IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

CASE NO. **72,730**

STATE FARM FIRE & CASUALTY CO.,

Petitioner,

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

MARGARITA J. PALMA,

Respondent.

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

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

PREFACE

Petitioner will be referred to as State Farm or insurer and respondent will be referred to as the insured. The following symbols will be used:

R - Record.

STATEMENT OF THE CASE AND FACTS

The insured agrees with insurer's statement of the case and facts, with the following additions.

It is clear from the two opinions of the Fourth District Court of Appeal, Palma v. State Farm Fire and Casualty Co., 489 So.2d 147 (Fla. 4th DCA), rev. denied, 496 So.2d 143 (Fla. 1986), and State Farm Fire & Casualtv Co. v. Palma, 524 So.2d 1035 (Fla. 4th DCA 1988), that the six-day non-jury trial in this case did not simply involve a $600 bill for a thermographic examination. State Farm not only convinced the trial judge to hold that thermographic examinations were not a necessary medical service, but also convinced him to hold that State Farm would not have to pay future bills for thermographic examinations for other claimants who were not involved in this case. As the Fourth District pointed out:

> The record is clear that State Farm hoped to prove a point in this case regarding bills for this medical procedure that would avail it in other cases nationally. So, the stakes were high and the issue became complex justifying the legal effort.

524 So.2d at 1037.

The 650 hours expended by counsel for the insured were for both the trial and the appeal. State Farm lawyers spent 731 hours on the trial and appeal (R 10). Three expert witnesses testified on behalf of the insured, and their opinions were that the contingency-risk multiplier should be 2, 2.75, or 3 (R 38, 42, 54). The trial court utilized a contingency-risk multiplier of 2.6 and State Farm brought this appeal.

SUMMARY OF MENT

NO CONFLICT

There is nothing in the opinion of the Fourth District Court of Appeal in the present case which creates conflict. The Fourth District did not decide that a multiplier was mandatory. The only issues discussed by the Fourth District were the amount of the award and whether the contingency-risk factor was applicable. This court apparently granted review of this case because the Fourth District cited Quanstrom v. Standard Guaranty Insurance Company, 519 So.2d 1135 (Fla. 5th DCA 1988). 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. There is nothing in the opinion in the present case which even arguably creates conflict.

MERITS

The major thrust of State Farm's argument on the merits is that this court should recede from Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), because of the decision of the United States Supreme Court in Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air, 483 U.S. ____, 107 S.Ct. 3078, 97 L.Ed.2d 585 (1987). That was a five to four decision, with Justice O'Connor (the fifth member of the plurality) only agreeing to a limited portion of the plurality opinion and disagreeing with some of the general views expressed by the other four members of the court on the use of the multiplier. Justice O'Connor agreed with enough of the plurality opinion so that the court could reach a result in that particular case, however, it is difficult to conceive of an opinion of the United State Supreme Court which would be less persuasive than this one.

In the present case plaintiff's counsel thought he was helping his client collect a $600 medical bill under Florida's no-fault insurance law, but found himself in a test case in which State Farm spared no expense in the hopes of setting a

precedent which would absolve it of responsibility to pay these claims throughout the United States. It is difficult to conceive of a lawyer undertaking this case on a contingency arrangement where there would be no attorney's fees if the insured did not prevail, and only the normal hourly rate if the insured did prevail. With all due respect, the decision in Pennsylvania v. Delaware Valley is not well reasoned and ignores reality. This court should not follow it. If this court does follow it, its decision should be prospective only, because of the reliance of counsel in this and thousands of other cases pending in this state, on existing law.

ARGUMENT

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

State Farm makes no argument that the hours expended by counsel for insured were unreasonable, presumably because it spent even more hours defending this case. State Farm's primary argument, that this court should recede from Rowe, makes it apparent that this case should not really be before this court. The only basis for this Court's review is conflict, and there clearly is no conflict.

As to the merits of Pennsylvania V. Delaware Valley, we respectfully submit that the dissenting opinion, in which four (not three) members of the Court joined, is far more logical and persuasive, than is the plurality opinion of four members of the Court, with Justice O'Connor concurring in portions. The reasoning of the plurality simply ignores reality, which the dissenters recognized:

> The basic objective for courts to keep in mind in awarding enhancements for risk is that a "reasonable attorney's fee" should aim to be competitive with the private market, even if it is not possible to **reflectthatmarketperfectly.** Thus, an enhancement for contingency, whether calculated as an increase in the reasonable hourly rate used to arrive at the lodestar or added to the lodestar as a bonus or a multiplier, is not designed to be a "windfall" for the attorney of the prevailing party. Rather, it is designed to ensure that lawyers who take cases on contingent bases are properly compensated for the risks inherent in such cases. Vindication of the statutory rights passed by Congress depends on the continued availability and willingness of highly skilled lawyers to take cases for which they will receive a statutory attorney's fee. In setting such fees, courts must ensure that the fees are "reasonable" - i.e., that the fees properly compensate an attorney for the risks assumed.

If a lawyer's normal hourly rate is $150 an hour, but a client cannot afford an attorney's fee and can only pursue a claim on a contingency basis, what kind of lawyer is that client going to be able to get to pursue a claim for $600, where the initial chances for recovery are 1 out of 3 or worse, without a multiplier? The Supreme Court's answer is that there is some lawyer out there who will take the case.

Any lawyer who would have taken this case on, under a contingent fee contract in which the most he would recover is his normal hourly rate, would have to have been starving for business, because it simply would not have been a gamble worth taking. The Florida Legislature did not pass the statute providing for attorney's fees to prevailing insureds, with the idea that insureds would not get the same quality of representation as insurers can afford. Elimination of the multiplier will simply encourage insurers, as well as other parties who are statutorily required to pay attorney's fees, to be less willing to pay claims.

This court's opinion in Rowe was well reasoned and makes sense. It is difficult to conceive of what could be more logical or reasonable than doubling or tripling the lodestar, where the lawyer is on a contingent fee, and the chances of recovery are 1 out of 2 or 1 out of 3. The multiplier adopted by this court in Rowe is conservative because a multiplier of 3 is the maximum, even where the odds of plaintiff recovering are 1 out of 10. Pennsylvania v. Delaware Valley is not binding on this court. The rationale for the plurality holding is extremely weak, and the fifth member of the plurality basically only agreed to the result in that case, and not to the general statements in the remainder of the opinion. This court should not adopt it or recede from Rowe.

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

State Farm argues that the Fourth District, in the present case, "read Rowe as requiring contingency risk multipliers where payment is contingent on success but not the amount thereof." This is not true. There is nothing in the opinion of the Fourth District in the present case which says Rowe requires a contingency risk multiplier.

State Farm next argues this was not a contingent fee notwithstanding the testimony of counsel for the insured that his fee was contingent (R 5). The fee was awarded under Section 627.428, Florida Statutes, which provides for the award of attorney's fees to an insured where there is a recovery under an insurance policy. There is no distinction between the contingency in the present case and the contingency in Rowe, in which the plaintiff in a medical malpractice case was entitled to recover attorney's fees under Section 768.56, Florida Statutes (1980). It is clear from the Rowe decision that contingent fee cases are not simply those cases where the lawyer recovers a percentage of an award of damages.

The reference to Black's Law Dictionary on page 8 is misleading. The quoted portion does not refer to a term which is defined, but is simply an example of a type of fee under

the general definition of fees. One does not need a dictionary to understand that counsel in this case was working under a contingent fee arrangement.

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

State Farm argues that multipliers should not be mandatory in all contingent fee cases. The Fourth District did not hold that a multiplier was mandatory in this case. The Fourth District merely affirmed the use of the multiplier by the trial court.

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

State Farm argues that a 2.6 contingency risk multiplier was not warranted on the facts, taking out of context counsel's testimony that he thought he had a 50/50 chance of success when he first undertook the case. Counsel's testimony was as follows:

> At the time that I started this case, I thought that at most or the worst position I was in was a fifty-fifty short of recovering the bill.
>
> It was a new area of law. Thermographic examinations were relatively new. It took me about seven months to figure out that it wasn't going to be as easy as I thought, and it started to become clear to me that we weren't in the typical PIP suit where the PIP suit is filed and there is limited discovery and there is usually some type of agreement, either a compromise or payment of the full amount owed. That wasn't going to happen.

> At the -- before the motion for summary judgment, which I filed with this Court, we got into extensive discovery which took us or attorneys that I employed on my behalf to California; Canada, Toronto, Canada; Minneapolis, Minnesota; Baltimore, Maryland; Philadelphia, Pennsylvania; Akron, Ohio; Orlando, Florida; Miami, Florida, doing discovery in this case. (R *6).*

State Farm's own expert testified that in his opinion the insured's chances of prevailing were no worse than 50/50, probably a little better (R **30**). The insured's experts testified that the chances of the insured prevailing were such that the multiplier should be from **2, 2.75** and **3 (R 38, 42, 54).**

CONCLUSION

The Fourth District did not hold that a multiplier was mandatory in contingent fee cases. It simply affirmed the use of a multiplier, and there is no conflict. If this court is going to recede from Rowe, that decision should be applied prospectively because of the thousands of pending cases which were undertaken under Rowe and the law as it existed for many years prior to Rowe.

In Pennsylvania v. Delaware Valley, supra, the plurality stated on page **3087** that a contingency enhancement may be superfluous because the same reasons for the enhancement go into determining the reasonable hourly rate for the lodestar.

This means that a higher hourly rate may be justified to compensate for the risk of not prevailing. Accordingly, if this court does recede from Rowe, and does apply its decision retroactively, this case should be remanded back to the trial court for a further determination of a reasonable fee.

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By _____
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CERTIFICATE OF SERVICE

I CERTIFY that copy hereof has been furnished, by mail, this 13th day of December, 1988, to:

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