

# Court Upholds *Rendine* Fee Shifting, Declining To Follow U.S. High Court

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Helen Hoens

The state Supreme Court on Wednesday reaffirmed its nearly two-decade-old commitment to a doctrine that permits trial judges to enhance counsel fees in cases that might never be filed if not for the ability to shift fees.

In a consolidated ruling in two cases, the unanimous Court overturned two appellate rulings that followed the U.S. Supreme Court's holding, in *Perdue v. Kenny A.*, 130 S.Ct. 1662 (2010), that trial judges may award fees only in rare and extraordinary circumstances.

Justice Helen Hoens said the justices saw no reason to abandon the fee-shifting principles it established in *Rendine v. Pantzer*, 141 N.J. 292 (1995).

In one of the cases, *Walker v. Guiffre*, A-72-10, the Court reinstates a \$99,000 legal fee on the plaintiff's \$650 recovery in a suit accusing Route 22 Nissan Inc. and other car dealerships of fraudulently inflating fees in sales contracts.

Plaintiff Mary Walker purchased a new Nissan under a sales contract that included a \$140 vehicle registration fee, which was \$51.50 more than the Motor Vehicle Commission charges. The dealer kept the difference, which Superior Court Judge Alexander Waugh Jr., then sitting in Middlesex County, found violated the Consumer Fraud Act and the Truth-in-Consumer Contract, Warranty and Notice Act.

The Appellate Division found Waugh improperly used his own personal experience to gauge the plaintiff's lawyer's hourly rate and failed to provide a sufficient analysis for his decision to enhance the lawyer's lodestar by 45 percent. He stated only his impression that the case "can hardly be classified as 'typical.'"

In the other case, *Humphries v. Powder Mill Shopping Plaza*, A-100-10, a wheelchair-bound woman alleged disability discrimination at the Powder Mill Shopping Plaza in Morris Plains. Bobbie Humphries alleged the parking lot did not have enough handicap parking spaces, with some located on a lower level accessible only by stairs or a ramp with a dangerously steep incline.

Under a partial settlement reached in 2008, Powder Mill agreed to fix two of the three ramps, improve striping and signage for handicap spots and pay Humphries \$2,500. The parties left it for the judge to decide whether five or six spaces were required by law and the amount of attorney's fees for her lawyer, Montclair solo Edward Kopelson.

Morris County Superior Court Judge Deanne Wilson held Humphries a prevailing party entitled to fees because most of the changes in the parking area — including those made after Kopelson contacted Powder Mill on Humphries' behalf, but before he filed her complaint — resulted from the suit rather than other causes, including a letter about the parking from a handicap-access organization a month earlier.

Wilson awarded Kopelson \$97,705 in counsel fees and costs, but an appeals panel said the *Perdue* requirement of rare and exceptional circumstances had not been met.

The Court remanded for the trial court to determine what fees should be awarded based on the principles outlined in *Rendine*.

Hoens said the U.S. Supreme Court already had sharply curtailed the use of fee-shifting three years before *Rendine* in *City of Burlington v. Dague*, 505 U.S. 557 (1992).

"In clear and unmistakable terms, this Court rejected the framework adopted by the United States Supreme Court in *Dague*," she said, adding that the ruling in *Perdue* did 'not represent any new approach on the subject.'

"More to the point, there are no decisions relied upon in *Perdue* that were not considered, and rejected, by this Court in *Rendine*," Hoens said. "There is, in the end,

nothing in the most recent pronouncement of the United States Supreme Court that causes us to vary from the approach we have previously adopted.

The attorneys for Walker and Humphries expressed relief at the ruling.

"It's an appropriate ruling regarding attorney's fees that rejects the unrealistically restrictive approach in *Perdue*," says Walker's attorney on the appeal, Bruce Greenberg.

"The Court recognized that *Perdue* has no place in New Jersey's fee-shifting rules," says Greenberg, of Lite DePalma Greenberg.

"It's exactly what we were hoping for," Kopelson says. The ruling "reiterates that the law in New Jersey is what has been the law since *Rendine* in 1995."

Guiffre's attorney, Salvatore Giampiccolo, says he is not concerned that the Court did not adopt *Perdue*. "It's our position that the plaintiff has failed to sustain her burden" that counsel fees are warranted," says Giampiccolo, of Morristown's McElroy, Deutsch, Mulvaney & Carpenter. "There was clear abuse of discretion by the trial court."

Powder Mill's attorney, Joseph O'Neill, of Parsippany's Garofalo & O'Neill, did not return a telephone call seeking comment.