IN THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 207350

JOY FRIOLO

Appellant,

v.

DOUGLAS FRANKEL and
MARYLAND/VIRGINIA MEDICAL TRAUMA GROUP

Appellees.

ON APPEAL FROM THE CIRCUIT COURT
FOR MONTGOMERY COUNTY

BRIEF OF METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION AS AMICUS CURIAE

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STATEMENT OF INTEREST

The Metropolitan Washington Employment Lawyers Association (MWELA) is a legal membership organization whose constituents represent plaintiffs in employment and civil rights litigation in the Washington area. The trial court's disposition of the fee petition in this case threatens to undermine important statutory rights which protect employees in the State of Maryland by deterring competent counsel from accepting such cases. Because the outcome will directly affect future client representation, MWELA members have a concerted interest in the fair resolution of the issues on appeal. Therefore, we offer our views to the Court.

ISSUES PRESENTED

1. Whether the circuit court's method of calculating attorneys' fees endangers private enforcement of the law and undermines the public policy behind the fee-shifting statute.

2. Whether the circuit court failed to adhere to settled law by calculating attorneys' fees using an arbitrary percentage of damages rather than the lodestar approach.

STATEMENT OF THE CASE

Appellant, Joy Friolo, and her husband filed a complaint against her employer Douglas Frankel, M.D., and Maryland/Virginia Medical Trauma Group, appellees. In bringing suit, appellant sought unpaid wages in the form of overtime and bonuses. While the complaint included other peripheral causes of action, the crux of appellant's suit was her claim for unpaid wages and overtime for services rendered under Md. Code Ann., Labor & Employment, §§ 3-427 and 3-507.1.

Appellant's counsel began work on this case in May 1999. Over the course of the next two years, the parties engaged in extensive proceedings, including written discovery and depositions, motions and settlement negotiations. A two-day trial was held on June 25-26, 2001. The jury found in favor of Ms. Friolo and awarded her virtually all of the relief she had sought in the Complaint -- $11,788. After the verdict, the defendant unsuccessfully moved for a new trial.

Appellant then submitted a motion for attorneys' fees and costs, consistent with §3-507.1(b) and §3-427. The motion sought reimbursement of fees based on the well-established "lodestar" method, which requires multiplying a reasonable hourly rate by the number of hours reasonably spent on the case. As in many statutory employment claims, and particularly here because the litigation had been long and hard fought, the fees were significantly higher than the amount of unpaid wages recovered. Appellant asked for about $69,000 in fees and expenses, a figure based on the lodestar amount minus ten percent to account for some peripheral claims upon which appellant did not prevail.

The trial court simply ignored the lodestar figure and chose its own novel method for determining fees. Without reference to any supporting authority, and without any cogent explanation, the trial court simply awarded appellant fees in the amount of 40 percent of damages she had won under both statutes. As a result, the fee award amounted to $4,712 -- less than ten percent of the actual fees incurred. Thus, the vast bulk of the time actually expended in securing full relief for appellant went uncompensated.

SUMMARY OF THE ARGUMENT

The trial court erred by fashioning a "proportional fee award" which compensated Ms. Friolo, the prevailing party, for only a small fraction of the costs she incurred in securing compliance with the law. Statutory fee shifting provisions, such as the one at issue here, are designed to foster private enforcement of the laws -- to encourage citizens to act "as a 'private attorney general,' vindicating a policy that [the Legislature] considered of the highest priority." Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968). Federal courts have been dealing with fee shifting statutes since the mid-1960's, and the Supreme Court comprehensively addressed the issue of computation of attorneys' fees under such laws in Hensley v. Eckerhart, 461 U.S. 424 (1983).

In Hensley, the Court endorsed use of the "lodestar," holding that "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Id. at 433. The Court noted that, after the lodestar has been determined, "other

considerations . . . may lead the district court to adjust the fee upward or downward." Id. at 434.

After Hensley, some courts required -- much like the lower court here -- proportionality between the damages awarded on the merits and the subsequent fee award. The Supreme Court rejected that approach in City of Riverside v. Rivera, 477 U.S. 561 (1986), holding that a "rule that limits attorney's fees in civil rights cases to a proportion of the damages awarded would seriously undermine" the statutory policy. Id. at 576. The same is true here. If adopted by this Court, the circuit court's approach would deter competent counsel from taking cases challenging wage and hour violations. And since the wage and hour laws primarily protect lower wage earners, the absence of an effective fee shifting provision would mean that those most in need would be unable to protect their rights. See Battaglia v. Clinical Perfusionists, Inc., 658 A.2d 680, 686 (Md. 1995) (describing the inadequate administrative remedies available to address wage and hour violations).

Use of the “lodestar” has been the established method of calculating fee awards for decades. It fairly compensates prevailing parties and deters recalcitrant employers from violating the law. The trial court simply discarded the lodestar method, without explanation or support. This was clear error, requiring reversal.

ARGUMENT

I. THE CIRCUIT COURT’S “PROPORTIONAL” FEE AWARD IS CONTRARY TO THE PUBLIC POLICY UNDERLYING THE FEE SHIFTING PROVISION

The trial court's disposition of the fee request in this case was extremely unfair to Ms. Friolo in particular and, more importantly, threatens the public policy behind the wage and hour laws. Fee shifting provisions, such as the one crafted by the Legislature under § 3-507.1(b), enable citizens who could not otherwise afford to do so the opportunity to vindicate important rights. In this regard, the Supreme Court in Rivera quoted approvingly from the legislative history of the fee shifting provision at issue in that case:

> "[F]ee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.
>
> ". . . If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court."

477 U.S. at 577-78.

In Rivera, the Court rejected the argument that "fee awards in damages cases should be modeled upon the contingent-fee arrangements commonly used in personal injury litigation" and "proportionate to the amount of damages." Id., at 573-74. And the Court affirmed an award of more than $240,000 in attorneys' fees and costs on a judgment of $33,000 in damages.

An effective fee shifting mechanism is particularly important for wage and hour cases because the amounts in controversy almost always tend to be modest. Indeed, these cases often arise after a termination of employment, where the employer simply refuses to pay the final paycheck or -- as in Ms. Friolo's case -- challenge the

non-payment of some but not all compensation, such as bonuses or overtime pay. Because in most cases the potential recovery is limited, wage and hour cases are less likely to attract competent counsel under a standard contingency fee arrangement. In this way, wage and hour cases resemble statutory civil rights claims, where effective fee shifting provisions are crucial.

The Supreme Court ruled in Rivera that "[a] rule that limits attorney's fees in civil rights cases to a proportion of the damages awarded would seriously undermine Congress' purpose in enacting" the fee shifting statute. 477 U.S. at 576. In particular, "the contingent fee arrangements that make legal services available to many victims of personal injuries would often not encourage lawyers to accept civil rights cases, which frequently involve substantial expenditures of time and effort but produce only small monetary recoveries." Id. at 577. The same is true of wage and hour matters.

Employees most in need of wage and hour protections tend to be among our society's lower paid workers. Accordingly, without an effective fee shifting mechanism, most workers protected by the wage and hour law would not be financially able to enforce their rights in court. And these employees have no realistic non-judicial options, since administrative enforcement of wage and hour law has proven largely ineffective. See Battaglia, 658 A.2d at 686 (noting the "disappearance of financial authorization for the State to prosecute the wage claims of private individuals"). In short, a wage law without an effective fee shifting mechanism lacks teeth. Most employees cannot afford to pay attorneys to pursue these cases, and

counsel will be deterred from taking them if reasonable fees are not awarded when their clients prevail.

The method of fee reimbursement embraced by the circuit court poses a serious threat to the viability of the wage and hour law. As previously stated, amicus is a bar association of attorneys representing a significant number of individuals who would be adversely affected should the method of establishing attorneys' fees chosen by the circuit court be affirmed. Members of MWELA often are approached by such workers – whether they work in construction, day labor, restaurants, custodial, delivery services, or private houses – who are paid under the minimum wage, not paid overtime wages, or otherwise denied compensation undeniably owed to them. Many of these individuals are owed sums, which even at maximum recovery, would be too small for any attorney to take on a usual contingency basis. For example, in the past year alone, one MWELA attorney has been approached by over fifty (50) individuals who work in the low-wage, non-union sector of the construction industry. Many of these individuals are owed wages in the range of $1000 - $2000, often for work performed for which they received no pay at all. Clearly, these individuals cannot pay for an attorney out of pocket, and in fact, it is often a hardship to pay for costs. Given the limited recovery possible even with the awarding of the maximum liquidated damages available, counsel would be unable to afford to represent such individuals were it not for the prospect of recovering attorneys' fees for the actual attorney time spent prosecuting the matter.

Although Ms. Friolo prevailed in her case, she was awarded less than one tenth of the cost she incurred in securing compliance with the law. As the Supreme Court has emphasized under similar circumstances, "the more obstacles that are placed in the path of parties who have won significant relief and then seek reasonable attorney's fees, the less likely lawyers will be to undertake the risk." Hensley v. Eckerhart, 461 U.S. at 456. Without competent lawyers available to take these cases, the law's protections will ring hollow.

Similarly, affirming the trial court's fee award would provide a powerful incentive to employers to wage scorched earth campaigns in defending wage and hour claims, recognizing that running up the cost of the litigation (without a meaningful opportunity for recovery) would further discourage attorneys from pursuing these matters. Litigation costs rise when recalcitrant defendants refuse to participate in timely and meaningful settlement discussions (even when the amount in controversy is modest), or when they engage in dilatory discovery tactics or aggressive motions practice.

As we explain below, the lodestar method, which the trial court ignored, is a straightforward measure of the work put into a case, and recognizes that the degree of effort required of plaintiff's counsel is largely driven by the conduct of the defense. In contrast, a "rule of proportionality would make it difficult, if not impossible, for individuals with meritorious . . . claims but relatively small potential damages to obtain redress from the courts." Rivera, 477 U.S. at 578.

II. THE CIRCUIT COURT ERRED BY NOT APPLYING THE LODESTAR CALCULATION

Federal courts, including the Supreme Court in Rivera, have specifically rejected the parsimonious "proportionality" method of awarding fees when interpreting the analogous fee shifting provisions under 42 U.S.C. § 1988. Instead, the Supreme Court has long held that "the most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Hensley v. Eckerhart, 461 U.S. at 433. The resulting "lodestar" can then be adjusted based on several factors, such as the degree of success on the merits. Id. at 434.

Since Hensley, this "lodestar" method for calculating fees has consistently been applied by the federal courts under statutory fee shifting statutes. Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546 (1986); Blum v. Stenson, 465 U.S. 886, 899 (1984) (lodestar is "presumed" to be reasonable); City of Burlington v. Dague, 505 U.S. 557, 562 (1992) (lodestar enjoys a "strong presumption" that it is the reasonable fee).

The trial court offered no justification for departing from this settled practice. Nor is there any indication from the Court of Appeals of this State that it would favor a departure from the settled fee shifting principles endorsed by the Supreme Court under federal law. On the contrary, although not squarely addressing the issue, the Court of Appeals' most recent discussion of the subject foreshadowed its support for the "lodestar" method:

> In the Federal System, attorney's fees awarded under fee-shifting statutes are calculated in accordance with the "lodestar" approach -- the product of reasonable hours times a reasonable rate. . . . Although we presently have no rule comparable to Fed.R.Civ.P. 54(d)(2) or the procedure set forth in 42 U.S.C. § 1988, a generally similar post-verdict approach may be used.

Admiral Mortgage, Inc. v. Cooper, 745 A.2d 1026, 1036 (Md. 2000) (internal citations omitted).

Of course, a trial court has considerable discretion, in ruling upon a fee petition, to consider the Hensley factors to determine whether the lodestar figure sought by a prevailing plaintiff is reasonable. But here, the trial court did not challenge the reasonableness of the time spent, or of the hourly rate charged, or of the skill of the attorneys, or of the results obtained. Instead, without any explanation, the court simply discarded the lodestar method altogether, in favor of a proportional approach. This was clear error, and is entitled to no deference from this Court. This Court should reverse the trial court's fee award, and instruct the court to follow the lodestar method in awarding fees upon remand.

CONCLUSION

For the reasons set forth above, The Metropolitan Washington Employment Lawyers Association, as amicus curiae, respectfully urges this Court to reverse the trial court's ruling on the fee petition and to order it, upon remand, to calculate fees using the established "lodestar" method.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this __ day of September, 2002, two true and correct copies of the foregoing Brief of Metropolitan Washington Employment Lawyers Association as Amicus Curiae were mailed, first class postage prepaid, to:

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