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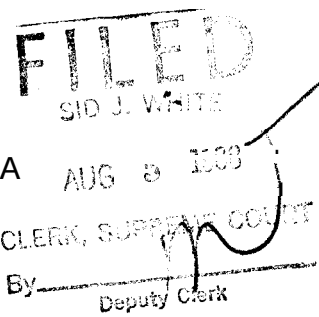

IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

CASE NO. 72,730

STATE FARM FIRE AND CASUALTY CO.,

Petitioner,

vs. FOURTH DCA CASE NO. **4-86-2444**

MARGARITA **J.** PALMA,

Respondent.
_____/

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

RESPONDENT'S BRIEF ON JURISDICTION

RONALD V. ALVAREZ, P.A.
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PREFACE

The parties will be referred to as Palma and State Farm.

The following symbol will be used:

(A) - Petitioner, State Farm's Appendix

STATEMENT OF THE CASE AND FACTS

Palma agrees with State Farm's statement of the case and facts.

SUMMARY OF ARGUMENT

This court has granted review of Quanstrom v. Standard Guaranty Insurance Company, 519 So.2d 1135 (Fla. 5th DCA 1988), because in Quanstrom the Fifth District held that the application of a multiplier factor was mandatory in a contingent fee case, where the prevailing party recovers attorney's fees. The Fifth District acknowledged conflict with Travelers Indemnity Company v. Sotolongo, 513 So.2d 1384 (Fla. 3d DCA 1987), because in that case the Third District held that a multiplier is not mandatory in every contingency fee case. State Farm is attempting to ride the coattails of Quanstrom in order to get this court to take jurisdiction of this case, however, there is nothing in the present opinion which creates a conflict. In the present

case the Fourth District merely affirmed a multiplier of 2.6, pointing out that the testimony of the expert witnesses who testified on attorney's fees supported that multiplier. The Fourth District did not state that a multiplier was mandatory and there is thus no conflict with Travelers Indemnity Company v. Sotolongo, supra. This opinion is indistinguishable from numerous other opinions affirming findings of fact in contingent fee cases where a multiplier was used.

Nor was the multiplier excessive. This was a non-jury trial after which the trial judge made a finding of fact that a thermographic examination was not a necessary medical service within the meaning of Section 627.33, Florida Statutes (1983). Palma's counsel obtained a reversal of this finding of fact in the Fourth District. A multiplier of 2.6 is certainly not excessive.

POINT I

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

In Quanstrom v. Standard Guaranty Insurance Company, 519 So.2d 1135 (Fla. 5th DCA 1988), the Fifth District stated on pages 1136 and 1137:

> This case further presents the question of whether the application of a multiplier factor is mandatory on the trial judge when the prevailing party's counsel is employed on a contingency fee basis and a reasonable attorney's fee is being calculated as directed in Rowe. We answer that question in the affirmative.
>
> * * *
>
> 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).

In Quanstrom the trial court refused to use a multiplier and the Fifth District reversed and held a multiplier was necessary. In the present case, a contingent fee case, the trial court used a multiplier of 2.6, made the proper findings of fact, and the Fourth District affirmed stating:

> The trial of this case took six days during which eleven medical doctors and a chiropractic physician testified to all aspects of the medical procedure and study known as thermography. The trial judge entered a twenty-eight-page final judgment, in which he found that a thermographic examination was not a necessary medical service within the meaning of section 627.733, Florida Statutes (1983), and, thus, he entered judgment for State Farm. After this court reversed that decision, holding the trial judge's interpretation of the statute was too restrictive, the matter was remanded for a determination of costs and attorney's fees for Palma's counsel. At the evidentiary hearing for that determination, the court heard three expert witnesses testify that the 650 hours that Palma's counsel spent on the case were justified and that an hourly rate of $150 was

> reasonable. Based on this evidence, the trial court arrived at the lodestar amount under the Rowe formula to which he then applied a contingency-risk multiplier of 2.6. There was evidence supporting a higher multiplier. The expert testimony considered all of the necessary Rowe factors to arrive at a fair and reasonable attorney's fee and that testimony fully supported the trial judge's finding of **$253,500.**
>
> State Farm contends that, even if the Rowe formula is applicable, the contingency-risk factor was not. 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, **13** F.L.W. **433** (Fla. 5th DCA Feb. 11, 1988). [cites om.]

It is clear from the opinion of the Fourth District that it was merely citing Quanstrom for the proposition that in a suit against an insurer, where counsel for the insured agrees to accept whatever fee the court awards if there is a recovery, the attorney's fees arrangement is contingent. Nowhere does the Fourth District say that the use of a multiplier is mandatory. The Fourth District has merely affirmed the trial court's use of a multiplier noting that there was expert testimony to support the attorney's fee award. There is thus no conflict with Quanstrom.

POINT II

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

The trial involving the issue of whether a thermographic examination is necessary medical treatment was non-jury. The trial court, after a six day non-jury trial, found as a matter of fact, in a 28 page final judgment, that a thermographic examination was not a necessary medical service. The chances of Palma obtaining a reversal of these findings of fact were obviously much less than the multiplier of 2.6. Moreover as is clear from the opinion of the Fourth District, State Farm decided to "go to the mat" over this case. The Fourth District noted that 11 medical doctors and a chiropractor testified, and that the record showed that this was a test case which State Farm hoped to win and therefore avoid the payment of similar bills in cases all over the country.

Palma's counsel, at the time he instituted this suit for a $600 medical bill as a PIP insurance claim, had no idea what he was in for. Had he known that State Farm was going to require him to expend 650 hours (State Farm's counsel spent 731 hours) on a trial and an appeal, chances are he would never have pursued the claim. A multiplier of

2.6 applied to a lodestar of $150 an hour is not high enough to justify risking 650 hours of a lawyer's time against an insurer as big as State Farm, which is going to use all of its resources to avoid payment of a controversial medical treatment.

The opinion of the Fourth District affirming a 2.6 multiplier, based on expert testimony that a higher multiplier would have been proper, does not create a conflict with Rowe.

CONCLUSION

The opinion of the Fourth District in the present case is simply an affirmance of findings of fact based on competent substantial evidence that a multiplier was appropriate in a contingent fee case. There is no conflict and review should be denied.

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By: LARRY KLEIN
LARRY KLEIN

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished, by mail, this 2nd day of August, 1988, to:

STEPHEN McALILEY, P.O. Box 2439, West Palm Beach, FL 33402

By: LARRY KLEIN