IN THE SUPREME COURT OF FLORIDA

STANDARD GUARANTY INSURANCE COMPANY,

Petitioner,

v.

BRENDA L. QUANSTROM,

Respondent.

CASE NO. 72,100

RESPONDENT, BRENDA L. QUANSTROM'S, ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

This Court has accepted jurisdiction of this case, Quanstrom v. Standard Guar. Ins. Co., 519 So.2d 1135 (Fla. 5th DCA 19881, based on the Court's jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with the decision of another district court of appeal or of the supreme court on the same question of law. Art. V, §3(b)(3), Fla. Const. The alleged conflict is between Quanstrom on the one hand and Travelers Indem. Co. v. Sotolongo, 513 So.2d 1384 (Fla. 3d DCA 19871, and Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 19851, on the other. The conflict is presented by the Fifth District's decision that the trial court in this case was required to apply a contingency risk factor to attorney's fees awarded in the present case.

Brenda Quanstrom was a passenger in an automobile owned and driven by Terry Nelson when she was involved in an accident resulting in her injuries. (R. 19). Because of her injuries, she incurred medical expenses and lost wages. (R. 19). At the time Quanstrom owned an automobile, but the automobile had been rendered inoperative over thirty days before the accident. (R. 4, 5, 7-9, 241. Because Quanstrom could not afford repairs on the vehicle, it remained inoperable until two weeks after the accident, when she was able to have the car fixed. (R. 14, 18, 21, 30). When the vehicle was inoperative and before the acci-

dent, she allowed the registration to lapse. (R. 24). She had no PIP insurance at the time of the accident. (R. 31).

Because she had no PIP of her own, Quanstrom made a claim against Nelson's PIP carrier, Standard Guaranty. (R. 19). Standard Guaranty owed PIP benefits if Quanstrom was not required by law to maintain her own PIP. (R. 105). Standard Guaranty refused to pay Quanstrom PIP benefits. (R. 105).

Quanstrom entered into an attorney/client contract with Dalton and Provencher, P.A.,[1] for the prosecution of her claim against Standard Guaranty. The fee agreement was that no fee would be earned by the firm unless Quanstrom was successful in her claim. If she made a recovery, her attorney would not take his fee from the amount she would receive for medical expenses or lost wages, but would limit his fee to that awarded by the court pursuant to section 627.428, Florida Statutes. (R. 192).

Quanstrom filed suit claiming a breach of the PIP contract. (R. 19). Standard Guaranty answered by denying most of the allegations of the complaint, including the damages allegations. (R. 22). Both parties moved for summary judgment on the liability question. (R. 105, 167). The trial court granted Standard Guaranty's motion, holding that Quanstrom did not have coverage under the Standard Guaranty policy. (R. 161). The Fifth District Court of Appeal reversed and held that the trial court

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[1]She actually entered into the contract with the precursor of Dalton and Provencher, P.A. Since then that firm was reconstituted into its present form.

should not have granted Standard Guaranty's motion but should have granted Quanstrom's motion. Quanstrom v. Standard Guar. Ins. Co., 504 So.2d 1295 (Fla. 5th DCA 1987).

With the liability question settled, a trial on damages was still necessary. (R. 183, 185). As the trial on damages approached, counsel for the parties were able to settle the damages question and entered into a stipulation reflecting that settlement.[2] (R. 208). The stipulated figure was $2,690.20 plus the appropriate attorney's fee under section 627.428. (R. 208).

Both parties were aware of the formula set forth in Rowe requiring the formulation of a lodestar, and they agreed to a lodestar figure. (R. 208). This amounted to $8,100 and reflected the hours the plaintiff's attorney had put into the case through the initial trial stage, the appeal, and the rest of the trial stage on remand. (R. 208). The parties could not agree on whether Quanstrom was entitled to a contingency risk multiplier. (R. 208). While Quanstrom argued she was (R. 186, 202), Standard Guaranty argued that the fee contract involved in this case was not a contingent fee contract and that contingent fee contracts were only those contracts by which the attorney takes a percentage of the plaintiff's recovery. (R. 192). It is undisputed that the contract in question did not call for the fee to be based on a percentage of the recovery.

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[2]This is contrary to Standard Guaranty's assertions made here that the amount of damages was never disputed.

The question of the attorney's fee was presented to the trial court, with the parties providing the court the agreed lodestar figure. The only question before the court was whether the contract in question qualified as a contingent fee contract *so* as to require a multiplier, and, if *so,* what the appropriate multiplier was. **(R. 1, 208).**

The trial court ruled that the contract in question was not a contingent fee contract and, thus, held that a contingent risk multiplier would not be appropriate. **(R. 211).** It has been suggested by Standard Guaranty in this Court that the trial court properly exercised discretion in its refusal to apply a multiplier. It must be pointed out here, however, that Standard Guaranty never argued nor made any suggestion to the trial court that the application of a multiplier was a discretionary matter. **(R. 1-18, 192-201).** Consequently, the court never exercised any such discretion. The court simply held that the contract in question was not a contingent fee contract. **(R. 211).**

Quanstrom appealed the trial court's ruling, presenting arguments that the contract was a contingent fee contract requiring a multiplier. In Standard Guaranty's answer brief came the first suggestion that the multiplier question was a matter of discretion. In response to that argument, Quanstrom argued that the application of a multiplier was not a matter of discretion although the amount of such a multiplier was. In any event, Quanstrom argued, the trial court had never exercised any such discretion. The Fifth District Court of Appeal reversed the

trial court and held that the contract was a contingent fee contract and, that, although the amount of the multiplier was a matter of discretion, the question of whether a multiplier should be applied was not, Quanstrom v. Standard Guar. Ins. Co., 519 So.2d 1135 (Fla. 5th DCA 1988).

SUMMARY OF ARGUMENT

Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), reflected this Court's concern with uniformity and objectivity in trial courts' calculation of reasonable attorney fees. That concern led to the development of the Rowe formula by which trial courts were required to make such calculations. The Rowe formula was devised to approximate, as nearly as possible, the relevant market considerations which go into determining attorney's fees. One of those considerations is whether the fee is to be fixed or contingent. A contingent fee must be more than a fixed fee in order for the provider of the service to have the same economic benefit as he would have if the fee were guaranteed at a lower rate. To allow trial courts to disregard the contingent nature of a fee agreement invalidates the formula and thwarts the purpose of both the formula and the Rowe court's effort.

The language of Rowe, itself, indicates that the Rowe court intended the risk factor to be mandatory. Also, every district court of appeal which has considered the question, except the third district (which is the district causing conflict), has ruled that the risk factor is mandatory. Although the fee contract in this case calls for the contingent fee to be determined under section 627.48, Florida Statutes, rather than as a percentage of the recovery, there is no significant difference between the two. The purpose of the risk multiplier is to

recognize the risk the attorney takes in taking the case. It is that risk of no recovery that is significant rather than the method the contract calls for for calculation of fees. Therefore, the fee agreement in question qualifies as a contingent fee agreement requiring the application of a risk factor.

ARGUMENT

I. WHETHER FLORIDA PATIENT'S COMPENSATION FUND v. ROWE, 472 So.2d 1145 (Fla. 1985), OR ITS FEDERAL PROGENITORS, MANDATES APPLICATION OF AN ENHANCEMENT FACTOR TO STATUTORY AWARDS OF ATTORNEY'S FEES[3]

The question before this Court is whether a trial court determining a court-awarded attorney's fee must apply a contingent risk factor from 1.5 to 3.0 when the attorney to be compensated stood a risk of not being paid because the attorney's fee contract was contingent. For the following reasons, this Court should hold that while the amount of the risk factor to be applied in any given case is a matter of discretion for the trial court, the trial court must, nonetheless, apply some risk factor between 1.5 and 3.0 when an attorney has accepted the case on a completely contingent basis, whereby, regardless of the method of calculation, the attorney takes the risk of receiving no fee if the claim fails.

Naturally, the starting point for any attorney's fee question is Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985). Rowe set forth the guidelines trial courts are compelled to follow when calculating court-awarded

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[3]This statement of the issue has been recast from the argumentative form used by Standard Guaranty to a more neutral form. While it is not a statement of the issue as Quanstrom would draft it, Quanstrom has resisted the temptation to completely recast the issue for the convenience of the Court.

fees. Rowe also, however, speaks to the mandatory nature of the risk factor.

Ironically, the issue presented to the Rowe court was not the question of how fees are to be calculated. The question before the court was the constitutionality of section **768.56,** Florida Statutes (1981), which directed trial courts to award a reasonable attorney's fee to the prevailing party in medical malpractice actions. Having found the statute was not unconstitutional, the court took the time and effort to develop a formula for trial courts to use in calculating the amount of such fees. The unanimous court was concerned with the inconsistency and lack of objectivity with which trial courts were awarding fees.

> Recently, partially because of the substantial increase in the number of matters in which courts have been directed to by statute to set attorney fees, great concern has been focused on a perceived lack of objectivity and uniformity in court-determined reasonable attorney fees.

Id. at 1149.

The court drew from the federal lodestar system to develop its own method of calculating fees.[4] It decided that the trial court should first determine the number of hours reasonably expended on litigation. The court should then decide a reasonable hourly rate by considering the criteria set forth in

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[4]The court did not adopt the federal lodestar system. It adopted the general approach of the federal system, but developed a system with many significant differences. This will be discussed later.

Disciplinary Rule 2-106(b) of The Florida Bar Code of Professional Responsibility.[5]

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

3. The fee customarily charged in the locality for similar legal services;

4. The amount involved and the results obtained;

5. The time limitations imposed by the client or by the circumstances;

6. The nature and length of the professional relationship with the client;

7. The experience, reputation, and ability of the lawyer or lawyers performing the services; and

8. Whether the fee is fixed or contingent.

In deciding the hourly rate, however, the trial court was to exclude from its calculation the time and labor required, the results obtained, and the contingent nature of the fee. Time and labor required were already taken into account in the court's initial determination of the hours reasonably spent. As for any reduction for the "results obtained," whereby the court should

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[5]This has now been changed to Rule Regulating The Florida Bar 4-1.5, but the criteria have not changed.

reduce a fee in situations in which a plaintiff is not completely successful. This factor is to be considered separately by the trial court after a determination of the reasonable hourly fee.

Finally, the court must separately consider whether the fee is fixed or contingent. Noting that attorneys who take cases on a contingency fee must charge more than those who are guaranteed payment of the fee, the court said that the trial court must separately consider that factor and enhance any lodestar fee by anywhere from 1.5 to 3.0, depending on the likelihood of success at the time the attorney took the case. The question before this Court, of course, is whether the Rowe court intended that the trial court always apply some risk factor or whether it intended that this be left to the whim of the trial judge.

An examination of the language used in the Rowe opinion is helpful, although not conclusive. On the one hand the court used the word "may" when it said:

> Once the court arrives at the lodestar figure, it may add or subtract from the fee based upon a "contingency risk" factor and the "results obtained."

~~Id.~~ at 1151 (emphasis supplied).

On the other hand the court used mandatory language as well:

> Because the attorney working under a contingent fee contract receives no compensation when his client does not prevail, he must charge a client more than the attorney who is guaranteed remuneration for his services. When the prevailing party's counsel is employed on a contingent fee basis, the trial court must consider a contingency risk factor when awarding a statutorily-directed reasonable attorney fee.

* * *

> Based on our review of the decisions of other jurisdictions and commentaries on the subject, we conclude that in contingent fee cases, the lodestar figure calculated by the court is entitled to enhancement by an appropriate contingency risk multiplier in the range from 1.5 to 3.0.

Id. (emphasis supplied).

The formula developed by the court reflects the court's effort to devise a formula which approximates the way fees are determined in the marketplace. Theoretically, when each of the factors set forth in DR-106(b) is considered, it will have an upward or downward effect on the amount of a reasonable fee. Each is a significant part of the formula, and the trial court needs to consider all and not just some of them. A failure to do so artificially alters the analysis and destroys the validity of the formula.

The court recognized the obvious fact that if a person is guaranteed payment, all other things being equal, his price is not as high as one who is not guaranteed payment. On the other hand, one whose collection of payment is not guaranteed must charge more for his services based on the probability of collection. Refusing to recognize this fact makes the calculation flawed and thwarts the attempt to approximate market conditions.

In the Rowe opinion, the court introduced its formula by citing five United States Court of Appeals cases and three other sources which the court deemed authoritative.[6] Id. at 1150. From one of the authorities, Berger, Court Awarded Attorneys' Fees: What is "Reasonable"?, 126 Pa.L.Rev. 281 (1977), comes some enlightening thoughts concerning the purpose for and justification of the risk factor:

> Unless an attorney has some agreement with the client guaranteeing compensation regardless of the outcome, the attorney will receive no fee in the event that suit does not succeed in some manner. In these cases counsel bear the risk that they will not be compensated at all for their time and effort. The experience of the marketplace indicates that lawyers generally will not provide legal representation on a contingent basis unless they receive a premium for taking that risk.
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> [T]he risk of nonrecovery must be accounted for if these cases are to attract lawyers.
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> Where the court concludes that the chance of success was about even at the outset, an increase in the hourly rate in the range of 100% appears appropriate. Finally, if the case appears unlikely to succeed when initiated, an increase in the basic hourly rate of up to 200% may be justified to compen-

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[6] Those authorities were Copper Liquor, Inc. v. Adolph Coors Co., 624 F.2d 575 (5th Cir. 1980); Detroit v. Grinnell Corp., 550 F.2d 1093 (2nd Cir. 1977); Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 540 F.2d 102 (3d Cir. 1976); Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974); Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973); Berger, Court Awarded Attorneys' Fees: What is "Reasonable"?, 126 Pa.L.Rev. 281 (1977); M. Derfner, Court Awarded Attorney Fees, 1.02[1], (1984); Leubsdorf, The Contingency Factor in Attorney Fee Awards, 90 Yale L.J. 473 (1981).

> sate the attorney for the substantial risk undertaken.

Id. at **324-26** (footnotes omitted).

The concept of multiplying the lodestar by 1.5 to **3.0** is adapted from Berger.

> If the court were to conclude that there was no realistic chance of losing at the inception of the case, the risk of non-recovery would be zero, and the basis hourly rate should not be adjusted. If the court were to conclude that there was an even chance of success at the outset, it would in effect be saying there was a fifty percent risk of nonrecovery. A lawyer would have to take two of these cases on a contingent basis to receive one fee. Accordingly, if risk were to be fully compensated, the lawyer would be entitled to twice his basic hourly fee.

Id. at **326**. The Berger article was obviously influential in the Rowe court's decision.

In addition to the Rowe language, itself, and the recognition that Rowe attempts to reflect economic pricing principles, one should also look once more to the reason the Rowe court decided to formulate a method of attorney-fee calculation in the first place. The motivating factor was the court's desire for uniformity and objectivity. To allow a trial court discretion as to whether to apply a multiplier runs counter to a desire for uniformity and objectivity. Rowe's purpose was to restrict discretion, not confer it. A court *so* concerned about uniformity and objectivity would not have conferred discretion to the trial

judge on such an important factor as to whether to apply a risk factor without having specifically said so. In fact, the word discretion is never used in the context of attorney-fee computation in the entire Rowe opinion. Moreover, the supreme court gave no guidelines to trial courts within which to use any discretion. There is no discussion as to under what circumstances in which a contingency fee agreement exists the risk factor should or should not be applied. For the Rowe court, with its concerns, to have granted discretion on this question to the trial court without having provided any guidelines by which the trial court should exercise that discretion is difficult to accept. The only logical conclusion, therefore, is that the court did not intend the trial court to have the discretion as to whether to apply a risk multiplier.

The formula set forth in Rowe resolves many questions trial courts and attorneys have had in the past about how fees should be calculated. It is a simple and objective formula. It takes away a great deal of the uncertainty experienced by practicing lawyers and, as such, it enhances settlements of attorney's fee matters. Instead of having opposing lawyers rolling the dice on fee questions, they now may more certainly evaluate the merits of their claims because they know the formula which the judge will

apply. This kind of situation promotes settlements of these issues.[7]

Three district courts of appeal have considered the mandatory versus discretionary question which is before this Court. The Fifth District Court of Appeal, of course, has ruled with Quanstrom on this question while the Third District Court of Appeal has ruled to the contrary in Travelers Indem. Co. v. Sotolongo, 513 So.2d 1384 (Fla. 3d DCA 1987), and National Found. Life Ins. Co. v. Wellington, 13 F.L.W. 1402 (Fla. 3d DCA June 14, 1988). The only other district court which has passed on this question is the Fourth District Court of Appeal in Aperm of Fla., Inc. v. Trans-coastal Maintenance Co., 505 So.2d 459 (Fla. 4th DCA), review denied, 515 So.2d 229 (Fla. 1987). Aperm, as is this case, was a first-party claim for insurance benefits. After the plaintiff prevailed, the trial court refused to apply a contingency risk factor. The district court reversed and remanded the case for application of a multiplier ranging from 1.5 to 3.0. In that case the argument was made that the trial court had discretion as to whether to apply a risk factor. The district court rejected that argument. Id. at 463.

Standard Guaranty argues that:

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[7]The formula led to a partial settlement in the present case. The attorneys in the present case knew the court would have to apply the Rowe formula and went far toward a settlement of the attorney's fee issue by agreeing on a lodestar figure.

> It is patently clear[8] from Rowe this Court intended the multiplier or enhancement figure to apply only under very limited circumstances where there is an extraordinary justification or a particular type contingent fee contract between the attorney and his client.

Standard Guaranty's Initial Brief at 10 (footnote added). Standard Guaranty does not present any support for that position, however. While Rowe was a personal injury case, Standard Guaranty has not shown how the contract in Rowe meets the "extraordinary" test Standard Guaranty says should be required before a risk factor is applied.

Standard Guaranty also suggests, without authority, that a risk factor should not apply to a first-party insurance claim and says that no district courts of appeal, except for the Fifth District in Quanstrom, has done so. On the contrary, the Fourth District Court of Appeal did that very thing in Aperm when it held the trial court erred in refusing to apply a risk multiplier in that first-party insurance claim.

Standard Guaranty cites three district court cases to argue that the district courts have restricted the use of Rowe to certain situations. Quanstrom is in general agreement with that proposition, but none of the situations in which the district courts have held Rowe does not apply is present in this case.

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[8] This writer was taught in law school that whenever someone uses phrases such as "patently clear. . ." and "it is obvious that. . ." one had best look particularly carefully at the reasoning accompanying such phrases. Sometimes these phrases are used to cover up that which is, in fact, not very clear or obvious. Quanstrom suggests that this lesson is particularly appropriate here.

For example, in Stabinski, Funt, and De Oliveria, P.A. v. Alvarez, 490 So.2d 159 (Fla. 3d DCA 19861, the court held that Rowe is designed to calculate fees to be paid by a third person and is not applicable to determine fees an attorney is trying to collect from his own client. Both Rivers v. S.C.A. Servs. of Fla., Inc., 488 So.2d 873 (Fla. 1st DCA 1986), and Division of Administration, State Dept. of Transp. v. Ruslan, Inc., 497 So.2d 1348 (Fla. 4th DCA 19861, show that Rowe is inapplicable in workers' compensation and eminent domain cases, respectively. This is because the legislature has statutorily set forth specific criteria to be used in those cases. None of these situations exists in the present case.

Standard Guaranty goes on to refer to federal cases for the principle that the trial court has discretion to refuse to apply a risk factor. First, a word must be said about the usefulness of federal authority on this subject.

Rowe did not adopt the "federal lodestar method." Instead, it found that the "federal lodestar approach. . . provide[d] a suitable foundation for an objective structure." Rowe, 472 So.2d at 1150. From the authorities cited by the court,[9] it is apparent that the court, while adopting the general approach used by the federal courts, in no way intended to adopt that system as it existed as the law of Florida. For example, under the federal system the contingent nature of the fee agreement was considered

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'These are the authorities listed in n.6, supra.

when determining the hourly rate. Hensley v. Eckerhart, 461 U.S. 424 (1983). This is not the case under Rowe. Under the federal system enhancement of the fee was allowed, not only for the attorney's risk, but also for the delay the attorney experiences in being paid. See, eg., Sierra Club v. Environmental Protection Agency, 769 F.2d 796 (D.C. Cir. 1985). An enhancement was appropriate under the federal system if the quality of the attorney's work is exceptional. Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973). Neither of these enhancements is appropriate under Rowe.

The idea of a range of multipliers from 1.5 to 3.0, depending on the likelihood of success at the onset of the litigation, is not a principle derived from any of the federal cases cited in Rowe. It is taken directly from the Berger article. In other words, the supreme court in Rowe did not adopt the federal system; it adopted the Florida system, which is loosely based on the federal system. It is not, by any means, meant to be the same as the federal system. Therefore, the federal cases cited by Standard Guaranty have very little, if any persuasive value. This Court must determine what was in the mind of the Rowe court at the time that decision was rendered, not how the federal courts then or now view contingency risk factors.

Finally, even if this Court accepts Standard Guaranty's position that the trial court had discretion not to apply a risk multiplier, this case would still need to be remanded to the trial court for exercise of that discretion. The trial court did

not reach its conclusion as a result of an application of discretion. Instead, the trial court ruled as a matter of law that the contract in question was not a contingent fee contract and, therefore, a multiplier was not applicable. Having made that ruling of law, the trial court was never called on to exercise any discretion. Therefore, if this Court holds that the trial court has discretion as to whether to apply a multiplier, this action must be remanded to the trial court for application of such discretion.

Standard Guaranty argues that the fee contract in question was not a contingency fee contract as contemplated by the Rowe court. Quanstrom, on the other hand, argues that any contract in which the payment of attorney's fees is contingent on the client's prevailing is a contingent fee contract for the purposes of Rowe. The only Florida court which has directly and expressly considered this question is the Fifth District in Quanstrom. Standard Guaranty has not cited any authority on this question, either from Florida or outside the state.

The Rowe court, when deciding that a contingency risk factor is appropriate, was not concerned by the method of calculation called for under the attorney's fee agreement. The reason for the enhancement was purely and simply to recognize the risk the attorney was taking. The fact that the issue arose in a medical malpractice case involving personal injuries has led Standard Guaranty to argue that the Rowe court intended its rationale to apply only to personal injury cases in which fees are based on a

percentage of the recovery. The fact is, however, there are personal injury cases in which a contingency fee is not based on a percentage of the recovery. In fact, there is no indication in Rowe, itself, that the fee agreement was based on a percentage of the recovery. A limitation of Rowe's applicability to only percentage-fee cases is so contrary to the stated purpose of the risk multiplier, that being a recognition of the attorney's risk, that it should not be presumed that Rowe is so limited unless the Rowe court had specifically so stated.

This question has been addressed by the United States Court of Appeals for the District of Columbia Circuit in Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980). Copeland was a Title VII action in which the plaintiff prevailed on her claim for gender discrimination. Because Title VII provided for the award of attorney fees to the prevailing plaintiff, the court was required to review the award of fees to the plaintiff under the federal lodestar approach. When discussing the enhancement of the lodestar because of a contingency risk, the court carefully pointed out that when speaking of contingency multipliers, the term "contingency" should not be confused with a contingency fee arrangement. Under a contingency fee arrangement, typically, an attorney in a personal injury case would take a percentage of the recovery. In contrast, the "contingency" under the federal lodestar system is merely a recognition of the likelihood a claim will not be successful and, thus, the attorney risks not being paid. As stated by the court:

> It is important to recognize that the contingency adjustment is designed solely to compensate for the possibility at the outset that the litigation will be unsuccessful and that no fee will be obtained. Contingency adjustments of this sort are entirely unrelated to the "contingency fee" arrangements that are typical in plaintiffs' tort representation. In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery. Such is not the case in contingency adjustments of the kind we describe herein. The contingency adjustment is a percentage increase of the "lodestar" to reflect the risk that no fee will be obtained. The contingency risk is not a percentage increase based on the amount of recovery.

Id. at **893**. Accord Blum v. Stenson, **465** U.S. **886, 904** (1984) (Marshall, J., concurring). Standard Guaranty's interpretation of the word **"contingency"** does not square with the purpose of the contingency risk factor set forth in Rowe, which is to recognize the risk an attorney takes when he takes a case without a guaranteed fee.

11. WHETHER PUBLIC POLICY CONCERNS REQUIRES APPLICATION OF A MULTIPLIER TO INSURE EQUAL ACCESS TO LEGAL REPRESENTATION

In the second part of Standard Guaranty's brief, it makes a "public policy" argument that this Court should not sustain the Fifth District's opinion in this particular case because the decision will drive up insurance rates and deprive the citizens of Florida of insurance coverage. This section of the brief is fraught with unsubstantiated claims and references to matters outside the appellate record.

The so-called insurance crisis is an issue about which there has been a great deal of debate and disagreement. Studies have been done and are continuing to be done on the issue, and the legislature, along with other civic groups, has struggled with the issues for years. The insurance industry has brought its economic resources to bear on the legislature and the public to convince them of the need for tort reform lest the public be subject to a draconian existence in which the public cannot have babies because no doctors will deliver them. The trial bar, along with other civic groups, is fighting this battle as well. Whatever one thinks of the "insurance crisis," this is not a question that this Court should take up in the context of this case nor should this Court make its decision in this case based on the considerations presented by Standard Guaranty.

CONCLUSION

For the foregoing reasons, this Court should approve the decision of the Fifth District Court of Appeal, which will result in a remand to the trial court for a determination of the risk factor to be applied in the present case. The amount of the risk factor from 1.5 to 3.0 would be decided by the trial court based on the trial court's assessment of the likelihood of success at the outset of the litigation. If the Court holds that application of a risk factor in this case is not mandatory, it should remand this case to the trial court to have the trial court exercise its discretion under guidelines set forth by this Court as to whether a risk factor should be applied and, if so, the amount of the risk factor.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 1 day of August, 1988, to Lora A. Dunlap, Esquire, Fisher, Rushmer, Werrenrath, Keiner, Wack and Dickson, P.A., Post Office Box 712, Orlando, Florida 32802.

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