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IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 73,319

BANKERS INSURANCE COMPANY,

Petitioner,

vs.

CHARLES F. OWENS,

Respondent.

On review from the Fifth District Court of Appeal,
State of Florida

PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

The petitioner was the appellant in the Fifth District Court of Appeal and the defendant in the trial court. The respondent was the appellee in the Fifth District Court of Appeal and the plaintiff in the trial court. In this brief, the petitioner will be referred to as "Bankers" or "insurer". The respondent will be referred to as "Owens".

The following symbol will be used:

"A" - Appendix attached to the brief on jurisdiction.

STATEMENT OF THE CASE AND FACTS

The decision by the Fifth District is a *per curiam* affirmance on the authority of *Quanstrom* v. *Standard Guaranty Insurance Company,* 519 So.2d 1135 (Fla. 5th DCA 1988), *review granted,* Case No. **72,100** (Fla. June **27,** 1988). (A-1). Consequently, there were no facts set forth in the opinion of the Fifth District.

The instant case involves an action that was tried before the court. The basis of the lawsuit was an automobile accident wherein Charles F. Owens was injured. At the time of the accident, Owens was an insured under a policy of automobile insurance with Bankers Insurance Company. (A-2). Under the terms and conditions of its policy of automobile insurance, Bankers was obligated to pay 80% of all reasonable expenses for necessary medical treatment for injuries received by Owens in the accident.

The accident occurred on July 12, 1985. Bankers paid for the medical treatment incurred by Owens until March 10, 1986. (A-2 at **2**). Owens sued Bankers for additional treatment for an alleged hip injury and for a neck injury which Owens claimed, within a reasonable degree of medical probability, resulted from the automobile accident of July 12, 1985.

The trial court, however, found that no treatment for the hip injury occurring after March 10, 1986 was related within a reasonable degree of medical probability to the

automobile accident, and payments relating to treatment after that date were disallowed. The trial court did find, though, that Owens had incurred reasonable expenses for necessary medical treatment for his neck in the amount of $2,979.00 which had not been paid by Bankers.

The court awarded Owens the sum of $3,520.40 plus $350.00 interest. (A-2 at 3).

The court then found that Owens and his attorney had an oral contract of representation for the personal injury protection ("PIP") claim which was contingent in nature.[1] (A-3). The court further found that plaintiff's attorney had expended ninety hours in the handling of the matter; that a reasonable hourly rate was $125.00 per hour; the court then found that a contingency risk multiplier of 1.5 was appropriate. (A-4). The court then entered a final judgment for costs and attorneys' fees in the sum of $16,875.00 for attorneys' fees with costs of $851.45. (A-5).

In *Florida Patients' Compensation Fund* v. Rowe, 472 So.2d 1145 (Fla. 1985), this Court adopted the federal lodestar approach for computing reasonable attorneys' fees when the fees were statutorily mandated. Under the lodestar process, a trial court first determines the number of hours reasonably expended on the litigation and then determines a reasonable hourly rate. This is what is referred to as a

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[1] Owens had a standard written 40% contingency fee contract with Sisserson for the lawsuit against the tortfeasor whose insurer was Allstate Insurance Company.

lodestar. Once a court arrives at the mechanical lodestar figure, it may add or subtract from the fee based upon a "contingency risk" factor and the "results obtained". The contingency risk multiplier is only to be applied when the attorney has been retained on a contingency fee basis. A contingency fee case in Florida has always been a personal injury type case wherein the attorney agrees to take the case contingent on the results, ***i.e.,*** the attorney takes no fee if the case is lost but takes 40% of the judgment if the case is won.

In ***Quanstrom*** v. ***Standard Guaranty Insurance Company, supra,*** however, the court held that if an attorney takes a case with the agreement that his fee will be contingent upon what the court awards, then that is a contingency fee case under the dictates of Rowe. The court further held that the application of the multiplier of 1.5 - 3.0 is mandatory on the trial judge in all such situations. In the instant case, Owens had a standard contingency fee agreement with his attorney, but then declared that he had an oral agreement as to the PIP claim from Bankers.

SUMMARY OF THE ARGUMENT

This Court has jurisdiction over the instant case since the decision below is a *per curiam* affirmed decision which references a district court decision that is presently pending for disposition on the merits in this Court. *State v. Lofton*, 13 F.L.W. 677 (Fla. Nov. 23, 1988).

ARGUMENT

THIS COURT SHOULD ACCEPT JURISDICTION OF THE INSTANT CASE AS IT HAS ACCEPTED JURISDICTION IN *QUANSTROM V. STANDARD GUARANTY INSURANCE COMPANY.*

Prior to the **1980** amendment to article V, section 3, of the Florida Constitution, a *per curiam* affirmed decision ("PCA") which referenced another district court decision that this Court had reversed or quashed, was *prima facie* grounds for conflict jurisdiction. However, the **1980** amendment to the constitution has been interpreted by this Court to mean that the Florida Supreme Court will not re-examine the case referenced in a "citation PCA" to determine whether the contents of that case conflicts with other appellate decisions. *Dodi Publishing Company v. Editorial America, S.A.*, **385** So.2d **1369** (Fla. **1980).** Alternatively, if the referenced case is a final decision and not pending review in this Court, this Court will also not re-examine the case referenced even when the district court filed that case contemporaneously with a citation PCA. *Robles Del Mar, Inc. v. Town of Indian River Shores*, **385** So.2d **1371** (Fla. **1980).**

The issue of what posture this Court should place a citation PCA where the cited case is either pending review in this Court or has previously been reversed by this Court was addressed in *Jollie v. State*, **405** So.2d **418, 419** (Fla. **1981).** This Court held in *Jollie* that a district court PCA opinion which cites as controlling a case that is pending review in or has been reversed by this Court constitutes *prima facie*

express conflict and allows this Court to exercise its jurisdiction. ***Quanstrom*** v. ***Standard Guaranty Insurance Company,*** 519, So.2d 1135 (Fla. 5th DCA 1988), the cited case in the instant citation PCA is pending review in this Court on the merits.

Since ***Quanstrom*** is presently pending review on the merits by this Court, this Court should accept jurisdiction of the instant case since it has already determined to accept the jurisdiction in ***Quanstrom.***

CONCLUSION

The petitioner respectfully requests that this Honorable Court accept jurisdiction of the instant case, as this Court has already determined to accept jurisdiction in ***Quanstrom*** v. ***Standard Guaranty Insurance Company,*** **519** So.2d **1135** (Fla. 5th DCA 1988), ***review granted,*** Case No. **72,100** (Fla. June **27, 1988).**

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail this 28th day of November, 1988, to JAMES A. SISSERSON, ESQUIRE, Post Office Box 361607, Melbourne, Florida 32936-1607.

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