IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA
THIRD DISTRICT

LINDA RICE CHAPMAN,

Appellant,

v. CASE NO. 3D00-3342 & 3D01-789
(Consolidated)

STATE of FLORIDA, DEPT. of HEALTH & REHABILITATIVE SERVICES; Secretary KATHLEEN KEARNEY, in her official capacity; and MORTON LAITNER, in his individual capacity,

Appellees.
_____/

BRIEF AMICUS CURIAE OF THE
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, FLORIDA CHAPTER

_____

ON APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

_____

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SUMMARY OF ARGUMENT

The court below erred in departing from controlling state precedent in applying Florida's offer-of-judgment statute to a losing plaintiff in a federal civil rights action. Not only Florida law, but binding U.S. Supreme Court precedent mandates that attorney's fees in federal civil rights cases are controlled by federal fee law. State courts may apply neutral rules of state procedure to such claims, but federal law preempts such state rules where they result in an outcome less favorable to the civil rights plaintiff. The state offer-of-judgment statute falls within the forbidden zone in that it allows for awards of attorney fees against plaintiffs asserting non-frivolous federal civil rights claims in state courts. Federal law mandates that such plaintiffs are at risk of paying the defendant's fees only where the suit is frivolous. This is a settled exception to the precept that federal law takes the state courts as it finds them. Federal preemption in such circumstances is by no means a one-sided benefit. Supreme Court precedents also prohibit use of state law to expand the liability of defendants or increase the recovery of plaintiffs in federal cases in state court.

Florida courts and the Florida Legislature have, prior to this case, always respected federal preemption regarding attorney fees in federal civil rights cases in state court. Numerous precedents in Florida courts involve the very statute at issue here. Several

others involve closely analogous statutes and rules. In the Florida statute most nearly comparable to the federal law at issue here, the Legislature has specifically adopted federal fee law.

Defendants' analogy of the Florida offer-of-judgment statute to a similar federal rule of civil procedure is spurious. The differences are more important than the similarities. First, the federal rule has no application whatever to losing plaintiffs, only to plaintiffs who win less than the amount offered by the defendant. Second, the federal rule merely reduces the fee award to a successful civil rights plaintiff whose recovery falls short of the offer. It does not shift fees to the defendant in such cases. Third, the federal rule is an act of the same Congress that adopted the civil rights laws and therefore presents none of the federalism and Supremacy Clause considerations that arise from an act of state legislature being interpreted to modify a federal law.

Trial courts in Florida are bound by the decisions of any District Court of Appeal which has decided a question, absent a contrary opinion by another District Court. The court below disregarded that rule. Accordingly, the defendants in this case are not entitled to the presumption of correctness normally enjoyed by the party defending an appeal.

ARGUMENT

I. A STATE LEGISLATURE MAY NOT AMEND AN ACT OF CONGRESS.

A. Background And Framework For Analysis Of This Case.

After granting Defendant Laitner's summary judgment motion against Chapman's cause of action under 42 U.S.C. § 1983, the court below awarded attorney fees of $63,755.50 at 11% interest to Laitner, not under the controlling attorney fee statute, 42 U.S.C. § 1988, but under Florida's proposal for settlement regimen as set forth in § 768.79, Florida Statutes, and Fla.R.Civ.P. 1.442. In so doing the court below acceded to the argument of Laitner that the court should ignore the controlling authority of Moran v. City of Lakeland, 694 So.2d 886 (Fla. 2d DCA 1997),because that case was simply wrongly decided. Neither the Florida Supreme Court nor any other District Court of Appeal except the Moran court has ever before addressed the specific issue of whether Florida's proposal for settlement statute could be used in an action under § 1983. Moran occupies the field alone.

Moran officially established for Florida's offer-of-judgment laws what has been known for many years: that state laws pertaining to attorney fees can not be applied, even in state court, to federal causes of action. The court in Moran noted that federal law preempts state law where the two conflict. The appropriate federal fee provisions grant fees to plaintiffs as a matter of course but to defendants only in extraordinary circumstances where the suit is found to be frivolous. Section 768.79, by contrast, allows fees to defendants and plaintiffs equally, regardless of the merit of the case. Moran therefore held the state law to be

inapplicable because it is trumped by the standard stated in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), that while prevailing plaintiff fees are virtually automatic, prevailing defendant fees are available only in frivolous cases. The Christiansburg standard originated in actions under the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. The Supreme Court extended the standard to § 1983 actions in Hughes v. Rowe, 449 U.S. 5 (1980). In common parlance the term "Christiansburg standard" is used to encompass the Hughes standard as well because they are identical. Likewise, one speaks of fees under § 1983, though the fee provisions governing that statute are actually contained in § 1988.

B. Federal Preemption Of State Law And Procedure Under § 1983.

The U.S. Supreme Court in Maine v. Thiboutot, 448 U.S. 1, 10-11 (1980), required state courts to apply federal fee standards in federal civil rights cases even to the exclusion of contrary state policies that might yield a different result. The Court grounded this decision in the legislative history of § 1988 and the dictates of the Supremacy clause of the U.S. Constitution. The Court noted that a contrary policy would create financial disincentives to bringing § 1983 claims in a state forum. Id. It is difficult to see how this holding, even standing alone, would not completely control the outcome of this appeal. But there is much more.

The Supreme Court has noted on occasion that federal law takes the state courts as it finds them. Johnson v. Fankell, 570 U.S. 911, 919 (1997). But where a plaintiff's federal rights under § 1983 are at issue, this doctrine often yields if the state procedures are less protective of those rights:

> Federal law takes the state courts as it finds them only insofar as those courts employ rules that do not impose unnecessary burdens upon rights of recovery authorized by federal laws.

Felder v. Casey , 487 U.S. 131, 150 (1988) (internal quotations and citations omitted). Section 768.79, by penalizing a plaintiff with a substantial payment of fees to the opposing party that could not have been imposed in federal practice and which serves as a de facto amendment to a federal fee statute that is already comprehensive, plainly falls within the forbidden zone marked off by Felder. The Felder court, in noting that the "federal interest in intra-state uniformity" needs to outweigh state policies, struck down a statute requiring a six month notice of claims period to sue the state. The idea was that federal civil rights laws should be applied equally in every state and in the federal and state courts of any particular jurisdiction to assure the same outcome. Id. at 138. A similar rationale forced Florida courts to cease using contrary state policies in federal civil rights cases. In doing so, the Supreme Court acknowledged the authority of state courts to enforce their own neutral rules of procedure that depart from

federal practice but do not affect the outcome of federal civil rights cases. Howlett v. Rose, 496 U.S. 356 (1990).

Florida's offer-of-judgment statute does not have a neutral impact. As shown in greater detail infra, under the comprehensive federal statutory scheme for attorney fees in § 1983 actions, the plaintiff in this case could not conceivably have suffered so harsh a penalty as this in federal court nor in state court under federal substantive law, absent the de facto amendment to federal law that the trial judge imposed by applying § 768.79 to this case.

The Supreme Court has twice articulated its heightened scrutiny of state procedures that work to the detriment of plaintiffs in civil rights cases while noting a significantly less exacting scrutiny of state procedures detrimental to defendants in such suits. Felder, 487 U.S. at 141-43, grounded this distinction in the historic purpose of § 1983, which was to provide remedies against a unique class of defendants, the officials of the very state making the laws and rules that might impair the plaintiff's rights in state court. Johnson v. Fankell, 570 U.S. 911, 919-20 (1997), elaborated on the plaintiff/defendant distinction in § 1983 law in a case in which the defendants challenged Idaho's court procedures for not permitting them an interlocutory appeal of a denial of their claims of qualified immunity -- an appeal to which they would have been entitled in federal court. The court stressed that a plaintiff's rights and interests with regard to state

procedures in a § 1983 action are federal and thus governed by the Supremacy Clause, but a defendant's interests are state interests. Thus a defendant seeking to escape the stricture of a state rule introduces no federal interest into the equation, but merely counterposes one state interest against another.

> While it is true that the defense has its source in a federal statute (§ 1983), the ultimate purpose of qualified immunity is to protect the State and its officials from overenforcement of federal rights. The Idaho Supreme Court's application of the State's procedural rules in this context is thus less an interference with federal interests than a judgment about how best to balance the competing state interests of limiting interlocutory appeals and providing state officials with immediate review of the merits of their defense.

Id. (emphasis in original).[1]

This is, of course, not to say that federal preemption in § 1983 cases is wholly one-sided. In Moor v. Alameda County, 411 U.S. 693,701-2 (1973),the Supreme Court refused to permit a use of a state law to expand the scope of a defendant's liability or a plaintiff's remedy under § 1983. The guiding principle is the simple doctrine of federalism that a state may not amend an act of

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[1] The dispositive plaintiff/defendant distinction the Supreme Court applied in Johnson was apparently overlooked by this Court's dicta in Sloan v. Toler, 778 So. 2d 1094 (Fla. 3d DCA 2001), suggesting that in a future case, a § 1983 plaintiff would be required to follow Florida's pleading requirements for punitive damages. But even if that were to be, the pleading requirement partakes much more of procedure than the offer-of-judgment statute that actually allows a monetary judgment to be entered against a § 1983 plaintiff with a non-frivolous claim. That is as substantive as it gets.

Congress, for good or ill. In a similar vein, the Supreme Court overturned a state supreme court which had used its own state law to enhance a plaintiff's award under the Federal Employer Liability Act (FELA) by adding prejudgment interest. Since FELA itself did not authorize such interest, state law could not be used to confer a benefit on the plaintiff beyond what Congress had permitted. Monesson Southwestern Railway Co. v. Morgan, 486 U.S. 330, 335-6 (1988). Monesson is particularly instructive in this case in that the Pennsylvania law at issue existed for the purpose of relieving court congestion by promoting earlier settlements. Id. This is also the policy and purpose behind Florida's offer-of-judgment statute.

C. Florida Law And Policy Has Heretofore Respected Federal Preemption in Civil Rights Matters.

Moran v. City of Lakeland, 694 So.2d 886 (Fla. 2d DCA 1997), the controlling authority in this case, did nothing new. It merely applied to the offer of judgment statute legal principles that had been known for many years to apply generally. Garan, Inc. v. M/V Aivik, 907 F. Supp. 397 (S.D. Fla. 1995) (§ 768.79 offer of judgment not applicable in federal admiralty case because it is a substantive rule in direct conflict with federal maritime law expressly requiring each party to pay own fees); Petsche v. Prudential Ins. Co., 607 So.2d 514 (Fla. 2d DCA 1992) (state statute providing for mandatory fees in ERISA cases is preempted by ERISA itself which provides for discretionary fee awards).

In reliance on Moran, the court in Clayton v. Bryan, 753 So. 2d 632 (Fla. 5th DCA 2000), held § 768.79 inapplicable to an action under a federal consumer protection statute with an attorney fee provision tracking that of § 1988 under which a prevailing plaintiff is entitled to fees but a prevailing defendant is eligible for a fee award only on a frivolous suit. One judge dissented, arguing the difference between a statute that penalizes a plaintiff who continues a non-frivolous suit after receiving a settlement offer versus a statute that penalizes a plaintiff who brings the same suit without receiving such an offer. Id. at 634-5 (Harris, J., dissenting). The argument is a mere tautology, asserting a distinction without a difference.

In an analogous situation, a sister court has held that § 1983 preempts the pleading requirements of § 768.72, for all the reasons relied upon in the foregoing authorities. Sanchez v. Degoria, 773 So. 2d 1103 (Fla. 4th DCA 1999).

The Moran principles are rooted in the jurisprudence of the First District as well as that of the Second, Fourth and Fifth Districts. Oldring v. Duval County School Board, 567 So. 2d 519 (Fla. 1st DCA 1990), stands as an often-neglected precursor of Moran. The Oldring court applied the Christiansburg standard to immunize a § 1983 plaintiff from Fla.R.Civ.P. 1.1420(d), providing that a party who has once dismissed an action and who recommences that action against the same party must pay the costs of the old

action before proceeding with the new. The School Board sought both fees and costs as a precondition to the second suit going forward. The First District reached the obvious conclusion that any fees of any sort in a § 1983 action must be awarded according to the Christiansburg standard or not at all.

Thus this Court remains the only District Court of Appeal in Florida not to have yet reached the central question in this case.

Florida has no equivalent counterpart statute to § 1983, but does have a counterpart to the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. That is the Florida Civil Rights Act of 1992 (FCRA). The general policy of the Florida Legislature on attorney fees in civil rights cases may be seen in FCRA, which explicitly adopts the Christiansburg standard in the following words:

> It is the intent of the Legislature that this provision for attorney's fees be interpreted in a manner consistent with federal case law involving a Title VII action.

§760.11(5), Florida Statutes.

II. DEFENDANTS' ANALOGY TO FED.R.CIV.P. 68 IS SPURIOUS.

Defendant/Appellee Laitner argued below, vigorously and at length, that failure to apply the Florida offer-of-judgment statute to this case would result in a windfall to the plaintiff because, had the case been brought in federal court, the defendant would have recovered the same attorney fees under Fed.R.Civ.P. 68, a federal cost-shifting rule that is somewhat analogous to § 768.79.

This argument is completely without merit for at least three

distinct reasons.

A. Losing Plaintiffs Are Immune From Fed.R.Civ.P. 68.

One must look at what happened in this case. The plaintiff lost completely. The court entered summary judgment against her. In that case, Rule 68 has never applied. In Delta Airlines, Inc. v. August, 450 U.S. 346, 352-3 (1981),the Supreme Court definitively interpreted Rule 68 as applying only to cases in which the plaintiff won at trial but recovered less than the amount of the defendant's offer of judgment. Under Delta, losing plaintiffs are immune from Rule 68 because it has no possible application to them by its own language.

From time to time it happens that a trial court is not aware of a controlling Supreme Court precedent. Such was apparently the situation in Smith v. Vaughn, 171 F.R.D. 323 (M.D. Fla. 1997), in which a trial judge awarded Rule 68 attorney's fees against a losing § 1983 plaintiff. Defendants relied upon this case below, but in light of Delta Airlines, that reliance is obviously misplaced.

B. Rule 68 Reduces Prevailing Plaintiff Fees in Civil Rights Cases But Does Not Shift Fees To Defendants.

The Supreme Court's leading Rule 68 case, Marek v. Chesny, 473 U.S. 1 (1985), discussed at length the application of Rule 68 to causes of action governed by the Christiansburg standard. However, the court specifically declined to reach the issue of whether a defendant could ever recover fees from a plaintiff in such cases.

Id. at 4 n.1. The court's entire discussion was on the extent to which a winning plaintiff could have prevailing party fees reduced by winning less than the defendant's offer of judgment. The court did not intimate whether Rule 68 would allow any fees to a defendant in such a circumstance. But other federal courts have filled that gap, as noted by the leading treatise on the subject.

> Literally construed, the language of Rule 68 -- that the prevailing plaintiffs covered by the Rule "must pay the costs incurred by after the making of the offer" -- not only would deny them recovery of their own post-offer attorney's fees and other costs but also would require them to pay the defendant's post-offer attorney's fees. The Marek decision does not address this question, but the lower courts have uniformly rejected such an interpretation, noting that it would fatally conflict with the rule that narrows a defendant's eligibility for § 1988 fees to instances in which she defeats a suit that was frivolous or instituted in bad faith.

Schwartz & Kirkland, Section 1983 Litigation, Vol. II § 8.4 (Panel 1997)(footnotes omitted).

Cases under Rule 68 in Christiansburg-type situations which concluded in one fashion or another that prevailing plaintiffs who fall short of a Rule 68 offer of judgment may have their fees reduced but are not liable for the defendant's fees include: In Re Water Valley Finishing, Inc., 139 F.3d 325, 328 (2d Cir. 1998); Gudenkauf v. Stauffer Communications, Inc., 158 F.3d 1074, 1083-4 (10th Cir. 1998); U.S. v. Trident Seafoods Corp., 92 F.3d 855 (9th Cir. 1996); O'Brien v. City of Greers Ferry, 873 F.2d 1115, 1120 (8th Cir. 1989); Crossman v. Maccoccio, 806 F.3d 329, 333-34 (1st

Cir. 1986); and Grosvener v. Brienen, 801 F.2d 944,946 n.4 (7th Cir. 1986) (dictum).

Thus Defendants' argument is completely misdirected to the extent that it contends: (a) Defendant could have got Rule 68 attorney's fees against Plaintiff in federal court, so (b) the state court should be allowed to copy that practice. The original premise is false.

C. Unlike State Legislatures, Congress Can Amend Acts of Congress.

Finally, let it be noted that even if Rule 68 could trump the Christiansburg standard to the extent of awarding fees to a victorious defendant in a non-frivolous case, the analogy to § 768.79 would still be unavailing. After all, congress adopted both Rule 68 and § 1988 and is perfectly free to modify one of its enactments with another. This is a power that state legislatures do not possess.

III. APPELLEE IS NOT ENTITLED TO PRESUMPTION OF CORRECTNESS.

Pardo v. State, 596 So. 2d 665 (Fla. 1992), established that circuit courts are bound to follow the decision of any District Court in the state unless the circuit's own appellate court has ruled to the contrary. Under Pardo, the Moran decision is binding on every circuit court in Florida because no other appellate court has disagreed with it.

Thus the trial court exceeded its authority in declining to follow Moran. This being so, the Defendants have forfeited the

normal presumption of the correctness of the decision below that is normally enjoyed by appellees.

CONCLUSION

The decision below should be reversed. The Court should hold that § 1983 plaintiffs are immune from attorney fee awards except under federal fee law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct copy of the foregoing was served this 9th day of August, 2001, by U.S. Mail to HELEN ANN HAUSER, ESQUIRE, Dittmar & Hauser, P.A., 3250 Mary Street, Suite

400, Coconut Grove, Florida 33133, Counsel for Defendant/Appellee Laitner; ELIZABETH M. RODRIGUEZ, ESQUIRE, Kubicki Draper, 25 West Flagler Street, City National Bank Building, Penthouse, Miami, Florida 33130, Counsel for Defendants HRS and Kearney; NANCY LITTLE HOFFMAN, ESQUIRE, 440 East Sample Road, Suite 200, Pompano Beach, Florida 33064, Counsel for Plaintiff/Appellant; and FRANK M. SHOOSTER, ESQUIRE, Frank M. Shooster, P.A., 777 South State Road Seven, Margate, Florida 33068, Co-Counsel for Plaintiff/Appellant.

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Richard E. Johnson

CERTIFICATE OF COMPLIANCE

Pursuant to Fla.R.App.P. 9.210(a)(2), I hereby certify that this brief was prepared using Courier 12 point font.

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Richard E. Johnson