS NOT ENTITLED TO A COURT AWARD OF ATTORNEYS FEES WHICH ARE IN EXCESS OF THE ATTORNEY'S FEE AGREEMENT

The Second District properly applied the long-standing law of this Court in holding that a party is not entitled to attorney fees in excess of the fee agreement. As this Court held in, Florida Patient's Comp. Fund v. Rowe, 472 So. 2d 1145, 1146 (Fla. 1985), and should continue to hold, in no case should the court-awarded fee exceed the fee agreement reached by the attorney and his client. The Court in Rowe, set out specific guidelines for a court to award attorneys fees under a prevailing party statute, which the court refers to as the Lodestar approach. Id at 1150. Under the lodestar approach, the Court stated the trial Judge in computing the attorney fee should (1) determine the number of hours reasonably expended on the litigation,(2) determine the reasonable hourly rate for this type of litigation; (3) multiply the result of (1) and (2); and, when appropriate, (4) adjust the fee on the basis of the contingent nature of the litigation or the failure to prevail on a claim or claims. Id at 1151-1152.

This Court stated that when a prevailing party's counsel is employed on a contingent fee basis, the trial court must consider a contingency risk factor when awarding a statutorily-directed reasonable attorney fee. Id. at 1151. The reasoning behind the contingency risk factor is that when an attorney who is working under a contingent fee contract receives "no compensation when his client does not prevail, he must charge a client more than the attorney who is guaranteed remuneration for his services." Id. at 1151. Turning to the instant case, there was no contingency agreement and the Plaintiff's counsel in the trial court action was guaranteed payment based upon the fee agreement with their client. The Rowe case shows that the present case is not the kind of case that is subject to a fee enhancement from a contingency risk factor as there was no risk of nonpayment in this case.

The Rowe Court further stated, "in no case should the court-awarded fee exceed the fee agreement reached by the attorney and his client." Id at 1151. Regardless of how the Court chooses to award attorneys' fees to the Petitioner, the Court should follow the long-standing principle in Rowe and not award fees that exceed the fees agreed on between the Petitioner and their attorney.

The Third District in Daniels v. Bryson, 548 So. 2d 679 (Fla. 3d DCA 1989), discussed the Rowe lodestar approach as it relates to an alternative fee

recovery clause in a noncontingent fee agreement like that in the present case. The Court in Bryson agreed with Rowe in that a court- awarded fee could not exceed the amount the party would be obligated to pay their attorney. Id. Relying on the Rowe principle that " in no case should the court awarded fee exceed the fee agreement reached by the attorney and the client" , the court stated that "where there is a conventional hourly fee agreement, the amount awarded by the court against the opposing party may not exceed the amount the client would be obliged to pay his or her own attorney." In doing so, the court addressed the case, Perez-Borroto, 544 So.2d 1022 (Fla. 1989), which the Petitioner relies on to argue that the Rowe principles apply equally to contingent and noncontingent fee agreements. The Court in Bryson, held that the court in Perez-Borroto, could award no more than the hourly rate which defense counsel could bill his client, and the amount of the award could not be enhanced above that level by application of the Rowe factors.

The court provided that "where Appellees are compensated on a flat hourly basis regardless of outcome, the possibility of a court-ordered enhancement does not convert the arrangement into a contingent fee." Id at 682. The Court specifically stated that "while other partial contingency arrangements may be permissible…the Appellee's fee arrangement cannot be considered contingent within the meaning of Rowe and its progeny." Id. at 682. The Court ultimately held

that the attorney's fees could not be calculated at a rate exceeding the agreed hourly rate in the fee agreement.

Just as in Bryson, the fee agreement in this case is calculated on an agreed hourly rate, which is stated in the agreement between the attorney and the insurance company. Compass Const., Inc. v. First Baptist Church of Cape Coral, Florida, Inc., 61 So. 3d 1273, 1277 (Fla. 2d DCA 2011). The result sought by the Petitioner as explained by the Second District is not supported by the Rowe progeny and the lodestar approach. As the Second District explained, "the fee arrangement was not contingent, and First Baptist's attorney did not assume any risk of non payment for his services. Thus the insertion of an alternative fee recovery clause in the agreement in unavailing." Id. at 1276.

The alternative fee recovery clause in the Petitioner's agreement does not convert the agreement into a contingency agreement. Regardless of the approach taken by the trial court to determine the appropriate amount of attorney's fees, the amount cannot exceed a fee calculated at the hourly rate agreed on by the attorney and their client.

In their Initial Brief on the Merits, relying on the cases of Wolfe v. Nazaire, 758 So.2d 730 (Fla. 4th DCA 2000) and Kaufman v. MacDonald, 557 So. 2d 572 (Fla. 1990), First Baptist Church argues these cases are consistent with the Rowe decision, and with the lodestar approach principles. The Petitioner relies on these

cases to argue the Trial Court could award attorneys' fees in excess of the amount actually charged. Petitioner's reliance on these cases is misplaced, as the facts in this case do not permit an award of attorneys' fees higher than actually charged.

The fee agreement in Kauffman provided that the attorney's compensation would be either a specific percentage of the recovery or the amount awarded by the court, whichever yielded the higher fee. In such a case, the court-awarded fee is allowed because it does not exceed the agreement reached by the attorney and client.

Contrary to Petitioner's contention, Kaufman does not, in the absence of such an agreement, allow a court to award attorneys' fees that exceed the fee agreement reached by the client and her attorney.

The Second District's opinion stated the Kaufman agreement was a true contingency fee agreement where the attorney assumed the risk of nonpayment. The Second District goes on to say that, this is not the case here because the fee agreement between First Baptist's attorney and the insurance company called for an hourly rate payable regardless of the result, not a contingency fee. Compass Const. at 1277 Petitioner is correct that this case is consistent with Rowe and its progeny, but Petitioner is not correct that this case supports the Trial Court to

award attorneys fees that exceed the fee agreement reached by the client and their attorney.

The Second District's opinion is in direct conflict with the decision in Wolfe v. Nazaire, 758 So.2d 730 (Fla. 4th DCA 1998). In Wolfe, The Wolfe case is also distinguishable in light of the fact that Wolfe involved a contingency contract, and counsel for Petitioner in the present case has been paid the hourly rate agreed upon in the fee agreement.

The Wolfe case holds that "a Trial Court could award attorneys' fees that exceeded the hourly wage the attorney and client agreed upon, where the contract addressing attorneys' fees stated that compensation would be either a specified hourly wage or an amount awarded by the Court under the prevailing party's Statute, whichever yielded the higher fee. Specifically, the contract read: "$85 or whatever may be awarded by the trial court." Id. However, as the Second District explains, the court in Wolfe actually disapproved the fee award because the trial court did not explain its reasons for the use of a multiplier. Compass Const. at 1277.

Comparing the agreement in the present case, to the ones in Wolfe and Kaufman yields some important distinctions. First, the Wolfe and Kaufman are not applicable to the case at bar, as those cases were based on statutory fee

provisions, while the present fee award was based solely on the indemnification clause in the construction contract.

Secondly, the higher fee proposal in this case is totally unnecessary in a pragmatic sense. As this higher fee proposal would conceivably only apply when "anyone other than the Petitioner would be required to pay attorney's fees," why would Petitioner have any concern or say in what the law firm charges as a fee? Thirdly, the Wolfe contract did not include a second, arbitrary higher number as in the present case. Again, the Wolfe contract simply stated "$85 or whatever may be awarded by the trial court." Id. This was a proper statement that the Court retains discretion to award statutory fees. There was no suggestion of a higher, inflated rate to be charged other parties. On those two points, Wolfe is clearly distinguishable.

The Kauffman and Wolfe cases both contained fee agreements where the basis of the amount to be charged the client for attorney fees is the court awarded fee. These cases do not permit the court to award higher fees where there is no such agreement.

As a final point, in addition to case law, public policy also supports the Respondent's position that the Petitioner is not entitled to attorneys fees which exceed the fee agreement. This is not a case where the risk of nonpayment existed,

rather, this is a case where the parties and their attorneys had a fee agreement that would provide their attorneys compensation regardless of the outcome of the case. There was never a risk of nonpayment since the amount of payment was provided in the fee agreement. The Petitioner will be made whole simply by payment of the attorney's fee calculated at the agreed upon hourly rate in the fee agreement. Therefore, there is no need or circumstance in this case to award the Petitioner with attorney's fees that exceed those in the fee agreement. Doing so would only create an undeserved windfall to the Petitioner. Just as the appellate court stated, compass, a third party to the fee agreement, should not be obligated to pay for this windfall. See Compass Const., Inc. v. First Baptist Church of Cape Coral, Florida, Inc., 61 So. 3d 1273 at 1278 (Fla. 2d DCA 2011).

CONCLUSION

For the foregoing reasons, this Court should affirm the Judgment rendered below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by First Class United States Mail and facsimile this 28th day of February, 2012, to the following: W. Gus Belcher, II, Esq., Nuckolls, Johnson, Belcher & Ferrante, P.A., Post Office Box 2199, Ft. Myers, FL 33902-2199 – Fax No. (239) 334-3442.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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APPENDIX