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Reply Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Lewis M. Steel '63

No. 83-1336

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MARY JONES et al.,

Petitioners,

vs.

AMALGAMATED WARBASSE HOUSES, INC., et al.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RICHARD F. BELLMAN*
LEWIS M. STEEL
Steel & Bellman, P.C.
351 Broadway
New York, New York 10013

LAWRENCE GROSBERG
New York Law School
57 Worth Street
New York, New York 10013

KAREN FREEMAN
470 Lexington Avenue
New York, New York 10037

Attorneys for Petitioners

* Counsel of Record

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This reply brief is filed in light of this Court's recent ruling in Blum v. Stenson, ___ U.S. ___, No. 81-1374, decided March 21, 1984, and to correct certain factual errors set forth in respondents' briefs. Most importantly,

this Court in Stenson held in clear and unequivocal terms that attorneys' fees in civil rights cases are to be calculated based upon "prevailing market rates." The Court also reaffirmed the strong policy which favors negotiation and settlement by the parties of counsel fees obtained under the Civil Rights Attorneys' Fee Awards Act of 1976. This petition should be granted as the decision below approves a cutback of a negotiated fee to rates far below prevailing market rates and undermines the goal in Stenson of achieving a settlement of fee questions.

ARGUMENT

I.

The Ruling Below Violates the Requirement that Counsel Fees in Civil Rights Cases be Calculated on the Basis of Prevailing Market Rates

There is no disagreement in this record that the fees granted to petitioners' counsel, as reduced by the district court, resulted in an award far below prevailing market standards in the New York metropolitan area for attorneys of comparable experience engaging in comparable work. Indeed, the consent order states that $129.00 an hour rate agreed upon represents a "reasonable and appropriate amount for fees and costs to be taxed against the State defendants."

Respondents, however, argue that the writ should not be granted because they claim petitioners are interjecting a prevailing rate issue for the first time in this Court. This is simply untrue. In the district court petition-

ers challenged the fee reduction on the ground that counsel were entitled to prevailing market rates. At the district court level, petitioners submitted affidavits setting forth prevailing rates in New York City for comparable work handled by counsel of comparable experience. Such rates, which were not challenged, were from $175 to $225 per hour. Joint Appendix, filed in Court of Appeals, 114a-116a. The issue as to counsel's entitlement to prevailing market rates was also fully briefed in the Court of Appeals. Appellants' Brief on Appeal, pp. 26-33.

Under Stenson it is now clear that it is inappropriate to award counsel fees in civil rights cases at less than prevailing market rates. Indeed, this Court reaffirmed that Congress, in enacting the Fees Awards Act, "directed that attorney's fees be calculated

according to standards currently in use in other fee shifting statutes . . ." Slip op. at 6.

The district court, in its first ruling, justified reducing the fees below market rates on the basis that the work involved was not as difficult as work done in other cases and the result achieved was not as substantial as in another civil rights case the court had decided. Petition, 42a. After petitioners had challenged the fee reduction, the district court in its second ruling added that many of the hours in counsel's work entailed settlement negotiations, that there was a comparatively small risk to plaintiffs' counsel involved in bringing the action and that the settlement represented a compromise and not a win for plaintiffs. Petition 55a-56a. Petitioner Warbasse, in its

reply brief, also argues that petitioners' counsel did not keep contemporaneous time records.

None of these explanations warrant deviation from the Stenson standard. Clearly, in the New York metropolitan area attorneys do not lower rates to undertake settlement negotiations. Whether or not settlement negotiations are more or less taxing than drafting a complaint is irrelevant. In any event, petitioners submit that settlement negotiations constitute one of the more important and difficult attorney functions. The nature of the work performed simply does not justify the drastic fee reduction in this case.

It is difficult to understand how the district court concluded there was small risk to petitioners' counsel in filing this matter. This litigation raised unprecedented legal issues. The challenge to Warbasse maintaining a

special waiting list for children of cooperators presented a novel theory under the Fair Housing Act. Petitioners' claim emanated from an effect-impact argument under the Act, a virtually uncharted area of law. Petitioners had no evidence of intentional discriminatory acts on the part of Warbasse or the State respondents. Indeed, the challenged practices had all been sanctioned by the State respondents. This was high risk litigation.

It is a gross misrepresentation of the record for respondents to argue that there was relatively little success obtained by the petitioners. This argument simply fails to recognize what was accomplished through this litigation. The district court itself acknowledged that counsel had secured "significant relief" for the class represented. Petition, 31a.

As a practical matter, the petitioners charged that the practice at Warbasse of maintaining children's lists was illegal. The settlement ended that practice. Petitioners claimed they were deprived of housing because of the defendants' policies. The settlement obtained almost ten percent of the units in a very large housing project for the class members on a preferential basis. Thereafter, minorities will secure units through affirmative marketing procedures now required of Warbasse. These procedures will insure minorities equal access to units at Warbasse.

Respondent Warbasse also argues that below market rates were appropriate as petitioners' counsel failed to present adquate time records. In fact, petitioners' counsel discussed at length with the Magistrate the number of hours expended on this case, advised that contemporaneous records had been main-

tained, agreed upon a fee and incorporated that fee into the stipulation of settlement. The stipulation was presented to the district court with all counsel requesting approval.

On April 15, 1982, the parties appeared before the district court, at which time the Court requested counsel to file an affidavit to support the negotiated attorneys' fees. At that time, the court specifically stated that a detailed breakdown of the hours counsel had spent on this case was not required. Joint Appendix, 76a. In reducing the fees pursuant to its ruling of November 15, 1982, the district court did not question the number of attorney hours spent on this case. The court merely reduced the hourly rate.

At a later date, respondent Warbasse, in support of the court's action in reducing the hourly rate, argued that inadequate records had been presented.

Counsel for the petitioners then wrote the district court stating, "if the Court does believe that further documentation of hours is necessary over what has already been presented to the court, counsel is prepared to give a detailed breakdown of hours." Joint Appendix, 118a-119a. Further documentation was not requested by the court. The Second Circuit, in fact, specifically noted that neither its decision, nor the district court ruling, was based upon inadequate time records. Petition, 17a-18a.

On the record before this Court, the below market rates granted in this matter cannot be reconciled with the Stenson holding.

II.

The Decision of the Court Below Is Inconsistent with the Goal in Stenson to Achieve Negotiated Settlements of Attorneys Fees in Civil Rights Cases

In the petition filed with this Court, it is argued that the lower court's ruling is fundamentally inconsistent with this Court's ruling in Hensley v. Eckerhart, ___ U.S. ___ 76 L.Ed.2d 40 (1983), in that voluntary resolution of attorney fees issues are to be encouraged. This principal was reaffirmed in Stenson. In fact, this Court went further to state that a district court "has a responsibility to encourage agreement." Stenson, supra, slip op. at 14, n. 19. In so ruling, this Court noted that the district court has the intimate knowledge of the litigation which places it in a position to encourage the parties to settle fee questions.

In the instant case, the fees were negotiated in the presence of a Magistrate, the same court official who had shepherded the negotiations between the parties to a successful out of court resolution. See Magistrate's Report, Petition, 62a. There was no basis whatsoever for the district court to override the Magistrate's recommendation, which was supported at the time by all the parties, and substitute its judgment to cut back substantially on the agreed upon fees.

For the reasons set forth in the Petition, the decision below cannot be reconciled with the holdings in Hensley and Stenson, confirming the importance of negotiation and settlement of counsel fee questions.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition, a writ of certiorari should be granted and the decision below reversed in light of Stenson.

Respectfully submitted,

RICHARD F. BELLMAN*
LEWIS M. STEEL
Steel & Bellman, P.C.
351 Broadway
New York, N.Y. 10013

LAWRENCE GROSBERG
New York Law School
57 Worth Street
New York, N.Y. 10013

KAREN FREEMAN
470 Lenox Avenue
New York, N.Y. 10037

Attorneys for Petitioners

* Counsel of Record

COUNSEL PRESS INC., 11 EAST 36TH STREET, NEW YORK, NEW YORK 10016; (212) 689-1303

(1856)