OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1437

TITLE JEFFREY MAREK, ET AL., Petitioners v. ALFRED W. CHESNY, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF STEVEN CHESNY, DECEASED

PLACE Washington, D. C.

DATE December 5, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

- -x

JEFFREY MAREK, ET AL., :

Petitioners, :

V. : No. 83-1437

ALFRED W. CHESNY, INDIVIDUALLY :

AND AS ADMINISTRATOR OF THE :

ESTATE OF STEVEN CHESNY, :

DECEASED :

- -x

Washington, D.C.

Wednesday, December 5, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 o'clock p.m.

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APPEARANCES:

DONALD G. PETERSON, ESQ., Chicago, Illinois; on behalf of the petitioners.

JERROLD J. GANZFRIED, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C.; on behalf of the United States as amicus curiae in support of petitioners.

VICTOR J. STONE, ESQ., Champaign, Illinois; on behalf of the respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Peterson, you may proceed whenever you are ready.

ORAL ARGUMENT OF DONALD G. PETERSON, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. PETERSON: Mr. Chief Justice, and may it please the Court, the facts of this case are important to this Court for two reasons: One, to decide this case and; two, to evolve, develop, to define the principles that should be applied in the future.

The facts of this case are that in October of 1979 a law suit was brought pleading a cause of action under 1983. Two years later, after the case had been pending in the Northern District of Illinois, the defendant, the petitioner here, made an offer to the complainant. The offer was a substantial offer. The offer was $100,000.

After the offer of $100,000 was made, pre-trial conferences were held, discovery was reopened, the case proceeded. That was November 5, 1971. In April of 1982 this case proceeded to trial. The negotiations had proved unsuccessful. The attempt to resolve this case without a jury trial proved unsuccessful.

A long, hard-fought, well-fought and

fairly-fought struggle took place in that courtroom, with expert witnesses on police procedure, with expert witnesses on ballistics, with expert witnesses on criminal evidence. When the jury went back to deliberate, they had about three weeks of proceedings that they had heard.

The attorney representing the plaintiff at trial, representing the respondent here, was an outstanding and excellent and effective advocate of his client's case. He had not with his client agreed to accept the $100,000 that was offered him.

For the defendant to offer that plaintiff $100,000 meant that that defendant's attorney had to persuade his clients and principals to come up with that money, because under Rule 68, when that offer is put on paper, when that offer is served, the plaintiffs -- excuse me, the defendant, the petitioner here, is going to have to live with it, because the plaintiff may take it.

And if the plaintiff takes it, there is a judgment entered and the defendant can do nothing but pay that judgment. The defendant, petitioner here, before making the offer had to evaluate the case, had to study the Federal Rules of Civil Procedure -- I believe there's 86 of them; this is Rule 68 -- had to, under the

state of the law as it existed at that time, make a judgment as to how to use 68 and how it might affect or be affected by 1988.

If the defendant on that occasion, November 5, 1981, when he made that offer, if he did not offer attorney's fees to the plaintiff, if he did not indicate, as he did, that attorney's fees were included in the offer, I suggest that when -- if the plaintiff had accepted the offer the plaintiff would have come back to the Court and asked the Court to assess attorney's fees stacked on top of that $100,000.

In this case, the fees accrued or alleged to be accrued in the trial court amount to around $171,000, perhaps even $173,000. Without making that offer as it was made, petitioners would have put $100,000 on the table, had it taken away from them, and exposed themselves to the potential of another $171,000 or $173,000.

The plain meaning of 1988 authorized, sanctions, and encourages what the defendant did. What the defendant did in these circumstances was fair. It was fair to the plaintiff; it was fair to the defendant.

QUESTION: Was there any request for injunctive relief in this case, or was it just a damages

action?

MR. PETERSON: Justice Rehnquist, the complaint in this case did have injunctive relief. It pled in the complaint that the police officers in question should be disarmed, that the Village of Berkeley should undertake to do that. The Village of Berkeley ended up with a verdict of not guilty.

But there was injunctive relief in this case, and an offer including injunctive relief was not made. We did not offer to disarm the police officers or give them any of the other remedies they sought.

QUESTION: You prevailed on that point in the trial?

MR. PETERSON: We prevailed on that point.

QUESTION: Well, then you're talking about -- how much was awarded in the way of damages?

MR. PETERSON: The award of damages in the aggregate is $60,000.

QUESTION: Well, how can a court award $173,000 attorney's fees, where all the plaintiff recovered was $60,000? Don't the attorney's fees have to bear some proportion to the value of what was recovered?

MR. PETERSON: Well, the trial court, of course, has not, Justice Rehnquist, at this point

awarded $171,000 or $173,000. The trial court at this point has awarded $32,000 and has entered judgment on verdict or, excuse me, has entered judgment for $32,000.

I believe the court is suggesting that the trial court, if this case were to be remanded on this issue, would have to take that into account. I'm suggesting to this court that the result here is not a remand but merely a reversal of the Seventh Circuit.

In this case, $32,000 has been paid in attorney's fees. This is important. This defendant has never, has never attempted to challenge 1988 or suggest that it shouldn't be used, it shouldn't be applied. This defendant has acted within the rules, the rules in terms of the statute, which is 1988, cognizant of it, made an offer, took it into account.

This defendant continued to play under the rules by paying the judgment, $60,000 judgment after $100,000 offer. The defendant didn't stop there. The plaintiff refused that money, the money. Two days after the judgment was entered on the verdict the defendant deposited the money to the Clerk of District Court pursuant to the order of the trial judge. Since the plaintiff won't take it, defendant deposited it to the court.

Defendant didn't stop there either. A fee petition had been filed. The fee petition indicated that the plaintiff alleged approximately $34,000 in fees accrued before the offer, that is, before November 5 of 1981. It's an itemized accounting, bill of accounting, of $34,000. The defendant and the plaintiff sat down and they negotiated $2,000 off it. The defendant took $32,000 in addition to the $60,000 and put that in the District Court Clerk, too.

Before this case ever went to the Seventh Circuit, $92,000 were paid. Sixty thousand dollars of that money was a judgment on verdict. Thirty-two thousand dollars was the pre-trial accrued attorney's fees of the plaintiff. The Seventh Circuit took the case and reversed, and when the Seventh Circuit reversed, the --

QUESTION: Mr. Peterson, can I ask you this one question? Does the record tell us what the hourly rate was?

MR. PETERSON: One hundred and fifty dollars an hour for the lead attorney, Your Honor, and the trial judge, Judge Shadur, did review this and felt that $150 was appropriate.

Defendant, your petitioner, has not asked this Court to review the hourly rate, has not asked this

Court to review Judge Shadur, has not filed -- excuse me. We filed the petition for cert. There has been no cross petition for cert.

One hundred-fifty an hour was awarded, plus, for the associate counsel, lower hourly rates in the vicinity of $70, $80 an hour were awarded.

The plaintiff has been well compensated in this law suit for his services. Taking into account he was offered $100,000 and only got $60,000, he didn't have a bad day in court.

I would like to address myself --

QUESTION: How did you -- when you made your offer, the $100,000 offer, you said it included attorney's fees, but you picked out an amount, didn't you?

MR. PETERSON: No, I did not.

QUESTION: Oh, you did not.

MR. PETERSON: No.

QUESTION: I thought you just said that it includes attorney's fees.

MR. PETERSON: That's right.

QUESTION: And it was only after the trial judge figured it up that he came up with the $32,000? All right, thanks.

MR. PETERSON: The way it works, as I see it

or I envision it, and this case, I think, is an excellent fact case for this Court to see how this whole thing evolves, at the moment that Judge Shadur entered judgment on verdict for $60,000, we didn't really know, in my opinion, we really didn't know whether or not the offer at that very moment did exceed the result finally obtained.

We didn't know whether it was in fact more favorable or not. But we did know it the moment that Judge Shadur entered judgment for the $32,000 in attorney's fees. That's when we knew it. I am cognizant of some of the earlier developments for this Court, for instance, in Delta v. August, where that issue has been troublesome to some of the Justices, at least.

I do suggest to this Court that the only workable solution to this problem is exactly what we did, and it's a beautifully logical result, and it's a fair result. It is in fact the result that doesn't take a lot of litigation to resolve.

I would like to follow up on the point that you are raising, Justice White. At the point the $60,000 judgment on verdict is entered, we do not know how that stacks up against the $100,000 offer. In this instance, the two sides agreed $32,000 was the amount of

pre-offer fee. The judge entered judgment on verdict for the $32,000.

I believe this Court should ask itself the next question: what if in fact they couldn't agree? The first step in the solution to that problem is that District Court is going to have to adjudicate that issue, and there is a body of law, obviously, upon which that is going to be measured. The Court's discretion in awarding those fees, the District Court's discretion, is governed by a body of common law and it's developed in large part out of this Court.

If when the District Court has done so it determines that not $32,000, in the case before you, but some larger sum, such as $40,000, $45,000, $60,000, whatever number they decide, he decides, will then determine whether or not the offer is more favorable or not. It is the sum of the two components, in my opinion, that should determine it.

It seems to me to be the workable solution to the problem.

QUESTION: It's only the sum of the two components if the offer included fees. If the offer had just been for the liability, then I don't suppose you'd have it.

MR. PETERSON: Well, I think that the Sixth

Circuit, Justice Stevens, in Hutto v. Finney would stand for that proposition, yes.

And sensitive to that, the practicalities. My client can not afford to make a $100,000 offer and then expose itself to a fee on top of that. That is why our offer was made the way it was.

QUESTION: But you could have made a clearcut offer, couldn't you?

MR. PETERSON: It is a clearcut offer.

QUESTION: You could have said blank dollars plus blank dollars for fee, couldn't you? Wouldn't that have been an offer?

MR. PETERSON: I would have to at that point, as a practical matter, have to guess not one thing but two things. I would have to not only guess what the jury was going to do, but I'd also have to guess what the trial court might do with the fee.

QUESTION: But it would have stopped us from having to guess, wouldn't it?

MR. PETERSON: Oh, I don't think this Court has to guess because this Court isn't going to see the case until there's been an adjudication on the fee. If someone wants to make an offer that doesn't include a fee --

QUESTION: Well, don't we have to guess

whether you made an offer of $100,000 for both or one item? Don't we have to guess that?

MR. PETERSON: Not in this record, you don't.

QUESTION: Well, what do we determine?

QUESTION: Well, your offer was for both, wasn't it?

MR. PETERSON: It sure was. The joint appendix. You'll see in the joint appendix a reprint of the offer.

QUESTION: What's the pertinent language there?

MR. PETERSON: The pertinent language there is: "for a sum," -- that is an adjective phrase, if I recall my grammar in grade school -- "a sum, including costs now accrued and attorney's fees," -- those are the two things that are within the comma -- "of $100,000." The sum is qualified by the phrase "costs now accrued and attorney's fees."

It covers both components. It is an attempt, and I think a successful attempt, to mirror the provision of the rule.

QUESTION: Is it settled under the rule that the judgment that is actually recovered -- when you are making the comparison, is it settled that you take the damages, the actual damages that are awarded plus

attorney's fees as the figure to compare?

MR. PETERSON: Is it settled? No, I don't think it is settled until this Court does it. I do not think that issue has been settled.

QUESTION: What if you had made an offer of $60,000, excluding attorney's fees, you offered to settle the substantive issue for $60,000, and then there had been awarded $50,000 in damages and $50,000 in attorney's fees?

MR. PETERSON: Well --

QUESTION: Would the rule have applied to you then, or do you know?

MR. PETERSON: I could -- I believe what I could do, Justice White, is make the offer without including attorney's fees or, as you put it, excluding attorney's fees -- I think it means the same thing -- and if I had done that, the result obtained would have been $60,000 compared to the $100,000.

After that happened, however, now we're going to have a fee hearing, and at the fee hearing --

QUESTION: I know, but I'm still interested in what do you compare. If you made a $60,000 offer excluding attorney's fees, what figure do you compare that with after a trial?

MR. PETERSON: You compare it with the

judgment on verdict.

QUESTION: All right, but that doesn't -- wouldn't include attorney's fees.

MR. PETERSON: It would not.

QUESTION: All right. So if the actual judgment was for less than you offered, you would have the benefit of the rule. But I grant you would still have a hearing on attorney's fees.

MR. PETERSON: Now or pay it later, I guess it what is sometimes said to be. But if you don't offer it, those fees now, then you are not -- you are entitled to do that, but I think it would be a foolish thing for you to do.

QUESTION: But you would only be liable for attorney's fees accrued before the date of your offer.

MR. PETERSON: Sure.

QUESTION: You wouldn't be paying for post-offer.

MR. PETERSON: That's correct.

QUESTION: Let me see if I understand you, Mr. Peterson. Are you saying that your offer was $100,000 divided up any way you want to?

MR. PETERSON: Any way you want to. It's not unreasonable. It's done. That is what a contingent fee always does. If 1988 didn't exist, if this was a

straight common law cause of action, somebody offers you $100,000, they don't care whether the attorney gets it or the client gets it.

There is a follow-up question, I think, that comes from it. Doesn't this take the discretion away from the District Court, which it should have, on fees, to set a reasonable fee? I think the body of Federal law would suggest that a District Court in regulating the procedure before it always has the right to determine those fees.

And I don't think that takes this discretion away from the court. What I'm suggesting in substance and in conclusion is that the District Court in the operation of Rule 68 is to, to borrow the expression from the Seventh Circuit, to mechanically apply Rule 68.

The District Court need, however, not apply mechanically the amount. The District Court's supposed to exercise its discretion as to amount. I understand that it's not easy to be successful making an offer of judgment, but if you do it right, shouldn't you get affirmed?

QUESTION: Mr. Peterson, under Rule 68 I gather that a prevailing plaintiff who gets a judgment less favorable than the defendant's offered judgment has

to pay defendant's costs accrued after the offer of settlement, as well as absorb the plaintiff's own costs and attorney's fees.

Now did you try to recover any post-offer costs from the defendant here?

MR. PETERSON: We did in our post-trial motion. There were cross post-trial motions and we did present those and the District Court denied all the relief.

QUESTION: Do you think you are entitled to those under Rule 68 in your version of it?

MR. PETERSON: Well, as I understand the body of law that's developed on that, there is a different standard for the defendant, apparently, under 1988.

QUESTION: Would you think 1988 cuts in and says no, you can't get them?

MR. PETERSON: It's not an absolute prohibition, but apparently the standard under the body of law that this Court has developed for a defendant is different under 1988 than it is for the plaintiff.

QUESTION: Well, why wouldn't Rule 68 prevail in its special circumstances over 1988 in that situation?

MR. PETERSON: Well, because the attorney's fee component has to come from somewhere, Justice

Rehnquist. Rule 68 uses the broad word "costs". In some contexts, 1988, the word "cost" comes out of 1988. Therefore, the specific -- that is, 1988 -- goes into the general.

QUESTION: Well, are you not entitled to it because you're not the prevailing party under 1988, or what?

MR. PETERSON: Okay. I'm sorry. I see your point now. I am not the prevailing party under 1988. I appreciate your making that point. I am not the prevailing party under 1988. I cannot use 1988 as my source for the fee. I appreciate your straightening me out.

QUESTION: And you think you can or cannot use Rule 68 to get -- for your post-offer costs?

MR. PETERSON: Well, I think Rule 68 would authorize, in this set of facts, my recovery of costs, "conventional" costs as opposed to fee costs, which only come out of 1988. My answer to your question is yes, but we have not pursued that. It is a nominal amount, in the first instance, and, frankly, I don't think it improves our standing to be arguing these equities to be going after those little things.

But on the big equities --

QUESTION: Well, it could be significant and

certainly we would have to have that in mind, I suppose.

MR. PETERSON: Yes. I think that 68 -- I think that 68 does authorize that recovery.

QUESTION: Costs but not attorney's fees?

MR. PETERSON: Conventional costs as opposed to the attorney's fee type costs, yes.

QUESTION: Your time has expired now, Mr. Peterson.

Mr. Ganzfried.

ORAL ARGUMENT OF

JEROLD J. GANZFRIED, ESQ., ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

MR. GANZFRIED: Thank you, Mr. Chief Justice, and may it please the Court: The question in this case is a very practical one, whether Rule 68 must be read in a way that rewards a lawyer even at the expense of his client.

Because of some mistaken notions of policy, the Court of Appeals held that an attorney's fee of $32,000, more than 50 percent of the damage award, was, as a matter of law, unacceptable, and that fees should be reconsidered and awarded for work that obviously produced no benefit to the client.

We submit that the decision below is in

error. It fails to honor the plain meaning of the language Congress employed in Section 1988, that costs include attorney's fees. The decision also undercuts the purpose of Rule 68, as expressed in the Delta Air Lines case, that is, to encourage settlement.

And, finally, the Court of Appeals incorrectly perceived a conflict between Rule 68 and Section 1988, a conflict between Rule 68 and in fact the intent of virtually all the Federal fee-shifting statutes. And we submit that there is nothing in the scores of Federal fee-shifting statutes that is incompatible with the objective of settling law suits.

Those laws were passed not simply to underwrite plaintiffs as an end in itself, but for the broader purpose of ensuring that lack of funds will not prevent an aggrieved party from vindicating his statutory or Constitutional rights. And the vindication of the client's right is a goal that we submit can be achieved just as effectively and, in many instances, more effectively by settlement than it can be by continuing to litigation law suits through trial and appeal.

Now by definition, in rule 68 cases, the client has achieved his greatest vindication when that offer of judgment is made, and at that point the

attorney's fee provision has satisfied its objective. It's served its purpose. If a plaintiff turns down that vindication and continues to litigate, there is no policy reason to continue to subsidize his litigation and to continue to subsidize his lawyer from pursuing that litigation, litigation which, by definition, will result in a detriment to his client.

Our reading of Rule 68 --

QUESTION: Excuse me. Can I ask you just one question? In your view, if there were no Rule 68 and the plaintiff here were entitled -- I don't know if the figures are right -- to a $170,000 fee under 1988, would you characterize the right to the $170,000 as a substantive right or a procedural right?

MR. GANZFRIED: If I had to choose between those two words, I would say that it's procedural. Certainly that's what the Court indicated in Hutto v. Finney. On the other hand, I don't think that that is necessarily appropriate.

QUESTION: But Judge Posner apparently thought that was important because of the limitations on what the rules can do; that's the reason I asked the question.

MR. GANZFRIED: Well, I understand that, but I suggest that Judge Posner is incorrect on that, for two

primary reasons. First, that he was relying on the Erie line of cases, the diversity cases. We don't have a Federal-state issue in this case. And, second, I suggest that this Court has rejected that substance-procedure test, and let me refer the Court to a case that is not cited in our brief. It's the American Pipe and Construction Company case v. Utah.

It's in 414 US, page 538, in which the Court specifically rejected the substance-prccedure dichotomy and said that the test is whether, in that case it was the tolling of the statute of limitations, the test is whether by a court doing that in a given context it is acting in consonance with the legislative scheme in which the statute cf limitations appeared.

Now our reading of Rule 68 is consistent with the principles of providing attorney's fees that this Court has announced in Smith v. Robinson and Hensley v. Eckerhart. The Rule allows the Court easily to draw the distinction that is described in Smith v. Rcbinscn, that is, the clear line between hours of work that contributed to a plaintiff's success and those that did not.

Rule 68 establishes a conclusive presumption that the hours spent after the cffer was rejected did not in any way contribute to the plaintiff's success,

and fees should not be awarded for such counter-productive efforts.

We argue also that the Court of Appeals opinion would make settlements less likely by encouraging counsel to reject reasonable offers, secure in the knowledge that the meter will continue to run and that any recovery at trial, no matter how small, will pay for every tick of the meter. Now that result is directly contrary to what this Court has called the "national policy to minimize the cost of litigation", a policy that is strongly emphasized in the Federal Rules of Civil Procedure.

The Court said that in 1964 in Farmer v. Arabian-American Oil Company. We submit that the need to control litigation costs is even more pronounced now than it was in 1964.

Now let's recognize how the attorney's fee provisions operate. They provide a powerful incentive for a defendant to settle because as a case drags on the defendant faces exposure to the damage award, he faces exposure to the plaintiff's attorney's fees and, of course, he has to bear the continuing cost of defending the law suit.

The defendants thus have strong pressures to settle, but obviously they can't do that alone, and

that's where Rule 68 fits in. It provides a similar incentive to bring the plaintiffs to the bargaining table.

We submit also that the decision below is inconsistent with Congress' purpose of preventing windfalls for lawyers, a purpose this Court recognized in Blum v. Stenson. To that end, Congress authorized courts, in their discretion, to award reasonable fees adequate to attract competent counsel.

Now one need only imagine the meeting at which counsel tells his client that it will cost him some $200,000 in fees to lose $8,000 in his judgment to conclude that the resulting fee is unreasonable. And, as the Court noted in Hensley, the hours that are not profitably billed to one's client also are not properly billed to one's adversary, pursuant to the statutory authority.

In short, our position is that the billing judgment principle that the Court described in Hensley is equally applicable here. Counsel should be expected to exercise litigation judgment, settlement judgment, in a way that encourages settlements by eliminating the windfall that the Court of Appeals approved, and in our view, when read correctly, Rule 68 does precisely that.

I'd like to respond to one point that came up

during petitioner's argument. The question of the validity of the offer in this case is not before this Court. The parties stipulated that the pre-offer fees were $32,000, so while the initial offer did not have a breakdown, as the parties stand before the Court that figure has been broken down. It's been broken down to $32,000 for costs, including attorney's fees, and $68,000 for damages.

QUESTION: Why did they break it down?

MR. GANZFRIED: Excuse me?

QUESTION: Why did they break it down, so that the judge could enter a judgment? Is that it?

MR. GANZFRIED: The fee request was made for pre-offer fees of $34,000-some-odd. The judge asked the parties to consult on the figure, and they agree that the pre-offer cost plus attorney's fees was $32,000, and that's where the figure comes from. So as the case reached the Seventh Circuit and as it comes to this Court, we have an offer that the parties, by stipulation, have broken down to $32,000 and the remainder for damages.

QUESTION: So you think under the Rule, under Rule 68, you can make your offer in either of two ways -- including attorney's fees or excluding attorney's fees?

MR. GANZFRIED: Well, we think that in order to make a valid Rule 68 offer you have to make it including attorney's fees.

QUESTION: You have to? Why?

MR. GANZFRIED: Because in a case in which attorney's fees are subject to recovery, such as in 1988, because the offer must include costs then accrued. If costs includes attorney's fees, then the figure -- the offer of judgment must include the attorney's fees as well.

QUESTION: If that's your position, then you would disagree with the response given to me by Mr. Peterson in my question to him about the recoverability of post-offer costs of a defendant.

MR. GANZFRIED: In a 1988 case? In a 1988 case, a defendant who is in a position to take advantage of Rule 68 can recover only his costs exclusive of attorney's fees, because under Section 1988 he is not the prevailing party, and so we don't have a situation where defendants will ever be in a position to recover attorney's fees from plaintiffs, because under Delta, in order for Rule 68 to shift anything, the plaintiff must have prevailed and if plaintiff prevails then the defendant can't recover his attorney's fees.

QUESTION: Well, I take it the petitioner

seemed to think that you could make the offer just for the amount of the damages and not include attorney's fees.

MR. GANZFRIED: Well, I'm not sure he said that, since his offer did include attorney's fees. It simply didn't specify a particular amount for attorney's fees.

QUESTION: Well, I am sure that in my thoughts I thought he said he could make the offer just for the amount of, just for damages, not including attorney's fees.

MR. GANZFRIED: Well --

QUESTION: You disagree with him?

MR. GANZFRIED: I disagree with that. In cases in which attorney's fees are recoverable by plaintiff --

QUESTION: You think, then, it's not only that this is a proper kind of an offer but it's the only kind of an offer to be made in a 1988 case, including attorney's fees?

MR. GANZFRIED: As a Rule 68. Obviously, our position is that the parties are perfectly free to settle cases on any basis they like, but in order for Rule 68 to operate the offer must include the attorney's fees.

QUESTION: The Rule doesn't quite say that, though. The Rule says "may make an offer", and then one of the elements of the offer. It doesn't say "may" or "must", either one. You just rely on the fact that the words "with costs then accrued" are in the sense --

MR. GANZFRIED: With costs then accrued, that's right.

QUESTION: But the verb that precedes it has a "may" in it. But, anyway, that's not an issue in this case, is it?

MR. GANZFRIED: No, the validity of the offer is not in issue in this case, additionally because there's no cross petition that's been filed. The Court of Appeals concluded that it was a valid offer, and should this Court conclude that the offer was invalid, it would be providing the respondents greater relief than they got in the Court of Appeals, and since they filed no cross petition that would not be an issue that's before the Court.

Thank you.

QUESTION: Mr. Stone.

ORAL ARGUMENT OF

VICTOR J. STONE, ESQ., ON BEHALF OF RESPONDENT

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

I should like in the time allcted to review the facts of the case somewhat supplementarily, but not lengthily, to rebut a few of the points made in the preceding oral argument, but then to get to the core of our argument, which is a legal argument, as to the meaning of costs in Federal Rule 68, the linkage alleged by the opposition to exist between that use of the term "costs", and the various fee-shifting statutes, prime among them, of course, in this case, Section 1988 of Title XLII.

I should like to deal also with the relationship of the Rule's enabling Act, and particularly the second sentence thereof, and its relationship to and interpretation of Rule 68 that is urged by the petitioner in this particular case. Then, to serve what I shall assert is the vast import of a reversal in this particular case, the chaos that would be fostered in innumerable classes of litigation involving fee-shifting statutes which contain both the words "costs" and "attorney's fees" in some proximity with one another.

If I may begin, Your Honor, I would like first of all to remind the Court, although this has already been read to the Court, of the precise language of the offer in this particular case, an offer to allow

judgment to be taken against them by the plaintiff for a sum, including costs now accrued and attorney's fees, of $100,000.

QUESTION: Do you see any ambiguity in that?

MR. STONE: Yes, Your Honor. Indeed, if I may empathize with trial attorney, I would have been puzzled as to whether costs at this time accrued and attorney's fees meant that attorney's fees were limited to this time accrued, whether -- I would be wondering what the point was.

QUESTION: Well, if the offer were accepted, there wouldn't be any more services to be performed, would there?

MR. STONE: That may very well be true, Your Honor.

QUESTION: May very well? Any other alternative? What fees would there be to get this settlement? Doesn't that cut it off?

MR. STONE: If judgment were entered thereupon, and there were no further proceedings.

QUESTION: What other proceedings could there be? What jurisdiction would any court have after the stipulation were entered?

MR. STONE: If I understand your question, Your Honor, it is to the effect that if the offer were

accepted and judgment entered by consent there could be no further attorney's fees in the case.

QUESTION: Just sending somebody down to the courthouse to file the papers; wouldn't that be about all?

MR. STONE: That would be about all.

May I, however, point to another matter that derives from the wording of the offer in this particular case? The offer in this particular case shows an awareness that as of that moment in time, at least, counsel who made the offer must have been aware that an offer of costs did not include attorney's fees; therefore, the separate mention of them both, of the two items, and that, I should think, indicates an awareness generally among the bar and the bench and the decided cases -- well, there were practically no decided cases -- but an understanding, generally accepted, that costs within Rule 68 did not include attorney's fees.

QUESTION: You don't agree with your friends characterizing that proposal as an offer to pay $100,000, divided up any way you want between counsel and client, client and counsel? You don't read that offer as that kind of an offer?

MR. STONE: I think it can be read that way, Your Honor, and we do not make --

QUESTION: What other way could it be read?

MR. STONE: We do not make a big point, Your Honor, nor do I wish really to urge that this Court's decision should turn upon the validity or invalidity of the offer. I do suggest that the making of an offer in this form presents uncertainties not only of prediction of how a jury will resolve disputed questions of unliquidated damages, but does present problems of determining how allocation shall be made of a lump sum as between client and attorney and so on.

And that, I believe, is a point that must be kept in mind in this particular case.

QUESTION: One more hypothetical.

MR. STONE: Yes.

QUESTION: If you had accepted the offer under your practice in your courts, what would you have done -- tried to agree with the client on the division of the $100,000 or, if you couldn't agree, then submit it to the court and let the court fix the fee? Which, or what third alternative might there be?

MR. STONE: I think those are the two alternatives that occur to me, Your Honor. If the offer had been accepted, then client and attorney would be required to negotiate a settlement and, failing that, present it to the court for adjudication.

In this particular case, if the Court please, we had a civil rights case involving a police action that resulted in the death of a 21-year-old man. The jury's verdict established liability for the civil rights violation and that further level of fault which is necessary to find in order to warrant the assessment of punitive damages.

Concerning the offer and rejection of the offer, as has been said by opposing counsel, the reasonableness of the offer and the reasonableness of the rejection are not before this Court at this time. I regret, however, that so much attention has been paid to this particular subject in the briefs on the other side of the case, and, therefore, it seems to me necessary to remind the Justices that this is not an issue in the case, that the reasonableness of the making of the offer and the reasonableness of the rejection have not been determined by any particular court, and, as this Court has cautioned in the Christianberg Clothing case, post hoc, 20/20 hindsight should not be engaged in to determine whether or not the rejection of an offer on the date and time and with the awareness then present should be considered to be reasonable or unreasonable.

QUESTION: No case from this case from this Court, Mr. Stone, has ever decided that there is a

reasonableness requirement in connection with Rule 68.

MR. STONE: No, there is none, Your Honor.

And therefore I shall proceed in connection with this case. The rejection of this offer in this case did lead to a trial and to a judgment which, according to the calculations of opposing counsel, amounted to a total judgment of $92,000. That is very easily seen to be eight percent less than the amount of the judgment, if one excludes court costs. And that makes the approximation even closer.

This is the degree of calculation upon which the drastic and mandatory consequences of Rule 68 are said then to have to follow, and I would argue that that is making a mountain move as a result of a very small movement of a molehill.

The linkage which must be --

QUESTION: What seems to be the natural consequence of Rule 68?

MR. STONE: One of the problems, Your Honor, in reading Rule 68 in conjunction with any provision that provides for reasonable fees, or for doing anything on the basis of a flexible standard that can be adapted to the facts and circumstances and equities of a particular case, one of the grave difficulties is the mandatory language of Federal Rule 68, which allows for

no discretion to be exercised.

And may I point out in this particular instance and in response to your question, Justice White, the logic of the position taken by the opposition to the effect that there is a linkage between Section 1988 and Rule 68, which would require the plaintiffs to forego post-offer fees accrued after the making of the offer, would not result in the transfer of defendant's fees to plaintiff in accordance with that particular incorporation either.

The reasonable fees which a court may discretionarily award pursuant to Section 1988 are or they are not included within "costs" in Federal Rule 68, and it is my contention, Your Honors, that they are not and they cannot be.

May I recall the history of Federal Rule 68, in its present form only slightly altered from its original form, which became effective with the rest of the Federal Rules in 1938? The word "costs" is used a number of times in the Federal Rules of Civil Procedure, never, never used alone to refer to anything but the costs defined in the Judicial Code, sections 1920 and following.

Under the Rule's enabling Act, it is at least questionable whether Congress intended to authorize the

making of rules that would affect substantive rights, and here I must state my strong disagreement with the Assistant Solicitor General as to whether the award of attorney's fees is, involves a substantive right.

First of all, the dimensions of the award are totally inconsonant with those relatively minor incidents of litigation that are referred to as "costs".

QUESTION: Mr. Stone, are you speaking of the dimensions of the award in this particular case, or just generally the relationship between the amount of fees and the amount of costs?

MR. STONE: Both, Your Honor. It is generally, I am tempted but it would be imprudent to say, always the case that attorney's fees will loom rather large in comparison with taxable costs under Section 1920 of the Judicial Code.

QUESTION: What's the breakdown here? Do you have it in mind, dollars?

MR. STONE: Yes, Your Honor. The requests for attorney's fees and costs submitted by Mr. Montgomery in trial court -- please excuse me if I'm slightly inaccurate -- was for $171,000, and that, incidentally, included pre-offer and post-offer fees and costs, of which --

QUESTION: How much are the costs?

MR. STONE: I believe $41,000, or approximately $40,000 was broken down -- was claimed by way of costs, of which the trial judge disallowed a portion.

QUESTION: It seems a staggering amount in this setting, but we will check that.

MR. STONE: Your Honor, this was a long, hard-fought case, as counsel for the petitioner has said to the Court, involving eleven days in court and innumerable pre-trial motions, fully briefed, many post-trial motions, fully briefed. The days in court have been described as trench warfare. I think the figure of speech carries --

QUESTION: Well, do you think if you recover, if you represent a plaintiff and recover a judgment for $50,000 or $60,000 for the plaintiff, do you think you can bill the plaintiff $170,000 for your attorney's fees?

MR. STONE: I think normally not, Your Honor, but I can think of certain kinds of litigation where that might very well be done. I also have read cases in which a purely nominal amount has been awarded in a civil rights case, and in which a very substantial attorney's fee has been awarded.

QUESTION: Well, don't you think the ordinary

principle of a billing is that the fee has to have some relationship to the amount recovered where all that's at issue is damages?

MR. STONE: If all that were issued, Your Honor, were the private parties' recovery, that argument would be more persuasive, but, as has been stated in opinions of this Court, the civil rights plaintiff enters the court wearing the mantle of the public interest, seeking to vindicate the public policy as well as the injury to private rights.

QUESTION: And that justifies an award of attorney's fees three times the amount of damages?

MR. STONE: I should suggest, Your Honor, that no case has set a fixed ratio or a fixed maximum to the ratio that attorney's fees may bear to recovery, and there -- but there are cases in which attorney's fees awards have exceeded the amount of damages awarded to the client.

QUESTION: Any approved by this Court?

MR. STONE: None comes to mind at this moment, Your Honor, and -- but I do recall the case, I believe, of Cooper v. Singer, decided by the Tenth Circuit en banc recently, in which that was the case. I believe that was the case. I must be cautious in not overstating my memory.

QUESTION: Well, in these cases where, according to you, they are doing the government's work and they are acting as private attorneys general, and for that reason you pay them five times what the Attorney General gets? Isn't there something wrong with that?

MR. STONE: Your Honor, the function -- it is the responsibility of the trial judge to set a reasonable attorney's fee. This Court, in Hensley v. Eckerhart, gave extensive guidance to the trial courts to --

QUESTION: The trial court should give attorney's fees of three times what he gets, the judge gets?

MR. STONE: The --

QUESTION: I am just wondering where you go on this.

MR. STONE: The guidance offered by Hensley v. Eckerhart, Your Honor, was not in terms of ratios, fractions, multiplying factors; it was in terms of hours spent reasonably. It was in terms of reasonable cost per hour.

QUESTION: Well, did Hensley really get into any of the issues we're dealing with here under Rule 68?

MR. STONE: I think, Your Honor, that Hensley gave the trial judge a starting point to reach what other cases have called a lead-star figure, from which variation can then be made on a variety of factors.

And it would be our contention, Your Honor, that many of the desired goals announced by the opposition in this case for giving defendants very powerful post-settlement weapons could be achieved by reasonable administration by the trial judge of the Hensley v. Eckerhart standards and guidelines, adjusted to and taking cognizance of the purposes that inform Section 1988, which were to encourage those who feel that they have been denied their civil rights to bring their cases in Federal court.

And certainly that encouragement should not be rendered negatory or lessened by an interpretation of a Federal rule that would say that the stakes in this litigation can be raised beyond any measure which is reasonable to the plaintiff by the making of an offer shortly after, and it can be made under Federal Rule 68, shortly after the making of the initiation of the trial.

QUESTION: Mr. Stone, excuse the interruption, but just to clarify for my benefit, if you would, we have attorney's fees being requested here by each party,

in effect. How much in the way of attorney's fees was being requested by the defendants in the original action and how much by the plaintiffs in the original action?

MR. STONE: If I recall correctly, Your Honor, defendant made a post-trial motion in which there was a request made for determination of attorney's fees, but no specific sum was mentioned; is that correct?

VOICE: That's correct.

QUESTION: Oh, I see. And the $170,000 was the plaintiff's requested fees and costs?

MR. STONE: Yes, Your Honor, that was the request which included pre- and post-offer attorney's fees plus costs, and the costs were very substantial.

QUESTION: So that $40,000 of costs was included in the $170,000?

MR. STONE: In the request, Your Honor. There has been no hearing on that.

QUESTION: If that figure of costs of $40,000 was right, the pre-trial and trial attorney's fees would total $130,000, is that it?

MR. STONE: Yes, Your Honor.

QUESTION: Now was it disclosed, am I correct, late in the picture that it was a contingent fee arrangement?

MR. STONE: Yes, Your Honor. There -- well, I

don't know how late it was. There was certainly awareness, but it is the case that there is a technical failure to comply with a rule of the District Court and Mr. Montgomery has informed me that that was a result of oversight which, needless to say, he regrets.

If I may, I should like to deal for a moment with Section 1988 of the Civil Rights Act. This was amended, as this Court well knows, following this Court's decision in the Alyeska case, which said that attorney's fees could not be awarded on the court's own initiative, with several acknowledged exceptions -- the bad faith exception, common fund-common benefit exception, et cetera -- without specific Congressional authorization.

Almost at once Congress acted and extensive hearings were held in 1975 and in 1976. One of the consequences of those hearings was the legislation, the legislative amendment of Section 1988 of the Civil Rights statute, the statute which is in discussion here today.

That section, as we know, tells us that the prevailing plaintiff may recover attorney's fees as among the costs in the particular case. It is contended by the opposition that somehow or other that particular language, added at the very end of the amendment,

establishes a linkage between Section 1988 and Federal Rule 68.

It is our contention, Your Honor --

QUESTION: Where are you ever -- how do you ever get the right to recover costs? Forget attorney's fees for a moment.

MR. STONE: How do we get that right? Because we are the victorious party, Your Honor, and under Section 1920 of the Judicial Code --

QUESTION: So that's a statutory provision?

MR. STONE: That is a statutory provision, Your Honor.

QUESTION: Is there something in the Rules about it?

MR. STONE: About the recovery of costs? There is only procedural provision for the taxing of costs under Federal Rule 54(d), if I recall correctly.

QUESTION: But I would suppose that if you win a civil rights case, a 1988 case, and ask for attorney's fees, which do in yours, it's awarded, it's taxed as part of costs as under the Rule, pursuant to that Rule.

MR. STONE: Your Honor, I would not agree that it is taxed as a part of costs.

QUESTION: That's what 1988 says.

MR. STONE: May I then address that particular

point, but I should like to do that against the backdrop of recognizing that in the extensive hearings that were held and in all of the testimony that preceded the enactment of Section 1988 there is not one word to suggest a recognition by any witness, any Member of Congress, by anyone that the purpose of the enactment could be frustrated or could even be affected by any linkage with any of the Federal Rules of Civil Procedure having to do with costs.

The phraseology that was used was phraseology that had been used before. Federal Rule 68 had been in existence for decades with no attorneys --

QUESTION: Mr. Stone, may I just ask this question, because it's kind of a theme that underlies a good deal of your argument that the operation of Rule 68 frustrates the purpose of 1988 and, to a certain extent, 1983. How does it frustrate the purpose if it motivates a defendant with a serious case before him promptly to make a serious offer, giving the plaintiff early in the litigation at least the advantage of a real bird in the hand rather than all the contingencies with a long law suit?

Isn't that consistent with the purpose of 1983 and 1988?

MR. STONE: Your Honor, you describe a case in

which the Rule might work that way. But the mechanics of the Rule pay no attention to reasonableness; therefore, even an unreasonable offer would immediately set the risk so high that it could not be endured. It involves a kind of speculation, particularly in a case like this where there --

QUESTION: Excuse me. Doesn't the operation of the Rule have its own built-in test of reasonableness by what happens later? If you don't recover more than the offer, by hypothesis, you fail to -- the offer had to be reasonable.

MR. STONE: If Your Honor please, the caution against, in Christianberg against using a post-hoc assessment of what was reasonable beforehand is, I think, a peril that we do not want to impose upon parties. There has been extensive insinuation that there is an incentive for lawyers to go ahead and keep the time clock running, but again there is zero evidence in the record or anywhere else that this is a prevalent evil.

What Your Honor has suggested is that there is, that there is a possible wholesome, salutary operation of Federal Rule 68 in promoting the making of an offer. Where the offer is reasonable, that may very well be the case. But I would suggest to Your Honor

that it is also an encouragement to defendants to make an offer that it at the very bottom of whatever range could be possibly considered to be reasonable.

QUESTION: How do you rate this one? How do you rate this offer?

MR. STONE: If I am to rate it on the basis of what appears in the record before this Court, Your Honor, I would rate it --

QUESTION: You have to leaven that with what happened in --

MR. STONE: Excuse me, Your Honor?

QUESTION: You'd have to leaven that with what happened in the trial court.

MR. STONE: One can do that, with the benefit of hindsight, yes, Your Honor, but if one may go back to that date upon which the offer was made, the question of liability or non-liability had not been decided, and that was a disputed, hotly-fought issue.

Also, there was in the offing testimony by an economist to the effect that the lost earnings over the lifetime of the decedent would amount to a half million dollars. There was a colloquy in judge's chamber in which estimates were made, and the estimates that were made, and this is in document number 157 in the documents submitted by the Court of Appeals, the range

was between $100,000 estimated by one defense counsel, $150,000, estimated by another defense counsel, and the sum of $500,000, estimated by plaintiff's counsel.

The experienced trial judge found that none of these was reasonable, and so in terms of what is reasonable we really have no basis for saying that an attorney -- a plaintiff's attorney who accepted an offer of $100,000 at that time might very well have been professionally irresponsible in advising acceptance of that kind of sum on the basis of the prospects reasonably to be expected.

But, Your Honor, if you please, reasonableness simply is not in the case. Federal Rule 68 does not require reasonableness in order to be triggered.

If I may return to Section 1988 and its enactment, I have stated that in the extensive hearings and debates on the enactment of the 1976 amendment there was absolutely zero evidence of any awareness, let alone attention, that there should be a linkage between that provision and any of the Federal Rules announcing costs.

Where Congress has acted regarding costs, it has called them costs, such as in the Judicial Code. Where it has acted in regard to attorney's fees, in a whole variety of statutes, which are listed handily for

us by petitioner's brief and the brief of the Solicitor General, Congress has always acted to further a substantive purpose related to a particular statute, whether it be in the commerce legislation in Title XV, whether it be elsewhere in Title XLII, or in any of the many other titles of the United States Code where attorney's fees are shifted by Congressional action.

If I may, Your Honor, then, I would conclude by saying costs are costs, and fees are fees. The conjunction of those two words at the end of Section 1988 establishes no linkage. Indeed, the historical evidence is that there simply was not linkage. That cannot be manufactured.

The many, many assertions in briefs to the effect that this was intended or it must be assumed or it is apparent are simply a tissue of wishful thinking.

QUESTION: Well, Mr. Stone, I guess there's some indication that Congress wanted to treat fees as costs so that they could be shifted to recovery against cities and states and counties, so apparently they wanted to treat them as costs, at least for that purpose.

MR. STONE: For that purpose, Your Honor, which is a sole purpose identified by this Court in Hutto, and recognized by a court of appeals, for the

sole purpose of resolving doubts as to whether Eleventh Amerdment immunity would prevent assessment of attorney's fees against the state. And yes, that purpose is clear and that is the sole purpose that has been attributed to that conjunction of words used at the end of Sectin 1988, the sole purpose that has been attributed to it by any court in the reported decisions.

QUESTION: Well, I guess the question is whether that purpose is enough to make costs mean something else for a different purpose.

MR. STONE: Well, Your Honor, I shall give you the obvicus and expected answer that I think it cannct be, should not be, that that would be a distortion of the Congressional purpose and that would be a frustration of the Congressional purpose.

The allowance of Federal Rule 68, Your Honors, to raise stakes, to allow defendants sc to raise the stakes of non-settlement of a civil rights claim brought under Section 1983 of the Civil Rights or in the grouping of other statutes with comparable language, this is a result which we ask this Court not to allow and the consequence is a request for affirmant.

I thank the Court for its attention.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:03 o'clock p.m., the case was submitted.)

CERTIFICATION

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

#83-1437

JEFFREY MAREK, ET AL., Petitioners v. ALFRED W. CHESNY, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF STEVEN CHESNY, DECEASED

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)