

**IN THE SUPREME COURT OF FLORIDA**

JOHN ROE,  
Plaintiff/Petitioner,

v.

HSN, LP, and HSN INTERACTIVE  
LLC,  
Defendants/Respondents.

**Case No.: SC07-1602**

2<sup>nd</sup> DCA No. 2D06-2908

L.T. Case No.: 05-294-Ci-7

**PETITIONER'S JURISDICTIONAL BRIEF**

On Discretionary Review from The Second District Court of Appeal from the Circuit Court of the Sixth Judicial Circuit in and for Pinellas County, Florida, Civil Division, Case No. 05-294-CI-7 from Order Determining Attorney Fees by Hon. Bruce Boyer, Judge

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## PRELIMINARY STATEMENT

In this brief, Petitioner JOHN ROE will be referred to by name or as the “Petitioner”, “Appellant”, “Roe” and/or “Plaintiff”. The Respondents HSN LP and HSN INTERACTIVE LLC will be referred to by name or collectively as the “Respondents”, “Appellees”, “Defendants” and/or “HSN”. All emphasis is supplied unless otherwise indicated.

## STATEMENT OF THE CASE AND FACTS

Roe seeks review of an order of the Second District Court of Appeal (“2DCA”) dated June 29, 2007 denying Roe’s Motion for Review of an Order Determining Attorney Fees by the trial court (“MFR”) (“6/29/07 MFR Order” or “Decision”). The basis of jurisdiction is discretionary review under Art. V, Section 3(b)(3), Fla. Const. (1980) and/or Fla.R.App.P., Rule 9.030(a)(2)(A)(iv). The facts of the case are as follows:

Roe sued HSN individually and on behalf of all others similarly situated for, inter alia, violations of the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. §501.201, et.seq. (“FDUTPA”) Final Summary Judgment was entered against Roe based on res judicata. On appeal the 2DCA affirmed and granted HSN’s Motion for Order Determining Entitlement to Appellate Attorney Fees (“Appellate Order”). The Appellate Order **only held** that HSN is the prevailing party in this action brought

pursuant to section 501.201 Florida Statutes (2003) **without** any consideration of equitable factors in determining that amount of attorney fees. Accordingly, the matter was remanded to the trial court to determine the amount of fees to be awarded to the HSN. The trial court granted HSN's Motion to Determine Amount of Attorney Fees ("Attorney Fee Order") against Roe as requested in full and without reduction in the total amount of \$136,732.75. The discretionary attorney fees award was made pursuant to Fla. Stat. §501.2105, Florida Statutes (2005) ("section 501.2105") under the exclusive criteria of *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985) and encompassed both HSN's appellate AND non-appellate attorney fees incurred in the cause without distinction.

Subsequently, Roe filed a Motion for Review of the Attorney Fee Order with the 2DCA regarding the trial court's award of appellate attorney fees. On June 29, 2007, the 2DCA denied Roe's Motion for Review of the Attorney Fee Order.

## **ISSUES ON JURISDICTION**

A. Whether the Decision conflicts with *Hamlin v. Hamlin*, 722 So. 2d 851, 852 (Fla. 1<sup>st</sup> DCA 1999) ("*Hamlin*"), *Douglas v. Douglas*, 795 So. 2d 99 (Fla. 5th DCA 2001) ("*Douglas*") and/or *Faircloth v. Bliss*, 917 So.2d 1005 (Fla. 4th DCA 2006) ("*Faircloth*") requiring reversal and/or remand

based on the trial court's failure to make appropriate findings in the Attorney Fee Order distinguishing between appellate and non-appellate attorney fees awarded for permissible review by the 2DCA.

**B.** Whether the Decision conflicts with *Humane Society of Broward County, Inc. v. Florida Humane Society*, No. 4D06-1239 (Fla.App. 03/14/2007) ("*Humane*") requiring reversal and remand based the trial court's failure to consider equitable factors in determining the amount of attorney fees under section 501.2105 in the Attorney Fee Order and the 2DCA's failure to review of the same equitable factors in the MFR.

**C.** Whether the Decision conflicts with *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150 (Fla. 1979) ("*Applegate*") requiring reversal and remand based on the trial court and/or 2DCA's misconception of a controlling principle of law in determining and/or reviewing the attorney fee award.

### **SUMMARY OF ARGUMENT**

This Court has jurisdiction to review decisions of District Courts that "expressly and directly" conflict with decisions of other courts of appeal or of this Court. The instant decision so conflicts with *Hamlin*, *Douglas* and/or *Faircloth* regarding a failure to make appropriate findings for permissible review; *Humane* regarding consideration of equitable factors in determining

the amount of attorney fees under section 501.2105 and appellate review of the same; and *Applegate* regarding the application of a misconception of a controlling principle of law.

Because the decision would have a serious impact on pleading and motion practice for and/or the prosecution of **avored** consumer protection statutes, and because it has resulted in manifest injustice and a denial of Roe's rights to adequate consideration in determining an attorney fees award and appellate review of the same, this Court should exercise its discretion to review and to reverse the decision of the appellate court.

## ARGUMENT

### **A. Conflict Exists Based On a Failure To Make Appropriate Findings For Permissible Review Of the Attorney Fee Order.**

The **lack of appropriate findings** constitutes **reversible error**, even if there is competent, substantial evidence to support the award. (See, *Hamlin at p. 852*; *Douglas* - without appropriate findings, meaningful appellate review is impossible and reversal and remand for findings is **required**); *Faircloth* - explaining that when an award of attorney fees or costs is appealed and the record on appeal is devoid of competent substantial evidence to support the order an appellate court will reverse the award without remand, but, when there is some competent evidence in record

supporting award, appellate court will **reverse and remand** for additional findings).

The Decision, which denies Roe's MFR, is partially based on the trial court's failure to set forth in its findings the distinction between appellate and non-appellate attorney fees in its order awarding of attorney fees under section 501.2105. This Decision acts in direct conflict with the *Hamlin*, *Douglas* and/or *Faircloth* Cases, *supra*, that require reversal and remand when appropriate findings are not made for review as compared with the 2DCA's decision to limit and/or deny review of the Attorney Fee Order based on the lack of such findings.

Furthermore, the 2DCA's failure to reverse and remand the matter based on the trial court's lack of making appropriate findings regarding the equitable factors as set forth by Roe in his Opposition to Motion To Determine Amount of Attorney Fees and/or as set forth in the *Humane* Case is in direct conflict with the *Hamlin*, *Douglas* and/or *Faircloth* Cases, *supra*, based on the same rationale.

**B. Conflict Exists Based On a Failure To Consider Equitable Factors In Determining The Attorney Fee Award Under Section 501.2105 And Appellate Review Of The Same.**

Appellant has properly set forth in principle the *Humane* equitable

factors in his Opposition To Motion To Determine Amount of Attorney Fees at the trial level and his MFR. The reasonableness of the attorney fee award is not limited to the exclusive criteria set forth in the *Rowe* Case, which is based on a mandatory attorney fee statute, but requires the trial court to exercise its discretion under the “may” language of section 501.2105 by considering any and all the equitable factors as discussed in the *Humane* Case as well, including but not limited to, the financial resources of the parties in determining the amount awarded as attorney fees.

The 2DCA’s self-imposed limiting interpretation and/or review of only the “reasonableness” criteria of the amount of the attorney fee award in Roe’s MFR, presumably under the criteria of *Florida Patient’s Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985) (“*Rowe*”) and not a full review of the trial court’s overall exercise of discretion in determining the amount of an attorney fee award under section 501.2105 is in direct conflict with the *Humane* Case because the Decision does not consider whether and/or to what extent the equitable factors as set forth in the *Humane* Case are applicable in this case and/or have been invoked in the trial court’s determination of the attorney fee award under section 501.2105.

**C. Conflict Exists Based On a Misconception Of a Controlling Principle Of Law In Determining And/Or Reviewing The Attorney Fee Award.**

While a conclusion or decision of the lower tribunal will generally be affirmed if the evidence or an alternative theory supports it, a **misconception** of a **controlling principle of law** can constitute grounds for reversal. See *Applegate* case.

In this instant matter, the trial court expressly states that the criteria for determining attorney fees was controlled by the *Rowe* Case and therefore never considered the existing equitable factors in the *Humane* Case. The trial court's exclusive use of the criterion in the *Rowe* Case to determine the amount of the attorney fees award as set forth on the face of the Attorney Fee Order is clearly an **erroneous** application of law because the *Humane* factors needed to be also considered by the trial court in exercising its discretion in determining the amount of fees awarded.

The 2DCA's refusal to find that a misconception of a controlling principle of law exists regarding the criteria used for determining the attorney fee award and remand the matter based on the trial court's erroneous application of the *Rowe* Case on the face of the Attorney Fee Order is an act in direct conflict with the *Applegate* case.

**D. The Court Should Exercise Its Discretion To Hear The Case Because Of The Decision's Impact Upon Petitioner, The Consuming Public And The Future Pleading And Motion Practice.**

A legitimate basis for this Court to exercise its discretion in reviewing the instant decision exists because, inter alia, the decision a) has resulted in manifest injustice and a denial of Petitioner's rights to adequate consideration in determining the amount of attorney fees to be awarded under the FDUPTA, which adversely impacts on the consuming public's access to the courts for the enforcement of the FDUPTA, and b) expresses a judicial loophole that would have serious impact on pleading and motion practice.

The [FDUTPA] act is intended to protect a consumer from unfair or deceptive acts or practices which diminish the value or worth of the goods or services purchased by the consumer. *Urling v. Helms Exterminators, Inc.*, 468 So. 2d 451, 454 (Fla. 1st DCA 1985). Consistent with this purpose, the legislature has created a civil private cause of action for any consumer who has been aggrieved by any violation of the Act: Fla. Stat. §501.211 Other Individual Remedies. The Florida Legislature intended chapter 501 to be construed liberally. [See Fla. Stat. §501.202].

The *Humane* Court correctly interprets the 1994 amendment of section 501.2105 [from mandatory to a discretionary statute] as a legislative recognition that mandatory fee awards had a chilling effect on consumer plaintiffs bringing suit under FDUTPA. The failure to consider the equitable factors in the *Humane* Case is unfair, unjust and/or will have a **chilling effect** on FDUTPA lawsuits because individual consumers will be less likely to seek enforcement of these consumer protection statutes through the courts with the heavy ax of financial ruin looming over their heads for pursuing such matters against the alleged well-funded corporate culprits. Without such equitable considerations, section 501.2105 **reverts** to a mandatory attorney fee statute.

Furthermore, the decision to deny the MFR based on the trial court's failure to set forth in its findings the distinction between appellate and non-appellate attorney fees in its order awarding of attorney fees under section 501.2105 and without remanding the matter to the lower tribunal to distinguish between appellate and non-appellate attorney fees acts as a **judicial loop-hole** by allowing the trial court to escape review of its attorney fee award and restricting the appellate court from fulfilling its obligations to completely review the trial court's order assessing the amount of appellate attorney fees, creating a travesty of justice.

## CONCLUSION

This Court has jurisdiction because there is express and direct conflict of the instant Decision with those cases discussed above. This Court should exercise its discretion to hear this case because its unjust result and potential impact on pleading and motion practice will have a chilling effect on the consuming public.

Date:

RESPECTFULLY SUBMITTED,  
Plaintiff/Petitioner John Roe

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**CERTIFICATE OF SERVICE**

I, Patricia Fitzgerald, Petitioner’s attorney of record, HEREBY CERTIFY that I have caused a true and correct copy of this brief to be furnished and served to the following person(s) by regular United States Mail and/or by email per agreement between the parties on \_\_\_\_\_, 2007.

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**CERTIFICATE OF COMPLIANCE**

I, Patricia Fitzgerald, Petitioner’s attorney of record, HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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