Appellate Court No. 05-3578

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DOROTHY GAUTREAUX, et al.,	)	**Appeal from the United States District Court for the Northern District of Illinois**
Plaintiffs-Appellees,	)	
	)	**No. 66 C 1459**
vs.	)	
	)	**Honorable Marvin E. Aspen**
CHICAGO HOUSING AUTHORITY and TERRY PETERSON,	)	
Defendants-Appellants,	)	
	)	
vs.	)	
	)	
DANIEL E. LEVIN and THE HABITAT COMPANY LLC,	)	
Receiver	)	

PLAINTIFFS-APPELLEES ANSWER TO PETITION FOR REHEARING

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 05-3578

Short Caption: Gautreaux v. CHA

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Dorothy Gautreaux (deceased), Odell Jones (deceased), Dorothea R. Crenshaw, Eva Rodgers, James Rodgers, Robert M. Fairfax, Bernadette Adams, Donnie Allen, Lydia Andrews, Mattie Bailey, Nicole Bennett, Pilar Boozer, Samantha Cathion, and a class of similarly situated individuals

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Business and Professional People for the Pubic Interest

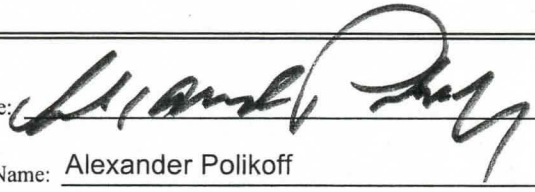
(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature:  Date: July 25, 2007

Attorney's Printed Name: Alexander Polikoff

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: Julie Elena Brown Date: July 25, 2007

Attorney's Printed Name: Julie Elena Brown

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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I. THERE IS NO CONFLICT WITH THE "NO-FINDINGS" RULE

The first of CHA's three legal arguments is that the Panel opinion is "[d]irectly in conflict" with *Pullman-Standard v. Swint*, 456 U.S. 273, 291-92 (1982), and *Price v. Johnston*, 334 U.S. 266, 291 (1948), as well as with a line of this Court's decisions exemplified by *Whetsel v. Network Property Services*, 246 F.3d 897, 904 (7th Cir. 2001). (Petition for Rehearing, hereafter "Pet.", at 1.) These cases are said to stand for the rule that where a Court of Appeals reverses a legal standard employed by the District Court, the Court of Appeals may not make "its own factual findings." (*Id.*)

There are three difficulties with this initial CHA argument. First, what CHA characterizes as the Panel's factual finding – that plaintiffs "have achieved success on the merits" (*id.* at 8) – may not be a factual finding at all. If "*de novo* review is appropriate here on the 'prevailing party' issue," as CHA argued to the Panel (Br. of Defendants-Appellants at 16), and as the Panel agreed (Exhibit A to Petition for Rehearing, hereafter "Panel Op.", at 8), whether plaintiffs achieved success on the merits and are therefore prevailing parties would be a question of law, not fact.

The second difficulty is that the Panel opinion, fairly read, does not make its own finding; the (supposed) factual finding that plaintiffs achieved success on the merits is but an affirmation of the District Court's like determination. Although Judge Aspen viewed the litigation as continuing, not freestanding,[1] he also entered current fee period orders that gave

[1] CHA is quite wrong in asserting that plaintiffs' sole theory of their case was that it was "continuing" litigation. (Pet. at 3 n.1.) In fact, plaintiffs argued in the alternative that they were prevailing parties on the freestanding view because of the "fruits" contained in current fee period orders. See Br. of Plaintiffs-Appellees at 16-19; Plaintiffs' Reply Br. in the District Court at 4-9 (SA 587-592). ("SA" is the Supplemental Appendix filed by the Appellants; "PSA" is the Plaintiffs' Supplemental Appendix.)

plaintiffs the many "fruits" that confer prevailing party status. (Panel Op. at 15-16.) Since the district judge, by his own (ordering) words, thus conferred prevailing party status on plaintiffs for the current fee period, it would be sheer formalism to read his opinion as failing to make such a finding.

Finally, even if we were to adopt both such a reading and CHA's view that the Panel was finding a fact rather than considering *de novo* a question of law, it would still not avail CHA. The reason is the exception to the "no-findings" rule, acknowledged by CHA (Pet. at 4 n.2), that when the record is susceptible of only one reasonable interpretation, appellate courts can draw the inescapable conclusion themselves rather than remand. *In re: Marchiando*, 13 F.3d 1111, 1114 (7th Cir. 1994) (when record permits only one finding, court of appeals can make finding itself without remand). Here, as the Panel opinion makes clear in its careful examination of current fee period orders (Panel Op. at 15-16), the inescapable conclusion from the face of the orders is that they award plaintiffs "judicial relief" (*id.* at 16), thereby conferring prevailing party status.

Indeed, CHA itself says that if an order on its face forced CHA to do anything, "perhaps the Panel would have had authority to make the finding that plaintiffs had prevailed, just by examining the text of the order." (Pet. at 8.) This is of course exactly what the Panel did in identifying some of the many things current fee period orders forced CHA to do, such as complying with an extremely detailed procedure for moving displaced families into scattered-site units, giving plaintiffs veto control over the initial location and configuration of certain units, adhering to a maximum number of public housing units and a maximum ratio of public to non-public housing units, distributing public housing units throughout certain complexes, building no more than specified numbers of public housing

units in specified buildings, submitting annual written reports to plaintiffs, and so on. (Panel Op. at 15-16.) In addition to these "forcing" provisions, the orders state that their purpose is to provide relief to plaintiff families, for example, ". . . an appropriate and desirable way to create viable mixed-income and desegregated housing opportunities for CHA plaintiff families." (SA 368)[2]

Since the record here (the undisputed current fee period orders) admits of only one reasonable conclusion as to "fruits" and therefore the prevailing party issue, the Panel was free to draw that sole reasonable conclusion.

CHA seeks to avoid this result by asserting that what is determinative is not what the orders say but whether they were "negotiated," further asserting in reliance on Mr. Peterson's affidavit that they were not. (Pet. at 9.) That this is incorrect is made clear not only by the absence of record citations to support CHA's oft-repeated "no negotiation" assertion, but by the Peterson affidavit itself:

> "As at our other mixed-income sites, there are many stakeholders at Horner, whose interests must be considered. . . As we planned [Horner], we conducted many, many meetings involving these various parties. We eventually reached agreement on an order. . ." (SA 323)

Mr. Peterson expressly includes the *Gautreaux* plaintiffs among the "stakeholders" (*id.*), and nowhere states that there were no negotiations with plaintiffs over the current fee period orders.

But suppose there were no negotiations. Imagine that each time plaintiffs and CHA sat down together to discuss the orders to be entered, in the "many, many meetings" Mr. Peterson references, by an astonishing quirk of chance the parties found that each wanted

---

[2] In several of the joint motions preceding the orders, CHA agreed that housing families as proposed would meet "the goal of creating mixed-income, desegregated housing opportunities for the plaintiff class. . ." (PSA 230)

exactly what the other wanted, down to the very last detail of what is contained in every current fee period order, and in every one of the – sometimes lengthy – joint written motions requesting the orders, and that therefore there was no need to "negotiate."

This is of course a most unlikely scenario. For example, it is extremely unlikely that – absent discussion with plaintiffs – CHA would propose the exquisitely detailed arrangements for tenanting scattered site units that appear in the Order of August 29, 2002, setting out procedures for granting families relocated by the Plan for Transformation priority access to scattered site remedial units built under prior Gautreaux orders. Among other things, this Order provides that CHA "must" conduct a screening of each relocated family, "must" provide its private manager with a complete tenant file, "shall" work with the private manager on needed social services, "shall" use best efforts to fill vacant scattered site units quickly, and "shall" lease to specified other groups any units that remain vacant for more than a "maximum lease up period" that is defined in great detail. The Order also requires CHA to provide plaintiffs with a list of all vacant scattered site units within 30 days, the list to be "updated and provided to the plaintiffs on a quarterly basis." (SA 377)

Yet it would make no difference if we were to adopt CHA's imagined scenario, fanciful though it is, and assume that, on the matter of moving relocated families, this Order was exactly what CHA wanted, and proposed, and that therefore no negotiation was required and that none took place. The Order still says what it says, and gives plaintiffs the "fruit" of mandated, detailed and precise, scattered site tenanting arrangements acceptable to them, and requires CHA to provide plaintiffs each quarter with specified information on scattered site vacancies. In multiple ways the Order also restricts CHA's future flexibility as to its tenanting practices. In like fashion each of the other orders provides "fruit" and restricts

CHA's future conduct. The Panel opinion is undoubtedly correct in saying, "That the CHA and the *Gautreaux* plaintiffs agreed on these orders cannot mean that the substantial benefits flowing to the latter are not 'fruits' of the litigation." (Panel Op. at 16.)

There being no dispute as to what the orders say, there was nothing improper about the Panel's drawing the sole reasonable conclusion to be drawn from the undisputed language of the orders, namely, that they give plaintiffs multiple "fruits" and thereby confer prevailing party status upon them. This conclusion is also dictated by the settled rule that a correct decision below "must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering v. Gowran*, 302 U.S. 238, 245 (1937); *Payne v. Churchich*, 161 F.3d 1030, 1038 (7th Cir. 1998); *American National Bank v. Equitable Life Assurance Society*, 406 F.3d 867, 881 (7th Cir. 2005).[3]

II. THERE IS NO CONFLICT WITH *ALLIANCE*

The second of CHA's three legal arguments is that the Panel opinion is "[d]irectly in conflict" with *Alliance to End Repression v. City of Chicago*, 356 F.3d 767, 770 (7th Cir. 2004) (Pet. at 1.) The Panel of course *followed Alliance* in viewing the current post-decree litigation as freestanding. (Panel Op. at 11.) Apart from this, there are multiple factual differences between *Alliance* and *Gautreaux,* any one of which vitiates the "directly-in-conflict" assertion. For example, whereas in the post-decree period *Alliance* plaintiffs had experienced "nothing but loss," (*Id.* at 770), *Gautreaux* plaintiffs have secured multiple orders containing a variety of "fruit." Whereas the *Alliance* decree involved an "appointed

[3] The hearing CHA now desires (and never requested below) in order to "understand" the history of facially clear orders would require, among other things, testimony from lawyers involved in the "many, many meetings" Mr. Peterson references, and would dramatically run afoul of the Supreme Court's admonition that "a request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

monitor" (*id.* at 771), *Gautreaux* has no appointed monitor. Whereas the *Alliance* decree in its original form "had accomplished its purpose and had become obsolete" (*id.* at 774), here, as the district judge has said, "compliance has always been at issue, and modifications and clarifications of the original judgment order must continuously be made to account for changing conditions and circumstances." (Br. of Defendants-Appellants at A-4.)

Apart from these and other significant differences between the two cases, CHA's summation of its *Alliance* argument – virtually all the awarded fees said to have been for time spent modifying the judgment order "so that its terms would not interfere with CHA's Plan for Transformation" (Pet. at 1) -- is less than forthcoming. This summation entirely ignores the many provisions of the current fee period orders providing "fruit" to plaintiffs.

III. THERE IS NO CONFLICT WITH *CITY OF TULSA*

Lastly, CHA contends (Pet. at 1) that the Panel opinion is "[d]irectly in conflict" with a Tenth Circuit decision, *Johnson v. City of Tulsa*, ___F.3d___, 2007 WL 1705088 (10th Cir. 2007). That decision addressed the question of whether a prevailing party in a civil rights class action is entitled to attorney fees for post-consent decree work that "resulted in no court order." (*Id.* at 1) *Tulsa* answered "maybe" – yes, if the work is for "reasonable efforts" to preserve or protect the fruits of or to enforce a decree, no if the work is on behalf of an individual class member asserting harm from a decretal violation – and remanded for a determination of which it was. (*Id.* at 19-20.)

CHA's directly-in-conflict-with-*Tulsa* argument fails for at least two reasons. First, unlike the Panel opinion, *Tulsa* addresses the question of whether fees can be paid for post-decree work that produced no court orders. (*Id.* at 1.) Second, none of the *Gautreaux* orders

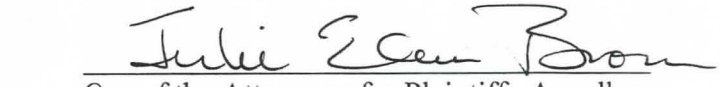
seeks redress for individual claims of harm, the type of work *Tulsa* considered non-compensable. (*Id.* at 19.)

In addition, CHA's discussion of *Tulsa* badly distorts the Panel opinion by saying it decided fees were appropriate because there had been no showing that CHA's public housing system had been desegregated. (Pet. at 14.) Clearly, the Panel affirmed the fee award because plaintiffs had obtained substantial "fruit" during the current fee period, not because of the state of public housing desegregation.

CONCLUSION

For the foregoing reasons, the Petition for Rehearing should be denied.

Respectfully submitted,



One of the Attorneys for Plaintiffs-Appellees

July 24, 2007

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CERTIFICATE OF SERVICE

Julie Elena Brown, an attorney, hereby certifies that on July 24, 2007, she caused to be served two physical copies of the foregoing **Plaintiffs-Appellees Answer to Petition for Rehearing** by messenger to:

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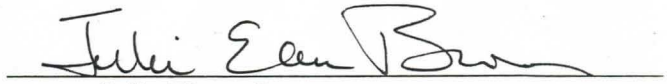

Julie Elena Brown