IN THE SUPREME COURT
STATE OF FLORIDA

FIRST BAPTIST CHURCH OF
CAPE CORAL, FLORIDA, INC.

Petitioner

vs.

Appeal Case no. SC11-1280
L.T. Case nos. 2D09-5455
06-CA-0001945

COMPASS CONSTRUCTION, INC.

Respondent
_____/

INITIAL 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 Initial 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).

STATEMENT OF THE CASE

First Baptist Church and Compass were co-defendants in a personal injury lawsuit arising from a church-activity-center construction project. R. 1. After successfully moving for summary judgment on its cross-claim against Compass, First Baptist Church moved for attorney fees against Compass. R. 1-2.

The trial court conducted a hearing on whether it could award attorney fees to First Baptist Church in an amount higher than actually charged. R. 3. On December 3, 2008, the trial court rendered its Order Affecting Amount of Attorney's Fees To Be Awarded First Baptist Church. R. 3-4.

Next, the trial court conducted an evidentiary hearing on October 12, 2009 on the amount of attorney fees to be awarded to First Baptist Church. R. 7. On October 22, 2009, the trial court rendered its Final Judgment, awarding attorney fees to First Baptist Church. R. 7-9. Compass then timely filed its Notice of Appeal to the Second District Court of Appeal. R. 10-14.

The Second District Court of Appeal reversed the trial court's decision through an Opinion filed May 27, 2011. App. 1 First Baptist Church then timely filed with the Second District Court of Appeal on June 23, 2011 its Notice to Invoke Discretionary Jurisdiction of this Court. First Baptist Church

timely filed Petitioner's Jurisdictional Brief with this Court on July 7, 2011. This Court accepted discretionary jurisdiction of this case by Order filed on November 29, 2011.

STATEMENT OF THE FACTS

An injured construction worker, Mr. Blasone, sued Compass and First Baptist Church in the Circuit Court for Lee County, Florida, for injuries received while working on a construction project. App. 1-2. First Baptist Church hired Compass as a general contractor to build an activities building on the campus of First Baptist Church in Cape Coral, Florida. Supp. R. Vol. 1, 57-90. As the owner, First Baptist Church cross-claimed against Compass. App. 1-2.

On First Baptist Church's Second Amended Cross-Claim, Compass agreed that First Baptist Church was entitled to an award of attorney fees against Compass. R. Vol. 1, 1. First Baptist Church then moved to determine the amount of the fees. R. Vol. 1, 1-2.

The trial court conducted a hearing on October 20, 2008 on whether it could award attorney fees to First Baptist Church in an amount greater than its counsel actually charged. R. Vol. 1, 3. First Baptist Church's liability insurer provided and paid for First Baptist Church's counsel. App. 1-2. The trial court ruled that it could award attorney fees in an amount higher than actually charged, citing Kaufman v. MacDonald, 557 So.2d 572 (Fla. 1990); and Wolfe v. Nazaire, 713 So.2d 1108 (Fla. 4th DCA 1998). R. Vol. 1, 3-4.

The trial court then determined the lodestar figure for the fees. On October 12, 2009, the trial court conducted an evidentiary hearing on the amount of attorney fees. R. Vol. 1, 7. First Baptist Church's counsel and its attorney fee expert testified at that hearing. R. Vol. 1, 7. The trial court also reviewed the court file. R. Vol. 1, 8.

The trial court rendered its Final Judgment on October 22, 2009 R. Vol. 1, 7-9. In its Final Judgment, the trial court found that counsel for First Baptist Church reasonably expended 115.40 hours. R. Vol. 1, 8. The trial court also found that $350.00 was a reasonable hourly rate for the services of the board certified civil trial attorney representing First Baptist Church. R. Vol. 1, 8. These findings resulted in the trial court awarding $40,390.00 to First Baptist Church in attorney fees against Compass. R. Vol. 1, 8-9.

The Second District Court of Appeal reversed the trial court's decision, holding that First Baptist Church's counsel was limited to the hourly rate of $170.00. App. 1. Citing Ware v. Land Title Co. of Fla., Inc., 582 So.2d 46 (Fla. 2d DCA 1991), the Second DCA concluded that the proper standard of review on appeal was de novo. App. 1-2. Both Compass and First Baptist Church agreed that the proper standard of review on appeal was abuse of discretion.

2 DCA R. TAB II, 4; and TAB III, 7. The Second DCA, however, wrote that the issue of First Baptist Church's right to a higher hourly rate than the one established in the noncontingent fee agreement is a question of law. App. 1-2.

Concerning the fee agreement between First Baptist Church's counsel and its liability insurer, the Second DCA noted that counsel had a written fee agreement for defending personal injury and wrongful death cases against insureds such as First Baptist Church. App. 1-2. The standard hourly rate in the fee agreement was $170.00. App. 1-2. No contingency existed in the fee agreement. App. 1-2.

The Second DCA also noted that the fee agreement contained an alternative fee recovery clause generally seen in contingent fee agreements. App. 1-2. The Second DCA described the alternative fee recovery clause in the attorney's own words: ". . . 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 or the amount to be determined by the court." App. 1-2.

Beginning with the premise that a court-awarded fee may never exceed the fee agreement between attorney and client, the Second DCA reasoned that a court can never increase the standard hourly rate in a noncontingent fee agreement.

App. 1-2. An alternative fee recovery clause is enforceable only in a contingent fee agreement. App. 1-2. Simply put, a noncontingent (hourly) fee agreement cannot contain an alternative fee recovery clause. App. 1-2.

The Second DCA did, however, state that it was unable to reconcile the Wolfe majority opinion with what the Second DCA considered to be the prevailing law on this issue in Florida. App. 1-2. It therefore certified that its decision was in direct conflict with the Fourth District Court of Appeal's decision in Wolfe. App. 2.

ISSUES ON APPEAL

1. The Second DCA should have reviewed this case for abuse of discretion, not de novo.

2. The trial court's decision violated no Rowe principles and was within its discretion.

SUMMARY OF THE ARGUMENT

The Second DCA used the wrong standard of review. The proper standard of review is abuse of discretion. The trial court's determining a reasonable hourly rate was not an abuse of discretion. This case was only about the amount of fees, not entitlement.

Assuming the Second DCA applied the proper standard of review, it failed to properly apply the law. The Rowe principles and procedures are to be applied equally to both contingent and noncontingent fee agreements. An alternative fee clause must be honored regardless of the type of fee agreement. The trial court's decision does not exceed the terms of the fee agreement between First Baptist's counsel and its insurer.

A R G U M E N T

1. **The Second DCA should have reviewed this case for abuse of discretion, not de novo.**

2. **The trial court's decision violated no Rowe principles and was within its discretion.**

Introduction

The sole issue in this case concerns the amount of the reasonable hourly rate component of the lodestar approach. This case has no issue of entitlement. This case is not about the reasonable number of hours spent representing First Baptist Church. 2 DCA R. TAB II, 2.

Furthermore, this case is not enhancement of the lodestar figure through a multiplier. At no time in either the trial court or on appeal has First Baptist Church argued that it was entitled to a multiplier.

This case is not even about whether $350.00 is a reasonable hourly rate for the services of counsel for First Baptist Church. Instead, the sole issue is whether the trial court had the discretion, in light of the fee agreement, to award fees at the hourly rate of $350.00 instead of $170.00.

The issue here does not involve interpretation of the fee agreement between First Baptist Church's counsel and its liability insurer. Rather, the issue concerns whether a trial court has the discretion to enforce this language.

Abuse of Discretion, Not De Novo, Was the Proper Standard of Review in the Second District Court of Appeal

The Second DCA reviewed this case using the wrong standard of review. The sole issue of this case was the amount of the hourly rate component under the lodestar approach. First Baptist Church's entitlement to fees was not an issue. Compass agreed that First Baptist Church was entitled to attorney fees; the dispute centers on the reasonable hourly rate component of the lodestar.

And although not binding on the Second DCA, both Compass and First Baptist Church agreed in their respective briefs that abuse of discretion was the proper standard of review.

The Second DCA cites Ware v. Land Title Co. of Fla., Inc., 582 So.2d 46 (Fla. 2d DCA 1991), as support for its conclusion that de novo review was proper. Ware supports no such conclusion.

The issue in Ware was an award of attorney fees under Section 57.105(1), Fla. Stat. (1989). Ware, 582 So.2d at 46. Thus, the Ware opinion addresses entitlement to fees, not the amount of a reasonable hourly rate. The

Ware opinion contains no discussion of the standard of review.

Other than the opinion in this (and its companion) case, counsel for First Baptist Church has not found any Second DCA decisions applying the de novo standard of review to the amount (as opposed to entitlement) of attorney fees. Generally, the Second DCA reviews issues of entitlement to fees de novo. Ware, 582 So.2d at 46. When the issue concerns the amount of fees, the Second DCA consistently applies the abuse of discretion standard of review. Gibbs Const. Co. v. S. L. Page Corp., 755 So.2d 787, 790 (Fla. 2nd DCA 2000).

Why is the standard of review significant? The de novo standard of review gave the Second DCA the judicial freedom to analyze the trial court decision without having to defer at all to the trial court ruling. Under the abuse of discretion standard of review, the Second DCA would, no doubt, have concluded that reasonable people could disagree about the trial court decision, requiring affirmance.

The Rowe Lodestar Approach Principles Support the Trial Court Decision in this Case

Any argument concerning the amount of a court-awarded attorney fee must begin with this Court's landmark decision in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985). From Rowe we have the lodestar

approach when a court determines the amount of an attorney's fee award. Rowe, 472 So.2d 1146. The lodestar approach contains two elements: the number of hours reasonably spent in the litigation; and a reasonable hourly rate for the attorney's services. Id, at 1150. The lodestar figure is the product of the two components. Id, at 1151.

Of particular relevance to this case is the principle that a court-awarded attorney's fee can never exceed the fee agreement between the attorney and the client. Id. Contrary to the Second DCA's reasoning, the trial court in this case did not exceed the fee agreement by finding that $350.00 was a reasonable hourly rate. This finding simply honored the terms of the fee agreement.

Although the fundamental lodestar approach principles have remained the same since the Rowe decision in 1985, this Court has refined the operation of the lodestar approach. Relevant to the present case is this Court's refinement of Rowe principles in Perez-Borroto v. Brea, 544 So.2d 1022 (Fla. 1989). In Perez-Borroto, this Court held that the Rowe principles apply equally to plaintiff and defendant in a medical malpractice action. Perez-Borroto, 544 So.2d at 1023. Specifically, this Court ruled that the admonition that a court-awarded fee cannot exceed the fee agreement applies equally to contingent and noncontingent fee agreements. Id. As this Court stated, "the playing field must remain balanced and

the principles of Rowe applied equally to both sides." Id. It bears noting that the noncontingent fee agreement at issue in Perez-Borroto did not contain an alternative fee clause as the fee agreement in the present case. Id.

Kaufman v. MacDonald, 557 So.2d 572 (Fla. 1990), further refined the Rowe guiding principle that a court-awarded fee can never exceed the fee agreement. In Kaufman, the plaintiff in a medical malpractice action sought attorney fees from the defendant. Kaufman, 557 So.2d at 573. The plaintiff's fee agreement with her counsel was contingent, but with a twist: the fee agreement provided that the fee would be the higher of the percentage amount of the contingency or the amount awarded by a court. Id. This Court held that the court-awarded fee that was higher than the contingency percentage amount did not violate the Rowe principle that in no case should the court-awarded fee exceed the fee agreement. Id. Because the fee agreement permitted the higher of the two amounts, the trial court award of the higher amount did not exceed the fee agreement. Id.

In light of the mandate of Perez-Borroto that **all** Rowe principles apply equally to plaintiff and defendant/contingent and noncontingent fee agreements, then a noncontingent fee agreement with an alternative fee recovery

clause passes muster under Rowe. The holdings of Rowe, Perez-Borroto, and Kaufman compel this conclusion.

THE FOURTH DISTRICT COURT OF APPEAL'S WOLFE DECISIONS ARE CONSISTENT WITH THE ROWE AND LODESTAR APPROACH PRINCIPLES

Wolfe v. Nazaire was one of the two decisions (the other being Kaufman) upon which the trial court based its decision on the hourly rate component of the lodestar figure. R. Vol. 1, 3-4. In its opinion, the Second DCA analyzes Wolfe in detail. App. 1-2. But the trial court and Second DCA citations to Wolfe are different because there are two Wolfe v. Nazaire decisions, both arising from the same case. The trial court cites to Wolfe I, Wolfe v. Nazaire, 713 So.2d 1108 (Fla. 4th DCA 1998). The Second DCA cites to Wolfe II, Wolfe v. Nazaire, 758 So.2d 730 (Fla. 4th DCA 2000). The issues resulting in two separate appeals to the Fourth DCA in Wolfe are not relevant to the issue in this case. What is relevant is that both Wolfe I and II are consistent on the enforceability of a noncontingent fee agreement permitting the higher of a specified hourly rate or the amount of a court-awarded fee. Wolfe I, 713 So.2d at 1108-09; Wolfe II, 758 So.2d at 732-33.

In Wolfe I, the trial court awarded attorney's fees to a defendant that had prevailed in a negligence action. Wolfe I, 713 So.2d at 1108. The fee

agreement between the defendant and her counsel was not contingent, providing for a fee that was the higher of $85.00 per hour or whatever the trial court might award. Id. The plaintiff argued that the hourly rate for defendant's counsel was capped at $85.00. Id. The trial court award was based on an hourly rate higher than $85.00. Id.

The Fourth DCA, citing Kaufman, held that the language in the defendant's fee agreement permitted the trial court to award fees at an hourly rate greater than $85.00. Wolfe I, 713 So.2d 1108-09. The Fourth DCA briefly set forth this court's approval in Kaufman of a contingent fee agreement with an alternative fee recovery clause. Id. Noting that the only difference between the fee agreement in Wolfe I and the fee agreement in Kaufman was the use of an hourly rate rather than a contingency, the Fourth DCA stated that there was no logical way to distinguish the two cases. Wolfe I, 713 So.2d at 1109.

Wolfe II confirms the Wolfe I holding on the issue of a higher hourly rate, but the bulk of the Fourth DCA's decision in Wolfe II focuses on that trial court's improperly applying a 2.0 multiplier. Wolfe II, 758 So.2d at 732-34. It is undisputed in the present case either that the trial court applied a multiplier or that a multiplier is an issue. It is crystal clear in Florida that a multiplier can only be applied to a contingent fee agreement, not a noncontingent fee agreement.

First Baptist Church respectfully submits that the Second DCA misread Wolfe II. It is apparent from the Second DCA's discussion of Wolfe II that it perceived that the trial court in Wolfe II considered the higher hourly rate to be a multiplier. Compass Construction, 61So.3rd at 1277-78. But the Wolfe II decision describes the trial court there as having applied a multiplier of 2.0 after the lodestar figure was computed with the higher hourly rate. Wolfe II, 758 So.2d at 732. The Fourth DCA's discussion of a multiplier in Wolfe II had nothing to do with the higher hourly rate.

In short, the Wolfe II decision's discussion of a higher hourly rate and the proper application of a multiplier are separate; those discussions are not different ways of looking at the same issue. The Second DCA's analysis of Wolfe II is, respectfully, flawed based on this misperception.

THE SECOND DISTRICT COURT OF APPEAL'S DECISION WILL ADVERSELY IMPACT LITIGANTS WITH LIMITED RESOURCES

The Second DCA's blanket prohibition of alternative fee recovery clauses in noncontingent fee agreements affects a wide variety of cases and litigants. The practical effects reach further than insurance defense counsel.

Keeping in mind that, under the Second DCA's reasoning, only totally contingent fee agreements may contain alternative fee recovery clauses, there are

categories of cases where a contingent fee agreement is an impossibility because no affirmative relief can be sought. Take, for example, a mortgage foreclosure defendant with limited resources. That defendant may have valid defenses but no counterclaim. This limited-resources defendant may be unable to hire competent counsel at the prevailing market hourly rate.

An enterprising, conscientious attorney may wish to represent this limited-resources defendant by charging a lower-than-market hourly rate with an alternative fee recovery clause should the defendant prevail and be entitled to an award of attorney's fees from the plaintiff lender. The contingent fee agreement is not an option because this defendant will not be seeking any affirmative relief.

Under the Second DCA's reasoning, the attorney who wishes to represent limited-resources mortgage foreclosure defendants is limited to either settling for the lower hourly rate or deciding to only take clients who can pay the higher market hourly rate.

It is easy to see this pattern repeating itself in different types of cases involving limited-resources defendants having no possibility of a contingent fee agreement, such as tenant evictions, contract disputes, and commercial paper disputes. And the practical effects would not be limited to limited-resources individuals, but also to struggling cash-strapped small businesses.

A blanket prohibition of an alternative fee recovery clause in a noncontingent fee agreement eliminates the creativity of a flexible noncontingent fee agreement. An attorney then has to choose between pro bono representation or only representing clients who can afford the higher market hourly rate. Any creative middle ground is eliminated.

Elimination of creativity in structuring a noncontingent fee agreement is especially harmful in light of the creativity permitted under the Rules of Professional Conduct. A portion of the Comment to Rule 4-1.5 of the Rules of Professional Conduct of the Rules Regulating the Florida Bar states:

> Fees that provide for a bonus or additional fees and that otherwise are not prohibited under the Rules Regulating the Florida Bar can be effective tools for structuring fees. For example, a fee contract calling for a flat fee and the payment of a bonus based on the amount of property retained or recovered in a general civil action is not prohibited by the rules. However, the bonus or additional fee must be stated clearly in amount or formula for calculation of the fee (basis or rate). Courts have held that unilateral bonus fees are unenforceable. The test of reasonableness and the requirements of this rule apply to permissible bonus fees.

R. Regulating Fla. Bar 4-1.5 (Comment to 4-1.5).

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 Initial 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 Initial Brief on the Merits complies with the font requirements of Rule 9.210(a)(s) of the Florida Rules of Appellate Procedure.

Dated this 20th day of January, 2012.

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APPENDIX