99-40547

99-40557

153 UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
New Orleans, Louisiana

---

Case No. 99 - 40547

EULUGIO MIRELES, BARTOLO MENDIOLA,
ISRAEL TREVINO and FRANCISCO GONZALES,

Plaintiffs - Appellants;

Vs.

ARTHUR BROTHERS, INC.,

Defendant - Appellee.

---

Case No. 99 - 40557

OSCAR GUERRA,

Plaintiff - Appellant;

Vs.

CELANESE CORP., CELANESE CHEMICAL CO.,
and, ARTHUR BROTHERS, INC.,

Defendants - Appellees.

---

Appeal from the United States District Court
Southern District of Texas - Corpus Christi Division
The Hon. Ricardo Hinojosa, United States District Judge

# REPLY BRIEF OF APPELLANTS

David Horton
NEEL & HORTON, LLP
Post Office Box 2159
South Padre Island, TX 78597
956.761.6644 Telephone

Enrique Valdivia
TEXAS RURAL LEGAL AID
405 N. St. Mary's-#400
San Antonio, TX 78205
210.222.2478 Telephone

## I. TABLE OF CONTENTS

## IV. TABLE OF AUTHORITIES

### 1. Cases



### 2. Statutes

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
New Orleans, Louisiana

---

Case No. 99 - 40547

EULUGIO MIRELES,BARTOLO MENDIOLA,
ISRAEL TREVINO and FRANCISCO GONZALES,

Plaintiffs - Appellants;
Vs.
ARTHUR BROTHERS, INC.,

Defendant - Appellee.

---

Case No. 99 - 40557

OSCAR GUERRA,
Plaintiff - Appellant;
Vs.
CELANESE CORP., CELANESE CHEMICAL CO.,
and, ARTHUR BROTHERS, INC.,
Defendants - Appellees.

---

Appeal from the United States District Court
Southern District of Texas - Corpus Christi Division
The Hon.Ricardo Hinojosa, United States District Judge

# REPLY BRIEF OF APPELLANTS

TO THE HONORABLE JUDGES
OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

Come now Appellants, in appeal from Final Judgment of the United States District Court for the Southern District of Texas, Corpus Christi Division, and submit to this Honorable Court such Reply Brief as follows.

## III. INTRODUCTION

In this Reply Brief, "Appellee" refers to the Celanese. Appellee Arthur Brothers, Inc.("ABI"), a nominal party, did not file a brief. "Appellee" does not refer to ABI.

This Reply Brief addresses these matters in Appellee's brief, 1) response to new issues raised for the first time, 2) response to assertion that counsel for Appellants refused to follow court orders, 3)correction to transcript of hearing, 4) miscellaneous clarification, and 5) response to Appellee's statement that Appellants incorrectly cited a case.

## IV. SUMMARY OF ARGUMENT

This appeal results directly from the District Court's refusal to follow the *Johnson* factors to determine the appropriate fee award for the prevailing parties. Instead of a *Johnson* analysis, the District Court utilized the "*per se*" rule of proportionality urged by Celanese in its brief to this Court.

Any objections regarding qualifications or methodology of Plaintiffs' expert (Bernard Yancey, Ph.D.)

were waived by Appellee. Celanese did not raise such objections at Dr. Yancey's evidentiary deposition or at the evidentiary hearing on joint employer liability where Dr. Yancey testified regarding the data analysis.

Celanese's contentions that Appellants' counsel "refused to abide by at least four (4) straightforward orders of the district court" in conducting the hearings on the last remand, are without legal or factual basis in the record. Similarly, Appellees' assertion that Appellants erroneously stated the holding in a cited case, is itself erroneous and misleading.

## V. ARGUMENT

Perhaps the central question in this appeal should be "Why is this the third appeal in this litigation?" Appellants submit that the previous and now this appeal, result directly from the District Court's refusal to follow the decisions and instructions of this Court in *Johnson*. Instead, the District Court has followed the course urged by Appellee. The previous appeal was necessary because the District Court erroneously ruled that Appellants were not prevailing parties. This appeal

is necessary to correct the District Court's reliance on a *per se* rule of proportionality in lieu of the *Johnson* factors. Had the District Court not heeded Appellee and done the appropriate *Johnson* analysis in the first instance some six years ago this case would not be here on appeal again.

A. Response to New Issues Raised for the First Time

1. Objections Regarding Plaintiffs' Expert

At this late date Celanese appears to raise objections to Plaintiffs' expert, and this data analysis (Appellants' Brief, pp. 12, f.n. 4; and 26). Regarding his testimony, Celanese states that Dr. Yancey's testimony is "objectionable on its face" (Appellants' Brief, pp. 12, f.n. 4). Celanese states Plaintiffs used "... an unqualified expert who utilized an untested, computer assisted analysis...." (Appellee's Brief, p. 15).

Regarding the data analysis, Celanese states

> In one of these cases, *Mireles*, Appellants chose novel, unrecognized, statistical methods for linking ABI with Celanese through the "joint employer" theory as the predicate for proving discriminatory

conduct. .... (Appellants' Brief, p. 25)

Even though Celanese now asserts Dr. Yancey's testimony was "objectionable on its face" (Appellee's Brief, p. 12, f.n. 4), such objection, even if proper had it been timely made, is waived. The practice of law requires proper objections and that a proper record be made.

Any objections regarding qualifications or methodology of Plaintiffs' expert (Bernard Yancey, Ph.D.) were waived by Appellee. Celanese did not raise such objections at Dr. Yancey's evidentiary deposition or at the evidentiary hearing on joint employer liability where he testified regarding the data analysis. Celanese can not now raise any such objection.

Celanese does not properly characterize Plaintiffs' data analysis and the reasons for same. Appellee states

> Recovery for paralegal costs were properly denied ... In fact, the only evidence of the nature of the paralegal expenses were in relation to the unsuccessful statistical analysis, not with relation to legal work generally performed by attorneys.

(Appellee's Brief, p.23).

> The only "novel" issue in this litigation was Appellants' decision to attempt to

> establish the joint employer relationship through an unqualified expert who utilized an untested, computer assisted analysis. The majority of expenses and costs associated with this litigation are directly related to that decision and subsequent analysis by Dr. Yancey.

(Appellee's Brief, p. 15).

The construction of the data base, and the analyses done, were reviewed in detail in the brief in the second appeal, and again in Appellants' Brief herein (Appellants' Brief, p.43; Record Excerpts- Tab E, M-R.pp.79-87, specifically pp. 18-26 of the Brief in the second appeal). The document review, data capture, and data base construction, which constitute almost of the support staff time in Plaintiffs' claim, did not even involve statistical analyses. This process was more akin to computer assisted counting (counting the names/signatures/initials of Celanese managers on *ABI personnel documents*) than statistical analyses.

The statistical analyses that were done, were rather common statistical procedures including probability statements consistent with established case law. Nothing "novel" (Appellee's Brief, p. 15) was done (Appellants'

Brief, p.43; Record Excerpts- Tab E, M-R.pp.81-87, specifically pp. 20-26 of the Brief in the second appeal).

Perhaps Celanese's now late objections can be best understood in context of the fact that Celanese did not offer an expert or any data analysis in rebuttal of the data presented by Plaintiffs. It is interesting, perhaps telling, that Celanese's response to Plaintiff's evidence offered and admitted into evidence at the "joint employer" hearing was to settle the cases.

As this Court ruled in the previous appeal, Celanese's appearance in the *Mireles*, and failure to make timely objection as to its status as a party defendant, resulted in Celanese's becoming a Defendant therein. Not only are Celanese's objections are without merit, but once again Celanese is untimely.

2. Assertion That Counsel for Appellants Refused to Follow Court Orders

Celanese's states that Appellants' counsel "refused to abide by at least four (4) straightforward orders of the district court" in conducting the hearings on the

last remand (Appellants' Brief, p. 7). Counsel for Appellants are not only surprised by the statement, but are reluctant even to respond so as not to give it more notice than it deserves.

It is telling that although Celanese makes the allegation, it offers no specific support. There is of course a reason why no such support is offered. The allegations are without legal or factual basis in the record. Words need not be here expended to explain what Judge Hinojosa would do to counsel who dared be so bold as to "refuse to abide by at least four (4) straightforward orders of the district court" (Appellee's Brief, p. 7).

B. Correction to Transcript of Hearing

Although not the fault of Celanese, Appellees quote part of a hearing transcript wherein one word is mistranscribed. Celanese states

> it is important to recite the words of Appellants' counsel which deferred to the briefing and exhibits on file: to wit: "We will rely on the record, the pleadings, the *dates*. We submit we've met out burden under *Johnson* in both the law and evidence admitted and request the Court award

> reasonable attorneys fees." (*Guerra* R., Vol. 10, 191; *Mireles* R., Vol. 20, 340). [Emphasis added]

The word "dates" should be "data". As this is a minor point, unless the Court otherwise directs, there appears no need to review the tape, or correct the matter by motion.

C. Miscellaneous Clarification

Remedies Under Title VII:
Pre- and Post 1991 Amendments

Regarding "proportionality", in support of their contention, Appellees cite *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041 (5th Cir. 1998), wherein plaintiff was awarded approximately $12,000.00 in actual damages, and the court reduced the attorney's fee award by one-third to $81,000.00 [Appellees' Brief, p.18]. *Migis* is a Title VII case arising after the 1991 amendments which added damages remedies to Title VII.

Plaintiffs claims herein arose under Title VII at times when Title VII did not have a "damages" remedy, only equitable relief. Appellants should not be penalized for failing to obtain a remedy unavailable to

them under the law at the time their claims arose.

### D. Response to Appellee's Statement That Appellants Incorrectly Cited a Case

Appellees also state that Appellants misstated a case citation regarding "proportionality"

> .... Appellants' Brief contains a footnote referencing *Branch-Hines v. Hebert*, 939 F.2d 1311 (5th Cir. 1991), cited for the proposition that there is "no rule of proportionality," and stating that this Court affirmed a $10,098 award of fees on a $4,000 damages award. Both statements are erroneous. In *Branch-Hines*, the actual damages award was determined by this Court to be $7,000 as stipulated by the parties as back pay. Proportionality, this case holds "is an appropriate consideration in the typical case." *Branch-Hines*, 939 F.2d at 1322 (Emphasis added).(Appellees' Brief, P.22

Regarding the $3000.00 difference in relevant amount, although both figures appear in the opinion (See Exhibit A), Appellees are correct, and Appellants were in error. However, regarding the point of law, for reasons not made clear in context, in editing the *Branch-Hines* opinion, Appellees omit the clauses in the same sentence which state

> ...there is no *per se* requirement of proportionality in an award of attorney's fees

> in the civil rights context. ... fees in this case may ultimately exceed the total monetary recovery .... [939 F.2d 1322]

The complete text states:

> The thrust of [the] challenge to the fee award in this case is that it is disproportionate to Branch-Hines' recovery. We noted in *Hernandez*, supra, citing *City of Riverside v. Rivera*, 477 U.S. 561, 106 S. Ct. 2686, 91 L.Ed.2d 466 (1986), that there is no *per se* requirement of proportionality in an award of attorney's fees in the civil rights context, but that proportionality is an appropriate consideration in the typical case.... fees in this case may ultimately exceed the total monetary recovery ....

939 F.2d 1322.

Celanese also failed to include the last sentence in the opinion, where this Court concluded that "the challenge to the fee award based on disporportionality is rejected." 939 F.2d 1323. A copy of the relevant parts of the opinion are included as Exhibit A.

Celanese once again appears to characterize differences of opinion on the facts and law as something sinister (See pp. 10-11, above, regarding Celanese's allegation that Apellants' counsel refused to obey court orders.). For example Appellee alerts the Court that

"Appellants also attempt to mislead this Court .... Such trickery must not be allowed." [Appellees' Brief, p.11]. In contrast to this characterization, Appellants submit Appellee simply was imperfect in its editing of direct quotes from *Branch-Hines*, a case which is adverse to its position.

With the above in mind, regarding a difference in interpretation of facts between Appellants and Appellee, Appellee alerts the Court that "Appellants also attempt to mislead this Court .... Such trickery must not be allowed." [Appellee's Brief, p.11]. In contrast to Appellee's characterization, Appellants here assume Appellee simply is imperfect in its editing.

## VI. CONCLUSION

This appeal results directly from the District Court's refusal to follow the decisions and instructions of this Court. Had the District Court done the appropriate *Johnson* analysis six years ago when it was first requested by Appellants this case would not now be here again.

Celanese has waived objections not made in the

District Court. There is nothing in the record to support Appellee's statement that counsel for Appellants "refused to abide by" any order of the District Court.

Even though an evidentiary hearing is not required, the District Court erred in not conducting a *Johnson* analysis. This Court, in the immediate past appeal, remanded these case with instructions for the District Court to consider Plaintiffs' claims in context *Johnson*.

There is no *per se* "proportionality" requirement as between attorney's fee award and amount obtained by plaintiffs in settlement. The District Court erred in requiring such proportionality.

## VII. SIGNATURE OF COUNSEL

Respectfully submitted,

David Horton
SBOT No. 10014500
NEEL & HORTON, LLP
Post Office Box 2159
South Padre Island, TX 78597
956.761.6644 Telephone
956.761.7424 Telecopier

Enrique Valdivia
SBOT No. 20429100
TEXAS RURAL LEGAL AID, INC.
405 N. St. Mary's- Ste. 400
San Antonio, TX 78205
210.222.2478 Telephone
210.222.9408 Telecopier

## VIII. CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I served a copy of this document on counsel as follows:

Ms. Kathryn Green
THE KLEBERG LAW FIRM
800 N. Shoreline Blvd.
900 North Tower
Corpus Christi, TX 78401
Telephone: 361.693.8500
Telecopier: 361.693.8600
e-mail: kgreen@kleberg.com

Mr. Paul Sexton, Jr.
FULBRIGHT & JAWORSKI, LLP
300 Convent St.- #2200
San Antonio, TX 78205
Telephone: 210.270.7116
Telecopier: 210.270.7205
e-mail:
psexton@fulbright.com

by means of FCM

on the 10 day of MARCH, 20 00.

David Horton

of the failure of being promoted to deli manager and failing to go to full-time employment.

It's quite easy to pick and choose from points in a deposition, or anything that might have occurred at trial, those items that benefit your side. Obviously, while the defendant prevailed on the claim I'm talking about now, simply by prevailing on that claim does not mean that the claim itself that was dismissed was a frivolous claim as acknowledged by defendant. But it sounds like that's what they want me to do, is to say that, because I directed the verdict, that it's frivolous, and that's not correct. They would rely on the plaintiff's admission at trial that she didn't, or maybe didn't, have any other basis for that claim, but I think that in this lady's mind, based upon everything that I know she's tried to present in this case, both in reading the prior deposition as well as her trial testimony, that she honestly believed that she was discriminated against on both aspects of her claim.

Did she capitulate at trial? Did she break down under cross-examination at trial, and simply gave up on that particular claim? I guess if I had an examining glass and could go into her brain to find that out I'd give you an answer. But based on my objective review of this case, it's my opinion that she pursued the case in good faith, both claims in good faith. The defendant was certainly dissatisfied with the claims. I mean, no one likes to be sued, obviously. Particularly, a suit involving racial discrimination.

And again, going back to whether or not it was a complex case or not, Title VII cases I think by their very nature and by the types of claims being presented are very sensitive cases, sensitive to the extent that they do become complex and difficult to handle, both from the plaintiff point of view or defendant point of view.

Hearing Tr. at pp. 24-26.

Having reviewed plaintiff's deposition, her testimony at trial and the interrelation of plaintiff's differing claims of discrimination, the trial court found plaintiff's entire case to have been prosecuted in good faith. When there are two permissible views of the evidence, a fact finders choice between them cannot be clearly erroneous, even if we as the reviewing court were convinced that, as the trier of fact, we would have weighed the evidence differently. *Anderson v. Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518 (1985). We certainly cannot say that the trial court's findings on this issue are clearly erroneous, and thus affirm the court's finding.

*E. Attorney's Fees.*

[11] Both Branch-Hines and National challenge the trial court's award of $10,098 in attorney's fees to Branch-Hines, which amount represents one-half her counsel's legal fees at a stipulated hourly rate. Branch-Hines contends she was the prevailing party on her overall claim and therefore is entitled to receive an award for all her attorney's. National reurges that the case involved minimal time and complexity and, in light of the jury's award of only $4,000, that the Magistrate Judge's award of $10,098 in attorney's fees is excessive.

The parties herein stipulated that $145 per hour was a reasonable and proper fee. Branch-Hines' counsel stated that one-third to one-half of his time sheets related to the failure to reclassify claim which was ultimately dismissed at trial. Following review of counsel's time sheets and the arguments of counsel regarding the complexity of the case and the reasonable time involved, the Magistrate Judge reduced counsel's submitted time sheets by one-half. The Magistrate Judge recognized that Branch-Hines did not recover on all the claims advanced in her suit, and justified the reduction of plaintiff's attorney's fees "not only by the overlapping of the work on the claims that the plaintiff did not prevail on, but also in terms of what I consider to be a reasonable amount of hours needed to pursue the claim that she

did prevail on."[6]

[12] This case involves attorney's fees under a Louisiana anti-discrimination statute and we have found no Louisiana cases assessing fees with respect thereto. Thus by analogy we adopt for this case the resolution which the Supreme Court applied in this circumstance in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), wherein it stated:

> Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.
>
> *Id.* at 440, 103 S.Ct. at 1943.

More recently, in *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 790–93, 109 S.Ct. 1486, 1491–92, 103 L.Ed.2d 866 (1989), the Supreme Court rejected the application of the "central issue" test for a prevailing party's entitlement to attorney's fees, holding instead that the proper measure is the degree of a plaintiff's overall success in relation to the other goals of the lawsuit when determining the amount of a reasonable fee under *Hensley*. In the instant case, not only did Branch–Hines prevail on the issue of equitable relief, which was settled by the parties in the form of the institution of a training program for her advancement, but she prevailed at trial on the general issue of the alleged discrimination itself. While National has argued that it prevailed on one issue, it lost on the merits of the entire case, with the Magistrate Judge concluding at the hearing that the reclassification claim was not frivolous.

We find that the Magistrate Judge did not abuse his discretion in arriving at his award of attorney's fees in this matter. Although we have found in the past that *Hensley* holds there should be no reduction in attorney's fees where plaintiff has prevailed and achieved substantial success on only part of its suit involving interrelated claims, *see Hernandez v. Hill Country Telephone Co-Op, Inc.*, 849 F.2d 139, 144 (5th Cir.1988), the Magistrate Judge in the instant case was compelled to recognize the reasonableness of the time spent on Branch–Hines' claims. Following removal of this case, plaintiff amended her petition to misjoin a non-diverse defendant for purposes of then moving to remand the matter to the state court. The misjoined defendant was later dismissed and the motion to remand denied following approximately two months' litigation of the matter. Thereafter, the pretrial discovery in this case involved only one set of interrogatories and one deposition. At the two day trial of this matter, plaintiff called only one witness, which was the plaintiff herself. Having reviewed the record, we cannot say that the Magistrate Judge's findings were clearly erroneous or that he abused his discretion in finding that counsel's submitted time sheets exceeded the amount of time reasonably required for the prosecution of Branch–Hines' claims, and we affirm the award of attorney's fees in the amount of $10,098 as a reasonable attorney's fee under La.R.S. 23:1006.

The thrust of National's challenge to the fee award in this case is that it is disproportionate to Branch–Hines' recovery. We noted in *Hernandez*, supra, citing *City of Riverside v. Rivera*, 477 U.S. 561, 106 S.Ct. 2686, 91 L.Ed.2d 466 (1986), that there is no *per se* requirement of proportionality in an award of attorney's fees in the civil rights context, but that proportionality is an appropriate consideration in the typical case. Although the fees in this case may ultimately exceed the total monetary recovery herein, we note that the fees awarded herein are substantially less disproportionate than those approved in *Rivera*, or those which we approved in *Hernandez*, and are reasonable under our interpretation of La. R.S. 23:1006. Accordingly, and in light of our remand for modification of the special damages judgment to the full $7,000 in stipulated back pay and for new trial on

not cited by Appellee (green highlight)

cited by Appellee (yellow highlight)

6. August 24, 1990 Hearing Tr. at 22.

neral damages, National's challenge to e fee award based on disproportionality rejected.

not cited by Appellee. (green highlight)

V.

CONCLUSION

As the trial court misapprehended the mages recoverable under La.R.S. :1006, and failed to properly instruct the ry as to the general damages recoverable Branch–Hines, we remand for a new ial on the issue of general damages for notional distress alone. In addition, we nd the trial court abused its discretion in iling to award the full amount of stiputed back pay, and remand for modificaon of the judgment to reflect special damges in the amount of $7,000. We reject ie contention that the Magistrate Judge's nding of "no frivolity" as to plaintiff's eclassification claim was clearly erroneis, and conclude there was no abuse of scretion in the award of attorney's fees in iis matter. Consequently, we AFFIRM ie decision of the trial court on all issues ut that of damages, on which we REERSE and REMAND for modification of ie judgment as to special damages and for new trial for the sole purpose of plaintiff utting on her testimony as to her emotion- distress as an issue of general damages.[7] ational shall bear the costs this appeal. n remand, the trial court shall also assess ) defendant any additional attorney's fees id costs occasioned by this appeal and for ial of the issue on remand.


7. Since plaintiff did not list in the pretrial order any evidence or witnesses as to such damages.

## IX. REVISED CERTIFICATE OF COMPLIANCE

(Place this as last document in your brief before the back.)

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b).

1. EXCLUSIVE OF THE EXEMPTED PORTIONS IN 5th CIR. R. 32.2.7(b)(3), THIS BRIEF CONTAINS (Select one.):

A. 2631 words, OR

B. _____ lines in text in monospaced typeface.

2. THE BRIEF HAS BEEN PRPARED (Select one.):

A. In proportionally spaced typeface using-

Software Name and Version- WORD PERFECT 6.1

in (typeface name and font size)- COURIER NEW 14 OR,

B. In monospaced (nonproportionallly spaced) typeface using-

Typeface name and number of characters per inch- _____.

3. IF THE COURT SO REQUESTS, THE UNDERSIGNED WILL PROVIDE AN ELECTRONIC VERSION OF THE BRIEF AND/OR A COPY OF THE WORD OR LINE PRINTOUT.

4. THE UNDERSIGNED UNDERSTANDS A MATERIAL MISREPRESENTATION IN COMPLETING THIS CERTIFICATE, OR CIRCUMVENTION OF THE TYPE-VOLUME LIMITS IN 5th R. 32.2.7, MAY RESULT IN THE COURT'S STRIKING THE BRIEF AND IMPOSING SANCTIONS AGAINST THE PERSON SIGNING THE BRIEF.

D Horton

Signature of filing party

(PLACE THIS AS LAST DOCUMENT IN BRIEF BEFORE BACK COVER)