Supreme Court of Florida

THURSDAY, MARCH 31, 2016

CASE NO.: SC14-1905
Lower Tribunal No(s).:
1D14-3953; 372012CA000412;
372012CA000490

THE LEAGUE OF WOMEN VOTERS OF FLORIDA, ETC., ET AL.	vs.	KEN DETZNER, ET AL.
Appellants/Cross-Appellees		Appellees/Cross-Appellants

Appellants' Motion for Appellate Attorneys' Fees filed with this Court on January 9, 2015, pursuant to Fla. R. App. P. 9.400, is hereby denied.

LABARGA, C.J., and LEWIS, CANADY, and POLSTON, JJ., concur.
PARIENTE, J., dissents with an opinion, in which QUINCE and PERRY, JJ., concur.

PARIENTE, J., dissenting.

I dissent from the denial of fees. In this case, the Appellants took up the exhaustive and costly task of seeking enforcement of the Florida Constitution's mandate that congressional districts be fairly apportioned. Art. III, § 20, Fla. Const. In doing so, the Appellants uncovered evidence that the redistricting process was "tainted" with "improper partisan intent." League of Women Voters v. Detzner (Apportionment VII), 172 So. 3d 363, 392 (Fla. 2015). The Appellants' challenge of the Legislature's redistricting plan vindicated the purpose of the Fair Districts Amendment, which "sought to eliminate the age-old practice of partisan

political gerrymandering," by requiring the Legislature to redistrict in a manner that prohibits favoritism or discrimination. Id. at 369.

Now that the Appellants' costly endeavor is complete, they request that this Court grant their motion for appellate attorneys' fees by adopting the private attorney general doctrine. The private attorney general doctrine encourages public interest litigation by private parties and promotes the vindication of important public rights affecting a large number of people when the government fails to enforce significant public interests. See Arnold v. Ariz. Dep't of Health Servs., 775 P.2d 521, 537 (Ariz. 1989). Because Appellants' successful litigation fits precisely within the bounds of the stringent requirements of this doctrine and because there is no procedural bar to awarding the Appellants' appellate attorneys' fees, I would grant the Appellants' motion.

At the outset, and contrary to the Legislative Parties' assertion, the Appellants are not procedurally barred from seeking appellate attorneys' fees in this case because they did not request fees in their initial pleadings.[1] Florida Rule of Appellate Procedure 9.400(b) plainly provides that "a motion for attorneys' fees . . . shall be served not later than: (1) in appeals, the time for service of the

---

1. The First District Court of Appeal recently concluded that the Appellants were procedurally barred from seeking attorneys' fees incurred at the trial level. See League of Women Voters v. Detzner, No.1D14-5614 (Fla. 1st DCA Mar. 24, 2016). The Appellants' motion for fees before the trial court involved a different procedural posture than the motion before this Court, which seeks fees incurred at the appellate level. Because the First District held that Appellants had waived their fee claim at the trial level, id. at 14, the First District's discussion of the merits of the private attorney general doctrine would be dicta.

reply brief[.]" Here, the Appellants served their motion for appellate attorneys' fees on the Legislative Parties on the same date they served their reply brief in this case, and are thus compliant with Rule 9.400(b). The Legislative Parties' other procedural argument, that the Appellants are barred from seeking fees because they served a copy of their motion for appellate attorneys' fees on the Department of Financial Services (DFS), rather than a copy of a "pleading" as provided in section 284.30, Florida Statutes (2014), is also unavailing. The pleading requirement of Section 284.30 is limited to "types of proceedings" in "which a pleading must be filed," and was therefore not thwarted by the Appellants' serving on DFS a copy of their motion actually seeking appellate attorneys' fees. See N.S. v. Dep't of Children & Families, 119 So. 3d 558, 561 (Fla. 5th DCA 2013).

As to the merits of awarding the appellate attorneys' fees under the private attorney general doctrine, this Court's adherence to the American Rule, which generally limits the award of attorneys' fees to agreement of the parties, contract or statute, Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145, 1147-48 (Fla. 1985), has not been without exceptions. See Moakley v. Smallwood, 826 So. 2d 221, 225 (Fla. 2002) (recognizing an exception to the American Rule based on the "limited inherent authority of courts to impose attorneys' fees against an attorney for bad faith conduct in the course of litigation."). The rule is grounded in the equitable principle that a party prosecuting or defending a lawsuit should not be penalized by having to pay the successful opposing party's attorneys' fees. As the United States Supreme Court has noted, one of the principles underlying the American Rule is that "the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their

opponents' counsel." Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967).

If the American Rule is intended to avoid discouraging citizens from instituting actions that "vindicate their rights," the private attorney general doctrine—which permits recovery of attorneys' fees for societally important and beneficial litigation that was prosecuted by private parties—furthers this principle. In short, I am persuaded by the Appellants' argument that "without the possibility of fee reimbursement, recalcitrant legislatures would also be emboldened to use the taxpayer resources at their disposal to run up their adversaries' costs, thereby shielding constitutional violations from scrutiny by the expense necessary to raise an effective challenge."

The private attorney general doctrine is extremely narrow. As first articulated by the California Supreme Court in Serrano v. Priest, 569 P.2d 1303, 1314 (Cal. 1977), courts award attorney's fees under the private attorney general doctrine according to three factors: (1) "the strength or societal importance of the public policy vindicated by the litigation," (2) "the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff," and (3) "the number of people standing to benefit from the decision."

The reasoning the Idaho Supreme Court employed when it adopted the doctrine over three decades ago in another redistricting case, Hellar v. Cenarrusa, 682 P.2d 524, 531 (Idaho 1984), is particularly persuasive as to why the private attorney general doctrine is commonly recognized as an exception to the American Rule in redistricting litigation. In Hellar, the Idaho Supreme Court considered an appeal from a trial court's decision that found that the Legislature's redistricting

plan violated the Idaho constitution. Hellar, 682 P.2d at 527-28. As in the case before this Court, in Hellar, private parties challenged the constitutionality of the state's redistricting plan. In approving the trial court's finding of unconstitutionality, the Idaho Supreme Court noted:

> Although the Idaho Supreme Court has alluded to the Private Attorney General Theory in the case of the County of Ada v. Red Steer Drive-Inns of Nevada, Inc., [] 101 Idaho 94 [609 P.2d 161 (Idaho 1980)], the Court has not had a case as strong as the instant action for applying such theory. It would be hard to imagine a case which would be more appropriate for an award of attorney's fees under the Private Attorney General Theory than the instant case considering its magnitude and the number of Idaho citizens affected thereby.

Hellar, 682 P.2d at 530-31 (emphasis added).

As the Hellar court noted, the private attorney general doctrine's three factors as enunciated in Serrano are easily met in redistricting litigation:

> 1. The strength or societal importance of the public policy indicated by the litigation.
>
> The Plaintiff is correct in stating that there may well be no greater public policy in a constitutional representative democracy than the policy of insuring that the citizens are properly represented according to the Constitution. If the Legislature is unconstitutionally apportioned, a pall is cast over all legislation which the Legislature adopts.
>
> 2. The necessity for private enforcement and the magnitude of the resultant burden on the Plaintiff. This criteria has been adequately answered heretofore. If the Plaintiffs had not filed their cause of action, [the redistricting plan] would not have been challenged.

3. The number of people standing to benefit from the decision.

The apportionment of the Idaho Legislature affects every Idaho citizen.

Id. at 530-31.

Other states have adopted the private attorney general doctrine outside of the redistricting litigation context, and in doing so have recognized the doctrine as a limited exception to the American Rule. See, e.g., Deleon Guerrero v. Commonwealth Dep't of Pub. Safety, No. 2012-SCC-0030-CIV, 2013 WL 6997105, at *4 (N. Mar. I. Dec. 19, 2013) (rejecting argument that "stare decisis prevents us from adopting the private-attorney-general exception because the American Rule has long been recognized in the Commonwealth," because "our case law has not rejected the possibility of exceptions."); Montanans for Responsible Use of Sch. Tr. v. State ex rel. Bd. of Land Comm'rs, 989 P.2d 800 at 811-12 (Mont. 1999) (recognizing private attorney general doctrine despite both parties' agreement that "Montana has followed the American rule"); Stewart v. Utah Pub. Serv. Comm'n, 885 P.2d 759, 782 (Utah 1994) (adopting private attorney general doctrine under the Supreme Court of Utah's "inherent equitable power" even though "[t]he general rule in Utah, and in the traditional American rule, subject to certain exceptions, is that attorney fees cannot be recovered by a prevailing party unless a statute or contract authorizes such an award.").

In this case, the goal of the Fair Districts Amendment, "to level the playing field" in apportioning legislative districts, Brown v. Sec'y of State of Fla., 668 F.3d 1271, 1281 (11th Cir. 2012), was far from championed by the Legislative Parties. Just the opposite. The Legislative Parties spent millions of dollars at

taxpayers' expense to defend their redistricting plans by hiring private attorneys as well as expert witnesses from across the country. There can be no doubt that the Legislative Parties, which vigorously opposed the Fair Districts Amendment at the outset, see Advisory Opinion to Attorney General re Standards for Establishing Legislative District Boundaries, 2 So. 3d 175 (Fla. 2009), would have never enacted a prevailing party attorneys' fee statute to support the enforcement of the Fair Districts Amendment, making adoption of the private attorney general doctrine in this instance all the more critical. When considering that this litigation proved that the Legislature's congressional redistricting plan was tainted with improper partisan intent in violation of the mandate of article III, section 20 of the Florida Constitution, it cannot be overstated just how necessary the efforts of the private parties in these proceedings were to ensuring the Legislature's faithfulness to, and compliance with, our state constitution.

If the Appellants had not brought their cause of action, the Legislature's unconstitutional, gerrymandered redistricting plan would have remained in place, and this offense to Florida's Constitution and the basic foundation of our democracy would have gone unchallenged. See, e.g., Hellar, 682 P.2d at 531 ("If the Plaintiffs had not filed their cause of action, [Idaho's redistricting plan] would not have been challenged."). Accordingly, I would adopt the private attorney general doctrine as a limited exception to the American Rule, and grant the Appellants' motion for appellate attorneys' fees.

QUINCE and PERRY, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

ks
Served:

DAVID B. KING
JOHN STEWART MILLS
MARK HERRON
ROBERT J. TELFER, III
FREDERICK STANTON WERMUTH
THOMAS ALAN ZEHNDER
COURTNEY REBECCA BREWER
ANDREW DAVID MANKO
VINCENT FALCONE, III
GERALD EDWARD GREENBERG
ADAM MICHAEL SCHACHTER
JOHN M. DEVANEY
MARC ERIK ELIAS
GEORGE N. MEROS, JR.
BLAINE H. WINSHIP
RAOUL G. CANTERO, III
CHARLES TALLEY WELLS
JASON LAWRENCE UNGER
J. ANDREW ATKINSON
ANDRE VELOSY BARDOS
MATTHEW JOSEPH CARSON
GEORGE T. LEVESQUE
ALLISON J. RIGGS
JASON NELSON ZAKIA
JESSE LUKE GREEN
GEORGE EDWARD EPPSTEINER
NANCY GBANA ABUDU
MARTHA ANGELA PARDO
HON. BOB INZER, CLERK
HON. JON S. WHEELER, CLERK
LYNN COLBY HEARN
RONALD GUSTAV MEYER
ABHA KHANNA
KEVIN J. HAMILTON
RYAN SPEAR
MICHAEL A. CARVIN
VICTOR L. GOODE
DORCAS R. GILMORE
ANITA S. EARLS
LOUIS K. FISHER
JERRY WILSON
HON. TERRY POWELL LEWIS, JUDGE
MICHAEL B. DESANCTIS
J. GERALD HEBERT
PAUL M. SMITH
JESSICA RING AMUNSON