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IN THE SUPREME COURT OF FLORIDA

STANDARD GUARANTY INSURANCE COMPANY,

Petitioner,

v.

CASE NO. 72,100

BRENDA L. QUANSTROM,

Respondent.
_____/

JURISDICTIONAL BRIEF OF RESPONDENT, BRENDA L. QUANSTROM, ON PETITION FOR DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND FACTS

As a preliminary issue, Quanstrom objects to Standard Guaranty's including in its statement of the case and facts facts which are not before the Court and which are not properly considered by the Court in determining whether jurisdiction exists. The jurisdictional brief is to address only the jurisdictional issues. Fla. R. App. P. 9.120(d). Only facts and principles of law which appear in the district court opinion may be relied on to support conflict jurisdiction. Jenkins v. State, 385 So.2d 1356 (Fla. 1980). This Court's analysis and the jurisdictional briefs should be confined to those facts and principles stated in the district court opinion.

Standard Guaranty's providing the Court facts beyond the district court opinion places Quanstrom in the awkward position of either having to submit other such facts on her behalf or having to rely on the Court's being able to ignore the facts improperly before the Court. For example, Standard Guaranty has referred to facts from which it has argued at both the trial and appellate levels that the amount of the fee is unfair because it is greater than the plaintiff's eventual recovery. Quanstrom, therefore, is tempted to bring other facts to the Court's attention to show that there is no injustice as to the amount of the lodestar and that the amount is supported by law.

Rather than responding in kind to Standard Guaranty's improper statement, however, Quanstrom respectfully requests this Court remember that the statements made by Standard Guaranty are

not before the Court, that there is no record before the Court by which the Court can verify the accuracy of the statements, and that, if allowed, Quanstrom could present numerous facts in opposition to those set forth by Standard Guaranty which she believes would clearly show that the amount of fee awarded was not excessive, given the number of hours expended at the trial and appellate levels and the hourly rate upon which the lodestar fee was calculated.

Quanstrom believes that the following facts are the facts upon which this Court must make its decision on jurisdiction:

Quanstrom's attorney undertook Quanstrom's representation in a dispute with Standard Guaranty over no-fault insurance benefits. The fee contract provided that the attorney would receive no fee if the claim were unsuccessful, but, if successful, the fee paid to the attorney would be the fee awarded by the court under section 627.428, Florida Statutes. The trial court held that this agreement did not qualify for a contingent fee multiplier because the court felt it was not a contingency fee agreement. The district court reversed holding:

1. The fee agreement is a contingency fee contract because the attorney took the case with a risk that he would not be paid unless his client prevailed. Because the reason for a contingency fee multiplier is this risk, the attorney was entitled to a multiplier.

2. The trial court may not, in its discretion, ignore the attorney's risk-taking and must, in order to follow the Rowe formula, recognize the risk and apply a contingent fee multiplier. Although it is mandatory for the trial court to apply a contingent risk multiplier, the setting of that multiplier between 1.5 and 3.0 is a discretionary decision of the trial court based on the trial court's

> evaluation of the plaintiff's likelihood of success when the action was initiated.

Standard Guaranty has petitioned to invoke the discretionary jurisdiction of this Court, arguing that the Fifth District's decision expressly and directly conflicts with Travelers Indem. Co. v. Sotolongo, 513 So.2d 1384 (Fla. 3d DCA 1987). In Sotolongo the trial judge applied a contingent risk multiplier even though the judge felt the underlying claim lacked merit. The judge believed he was bound to apply such a multiplier because "the likelihood of success at the outset was almost non-existent." Id. at 1385. The Third District Court of Appeal held:

> [T]he court is not obligated to adjust the lodestar fee in every case where a successful prosecution of the claim was unlikely.

Id.

SUMMARY OF ARGUMENT

Quanstrom v. Standard Guar. Ins. Co., 13 F.L.W. 433 (Fla. 5th DCA Feb. 11, 19881, held that application of a contingency risk multiplier is mandatory when a contingency fee contract exists. Travelers Indem. Co. v. Sotolongo, 513 So.2d 1384 (Fla. 3d DCA 19871, on the other hand, held that a trial court is not bound to apply a multiplier just because a case has a low likelihood of success. Sotolongo says nothing about the application of a multiplier when a contingent fee exists. These two holdings are not inconsistent.

Quanstrom is not inconsistent with Florida Patient's Compensation Fund v. Rowe, **472** So.2d 1145 (Fla. 19851. Rowe requires application of a contingency risk multiplier whenever an attorney takes a case on a contingency fee basis. This holding is consistent with Quanstrom.

ARGUMENT

WHETHER QUANSTROM v. STANDARD GUAR. INS. CO., 13 F.L.W. 433 (Fla. 5th DCA Feb. 11, 1988), EXPRESSLY AND DIRECTLY CONFLICTS WITH TRAVELERS INDEM. CO. v. SOTOLONGO, 513 So.2d 1384 (Fla. 3d DCA 1987) AND FLORIDA PATIENT'S COMPENSATION FUND v. ROWE, 472 So.2d 1145 (Fla. 1985)

If Travelers Indem. Co. v. Sotolongo, 513 So.2d 1384 (Fla. 3d DCA 1987), stands for the proposition that the trial judge has discretion as to whether to apply a contingency risk multiplier even when an attorney's entitlement to fees from his client is fully contingent on whether his client prevails, then Sotolongo conflicts with Quanstrom v. Standard Guar. Ins. Co., 13 F.L.W. 433 (Fla. 5th DCA Feb. 11, 1988). If it does not, as Quanstrom suggests, there is no conflict.

The potential conflict arises from the following sentence in the Sotolongo opinion:

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

Sotolongo, 513 So.2d at 1385. By this language the Third District Court of Appeal held that the likelihood of success is not the determining factor as to whether a contingency risk multiplier is appropriate. When juxtaposed, the holdings of the two cases are more easily distinguished:

> The court is not obligated to adjust the lodestar fee in every case where a successful prosecution of the claim was unlikely.
>
> Sotolongo

> The court is obligated to adjust the lodestar fee in every case where the attorney is not

> being paid a fee if the claim is not successful.
>
> Quanstrom

The Sotolongo court did not hold, as Standard Guaranty suggests, that a court may, in its discretion, refuse to apply a multiplier when a contingency fee agreement exists. It is not known what the fee agreement was in Sotolongo, nor whether or to what extent payment of the fee was contingent on a successful outcome. Absent this knowledge it cannot be said that the Third District Court of Appeal would hold any different than did the Fifth District Court of Appeal in Quanstrom if presented with identical facts.

Standard Guaranty also claims the district court opinion conflicts with Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985). To show this conflict, Standard Guaranty points to the phrase in Rowe that says the trial court "may add or subtract from the fee based upon a contingency risk factor. . . ." Id. at 1151. The Fifth District's ruling that the application of the contingency risk multiplier is mandatory when a contingency fee contract exists is not in conflict with Rowe. In addition to the part of Rowe quoted by Standard Guaranty, Rowe also says:

> Because the attorney working under a contingency 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's fee.

Id. (emphasis supplied).

The very reason this Court took the time to formulate a method of determining fees is because of the Court's concern about the lack of uniformity in setting such fees. As stated by the Court:

> Recently, partially because of the substantial increase in the number of matters in which courts have been directed 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**. In light of this purpose, it is inconsistent to say that this Court, while concerned about the lack of uniformity in court-determined fees, would then leave to the trial judge's discretion the decision of what parts of its newly devised formula are to be used and which parts can be discarded on a day-to-day basis. To have done so without *so* much as providing guidelines by which a trial judge would exercise such discretion puts the assessment of court-determined fees back in its pre-Rowe state, that is, having trial judges decide attorney's fees by the seat of their pants. This results in the same lack of objectivity and uniformity the Rowe court was trying to eliminate. Quanstrom is consistent with, not in conflict with, Rowe.

In its efforts to convince the Court that the state of law is in disarray, Standard Guaranty cites several cases it claims show attorney-fee rulings which inconsistently interpret Rowe. To read these cases as inconsistent with Rowe or with each other is to misread the cases.

The first two cases cited in this argument are Rivers v. SCA Servs. of Fla., Inc., **488** So.2d **873** (Fla. 1st DCA **1986),** and

Division of Admin., State Dep't of Transp. v. Ruslan, Inc., 497 So.2d 1348 (Fla. 4th DCA 1986), in which two district courts of appeal decided that the Rowe method was not to be used in workers' compensation and eminent domain cases, respectively. These decisions did not result from nor cause any confusion in the state of law concerning the setting of fees. These cases simply recognized that the legislature had already mandated how fees were to be computed in those types of cases. When the workers' compensation and eminent domain statutes authorizing those actions defines how attorney fees will be computed, those guidelines are to be followed by the courts. This is why the Rowe analysis is not proper in these contexts. No other district courts have held to the contrary.

Standard Guaranty cites Aperm of Fla., Inc. v. Trans-Coastal Maintenance Co., 505 So.2d 459 (Fla. 4th DCA 1987), and Reliance Ins. Co. v. Harris, 503 So.2d 1321 (Fla. 1st DCA 1987), for the proposition that, contrary to the Fifth District's decision in this case, other district courts have refused to apply multipliers in first-party-insurance cases. The implication made is that these courts felt that first-party-insurance disputes are not appropriate for use of a contingent risk multiplier.

Ironically, Aperm stands for the opposite. In Aperm the trial court refused to apply a contingent risk multiplier in a first-party-insurance claim. The Fourth District Court of Appeal reversed, holding that Rowe did not intend to limit the contingent risk multiplier to personal injury cases, but, instead, intended such a multiplier to apply whenever a contingent fee exists. Aperm, 505 So.2d at 459.

While Harris is a case in which the district court held a contingent risk multiplier to be improper, the reason it was improper had nothing to do with the fact that the claim was a first-party-insurance claim. The multiplier was inappropriate in that case because the attorney was never at risk of not recovering a fee.

There are those who might read the cases cited by Standard Guaranty and conclude that they are inconsistent and confusing. Quanstrom suggests, however, that they are inconsistent or confusing only after the clear and cogent language of those opinions has been refashioned on the anvil of the advocate.

CONCLUSION

For the foregoing reasons, this Court should not review the decision of the Fifth District Court of Appeal in Quanstrom v. Standard Guar. Ins. Co., 13 F.L.W. 433 (Fla. 5th DCA Feb. 11, 1988).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 15* day of April, 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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