SUPREME COURT
OF THE UNITED STATES

In the Matter of:

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JOSEPH G. BUDINICH, :

Petitioner, :

v. :

BECTON DICKINSON AND COMPANY :

----------x

No. 87-283

Pages: 1 through 34

Place: Washington, D.C.

Date: March 21, 1988

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IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH G. BUDINICH,
Petitioner,
v. No. 87-283
BECTON DICKINSON AND COMPANY

Washington, D.C.
Monday, March 21, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

THOMAS FRANK, Evergreen, Colorado; on behalf of the Petitioner.

MS. TERRE LEE RUSHTON, Denver, Colorado; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this afternoon on Number 87-283, Joseph Budinich v. Becton Dickinson and Company. Mr. Frank, you may proceed whenever you are ready.

ORAL ARGUMENT BY THOMAS FRANK, ESQ.

ON BEHALF OF PETITIONER

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

This case arises out of an employment contract case arising under Colorado law wherein the Plaintiff was a sales commissioned agent for the sale of the Appellant's products.

The case was brought in 1982 when the course of the law was changing both with respect to employment law in Colorado and with respect to this Court's decisions on the issues of attorney's fees and the federal rules of civil procedure.

The case was eventually removed to the Federal District Court in Colorado and tried on diversity jurisdiction basis. At the conclusion of that case, Colorado law was deemed applicable by the Federal District Court. A verdict was entered for monetary damages which, under Colorado law, included as part of the judgement, as

part of the merits on the case, and a mandatory award of attorney's fees as part of the relief entitled under the public policy and the laws of Colorado.

QUESTION: All the law said is that the attorney's fees are required in these cases.

MR. FRANK: The normal cases construing attorney's fees have dealt with taxing attorney's fees as cost, or as an ancillary or collateral matter, Mr. Justice.

The actual statute in Colorado provided that whenever it is necessary for an employee to commence a civil action for the recovery or collection of wages under our Colorado Peace Act, the judgement in such actions shall include a reasonable attorney fee in favor of the winning party.

QUESTION: So you say that's different from the normal award of attorney's fees?

MR. FRANK: In that there is no court determination mandated in that, for one thing. It is not left to the discretion of the court as --

QUESTION: As to whether to grant attorney's fees?

MR. FRANK: -- as to whether to grant the attorney's fees or not.

QUESTION: Sort of like in the treble damage antitrust case?

MR. FRANK: It could be analogized to that. It could also be argued that this is part of the verdict function, for the finder of fact to try. It may be that it isn't even a court determination under that language. It's: part of the judgement shall include attorney's fees.

QUESTION: You mean to be decided, as to amount, by the jury?

MR. FRANK: It could be.

QUESTION: That isn't the way it works in Colorado, in the Colorado courts, is it?

MR. FRANK: It would be a case of first impression, Mr. Justice.

QUESTION: You mean nobody's ever raised the point?

MR. FRANK: Nobody has ever raised it before.

QUESTION: But the practice is that the judge decides the amount, in the Colorado courts?

MR. FRANK: The practice is the judge decides the amount and the fact of this case is that it was submitted to the judge for a determination and this case was tried to a jury. But in view of the Court's recent decisions in White and Marek v. Chesny, the distinction in the language here could be that this is not within the jurisdiction.

That is the essence of the Plaintiff's case

before the Court here today, that this is an Erie v. Tompkins. This is a 28 USC Section 1652 case. We're not here interpreting the federal rules or the federal statutes with respect to civil rights fees. We're here deciding whether or not the state of Colorado could, as a practical matter, under Erie, make attorney's fees part of the merits of the case, part of the substantive relief, part of the remedial relief, if you will, that is designed to compensate and redress the Plaintiff if he prevails, or perhaps the Defendant in an appropriate case, for the damages suffered, or to encourage some state public policy.

QUESTION: Counsel, what did the legislature have in mind when they added the final phrase to the statute: to be taxed as part of the cost of the action?

You're correct. It says that the judgement in such action shall include a reasonable attorney fee. But then it says: to be taxed as part of the cost of the action

What did the legislature have in mind, adding that?

MR. FRANK: We would submit that after the comma, and that the language that you are quoting, Mr. Justice, is the procedural part of how the attorney's fees are to be collected. That a taxing matter under Rule 54, which is the same in Colorado as it is under the federal rules, or an entry of judgement under Rule 58, is

a mere procedural formality for the clerk to do. The clerk can do it in one day. There is no further adjudication necessary once the attorney's fees are apportioned or determined, perhaps by the finder of fact, or perhaps by the court. That it's merely a procedural device as to how the attorney's fees become a part of the judgement, that they would then be taxed.

QUESTION: Well, is the entry of the judgement postponed until the amount of the attorney's fees is determined?

MR. FRANK: In Colorado it has been. Colorado cases not only dealing with the Labor Peace Act, of which this case arises, a Wage Act claim. All Colorado cases are unitary on the point that the judgement is not final.

The issue of finality in Colorado is exactly the reverse of the issue of finality under the White case and under the Marek v. Chesny case, ruled on the Civil Rights Act cases. In Colorado we have no final judgement until the question of attorney's fees is decided, determined in substance, and that decision becomes part of the case.

QUESTION: Well, it does seem there is some sense to what the Tenth Circuit said that you are really inviting just a mass of confusion if in a case tried in the District Court in the federal system you have to

examine each state statute to see whether attorney's fees are part of the recovery or separate. You have fifty states, of course, and you'll just have a proliferation of independent inquiries like that.

MR. FRANK: Mr. Justice, we would suggest that it is no more complicated or taxing than the substantive state law, come determinative cases, on the Erie line of cases.

The Hanna v. Plumber test requires a statute of limitations of the state of Oklahoma, or the appellate procedure if it has substantive outcome of Oklahoma to be followed by the Tenth Circuit.

QUESTION: But this type of thing determines the timeliness of appeals in that sort of thing. So it has a little bit different effect than just a branch of substantive law.

MR. FRANK: That is correct but only in the sense that finality under 28 USC 1291 can be interpreted either way. It can be interpreted one way for the federal system, if in fact the collateral adjudication doctrine is followed for the civil rights cases. It can also be interpreted to allow a state under Erie to include a thing, be it a label called attorney's fees or be it a supplementary adjudication of incremental damages of some kind, as part of the substantive relief, as part of the finality issue under that state's law.

QUESTION: But if we interpret it the latter way, so that a state may vary in deciding whether attorney's fees are part of a judgement or something added after, so that it's different from our White doctrine in the federal attorney's fees statute, then every single federal court is faced with the statutes of several different states. And it may be that one state statute means one thing and one another. It's just a tremendous proliferation of diversity.

MR. FRANK: We would suggest, Mr. Justice, that if the outcome, if the remedy, is part of substance, that, under the state system level, then the Erie doctrine would prevent a simple procedural rule from applying in the so-called bright line manner in which the Tenth Circuit does follow.

All attorney's fees, if they are denominated as attorney's fees, under the Tenth Circuit Cox v. Flood case, are severable and collateral issues and not part of the merits of the case. That bright line rule does, in fact, preclude a state from the option of including attorney's fees. It can be that you have a --

QUESTION: What's the practical difference, so far as Plaintiffs and Defendants suing each other in real courts are concerned, other than the fact that an appeal may be untimely if you follow one rule? What would be the

practical difference in saying that in federal courts, even if Colorado might provide one way, in the federal court the attorney's fees are collateral?

MR. FRANK: It could affect substance in the essence, in the simplest sense, that the trial court judge would retain jurisdiction over the attorney's fee issue and force a double appeal. In essence, that is what happens under the Tenth Circuit now.

QUESTION: And it happens in federal cases?

MR. FRANK: It happens in federal cases under the Collateral Rule doctrine perhaps because of the injunctive relief factor on the -- the only federal cases that are well-hammered out are the civil rights cases, the 42 USC 1988 cases to implement 1981, 1982 and 1983.

QUESTION: And there, there is a double appeal, isn't there?

MR. FRANK: And there, in essence, there is a double appeal.

QUESTION: Does it make any difference in the amount you recover or anything like that?

MR. FRANK: It does if you exclude injunctive relief, Mr. Chief Justice. There is a very good reason under the federal system in the federal civil rights cases for bifurcating the issue of attorney's fees if, in fact, there's going to be a long mandatory injunctive

review process where you really can't determine the efficacy or the complexity or the novelty of the issues argued and accomplished by the attorney.

School bus injunction cases that go on, for the purpose of integration, for example, there there is no damage or there's relative little damage. All of the relief is declaratory and injunctive, and possibly mandatory and supervision. In that instance, the appeal of the initial determination of the need for the injunctive relief needs to go forward or it would never get tested if you had to await, in that instance, for an attorney's fee at the end of the case, you would effectively preclude review.

That's not true in a labor and wage statute where there is no injunctive relief.

QUESTION: The reason you apply Erie in a federal court is so you'll get the same substantive result, substantive law result, in federal court as you do in state court. Now, would applying the federal rule as to attorney's fees in this federal court proceeding give you any different substantive outcome in your particular lawsuit?

MR. FRANK: It could.

QUESTION: How?

MR. FRANK: It could in the sense that the

procedure --

QUESTION: But I'm talking about substance. The amount you can recover, that sort of thing.

MR. FRANK: If the intention of the statute is to encourage or to make parties -- in essence, all attorney's fees cases enacted by statute are compensatory. They are an attempt by a legislature to either encourage a private attorney general function or they are an attempt to bring the small wage claim case, where the dollars involved may not be sufficient to encourage deterrence of the conduct before the courts need it to be.

QUESTION: Yes, and how would that come out differently in federal court than in state court, if the White rule was followed across the board as the Tenth Circuit?

MR. FRANK: Because the substantive law of Colorado --

QUESTION: I mean, would you recover less attorney's fees?

MR. FRANK: Perhaps.

QUESTION: How?

MR. FRANK: If, because attorney's fees can be part of the merits and part of the damages under Colorado's law. Under the latest enunciation of that, the Basset case which is attached -- there was a slip decision that

came out December 10th, 1987. There the Colorado court has said that the verdict itself remains modifiable until the issue -- the very verdict on damages itself remains modifiable -- until the issue of attorney's fees is determined. It can ebb or flow in relation to attorney's fees because attorney's fees are an essential amount of the damages.

QUESTION: But I still haven't heard you say anything as to how if you could recover $10,000 damages and $5,000 attorney's fees -- say, if you're trying this case in the District Court of the City and County of Denver, you couldn't also recover $10,000 damages and $5,000 attorney's fees if you're trying it in the United States District or for the District of Colorado?

MR. FRANK: It would be you would lose the right. You would the lose the right to have the entire situation, both attorney's fees and damages, weighed as a total judgement on the merits in relation to the substantive purpose and intent of the statute.

If, in fact, the public policy is to deter or to encourage the bringing of small wage claims, for example, then you preclude by a federal rule of civil procedure the timeliness of an appeal under Appellate Rule 4(a) implementing 28 USC 1291 -- you preclude that substantive modification process under the state law of Colorado, if

you apply a bright line Appellate rule. That is as close as I can answer that question, Mr. Justice. The procedure laps over into substance. Under the Erie doctrine you will preclude that if you impose a Cox v. Flood Tenth Circuit absolute bright line rule.

QUESTION: I must confess I don't really follow your argument. Why if, say, there's a delay -- here there's a delay of a couple of months between May and August, between the judgement and the fees -- why wouldn't you make all the same arguments at the fee hearing in August, even if you had already taken an appeal from the original judgement? And then appeal that and maybe get them up in the Appellate Court and have the Appellate Court consider them both together?

MR. FRANK: Mr. Justice, the essence of the response is that you're taking a portion -- you don't have finality. This isn't an issue of whether attorney's fees are costs or not. The Appellant's argument here is that attorney's fees can be part of the substantive case in chief, the case on the merits itself.

QUESTION: Are you talking about arguments made in the trial court or arguments made in the Court of Appeals?

MR. FRANK: I'm saying that, under Erie and under the unitary -- there is not variation in Colorado -- under

the unitary treatment of cases in Colorado, a case is not final in the federal sense under 1291 until attorney's fees are part of that judgement.

QUESTION: I understand the conceptual argument, but I think the Chief Justice was asking you as a practical matter, what difference does it make? You go to the judge and you say I am entitled to $10,000 substantive recovery and I think you ought to give me a $5,000 fee for deterrent purposes and because of the work and so forth and so on. Can't you make the same arguments whenever you take your appeals?

MR. FRANK: You could make those same arguments. We admit that you could make those same arguments. The reason for those arguments, we respectfully suggest, would only be an administrative or an efficiency concept under the federal system. And we say that in a diversity case, you don't have the same -- we submit that the court doesn't have the same -- power to implement 1291 through 4(a), or any other rule, where it's going to be outcome determinative or change of procedure or preclude -- more accurately -- preclude a state from using attorney's fees not as cost but in any substantive manner within which they may choose.

If they roll attorney's fees into the merits of the cause, then it shouldn't be rolled back out simply

because it is going to be a bright line, collateral issue rule under the federal Rules of Civil Procedure.

QUESTION: But there's nothing to be decided about attorney's fees except amount, in Colorado rule. There's nothing to litigate except amount.

MR. FRANK: It could be.

QUESTION: Well, it is. Isn't that right?

MR. FRANK: If, in fact, it could be a source of who decides it, as suggested earlier.

QUESTION: If a liability is appealed separately and it's reversed, there's not going to be any attorney's fees, I gather?

MR. FRANK: There would not be under the Peace Act. That's correct.

QUESTION: If the Plaintiff wins and the Defendant appeals and wins on the merits, there's not going to be any attorney's fees?

MR. FRANK: That is correct.

QUESTION: Under your view then, every single case you're going to have to litigate the amount of attorney's fees before you can ever appeal and you're going to have just a lot of useless -- everytime there's a reversal, the litigation on attorney's fees will be useless.

MR. FRANK: The litigation on attorney's fees

insofar as --

QUESTION: It would just be a waste of time.

MR. FRANK: It would be. It would be in the sense that attorney's fees become a collateral issue rule to be determined only after liability.

QUESTION: Well, it's bad enough to have two pieces of litigation in every case: one on the merits and one on attorney's fees, but it's even worse to go through the procedure of litigating the attorney's fees when there may be no need for it.

MR. FRANK: If, in fact, a state chooses to put the attorney's fees issue into an element of the case on the merits it is implicit within that decision: a) that they have a right under Erie to do it and b) that it is going to increase the complexity of the litigation.

QUESTION: Can't we decide how the matters will be appealed? What does the state care whether our courts, the federal courts, choose to take them one at a time and make sure that there's a need to reach the second one?

MR. FRANK: If, in fact, that decision is for a procedural rule efficiency or efficacy in the administration of the federal courts and if, in fact, it changes the substantive law of the state or changes the finality requirement under state law, which has substance implicit within it, then we respectfully submit you can't do it.

QUESTION: Well, I agree. If there's some aspect of the finality requirement that could conceivably affect, let's say, rais judicata or something like that, then I could see how you might have an argument that it has some substantive impact. But really all we're talking about here is not substantive impact but the process for getting the matter appealed. Why can't the federal courts, why shouldn't the federal courts, set their own ground rules? If Colorado wants to waste the time of its District courts figuring out what the correct amount of attorney's fees is when it may not be necessary that's up to Colorado, but why do we have to do that?

MR. FRANK: Because, Mr. Justice, you impose upon Colorado the federal civil rights developing bifurcation collateral issue label for attorney's fees.

The issue would not arise if there was a compensatory provision within the statute or another condition within the statute that was not called an attorney's fee, or was not called a cost. But because attorney's fees are rolled into this language, arguably within this language, as part of the merits of the claim itself as opposed to a determination, post-determination, of the merits, if you rule that way on the federal level in effect you're going to bifurcate every case.

QUESTION: Mr. Frank, let me ask you a question

about how Colorado judges deal with this type of wage statute which I see your opponent says really isn't, doesn't, treat it much different than the federal courts do. Does the judge charge the jury that they may return in their verdict along with lost wages and that sort of thing also attorney's fees?

MR. FRANK: There has not, to my knowledge, ever been a case that has done that.

QUESTION: Okay. So the verdict is just damages. It does not include attorney's fees. Is that right?

MR. FRANK: To my knowledge, the issue has not been determined whether it could go to a verdict or not. That's correct.

Then the judge determines, much like Georgia v. Johnson on the federal level.

QUESTION: Well, my question was: a verdict just embraces damages and not attorney's fees. Is that correct or incorrect?

MR. FRANK: It just embraces damages. That is correct.

QUESTION: So then you apply later to the judge for attorney's fees?

MR. FRANK: So far that is correct.

QUESTION: And how does that differ from the

federal system?

MR. FRANK: It differs from the federal system now in that the case is not final under Colorado's process, if you will -- I won't go any further than to use the word process -- until that determination becomes part of the record, howsoever it's done. And to my knowledge --

QUESTION: So it's a question about when the judgement becomes final?

MR. FRANK: It's a question of finality, currently.

If there are no further questions, I would like to reserve the remaining amount of my time.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Frank.

We'll hear now from you, Ms. Rushton.

ORAL ARGUMENT BY TERRE LEE RUSHTON, ESQ.

ON BEHALF OF RESPONDENT

MS. RUSHTON: Mr. Chief Justice, and may it please the Court:

The Respondent submits that the adoption by this Court of a rule which recognizes that attorney's fees are collateral to a judgement on the merits is the only rule which promotes uniformity, finality, judicial economy, and fairness to all the litigants in a federal court action.

We believe that the adoption of a rule recognizing that attorney's fees are, in fact, collateral to a judgement on the merits promotes several important

policies of this Court. It clarifies and eliminates guesswork over the timing of a federal court appeal. It makes uniform those procedures for appealing judgement and for making attorney's fees applications regardless of the source of the fees and avoids needless litigation over issues of finality and divergent interpretations of state law.

Now, the Petitioner seeks to avoid the decision of the Tenth Circuit by claiming that because this is a diversity action and because he perceives a conflict between federal procedure and state law, that state law should govern.

The first question, then, to be addressed by the Court is, in fact, whether the timeliness of the federal appeal is governed by federal law and we think that it is. The right to appeal, of course, is created by federal statute 28 U.S.C. 1291, which provides that final decisions of the District court may be entertained by the federal Appellate courts and it's implemented by the federal Rules of Civil and Appellate Procedure, specifically Rule 4(a)(1) which provides that the notice of appeal shall be filed with the Appellate Court thirty days after entry of a final judgement on the merits.

An entry of judgement is defined in federal Rule of Appellate Procedure 4(a)(6) by reference to the

federal Rules of Civil Procedure 58 and 79. Those rules set forth the entire mechanism for processing an appeal through the federal system. The purpose of the rule is to let all parties know when the judgement is ready for appeal. They encompass the procedure for a federal appeal, and we believe that those federal rules are intended to occupy the field, explicitly or implicitly. There is no room for the operation of a conflicting state court procedure.

We also believe that the application of the federal Rules of Appellate and Civil Procedure in this case do not transgress either the Constitutional restrictions that this Court has recognized nor any statutory restrictions.

The rules regulating the timing of an appeal in the federal court are indisputably procedural rules and, therefore, a priori, Constitutional. They do not enlarge. They do not embridge and they do not modify any state-created entitlement to damages in this action nor to fees. It merely regulates the procedure for enforcing that right in the federal system.

QUESTION: Well, that's true but they don't give us limitless discretion as to how to regulate it. For example, you're right that it's more efficient not to make the District court resolve an issue that may be irrelevant. But we certainly cannot allow an initial appeal in, let's

say in an ordinary misrepresentation case where the Plaintiff has to prove a falsehood and reliance on the falsehood. Now, we can't allow an appeal of the first part whether there was a falsity simply by saying, well, it will save our District courts time --

MS. RUSHTON: No, Your Honor.

QUESTION: -- because they may never have to reach the -- whether there was reliance on it -- if there was no falsehood at all. Right?

MS. RUSHTON: I'm sorry, Your Honor. That is, of course, correct. But this case presents an entirely different situation.

QUESTION: Why? If your opponent is correct that it's one cause of action created by the state, why is that different from this?

MS. RUSHTON: The Respondent believes that the Petitioner is not correct in his interpretation of Colorado law. We believe that Colorado law has not spoken to the issue, whether under the Wage Claim Act attorney's fees directed by the statute to be taxed as costs are, in fact, a part of the judgement.

QUESTION: And you agree that if you're wrong about that, you lose?

MS. RUSHTON: No.

QUESTION: Well, then you want to answer my

question, don't you?

MS. RUSHTON: Yes. Sir, we simply don't believe that this is under the same stricture, that it doesn't create the same kind of problems that other cases coming before this Court under the Collateral Order doctrine create.

This is a situation that's purely mechanical. It talks about the way to enforce rights and doesn't intend to bifurcate the entitlement to those rights. There's a decision on the merits that can be appealed and there's a right to attorney's fees which can also be appealed. But I think both the Colorado legislature and this Court have directed that they are to be appealed in a particular manner and a manner which we do not believe abridges any of those rights.

Rule 54(d) and 58 have been amended to address what we believe is the conflict present herein. We believe that the federal rules govern that question by designating that where, as here, these attorney's fees are to be taxed as cost of the action there's a Congressional history that shows that they should be separated.

The practical considerations also dictate that there's a uniform rule in the federal courts whether these matters arise under a federal claim or by diversity of jurisdiction. For example, under Rule 58 fees, we believe, are costs and it is clear that when Rule 58 was amended in

1946 costs were determined not to delay the entry of judgement. That distinction between the costs of an action and the merits of an action applies particularly to attorney's fees, which are both practically distinct from the merits of an action and philosophically distinct. They are practically distinct because as we've touched upon it depends on the determination of the prevailing, or winning, party, as the Colorado statute puts it and, also, that costs accrue throughout the litigation. And a final judgement on costs can't be made until, in fact, there is a final judgement on the merits of the case. They are philosophically distinct because attorney's fees are compensation for the costs of going through the litigation, not as compensation for the wrong that the Plaintiff alleges was done to him.

We believe that the drafters of Rule 58 intended to include attorney's fees as costs and that this delay that would attend the Petitioner's interpretation of this problem is exactly the problem that Rule 58 was designed to avoid by separating determinations on costs from determinations on merits.

However, if this Court would decline to find that attorney's fees are costs, we still believe that this fee determination should be found to be collateral to a judgement on the merits. This Court declined in the case --

QUESTION: Are costs or are not costs?

MS. RUSHTON: I'm sorry. Attorney's fees -- if this Court would find that attorney's fees are not costs --

QUESTION: Are not costs.

MS. RUSHTON: -- we still believe they would be collateral to a decision on the merits.

We believe that the reasoning of this Court in White v. New Hampshire would apply equally here. A decision as to the reasonableness of attorney's fees requires the kind of detailed inquiry that this Court went into in great detail in Hensley v. Eckerhart.

QUESTION: Wouldn't you agree, though, that Colorado law is binding on the federal court as to the entitlement to attorney's fees?

MS. RUSHTON: As to the entitlement to attorney's fees, yes, Justice White, but we do --

QUESTION: So it is a substantive rule?

MS. RUSHTON: We're not talking about the entitlement, I don't believe, in this case. We're talking about the method of enforcing the entitlement to fees. And I think those are very different questions.

QUESTION: So the federal court wouldn't be free to say, well, federal law determines whether attorney's fees are to be allowed?

MS. RUSHTON: No, Your Honor. I don't believe so.

But I think the federal court does have the right and, in fact, must exercise the right to protect the integrity of the federal court system in determining how these fees should be processed on appeal.

QUESTION: Or, to put it another way, I suppose, without even mentioning attorney's fees yet, to say the federal law has a right to determine when the judgement is final?

MS. RUSHTON: In the federal court system, yes, Your Honor. A recognition --

QUESTION: And appealable?

MS. RUSHTON: I'm sorry, Your Honor.

QUESTION: And appealable?

MS. RUSHTON: And appealable. Because that's what we're talking about. The issue of finality that we're talking about here is final for purposes of appeal.

A decision by this Court that attorney's fees are collateral we don't believe would affect the Petitioner's entitlement to fees in any aspect. I think it would leave the right to fees that's present in the Colorado Wage Claim Act intact, but it would allow all litigants who seek those fees to apply definitive, unambiguous rules to determine when the time for appeal begins to run.

Now, following the White, the Circuit courts

have taken two divergent approaches to attorney's fees. The one adopted by the Tenth Circuit and applied in Cox v. Flood is the collateral or bright line approach. And, again, we believe that approach has the advantage of doing away with any uncertainty regarding the time for appeal, allowing the prompt entry of judgement, the prompt execution of judgement, and the running of post-judgement interests. It also separates and recognizes what may be ethical problems in an unholy alliance of the merits decisions and the fee questions, involving as they do very different issues and very different considerations for the lawyer and the client.

If this Court, however, is concerned with the idea of piecemeal litigation to independent appeals several of the circuits have postured that local rules and the adoption of local rules would solve those problems. Rules, for instance, that set deadlines for filing attorney's fees applications, that made prompt determination of attorney's fees easy, and perhaps expanded the rules on consolidation of a decision on the merits and appeal of the decision on the merits with the appeal of a decision on attorney's fees in the Circuit courts.

On the other hand, the ad hoc approach that appears to be advocated by the Petitioner in this case creates a deal of uncertainty. As the Court's questions

have indicated, there is a concern with further litigation over state law. Not only would each state have to come to a decision, but each statute in each state would have to be examined to determine whether the right to attorney's fees was integral or collateral and, therefore, when the Appellate time began to run. This would be a particular problem in those cases, such as Bilmar v. IGF Drilling which is a case cited in our brief, where the entitlement to fees arises both under a federal statute and under a state law claim and, therefore, may be subject to different Appellate times and to a very difficult determination, at the least, as to how the attorney's fees were awarded and how they should be appealed.

I think that this case illustrates the problems in the ad hoc approach where we are here before this Court with still a divergent interpretation of what Colorado law says about the attorney's fees entitlement under the Colorado Wage Claim Act.

Although the Petitioner has cited several cases to this Court, only that case decided in December of 1987 speaks at all to the issues of finality and appealability as they affect attorney's fees. The other cases cited reflect entirely different statutes and, perhaps, we would suggest, entirely different considerations about appealability. Those are the problems that the adoption of

a collateral rule, a bright line rule, that says all attorney's fees are collateral would avoid.

We believe, however, that regardless of the approach adopted by this Court these fees would be collateral under either of the approaches adopted by the federal court.

These are statutory, as distinguished from contractual fees. They are found in a separate statutory provision from that which allows damages under the Colorado Wage Claim Act. They were never raised, the request for attorney's fees was never raised in the complaint nor in any part of the action on the merits. They are directed to be taxed as costs by the Colorado statute and they were, in fact, treated as costs by the court and by the parties to this case. They were first raised in Petitioner's bill of cost, subsequent to the entry of the judgement on the merits, and his right to those fees was supported in his memorandum supporting attorney's fees as costs.

Finally, Your Honors, the Petitioner requests that if this Court finds that his attorney's fees request was, indeed, collateral and, therefore, his appeal of the judgement on the merits was untimely that any decision of this Court be applied perspectively only.

First, we believe this Court has already spoken in the case of Firestone Tire and Rubber Company v. Risjord that because when a court lacks discretion to even hear the

issue, as the Tenth Circuit did to hear the untimely appeal on the merits, that ruling can never be made perspective only.

But if, in fact, this Court does consider the question of prospectivity, we believe that the equities justifying an exception to the rule on retroactivity are not present here. This is not a matter of first impression in this Court nor in the Tenth Circuit, being clearly foreshadowed by this Court's decision in White v. New Hampshire and the Tenth Circuit's determination in Cox v. Flood.

The application of this rule to the Petitioner herein doesn't retard the purposes behind the rule and there clearly is no reliance by the Petitioner on this position, when throughout the course of the litigation he has treated these attorney's fees as costs.

In conclusion, we would urge that this Court adopt a rule that finds that fees are collateral to a judgement on the merits and that the time for filing a notice of appeal is thirty days from the entry of the judgement on the merits regardless of the pendancy of an attorney's fees request.

We believe that decision can be reached whether this Court decides that attorney's fees are costs pursuant to Rule 58 or whether they are collateral because of their

separate and independent nature. We believe that that rule would promote the policies of this Court and establish uniform federal rules for processing appeals, and is the only rule that is truly fair to litigants in the federal court system.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Rushton.

Mr. Frank, you have seven minutes remaining.

ORAL ARGUMENT BY THOMAS FRANK, ESQ.

ON BEHALF OF PETITIONER - REBUTTAL

MR. FRANK: Mr. Chief Justice and Members of the Court:

I would just like to correct one statement made by Appellee's counsel. We finally taxed our attorney's fees as a bill of cost on Page 29 of the record of the Joint Appendix. We also filed a motion for attorney's fees directed to the court's attention because, quite frankly, at that point we didn't know whether attorney's fees were going to be costs or whether attorney's fees were part of the substantive merits of the case. So, we did both of that within the ten days required by Rule 59, under both the federal rules and Colorado state rules.

In essence, this case boils down to the issue of whether the federal Appellate Rule 4(a) dominates the field, occupies the field, and precludes a state from having the ability to do the following, which is the

Basset case in the Appendix of our reply brief:

The jury returned its verdict on November 5th, 1982 but the court did not reduce Plaintiff's claim for attorney's fees to judgement until June 25th. Pursuant to the provisions of CRCP -- those are our Rules of Procedure -- 54(a) and 58(a), therefore the amounts awarded by the jury remained subject to revision. And until the court finally entered judgement on Plaintiff's request for attorney's fees, no judgement -- underlined, the court's emphasis -- can be considered to have been entered.

In essence, Hanna v. Plumber, Erie, and most recently this Court in the Burlington Northern Railroad case, the intial step is to determine whether when fairly construed the scope of the federal rule is sufficiently broad to cause a direct collision with the state law or implicitly has to be interpreted to occupy the field.

We submit that, in this case, it is not and that the Erie line of cases should be followed and that the Colorado procedure should be followed.

If there are no further questions, thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Frank. The case is submitted.

(Whereupon, at 1:42 p.m., the case in the above-entitled matter was submitted.)

REPORTER'S CERTIFICATE

DOCKET NUMBER: 87-283

CASE TITLE: JOSEPH G. BUDINICH v. BECTON DICKINSON AND COMPANY

HEARING DATE: March 21, 1988

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the

Date: March 25, 1988

Margaret Daly

Official Reporter

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