

Tolenoa v. State of Kosrae

Supreme Court, Appellate Division
 Benson J.A., Weeks and Skilling Temp JJ.
 4 August 1987

Civil rights – attorney's fees – no attorneys resident in State of Kosrae – whether established market for legal services exists in State of Kosrae – 11 F.S.M.C. 701(3).

10 *Civil rights – attorney's fees – enhancement – whether hourly fee should be enhanced by percentage for vindication of important rights.*

Practice and procedure – costs – attorney's fees – factors to take into account.

The appellant prevailed in the court below in a tort action, and in a civil rights action, against police officers and the employing State of Kosrae. The Court awarded damages and attorney's fees to appellant, but rejected appellant's claim of \$100 per hour as a reasonable rate. The Court awarded \$40 per hour because of the absence of a sufficiently established market for legal services. (There were no lawyers resident in Kosrae.) The Court also rejected the appellant's claim for enhancement of 25 per cent. The appellant appealed on the hourly rate to be
 20 awarded and on the denial of the enhancement claim.

HELD:

- (1) The correct test is the fee customarily applied in the locality for similar legal services. The affidavit of appellant, which set out the hourly rate of twenty-five attorneys in practice in the Federated States of Micronesia and in Guam, demonstrated that \$100 per hour was not an unreasonable rate. *Johnson v. Georgia Highway Express, Inc.* 488 F. 2d 714 (5th Cir. 1974) applied
- 30 (2) The claim for enhancement was rejected. There was no evidence that other legal business had been lost, and the case was not particularly "unpopular".

Cases referred to in judgment:

Alaphonso v. F.S.M. 1 F.S.M. Intrm. 210
City of Riverside v. Rivera 477 U.S. 561, 106 S.Ct. 2686, 91 L. Ed. 2d 466 (1986)
Dickerson v. Pritchard 551 F. Supp. 306 (W.D. Ark. 1982)
Johnson v. Georgia Highway Express, Inc. 488 F.2d 714 (5th Cir. 1974).
Pennsylvania v. Delaware Valley Citizens Counsel for Clean Air 483 U.S. 711, 107 S.Ct. 3078, 97 L. Ed. 2d 585 (1987); 478 U.S. 546, 106 S.Ct. 3088, 92 L. Ed. 2d 439 (1986)

Legislation referred to in judgment:

40 11 F.S.M.C. 701
 42 U.S.C. sections 1983, 1988

Other sources referred to in judgment:

Model Rules of Professional Conduct: General Court Order No. 1983-2

F.L. Ramp for the appellant

D. Daley for appellee (State of Kosrae)

BENSON A.J.**Judgment:***Issue*

50 Whether it was within the proper exercise of the trial Court's discretion to award attorney's fees of \$40 per hour to the prevailing plaintiff in a civil rights case under 11 F.S.M.C. 701 in which the plaintiff's request was supported by an uncontested affidavit showing \$100.00 per hour as reasonable but in which the Court took judicial notice of economic conditions in the F.S.M. and found no established market for legal services.

Holding

We conclude that the proper award of reasonable hourly attorney's fees is \$100, that there does exist an established market for legal services, and that the record does not support the trial Court's award of \$40 per hour.

60 *Facts*

At the conclusion of a three day trial the court found that the plaintiff had been deprived of his rights under the F.S.M. Constitution by the defendant police officer who stripped and beat the defendant and destroyed his property, by the defendant police officer in charge of the jail who permitted the stripping, beating and destruction to occur, and by the defendant State which had a policy of stripping prisoners for punishment and which was responsible for the acts of its employees. The Court awarded damages in favour of the plaintiff and against the three defendants. The Court also allowed attorney's fees to the plaintiff, with the amount to be determined after briefing by the parties.

70 The brief of the plaintiff was supported by an affidavit in which the customary billing rates of twenty five attorneys were set out. The defendants' affidavit failed to mention a reasonable fee. The brief of the defendants asserted that \$100 was too much, but did not suggest an amount.

The court in its opinion awarded \$40 per hour, holding that there did not exist in the F.S.M. such a sufficiently established market for legal services that the approach employed in the United States could be used, that a fee that would be a level existing in the United States would not be appropriate, and that the goal of the statute was to permit attorneys to bring civil rights cases "without great [or substantial] financial sacrifice." *Tolenoa v. Alokoa* 2 F.S.M. Intrm. 247, 257, 258 (Kos. 1986).

80 The number of hours claimed by the plaintiff's attorney was accepted by the trial Court. The trial Court stated, "The lawsuit was meritorious and almost certainly could not have been initiated without anticipation by counsel of the possibility of an attorney's fee award. The legal services rendered in this case were of high quality." 2 F.S.M. Intrm. at 251.

The fee agreement between the plaintiff and his attorneys was contingent, in that

unless the plaintiff succeeded there would be no charge, and that if successful, he would be charged \$100 per hour. At oral argument before this court Mr Ramp admitted, however, that because of the number of hours devoted to the case, the attorneys had later agreed with plaintiff that his liability would not exceed one-third of the judgment – otherwise the plaintiff could have finished the case without any funds for himself.

In his brief before the trial court, in addition to requesting \$100 per hour as reasonable, the plaintiff's attorney requested a 25% enhancement because of the undesirability of the case, the contingency of the fee arrangement, the quality of the legal services, and other factors considered in United States cases in suits asserting civil rights. The enhancement was denied by implication by the trial Court. The request is renewed before this court. The principal ground for the appeal however is the award of the \$40, which the plaintiff contends is not reasonable.

Reasoning

This case was brought under 11 F.S.M.C. 701(1) which states:

(1) Deprivation of rights. A person commits an offence if, whether or not acting under colour of law, he deprives another of, or injures, oppresses, threatens, or intimidates another in the free exercise of enjoyment of, or because of his having so exercised any right, privilege, or immunity secured to him by the Constitution or laws of the Federated States of Micronesia, the laws of the Trust Territory of the Pacific Islands, or the Constitution or laws of the United States of America which are applicable to the Federated States of Micronesia.

Attorney's fees are sought pursuant to 11 F.S.M.C. 701(2) which states:

(3) Civil liability. A person who deprives another of any right or privilege protected under this section shall be civilly liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, without regard to whether a criminal case has been brought or conviction obtained. In an action brought under this section, the court may award costs and reasonable attorney's fees to the prevailing party.

Legislative history is not available which would explain the origin of these provisions. However there exists such a similarity with United States statutes that it appears fair to assume that the F.S.M. used those statutes as a source. The United States provisions are:

Every person who, under colour of any statute, ordinance, regulations, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. Section 1983.

... In any action or proceeding to enforce title, ... the court, in its discretion, may allow the prevailing party, ... a reasonable attorney's fee as part of the costs.

42 U.S.C. Section 1988.

The similarities observed are in the use of "deprive" or "deprivation", the phrase in each of "any right(s), privilege(s), or immunity (immunities) secured . . .", the use in one of "shall be civilly liable," and in the other of "shall be liable" and finally that "reasonable attorney's fee(s)" "may" be awarded to the "prevailing party".

We should consider the decisions of the United States (the only foreign jurisdiction cited) in arriving at a decision, without being bound by them. *Alaphonso v. F.S.M.*, 1 F.S.M. Intrm. 210, 213 (App. 1982).

140 In enacting Title 42, section 1988, the Congress of the United States expressed approval of the reasoning of *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) in regard to fixing a reasonable attorney's fee. *City of Riverside v. Rivera*, 477 U.S. 561, 106 S.Ct. 2686, 2691, 91 L. Ed. 2d 466 (1986). According to *Johnson* the factors to be considered are:

- (1) The time and labour required.
 - (2) The novelty and difficulty of the questions.
 - (3) The skill requisite to perform the legal service properly.
 - 150 (4) The preclusion of other employment by the attorney due to acceptance of the case.
 - (5) The customary fee.
 - (6) Whether the fee is fixed or contingent.
 - (7) Time limitations imposed by the client or the circumstances.
 - (8) The amount involved and the results obtained.
 - (9) The experience, reputation, and ability of the attorneys.
 - (10) The "undesirability" of the case.
 - (11) The nature and length of the professional relationship with the client.
 - (12) Awards in similar cases.
- 160 448 F.2d at 717-719.

In the case before us, the only issue presented relates to number 5, the customary fee.

The Chief Justice of this court has made the Model Rules of Professional Conduct applicable to those practicing before this court. General Court Order No. 1983-2. Rule 1.5(a) provides:

A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

- 170 (1) the time and labour required, the novelty and difficulty of questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- 180 (8) whether the fee is fixed or contingent.

Only number 3 of this rule applies to the issue presented by this appeal - the fee customarily charged in the locality for similar legal services. Thus under either

Johnson or the Model Rules, the guidance for the court is identical.

The affidavit submitted to the trial court by the plaintiff set forth the hourly rate charged by 25 attorneys, including the two who represented the plaintiff. The attorneys were identified by name. The trial court found that "most, if not all of them, have appeared in cases before this Court." 2 F.S.M. Intrm. at 253. We have tabulated the information appearing in the affidavit as follows:

	Customary Hourly Rate	No. of Attorneys
190 Attorneys residing in Guam	\$125.00	8
	\$120.00	2
	\$115.00	1
	\$100.00	2
200 Attorneys residing in Saipan	\$120.00	2
	\$110.00	1
	\$100.00	1
Attorneys residing in Palau	\$125.00	1
	\$ 75.00	(work out of court) 1
	\$125.00	(work in court)
210 Attorneys residing in Pohnpei	\$100.00	4
	\$ 50.00	(part time practice) 1
	\$ 50.00	1
Total		25

It appears from this factual and unopposed presentation that persons in Kosrae wishing to obtain the assistance of counsel are able to employ attorneys. We do not find it significant that no attorneys reside in Kosrae because there are attorneys who 220 will come to Kosrae to render their services.

In the United States, in some cases the hourly fees approved have been higher, and in some cases lower than the \$100 approved in this case. This does not mean that we are approving a fee set at a United States level. The correct test is the customary fee in the locality in which case was tried. That is the test that the court has applied.

We conclude from a review of the entire record that sufficient data exist from which a reasonable hourly attorney's fee can be determined; that legal services are available to represent litigants in Kosrae; and that no monopoly exists by those furnishing the services.

230 We do not find support in the record for the \$40 chosen, rather than \$25, \$65 or another amount. The trial court described certain economic and social conditions existing in the F.S.M. that are distinctly different from conditions in the United

States. The conditions were not related to the dollar figure awarded as reasonable attorney's fees; they were not factual findings as to the dollar amount.

We conclude that the billing of \$100 per hour, which represents the customary rate for plaintiff's attorney, is at or near the rate other attorneys customarily charge, is not factually disputed by the defendants, and represents properly the amount authorized by the Model Rules.

240 In some cases in the United States the courts permit an upward adjustment or enhancement of the fee, usually expressed as a percentage, in cases where they find this justified because of the undesirability of the case, the risk involved, the vindication of important rights, or other reasons. *Dickerson v. Pritchard* 551 F.Supp. 306, 313 (W.D. Ark. 1982). The difficulties involved in an enhancement case in which a contingency fee was arranged between the attorney and the prevailing party may be seen in *Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air* 483 U.S. 711, 107 S.Ct. 3078, 97 L. Ed. 2d 585 (1987).

The plaintiff requested such enhancement. We find that the trial court was entitled to refuse the request in the exercise of its discretion.

250 In his presentations before this court the plaintiff failed to make a compelling case for enhancement, even if such a practice were to be adopted in the Federated States of Micronesia, a question we do not decide. In particular, the plaintiff did not establish that the case was so unpopular and undesirable that it resulted in the loss of other legal business. On the contrary, it was represented to us that the State of Kosrae itself investigated the incident giving rise to this case, and punished those employees at fault. We conclude that there is no reason to disturb the denial of the enhancement by the trial court.

For the reasons stated the award granted by the trial court is reversed, and the matter is remanded to the trial court for the entry of an award of \$100 per hour.