IN THE SUPREME COURT

OF FLORIDA

12,130

CASE NO. :
FOURTH DISTRICT COURT OF APPEAL CASE NO. **4-86-2444**

STATE FARM FIRE & CASUALTY CO.,

Petitioner,

vs.

MARGARITA J. PALMA,

Respondent.

JUL 13 1988
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By

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF FLORIDA,
FOURTH DISTRICT

PETITIONER'S BRIEF ON JURISDICTION

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OTHER AUTHORITIES CITED

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STATEMENT OF THE CASE AND FACTS

State Farm Fire and Casualty Company ("State Farm") pet tions this Court for discretionary review of a decision of the Fourth District affirming an attorney's fee award of $253,500 in a suit to recover a $600 medical bill presented in a personal injury protection claim. (A.7-9) [1] The pertinent facts are as follows:

Margarita J. Palma was injured in an automobile accident and sought treatment from a chiropractor. As part of her treatment, the chiropractor ordered a thermographic examination and a bill for $600 was submitted to Ms. Palma's insurer, State Farm. State Farm refused payment on the ground that thermographic examinations did not constitute necessary medical services within the purview of the Florida No-Fault Act, § 627.736, Fla. Stat. (1983).

Palma then brought suit against State Farm to recover the $600. Following a six day trial, consisting mostly of expert testimony, the trial court ruled in favor of State Farm. Palma appealed and the Fourth District reversed. Palma v. State Farm Fire and Casualty Co., 489 So.2d 147 (Fla. 4th DCA), rev. denied, 496 So.2d 143 (Fla. 1986). (A.3-6).

The Fourth District first ruled that the No-Fault statute must be liberally construed in favor of coverage. The

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1/ "A" refers to Appendix. Unless otherwise stated, all emphasis as supplied.

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court noted:

> The policy of the courts of Florida when construing provisions of the Florida No-Fault Act has always been to construe the act liberally in favor of the insured.

Id. at 149 (citing Farley v. Gateway Insurance Co., 302 So.2d 177, 179 (Fla. 2d DCA 1974), and Charter Oak Fire Insurance Co. v. Regalado, 339 So.2d 277, 278 (Fla. 3d DCA 1976)).

The Fourth District then held that this rule of liberal construction compelled the conclusion that thermographic examinations were necessary medical services under the No-Fault Act. 489 So.2d at 149-150. The court emphasized that plaintiff's expert witnesses had testified that the thermographic examination constituted necessary medical services for the treatment of plaintiff's injuries. Id. Although the court acknowledged that the record contained evidence "which supports the trial court's finding that thermography is of unproven and dubious value in the diagnosis of musculoskeletal disease and nerve root impingement", it found such evidence to be legally insufficient. Id. at 149. The court also noted that the Second District, in Fay v. Mincey, 454 So.2d 587, 593 (Fla. 2d DCA 1984), held that thermographic examinations were admissible in evidence. 489 So.2d at 149 n.1.

The case was remanded to the trial court for the purpose of awarding attorney's fees to plaintiff's counsel, pursuant to § 627.428, Fla. Stat. Following an evidentiary hearing, the trial court entered a fee award of $253,500. The trial court found that plaintiff's counsel reasonably expended 650 hours on

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his case, and that the reasonable hourly rate was $150 per hour. The trial court then enhanced this loadstar figure by a contingency risk multiplier of 2.6.

State Farm appealed the fee award and the Fourth District affirmed. State Farm Fire & Casualty Co. v. Palma, 524 So.2d 1035 (Fla. 4th DCA 1988). (A.7-9). The appellate court rejected State Farm's contention that the trial court should not have imposed a contingency risk multiplier, stating:

> We reject that argument, as did the trial judge, because counsel for Palma took the case on a contingency basis requiring him to prevail in order to receive compensation for his services. Quanstrom v. Standard Guaranty Insurance Company, 519 So.2d 1135 (Fla. 5th DCA 1988). Furthermore, the amount of the fee agreed to under the contract was a fee to be awarded by the court.

Id. at 1037. The Fourth District sustained the trial court's application of the 2.6 multiplier, on the ground that it was supported by expert testimony. Id. The court emphasized that State Farm vigorously contested the case, which added to the complexity of the issues and the required effort of Palma's counsel. Id.

Rehearing was denied on June 8, 1988 (A.10), and petitioner's notice to invoke this Court's discretionary jurisdiction was timely filed on July 1, 1988.

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SUMMARY OF THE ARGUMENT

In this case, the Fourth District affirmed an attorney's fee award in which the loadstar amount was enhanced by a 2.6 contingency fee multiplier. That decision expressly and directly conflicts with decisions of this Court and of another district court of appeal, supporting this Court's discretionary review jurisdiction. Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv).

This Court recently granted review of the Fifth District's decision in Quanstrom v. Standard Guaranty Insurance Co., 519 So.2d 1135 (Fla. 5th DCA 1988), which expressly and directly conflicts with the Third District's decisions in Travelers Indemnity Co. v. Sotolongo, 513 So.2d 1384 (Fla. 3d DCA 1987) and National Foundation Life Insurance Co. v. Wellington, 13 F.L.W. 1402 (Fla. 3d DCA June 14, 1988). The instant decision of the Fourth District expressly follows Quanstrom in construing this Court's decision in Florida Patients' Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) to require the application of a multiplier in contingency fee cases. That reading of Rowe was rejected by the Third District in Sotolongo and Wellington.

An independent basis for accepting jurisdiction is that the Fourth District's decision misapplies, and thus expressly and directly conflicts with, this Court's decision in Rowe. Rowe held that a high multiplier (between 2.5 and 3) can only be applied in cases where "success was unlikely at the time the case was initiated". 472 So.2d at 1151. Here, there was no objective

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basis for concluding that respondent's success was "unlikely" at the outset of this litigation, since all prior precedent as to the construction of the Florida No-Fault Act -- the basis upon which respondent prevailed -- favored respondent's position.

ARGUMENT

I.

THE FOURTH DISTRICT'S DECISION FOLLOWS QUANSTROM V. STANDARD GUARANTY INSURANCE CO., WHICH THIS COURT HAS ACCEPTED FOR CONFLICT REVIEW.

This Court has recently accepted jurisdiction[2/] to review the Fifth District's decision in Quanstrom v. Standard Guaranty Insurance Company, 519 So.2d 1135 (Fla. 5th DCA 1988), on the basis of express and direct conflict with the Third District's decision in Travelers Indemnity Co. v. Sotolongo, 513 So.2d 1384 (Fla. 3d DCA 1987). See also National Foundation Life Insurance Co. v. Wellington, 13 F.L.W. 1402 (Fla. 3d DCA June 14, 1988). The decision of the Fourth District challenged in this petition specifically follows the Quanstrom decision and involves the same conflict with the Sotolongo and Wellington decisions.

In Quanstrom, the trial court had awarded statutory attorney's fees in a No-Fault case but declined to enhance the loadstar figure by a contingency risk multiplier. The Fifth District reversed, holding that the fee agreement between the insured and her attorney was a contingency fee agreement, and

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2/ Supreme Court Case No. 72,100, Order dated June 28, 1988.

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that this Court's decision in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) mandates enhancement by a multiplier of between 1.5 and 3 in all contingency fee cases. 519 So.2d at 1136-37.

The Fifth District's reading of Rowe has been rejected by the Third District in the Sotolongo decision. In Sotolongo, the Third District reversed a trial court's application of a high contingency risk multiplier to the loadstar, holding, inter alia, that

> 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.

513 So.2d at 1385.[3] Accord National Foundation Life Insurance Co. v. Wellington, supra.

In the instant case, the Fourth District expressly followed the Quanstrom decision in sustaining the trial court's application of a multiplier to the fee award on the sole ground that Palma's attorney brought the suit on a contingency fee basis. 424 So.2d at 1037. Accordingly, both Quanstrom and the

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[3] The Sotolongo court also made note of the recent United States Supreme Court decision of Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air, 483 U.S. ___, 107 S. Ct. 3078, 97 L.Ed. 2d 585 (1987). The Third District observed that a plurality of the Supreme Court "was critical of the contingency risk factor to enhance a loadstar fee", and that Justice O'Connor's partial concurrence expressed "the view that legal risks and risks unique to the case were already factored into the loadstar fee and that the contingency risk factor should apply only where there is a finding that the risk multiplier is necessary to attract competent counsel in the relevant community." 513 So.2d at 1385 n.1.

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Fourth District's decision herein construe Rowe to require that the loadstar be enhanced by a multiplier in contingency fee cases. Because that reading was rejected by the Third District in Sotolongo and Wellington, this Court has jurisdiction on the basis of express and direct conflict.

II.

THE FOURTH DISTRICT'S DECISION MISAPPLIES, AND TWS EXPRESSLY AND DIRECTLY CONFLICTS WITH, THIS COURT'S DECISION IN FLORIDA PATIENT'S COMPENSATION FUND v. ROWE.

An independent basis for reviewing the Fourth District's decision in this case is the fact that it misapplies this Court's holding in the Rowe decision with respect to when a high contingency risk multiplier may properly be applied.

This Court has repeatedly held that a district court of appeal creates an express and direct conflict, supporting discretionary jurisdiction, when it misapplies a rule announced in a prior decision of this Court. E.g., Department of Transportation v. Anglin, 502 So.2d 896, 897 (Fla. 1987); Acensio v. State, 497 So.2d 640, 641 (Fla. 1986); State v. Stacey, 482 So.2d 1350 (Fla. 1985); Arab Termite and Pest Control of Florida, Inc v. Jenkins, 409 So.2d 1039, 1040 (Fla. 1982).

In the Rowe decision, this Court ruled that a loadstar figure may be enhanced by a contingency risk multiplier ranging between 2.5 and 3 only in cases where "success was unlikely at the time the case was initiated.'' 472 So.2d at 1151. The Court further emphasized that a trial judge's determinations in

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awarding reasonable attorney's fees should be based on **"objective"** standards so as *to* "allow parties an opportunity for meaningful appellate review." Id. at **1152.**

In the instant case, the Fourth District sustained the trial court's imposition of a **2.6** contingency risk multiplier, stating that such a multiplier was supported by expert testimony which "considered all of the necessary Rowe factors to arrive at a fair and reasonable attorney's fee." 524 So.2d at 1037. State Farm respectfully submits that it cannot objectively be said that Plaintiff's success was "unlikely" at the outset of this litigation. As the Fourth District observed in its decision on Palma's underlying claim, prior cases construing the Florida No-Fault Act had uniformly held that the act must be liberally construed in favor of coverage. **489** So.2d at **149.**[4/] In the challenged decision on attorney's fees, the Fourth District acknowledged that it reversed the trial court in the prior appeal upon the "holding [that] the trial judge's interpretation of the statute was too restrictive." 524 So.2d at 1036. In fact, Palma's initial chances of success were so great that on appeal thermography expenses were held recoverable as a matter of law in spite of a trial ruling to the contrary.

To the extent that the Fourth District found support for the high multiplier in the fact that State Farm vigorously

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4/ The Fourth District also noted in that decision that the broad intended scope of the No-Fault Act is highlighted by the fact that the act, by its terms, covers expenses for "spiritual healing". §627.736(1)(a), Fla. Stat. Id.

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contested the case, such support is clearly misplaced. State Farm's subsequent conduct can have no logical bearing on the determination of plaintiff's chance of success at the time the action was commenced. Moreover, any difficulties encountered by plaintiff's counsel due to the tenacity or stubbornness of State Farm are already properly reflected in the loadstar components. See Blum v. Stenson, **465** U.S. **886, 898 (1984);** Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air, **483** U.S. ___ , **108 S.** Ct. **3078, 3091, 97 L.** Ed. 2d **585, 603 (1987)** (O'Connor, **J.** concurring).

State Farm submits that the determination, sustained by the Fourth District, that Palma was unlikely to prevail at the outset of this litigation has no objective basis, and thus misapplies the principals articulated in Rowe, supporting this Court's discretionary jurisdiction.

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CONCLUSION

Based on the reasons and authorities set forth above, petitioner respectfully submits that express and direct conflict exists and that this court should accept jurisdiction.

Respectfully submitted,

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BY: Joseph C. Brock
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on Jurisdiction was furnished by mail on this 11th day of July, 1988, to: Ronald V. Alvarez, P.A., 1801 Australian Avenue South, #101, West Palm Beach, Florida, 33409.

Joseph C. Brock
JOSEPH C. BROCK