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B Grading

IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,100
FIFTH DISTRICT CASE NO. 87-1340

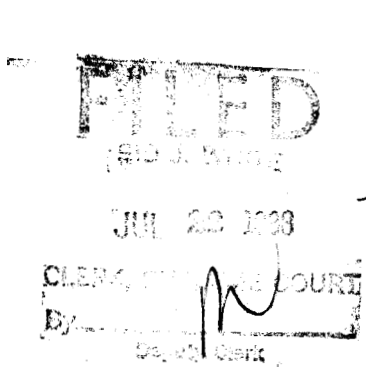
STANDARD GUARANTY INSURANCE COMPANY,

Petitioner,

-vs-

BRENDA L. QUANSTROM,

Respondent.



PETITIONER'S, STANDARD GUARANTY INSURANCE COMPANY, INITIAL MERITS BRIEF ON ITS PETITION FOR DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

LORA A. DUNLAP
Fisher, Rushmer, Werrenrath,
Keiner, Wack & Dickson, P.A.
Post Office Box 712
Orlando, Florida 32802
(305) 843-2111
Attorneys for Petitioner,
STANDARD GUARANTY INSURANCE
COMPANY

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STATEMENT OF THE CASE AND FACTS

The present controversy reaches this court pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), and Article V, Section 3(b)(3), of the Florida Constitution. This court accepted jurisdiction on June 27, 1988, based upon a conflict between the Fifth District Court of Appeal's February 11, 1988, decision in Quanstrom v. Standard Guaranty Insurance Company, 519 So.2d 1135 (Fla. 5th DCA 1988),[1] and Travelers Indemnity Company v. Sotolongo, 513 So.2d 1384 (Fla. 3d DCA 1987).[2]

The underlying controversy arises out of a relatively simple insurance coverage dispute. BRENDA L. QUANSTROM (hereafter QUANSTROM) initiated litigation against STANDARD GUARANTY INSURANCE COMPANY (hereafter STANDARD GUARANTY)

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[1] A copy of the Fifth District Court of Appeal's decision in Quanstrom v. standard Guaranty Insurance Company, 519 So.2d 1135 (Fla. 5th DCA 1988), is attached hereto as allowed by Florida Rule of Appellate Procedure 9.220 and designated A. 1-3.

[2] A copy of Travelers Indemnity Company v. Sotolonso, 513 So.2d 1384 (Fla. 3d DCA 1987), is attached hereto pursuant to Florida Rule of Appellate Procedure 9.220 and designated A. 4-5. subsequent to submission of the Jurisdictional Briefs in the present controversy, the Third District Court of Appeal decided National Foundation Life Insurance Company v. Wellington, So.2d (Fla. 3d DCA 1988), 13 F.L.W. 1402, which is also in express and direct conflict with the Fifth District's decision in Quanstrom. A copy is attached hereto and designated A. 6-7.

seeking recovery of $2,066.04.3 in personal injury protection (PIP) benefits. (R. 19-20)[4] Quanstrom initiated the action to recover PIP benefits under a STANDARD GUARANTY policy issued to Terry Nelson, the owner of the vehicle in which QUANSTROM was allegedly injured. (R. 19-20) STANDARD GUARANTY denied coverage on the basis QUANSTROM owned a vehicle on which Florida law required she maintain her own PIP coverage, thus she was not entitled to recover under the Nelson policy. (R. 22)

The only disputed issue, exclusive of attorney's fees, in the underlying controversy centered on the definition of the term "inoperable" under Florida's No-Fault Statute, Section 627.736(4) (d)(4)(a). (R. 22). Both parties moved for summary judgment on the inoperability question (R. 105-133, 167-168) and the trial court entered Final Judgment on behalf of STANDARD GUARANTY. (R. 170) The Fifth District Court of Appeal subsequently reversed in Quanstrom V. Standard Guaranty Insurance Company, 504 So.2d 1295 (Fla. 5th DCA 1987), and remanded for entry of judgment and an award of attorney's fees under Florida Statute Section 627.428.

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[3]The dollar amount in dispute was never controverted. (R. 208-209)

[4]All references will be to the Record On Appeal as prepared for the Fifth District Court of Appeal by the Clerk for Volusia County Circuit Court and forwarded to this Court per its June 27, 1988, order and will be designated (R. page number).

Upon remand, the trial court, after taking evidence on the attorney's fee issue, refused application of an enhancement or multiplier figure to the **$8,100.00** loadstar figure stipulated to by counsel.[5] (R. **211)** The trial court determined an **$8,100.00** award for a **$2,066.04** recovery in an action which consisted of filing a complaint, a motion for summary judgment, the taking of one deposition, and the filing one appeal, was adequate, and expressly rejected QUANSTROM's request for a tripling of the **$8,100.00** figure for recovery of an attorney's fee in excess of **$24,000.00.**

The Fifth District Court of Appeal reversed, determining application of the multiplier was mandatory stating:

> If the result is unsatisfactory to those having the responsibility and authority in the matter, then they should change the formula by reassessing the factors to be considered and the weight to be given each. We who are bound to follow the authority of others should not omit factors or juggle the weight given a factor, beyond the parameters given the exercise of discretion, in order to reach a preferred result. Quanstrom v. Standard Guaranty Insurance Company, 504 So.2d 1135, **1137** (Fla. 5th **DCA 1988).**

The Fifth District noted its decision expressly and directly conflicted with the Third District Court of Appeal's decision in Travelers Indemnity Company v. Sotolongo,

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[5]Both counsel for Standard Guaranty and Quanstrom agreed as to the reasonable number of hours and the reasonable hourly rate. The only dispute was ***over*** application of an enhancement figure.

513 So.2d 1384 (Fla. 3d DCA 1987). STANDARD GUARANTY subsequently filed its Notice To Invoke Discretionary Jurisdiction pursuant to Florida Rule of Appellate Procedure 9.120 on March 11, 1988, and the court's June 27, 1988, Order accepting jurisdiction properly brings the matter before this court.

SUMMARY OF ARGUMENT

The "loadstar analysis" adopted by this court in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), (hereafter Rowe) was designed to develop a consistent and reasonable approach to the award of attorney's fees. Neither Rowe, nor its federal progenitors were designed to subsidize the legal profession or penalize unsuccessful parties in litigation.

The "loadstar analysis" begins with a determination of hours reasonably spent on the particular litigation which is then multiplied by a reasonable hourly rate. The result is what has come to be known as the ''loadstar figure", reflecting the attorney's skill, the complexity of the litigation, the risks involved, and those factors determined relevant, both by the Florida Bar and by the courts, in determining appropriate and reasonable fees.

The loadstar figure is presumptively adequate to compensate counsel for their time and effort in a particular action, and only in the most extraordinary circumstances will the second phase of Rowe, the enhancement or

reduction of the loadstar figure, come into play. Moreover, if enhancement should be considered, Rowe determined the total fee award could never exceed the fee agreed to by the claimant and his counsel, there was a "Cap" to assure some control of the attorney's fee awards which prompted Rowe. Thus if the loadstar figure exceeds a prior contractual agreement, it should be reduced, and if there are extraordinary factors, the loadstar figure could be enhanced, but only up to the amount originally agreed to between a client and his attorney, the "Cap".

It is essential to recognize a successful result or high quality representation does not justify an enhancement factor. As professionals, and as members of the Bar, attorneys have a duty to zealously represent their clients and to provide a high quality legal service. Thus successful representation is not the type of extraordinary circumstance necessary to justify enhancement of the loadstar figure. Moreover, the existence of a risk of non-payment or a contingency factor does not justify an enhancement factor since it penalizes losing parties with the strongest and most reasonable defenses. It creates a penalty for those who are the least culpable and encourages marginal and highly questionable litigation without any concomitant public policy benefit. Establishing the extraordinary circumstances justifying an enhancement factor is a heavy burden, and rests squarely with the requesting parties. Its ultimate determination, however, rests within the sound

discretion of the trial court. There has been no showing in the present controversy of any extraordinary circumstance justifying the tripling of the $8,100.00 award. In fact, there are serious questions as to whether the typical "contingency fee contract" even exists in the present controversy, and most assuredly, there has been no showing of an abuse of discretion by the trial judge.

This court, in Rowe, specifically created a "checks and balances" system. It adopted the federal loadstar approach and delineated an enhancement factor in certain limited cases. Moreover, it put a **"Cap"** on the enhanced dollar figure such that the total attorney's fee award could never exceed the dollar figure of the original contingency agreement between the plaintiff and his counsel. Where there is no contingency fee agreement with its "Cap", the prerequisites for enhancement do not exist.

Finally, if this court should determine the contract in question was a contingency fee agreement such that the multiplier set forth in Rowe is potentially applicable, the trial court's award should not be disturbed as it constitutes an adequate recovery under the facts of this case. Florida courts have consistently held an award of attorney's fees must bear a reasonable relationship to the results obtained. A $24,000.00 recovery of attorney's fees bears no justifiable or reasonable relationship to the issues litigated in this controversy, nor the amount recovered.

Therefore, the Final Judgment (R. 211) overturned by the Fifth District Court of Appeal should be reinstated.

ARGUMENT

I. NEITHER FLORIDA PATIENT'S COMPENSATION FUND v. ROWE, 472 So.2d 1145 (FLA. 1985), NOR ITS FEDERAL PROGENITORS, MANDATE APPLICATION OF AN ENHANCEMENT FACTOR TO STATUTORY AWARDS OF ATTORNEY'S FEES.

At the outset, it is informative to consider the history and background of Florida Patient's Compensation Fund v. Rowe. 472 So.2d 1145 (Fla. 1985). This court adopted the federal loadstar analysis in an effort to establish some consistency and moderation in attorney's fee awards. As later decisions would reveal, Rowe's goal was to inject some objectivity into the awards and create a cap for unreasonable and outrageous attorney's fee awards. Stabinski, Funt & De Oliveria, P.A., v. Alvarez, 490 So.2d 159 (Fla. 3d DCA 1966).

The federal loadstar approach, as this court recognized in Rowe, is a two-fold process. First, the court must determine the number of hours reasonably expended in the defense or prosecution of a particular action. Once the reasonable number of hours is established that figure is multiplied by a reasonable hourly rate. The sum of those two numbers yields "the loadstar", which is a relatively objective basis for attorney's fee awards. Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145

(Fla. 1985); Aperm of Florida, Inc. v. Trans-Coastal Maintenance Co., 505 So.2d 459 (Fla. 4th DCA 1987).

Determining the reasonable number of hours and the reasonable hourly rate encompasses virtually all of the individual factors expressly set out in The Florida Bar Code of Professional Responsibility Rule 4-1.5. More specifically, Rule 4-1.5 lists eight factors as guides in determining the reasonableness of an attorney's fee, including:

1. The time and labor required, the novelty and difficulty in 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.

Rowe recognized those factors help determine both the reasonable hourly rate and the reasonable number of hours necessary for a particular proceeding. In fact, they subsume virtually every factor suggested as a basis for

the multiplier analysis including the "contingency" nature of the representation (number 8), which is the second phase of the loadstar calculation. See also: Aperm of Forida, Inc. v. Trans-Coastal Maintenance Companv. 505 So.2d 459 (Fla. 4th DCA 1987); Winterbotham v. Winterbotham, 500 So.2d 723 (Fla. 2d DCA 1987); FIGA v. R.V.M.P. Corp., _____ F. Supp._____ (S.D. Fla. 1988), 2 F.L.W. Fed. D119.

Once the initial loadstar figure is reached, it may be increased or decreased in unusual or unique circumstances. This court specifically held in Rowe:

> Once the court arrives at the loadstar figure, it may add or subtract from the fee based upon a "contingency risk" factor and the "results obtained". (emphasis added) Id. at 1151.

The court did not give extensive guidance on when to add or subtract from the loadstar figure, or if such calculations were mandatory or permissive, thus subsequent decisions from the Florida District Courts of Appeal have been inconsistent.6 Consequently, the first question under consideration is the discretionary nature of the enhancement factor.

6The very basis of this appeal, the conflict between Quanstrom v. standard Guaranty Insurance Company, 519 So.2d 1135 (Fla. 5th DCA 1988), and Travelers Indemnity Company v. Sotolongo, 513 So.2d 1384 (Fla. 3d DCA 1987), reflects the divergent attitudes toward application of the enhancement figure.

A. Application Of An Enhancement Or Reduction Factor Is Discretionary With The Trial Judge.

In the underlying appeal the Fifth District seems to have been persuaded by QUANSTROM's argument that this court's statement an attorney working under a contingent fee contract "must charge" a client more, transforms the holding in Rowe into a guaranteed enhancement every time there is a chance of non-payment. Such a conclusion, however, is inconsistent with Rowels express language providing the trial court "may add or subtract" from the loadstar figure. Moreover, it is patently clear 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. The usual situation, as recognized in Rowe arises in a personal injury context. It is essential to recognize the present controversy is not a personal injury case, but rather, a first party claim for insurance coverage under a contract.7

QUANSTROM argues the multiplier should be applicable in every case where there is the possibility of no recovery. Such a position is untenable under Florida law. The

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7At no time was there ever a controversy regarding Quanstrom's personal injuries, or the amount of damages she sustained. In fact, those figures were stipulated to. (R. 208-209).

Florida courts have consistently held the enhancement factor is not applicable in all situations, even though there is a chance of zero recovery. Stabinski, Funt, and De Oliveria, P.A. v. Alvarez, 490 So.2d 159 (Fla. 3d DCA 1986), recognized there are many instances and many different kinds of attorney fee disputes, but the loadstar analysis does not extend to all of them. Perhaps the most striking example involves workers compensation disputes. Florida Statute Chapter 440 specifically provides for an award of an attorney's fees in workers compensation proceedings much as Section 627.428 of the Insurance Code provides for the award of attorney's fee in insurance disputes. The Florida courts have, however, consistently refused to apply the multiplier and the loadstar principle in workers compensation cases. Rivers v. SCA Services of Florida, Inc., 488 So.2d 873 (Fla.1st DCA 1986).

The Fourth District Court of Appeal has expressly refused to apply the multiplier in eminent domain proceedings, even though once again there is a statutory entitlement to attorney's fees precisely as there is in the present controversy. Division of Administration, State of Florida, Department of Transportation v. Ruslan, Inc., 497 So.2d 1348 (Fla. 4th DCA 1986). In fact, exclusive of the Fifth District Court of Appeal in the present controversy, no Florida court has ever applied the multiplier in a first party insurance context such as that presently before this court. The Third District on two separate

occasions has however, expressly refused to find the enhancement factor mandatory in first party insurance controversies. National Foundation Life Insurance Company v. Wellinston, ____ So.2d ____ (Fla. 3d DCA 1988), 13 F.L.W. 1402; Travelers Indemnity Company v. Sotolongo, 513 So.2d 1384 (Fla. 3d DCA 1987). The Third District has relied on this court's express language in Rowe stating:

> Once the court arrives at the loadstar figure, it may add or subtract from the fee based upon a "contingency risk" factor and the "results obtained". Id. at 1151.

Since Florida courts have for decades utilized the term "may" as a permissive as opposed to a mandatory verb, the Third District's conclusion is reasonable and better reasoned than the Quanstrom court's. McDonald v. Rowland, 65 So.2d 12 (Fla. 1953); Harper v. State, 217 So.2d 591 (Fla. 4th DCA 1968).

As do many states, Florida courts often look for interpretation to the federal courts where either similar rules, procedures, or issues have been litigated. Stabinski, Funt & De Oliveria v. Alvarez, 490 So.2d 159 (Fla. 3d DCA 1986); Orlando Sports Stadium, Inc. v. Sentinel Star Company, 316 So.2d 607 (Fla. 4th DCA 1975). Since the Florida loadstar analysis is directly derived from the original federal loadstar analysis, a review of the federal courts' interpretation of the appropriateness of enhancement or subtraction factors is helpful. Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla.

1985); FIGA v. R.V.M.P. Corp., _____ F.Supp._____ (S.D. Fla. 1988), 2 F.L.W. Fed. D119.

The federal courts have long been clear enhancement is the exception rather than the rule in calculating attorney's fees pursuant to the loadstar analysis. The Eleventh Circuit Court of Appeal in Marion v. Barrier, 694 F.2d 229 (11th Cir. 1982), held the trial court did not abuse its discretion in failing to enhance an attorney's fee award even in a contingency fee contract arrangement. The court held the loadstar approach with its multiplier:

> ...does not, however, compel them to adjust a fee upward or downward in every instance where one or another of the factors is found to be present; rather, it suggests a "balancing process'' in which the trial judge remains responsible for the discretionary functions of assessing the weight to be given each factor and the appropriate adjustments in the fee. Id. at 231.

The Ninth Circuit reached the identical conclusion in Hall v. Bolger, 768 F.2d 1148 (9th Cir. 1985), when it held a district court's award of attorney's fees is generally subject to an abuse of discretion standard of review. The court went on to note this standard applies not only to the basic fee (the loadstar figure) but also to the application of multipliers. The bottom line is, as the Fifth Circuit Court of Appeal noted in Hart v. Walker, 720 F.2d 1436 (5th Cir. 1983), the trial court is not required to enhance an award simply in light of a contingent fee contract or any other factor.

Enhancement is only appropriate in exceptional circumstances. The United States Supreme Court in refining the loadstar analysis, decided three major cases in the last several years which clarify and reaffirm enhancement of the loadstar analysis is the exception rather than the rule and only available in extraordinary circumstances, irrespective of the contingency nature of the recovery. Pennsylvania v. Delaware Valley Citizens Counsel For Clean Air, _____ U.S. _____, 107 S.Ct. 3078 (1987); Pennsylvania v. Delaware Valley Citizens Counsel For Clean Air, 478 U.S. 546, (1986); (Pennsylvania v. Delaware Valley, II & I, respectively); and Blum v. Stenson, 465 U.S. 886 (1984).

1. Neither Exceptional Results Nor The Existence Of A Risk Of Non-Payment Justify Application Of A Multiplier Except In The Most Extraordinary Circumstances.

The United States Supreme Court acknowledged the starting point for any determination of an attorney's fee award is the basic loadstar analysis, the reasonable number of hours expended in the action times the reasonable hourly rate. The court concluded the loadstar analysis incorporates the twelve (12) factors identified in Johnson v. Georgia Highway Express, 488 F.2d 714 (5th

Cir. 1974)[8]. More importantly, the court recognized the novelty and complexity of the issues is reflected in the number of billable hours recorded by counsel, and virtually never justifies an upward adjustment of the loadstar figure. Furthermore, the court acknowledged the special skills and experience of counsel is reflected in the reasonableness of the hourly rates proposed, thus neither complexity, novelty, nor exceptional handling justifies an increase in the basic fee award. Blum v. Stenson, 465 U.S. 886, 900 (1984). Justice Powell, speaking for the Court in Blum specifically addressed the question of whether the "riskiness" of being paid could ever justify an enhancement of the loadstar figure. In footnote 17, Powell pointed out the Court was not addressing that issue, but implied they had serious questions regarding it --

> We have no occasion in this case to consider whether the risk of not being the prevailing party in a Section 1983 case, and therefore not being entitled to an award of attorney's fees from one's adversary, may ever justify an upward fee adjustment. (emphasis added) Id. at 900.

The Supreme Court returned to the issue of appropriate enhancement factors in a pair of decisions, between the State of Pennsylvania and the Delaware Valley Citizens Counsel for Clean Air. Pennsylvania v. Delaware Valley

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[8]The 12 factors identified in Johnson are similar, and in many *cases* identical, to those delineated by the Florida Bar in Rule 4-1.5 previously discussed.

Citizens Counsel For Clean Air. 478 U.S. 546, (1986)(I); Pennsylvania v. Delaware Valley Citizens Counsel for Clean Air, _____ U.S._____, 107 S.Ct. 3078 (1987)(II). In Pennsylvania v. Delaware Valley (I), the court acknowledged the refinement process of the loadstar analysis, and clarified the fact upward adjustments of the loadstar figure were permissible, but were "proper only in certain rare and exceptional cases, supported by both specific evidence on the record and detailed findings by the lower courts". Id. at 3098. Pennsylvania v. Delaware Valley (I), reaffirmed the strong presumption the loadstar figure represents a reasonable fee and there is no necessity for enhancing it. Justice White, speaking for the Court held:

> In short, the loadstar figure includes most, if not all, of the relevant factors comprising a reasonable attorney's fee, and it is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance. Id. at 3099.

The Court discussed at length such considerations as quality of representation and overall performance were automatically included in the loadstar figure. It would be "double counting" to utilize an enhancement factor based upon successful results and the overall quality of representation. Once again the court left open the question of justifiable enhancement based upon the risk of

non-payment or what has commonly been referred to as the contingency factor.

The Court resolved that remaining issue in Pennsylvania v. Delaware Valley (II),[9] and concluded neither exceptional results nor the existence of the risk of non-payment iustifv application of a multiplier or enhancement factor except in the most extraordinary circumstances. Once again Justice White, speaking for the Court set out the issue "...whether, when a plaintiff prevails, its attorney should or may be awarded separate compensation for assuming the risk of not being paid". Id. at 3081. The Court, concluded the mere risk of non-payment did not justify an enhancement factor. Recognizing a long line of decisions from the District of Columbia Circuit the Court pointed out a contingency factor penalizes the losing parties with the strongest and most reasonable defenses and rewards the bringing of marginal or questionable litigation. The contingency factor enhancement creates a "perverse penalty for those least culpable." Id. at 3083.

The United States Supreme Court reviewed all of the leading opinions addressing the loadstar analysis in contingency fee cases and recognized four major problems

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[9]Justice O'Conner's special concurrence is cited with approval in the Third District's decision in Travelers Indemnity Company v. Sotolongo, 513 So.2d 1384 (Fla. 3d DCA 1987).

with allowing enhancement. First, it creates a potential conflict of interest between an attorney and his client. In order to increase the fee award, a plaintiff's lawyer must expose all of the weaknesses and inconsistencies in his client's case, while a defense attorney must either concede the strength of the plaintiff's case in order to keep down the fee award, or allow the fee to be boosted by the contingency bonus which will result if he insists the plaintiff's victory was unique. The second major problem with a contingency enhancement is in order to determine the proper size of any bonus, the court must retroactively estimate the prevailing party's chances of success from the perspective of the attorney when he first considered filing suit. Not only is this mathematically difficult, but once the result is known, it is hard for judges and lawyers to regain the perspective of ignorance and treat the result as only one of several initially possible.

Perhaps the strongest objection to enhancing attorney fee awards based on a risk of no recovery is that it penalizes the defendant with the strongest defense, and forces him to subsidize the plaintiff's attorney for bringing other unsuccessful actions against unrelated defendants. Moreover, it does this with no balancing public policy justification, since the Court expressly rejected any need for incentives to encourage lawyers to undertake representation. See also: Laffev v. Northwest Airlines, Inc., 746 F.2d 4 (D.D.C. 1984) (where the court

recognized the multiplier is less efficient than a general insurance pool for losing lawyers).

The acknowledged purpose of most fee shifting statutes, including Florida Statute Section 627.428, which is at issue here, is to make it possible for those who cannot pay a lawyer to obtain competent counsel. The United States Supreme Court, after extensive discussion, concluded such an incentive is unnecessary. The court acknowledged it is unlikely in any reasonable legal market there are no competent attorneys whose time is not fully occupied with other matters such that representation was unavailable.[10] The court concluded:

> It may be that without the promise of risk enhancement some lawyers will decline to take cases; but we doubt that the Bar in general will so often be unable to respond that the goal of fee-shifting statutes will not be achieved. Id. at 3087.

In conclusion, the original architects of the loadstar analysis have recognized the base loadstar figure provides adequate compensation. See also: Norman v. The Housing Authority Of The City Of Montsomerv, ___F.2d ___ (11th Cir. 1988), 2 F.L.W. Fed. C24; Murray v. Weinberser, 741 F.2d 1423 (D.D.C. 1984). The lower federal courts have, as

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[10]It should be recognized most representations for PIP benefits are in tandem with a traditional contingency fee agreement for the tort portion of the claim. Thus, the incentive for taking lower dollar PIP claims *already* exists in Florida.

have the Florida courts, been inclined to routinely adjust the loadstar factor, but as Murray v. Weinberger, held that trend is all too common and --

> ...should stop. Only in the rare case of exceptional success is an enhancement of the loadstar proper for above average quality of representation. Id. at 1430.

In Murray v. Weinberger, decided prior to Pennsylvania v. Delaware Valley 11, but after Blum v. Stenson, the court also expressly recognized the U. S. Supreme Court's serious concerns as to whether risk of non-payment is an independent ground for application of a multiplier. Thus, concerns over the viability and applicability of the multiplier in the federal system were beginning even as this court was adopting the federal analysis in Florida Patient's Compensation Fund v. Rowe. Refinement in the federal analysis has made loadstar workable and effective. Those clarifications need to become part of Florida's jurisprudence to assure the original goals and purposes of Rowe are effectuated.

2. Neither Exceptional Results Nor A "Contingency Fee Contract", As That Term Is Used In Rowe, Exists In The Present Controversy.

Florida Patient's Compensation Fund v. Rowe, requires "if the court decides to adjust the loadstar, it must state the grounds on which it justifies enhancement or reduction." Id. at 1151. Both the Florida courts and the federal courts have consistently agreed there must be a strong showing to justify deviation from the loadstar figure. This is a heavy

burden and rests squarely on the requesting party. There must be a specific showing either through an evidenciary hearing, affidavits, or other record evidence, to justify deviating from the established loadstar criteria. See also: Jordan v. Multnomah County, 815 F.2d 1258 (9th Cir. 1987); Murray v. Weinberger, 741 F.2d 1423 (D.D.C. 1984); Travelers Indemnity Company v. Sotolongo, 513 So.2d 1384 (Fla. 3d DCA 1987).

There is no showing in this record of any activity which is extraordinary, exceptional, or in any way creates the "rare" circumstance necessary for consideration of the enhancement factor. The record in the present controversy reveals more than adequate compensation for the work actually performed and the results obtained. The record reveals minimal activity, minimal proceedings, no lengthy discovery, no dispute over damages, merely the litigation of the term **"inoperable"** under Florida's No-Fault Statute. The amount of damages was never contested, and the total possible recovery was $2,066.04. Certainly, the record reveals nothing to trigger the exceptional circumstances requirement for application of the multiplier, and absolutely nothing to indicate the trial court abused its discretion in refusing application of a multiplier.

QUANSTROM's justification for requesting the multiplier was simply limited to repeating this was a "contingency fee contract". Yet there are serious questions as to whether the contract involved is even the type contingency

fee contract considered by Rowe. The contract between BRENDA L. QUANSTROM and the law firm of Dalton & Provencher, P.A., specifically provided:

> The other aspect of your claim which we have undertaken is your claim for no fault benefits from Standard Guaranty. This of course, was not a percentase contingency fee arransement (R. **198)** (emphasis added).

The very language of the QUANSTROM retention agreement seems to place it outside of the scope of Rowe and its progeny. After all, one of the primary considerations in interpreting a contract is the intent of the parties. Royal American Realty, Inc. v. Bank of Palm Beach and Trust Company, **215** So.2d **336** (Fla. 4th DCA **1968);** Bal Harbour Shops, Inc. v. Greenleaf and Crosby Company, **274** So.2d **13** (Fla. 3d DCA **1973),** and here the intent is that this not be a !!percentage" contingency fee arrangement.

This court, in Rowe, recognized the potential enhancement factor had to be capped in some way, and concluded:

> **...**in no case should the court awarded fee exceed the fee arrangement reached by the attorney and his client. Id. at **1151.**

The cap established by the contractual arrangement between the parties is to assure some type of control or upward figure for court awarded attorney's fees. The approach adopted in Rowe provides a checks and balances system. While it allows an enhancement or reduction factor in certain extraordinary cases, it put a cap on the enhanced dollar value such that the total attorney's fees could never exceed the dollar figure of the original contingency

arrangement between the plaintiff and her counsel. If no such "contingency fee arrangement" exists, there cannot be a cap, and hence, the analysis in Rowe could be open ended, defeating the purpose of adopting the "loadstar theory" in the first place. QUANSTROM has indicated there is a "contingency fee" contract sufficient to allegedly trigger the multiplier in Rowe, but that there is no "contingency fee" agreement such that there is any **"cap".** The reason is obvious, since 40% of the $2,066.04 recovery is not as appealing as the $8,100.00 award entered by the court, and certainly nowhere near as appealing as the $24,000.00 award sought.

QUANSTROM has taken the position throughout this was a "contingency fee" contract, based upon the fact she might not recover and there might not be a **fee.**[11] Such syllogistic reasoning confuses the term "contingency" and uses it in a manner not contemplated by this court in Rowe, nor in subsequent decisions. Moreover, it does violence to the ordinary and plain meaning of the term "contingency fee" arrangement, as used by lawyers and courts throughout this country. Contingency fee contracts are those where there is a percentage recovery, as elucidated in Old Equity Life

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[11] In reality, the percentage of PIP suits where there is not at least $1.00 of recovery, thus triggering a full recovery of all attorney's fees is far less than 50 percent, thus the true **"contingency"** nature in the present controversy should be looked at realistically.

Insurance Company v. Barnard, 171 S.E.2d 636 (Ga. App. 1969), where the court held:

> A contingent fee may or may not be reasonable, but it is by definition a proportionate part of the judgment recovered by the attorney for his client. Id. at 639.

Clearly, this court knew and understood the definition of contingent fee contract to be that type of contract delineating a percentage of recovery. After all, that definition has been used in the years since Rowe in precisely that context. The Florida Bar Re: Amendment To The Code Of Professional Responsibility (Contingent Fees), 494 So.2d 960 (Fla. 1986). In the Amendment To The Code Of Professional Responsibility the court specifically discussed the requirements and conditions of contingent fee arrangements and it, as well as the Bar for decades, has used the term "contingent fee" to mean a percentage of plaintiff's recovery.

While there is no question QUANSTROM's argument her contract is contingent, is facially appealing, such reasoning confuses the term "contingency" as it is used in the generic sense with its use in a legal context as contemplated by Rowe. QUANSTROM's analysis allows her to circumvent the cap imposed in Rowe, the percentage of the contingency fee originally agreed to with Dalton & Provencher, P.A., without forfeiting the potential multiplier effect. What QUANSTROM wants is the benefit of the enhanced fee set forth in Rowe, but not the cap Rowe expressly places on that

fee. When Rowe enunciated the possible existence of a multiplier or enhancement factor, it did so within the parameters of a clearly defined ceiling for fees. QUANSTROM's position here ignores the ceiling and seeks to accept only those portions of Rowe beneficial to her. Certainly, such an "election" was not contemplated or intended by Rowe. Thus, there are serious questions of whether the present fee arrangement even justifies consideration as one of the categories originally discussed in Rowe, and even if it does the contingent nature is not a sufficient "exceptional circumstance" to justify tripling the trial court's award.

In conclusion, there is neither the exceptional result, nor the type contingency fee contract envisioned by Rowe to justify enhancement of the loadstar factor. The loadstar approach yields an attorney's fee which adequately compensates counsel for his work taking into account not only his special skills, but the complexity of the case, and all other factors delineated by the Florida courts as being important in determining a reasonable fee. Those factors are subsumed within the loadstar calculation, and thus do not justify an enhancement factor. Enhancement of the loadstar figure is only appropriate in rare and extraordinary circumstances, and it rests within the sound discretion of the trial judge. There is no basis in the record justifying enhancement, nor any showing the trial court abused its discretion.

B. There Has Been No Showing The Trial Judge Abused His Discretion In Refusing To Triple An $8,100.00 Award Of Attorney's Fees For A $2,066.04 Recovery Of Personal Injury Protection Benefits.

As discussed above, the burden of establishing either extraordinary circumstances or some justification for enhancement of the loadstar figure rests squarely with the requesting party. As this court recognized in Rowe, if a court decides to adjust the loadstar, it must state the grounds on which it justifies the enhancement or reduction with specificity. See also: Aperm of Florida, Inc. v. Trans-Coastal Co., 505 So.2d 459 (Fla. 4th DCA 1987); Alston v. Sundeck Products, Inc., 498 So.2d 493 (Fla. 4th DCA 1986).

The Supreme Court in Blum v. Stenson, 465 U.S. 886 (1984) "squarely held a fee applicant bears the burden of proving an upward adjustment of the loadstar is necessary in order to produce a reasonable fee and this burden is satisfied only if the applicant makes a specific claim for an upward adjustment based upon a particular factor. This claim must be supported by specific evidence of the need for an enhancement of the loadstar." Murray v. Weinberger, 741 F.2d 1423, 1428 (D.D.C. 1984), (emphasis in original). There is nothing in the record to justify any enhancement figure, much less the maximum enhancement figure of three which QUANSTROM requested. Since application of the multiplier is a discretionary function, it will not be disturbed

absent a showing of abuse of discretion. Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980). Certainly, there is nothing in the record suggesting Judge Blount abused his discretion in any manner.

Although the award of attorney's fees is never a purely mathematical consideration, in the present controversy it is helpful to look at exactly what numbers are in issue and precisely what QUANSTROM sought in evaluating whether the trial judge has abused his discretion. The undisputed PIP benefits in controversy were $2,066.04. (R. 208) The parties stipulated to the reasonable number of hours and the reasonable hourly rate for QUANSTROM's counsel, and the loadstar figure based upon that computation is $8,100.00. (R. 208) QUANSTROM seeks roughly triple that number by application of a multiplier and is requesting this court determine QUANSTROM's counsel is entitled to a fee of more than $24,000.00 for that $2,066.04 PIP recovery. Appellant's position leads to an attorney's fee of 1200 percent of the recovery, and 12 times what QUANSTROM herself received! Such a request strains all bounds of logic and reasonableness. After all,

> A lawsuit is not an investment in a uranium mine in which the lawyer is a co-venturer. Rather, it is an attempt by the plaintff to obtain redress for legal injury. Berger, S. "Court Awarded Attorney's Fees: What Is Reasonable?" 126 Har. L. Rev. 281, 318 (1977).

This court voiced concern over outrageous attorney's fees more than a half century ago in Baruch v. Giblin, 164 So. 831 (Fla. 1935), holding:

> Lawyers are officers of the court. The court is an instrument of society for the administration of justice. Justice should be administered economically, efficiently, and expeditiously. The attorney's fee is, therefore, a very important factor in the administration of justice, and if it is not determined with proper relation to that fact it results in a species of social malpractice that undermines the confidence of the public in the bench and the Bar. It does more than that. It brings the court into disrepute and destroys its powers to perform adeqautely the function of its creation. Id. at 388.

This philosophy has essentially been codified through the Florida Code of Professional Responsibility and the Supreme Court's adoption in 1986 of the original D.R. 2-106 [12] which provides in pertinent part:

> (A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee. The Florida Bar Amendment To Code Of Professional Responsibility (Contingent Fees), 494 So.2d 960 (Fla. 1986).

STANDARD GUARANTY would respectfully suggest requesting $24,000.00 in attorney's fees for a roughly $2,000.00 recovery boggles the mind and is precisely the type of "excessive fee" at which the Code of Professional Responsibility was aimed.

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[12] Currently renumbered 4-1.5.

An attorney's fee award, even in the post-Rowe era must bear a reasonable relationship to the results obtained. This has been true in the Florida courts' interpretations as well as federal courts' interpretations.

Lumberman's Mutual Casualty Company v. Quintana, 366 So.2d 529 (Fla. 3d DCA 1979), is instructive. It involves a similar factual setting. There a coverage question regarding the applicability of certain no-fault and uninsured motorists benefits arose and the claimant ultimately prevailed, receiving $15,000.00. Plaintiff's counsel, under the same statute QUANSTROM's counsel seeks recovery, Florida Statute Section 627.428, sought recovery of $20,000.00 in attorney's fees. The Third District Court of Appeal reversed the $20,000.00 attorney's fee award, noting it did not bear a reasonable relationship to the judgment obtained which was at maximum $15,000.00. In the present controversy, the absence of a reasonable relationship between the results obtained and the attorney's fees sought is far more egregious. The maximum possible recovery was $2,066.04, and the plaintiff is seeking $24,000.00 in attorney's fees.

Littlejohn v. Null Manufacturing Company, 619 F.Supp. 149 (D.N.Ca. 1985), refused to allow upward adjustment where the loadstar fee was 70% of the plaintiff's original award. The court held the number of hours worked times the reasonable hourly rate provided full compensation and it would be inappropriate to provide an enhancement under those

circumstances. Here the requested attorney's fees far exceed the recovery, and are highly unreasonable.

It is important to keep in mind the present controversy does not involve any type of penalty situation. There have been no allegations of bad faith, or any long drawn out litigation process. This is a relatively simple PIP case, and the dispute was over the definition of the term "inoperable" within the parameters of the no-fault statute. It essentially constituted a complaint, the motions for summary judgment, a deposition, and an appeal. Exclusive of a dispute over the term "inoperable" the determination of attorney's fees has been the only contested issue in the litigation.[13] Thus, perhaps the question becomes what is the purpose underlying the attorney's fee awards, and what policy best carries out that purpose?

11. PUBLIC POLICY CONCERNS DO NOT REQUIRE APPLICATION OF A MULTIPLIER TO INSURE EQUAL ACCESS TO LEGAL REPRESENTATION. IN FACT, THE CITIZENS OF THE STATE OF FLORIDA WILL SUFFER HIGHER INSURANCE RATES AND DECREASED AVAILABILITY OF COVERAGE IF THIS COURT REVISES ROWE, MAKING ENHANCEMENT FACTORS MANDATORY.

Although Florida courts have varied on the purposes underlying Florida Statute Section 627.428, it has generally not been considered purely punitive. Universal Underwriters

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[13] It appears the present controversy has become precisely what the U. S. Supreme Court cautioned against in Hensley v. Eckerhart, 461U.S. 424 (1983) -- a second major litigation.

Insurance Company v. Gorgei Enterprises, Inc., 345 So.2d 412 (Fla. 2d DCA 1977). The Second District recognized there is a limit to the amount of attorney's fees which the public can accept as being reasonable, and the purpose of Section 627.428 is not to punish insurance companies, but to encourage prompt payment of claims.

Moreover, as discussed above, one of the underlying theories which has not been borne out, behind the fee shifting statutes was assuring access to competent legal representation in low monetary value cases. Pennsylvania v. Delaware Valley (I). Regardless of the underlying purpose, however, this court and other courts have recognized they must not allow themselves to be used as instruments of enforcing excessive fee awards against individuals and entities who have no means of protecting themselves other than waiving their rights to a judicial determination of a contested legal issues. Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985); Murray v. Weinberser. 741 F.2d 1423 (D.D.C. 1984).

The federal courts in refining the loadstar analysis have been quite outspoken and Judge Wilkey speaking for the leading District of Columbia Circuit in Murray v. Weinberser, noted the purpose of fee shifting statutes is to benefit meritorious claimants, not to subsidize the legal profession for unsuccessful suits. This philosophy was further refined in one of the most definitive discussions on attorney's fee awards and the loadstar analysis ever

published. In Re: Agent Orange Product Liability Litigation, 611 F.Supp. 1296 (E.D.N.Y. 1985), modified other grounds, 818 F.2d 226 (2d Cir. 1987), recognized there must be a "philosophy of adequacy" rather than generosity, and the courts must avoid even the "appearance" of a windfall to the attorney receiving the award. Id. at 1305.

The Florida Legislature has made a policy decision that a certain class of individuals will be required to provide personal injury protection benefits for themselves, their families, and their vehicles. This policy decision reflects the need and desirability of such insurance coverage. If every time an insurance carrier disputes the reasonableness of a medical payment or the applicability of coverage it is forced to pay not only the disputed benefits, but 1200 percent as attorney's fees or some other even greater figure there will be two unfortunate results. First, insurance carriers will forego litigating their rights, and simply provide blanket coverage, the cost of which will be passed on to every citizen in the State of Florida via higher insurance premiums and decreased availability of coverage as carriers choose not to do business in the State of Florida. In the last year alone a number of major carriers, including St. Paul and INAPRO have either withdrawn from the Florida market entirely or withdrawn certain lines of coverage.

Alternatively, carriers will continue to litigate disputed issues, and where they are unsuccessful simply pass

on the **1200** percent attorney's fees in higher premiums to the consumers in the State of Florida. Either way the clearly excessive fees unjustified under Rowe or its federal progenitors will have a negative impact on Florida citizens. It will be a far greater negative impact than any minimal advantage or justification for application of an enhancement factor.

CONCLUSION

In determining an attorney's fee award under Florida Statute Section **627.428**, Florida courts must avoid windfall gains, or even the appearance of windfall gains. An award of **$24,000.00** for a **$2,000.00** PIP recovery strains the bounds of credibility and runs afoul of Rule **4-1.5**, as it clearly constitutes an excessive fee based upon the record before this court.

Moreover, application of a multiplier to enhance the base loadstar figure is unjustified absent rare and extraordinary circumstances. Neither a successful result nor a contingency fee contract, if in fact one exists in this case within the meaning of Rowe, justifies application of a multiplier. The factors regarding skill, experience, and successful representation are already factored into the loadstar base figure. The existence of a risk of non-payment is not sufficient to justify application of a multiplier or enhancement figure. There is no reason to believe such a factor is necessary to assure adequate

representation, and in fact, such a figure creates a penalty for individuals with the strongest defense posture and encourages the bringing of frivolous litigation.

This court adopted the federal loadstar analysis in Rowe as a means of controlling and putting some objectivity into attorney's fee awards. The federal courts, who have been wrestling with the loadstar analysis for significantly more years than the Florida courts, have concluded a multiplier or enhancement factor is unjustified except in the most extraordinary circumstances. Its application is purely discretionary with the trial court, and should not be disturbed absent a showing of abuse of discretion.

There has been no showing the trial judge in this case abused his discretion, and on the contrary, there is every reason to believe his award is adequate and justifiable based upon the record. To adopt the Fifth District Court of Appeal's mandatory application of the multiplier will result in skyrocketing insurance rates for basic protections mandated by the Florida Legislature with no concomitant benefit to the public and only a minimal benefit to a few select members of the Plaintiffs' Bar who will sustain windfall gains.

THEREFORE, Petitioner, STANDARD GUARANTY INSURANCE COMPANY, respectfully requests this court reverse the Fifth District Court of Appeal and reinstate the trial judge's decision.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery this 22nd day of July, 1988 to: STEPHEN W. CARTER, ESQ., 17 E. Pine St., Orlando, FL 32801.

LORA A. DUNLAP
Fisher, Rushmer, Werrenrath, Keiner, Wack & Dickson, P.A.
Post Office Box 712
Orlando, Florida 32802
(305) 843-2111
Attorneys for Petitioner, STANDARD GUARANTY INSURANCE COMPANY