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IN THE SUPREME COURT

OF FLORIDA

CASE NO. 72,730

STATE FARM FIRE & CASUALTY CO.,

Petitioner,

vs.

MARGARITA J. PALMA,

Respondent.

PETITIONER'S INITIAL BRIEF ON THE MERITS

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OTHER AUTHORITIES CITED

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I.

STATEMENT OF THE CASE AND FACTS

On October 28, 1988 the Court accepted jurisdiction and dispensed with oral argument in this case.[1/] Jurisdiction has also been accepted in the companion case of Quanstrom v. Standard Guaranty Insurance Co., 519 So.2d 1135 (Fla. 5th DCA 1988); review granted, June 27, 1988. At issue is whether Rowe[2/] was properly applied below using a 2.6 contingency risk multiplier to award a $253,500 attorney's fee.

The facts of the case are as follows:

Margarita J. Palma was injured in an automobile accident and sought treatment from a doctor. As part of her treatment, the doctor ordered a thermographic examination and a bill for $600 was submitted to Ms. Palma's insurer, State Farm. (R.1483). 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, S627.736, Fla. Stat. (1983). (R.1483).

Palma then brought suit against State Farm to recover the $600 and State Farm counterclaimed for declaratory relief. (R.1484-1485). Following a six day trial, consisting mostly of expert testimony, the trial court ruled in favor of State Farm.

1/ Unless otherwise indicated, all emphasis is supplied.

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

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(R.1483-1524). 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).

Opinion on First Appeal

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

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examinations were admissible in evidence. 489 So.2d at 149 n.1.

Proceeding on Remand

The case was remanded to the trial court for the purpose of awarding attorney's fees to plaintiff's counsel, pursuant to S627.428, Fla. Stat. Following an evidentiary hearing, the trial court entered a fee award of $253,500. The trial court first found that plaintiff's counsel reasonably expended 650 hours on his case, and that the reasonable hourly rate was $150 per hour. (R.2620). The trial court then enhanced this lodestar figure by a contingency risk multiplier of 2.6. (R.2620). The trial court awarded a $253,500 fee after hearing the evidence "and having considered the criteria and requirements set forth" in Rowe. (R.2620).

The Second Anneal

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). 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

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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, and petitioner's notice to invoke this Court's discretionary jurisdiction was timely filed on July 1, 1988. The Court accepted jurisdiction October 28, 1988.

II.

SUMMARY OF ARGUMENT

The Court's decision in Rowe adopts the "federal lodestar approach" in determining a reasonable attorney's fee. 472 So.2d at 1150. However, the federal contingency risk multiplier has been substantially changed by the United States Supreme Court's subsequent decision in Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air, 483 U.S. ___, 107 S.Ct. 3078, 97 L.Ed.2d 585 (1987). To keep pace this Court should, it is respectfully submitted, reconsider the wisdom of its 1.5-3 contingency risk multiplier formula.

A threshold issue, however, is whether the instant case even qualifies for a contingency risk multiplier. A fee agreement to accept as a fee whatever the court awards is not the typical contingent fee case. While the lawyer must win to get paid, such a fee is not computed as a percentage of the amount

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received. We seriously doubt that the Court intended to double or triple a lawyer's fee everytime he agrees to accept whatever, if anything, the court awards.

We likewise doubt that the Court intended the contingency risk multiplier to be mandatory in all contginency fee cases. Assessment of a reasonable fee has always involved consideration of all the applicable factors and the exercise of considerable discretion.

Finally, no matter what the Court declares the law to be, a 2.6 multiplier is not warranted on the present facts.

111.

ARGUMENT

The simple uncontradicted facts of this case give rise to a number of important legal issues which the Court may address if it chooses to do so. First, is the issue as to whether Rowe's 1.5-3 contingency risk multiplier of the lodestar amount should be reconsidered in the light of Valley Citizens'. Second, is the issue of whether respondent's fee agreement -- entitlement only to what the court awards -- qualifies as a "contingent fee" case to which the Rowe contingency risk multiplier applies. Third, is the issue of whether the contingency risk multiplier is mandatory or permissive. Fourth, is the issue of whether a 2.6 multiplier and a $253,500 fee, at the rate of $390 an hour, comports with Rowe on the facts of this case.

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For the reasons which follow, it is respectfully submitted that the Final Judgment below should be reversed.

A. ROWE'S CONTINGENCY RISK MULTIPLIER SHOULD BE RECONSIDERED IN THE LIGHT OF THE UNITED STATES SUPREME COURT'S VALLEY CITIZENS' DECISION,

After this Court adopted the federal lodestar approach in Rowe, the United States Supreme Court rendered its decision in the Valley Citizens' case. A plurality of the Court was highly critical of the contingency risk multiplier and concluded that a 1/3 increase was the most that could ever be awarded for that factor. Justice O'Connor's partial concurrence took the view that the only time a contingency risk multiplier could be used was where the evidence showed one was required to attract competent counsel in the relevant community. The three dissenting justices contended that the risk enhancement should parallel as closely as possible "the premium for contingency that exists in prevailing market rates." 97 L.Ed.2d at 616.

The Valley Citizens' decision collects the decisions and the reasoning advancing the various views. It is rendered by the highest court in the legal system from which this Court adopted the lodestar approach. If Rowe stands as written, the fees awarded by the Florida Courts may be several times as much as those awarded in the Federal Courts for the same services. Surely, compensation should not be doubled just because a lawyer tries a case on one side of the street rather than on the other.

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Rowe, as presently written, works an unfairness in that it makes the losing defendant pay the most who had the best defense and the most reason to contest the suit. As the plurality observed in Valley Citizens':

> The third problem with increasing the fee award to account for the risk of not prevailing is the same one identified by the courts which have questioned this practice: it penalizes the defendant with the strongest defense, and forces him to subsidize the plaintiff's attorney for bringing other unsuccessful actions against other defendants. Id., at 488-491. See Note, 80 Colum L Rev 346, 375 (1980). Finally, because the contingency bonus cannot be determined with either certainty or accuracy, it "cannot be justified on the ground that it provides an appropriate incentive for litigation." Leubsdorf 496. Cf. Note, 96 Harv L Rev 677, 686, n 51 (1983); Comment, 53 U Chi L Rev 1074 (1986). (97 L.Ed. 2d at 596).

It is respectfully submitted that the life of the law -- experience -- has shown that Rowe's 1.5-3 contingency risk multipliers need re-examination and change. The policy of statutes like S627.428, Fla. Stat., is to encourage payment of policy claims. Feller v. Equitable Life Assur. Co., 57 So.2d 581 (Fla. 1952). It simply makes no sense to mulct an insurer the most which has the best reason for denying a claim.

B. CONTINGENCY RISK MULTIPLIERS SHOULD NOT APPLY WHEN ONLY FACT OF PAYMENT RATHER THAN AMOUNT OF FEE IS AT RISK.

Both the decision below and Quanstrom v. Standard Guaranty Ins. Co., 519 So.2d 1135 (Fla. 5th DCA 1988) review granted, Case No. 72,100 read Rowe as requiring contingency risk multipliers where payment is contingent on success but not the amount thereof. We do not believe Rowe should be *so* read.

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Black's Law Dictionary (5th Ed) defines "contingent fee" as follows:

> Contingent Fees. Arrangement between attorney and client whereby attorney agrees to represent client with compensation to be a percentage of the amount recovered: e.g. 25% if case is settled, 30% if case goes to trial. Frequently used in personal injury actions. Such fees are often regulated by court rule or statute depending on the type of action and amount of recovery.

Cf. Rule 4-1.5F(1), Rules of Professional Conduct: Valparaiso Bank & Trust Co. v. Sims, 343 So.2d 967, 971 (Fla. 1st DCA), cert. denied, 353 So.2d 678 (Fla. 1977)("...a contingent fee -- one measured exclusively or predominantly by the financial results accomplished.")

Does anyone doubt that a lawyer could properly represent a party to a dissolution of marriage action on the same basis as respondent is here represented -- whatever sum, if any, the court awards. Yet, "contingent fees" are unprofessional and not permitted in divorce cases. Rule 4-1.5F(3)(a), Rules Professional Responsibility.

Clearly, what this Court intended in Rowe was that the contingency risk multiplier only apply in cases where the amount of the fee was determined by the size of the recovery -- a percentage thereof. The Court's limitation that in no case should "the court-awarded fee exceed the fee agreement reached by the attorney and his client "(Rowe, supra, 472 So.2d at 1151.) has no meaning when the fee contract is for whatever the court awards.

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What the Rowe Court appears to have had in mind as a "contingent fee" case was one where the potential recovery had enough substance *so* that a lawyer would accept a percentage of the recovery for his fee. It seems most unwise to apply a Rowe contingency risk multiplier to every case where the fee contract is for whatever the court awards.

C. THE ROWE CONTINGENCY RISK MULTIPLIER SHOULD NOT BE MANDATORY.

The trial judge in this cause, the Fourth District below, and the Quanstrom court have all treated the contingency risk multiplier as mandatory. This Court, however, has stated the rule as permissive in Rowe:

> ...Once the court arrives at the lodestar figure, it may add or subtract from the fee based upon a "contingency risk" factor and the "results obtained." (472 So.2d at 1151).

The custom and practice in this State has long been one of reducing even contingent fees whenever a lawyer's professional conscience tells him such should be done. Not all lawyers are hard-hearted when it comes to charging a badly injured client. Any lawyer worth his salt must feel right after the closing statement is signed.

When it is a trial judge rather than the lawyer who sets the fee, the same professionalism should apply. After all the effort to do equity should be clothed with considerable discretion. Must a widow with small children be saddled with a three times multiplier when a superior defense causes her loss of a "slam-dunk" case?

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The assessment of attorney's fees has always been steeped with professionalism and has always involved the consideration of many factors. To impose a mandatory, indeed somewhat arbitrary, formula upon a trial judge as to one factor alone does not make good sense.

D. A 2.6 CONTINGENCY RISK MULTIPLIER IS NOT WARRANTED ON FACTS.

There is no way to justify a **2.6** contingency risk multiplier on the present facts. Even respondent's counsel testified below that he thought he had a 50/50 chance of success when he first took the case. (R.6). Later on, the Fourth District held that respondent should prevail as a matter of law even though the trial court ruled against her on the facts. Application of such a high multiplier simply does not comport with Rowe.

Assuming arguendo that Rowe's **1.5-3** multiplier formula remains the law, the instant case still cannot be characterized as one where, at the outset, "success was unlikely.'' 472 So.2d at 1151. Given the narrow issue involved, the liberal interpretation of the PIP statute, and the relative ease with which insureds recover from insurers, this case does not call for a 2.6 contingency risk multiplier.

All State Farm attempted to do in this case was to reduce insurance costs by excluding payment for thermography examinations -- procedures regarded as useless by a majority of the medical profession at the present time. To saddle State Farm with the **$253,500** attorney's fee awarded below does nothing to advance the cause of justice in this State.

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CONCLUSION

It is respectfully submitted that the Final Judgment below should be reversed.

Respectfully submitted,

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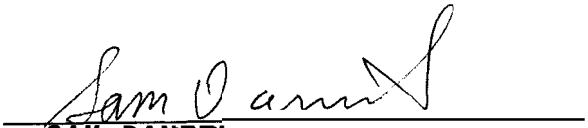

SAM DANIELS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Initial Brief on the Merits was mailed this 21st day of November 1988 to: Ronald V. Alvares, P.A., 1801 Australian Avenue South, #101, West Palm Beach, Florida, 33409.

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