In the

ORIGINAL

Supreme Court of the United States

RICHARD H. WHITE,

Petitioner

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, et al.,

Respondent

NO. 80-5887

Washington, D. C.

November 30, 1981

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ALDERSON REPORTING

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Monday, November 30, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:30 o'clock a.m.

APPEARANCES:

E. RICHARD LARSON, ESQ., 132 West 43rd Street, New York, New York 10036; on behalf of Petitioner

MARC R. SCHEER, ESQ., Assistant Attorney General, State House Annex, 25 Capitol Street, Concord, New Hampshire 03301; on behalf of Respondent

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear oral argument in Case No. 80-5887, Richard White against New Hampshire Department of Employment Security, Et Al. Mr. Larson, I think you may now proceed whenever you are ready.

ORAL ARGUMENT OF E. RICHARD LARSON, ESQ.

ON BEHALF OF THE PETITIONER

MR. LARSON: Thank you, Mr. Chief Justice. May it please the Court:

This case involves an award of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, a federal statute which authorizes fees as a part of costs. There is no issue here about whether the petitioner, the plaintiff below, was the prevailing party, or whether there was an entitlement to fees under the Fees Act.

The issues here instead are procedural. The first issue concerns the timing of a request for attorney's fees under the Fees Act. The second issue concerns the ethical conflicts which arise from the imposition of a requirement that fees be negotiated simultaneously with the relief for the class on the merits.

As to the timing of a fee request, there are at least three views about the proper characterization of fee requests, and hence, of the timing of a fee request.

First, is the fee request part of the costs, as

defined by Congress, as recognized by this Court in Hutto v Finney, and indeed, in Newman v Piggie Park Enterprises, and as recognized by the drafters of Rule 54(d).

Second and quite consistently, is a request for fees a matter to be determined in an independent proceeding, supplemental to the original proceeding, and thus not a request for a modification of the original decree on the merits, as held by this Court in Sprague v Ticonic National Bank, and as recognized by this Court in Bradley v School Board of City of Richmond, and implicitly in Maher v Gagne, decided two years ago.

QUESTION: Mr. Larson, is there any recognized time limit for the filing of a bill of costs as such after the prevailing party has gotten his judgment in a lawsuit and it has been affirmed?

MR. LARSON: Justice Rehnquist, generally it is a rule of reasonableness with regard to the district courts. I mean, in the Federal Rules itself there is no specific time period with regard to the filing of a bill of costs.

What happens within the trial courts, Your Honor, is that very often, the court will decide fees as part of the costs as well as other items of costs quite quickly. On other occasions, when appeals are taken, the bill of costs issues, with regard to all items of costs, are sometimes reserved pending the outcome of the appeal.

QUESTION: But there is a provision in one of the Rule 54 -- either 54 or 56 -- that the entry of judgment shall not be delayed because of entry of costs.

MR. LARSON: That's correct, Justice Rehnquist. That's Rule 58. Judgment shall not be delayed.

QUESTION: Mr. Larson, if the time for appeal had elapsed and no appeal were taken, do you think that thereafter, any application for costs would be appropriate under Rule 54?

MR. LARSON: Both with regard to our argument on Congress's definition with regard to costs, and with regard to the independent proceeding, yes. Even if the time for appeal of the underlying order had elapsed, costs are still determined thereafter.

QUESTION: Is there no time limit, then, in your view?

MR. LARSON: Well, we do think -- there are several time limits that could be applied. The basic time limit that is applied by trial courts, Justice O'Connor, is the rule of reasonableness with regard to, for example, if there are ongoing fee negotiations; that the trial courts will not allow a request for costs or a request for fees as part of the costs to be made an extraordinary amount of time, especially when there are no ongoing negotiations.

QUESTION: Well, take --

MR. LARSON: Secondly, if I may with regard to Justice O'Connor's question, some district courts do have time limits with regard to the filings of costs. Usually they are around 30 days, sometimes more. But there is a major distinction between these trial court rules on the filing of costs and Rule 59(e).

Local court rules are extendable by the courts, and we have to give some consideration to district courts to manage their own dockets with regard to case management.

Rule 59(e), though, the ten-day period there, under Rule 6(b), is not extendable. It is not a rule that can be enlarged under the Federal Rules.

QUESTION: Take a situation where the costs sought to be taxed are traditional costs, costs of depositions, filing fee, service of process, that sort of thing. I've been away from private practice sufficiently long so that I am not aware. Would a district court entertain a statement of costs four years after the termination of the litigation?

MR. LARSON: If the case had been on appeal and there had been, say, a remand from the United States Supreme Court months previously.

QUESTION: No, say it had simply terminated.

MR. LARSON: Oh, absolutely not. If it had terminated -- I mean, there is a rule of reason that is applied, even when there is no district court rule governing

the bill of costs. It's akin to a laches type of argument. You are entitled to the costs and fees as a part of costs within a reasonable time.

QUESTION: And what would the other side be able to do with that? Would they object?

MR. LARSON: Oh, yes, they could.

QUESTION: And what else could they do?

MR. LARSON: Similar to a laches argument, first of all, prejudice is the key.

QUESTION: Well, this isn't that longstanding, you know, it has only been on the books a few years. Don't you think it's about time that a rule was established?

MR. LARSON: Well, if a rule -- I believe a rule has been established, as far as the rule of reasonableness, and under Rule 58 and 54(d) --

QUESTION: And the rule of reasonableness is how long?

MR. LARSON: It is not long at all. It has to do with the flexibility. Let's get clear --

QUESTION: Well, the rule of reasonableness I understand can extend from one minute to 36 years.

MR. LARSON: Oh, I don't believe it can extent quite to 36 years, Justice Marshall.

QUESTION: I don't know. Maybe I'm different reasonable from you.

MR. LARSON: Well, there are different fee applications that are --

QUESTION: Don't you think there should be some stability to it, like the ten-day rule that was put in the rules?

MR. LARSON: If there should be some stability, I believe that's for Congress, if there is to be specific rule. Or it's for the local courts.

QUESTION: Don't you think we can, if Congress does not?

MR. LARSON: I think the obligation of this Court is to interpret what Congress has done, and I think Congress has specified that fees are a part of costs, Your Honor.

QUESTION: Well, I'm not talking about whether it's costs or not. The question that Justice Rehnquist asked you, four months on costs due, and you said you didn't know. If it was on appeal or something, or if it wasn't on appeal.

MR. LARSON: Justice Marshall, there really has been no problem with this in the trial courts on the rule of reasonableness. And let me also point out that there are --

QUESTION: But then the problem -- what is it here? Why is it here?

MR. LARSON: It is here because the first circuit has imposed an inflexible rule.

QUESTION: But don't you think it's here because we wanted to look into it?

MR. LARSON: Oh, absolutely, Your Honor.

QUESTION: Well, don't mind if we do, please.

MR. LARSON: Absolutely.

The rule, for example, if 59(e) were applied to this case, that is an inflexible rule that does not allow for extensions under Rule 6(b). Now, let's recall that although this arose and is here under the Fees Act, there are literally dozens and dozens of fee shifting statutes, and many of them like Section 4 of the Clayton Act, the securities authorizations, and in some of these cases, as in some major Civil Rights cases such as Title VII cases, there are thousands and thousands of hours that are billed.

Now, this is not this type of case. But the district courts need some flexibility to deal with the different type of fee petitions that are filed. Some of them are a half an inch thick, and some of them are six inches thick, with regard to the affidavits, the time sheets, the briefs that are filed.

Under Rule 59(e) all of these matters, in an inflexible sense, would have to be filed within ten days of the judgment.

QUESTION: Mr. Larson, that isn't quite right. All they have to do is reserve the issue of fees, don't

they, with intend --

MR. LARSON: Oh, I don't think so, Justice Stevens.

QUESTION: The judgment says, in so many words, the question of fees will be taken up in six months, or --

MR. LARSON: I think a reservation of fees, as the seventh circuit held in Martinez v Trainor in 1977, indeed is an enlargement, and an enlargement is not granted. Not to be granted under Rule 6(b).

QUESTION: You didn't even ask for them in your pleadings, did you?

MR. LARSON: Well, we have a boilerplate in our pleadings -- and I would also point out that --

QUESTION: Well, do we have to approve boilerplates?

MR. LARSON: Our complaint was filed prior to the Fees Act, prior to enactment of the Fees Act and subsequent to this Court's decision in Alyeska. At the time that the case was filed, there technically was no clear authorization for fees. There, however, was a boilerplate asking for such just relief.

QUESTION: Well, there was no rule that prevented you from asking for them, as they did in Alyeska. Right?

MR. LARSON: Well, as in Alyeska, or after this Court's decision in Alyeska, there was no statutory authorization for fees in a 1983 action. This was a 1983

action. The Fees Act became effective six months after this case was filed.

QUESTION: Let me go back to reserving fees. Is it your view that under the first circuit holding, if someone gets in the same position that you were in, five days after judgment the plaintiff went in and said, Your Honor, we left out the question of fees; would you amend the judgment and add a clause saying the issue of fees shall be reserved for later determination. Would he have power to do that?

MR. LARSON: I don't think the court would have the power to do that.

QUESTION: He couldn't amend the judgment within ten day in that way? I don't understand why not.

MR. LARSON: Okay. The confluence of Rule 6(b) and the ten-day rules -- the ten-day rules are 50(b) and 52(b) and 59 (b), (d) and (e). 6(b) says that there are no extensions of those rules.

QUESTION: What if the original judgment said the matters of fees will be reserved for further determination? It is done in antitrust cases all the time.

MR. LARSON: I know. That is why it is inconsistent with Rule 59(e). That is, in effect, a court extension.

What happened in Martinez v Trainor, the seventh

circuit case, is that there was simply a skeleton motion filed, and then later a brief and some affidavits were filed outside of the ten-day time limit. The seventh circuit recognized that that can occur with regard to only one of the ten-day motions, and that is with regard to the motion for a new trial, under Rule 59(b), because Rule 59(c) has a separate specification for affidavits, which is not controlled by the no extension rule in 6(b).

QUESTION: Mr. Larson, this case on the merits went off on a consent decree, didn't it?

MR. LARSON: Initially, there was a judgment that was appealed; then there were negotiations and it came back down and there was a consent decree. Yes, Your Honor.

QUESTION: Well, don't you think in a consent decree, ordinarily the parties taken into consideration the possibility of attorney's fees and negotiate for them, too, so that when the consent decree is finally filed, both parties figure that the attorney's fees are taken care of?

MR. LARSON: On occasion that is done, Justice Rehnquist. But what was followed in this case was the rule that had been announce in 1977 by the third circuit in Prandini v National Tea Company. The Prandini court held that it is unethical to engage in simultaneous negotiations of the fees and of the merits.

Now, on the record in this case in the trial court

on two occasions, respondent's counsel conceded that it would have been unethical under the Prandini rule to engage in simultaneous negotiations. And the court --

QUESTION: But you weren't in the third circuit.

MR. LARSON: Well, as is stated with regard to the ethical issue by respondent's counsel, they were aware -- we were in the first circuit, but they were aware of the third circuit decision. And they thought that it was appropriate law, and they had, indeed, followed that with regard to simultaneous negotiation.

Because of the ethical conflict -- and I should say that the third circuit rule was later followed by the ninth circuit in the Mendoza case, and as of this September, the ethical negotiation, simultaneous negotiation issue, resulted in an ethical opinion by the New York City Bar Association barring simultaneous negotiation of the fees and of the merits. And that is referred to in our reply brief.

QUESTION: Do you think that would be binding on the second circuit?

MR. LARSON: The particular ethical opinion binding? It is not binding, no, but it is a rule that is being followed by attorneys in New York City. It particularly comes up with regard to the grievance proceedings, of course.

QUESTION: But do you think the second circuit,

because of the Bar Association of the City of New York, would be bound to follow the --

MR. LARSON: It certainly is not bound to follow it, no.

QUESTION: Mr. Laron, do I understand your argument to be that if we affirmed the first circuit, a practical effect would be that you would have to file your application for fees within ten days. And not only that, but the court would have to decide the application within ten days?

MR. LARSON: In practical effect, because let's keep in mind --

QUESTION: If we affirm, that is what this would mean.

MR. LARSON: Yes, it would, Your Honor.

QUESTION: Whether or not it was an application supported by, as you put it earlier, an inch or six inches, an application six inches thick?

MR. LARSON: Right. There is no rule in Rule 59(e) requiring an immediate decision by the court. But the whole thrust of the rule is because of the suspension of a finality of the underlying judgment --

QUESTION: Mr. Larson, your reading of the first circuit decision is that both the application would have to be made and the decision on the application reached by the

court within ten days.

MR. LARSON: Oh, no, no. The decision does not have to be made within ten days. Rule 59(e) basically says that the motion has to be served within ten days, and the courts have interpreted that to mean also filed. But the thrust of the rule, it was designed to allow a court to correct an error of judgment, not to rule on new evidentiary matters.

QUESTION: I am just trying to get your reading of the first circuit decision, and all you're telling me now is that it means only that the application has to be made within ten days, and the district judge may sit on it for a year. Is that right?

MR. LARSON: I guess the judge could sit on it for a year. That would be, I believe, inconsistent with the rule. The rule is to encourage quick action, because let's recall that under Rule 4(a)4 of the Federal Rules of Appellate Procedure, the underlying judgment has been totally stopped now. It has been suspended, so nobody can appeal from that.

In other words, if a plaintiff gets a fairly large injunction in a case, having some substantial impact and then files a fee application within ten days, that prevents the defendant from appealing under 1292(a) the injunction. I mean 59(e) simply was not designed to deal with new

evidentiary matters; it was not designed to deal at all with attorney's fees.

To the extent that there is a rule, the rule has been decided by Congress with regard to Rules 54(d) and Rule 58, entry of judgment --

QUESTION: At this point, Mr. Larson, are you resting your case on 54(d)?

MR. LARSON: Certainly, with regard to --

QUESTION: In its entirety? Would you be content, then, to have attorney's fees taxed by the clerk on one day's notice?

MR. LARSON: No. Congress has --

QUESTION: Then you are not resting entirely on 54(d).

MR. LARSON: Well, this is an application for fees pursuant to the Fees Act, and the Fees Act specifies that fees, as a part of the costs, shall be awarded by the court. In other words, when you look at 54(d), in the advisory committee notes of 54(d), the advisory committee notes recognize that there were some 20 statutes already dealing with costs, and 12 or 13 of those statutes had authorized fees as a part of costs. And the advisory committee refers to those statutes as cost statutes and that they were already consistent with Rule 54(d).

And in those statutes -- Section 4 of the Clayton

Act was one -- that authorizes the court to award fees as part of the costs.

QUESTION: Could I have your comment, now that I have you interrupted, to the eight circuit's opinion in Obin?

MR. LARSON: With regard to the collateral and independent proceeding that is to be held with regard to fees, as we point out in your brief, Mr. Justice Blackmun, we certainly agree with the eighth circuit's decision.

It is also consistent with your decision for this unanimous Court in Bradley v School Board of City of Richmond, where the Court recognized that simultaneous -- even apart from the ethical issue -- that it is undesirable for a court to engage in simultaneous resolution of the fees and of the merits. That instead, the fee issue should be dealt with in a separate proceeding.

Section 59(e), briefly, we did point out in our brief that 59(e) was designed to handle a situation wholly apart from the consideration of a new evidentiary matter such as fees. Rule 59(e) was designed to care for a situation as provided by the eighth circuit in the Boaz case, for a court, a trial court, to correct a judgment. It was not designed with regard to entirely new matters. Something, as Mr. Justice Brennan indicated, could last for as long as a year in consideration of the fee issue.

There is a suspension of finality of judgment

here. 59(e) is basically for correction of an error of law, and it was not designed to cover situations such as the filing of fee requests, which sometimes are extraordinarily long.

With regard to the collateral and the independent proceeding that is normally held in trial courts, I would like to point out that this is entirely consistent with not only what happened in this Court's decision in Maher v. Gagne where, as in this case, there was a consent decree that did not mention fees, and this Court went on and considered and held that consistent with the legislative history of the Fees Act that a prevailing plaintiff can become a prevailing plaintiff through a consent decree.

Now, in the legislative history, in both the Senate report and in the House report, the Congress recognizes that fees flow from the judgment, and that as a result of a consent decree, a plaintiff thereafter can be determined to be, in an independent proceeding, a prevailing party.

If there are no further questions at this time, Your Honors, I would like to reserve my remaining time.

CHIEF JUSTICE BURGER: Very well. Mr. Scheer?

ORAL ARGUMENT OF MARC R. SCHEER, ESQ.

ON BEHALF OF THE RESPONDENT

MR. SCHEER: Mr. Chief Justice, and may it please

the Court:

I think to start out, it is important to focus in on what is really an issue in this particular case. It is a really very narrow issue in this case, and that issue is what remedies are available to a successful civil rights litigant if he is not asked for attorney's fees at a time prior to judgment.

In those cases where the civil rights litigant has properly requested attorney's fees in his pleadings, or in a motion prior to entry of judgment, that request is preserved and can be addressed by the court.

QUESTION: What happens to a case filed before this statute? Did they have to ask for attorney's fees?

MR. SCHEER: I believe that Congress provided that the Civil Rights Attorney's Fees Awards Act of 1976 would apply to cases pending at the time of the enactment of the statute.

QUESTION: You mean that he should have amended?

MR. SCHEER: That is correct, Your Honor, and under Rule 15 they have liberal rights to amend. They could have filed a motion for attorney's fees at any time prior to entry of the judgment.

In this case, --

QUESTION: Well suppose he does, though, have it in his complaint, or he files a motion and then there is

judgment. Now, the ten-day time limit would never apply to him, would it?

MR. SCHEER: That is correct, because it would not be a final judgment, Your Honor. Because the if fees issue has not been addressed by the district court, that judgment would not be final.

QUESTION: And it would not be appealable unless he certified it as appealable?

MR. SCHEER: That is, unless the district court perhaps decided to certify under Rule 54(b) I think it is that there are other important issues that desire a review on appeal.

QUESTION: But you think he could always do that, and still save the attorney's fees.

MR. SCHEER: I believe that he could, Your Honor, that is correct.

The point is that the application of Rule 59(e) gives the prevailing civil rights litigant a second shot to get attorney's fees after there has been judgment on the underlying cause of action, where the prevailing plaintiff has not yet made a request for attorney's fees. Rule 59(e) gives the prevailing litigant an additional ten days to make that request.

Under the Federal Appellate Rules, Number 4, that will suspend the time of the running of the appeal until the

decision on the fees issue is made. Once that is made, the entire --

QUESTION: Excuse me, may I interrupt? What is your view of what he should file within the ten-day period? Should he file a fee petition, or should he file a motion to amend the judgment to reserve the fee issue?

MR. SCHEER: All he need file is a motion to amend the judgment. That is all that Rule 59(e) requires.

QUESTION: But what if he just filed a fee petition? What if just filed a document that said Motio for allowance of fees? Would that be enough?

MR. SCHEER: I think that would be enough. I think the whole point is that --

QUESTION: And the judge does not act on it within the ten days. Then he would later on treat it as though it were filed under 59(e)? Is that it?

MR. SCHEER: Well presumably, the judge could treat it as though it was filed under Rule 59(e). The purpose of Rule 59(e) is to promote expeditious resolution of matters before the court. The court would presumably schedule a hearing on the fees issue if the issue were contested, and presumably, the court could schedule that hearing fairly expeditiously.

QUESTION: I thought that was when there was an appeal involved.

MR. SCHEER: Excuse me, Your Honor?

QUESTION: I thought that ten-day involved an appeal.

MR. SCHEER: The ten days, under Rule 59(e) refers to a motion to alter or amend the judgment.

QUESTION: You said that that would hold up the appeal.

MR. SCHEER: Under Rule 4 of the Rules of Appellate Procedure.

QUESTION: But there is no appeal involved here.

MR. SCHEER: That is correct.

QUESTION: So how does the ten-day rule apply here?

MR. SCHEER: I don't think I understand your question, Justice Marshall.

QUESTION: I don't think I understand your.

MR. SCHEER: Okay, what --

QUESTION: I thought that the ten-day was restricted to where there was an appeal involved.

MR. SCHEER: No, sir. The ten-day rule relates to the motion to alter or amend the judgment that has previously been entered.

QUESTION: Prior to appeal?

MR. SCHEER: Correct.

QUESTION: Well, there is no appeal involved here.

MR. SCHEER: If -- what happens is, if there is an

appeal pending at the time the Rule 59(e) motion to amend the judgment is filed, that time for appeal will be suspended, pending the court's ruling on the 59(e) motion.

QUESTION: And if there is no appeal pending, what?

MR. SCHEER: If there is no appeal pending, if the prevailing party has not filed a fee request within the ten days allowed by Rule 59(e), he is barred from again seeking the fees.

QUESTION: Suppose he had filed one?

MR. SCHEER: Within the ten-day period?

QUESTION: Yes, sir.

MR. SCHEER: Yes, sir.

QUESTION: What would happen?

MR. SCHEER: Then the court would presumably schedule a hearing --

QUESTION: Presumed? Can you give me a case that says it happened? You said presumed. I can't work on presumed.

MR. SCHEER: In the White case, Your Honor, although the motion was not filed -- in this case, although the motion was not filed within ten days; it was filed four and a half months later, the court did schedule a hearing because the fees issue was contested. If the issue is contested, the court will schedule a hearing. In fact, the court almost always generally schedules a hearing on an

attorney's fees award issue because the reasonableness of the fee must be determined by the court through the application of various criteria to determine if it is reasonable.

QUESTION: Counsel, frequently a judgment will say the plaintiff, if he gets the monetary judgment, shall recover his costs. And then later on they will assess the costs; sometimes within ten days, sometimes not. Supposing the judgment omitted that fairly common recital; is it your view that the plaintiff would lose his right to recover costs if he didn't ask for them within ten days?

MR. SCHEER: No, Your Honor.

QUESTION: What is your view of the time limit on th recovery of costs when the judgment makes no reference to costs?

MR. SCHEER: Under Rule 54(d), routine costs can be covered at about -- at any time. In other words, there is no time limit on it. I would agree with counselor Larson that as to those costs, a rule of reason should be applied. I mean, the parties should not wait for an unusually long period of time in which to file it.

But the reason for that rule is because costs are items that are routinely taxed; they generally do not involve any major controversy, and as the statute provides, the clerk of the court may tax the costs.

QUESTION: Yes, but there can be disputes over costs.

MR. SCHEER: There can. But there, however, still a significant difference between a cost, a routine cost, and an attorney's fees award such as we have in this case.

The attorney's fees award can lead to substantial additional liability on behalf of the losing party. In this case, at the district court level the attorney's fees award was roughly an amount of $16,000. That is an amount of money that must be paid directly by the defendant. He's got to pay it out of his own pocket. It is an additional liability that he does not have.

So, since there is --

QUESTION: How is that differentiated from the judgment itself, if you have money involved? The defendant always pay the judgment.

MR. SCHEER: That is correct. But what we are saying is in the case, solely in the case where the attorney's fees issue has not been awarded prior to entry of judgment, it seeks to impose a new, unanticipated liability on the defendant.

QUESTION: How can you say it is unanticipated?

MR. SCHEER: If the issue is not framed in the pleadings, and if it is not raised prior to entry of judgment, if it is not before the court, if the parties have

not resolved it, the issue is not in the case.

QUESTION: It's not -- the amount is not known.

MR. SCHEER: That is correct, Your Honor.

What we are saying is that this is a case where the litigant has never asked for the fees prior to entry of final judgment. If the final judgment is, presumably, final, it terminates the litigation; it fixes the obligations of the parties. And if four months later counsel for -- if four months later the prevailing party can come in and say by the way, we would like to have our attorney's fees, that is a significant new liability for the losing defendant, or the losing party. The losing party has a right to expect that the prior judgment that was entered without reference to attorney's fees, fixed his liability and that the case was over.

QUESTION: But reasonable is -- of course, this arose in a transition period. But do you suppose there really will be very many cases in the future where defendants, state organizations, won't be aware of the fact that somebody is going to ask for fees? I mean, that seems to me to be kind of theoretical. The statute is plain on its face, unless, of course, you have the ten-day rule. And if you run on that, then they will just have to be more diligent in their pleadings.

MR. SCHEER: But, Justice Stevens, I think that

this case indicates that, for example, in the settlement context the defendant may come to believe, after discussions with other counsel, that there would be no request for costs.

QUESTION: Well, those are pretty naive defendants. I've been in a lot of cases where there are fees that you wait on until later on.

QUESTION: Mr. Scheer, is there anything in the legislative history that suggests that Congress intended the fees not to fall under Rule 54 as costs?

MR. SCHEER: Nothing specifically, Justice O'Connor, but there is language I believe in the Senate report that indicates that in passing the Act, the Congress intended to bring the remedy under 1983 actions in line with the remedies that were available under other civil rights actions, and the language of the Senate report also indicated that it did not intend to create any startling new remedies.

I would suggest that if you were to construe a fee as a cost, and thereby allow the fee award to be asserted adversely any time after entry of final judgment, that would indeed be a startling new remedy that the Congress did not intend to create when it enacted the Attorney's Fees Award Act of 1976.

QUESTION: Well, your argument then turns almost on a difference that attorney's fees as costs are different

in kind, not just in degree from the Fairmont Creamery type of case that the court long ago held was not barred from being awarded by a federal court under the 11th Amendment against a state.

MR. SCHEER: Correct, but there are basically two bases for our position. One is that indeed, fees are substantially different from costs. And Congress, by using the language it did in the statute, did not intend to define fees as costs. You must look at the entire language of the statutory at the discretionary aspect of the court award of attorney's fees.

The other basis of our argument is that a fee award, under 42 USC 1988, is intimately tied to the merits of the underlying cause of action; that it is not a collateral and independent matter, as suggested by the petitioner in this case.

In support of that contention, he cites certain cases that deal with what is known as the common fund doctrine. In those cases, courts have held that when a common fund is identified, the prevailing plaintiff, the successful plaintiff, can receive an attorney's fee award out of the common fund. Those cases, however, do not bear on this case.

In the common fund cases, once the fund is identified, the losing party no longer has any interest in

the award of attorney's fees out of the fund. The award of those fees is intended to spread, to distribute the fees among the class of benefited, by the efforts of the successful party.

In this case, quite to the contrary, you have a situation where the attorney's fee award is directly against the losing party. He obviously has a direct compelling interest in the amount of the fee award because he is going to have to pay it out of his own pocket.

So those essentially are our two main arguments with respect to why Rule 54(d) cannot be applied to this situation.

QUESTION: Mr. Scheer, would you make the same argument if you were faced with the question under the Securities Act, and the Antitrust Act and the Packers and Stockyards Act and the Communications Act and the Railway Labor Act, where also, Congress has referred in a variety of ways to the taxing of attorney's fees as costs? Are you saying that in none of those instances did Congress mean what it said; that they would be taxed as costs?

MR. SCHEER: I am not familiar with those statutes, Your Honor, but I am familiar with the fact that there are several statutes. The Solicitor General's brief to this Court filed in April said that there were around 16 statutes which have been passed by Congress relating to the

attorney's fees issue.

CHIEF JUSTICE BURGER: Counsel, you can resume there at 1:00 o'clock.

Whereupon, at 12:00 o'clock noon, the oral argument in the above-entitled matter recess for lunch, to reconvene at 1:00 o'clock p.m. the same day.)

AFTERNOON SESSION

CHIEF JUSTICE BURGER: Counsel, you may resume.

ORAL ARGUMENT OF MARC R. SCHEER, ESQ.

ON BEHALF OF RESPONDENT - Continued

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

An additional issue we would like to address is an issue raised for the first time in the petitioner's reply brief, and that is the applicability of Federal Rule of Civil Procedure 54(c) to this case. This issue was not raised in the courts below, and the parties have not had an opportunity to brief it. If the Court desires, I would be happy to state our position with respect to Rule 54(c).

Rule 54(c) relates to the power of the trial court to include in a judgment all remedies to which a party, a prevailing party would be entitled. But it is important to note that Rule 54(c) is a directive to the court before entry of final judgment. Rule 54(c) cannot be raised at a time after the final judgment is entered.

Therefore, Rule 54(c) cannot have an application to this case. As we say, anytime that an alteration in the final judgment is requested, it must be done pursuant to the directive of Federal Rule of Procedure 59(e), within ten days after entry of the judgment.

I also desire to inform the Court of a recent

decision of the New Hampshire Supreme Court dated November 20, 1981. I wish to inform the Court that although it deals with an issue similar to this issue, the New Hampshire Supreme Court has not totally adopted the position that the respondents have taken in this case.

The New Hampshire Supreme Court, in ruling on a fees request made approximately two months after entry of final judgment, allowed the prevailing plaintiffs to assert the attorney's fees.

However, the New Hampshire Supreme Court did notice in its decision -- and incidentally, the name of the case is Royer v. Benjamin Adams, Commissioner of New Hampshire, Department of Employment Security. It will be reported in 121 New Hampshire. The date, again, is November 20, 1981.

QUESTION: There is no Atlantic cite?

MR. SCHEER: Not yet, Your Honor.

QUESTION: New Hampshire certainly adopt whatever rule it wishes.

MR. SCHEER: And that is the point, Your Honor. I feel an obligation to tell the Court about this case, and this case is also distinguishable from the White case which is now under consideration. The New Hampshire Supreme Court noted that Mr. Royer in his original pleadings requested fees, and that preserved, under our analysis of 59(e), that

fee request would still be appropriate two months after entry of judgment, because the judgment was not final as the fees issue had not been decided.

And as you indicate, Justice Rehnquist, New Hampshire Supreme Court did specifically say that there is no state law on point, and in the absence of any definitive directive, it would decide the case on the basis of the rule of reason and decided that applying for fees two months after entry of judgment was reasonable in the circumstances of that case.

Finally, the application of Rule 59(e) to judgments in a case of this type has practical and desirable results. As noted before, there have been many different positions that have been taken with respect to the timeliness of a request for attorney's fees after final judgment is entered. It is desirable, and it is practical, to have a uniform rule which will require that attorney's fees requests be made no later than ten days after entry of the final judgment.

QUESTION: And I gather, Mr. Scheer, all that the prevailing party has to do, do I understand you to suggest, is simply say I apply for fees, period?

MR. SCHEER: Essentially, that is correct, Your Honor.

QUESTION: That's all he has to do.

MR. SCHEER: If he files the motion with ten days, he has preserved it, yes, sir.

QUESTION: He does no more than that.

MR. SCHEER: That's right.

QUESTION: Mr. Scheer, if you are correct, am I not correct in believing there is no jurisdiction of the appeal after the plaintiffs first won in this case? Because they prevailed at the first trial, did they not?

MR. SCHEER: That is correct, they did.

QUESTION: And there was no mention of fees in the original judgment, was there?

MR. SCHEER: That is correct.

QUESTION: So there really was no jurisdiction in the court of appeals, so actually, they are about two years late, not just four months late. Because you had no right to appeal, I take it, under your present theory of the case.

MR. SCHEER: Excuse me, Your Honor?

QUESTION: You had no right in 1979 to appeal under your present theory of the case, isn't that right?

MR. SCHEER: We did, because there is a final judgment.

QUESTION: I thought you said there's no final judgment if it doesn't dispose of -- oh, because the fees were not requested. I've got it.

MR. SCHEER: The fees weren't requested, and that

is the point.

QUESTION: Right.

MR. SCHEER: But it was a proper appeal. And then the case was remanded, the judgment was opened for the entry of the consent decree, and then this case arose after that.

Rule 59(e) promotes several important policy considerations. It promotes the policy of finality of judgments. It allows people to have an expectation, a legitimate expectation, that a final judgment entered by the court will adjudicate all the issues that have been framed in front of the proceeding in the trial court. And the application of Rule 59(e) also promotes fairness to all of the parties.

The parties will know that after a period of ten days has run after final judgment, if no fee has been requested, the issue is foreclosed.

QUESTION: What significance is the conversation during the settlement about fees?

MR. SCHEER: Are you referring, Justice Marshall --

QUESTION: What's in the appendix.

MR. SCHEER: The Joint Appendix relates that the defendants considered that the fees issue had been waived during settlement negotiations.

QUESTION: There was an argument about it during the settlement.

MR. SCHEER: There was a discussion of it.

QUESTION: So you were on notice then, weren't you?

MR. SCHEER: That is correct, but the defense counsel is under the impression -- I wasn't defense counsel, Justice Marshall, but the defense counsel was under the impression that fees had been waived in the settlement context.

QUESTION: But that was disputed in court.

MR. SCHEER: It was after the fees motion was filed, that is correct. The petitioners said that --

QUESTION: So you did know that they did want counsel fees.

MR. SCHEER: We were aware that they had it in mind, but our knowledge was, our counsel's knowledge was, that they had been waived.

QUESTION: Wasn't it first decided that each side would pay its own counsel fees?

MR. SCHEER: Excuse me, Your Honor?

QUESTION: Wasn't there discussion that each side would pay its own fees, and that was discarded? So it was a subject of discussion.

MR. SCHEER: That is correct. It was. But since the consent decree embodied the agreement of the parties --

QUESTION: All I mean is you weren't so surprised when they did ask for them again, were you?

MR. SCHEER: I would say no because it had been discussed. But surprised based on the fact that we thought that they had waived the fee request; that they were not going to bring it up. Surprised to that extent.

Rule 59(e) contrasts with the practical problems that would arise from the approach suggested by the petitioners. There would be no uniform rule relating to the request of attorney's fees in civil rights cases. The parties' expectations after settlement or after entry of final judgment could never be sure. The judgment could theoretically -- the party could theoretically be exposed to significant new liability for long periods of time after entry of final judgment.

The rule of reason in these cases really does not help losing parties because they will never know, theoretically, when their final liability is going to be foreclosed.

The final point I would like to make relates to the first circuit's language relating to the discussion of attorney's fees in the settlement context. The first circuit decision does not, does not, require the parties to simultaneously negotiate the issue of attorney's fees and the merits ofthe action in a settlement context.

All the first circuit decision does is say face up to the issue; the parties should consider the issue. The

first circuit in fact touches on a potential unfairness, a basic unfairness, to the liable party in settlement context. And that is, if one of the parties has an intention to seek attorney's fees and if it has not previously been raised, that intention should be disclosed during the course of settlement negotiations. If the parties are unable to reach an agreement on attorney's fees after an agreement on the merits has been reached, the parties may preserve the issue in the dissent decree by specifically reserving it for later court consideration, or the prevailing party may petition the court within ten days after entry of the consent decree.

This procedure provides a safety valve which promotes the important policy of encouraging settlement of litigation and it also provides a mechanism whereby the attorney's fees issues, if it cannot be settled, can be reserved for consideration at a later date.

I have no further argument. I will be happy to answer questions.

QUESTION: I have one other question. You may have already completed your answer, but Justice O'Connor called your attention to a number of statutes that make reference to fees, costs including fees, or fees as a part of the costs.

And in the particular statute before us, under

your view of the statute, would the statute have any different meaning if those words are simply stricken from the Act? It says a reasonable attorney's fee as part of the costs. Supposing it didn't say "as part of the costs." Do you give any meaning at all to those words in your analysis?

MR. SCHEER: As part of the costs?

QUESTION: Yes. Or do you say we just simply ignore it?

MR. SCHEER: The meaning that we give to it is, as part of the costs, the expenses, of litigation. We don't --

QUESTION: In other words, it would have the same meaning if the words were simply deleted.

MR. SCHEER: Correct. Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Larson?

ORAL ARGUMENT OF E. RICHARD LARSON, ESQ.

ON BEHALF OF PETITIONER -- Rebuttal

MR. LARSON: I do, Mr. Chief Justice. In rebuttal, the question of the record with regard to how the fee issue was raised in this case I think needs some further elucidation at the outset.

Respondents have referred to the fee requests in this case as being unanticipated. Indeed, they were on notice, as Justice Marshall pointed out, there was no prejudice. It is clear on the record in this case, and

indeed, it is a matter of trial court findings in this case that there was no prejudice and there was no surprise. This was ruled on by the trial court.

QUESTION: Do you suggest that anything short of a stipulation, casual conversations or non-casual conversations takes the place of what the first circuit required?

MR. LARSON: As a matter of notice and with regard to lack of prejudice? Yes, Your Honor, this does take care of it, in our view.

QUESTION: Mr. Scheer, isn't the basic purpose of a consent decree to resolve in favor of one party or another party a lot of disputed issues, of which each party has notice. And some may be resolved in favor of one, some in favor of the other. But the consent decree is a package which presumably brings an end to the litigation.

MR. LARSON: But not necessarily with regard to all issues, and that particularly is true with regard to fees when it comes to the simultaneous negotiation of fees and the relief on the merits because of the ethical conflict, Mr. Justice Rehnquist.

QUESTION: Couldn't the consent decree have reserved the question of fees?

MR. LARSON: It could have, but on this record fees were raised as an issue, and then it was not further

discussed because of the ethical issue. There was no need to specifically reserve the fee issue in the consent decree. The respondents were fully on notice.

QUESTION: How do you answer, Mr. Larson, Mr. Scheer's suggestion that they had reason to think that as a consequence of the settlement, fees had been waived?

MR. LARSON: I answer that by the findings of the trial court, and I would specifically make reference, Mr. Justice Brennan, to the bottom of page 68 of the record of the Joint Appendix. There are two questions. This is not with regard to the findings. This is what the trial court based its findings on with regard to the fee request.

There are two questions presented by the trial court to respondent's counsel. "Let me ask a direct question, and this cuts right to the heart of the issue. Are you saying that you and brother Kelly, who represented the petitioner, had an agreement that there wouldn't be any motion for fees?"

The first answer is a little bit evasive, and the court comes back and says, "Did you work it out at that time, whatever point it was? Answer: No, we did not."

QUESTION: And you think that helps you?

MR. LARSON: That the fees were not waived? Absolutely. They were not waived, Mr. Chief Justice.

QUESTION: Well, not waived, but not dealt with in

the consent decree.

MR. LARSON: Because of the simultaneous -- I mean, in the two hearings before the trial court, respondent's counsel admitted on both occasions that the reason the fees were not further pursued was because of the ethical considertations of holding the class action hostage for an award of fees that would go to plaintiff's counsel. It was fully discussed.

I should also point out two other things.

QUESTION: Mr. Larson, I'm surprised you read that sentence rather than the one you omitted, because the one you omitted indicates that they were astounded at the thought that you would waive fees. That seems to me a lot more supportive to your position than the one you quoted.

MR. LARSON: I believe that is, also, but I believe the second answer also rather succinctly states that the fee issue was not resolved during the negotiations. And indeed, it was reserved, going on to page 69 of the transcript, because of the ethical consideration of the simultaneous negotiation.

QUESTION: But not reserved in the decree; it simply wasn't settled by the decree.

MR. LARSON: It was not settled by the decree. It did not have to be reserved in the decree to the extent that respondent's counsel were on notice that the fees would be

requested.

QUESTION: Mr. Larson, you don't see anything unethical, do you, in reserving in the consent decree the issue of attorney's fees, for example.

MR. LARSON: That would not bother me at all.

QUESTION: Or in a settlement agreement.

MR. LARSON: No, that would have been wrong.

QUESTION: Do you perceive anything unethical in the agreement or consent decree if the parties first deal with the merits and resolve that and then secondarily deal with the issue of the attorney's fees?

MR. LARSON: Well, the Prandini rule is that the consent decree on the merits should be first court-approved, and then you should go forward and negotiate the fees and try to resolve the fees. In other words, it is not simply the out-of-court resolution under Prandini in the third circuit; it is a court approval of that --

QUESTION: But presumably you could do it in a bifurcated fashion, and the parties could still contemplate taking care of all potential issues in any settlement or consent decree, could they not?

MR. LARSON: Under a bifurcated approach, yes.

QUESTION: And so if they're thinking ahead, they can solve these problems and not be in the kind of a situation that these parties found themselves, presumably.

MR. LARSON: Five days after the court approval of the consent decree in this case, petitioner's counsel began to negotiate for fees. A letter went out to respondent's counsel and fee negotiations ensued.

The fee application in this case was filed only when the negotiations were not fruitful and did not resolve the matter, Justice O'Connor. I mean, we tried this bifurcated procedure that had been approved, indeed, by the third circuit.

QUESTION: Will you help me out on New Hampshire? I've looked at both judgments here, and I don't see costs anyplace. Is there a separate bill of costs in there? A separate piece of paper?

MR. LARSON: This case was IFP, Your Honor, informer pauperus, and so there was technically --

QUESTION: On page 41 of the appendix, what is 30? That's the court of appeals, right? Now, where is the district court's order?

MR. LARSON: The district court's order with regard to the entry of the consent decree --

QUESTION: Yes, that's what I want. I didn't see any costs on that at all.

MR. LARSON: The consent decree and judgment are on pages 31 through 33.

QUESTION: Yes, but there's no costs.

MR. LARSON: No, we did not reserve the issue in the negotiations. Five days after the entry of the consent decree under the Prandini rule, we began to negotiate the fees, Your Honor.

QUESTION: Well, where is the judgment that gives the costs? Do you have separate costs?

MR. LARSON: The judgment that gives the costs in this case is the district court's judgment with regard to fees.

QUESTION: But it doesn't say what the costs are.

MR. LARSON: We have been permitted to proceed in the trial court informer pauperus; accordingly, we did not submit a separate bill of costs, but we submitted an application for attorney's fees.

QUESTION: What's confusing me, in some states it says judgment for plaintiff, et cetera, et cetera, and costs -- and then put $30.80 or $56.00.

MR. LARSON: Normally, the costs are, as I have mentioned before --

QUESTION: Are there no costs in this case?

MR. LARSON: Yes, the attorney's fees that were awarded; the $16,000 that were awarded as part of the costs, to petitioner's counsel.

QUESTION: Well, who paid for the filing of the papers?

MR. LARSON: It was informer pauperus; it was paid free or it was paid by the United States.

QUESTION: And the other side had no expenses? So there's no costs except attorney's fees.

MR. LARSON: That was the only item of costs that was at issue in this case in the trial court, that is correct, Your Honor.

QUESTION: Counsel, under your view, of the case does it matter whether the parties thought that their litigation was at an end, at the time of the judgment?

MR. LARSON: With regard to a final judgment or the fee issue? I don't understand.

QUESTION: Let's suppose a judgment was obtained, as indeed it was here, but both parties assumed their litigation was over.

MR. LARSON: Well, that certainly is not this case.

QUESTION: Now, can you change your mind later and come back and ask for attorney's fees?

MR. LARSON: Under a rule of reasonableness, which is akin to laches, the issue would be prejudice. And if indeed, there had been an express or even an implied waiver of fees at some stage, that would be up to the trial court to determine as a matter of fact whether there had been such a waiver and whether they were prejudiced.

On this record, of course, there was notice so

there was no prejudice, and indeed, the trial court found that there had been no waiver of fees; that the issue had been discussed and essentially reserved.

QUESTION: When you say essentially reserved, it certainly wasn't essentially reserved in a written document, was it?

MR. LARSON: It was not in a written document.

QUESTION: In the consent decree.

MR. LARSON: But again, respondents were on notice, the issue was raised, it was effectively deferred until after court approval of the consent decree.

Several things that were said by the respondents I would also like to rebut. There was -- it is their view that fees are not costs; that fees can be excised from the -- Congress's chosen language can be excised from the Fees Act. That is contrary to a cardinal rule of statutory construction that was most recently announced by the Chief Justice in Reiter v Sonotone Corporation two years ago, where the court applied, under Section 4 of the Clayton Act, the cardinal rule of statutory construction, that all words used by Congress must be given effect if at all possible. And indeed, the court has done this in fees cases; did it twice within the last several years in the Fees Act cases of New York Gaslight Club v Carey and also in Maine v Tibotoc. I see my time has expired. Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen, the case is submitted.

(Whereupon, at 1:30 p.m. the oral argument in the above-entitled matter ceased.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

RICHARD H. WHITE, v. NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, ET AL. NO. 80-5887

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and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY