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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No. 2012-212006

Unpublished Opinion No. 2012-UP-081(S.C. Ct. App. filed February 15, 2012)

William Alvin Hueble, Jr., ... Petitioner,

v.

South Carolina Department of Natural Resources and Eric Randall Vaughn, ... Defendants,

Of Whom Eric Randall Vaughn is ..... Respondent.

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TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No.

CASES

STATUTES

OTHER AUTHORITIES

RULES

ARGUMENTS

I. No matter the analysis, Petitioner's obtainment of an enforceable judgment against Respondent constituted a material change in the relationship of the parties, establishing the necessary judicial imprimatur for Petitioner's designation as prevailing part; the declination of such status was in error.

Respondent maintains that Belton v. State of South Carolina, 339 S.C. 71, 529 S.E.2d 4, (2000) controls the determination of "prevailing party" status and further suggests the "two-issue rule" bars litigation of the issue in this Court, alleging Petitioner has not even challenged the determination of Respondent's private settlement as an alternative ground of denial. However, Respondent ignores the pertinent portions of Rule 242(d)(2) allowing for the omission of "unnecessary detail" and that "[a] question presented will be deemed to include every subsidiary question fairly comprised therein." Petitioner has adequately questioned the determination, both in the Court of Appeals and through the petitions for rehearing and writ of certiorari, that Petitioner was not a prevailing party as required under 42 U.S.C. §1988. Petitioner has consistently maintained that the failure to initially designate prevailing party status alone requires reversal and remand.[1] The question of prevailing party status has been adequately presented and preserved for review.

"[T]he designation of a party as a prevailing party . . . is a legal determination which we review *de novo.*" Grissom v. The Mills Corporation, 549 F.3d 313, 318 (4th Cir. 2008). Moreover, if, as all seem to agree, such determination constitutes a novel question of law, no deference to the lower court seems required and the court is "free to decide the question based on

[1] If it was error for the trial court to decline prevailing party status to Petitioner (which Petitioner maintains is THE primary question herein) any "additional" declination of prevailing party status (such as due to allegedly improper consideration of the subsequent "confidential settlement agreement" between Respondent and Petitioner's Insurance Company or the curious suggestion that, despite obtaining Judgment as to all causes of action Petitioner had somehow NOT prevailed of the §1983 claim) would likewise constitute error as to prevailing party determination. Such would at best constitute considerations of "special circumstances" which have been equally contested on appeal.

its assessment of which interpretation and reasoning would best comport with the law and public policies of this state and the Court's sense of law, justice and right." Sloan v. SC Board of Physical Therapy, 370 S.C. 452, 466-467, 636 S.E.2d 598, 605-606 (2006). See also Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000); I'ON, LLC v Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716 (2000)[2]

While South Carolina procedural rules may govern, the prevailing party determination necessarily considers federal statutes and case law. Being the only party to have obtained a legally enforceable judgment, Petitioner was the sole party entitled to move for costs as allowed per that judgment, which could include "reasonable attorney's fees . . . . under any **statute**." Rule 54, SCRCP (emphasis added). The statute at issue is 42 U.S.C. §1988, which allows an award of attorney's fees, in this instance, for parties prevailing on claims pursuant to 42 U.S.C. §1983. Petitioner was the only such party.

It is not disputed that, upon the facts in Belton, the South Carolina Supreme Court determined that an Offer of Judgment "does not qualify as a court award." However, unlike the §1988 prevailing party statute, the Whistleblower Act at issue in Belton specifically required a "court or jury award" as a prerequisite to attorney's fees. Therefore, any "settlement" prior to a court or jury award, including a Rule 68 Offer of Judgment, was admittedly an insufficient basis upon which attorney's fees could be awarded under the Whistleblower Act.[3] However, neither Belton nor any other S.C. case has considered whether the acceptance of a Rule 68 Offer of Judgment confers prevailing party status upon a §1983 plaintiff. Accordingly, the more significant holding in Belton is the reminder that "a statute allowing attorney's fees is in

[2] A 2006 Amendment made Rule 68 consistent with S.C. Code Ann. §15-35-400; S.C. Code Ann. §§15-35-520, 530 regarding Judgments are also applicable.

[3] It is reminded that both prejudgment interest and costs other than attorney's fees were awarded in Belton.

derogation of common law and must be strictly construed." Belton, 529 S.E.2d at 5 (2000), citing Steinart v. Lanter, 284 S.C. 65, 325 S.E.2d 532 (1985).

> Because our courts have not spoken on this issue, we may seek guidance from federal cases. *See Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C.328, 330, 404 S.E.2d 200, 201 (1991) ("Since our Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure.") [4]
>
> Cothran v. Brown, 350 S.C. 352, 360, 566 S.E.2d 548, 553 (2002).

Fortunately, following the Belton decision, the U.S. Supreme Court further commented upon "prevailing party" fee shifting statutes through its decision in Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources, 532 U.S. 598, 121 S.Ct. 1835 (2001), which primarily determined that the "catalyst theory" was no longer sufficient for fee shifting purposes. In so ruling, the Buckhannon majority affirmed the Court of Appeals for the Fourth Circuit, which had previously determined that a "person may not be a 'prevailing party' . . . except by virtue of having obtained an enforceable judgment, consent decree, or settlement giving some of the legal relief sought." Buckhannon, 532 U.S. at 602 (2001). While judgments on the merits and settlement agreements enforced through a consent decree were examples provided of approved prevailing party methods, a "material alteration" in the legal relationship of the parties was determined to be the overall prerequisite to prevailing party status and the award of attorney's fees.[5]

The Buckhannon concurring opinion states: "[t]he Court today concludes that a party cannot be deemed to have prevailed, for purposes of fee-shifting statutes such as 42 U.S.C. §§ 1988, 3613(c)(2) (1994 ed. and Supp. V), unless there has been an enforceable "alteration of the

[4] Though admitted differences exist between State and Federal Rule 68, their principles are consistent and both constitute final Judgment.

[5] Though "judgment on the merits" seems to suggest determination by a jury or Judge after hearing, why would such exclude an accepted and unrestricted Offer of Judgment as to all causes of action?

legal relationship of the parties." That is the normal meaning of "prevailing party" in litigation, and there is no proper basis for departing from that normal meaning." Buckhannon, 532 U.S. 598, 622, 121 S.Ct. 1835, 1849 (2001).

The Buckhannon dissenting opinion opens by stating: "[t]he Court today holds that a plaintiff whose suit prompts the precise relief she seeks does not "prevail" and hence cannot obtain an award of attorney's fees, unless she also secures a court entry memorializing her victory. The entry need not be a judgment on the merits. Nor need there be any finding of wrongdoing." Buckhannon, 532 U.S. 598, 622, 121 S.Ct. 1835, 1849 (2001). Is an accepted offer of judgment per Rule 68 not a "court entry memorializing victory?"

Nowhere in Buckhannon is there any suggestion that the obtaining of judgment would not suffice for the determination of prevailing party status.[6] Alternatively, nothing suggests that the private, confidential settlement reached between Respondent and Petitioner's insurance company, which specifically memorialized Petitioner's denial of wrongdoing and opposition to said settlement, could ever confer prevailing party status upon Respondent, even if he had somehow brought a §1983 claim and consideration thereof was deemed appropriate. Respondent's general and continued reference to 66 A.L.R.1115, which was drafted in 1975 (not 2010), a year before the passage of §1988, is of no avail given the circumstances regarding the respective resolution of the claims of the parties; Petitioner has a recorded Judgment, Respondent has a recorded dismissal with prejudice.

Respondent suggests via footnote 3, that, unless accepted offers of judgment are treated as settlements, such mechanism could be effectively used to "contravene and thwart" the statutory processes in place for court approval of death, minor and incapacitated person

[6] Per Respondent's theory, even if the accepted offer of judgment were for $510,000.00, Petitioner would be incapable of achieving prevailing party status.

settlements. While the Court could distinguish such determinations as not involving §1983 determinations of prevailing party status, recognition of an accepted offer of judgment as a judgment would "contravene and thwart" such approval statutes no more than jury or non-jury trial determinations or default judgments. Such remains the primary question to be resolved: is an accepted offer of judgment a judgment? Respondent's argument that Belton and Buckhannon reject prevailing party status as to Petitioner consistently relies upon agreement to the contrary: that an offer of judgment constitutes a private settlement; neither our rules,[7] statutes, language nor common sense require such acceptance.

The decisions in Grissom and Bosley v. Mineral County Commission, 650 F.3d 408 (4th Cir. 2011), of which Judge William B. Traxler served a panel participant, persuade that acceptance of an offer of judgment pursuant to Rule 68 constitutes a judgment, sufficient to confer prevailing party status and an accompanying award of costs, including attorney fees. Respondent suggests misplaced reliance given that the prevailing party issue was not raised in Bosley. However, as referenced previously, no issue was raised because it was not disputed that acceptance of an offer of judgment conferred prevailing party status under §1988. "When a Rule 68 offer of judgment is silent as to costs, a court faced with such an offer that has been timely accepted is obliged by the terms of the rule to include in its judgment an amount above the sum stated in the offer to cover the offeree's costs." Bosley, 650 F.3d at 414. Grissom reiterates "that for a party to be considered a 'prevailing party,' there must be a 'material alteration of the legal relationship of the parties'. . . and there must be 'judicial imprimatur on the change . . . .'" Grissom, 549 F.3d at 318, citing Buckhannon. Grissom thereafter determines that, when judgment was entered pursuant to the offer of judgment:

[7] Are we to accept that Rule 41.1 references to settlements and private settlements include offers of judgment? Surely not, especially when offers of judgment must necessarily consider penalty provisions via the included Consequences of Non-Acceptance. Rule 68(b), SCRCP.

> "[s]uch judgment created a material alteration of the legal relationship between Plaintiff and Defendant by imposing upon Defendant a legally enforceable obligation to pay Plaintiff . . . Rule 68 judgment represents a judicially sanctioned change in the relationship between the parties. . . . [T]here is judicial imprimatur on the change in that the district court has the inherent power to compel Defendant to satisfy such judgment. . . . . **[A]ccepted offer of judgment made pursuant to Rule 68 has necessary judicial imprimatur per *Buckhannon* "in the crucial sense that it is an enforceable judgment against the defendant.""**
>
> Grissom, at 319 (4th Cir. 2008), citing Utility Automation 2000, Inc. v. Choctawatchee Electric Cooperative, Inc., 298 F.3d 1238, 1248 (11th Cir. 2002). (Emphasis added).[8]

Accordingly, per Rule 54, SCRCP; 42 U.S.C §§ 1983 and 1988; Buckhannon, Grissom and Bosley, no matter the route of analysis, Petitioner's obtainment of a legally enforceable judgment established the necessary judicial imprimatur for Petitioner's designation as prevailing party. The rejection of such designation and the failure to award costs, including attorney's fees, was in error, urging reversal.

II. The Trial Court's alternative ruling that, even if Petitioner were "prevailing party," attorney's fees and costs were not recoverable due to special circumstances, was an abuse of discretion.

Petitioner does not disagree that the standard of review in regard to an award of attorney's fees is generally an abuse of discretion standard. However, at least in Bosley, where the interpretation of Rule 68 was also a consideration, the appropriate standard of review was de novo. See Bosley, 650 F.3d at 411. Whether de novo or abuse of discretion, Petitioner maintains reversal is proper. As noted by Respondent, "an abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported

[8] Though admittedly NOT a § 1983 case, the Florida Supreme Court addressed similar arguments in Mady v. Daimler Chrysler Corporation, 59 So.3d 1129 (Fla. 2011) in determining that a consumer who resolves a Magnuson-Moss Warranty action with a warrantor pursuant to Florida's Offer of Judgment statute constitutes a prevailing party per Buckhannon analysis.

factual conclusions." Kiriakides v. School District of Greenville County, 382 S.C. 8, 675 S.E.2d 439, 445 (2009). It is submitted that both circumstances apply in this instance, as detailed by Petitioner in his initial brief. However, it is reminded that the determination of prevailing party status, which the trial court specifically declined to find as to Petitioner, is to be reviewed de novo. Despite the trial court's attempt to provide an alternative and advisory opinion as to why "special circumstances" would prevent any award of costs and/or attorney's fees, it is maintained that the mere failure to confer prevailing party status and award at least minimal costs is error requiring reversal.

Comparisons of competing awards, determinations regarding nuisance value and suggestions that Petitioner did not obtain a desired result all amounted to an error of law, based on unsupported factual conclusions including the continued assumption that an accepted offer of judgment constitutes a settlement. Petitioner's analyses in all prior submissions within the record adequately argue, challenge and demonstrate actual abuse of discretion in finding and/or affirming that special circumstances existed to render an award of costs and/or fees unjust. It is the cursory, conclusory rulings of the trial court and the Court of Appeals, in disregard of the cited cases themselves, which evidence the errors of law and unsupported factual conclusions, all of which necessitate reversal.

CONCLUSION

For the reasons stated, this Court is urged to reverse the determinations of the trial court and Court of Appeals by declaring Petitioner prevailing party; remand with instructions to disregard consideration of any independent, confidential settlement; determine no special circumstances exist to deprive an award of costs and then determine the applicable and reasonable costs, including attorney's fees, to be awarded through application of lodestar analysis.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned certifies that on the 7th day of April, 2015, he caused to be served the Reply Brief of Petitioner on counsel for Respondent and Defendant DNR by regular U.S. mail, copies of the same addressed to:

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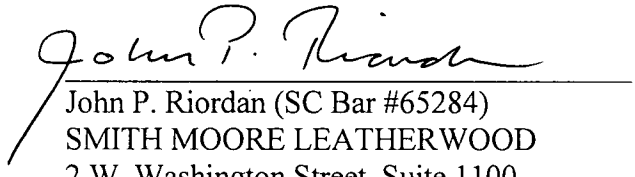

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April 7, 2015

The Honorable Daniel E. Shearouse
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RE: William Alvin Hueble, Jr. v. South Carolina Department of Natural Resources and Eric Randall Vaughn
Supreme Court Number: 2012-212006
Civil Action Number: 2007-CP-24-1056

Dear Mr. Shearouse:

Enclosed for filing is an original and 14 copies of the Reply Brief of Petitioner. We have enclosed an additional copy which we would appreciate your stamping as filed and returning to us in the enclosed envelope. By copy of this letter, I am serving all counsel of record with this Reply.

Sincerely,

SMITH MOORE LEATHERWOOD LLP

for John P. "Jack" Riordan

JPR/lbr
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