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IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,100
FIFTH DISTRICT CASE NO. 87-134C

STANDARD GUARANTY INSURANCE COMPANY,

Petitioner,

-vs-

BRENDA L. QUANSTROM,

Respondent.

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

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STATEMENT OF THE CASE AND FACTS

Petitioner, STANDARD *GUARANTY* INSURANCE COMPANY (hereafter STANDARD GUARANTY) relies on the Statement Of The *Case* And Facts as set out in its Initial Brief. While BRENDA QUANSTROM (hereafter QUANSTROM) recast the Statement Of The Case And Facts, including many **extraneous** matters, both parties are in agreement as to the essential facts before this **court.**

SUMMARY OF ARGUMENT

Florida Patient's Compensation Fund v. Rme, 472 So.2d 1145 (Fla. 1985), (hereafter Rme) adopted the federal lodestar analysis. *QUANSTROM* and STANDARD GUARANTY are in agreement the central purpose of Rme was to inject uniformity, consistency, and objectivity into attorney's **fee** awards which varied from **court** to **court** and district to district. Moreover, both *QUANSTROM* and STANDARD *GUARANTY* agree the starting **point** for any analysis must be the 8 factors delineated in Disciplinary Rule 2-106, currently Rule 4-1.5. This leads to the "lodestar figure", the determination of a reasonable number of hours multiplied by a reasonable hourly rate.

It is at this point the interpretation of Rme and its federal progenitors differs. QUANSTROM has rejected with little mre than a conclusionary statement **Rme** did not, in fact, adopt the federal analysis, but created a new system relying on a law review article by S. Berger. This allows QUANSTROM to summarily dismiss the most **recent** decision of the United States Supreme **Court** interpreting the lodestar principles. Those decisions, however, cannot be so cavalierly dismissed as they reflect the evolution of the lodestar doctrine. The federal courts and ***some*** Florida courts have consistently rejected the automatic application of an enhancement factor *simply* because there is the risk of non-recovery. The lodestar figure is presumptively

adequate to compensate counsel for their time nd ffort in particular circumstance and there has been no showing it is inadequate in this controversy.

Perhaps most critically, QUANSTROM fails to consider or justify how Rowe can require a multiplier where there is no "cap" to assure the initial goal of Rave, the control of attorney's fee awards, is met. Rave instituted a checks and balances system to assure there would not be open ended awards of attorney's fees. The enhancement factor is only available where the cap exists. In the present controversy, there is no cap, thus the type contingency fee contract contemplated by Rowe does not exist.

Finally, Florida courts have consistently held an award of attorney's fees must bear a reasonable relationship to the results obtained. There is no argument the $8,100.00 attorney's fee award adequately compensates QUANSTROM's counsel for the time and effort involved in this controversy. A $24,000.00 attorney's fee bears no justifiable or reasonable relationship to the issues litigated or the $2,066.04 recovered.

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.

The Florida Supreme Court in Florida Patient's Compensation Fund v. Rave, 472 So.2d 1145 (Fla. 1985), adopted the federal lodestar analysis. Although QUANSTROM attempts to distinguish the Florida lodestar analysis from the federal analysis, indicating Florida did not adopt the federal system, but merely used parts of the federal system (Brief 9, 18-19)[1] the language of

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[1] References to Quanstrom's Answer Brief served August 11, 1988, Will be referred to as (Brief page number

Rowe, belies *such* a conclusion. Rowe held:

> For the reasons expressed, we hold that Section 768.56 is constitutional and adopt the federal lodestar approach for computing reasonable attorney's fees. Id. at 1146. (emphasis added)

Moreover, the court relied on a number of the federal decisions cited in STANDARD GUARANTY's Initial Brief and acknowledged in QUANSTROM's Footnote 6. (Brief 13) QUANSTROM attempts to distinguish the federal line of authority, culminating in Pennsylvania vs. Delaware Valley Citizens Council For Clean Air, _____ U.S. _____, 107 S.Ct. 3078 (1987), and Pennsylvania vs. Delaware Valley Citizens Council For Clean Air, 478 U.S. 546 (1986), (Pennsylvania v. Delaware Valley. II & I, respectively), in an effort to avoid dealing with the substantive analysis of those decisions. In reality, however, the differences between the federal and state lodestar analysis are insignificant to non-existent. The suggestion Sierra Club v. Environmental Protection Agency, 769 F.2d 796 (D.C.Cir. 1985), allows, unlike Florida, consideration of delay as a possible basis for enhancement (Brief 19) is erroneous as the court expressly rejected such considerations holding:

> We believe that further enhancement of the lodestar for that delay in payment is inappropriate on the facts of this case. Id. at 810.

Moreover, Sierra expressly rejected enhancement for risk of loss. Sierra held:

> ...we must reject the petitioners' contentions that the resulting lodestar should be increased to compensate the petitioners for their risk of losing the case. Id. at 809.

The federal and the Florida lodestar analyses are virtually identical, and this court should be cognizant of the changes and modifications the federal court system has instigated regarding the lodestar theory. While the federal decisions are not controlling, they offer a wealth of analysis and experience

for Florida's benefit. After all, the federal courts were already recognizing the United States Supreme Court's concern as to whether risk of non-payment is an independent justification for the enhancement factor as Florida was adopting the lodestar approach. Blum V. Stenson, 465 U.S. 886 (1984); Murray V. Weinberger, 741 F.2d 1423 (D.D.C. 1984). Refinement in the federal analysis has made the lodestar theory workable and effective. Those clarifications need to become part of Florida's jurisprudence to assure the original goals and purposes of Rowe are effected.

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

QUANSTROM essentially raises two arguments with respect to the discretionary nature of Rowe's application of the multiplier. QUANSTROM suggests Rowe cannot be discretionary because it did not set any uniform guidelines or parameters for a trial court's exercise of discretion, and second, the issue of discretion was not before the trial court. Both the memorandum of law (R. 19-201)[2] and the transcript of the proceedings (R. 1-18) discuss the reasonableness of applying the multiplier, as well as the propriety and appropriateness of a $24,000.00 award on a roughly $2,000.00 recovery. QUANSTROM is quite correct one of the central issues raised and still remaining is whether the fee arrangement between QUANSTROM and her counsel was a "contingency fee contract" as that term is used in Rowe, but it certainly was not the sole issue. STANDARD GUARANTY argued from the outset the trial judge did not have to apply the multiplier, and had the option or the discretion not to do so.

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[2]References to the Record on Appeal will be designated (R. page number).

The fact an issue is phrased differently on appeal or is focused on differently does not mean it was not available and presented to the trial court.

It should also be recognized the burden of justifying an enhancement of the lodestar figure rests squarely with the requesting party. As this court recognized in Rowe, there must be a sufficient record establish — the grounds for enhancement or reduction, and those grounds must be set out with specificity. See also Acerm of Florida, Inc. v. Trans-Coastal Company, 505 So.2d 459 (Fla. 4th DCA 1987). QUANSTROM presented no specific reasons for the enhancement factor, other than the fact there was a "risk of no recovery".

There are, unfortunately, no clear cut guidelines as to the application of the trial court's discretion in Rowe. As pointed out in the original jurisdictional briefs,[3] the Florida District Courts of Appeal have reached contrary conclusions in a number of factual situations, some similar, some different, creating uncertainty and differ — applicability of the lodestar analysis. The absence of guidelines for the exercise of a trial court's discretion does not, however, lead to the conclusion this court intended the enhancement factor to be mandatory. The goals and purposes underlying Rowe, to inject objectivity and uniformity into the award of attorney's fees, arises from the original lodestar analysis. Determination of a reasonable hourly rate times a reasonable number of hours, yields an objective figure, not the multiplier calculation. At no time has STANDARD GUARANTY ever suggested reconsideration of the initial step in the lodestar analysis, the

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[3]Standard Guaranty's Jurisdictional Brief, served March 21, 1988, page 8.

determination of the "lodestar figure", but only in the appropriateness of a multiplier.

Rowe does establish a simple and a relatively objective formula for determining attorney's fee awards. The formula will remain in place irrespective of the outcome in the present controversy. Thus, QUANSTROM's suggestion settlement opportunities will be lost (Brief 17) or the goals of objectivity and uniformity will be lost are without basis.

Clarification and guidance similar to that the United States Supreme Court has handed down in the last few years is what is needed, since the only two district courts which have addressed the mandatory vs. discretionary nature of the multiplier have reached opposite conclusions. [4]

Although QUANSTROM suggests (Brief 16) the Fourth District has addressed the issue in Aperm of Florida, Inc. v. Trans-Coastal Maintenance Company, 505 So.2d 459 (Fla. 4th DCA 1987), a close reading of Aperm shows the issue was not the application of a multiplier or enhancement factor, but the lower court's erroneous failure to apply Rowe in determining a lodestar figure in the first instance. The Fourth District did reject a "discretionary" argument on behalf of Trans-Coastal, however, it was the discretion not to apply the lodestar figure in Rowe, rather than the discretion not to apply the multiplier after the original lodestar figure was reached. A review of the court's holding is quite informative,

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[4] The Third District Court of Appeal addressed the issue in two decisions, National Foundation Life Insurance Company v. Wellington, ____ So.2d ____ (Fla. 3d DCA 1988), 13 F.L.W. 1402, and Travelers Indemnity Company v. Sotolongo, 513 So.2d 1384 (Fla. 3d DCA 1987), while the Fifth District has addressed the issue in Quanstrom vs. Standard Guaranty Insurance Company, 519 So.2d 1135 (Fla. 5th DCA 1988).

> Rowe further requires that in determining the hourly rate, the number of hours reasonably expended and the appropriateness of any reduction or enhancement applied, the court must set forth specific findings, stating grounds for any adjustment of the lodestar up or down. We think the trial court here failed fully to apply the principle of Rowe, and the order respecting the amount of attorney's fee award fails to lay out how the court reached the fee. On remand, determination must be made in accordance with the lodestar approach as embellished in Rowe. Id. at 464.

While the trial judge reached a fee award by multiplying $125.00 an hour times the number of hours on the billing sheet, the court did not take evidence or make a determination as to the reasonableness of the number of hours expended or the reasonableness of the $125.00 per hour fee. Thus, the initial determination of a lodestar figure was flawed. There was no discussion of an enhancement factor.

As pointed out in its initial brief, the language in Rowe, specifically states a court may add or subtract from the lodestar figure. The federal courts out of which the lodestar analysis arose, have for years consistently held the multiplier purely discretionary. The rationale set out in those decisions is persuasive and logical. QUANSTROM suggests no flaw in the federal analysis other than the previously discussed insignificant differences between the federal and state lodestar theories.

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

As STANDARD GUARANTY initially pointed out, the United States Supreme Court in a trilogy of opinions, Pennsylvania v. Delaware Valley, I & II, and Blum v. Stenson, 465 U.S. 886 (1984), specifically addressed application of multipliers in lodestar calculations. In 1987, Justice White, in Pennsylvania v. Delaware Valley II, concluded risk of non-payment does not justify

enhancement. The Court recognized the contingency factor penalizes losing parties with the strongest defenses and rewards the bringing of marginal litigation. It creates a "perverse penalty for those least culpable." Id. at 3083.

The United States Supreme Court delineated four reasons why the application of a multiplier was inappropriate solely based upon the contingent nature of the contract. Initially, the Court recognized a potential conflict of interest between the attorney and his client since the plaintiff's lawyer must expose all of the weaknesses and inconsistencies in his client's case to get a large multiplier, while the defense attorney is in the reverse position. The attorneys in the present controversy faced this unusual position at the July 13, 1987, hearing where QUANSTROM's counsel stated:

> I am in the strange position of arguing how bad *our* case was. (R. 5-6)

The second major problem with pure contingency enhancement is the defeat of exactly what both QUANSTROM and STANDARD GUARANTY pointed out were the strong points of Rowe, the uniformity and objectiveness inserted into the evaluation. If a contingency multiplier is utilized the court must retroactively estimate the prevailing party's chances of success from the perspective of the attorney when he first considered filing suit. As Pennsylvania v. Delaware Valley 11, recognized, that is virtually impossible. Rousseau's "veil of ignorance" cannot be reinstated at the conclusion of suit. Thus, the goal of uniformity and consistency originally espoused in Rowe is weakened by a mandatory requirement for enhancement.

QUANSTROM spends a good deal of her brief discussing market factors and the necessity for enhancement to assure competent representation. The United States Supreme Court, however, after extensive discussion, rejected such a

position in Pennsylvania vs. Delaware Valley, II. The Court noted it was unlikely in any reasonable legal market there would be no competent attorneys whose time was not fully occupied with other matters such that representation would be unavailable. 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.

QUANSTROM does not suggest any reason the Florida market is atypical or would not respond as the United States Supreme Court observed. Overall, the market factors, including the contingency nature [5] are subsumed within the determination of the original **lodestar** figure.

In conclusion, the original architects of the lodestar analysis have recognized the lodestar figure provides adequate compensation. Absent a showing of extraordinary or unusual circumstances justifying departure from that presumptively adequate figure, there is no basis for enhancement.

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

As pointed out in STANDARD GUARANTY's Initial Brief, there is no record **showing** of any extraordinary or exceptional activity which creates the rare circumstance necessary for consideration of the enhancement factor. QUANSTROM suggests there were no extraordinary or unique circumstances in Rowe which justified application of a multiplier, yet this court ordered one utilized. (Brief 17) Such a reading, unfortunately, overstates Rme. This

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[5] Factor No. 8 of D.R. 2-106, now Rule 4-1.5.

court adopted the federal lodestar approach and determined Florida Statute Section 768.56 was constitutional. It did not, however, comment on the propriety of enhancement on the facts in question. Rowe concluded:

> We affirm the order of the trial court finding Section 768.56 to be constitutional, but, because this record is silent as to when the cause of action accrued, we remand for a determination as to whether the section *can* be applied in light of this court's decision in Young v. Altenhaus. If the cause of action accrued subsequent to July 1, 1980, the court is directed to hold a new evidenciary hearing for the purpose of determining a reasonable fee in this case consistent with the appropriate factors and guidelines set forth in this opinion. Id at 1152. (emphasis added)

This court remanded for an evidenciary determination as to the reasonable number of hours, a reasonable hourly rate, and potentially the applicability of a multiplier. There is nothing, however, in Rowe which suggests enhancement is automatic.

One of the issues before the trial court, and one of the issues which remains before this court is whether the contract in question was the "type contingency contract" Rowe was referring to. It is essential to recognize one aspect of Rowe QUANSTROM has ignored throughout these proceedings is the "cap". This court recognized the potential enhancement factor had to be capped and concluded in no *case* could the court awarded fee exceed the fee arrangement reached by the attorney and his client. The cap assured *some* type of control or upward limit for the attorney's fee award. After all, the initial goal and purpose of Rowe was to inject objectivity and uniformity into the awards. The Rowe approach provided a checks and balances system. It allowed an enhancement or reduction factor in certain cases, but placed a cap on the *enhanced* dollar value such that the total attorney's fees could never exceed the original contingency arrangement between plaintiff and her

counsel. If no such "contingency fee arrangement" exists, there cannot be the cap, and hence, the analysis of Rowe would be *open* ended, defeating the purpose of adopting the lodestar theory in the first place. QUANSTROM is attempting to have the best of both worlds. Claiming there is a contingency fee contract sufficient to trigger the multiplier of Rowe, but that there is no contingency fee agreement such that there is a cap. This analysis allows QUANSTROM to circumvent the cap without forfeiting the potential multiplier effect. Florida law does not, however, allow parties to pick and choose favorable portions of a decision.

STANDARD GUARANTY has serious questions as to whether the contract in question, particularly in light of its language, was the type contingency fee contract Rowe addressed. The cap would have to be 40% of $2,066.04, thus the $8,100.00 award would already be seriously over that amount Without any enhancement.

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.

Although the award of attorney's fees is never a purely mathematical consideration, as initially pointed out it is informative to look at exactly what numbers are in issue. The undisputed personal injury protection benefits in controversy were $2,066.04. (R. 208) The parties stipulated to the reasonable number of hours and reasonable hourly rate for QUANSTROM's counsel, and the lodestar figure based upon that computation was $8,100.00. (R. 208)[6]

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[6] Quanstrom seems to suggest the existence of a multiplier had something to do with the stipulation as to the reasonable lodestar figure. (Brief 16) Standard Guaranty is, unfortunately, unable to perceive the connection as it is the existence of the multiplier, not the lodestar figure, that has necessitated two appeals and there is certainly no agreement among the parties on its application.

QUANSTROM's request for a multiplier leads to a virtually unconscionable result of a $24,000.00 attorney's fee for a $2,000.00 recovery. Such a request strains all bounds of logic and reasonableness, since as Berger recognized in the article QUANSTROM states was very influential in the lodestar analysis (Brief 14), a lawsuit is not an investment in a uranium mine in which the lawyer is a speculator. Berger, S., "Court Awarded Attorney's Fees: What is Reasonable?" 126 Har. L. Rev. 281, 318 (1977).

Florida's Code of Professional Responsibility mandates lawyers shall not enter into or collect "clearly excessive fees". A $24,000.00 attorney's fee for a $2,000.00 recovery is precisely the type of excessive fee the Code was aimed at.

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.

QUANSTROM does not dispute the underlying purpose of Florida Statute Section 627.428 is not punitive. In fact, the only purpose espoused for the attorney's fee statute and the enhancement factor has been to approximate market factors, thus assuring adequate representation. (Brief 12) The United States Supreme Court, however, in Pennsylvania v. Delaware Valley, I & II, recognized enhancement factors were not necessary to assure access to competent legal representation in low monetary value cases. QUANSTROM ignores the United States Supreme Court's multiple decisions on the issue and provides no justification or explanation why the Florida legal market would be unique or different.

Overall, the courts have recognized there must be a philosophy of adequacy, not generosity. Courts must avoid the appearance of windfall gains

to attorneys receiving court awarded fees, 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), to maintain public confidence in both the bench and the bar. Baruch v. Giblin, 164 So. 831 (Fla. 1935).

QUANSTROM does not dispute the policy or propriety of the Florida Legislature requiring certain classes of individuals provide personal injury protection benefits. This decision reflects the need and the desirability of such insurance coverage, yet if every time an insurance carrier disputes the applicability of coverage it is forced to pay, not only the disputed benefits, but 1200 or 2000 percent as attorney's fees, the burden will ultimately come to rest on the Florida consumer. The potentially higher rates and decreased availability of coverage are juxtaposed to no public policy benefits from large attorney's fee awards. While this litigation will not solve the "insurance crisis" as QUANSTROM labels it, (Brief 23), the impact of 1200% attorney's fees cannot be ignored.

CONCLUSION

This court adopted the federal lodestar analysis in Rowe as a means of injecting objectivity into attorney's fee awards. The federal courts, who have been wrestling with the lodestar analysis for significantly more years than the Florida courts, have concluded enhancement is unjustified except in the unusual or extraordinary circumstance. Its application is purely discretionary with the trial court, and in the present controversy, there has been no showing of abuse of discretion in refusing a $24,000.00 attorney's fee award in favor of an $8,100.00 award where the total benefits recovered were $2,066.04.

A $24,000.00 award strains the bounds of credibility and runs afoul of Rule 4-1.5. Adopting the Fifth District Court of Appeal's mandatory application of the multiplier will result in skyrocketing insurance rates for the protections mandated by the Florida Legislature with no concomitant public benefit.

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

FICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U. S. Mail this 1st day of September, 1988 to: STEPHEN W. CARTER, ESQ., 17 E. Pine St., Orlando, FL 32801.

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