IN THE SUPREME COURT OF FLORIDA

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

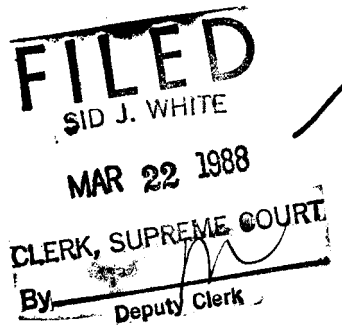
STANDARD GUARANTY INSURANCE COMPANY,

Petitioner,

-vs-

BRENDA L. QUANSTROM,

Respondent.
_____/



JURISDICTIONAL BRIEF OF PETITIONER,
STANDARD GUARANTY INSURANCE COMPANY,
ON PETITION FOR DISCRETIONARY REVIEW
FROM THE FIFTH DISTRICT COURT OF APPEAL

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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, following the Fifth District Court of Appeal's February 11, 1988, decision.[1] The Fifth District Court of Appeal reversed the trial court's decision refusing application of a "multiplier" or "enhancement" of the loadstar figure in an attorney's fee award pursuant to Florida Patients Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985).[2]

The Fifth District recognized its decision expressly and directly conflicted with the Third District Court of Appeal's decision in Travelers Indemnity Company v. Sotolongo, 513 So.2d 1384 (Fla. 3d DCA 1987).[3] STANDARD GUARANTY INSURANCE COMPANY (hereafter STANDARD GUARANTY), thus filed and served its Notice To Invoke Discretionary Jurisdiction pursuant to Florida Rule of Appellate Procedure 9.120 on March 11, 1988, thus properly bringing the matter before this court.

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[1] A conformed copy of the Fifth District Court of Appeal's decision in Quanstrom v. Standard Guaranty Insurance Company, ____ So.2d ____ (Fla. 5th DCA 1988), is attached hereto as required by Florida Rule of Appellate Procedure 9.120(d), and designated A. 1-3.

[2] A copy of Florida Patients Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), is attached hereto as part of the Appendix allowed by Florida Rule of Appellate Procedure 9.220 because of its centrality to the issues, and is designated A. 4-11.

[3] A copy of Travelers Indemnity Company v. Sotolongo, 513 So.2d 1384 (Fla. 3d DCA 1987), is attached hereto pursuant to Florida Rule of Appellate Procedure 9.220, and designated A. 12.

The underlying controversy arises out of a relatively simple insurance coverage dispute. BRENDA L. QUANSTROM (hereafter QUANSTROM) initiated litigation against STANDARD GUARANTY seeking recovery of $2,066.04.[4] The only issue in dispute, exclusive of attorney's fees, in the underlying controversy centered on the definition of the term "inoperable" under Florida's no-fault statute. QUANSTROM ultimately prevailed, and sought attorney's fees under Florida Statute Section 627.428.

The trial court, after taking evidence, refused to apply an enhancement figure to the $8,100.00 loadstar figure stipulated to by counsel.' The court determined an $8,100.00 award for a $2,066.04 recovery in an action which consisted of filing a complaint, motions for summary judgment, taking one deposition, and 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 on a $2,066.04 recovery.

The Fifth District Court of Appeal concluded it had no choice but to reverse and require application of the multiplier stating:

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[4] The dollar amount in dispute was never controverted.

'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 the application of an enhancement figure.

> 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. (A. 3)

The Fifth District recognized its decision expressly and directly conflicted with the Third District Court of Appeal when it went on to recognize:

> WE NOTE THAT OUR HOLDING APPEARS TO BE IN DIRECT CONFLICT WITH TRAVELERS INDEMNITY COMPANY V. SOTOLONGO, 513 So.2d 1384 (Fla. 3d DCA 1987). (A. 3)

Following the Fifth District Court of Appeal's decision on February 11, 1988, recognizing the express and direct conflict, STANDARD GUARANTY filed its Notice To Invoke Discretionary Jurisdiction of this court, and seeks review of the Fifth District Court of Appeal's decision which is in express and direct conflict with a decision of the Third District Court of Appeal.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal in Quanstrom v. Standard Guaranty Insurance Company, _____ So.2d _____ (Fla. 5th DCA 1988), recognized its decision expressly and directly conflicted with the Third District Court of Appeal's decision in Travelers Indemnity Company v. Sotolongo, 513 So.2d 1384 (Fla. 3d DCA 1987). The two decisions are virtually identical. Both grew out of insurance coverage disputes. The only difference being

Sotolongo arose out of a dispute under a homeowners policy while Quanstrom's claim came under a personal injury protection policy. In both cases, after prevailing on the merits, the claimant's attorney sought recovery of attorney's fees under Florida Statute Section 627.428, which expressly allows recovery of attorney's fees in coverage disputes. In addition, in Sotolongo and Quanstrom, the claimed attorney's fees far exceeded any client recovery,[6] The Third District Court of Appeal in Sotolongo, held the enhancement factor or "multiplier" of Florida Patients Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), was discretionary. The Fifth District Court of Appeal on identical facts reached a diametrically opposite decision, holding the enhancement factor in Rowe mandatory, irrespective of the potentially unsatisfactory result.

The Fifth District Court of Appeal's decision in Quanstrom v. Standard Guaranty Insurance Company, is in express and direct conflict with the Third District Court of Appeal's decision in Travelers Indemnity Company v. Sotolongo, as well as this court's decision in Florida Patients Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), which expressly makes the enhancement factor

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[6] In Sotolongo, the client's recovery was $6,793.00 and an attorney's fee of $28,125.00 was sought; while in Quanstrom, a recovery of $2,066.04 resulted in an attorney's fee request of $24,300.00.

discretionary. Thus, this court has jurisdiction pursuant to Art. V, Section 3, Fla. Const. and Florida Rule of Appellate Procedure 9.030.

ARGUMENT

THE FIFTH DISTRICT COURT OF APPEAL'S DECISION IN QUANSTROM v. STANDARD GUARANTY INSURANCE COMPANY, ____So.2d____ (FLA. 5TH DCA 19881, IS IN EXPRESS AND DIRECT CONFLICT WITH THE THIRD DISTRICT COURT OF APPEAL'S DECISION IN TRAVELERS INDEMNITY COMPANY v. SOTOLONGO, 513 So.2d 1384 (FLA. 3d DCA 1987), AS WELL AS THE FLORIDA SUPREME COURT'S DECISION IN FLORIDA PATIENTS COMPENSATION FUND v. ROWE, 472 So.2d 1145 (FLA. 1985).

At the outset, it is essential to recognize the factual and legal similarity between Quanstrom v. Standard Guaranty Insurance Company, and Travelers Indemnity Company v. Sotolongo. Both involve disputes over insurance coverage, and both seek recovery of attorney's fees under Florida Statute Section 627.428. Moreover, both involve claims for attorney's fees far in excess of the recovery in the underlying controversy, and most importantly, both base their decision on this court's opinion in Florida Patients Compensation Fund v. Rowe. The two courts, however, reached diametrically opposite conclusions, resulting in the Fifth District's acknowledgement of an express and direct conflict.

The plaintiff in Travelers Indemnity Company v. Sotolongo, sought recovery under a homeowners policy for personal property lost when her automobile was stolen. The dispute was ultimately

resolved in favor of Emma Sotolongo, and pursuant to Florida Statute Section 627.428, she sought attorney's fees. The court, relying on this court's seminal decision in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), held:

> First, as we read Rowe, the court is not obligated to adjust the loadstar fee in every case where a successful prosecution of the claim was unlikely. Id. at 513.

The Third District Court of Appeal apparently relying on the discretionary language in this court's opinion in Rowe, expressly refused to apply a multiplier or enhancement figure, and determined a $28,000.00 attorney's fee award was unjustified for a $6,793.00 recovery.

In the present controversy, Quanstrom v. Standard Guaranty Insurance Company, the factual setting is identical. The parties disputed the definition of the term "inoperable" under Florida's no-fault statute, The court ultimately determined Quanstrom was entitled to personal injury protection benefits under her automobile policy, and she subsequently made a claim for attorney's fees under the same statute the Third District Court of Appeal utilized in Sotolongo, Florida Statute Section 627.428. The Fifth District, however, contrary to the discretionary language in Rowe, as well as the Third District Court of Appeal's decision in Sotolongo, held the enhancement or multiplier factor was mandatory.

The two decisions are clearly in conflict, and reach different results in interpreting the same Florida Supreme Court

decision, Florida Patients Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985).

It is indisputable under Rowe, the application of an enhancement or a detraction figure from the loadstar is discretionary. This court expressly held:

> 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 (Emphasis added).

The Florida Supreme Court utilized the term "may", which has for decades been recognized as a permissive as opposed to a mandatory verb. McDonald v. Rowland, 65 So.2d 12 (Fla. 1953).

Moreover, it is essential to recognize the "loadstar approach" in Rowe was adopted from a system federal courts developed and utilized. The federal courts have consistently held the enhancement or multiplier effect should be the exception rather than the rule. Furthermore, two recent decisions, one by the United States Supreme Court and one by the Eleventh Circuit Court of Appeals, have reiterated the multiplier is the exception rather than the rule. Pennsylvania v. Delaware Valley Citizens Counsel For Clean Air, _____ U.S. _____ 107 S.Ct. 3078 (1987); Norman v. The Housing Authority Of The City Of Montgomery, _____F.2d _____ (11th Cir. 1988), 2 F.L.W. Fed. C24. After reviewing the new line of United States Supreme Court decisions addressing the "loadstar approach", the Eleventh Circuit Court of Appeal in Norman v. The Housing Authority Of The City Of Montgomery, held:

> Exceptional results are results that are out of the ordinary, unusual or rare, Ordinarily, results are not exceptional merely because of the right vindicated or the amount recovered... Even if the results are exceptional, no enhancement is permissible unless there is specific evidence in the record to show that the quality of representation was superior to that which one would reasonably expect in light of the rates claimed. Id, at C **28.**

Thus, the Fifth District Court of Appeal's decision in Quanstrom v. Standard Guaranty Insurance Company, is not only in conflict with the Third District Court of Appeal's decision in Sotolongo, and this court's decision in Rowe, but abandons the policies and justifications for the loadstar analysis recognized and adopted by this court in Rowe,

Application of the loadstar approach to attorney's fee awards since this court adopted it in **1985**, has been varied and inconsistent. Courts have consistently refused application of the entire loadstar principle in workers compensation cases, even though they are arguably "contingency fee" cases under the Fifth District's definition in this case, Rivers v. S.C.A. Services of Florida, Inc., **488** So.2d **873** (Fla. 1st DCA **1986).** Moreover, the Fourth District expressly refused application of the multiplier concept in eminent domain proceedings, even though, as here, there is a statutory entitlement to attorney's fees. Division Of Administration, State of Florida Department of Transportation v. Ruslan, Inc., **497** So.2d **1348** (Fla. 4th DCA **1986).**

Perhaps most important, the District Courts of Appeal have been inconsistent in situations involving first party insurance contracts, and the award of attorney's fees under Florida Statute

Section 627.428. Both the First District and the Fourth District in Aperm of Florida, Inc. v. Trans-Coastal Maintenance Company, 505 So.2d 459 (Fla. 4th DCA 1987), and Reliance Insurance Company v. Harris, 503 So.2d 1321 (Fla. 1st DCA 1987), have refused application of an enhancement factor exactly as the Third District did in Travelers Indemnity Company v. Sotolongo. The Fifth District, on the other hand, has concluded not only is a multiplier available in the appropriate context in first party insurance controversies, but is mandated. This clearly leaves litigants in a state of confusion, particularly when the federal courts, which originated the loadstar approach, have consistently held an enhancement or multiplier figure is available in only rare and exceptional cases.

The scope and applicability of the loadstar analysis and the application or non-application of an enhancement factor needs clarification. Currently the Florida District Courts of Appeal are operating under varied interpretations of Rowe, resulting in diametrically different outcomes in factually, legally, and procedurally identical cases. This is precisely the type situation Article V Section 3 of the Florida Constitution and Florida Rule of Appellate Procedure 9.030 were designed to avoid. Therefore, in light of the unequivocable express and direct conflict between the Fifth District's decision in Quanstrom, and the Third District's decision in Sotolongo, the Fifth District Court of Appeal recognized:

> We note that our holding appears to be in direct conflict with Travelers Indemnity Company v. Sotolongo, 513 So.2d 1384 (Fla. 3d DCA 1987).

CONCLUSION

The Fifth District Court of Appeal recognized its decision in Quanstrom v. Standard Guaranty Insurance Company, conflicted with the Third District Court of Appeal's decision in Travelers Indemnity Company v. Sotolongo. The two decisions, both addressing an attorney's fee award under Florida Statute Section 627.428, reach opposite results, one interpreting the enhancement factor of this court's decision in Rowe to be discretionary, and the other interpreting it as mandatory. It is essential this conflict be resolved, as the uncertainty leads to additional litigation in an already backlogged judicial system. Therefore, STANDARD GUARANTY INSURANCE COMPANY respectfully requests this court accept jurisdiction and consider the matter on its merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed this 21st day of March, 1988 to: STEPHEN W. CARTER, ESQ., P. O. Box 606, Orlando, FL 32802.

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