ORIGINAL

In the

Supreme Court of the United States

ROADWAY EXPRESS, INC.,

PETITIONER,

V.

J. D. MONK, ET AL.,

RESPONDENTS.

No. 79-701

Washington, D. C.
April 14, 1980

Pages 1 thru 37

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IN THE SUPREME COURT OF THE UUNITED STATES

ROADWAY EXPRESS, INC., Petitioner,	:	
v.	:	No. 79-701
J. D. MONK, ET AL., Respondents.	:	

Washington, D. C.,

Tuesday, April 14, 1980

The above-entitled matter came on for oral argument at 1:21 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

M. CURTISS McKEE, ESQ., Fuselier, Ott, McKee & Flowers, 2100 Deposit Guaranty Plaza, Jackson, Mississippi 39201; on behalf of the Petitioner

HERSCHEL E. RICHARD, JR., ESQ., Cook, Yancey, King & Galloway, 600 Commercial National Bank Building, Shreveport, Louisiana 71101; on behalf of the Respondents

HARRIET S. SHAPIRO, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C. 20530; as amicus curiae

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 79-701, Roadway Express v. Monk

Mr. McKee, you may proceed whenever you are ready.

ORAL ARGUMENT OF M. CURTISS McKEE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. McKEE: Thank you, Mr. Chief Justice, and may it please the Court:

This case is before the Court on a writ of certiorari to the Fifth Circuit Court of Appeals. The issue is whether attorneys who multiplied proceedings in an action under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. section 1891 and thereby unreasonably and vexatiously increased the costs may be personally assessed pursuant to 28 U.S.C. 1927 with attorneys' fees as part of the excess costs incurred by an opposing party as a result of such conduct.

The case originated in the Western District of Louisiana where it was dismissed without prejudice by reason of the failure of the plaintiffs to answer the defendant's interrogatories as ordered by the court, the failureof the plaintiff to produce one of the plaintiffs for a deposition, the general failure to prosecute the suit and ultimately the plaintiffs' abandonment of

their claim.

The court after the dismissal and after an evidentiary hearing on the matter of the assessment of costs at which the lawyers for the plaintiffs were represented by their malpractice carrier, the court awarded fees as costs pursuant to 1927 and under the terms and provisions of Title VII and section 1988. It allowed attorneys fees as part of the costs and in the case of Hutto v. Finney as decided by this Court in 1978, attachable costs were equated with attorneys fees under 42 U.S.C., section 1988.

Our argument to the Court is plain and simple because we rely on the plain meaning of the statute and where the plain meaning of the statute is present, there is no construction necesary.

Now, the Fifth Circuit said that you could not combine these statutes, 42 U.S.C. and 1988 and Title VII and 1927 on the other hand, that you could not combine them to obtain what the Fifth Circuit called a hybrid result.

The Court of Appeals did this without any explanation, without any discussion of the intolerable cure of relationship of these statutes and without explaining away the plain language of the statute and

without pointing to any absurd, futile or unreasonable results.

Where our costs are defined for determination under section 1927, it must rely on other statutes for its definition and upon which statutes may it rely? The United States and the respondents say that it may rely on only two statutes and that is 27 U.S.C. 1920 and 1923. They admit that section 1927 must resort mechanically to other statutes for definition, but they draw a barrier at the resort to Title VII in section 1988.

The respondent and the amici government don't demonstrate any statutory or other limitation on section 1927's access to Title VII and section 1988 for the definition of cost. There is nothing in any statute to prohibit this access to these statutes for cost.

Neither the respondents nor the United States or any of the amici in this case assail the bare language of the statute. Their efforts are devoted to unsubstantiated, unsupported speculation and postulation on which they offer no cases and no authority.

QUESTION: Mr. McKee, one reason advanced by the Court of Appeals for the Firth Circuit was that 1927 should be construed strictly because they regard it as penal in nature. Did you agree with that?

MR. McKEE: Your Honor, we could agree with it

for the purposes of argument.

QUESTION: Do you think it would be consistent with the language in Newman v. Piggie Park Enterprises, where they say that the -- the Court said that on attorneys fee awards, they flow almost as a matter of right if he were to prevail on the merits?

MR. McKEE: Well, Your Honor, there is authority saying that such statutes are penal to one group of people and not penal as to the others and they are remedial as to others.

QUESTION: What authority is that? I mean is it authority from this Court?

MR. McKEE: No, it is not. It is Circuit Court authority, Your Honor.

QUESTION: Well, 1927 runs against the party, doesn't it?

MR. McKEE: No, sir, 1927 now is the one that shifts the cost to the lawyers.

QUESTION: Yes, but the attorneys fee provision says that the party is to pay the attorneys fee.

MR. McKEE: Well, Your Honor, there is some legislative history that says that it is against the party. The actual language of Title VII and the actual language of 42 U.S.C. 1988 are that the award of costs are to the prevailing party.

QUESTION: Well, normally they are taxed against the losing party.

MR. McKEE: Normally that is correct, yes. Normally the statute deals in terms of parties and they don't deal in terms of lawyers per se. 1927 is a special statute dealing with lawyers themselves for the prosecribed conduct that is described in 1927.

QUESTION: Well, was it part of the theory of that that clients should not be penalized for the conduct of the lawyer when the client is not in as good a position to evaluate the technique as the lawyer is?

MR. McKEE: That is absolutely correct, Your Honor, and that is what was done --

QUESTION: And that was not done, for example, with frivolous appeals without any statutory authority under the inherent power of the court to protect its operations?

MR. McKEE: Yes, they have, Your Honor.

QUESTION: I hope they have because we have done it from the bench on the Court of Appeals in the District of Columbia Circuit where there was a frivolous appeal and we ordered the payment by the lawyer, not by the client.

MR. McKEE: Yes, sir. Section 1927 must have its cost definition from some other statute. Everybody

agrees on that. Everybody agrees that you must go to 1920 and 1923 to get anything at all that that you are going to pump into 1927 to make it make any sense. But Title VII and section 1988 are also cost defining statutes and there are at least -- other than those two, there are at least 34 others.

There is nothing about the language of any of those statutes that prohibits their application to section 1927. There is nothing that would prevent 1927 costs from including attorneys fees as dictated by the statutes.

We also maintain before the Court that the bad faith exception to the American rule supports this award. The same shifting process is available. The client is responsible under the Lincoln-Wabash doctrine and section 1927 would shift such an award to the lawyer given the proper finding.

Our position before the court on the policy aspects of it is that the policy of all these statutes are that meritorious suits will be expeditiously conducted by competent counsel of impeccable integrity, strictly on the issues and nothing that we suggest is alien to that policy whatever.

If the Court please, with our argument relying upon the plain meaning of the statute, such as it is, we would reserve the balance of our time, if there are no

questions, for rebuttal.

QUESTION: Yes, I have one question. Did the District judge allow the attorneys fees in full or did he restrict them to the excess over reasonableness?

MR. McKEE: Your Honor, he allowed them in total. There were some adjustments made to them, but as a practical matter he allowed them in total because he considered that this suit was improvidently brought from the very beginning and that it was the responsibility of these lawyers.

QUESTION: And you think that is in line with the statute?

MR. McKEE: To the extent, Your Honor, that the decision may be read that he felt that the lawyers were completely responsible for this situation, I might add in his finding that he found that these lawyers had taken advantage of three unfortunate clients and that they had enlarged upon their claim, and to the extent that you can attribute that from the very beginning, I think the decision is correct, Your Honor.

QUESTION: Then in effect you are saying the entire proceeding was unreasonable and vexatious?

MR. McKEE: That's correct, Your Honor. I don't think you can read it any other way.

QUESTION: Therefore do you read the District

judge as saying there was no occasion to try to divide or allocate?

MR. McKEE: The entire thrust of the decision, Mr. Chief Justice, is that it was an unfortunate matter from the very beginning. One of these plaintiffs --

QUESTION: Well, it had to be more than unfortunate, it had to be unreasonable and increase the costs. It was vexatious. In other words, it was -- they don't use the term "frivolous" but isn't there some concept of abuse of the processes of the court implicit in this statute?

MR. McKEE: Yes, sir, I think so. I don't think it goes quite as far as bad faith, Your Honor, but I think it is certainly abusive of the process of the court.

QUESTION: You wouldn't say I suppose that just because the District Court found that the litigation had been vexatious and unjustified that the District Court was bound to award costs, or that even if he awarded the costs, that he was bound to include attorneys fees as part of the costs?

MR. McKEE: No, I wouldn't, Your Honor.

QUESTION: So what is his standard?

MR. McKEE: Well, I understand this Court's decision in Christiansburg that Christiansburg did not

dictate under what standards all of these things should be allowed. The only thing that Christiansburg said and the only thing that I think this Court has ever said about these standards are that these are guidelines for the judge's discretion.

QUESTION: Well, my --

MR. McKEE: So discretion --

QUESTION: My question really goes to what if we happened to agree with you that the Court of Appeals was wrong, what do we do then? We don't necessarily reinstate the District judge.

MR. McKEE: Your Honor, it was remanded to the District Court for what the court called a proper award. What we construe that to mean, and my brother on the other side, Mr. Richard and I have entered into a stipulation as far as the District Court is concerned, is that the purpose in that was to remove the attorneys fees from the award.

QUESTION: I know, but assume we agree with you, that doesn't necessarily mean that you can keep your District Court judgment, does it?

MR. McKEE: Yes, I think it does, Your Honor.

QUESTION: Why? You might say that there is some other standard that ought to be followed. The Court of Appeals said you never include attorneys fees, right?

MR. McKEE: That is what they say, yes.

QUESTION: What if we agree with you that sometimes you can? Do we automatically then agree with the District Judge?

MR. McKEE: I am afraid I don't understand your question, Mr. Justice White. It is difficult for me to follow it.

QUESTION: If we thought the District Court had over-reached a little bit in the exercise of discretion, we might conceivaly say you went too far when you allocated all of these costs. That is possible, but your position is, I take it, that he did not abuse his discretion and there should be an outright reversal here.

MR. McKEE: Well, Mr. Chief Justice, I don't want to eliminate the possibility that that may happen. That is Mr. Justice White's question. If this Court should feel that he has overstepped his bounds to the extent that he has awarded too much or that he did not find the point at which the excess costs began, then obviously it should be remanded to the Fifth Circuit with instructions to remand it to the District Court with those instructions.

QUESTION: Mr. McKee, isn't there an intermediate ground to simply remand it to the Fifth Circuit with instructions for them to decide whether or not they think

the District Court allowed the proper fees? They didn't reach that question.

MR. McKEE: Your Honor is correct, they did not reach the question.

QUESTION: And they might well, if they say some fees are awardable, might have said, well, these are a little too much, but that is up to them to decide in the first instance.

MR. McKEE: It was definitely established in the Fifth Circuit decision that there is no question but that the proceedings were multiplied and the conduct fitted --

QUESTION: And some fees would be appropriate if they are ever appropriate.

MR. McKEE: Yes, sir.

QUESTION: But they didn't address the question of how much should be awarded.

MR. McKEE: That's correct.

QUESTION: So we would say -- if we agree with you, we should reverse and ask the Court of Appeals to see if the District Court abused its discretion.

MR. McKEE: That's correct.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Richard.

ORAL ARGUMENT OF HERSCHEL E. RICHARD, JR., ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. RICHARD: Mr. Chief Justice, and may it please the Court:

Let me first make it clear that our argument does not intend to take the position as contended somewhat by the reply brief filed by Roadway that lawyers are immune from -- have some sort of immunity from the court's sanctioning those lawyers. I think that there is adequate legislation to allow the imposition of sanction on lawyers. In fact, in this case Rule 37 of the Federal Rules of Civil Procedure was available. In fact, that is how this whole attorneys fee business got started.

A motion was filed by counsel for Roadway to assess attorneys fees under Rule 37 for failure to answer interrogatories and for failure to appear at a deposition. The thing moved a long way from there to an awarding by the District Court of $17,000, in other words, the attorneys fees in the whole case. So --

QUESTION: Mr. Richard, do you support the reasoning of the Fifth Circuit in saying that 1927 should be strictly construed because it is penal in nature?

MR. RICHARD: Yes, sir, I think that is --

QUESTION: How do you square that with the language in Newman v. Piggy Park that says where a

plaintiff bringing a Title VII case is -- that attorneys fees should be awarded almost as a matter of course?

MR. RICHARD: Well, in the Piggy Park case, the awarding of attorneys fees was not to punish the defendant but it was the purpose of the statute to eliminate discrimination. It was to encourage the so-called private attorney general --

QUESTION: But it certainly punished the defendant in a sense.

MR. RICHARD: It punished the defendant to the extent that they had to pay attorneys fees, but they -- and to the extent that -- you could almost make the argument that they violated the law so it was justifiable for them to be punished.

QUESTION: Well, in 1927 is intended to punish people who violate its conduct in a sense.

MR. RICHARD: 1927 is designed to punish lawyers. I don't think there is any question about that.

QUESTION: So the two really stand pretty much on the same footing, don't they?

MR. RICHARD: Well, I don't think that the idea of the attorneys fees provisions, if you look at the legislative history of the provisions to allow attorneys fees was to punish the lawyers but, rather, to encourage the attorneys to take these sorts of cases that need to

be handled.

QUESTION: But one man's meat is another man's poison. In a sense, the plaintiff's lawyer gets an award of attorneys fees, the defendants get the attorneys fees award against them.

MR. RICHARD: I think what you have to look at though is the language of the statute. The statute clearly provides the award of attorneys fees under 2000e-5(k) and the provision being interpreted in Piggey Park, but the reason that the Fifth Circuit felt the reference to the Fleischmann case was important was that the language of 1927 is certainly not plain and unmistakable, because it just says costs and it sure doesn't say attorneys fees, and the purpose of the strict construction rule is to insure that for one thing the lawyer in this case under 1927 knows what is coming. When he just reads costs, he sure doesn't -- he would think that's costs, that is what it says. It doesn't say attorneys fees.

QUESTION: Here is a plaintiff that sued and lost, is that right?

MR. RICHARD: This case was dismissed without prejudice in this case.

QUESTION: And then attorneys fees were assessed against the lawyer for the plaintiff --

MR. RICHARD: Yes, sir.

QUESTION: -- in favor of the defendant.

MR. RICHARD: That's correct.

QUESTION: Now, could an attorneys fee have been allowed to the defendant against the plaintiff?

MR. RICHARD: I don't think so. Excuse me, did you say attorneys fees awarded against the plaintiffs in the --

QUESTION: Was this the kind of a case that --

MR. RICHARD: Yes, this was a Title VII.

QUESTION: So that the prevailing party in proper circumstances can be awarded attorneys fees.

MR. RICHARD: Under Christiansburg.

QUESTION: So the defendant might have had an award of attorneys fees against the plaintiff as a party.

MR. RICHARD: That's right, but that was not the case in this -- that was not the situation in this case and --

QUESTION: But nevertheless in these very circumstances the District judge would not have abused his discretion I suppose if he had awarded attorneys fees in favor of the defendant against the plaintiff as a party.

MR. RICHARD: I don't think so.

QUESTION: What do you mean, you don't --

MR. RICHARD: In this case, under these facts, there are no facts to award attorneys fees against the

party based on the rationale of Christiansburg.

QUESTION: Why not?

MR. RICHARD: Christiansburg looks to the claim of the plaintiff, whether it was unreasonable, groundless, frivolous I believe is the other word. The record reflects that two of the three plaintiffs filed a claim through the EEOC and reasonable cause for discrimination was found with regard to two of the three plaintiffs. So that left the only evidence in the record as to, if you want to call it the merits of the claim.

QUESTION: I see.

MR. RICHARD: So far as the record is concerned in this case, under these facts, I don't believe you could really --

QUESTION: The award here wasn't based on bringing a frivolous case but on needless --

MR. RICHARD: On the conduct of the lawyers, right. That is the problem, Your Honors, with the argument being made by Roadway in this case. They say on page 17 of their brief -- and I think this is basically their problem with their rationale. The authority of the basic award of attorneys fees in this case is not section 1927. You've got to get attorneys fees out of 2000e-5(k) and 1988 as interpreted by Christiansburg before you can hop over to 1927, and the facts in this case don't support

that. And I don't think the lebislative history of 2000e-5(k) or 1988 support --

QUESTION: But that wasn't the reason the Court of Appeals, was it, saying that in this particular case there should have been no award of attorneys fees. They said you can never award attorneys fees.

MR. RICHARD: They said -- the issue was not considered at all in the Court of Appeals like it has been briefed here in this Court, Your Honor. As I was saying, the legislative history of the civil rights statutes provide attorneys fees and particularly when you look at 1927 and the history of that statute, as the statute was discussed by this Court in the Alyeska case and in that decision it is clear that -- the legislation is clear that it was enacted at the same time as section or what has become section 1920 and section 1923, all of which deal with the definition of "costs" and what they call docket fees or proctor's fees can be awarded, and that is the limitation.

Congress, as this Court has said in Alyeska, Congress, with regard to the question of attorneys fee, has gotten into the act and the federal courts do not have so-called authority to grant attorneys fees --

QUESTION: Let me go back. Suppose there had been an award of fees against the plaintiff in this case

as a party on the grounds -- suppose the plaintiff had made a -- suppose the defendant had made a motion for attorneys fees on the grounds that this had been frivolous litigation and said we are the prevailing party, this is a proper case for an award of attorneys fees, and suppose the District judge said you are quite right, you are entitled to attorneys fees but I will tell you what I am going to do, I think it would be unfair to make the plaintiff pay them, I think I will make his lawyer pay them because he is the one who brought this frivolous case and needlessly ran the bill up.

MR. RICHARD: The problem with that is --

QUESTION: Would you still be making your argument?

MR. RICHARD: Yes, because Congress has stepped into the act, into the breach as far as what 1927 says. The award of attorneys fees is based on the congressional -- the award of costs against counsel is based on section 1927. Congress --

QUESTION: I understand, but suppose attorneys fees weren't even involved here and the defendant wins the case and the plaintiff has to pay his costs, right?

MR. RICHARD: Right.

QUESTION: Then the judge says, well, I think this is a proper case for 1927 so I am going to make the

plaintiff's lawyer pay the costs rather than the plaintiff. That is what happens, isn't it?

MR. RICHARD: Well, you've got to go back to 1927 and read 1927 for what it says, that the lawyer justiplies the percentage of the case as to increase costs unreasonably and vexatiously. That is the standard.

QUESTION: Right.

MR. RICHARD: And just because the plaintiff lost I don't think meets that standard.

QUESTION: Well, let's suppose that because of this lawyer's conduct costs were increased.

MR. RICHARD: All right.

QUESTION: The defendant's costs were increased, and he won and the plaintiff is going to have to pay his costs. Let's forget attorneys fees for the moment -- his costs. Then the judge says these costs were run up by vexatious litigation by the attorney so I am going to make the attorney pay them rather than his client.

MR. RICHARD: All right.

QUESTION: Isn't that --

MR. RICHARD: That is the purpose of 1927.

QUESTION: Now you say that you just can't fit 1927 and the civil rights attorneys fee statute together.

MR. RICHARD: You can't --

QUESTION: Because they are different.

MR. RICHARD: That's right, and you are mixing apples and oranges.

QUESTION: Well, don't you have to say with respect to all the other federal statutes that provide for the award of attorneys fees in addition to ordinary costs, too, don't you?

MR. RICHARD: Yes.

QUESTION: You can never have attorneys fees as a part of the award under 1927 under your view?

MR. RICHARD: That's correct, yes, sir, because of the language of 1927 and the consideration of its inter-relationship of 1920 and 1923.

Mr. Chief Justice, you mentioned the award of fees for frivolous appeal. I think that is established by specific statute in --

QUESTION: Well, that was just frivolous appeal as one example.

MR. RICHARD: Rule 46(a) I believe of the Federal Rules of Appellate Procedure.

QUESTION: But absent any rule or statute, a good many courts have treated that as an inherent power, both federal and state, have they not?

MR. RICHARD: Certainly the courts have awarded attorneys fees against parties as part of --

QUESTION: No, I am talking about attorneys fees

against a lawyer as distinguished from the party.

MR. RICHARD: Well, there have been no -- none of the cases cited by Roadway have reached that result. I suppose that you could discipline lawyers by contempt, but that is not what we have here, Your Honors. The final --

QUESTION: Don't you think it would be proper for a judge to award -- under 1927, wouldn't it be proper to award costs, to stick the attorney with costs if the judge thought the action was just simply frivolous and vexatious, just no merit whatsoever?

MR. RICHARD: I think it is in the conduct of litigation is --

QUESTION: Well, it says who so multiplies the proceedings in any case. Well, the first time you multiply it is when you file it.

MR. RICHARD: That is assuming that the claim had no merit to begin with.

QUESTION: Exactly. Exactly. Assume the case had no merit to begin with and it was just vexatious.

MR. RICHARD: Under those facts, which I don't think are applicable here, I think that 1927 would probably reach that, that conduct.

QUESTION: May I ask you a question about section 1920 which describes taxable costs. As I

understand your argument, it is that 1927 does pick up those items of taxable costs?

MR. RICHARD: Yes.

QUESTION: And my question is does it pick up those items of taxable costs that have been added recently? For example, I think the statute now allows compensation to court appointed experts and interpreters and some other things which were not part of the statute when 1927 was first enacted. Are they properly taxable under this against lawyers?

MR. RICHARD: Well, I think so, Your Honor, I think that they would be.

QUESTION: Well, if you include subsequently added costs, why don't you include attorneys fees which are taxable as part of the costs in Title VII litigation?

MR. RICHARD: Well, because I think of the relationship --

QUESTION: It is not in 1920, is that the reason?

MR. RICHARD: It is not in 1927. When you look at --

QUESTION: In other words, you would read section 1927 as saying those costs authorized by section 1920 and nothing else.

MR. RICHARD: They are all in the same chapter, 1923 or whatever it is, yes, sir.

QUESTION: It has to be in the same chapter.

MR. RICHARD: Well, you have to read it, looking at what Congress intended and one of the things you consider is the definition of costs within that particular chapter.

One other thing that I would like to mention as to the award by the District Court of $17,000 and what the Fifth Circuit did. The Fifth Circuit's remand was to go back and find out what costs should be awarded under 1927.

QUESTION: But they said under no event could attorneys fees be awarded.

MR. RICHARD: That's correct. That's correct. That is the clearest reading of 1927.

Thank you.

MR. CHIEF JUSTICE BURGER: Mrs. Shapiro.

ORAL ARGUMENT OF HARRIET S. SHAPIRO, ESQ.,
AS AMICUS CURIAE

MRS. SHAPIRO: Mr. Chief Justice, and may it please the Court:

My function here today is to emphasize the government's disagreement with petitioner's reading of section 1927 which singles out lawyers litigating cases under federal statutes that provide for the recovery of attorneys fees. And my basic point is that these attorney fee statutes provide for recovery against the opposing

party. It distorts their purpose to read them as also approving recovery against counsel for that party.

The attorney fee provisions in the Civil Rights Acts are typical of those in many other federal statutes. They serve two related purposes. The first purpose is to encourage private parties to enforce important federal policies. That is the private attorney general principle. The cost of hiring counsel is likely to be a serious problem to victims of employment discrimination, but that problem is less serious if successful plaintiffs can recover their counsel fees. That means that the litigation will essentially pay for itself. That makes it attractive from the point of view of the lawyers, and Congress recognized that in civil rights cases it is a problem finding lawyers that are willing to take these cases. But if counsel fees can be recovered by the prevailing party, then the lawyers are more likely to be interested in taking the cases. They become attractive cases.

But if litigating these cases imposes a special risk that is not part of the normal risks of litigating cases in any event, then the cases are unattractive to the lawyers. That makes it harder for the victims --

QUESTION: Mrs. Shapiro, award of attorneys fees on both sides is provided in Title VII case, isn't it?

MRS. SHAPIRO: That's true, but --

QUESTION: So in effect the lawyer who undertakes to defend a civil Title VII action is faced with the same sort of problem as the lawyer who takes on the plaintiff's case.

MRS. SHAPIRO: Well, lawyers fees are recoverable to the prevailing party, but in reading Piggey Park and Christiansburg, the standards are different. The plaintiff's lawyer can expect to recover his fees absent extraordinary circumstances, so he is the one that is encouraged to take the case. The defendant's lawyer, the Congress didn't feel that he needed the special incentive and for the reasons that are not --

QUESTION: Well, Congress has given him a special incentive to a certain extent because it does authorize the award of attorneys fees as costs to the defendant under the Christiansburg standard.

MRS. SHAPIRO: Only if the defendant is essentially blameless. If the suit is without merit, in that situation, yes, then the defendant is entitled to recover his costs. It is not nearly as generous a cost provision.

QUESTION: Mrs. Shapiro, we are dealing with exceptional cases to start with, because most lawyers don't misbehave and give rise to claims of this kind, and I think we have to start with the assumption that the lawyers did something that lawyers do not normally do.

And if you have a case in which a plaintiff is perhaps named as a class representative or something, is relatively unsophisticated and the lawyer persuades the plaintiff to file a totally meritless claim and makes a lot of trouble for the other side and runs up the kind of situation where normally a district judge would say the plaintiff ought to be charged with costs, your position really is that they shouldn't be recovered from anybody because you just don't want to stick the innocent plaintiff with them and so you are saying nobody should have to pay.

MRS. SHAPIRO: Well, I think the Court really faced that problem in Christiansburg because in Christiansburg you made it fairly clear that you were not saying that only the bad-faith plaintiff could expect to have attorneys fees recovered against him. It was also the frivolous case, regardless of bad faith, so I think you already faced in Christiansburg the fact that you do look to the party to make sure that he doesn't bring frivolous suits, not just saying, well, I was misled, that it is up to the party to assure that he doesn't bring frivolous suit, that if he does then he bears the risk of having counsel fees assessed against him. And I think that it is important that that is where the line has been drawn between the protection of defendants and the protection of plaintiffs.

The difficulty with the petitioner's point of view is that 1927 is penal and it is looking at the attorney's responsibility, the attorney's responsibility for the way he litigates. The attorney fee provisions in the substantive statutes are not penal, they are looking at the merits of the case and either encourage --

QUESTION: Once they say fees are part of the costs, how do you get out of the statutory language? How do you meet the plain language?

MRS. SHAPIRO: Well, the purpose of saying the fees are part of the costs in the substantive statutes is (a) this private attorney general principle --

QUESTION: Well, you used the language "fees as part of the costs" in one statute as entirely different meaning than in 1927.

MRS. SHAPIRO: That's right. 1927 was part of the original bill in 1853 that said that these costs and no others are to be recovered, and so the costs in 1927 are the costs that are defined in 1920 and 1923.

QUESTION: Mrs. Shapiro, what if a general statute were passed, what if Congress just decided to change the so-called American rule and say from here on we will adopt the British rule that ordinarily attorneys fees will be allowed to the prevailing party as a part of costs? Suppose there was a general statute like that,

just general?

MRS. SHAPIRO: Then you wouldn't have the singling out problem, which is our basic -- that is the problem, our fundamental policy problem.

QUESTION: How does that get you though to excluding attorneys fees from costs? I don't --

MRS. SHAPIRO: Well --

QUESTION: -- because in my example, I take it you would say that, well, I guess attorneys fees are part of costs that can be charged against the lawyer.

MRS. SHAPIRO: If you just had a statute that said attorneys fees are part of the costs --

QUESTION: And they are allowable to the prevaling party.

MRS. SHAPIRO: -- and they are allowable to the prevailing party, without amending 1927, then you would still have 1927 as part of -- assuming this statute didn't overrule the 1853 act.

QUESTION: What if you amend 1920?

MRS. SHAPIRO: Well --

QUESTION: Put Mr. Justice White's statute in as subsection (7) of 1920, there is just an additional item of costs and additional docket fees, just say attorneys fees.

MRS. SHAPIRO: There has been a proposal, there

is a proposal in Congress to --

QUESTION: I understand. Supposing it was passed, would that not be picked up by 1927 then?

MRS. SHAPIRO: Sure. Well, the proposal is to amend 1927.

QUESTION: I mean if you just amended 1920.

MRS. SHAPIRO: I think that would --

QUESTION: But what you are saying is the word "costs" only applies if it is costs in all litigation and doesn't apply if it is a special kind of costs for a one kind of case like civil rights or antitrust or something like that.

MRS. SHAPIRO: When you have the singling out, you get real policy problems.

QUESTION: The problem that I see with your argument is you seem to assume that the singling out was totally for the benefit of the plaintiffs, but it seems to me that is inconsistent with the notion that whichever party prevails there is a right to costs -- an opportunity to have the judge assess fees as part of the costs.

MRS. SHAPIRO: No. The argument really is that in the substantive statute you are talking about costs, shifting costs against the parties, and however that line is drawn between the parties, it is drawn on the basis of the merits of the suit. 1927 says nothing about prevailing

parties. It says excess costs and --

QUESTION: I just don't understand. You've got a special statute, 1927, dealing with misbehaving lawyers and I don't know why you say a misbehaving lawyer is any different in one kind of case than another. It seems to me in any kind of case, assuming that he can be treated, he comes within the statutory language.

MRS. SHAPIRO: We agree, a misbehaving lawyer is a misbehaving lawyer and he ought to be subject to the same penaltires, regardless of what kind of a statute he is litigating under, he is subject to the penalties that are provided in 1927 which are conventional costs.

QUESTION: And if the consequences of misbehavior are that you have to pay the costs, I don't know why you don't pay whatever costs are appropriate for that kind of litigation.

MRS. SHAPIRO: Because the purpose of putting the particular costs in a particular statute --

QUESTION: Without the plaintiffs.

MRS. SHAPIRO: -- there is a different basis for that.

My time is expired. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. McKee, do you have anything further?

ORAL ARGUMENT OF M. CURTISS McKEE, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. McKEE: Mr. Chief Justice, you asked earlier about the matter of improvident appeals and awards under inherent powers. It is a strange result, but on April 2, the Fifth Circuit decided a case -- a penal decided a case called Self v. Self, which is cited on page 4 of our reply brief, in which they suggested that an award for just such a reason might be made under 1927.

Mr. Justice Rehnquist, on the question of penal, our position is simply that where these statutes are as clear as they are, that there is no construction needed. And whether you admit, even if you admitted completely that they might be penals, that it doesn't change the result that we are contending for.

If you follow the argument of the government, you must say that Congress was not aware of 1920 or 1923 when it passed 42 U.S.C. 1988 or Title VII of the Civil Rights Act of '64. It has the effect of ignoring one of the cases that they cided, which was Erlenbaugh, decided by the Court in 1972, holding that Congress is presumed to be aware of all previous statutes on the same subject.

Nor should we presume that Congress was aware that 1920 and 1923 and intended something entirely different by the use of the phrase "as a part of the costs."

Congress has from time to time used various phrases to define costs. In 17 statutes, they have separated them as "costs and attorneys fees," in five they have used the language "together with," in 21 statutes they have used "costs including attorneys fees," and in 15 statutes, the ones that we are involved with today, they used "costs as a part of."

The simple meaning of all of this is that these attorneys fees are part of the taxable costs in these cases and Hutto v. Finney foreclosed any further discussion of that.

I would like to comment very briefly on the merit conduct distinction that has been advanced here and that is that it is a very mechanistic argument which divides the lawyer and his client and which divides the suit into two parts, and it assigns --

QUESTION: Doesn't 1927 divide the lawyer from his client?

MR. McKEE: It does, Your Honor, for the purpose of the discretion of the court, yes.

QUESTION: Well, you can have very serious misconduct on the part of a lawyer in a very meritorious case, couldn't you?

MR. McKEE: You could, sir.

QUESTION: And very exemplary conduct on the

part of the lawyer in a frivolous case.

MR. McKEE: That's correct.

QUESTION: So aren't they divided? Aren't they two quite separate things?

MR. McKEE: Well, they are, Your Honor, but you can't divide them entirely for all of these purposes and ignore the Link v. Wabash decision altogether. But what they have done is they have created a factual distinction here where they divide the suit down the middle and they assign the lawyer one side of the suit and they assign the client the other side, to wit, the bringing of the suit is the client's responsibility, the conduct of the suit is that of the lawyer. They apply Title VII to the front side of that argument and 1927 to the back side of it, and they are never to be met again, according to the argument as it goes.

QUESTION: Mr. McKee, having interrupted you, let me say I didn't quite get the point of what you began with, a recent case in the Fifth Circuit, Self v. Self I think it was?

MR. McKEE: Self v. Self, Mr. Justice Stewart, is a case which was a domestic relations case and some how or other got appealed, got removed and was appealed to the Fifth Circuit and Judge Clark, who was writing for the panel, suggested that fees for the frivolous appeal

should be assessed against the lawyer under 1927.

QUESTION: I see.

QUESTION: Under 1927, could the strictures of 1927 be applied against the lawyer for the prevailing party? Suppose the defendant in a given suit prevails but the court concludes that all through the litigation the defense counsel has used these tactics that are proscribed, multiplying the proceedings in rear-guard action, making it as difficult as possible all the way, but the defendant finally prevails.

MR. McKEE: There is no question, Your Honor.

QUESTION: There is no question which way?

MR. McKEE: Mr. Chief Justice, this thing can be applied to everyone who is involved in the litigation.

QUESTION: It doesn't make any difference whether he is the prevailing party or the losing party.

MR. McKEE: Not at all. These offenses which seem to come through the argument of the government, they seem to come from somewhere else, and they are really self-made. The lawyer himself puts himself in this position. They don't come from outside and we are not singling out anybody. The people that were singled out were singled out by Congress when they passed these statutes that said that attorneys fees are part of the costs or the costs include attorneys fees. There is no singling

out except to the extent of some 37 or so statutes that deal in those terms.

I think, if the Court has no other questions, I will conclude.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted.

(Whereupon, at 2:08 o'clock p.m., the case in the above-entitled matter was submitted.)

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