IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,319

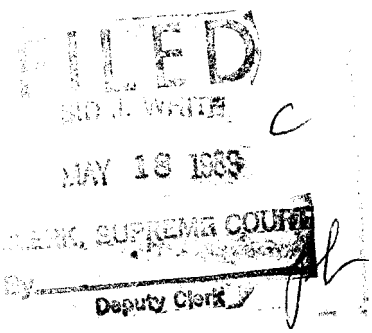
BANKERS LIFE INSURANCE COMPANY,

Petitioner,

vs.

CHARLES F. OWENS,

Respondent.



RESPONDENT'S BRIEF ON THE MFRITS

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and
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TOPICAL INDEX

LIST OF CITATIONS AND AUTHORITIES

I.

INTRODUCTION

The parties will alternately be referred to herein as they stand before this Court and as follows: petitioner/insurer as "BANKERS;" and respondent/insured as "OWENS." The symbol "R" shall stand for the record on appeal.

All emphasis appearing in this brief is supplied by counsel unless otherwise noted.

II.

STATEMENT OF CASE AND FACTS

Sans the editorialized, OWENS accepts the statement of case and facts contained in BANKERS' brief as accurate and sufficient for present purposes. OWENS would point out that:

1. Quite properly, BANKERS concedes the existence of the subject oral contract and does not challenge the trial court's findings that OWENS' counsel expended 90 hours on this case and that a reasonable hourly rate would be $125.00.

2. It should also be noted that when the written agreement was entered into, OWENS did not contemplate having to sue to obtain coverage. This problem arose at a much later time.

3. In the attorneys' fee order sought to be reviewed, the trial court simply stated:

* * *

> "That the case was handled on a contingency fee basis, and that the fees awarded were statutorily directed attorneys' fees so that a contingency risk multiplier of 1.5 was appropriate."

* * *

The trial court did not hold that a contingency risk multiplier was mandated by this Court in **FLORIDA PATIENTS COMPENSATION FUND** v. **ROWE,** 472 So. 2d 1145 (Fla. 1985).

4. On this record the fact that **OWENS** did not recover all that he claimed from **BANKERS** is irrelevant and immaterial. **OWENS** as the prevailing party below is entitled to a § 627.428, Florida Statutes, attorneys' fee award.

III.

POINT INVOLVED ON THE MERITS

WHETHER ON THIS RECORD, PROPERLY VIEWED, THE TRIAL COURT ERRED IN HOLDING THAT A ROWE "CONTINGENCY RISK MULTIPLIER OF 1.5" WAS APPROPRIATE.

OWENS rejects **BANKERS'** statement of the point involved in lieu of the merits point which he feels is presented for determination by this record. This, as will be explained, infra, because **BANKERS** argues the merits of the point involved in **QUANSTROM** v. **STANDARD GUARANTY INS. CO.,** 519 **So.** 2d 1135 (Fla. 5 **DCA** 1988) and not the point involved here.

IV.

SUMMARY OF ARGUMENT

OWENS contends:

1. The trial court did not hold a **ROWE** 1.5 factor must be applied here. It simply held that it was, on this record, "appropriate."

2. **BANKERS** concedes in its merits brief at page 5 that the trial court's ruling is **ROWE** authorized.

3. **BANKERS** argues the merits of **QUANSTROM,** not the merits of the case at Bar.

4. Insofar as the QUANSTROM-TRAVELERS INDEMNITY CO. v. SONTOLONGO, 513 So. 2d 1384 (FLa. 3 DCA 1987) is concerned in the abstract, this Court should adopt the rule of QUANSTROM. However, if it does not, the "ROWE multiplier appropriate" trial court holding here is entirely consistent with the SONTOLONGO holding.

5. Assuming arguendo this Court should merits rule in favor of BANKERS here, no remand for further hearing would be required. This Court would simply order remand with directions for entry of an appropriately reduced judgment in favor of OWENS.

V.

ARGUMENT

ON THIS RECORD, PROPERLY VIEWED, THE TRIAL COURT DID NOT ERR IN HOLDING THAT A ROWE "CONTINGENCY RISK MULTIPLIER OF 1.5" WAS APPROPRIATE.

A.

BANKERS ARGUES THE MERITS OF ROWE RATHER THAN THE MERITS OF THE CASE AT BAR.

For the reasons which follow, the arguments advanced by BANKERS are without merit:

1. OWEN8 concedes that QUANSTROM and SONTOLONGO are in direct conflict.

2. The trial court here simply held that application of a ROWE contingency factor of 1.5 was "appropriate." It did not hold it "mandatory." Therefore, the trial court's holding here is consistent with the SONTOLONGO rule.

3. BANKERS argues that the SONTOLONGO rule should be the Florida rule. It thus argues the merits of QUANSTROM

rather than the merits of the case at Bar. OWENS wins either way.

B.

IN THE ABSTRACT THIS COURT SHOULD APPROVE THE QUANSTROM RULE RATHER THAN THE SONTOLONGO RULE.

For the reasons which follow, this Court should adopt the QUANSTROM rule for Florida rather than the SONTOLONGO rule in any event:

1. This is yet another attempt by a recalcitrant insurance company to establish a principle of law that would prohibit citizens of this state from obtaining competent counsel, and maybe representation at all, in insurance disputes unless the dollar amount to be ultimately recovered is *so* significant that the impact of Florida Statutes Section **627.428** is of real importance.

2. Here, BANKERS raised a coverage defense of questionable legitimacy, forced OWENS into Court and, finally, was forced to pay what it owed. It now attempts to subvert the very purpose of the attorneys' fee statute. This demonstrates "wear-'m-down" claims handling philosophy at its worst.

3. From the insurance company perspective the time and expense is totally justified and worthwhile if it can secure a decision which will cause competent counsel to be economically excluded the next twenty times coverage is improperly denied if the amount in controversy is not great.

4. BANKERS seeks a decision which will establish that an insured and an attorney cannot enter into a reasonable fee

contract. It seeks to establish limitations on attorneys' fees based upon the amount of insurance benefits recovered.

5. Such a proposition has never been the law of Florida, nor has it become the law of Florida with the recent procedural developments with regard to the mechanism for determining attorneys' fees. It just doesn't make sense.

6. Historically, awards of attorneys' fees pursuant to Florida Statutes Section **627.428** are not absolutely linked to either the amount actually recovered by an insured (high or low) or a percentage fee contract between an insured and an attorney. The concept has consistently required the payment of a reasonable fee when all factors are considered.

7. Insurance companies have not been required to pay an exorbitant fee simply because there is a large percentage representation contract, nor have insurance companies been permitted to escape the payment of reasonable fees simply because the amount in controversy is not large.

8. The simple purpose of Florida Statutes Section **627.428** is to protect the public from being squeezed by the overwhelming economic power and resources of the insurance industry by placing the citizens on the same footing as insurance companies with regard to disputes. Insurance is so vested with the public interest that it is subject to the regulation and control of the Florida Legislature, which has deemed it necessary to include an attorneys' fee provision.

9. The principles applicable pre-ROWE in this case are well stated in COMMERCIAL UNION INSURANCE CO. v. PLUTE, 356

So. 2d 54 (Fla. 4 DCA 1978). There, an award of attorneys' fees equalling 90 percent of the total amount payable under an insurance policy was affirmed. The Court noted that a competent lawyer might well be required to expend 100 hours of time to recover a mere $5,000 from a stubborn and unreasonable insurer. Under such circumstances the Court stated that it would have absolutely no hesitation in approving a fee in excess of the actual amount in controversy. The Court noted that although the amount of the controversy is only one factor, it is not a controlling significance in determining a reasonable fee. Accord--REPUBLIC NATIONAL LIFE INS. CO. v. VALDES, 348 So. 2d 566 (Fla. 3 DCA 1977); AETNA INS. CO. v. SETTEM BRINO, 369 So. 2d 954 (Fla. 3 DCA 1978); STATE FARM FIRE & CAS. CO. v. PALMA, 489 So. 2d 147 (Fla. 4 DCA 1986), another recalcitrant insurer case dealing with a pre-ROWE contract, ($253,000 fee for the recovery of a $600 medical bill).

10. In both ALLSTATE INSURANCE CO. v. CHASTAIN, 251 So. 2d 354 (Fla. 3 DCA 1971) and GIBSON v. WALKER, 380 So. 2d 531 (Fla. 5 DCA 1980), the courts applied the same concept to protect insurance companies by stating that the mere fact that there would be a large percentage recovery by an attorney under a contract does not automatically make the insurance company responsible for the payment of that amount.

11. ROWE simply does not hold that the quantum of recovery controls the quantum of the fee. That could not have been this Court's intention. ROWE actually reaffirms the

prior existing criteria under the Code of Professional Responsibility for an award of attorneys' fees. ROWE simply set forth a range for the impact of a contingent contract. ROWE did not create the contingency contract as a new factor for the first time.

12. The trial court's fee award here was a distinctly factual finding. The record supports the finding. This Court should not disturb it. Nor should it hold that the amount of the fee must be tied to the amount recovered.

C.

ASSUMING ARGUENDO THE! WORST, NO REMAND FOR NEW HEARING REQUIRED.

Assuming arguendo this Court should merits rule in favor of BANKERS here, no remand for further hearing would be required. This Court would simply order remand with directions for entry of an appropriately reduced judgment in favor of OWENS.

VI.

CONCLUSION

It is respectfully submitted that for the reasons stated herein, the attorneys' fee order appealed must be affirmed. Should the Court reverse, it should remand with directions for entry of an appropriate judgment in favor of OWENS without the 1.5 ROWE enhancement.

Respectfully submitted,

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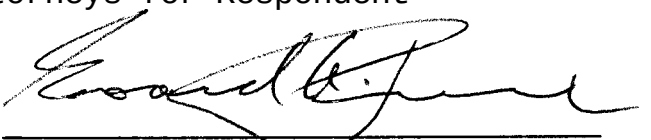
By: 
Edward A. Perse

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Brief of Respondent was mailed to the following counsel of record this 15 day of May, **1989**.

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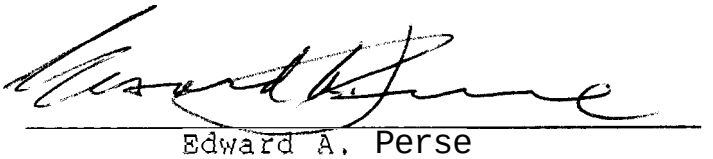
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