W00A

IN THE SUPREME COURT

OF FLORIDA

CASE NO. 72,730

STATE FARM FIRE & CASUALTY CO.,

Petitioner,

vs.

MARGARITA J. PALMA,

Respondent.

REPLY BRIEF ON THE MERITS

McALILEY, FLANAGAN,
MANIOTIS & BROOKS, P.A.
10th Floor-Comeau Building
319 Clematis Street
Post Office Box 2439
West Palm Beach, Florida 33402
-and-
DANIELS & HICKS, P.A.
Suite 2400, New World Tower
100 N. Biscayne Boulevard
Miami, Florida 33132

Attorneys for Petitioner

TABLE OF CONTENTS

DANIELS AND HICKS, P.A.

SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

TABLE O_ CITATION:

DANIELS AND *HICKS*, P.A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

REPLY TO ARGUMENT

For the reasons which follow, it is again respectfully submitted that the final judgment below awarding a $253,500 attorney's fee should be reversed.[1/]

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

The Valley Citizens[2/] opinion of the United States Supreme Court has much more significance than Respondent would have us believe. All nine justices flatly disagree with the Rowe contingency risk multiplier formula. The disagreement centers, in part, around the inherent impossibility of determining the chances, at the outset, of success for an individual case. Justice O'Connor, in her concurring opinion, agreed with the four dissenting justices that:

> [C]ompensation for contingency must be based on the difference in market treatment of contingent fee cases as a class, rather than on an assessment of the "riskiness" of any particular case.

97 L.Ed.2d at 601; emphasis Justice O'Connor's).

Likewise, the four Justices who joined in the plurality opinion were of the view that:

1/ Unless otherwise indicated, all emphasis is supplied. "R" refers to the record on appeal.

2/ Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air. 483 U.S. ____, 107 S.Ct. 3078, 97 L.Ed.2d 585 (19871.

DANIELS AND HICKS, P.A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

> [I]f the trial court specifically finds that there was a real risk of not prevailing issue in the case, an upward adjustment of the lodestar may be made, but, as a general rule, in an amount no more than 1/3 of the lodestar.

97 L.Ed.2d at 601.

One reason the plurality reached the above conclusion is that it believed the lodestar amount was already enhanced if the case was novel and difficult and had a potential for protracted litigation.

While Rowe involves state law which this Court is free to declare, the research and reasoning of the United States Supreme Court is surely worthy of serious consideration by this Court as it decides and declares what is right and just for the State of Florida. Surely some clarification would be of benefit to the Bench and Bar because the Court said in Rowe that "we... adopt the federal lodestar approach for computing reasonable attorneys fees...." 472 So.2d at 1146.

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

As noted in the Fourth District's opinion below:

> [C]ounsel 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.

524 So.2d at 1037.

DANIELS AND HICKS, P.A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

The only contingency in the present case is that respondent had to prevail before a court could award her a fee. The Rowe case involved a true contingent fee where the prevailing counsel obtained a percentage of his client's recovery. There are very different policy considerations involved in the two classes of case.

Where, as here, the only contingency is the fact of a recovery, the client never pays a fee no matter what happens! The lawyer either gets paid nothing or whatever the court awards. In this type of fee contract, there is no need to award enough of a fee to make sure the client retains all of his recovery.

In sharp contrast is the situation where a client, as in Rowe, employs a lawyer under a true contingent fee contract -- where the lawyer is entitled to a percentage of whatever is recovered. In this situation, the court-awarded fee is designed to permit the client to recoup whatever he has reasonably paid his counsel and not a cent more.

The Rowe contingency risk multiplier should only apply in cases where the client agrees to pay the lawyer a percentage of his recovery. Such a rule insures that matters of substance will be involved and is needed to protect the client. Where the contract is for whatever, if anything, the court awards the lawyer is fully protected by enhancement of the lodestar for novel and different cases. No contingency risk multiplier is justified or needed in this later situation.

DANIELS AND HICKS, P.A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

While both Quanstrom v. Standard Guaranty Insurance Company, 319 So.2d 1135 (Fla. 5th DCA 1988), review granted, June 27, 1988, and the decision below hold to the contrary, it is respectfully submitted that both should be reversed.

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

Respondent's only response to this point is to claim that there was no holding below that the contingency risk multiplier was mandatory. The record shows the contrary. The trial court awarded the $253,500 fee using a 2.6 contingency risk multiplier after hearing the evidence "and having considered the criteria and requirements set forth" in Rowe. (R.2620).

In affirming, the Fourth District said:

> 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, 319 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.

524 So.2d at 1037.

Quanstrom, which is cited with approval above, of course, squarely holds that application of the contingency risk multiplier is mandatory. Both the trial court and the Fourth District appear to have read Rowe as imposing a mandatory contingency risk multiplier. For the reasons stated in our initial brief, it is respectfully submitted that Rowe should not be so read.

DANIELS AND HICKS, P.A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

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

Even if Rowe applies and remains unchanged, the **2.6** contingency risk multiplier is wholly uncalled for on the instant facts. After losing in the trial court on the facts, the Fourth District held that respondent was entitled to recover as a matter of law anyway. This is no objective way to characterize such a case as having very little chance of success.

CONCLUSION

It is respectfully submitted that the **$253,500** final judgment below should be reversed. In addition, since respondent's trial counsel[3/] was paid in full (under threat of execution) while this certiorari proceeding was pending, the cause should be remanded with directions that counsel repay with interest all sums he is not entitled to under this Court's opinion. Cf., Waggoner v. Glacier Colony of Hutterites, **31** Mont. **525, 312** P.2d 117.

Respectfully submitted,

McALILEY, FLANAGAN,
MANIOTIS & BROOKS, P.A.
10th Floor-Comeau Building
319 Clematis Street
Post Office Box **2439**
West Palm Beach, Florida **33402**
-and-

3/ The **$253,500** was awarded solely for the legal services of Ronald V. Alvarez, Esquire **(R.2621),** who is the real party in interest in these proceedings. Since respondent agreed to pay Mr. Alvarez whatever the court awarded, respondent is herself merely a nominal party.

DANIELS & HICKS, P.A.
Suite 2400, New World Tower
100 N. Biscayne Boulevard
Miami, Florida 33132

BY: Sam Daniels
SAM DANIELS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Reply Brief on the Merits was mailed this 5th day of January 1989 to: Ronald V. Alvarez, P.A., 1801 Australian Avenue South, #101, West Palm Beach, Florida, 33409; and Larry Klein, Esq., Klein & Beranek, P.A., 501 S. Flagler Drive, Suite 503 - Flagler Center, West Palm Beach, Florida 33401.

Sam Daniels
SAM DANIELS