

IN THE SUPREME COURT OF FLORIDA

Case No. 73,319

BANKERS INSURANCE COMPANY,

Petitioner,

vs.

CHARLES F. OWENS,

Respondent.

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CLERK, SUPREME COURT

By *ph*
Deputy Clerk

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

PETITIONER'S REPLY BRIEF ON THE MERITS

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ARGUMENT

POINT ON APPEAL

THE APPLICATION OF A MULTIPLIER FACTOR IS NOT MANDATORY ON TRIAL COURTS WHEN THE PREVAILING PARTY'S COUNSEL HAD AN AGREEMENT WITH HIS CLIENT TO BE PAID A FEE DIRECTED BY THE COURT.

Although the trial court may in fact have held that the application of a *Rowe* contingency risk multiplier of 1.5 was "appropriate", the Fifth District Court of Appeal affirmed the trial court on the authority of *Quanstrom v. Standard Guaranty Ins. Co.*, 519 So.2d 1135 (Fla. 5 DCA 1988), pending on the merits, Case No. 72,200. In *Quanstrom*, the Fifth District held that the application of the contingency risk multiplier of *Rowe* was mandatory in all cases where an agreement between an insured and the insured's attorney was a contingency fee agreement. The court further held that if the agreement was to the effect that the fee was contingent upon what the court awarded pursuant to a fee-shifting statute then the agreement was a contingency fee agreement for purposes of *Rowe*. Since the Fifth District affirmed the instant case on the authority of *Quanstrom* which held that the contingency risk multiplier was mandatory, then the issue before this Court in the instant case is whether or not the application of a contingency risk multiplier is mandatory, regardless of whether the instant trial court stated that it was "appropriate".

This Court exercised its jurisdiction over the instant

case pursuant to *Jollie v. State*, 405 So.2d 418 (Fla. 1981). In *Jollie*, this Court held that when a district court of appeal *per curiam* opinion cited as controlling authority a decision that was either pending review in or had been reversed by this Court the decision constituted prima facie express conflict and allowed this Court to exercise its jurisdiction Id. at 420. Since this Court had accepted jurisdiction over *Quanstrom* due to expressed conflict with *Travelers Indemnity Company v. Sotolongo*, 513 So.2d 1384 (Fla. 3 DCA 1987), and the instant case was a per curiam affirmed decision on the authority of *Quanstrom*, the issue in the instant case is the identical issue involved in *Quanstrom*. Accordingly, the Petitioner argued the merits of the *Quanstrom* case in its initial brief.

This Court has jurisdiction over the instant case due to the *Quanstrom* holding, not due to the trial court's holding. The primary purpose of the constitutional authorization for conflict jurisdiction of this Court is to avoid confusion and to maintain uniformity in the case law of the state so as to forestall any uncertainty that might be derived from situations where conflicting decisions develop in the district courts of appeal. *Hastings v. Osius*, 104 So.2d 21 (Fla. 1958). Thus, it is a conflict of appellate court decisions, not trial court decisions, that vests conflict jurisdiction in this Court and, consequently, over the instant case.

Contrary to the Respondent's assertion, this is not an attempt by a "recalcitrant" insurance company to establish a principle of law that would prohibit citizens of this State from retaining competent counsel. The Petitioner has never questioned the validity of the statutory right of a prevailing insured to receive a reasonable attorney's fee from the insurer. However, the Petitioner is objecting to an insured's receiving a windfall by mandating that all trial judges are to consistently enlarge what has been determined to be a reasonable attorney's fee by 50% to 300%. That is the issue for this Court and the principle of law that the Petitioner questions.

Additionally, it cannot be said that Bankers Life Insurance Co. was a recalcitrant insurance company which raised a coverage defense of questionable legitimacy since the trial court specifically ruled that Owens had made an unreasonable demand under his insurance policy. The trial court ruled that only half of the money that Owens was requesting was due him under the policy issued by Bankers Life Insurance Co. Surely it cannot be questioned but that an insurance company does not have to make payments under an insurance policy if the requested payments are not covered pursuant to the policy. Bankers submits that it must be remembered that what is involved here is a contract. The parties entered into a contract for which the insured pays a certain premium and for which the insured will receive

certain coverage. Owens requested more than was due him in the trial court and Bankers legitimately contested. The common sense principle involved in the instant case is "you get what you pay for" and nothing more.

As to the Respondent's statement that "from the insurance company's prospective, the time and expense is fairly justified and worthwhile if he can secure a decision which would cause competent counsel to be economically excluded the next time coverage is improperly denied if the amount in controversy is not great," Bankers is not contesting an award of a reasonable attorney's fee. In the instant case, the trial court found that Owen's attorney had expended 90 hours and that a reasonable hourly rate for the attorney was **\$125.00**. Consequently, a reasonable attorney's fee pursuant to the trial court's finding would be **\$11,250.00**. However, the trial court took the reasonable fee, and multiplied that amount by **1.5** (pursuant to the Fifth District's holding in *Quanstrom*), to come up with the unreasonable amount of **\$16,875.00**.

Since the amount of recovery due Mr. Owens was approximately \$4,000.00, Rowe mandates that the fee awarded cannot exceed 40% (the standard contingency fee percentage) of the \$4,000. The Respondent is arguing that the portion of Rowe that mandates that a multiplier of a minimum of **1.5** must be applied but that the cap of 40% of the recovery does not.

Bankers is only submitting that either all of *Rowe* or none of *Rowe* is applicable.

There is another portion of *Rowe* that the Respondent has ignored and that Bankers discussed in its initial brief. That is the portion of *Rowe* that declared that a court may add or subtract from the lodestar figure, based upon a contingency fee risk factor and the results obtained. In the instant case, not only should the lodestar figure not have been multiplied but it should have been subtracted from due to the results obtained, *i.e.*, the amount awarded under the insurance policy was half of the amount demanded.

Bankers would also like to point out that, although the Respondent has declared that this Court should approve the *Quanstrom* rule rather than the *Sotolongo* rule, his arguments support the *Sotolongo* rule. The court in *Sotolongo* held that a court is not obligated to adjust the lodestar fee in every case. It must be remembered that the lodestar fee is the fee arrived at by multiplying hours reasonably expended by a reasonable hourly rate. The reasonable hourly rate is the prevailing rate in the relevant legal community for similar services by attorneys of reasonably comparable skills, experience and reputation. *Florida Patients Compensation Fund v. Rowe*, 472 So.2d 1145, 1150 (Fla. 1985).

The reasonable hours excluding excessive or unnecessary work, is multiplied by the reasonable hourly rate. A principle of law which may be inferred from *Sotolongo*, is

that the lodestar figure is presumed to be a reasonable attorney's fee. See *Travelers Indemnity Company v. Sotolongo*, supra, 513 So.2d at 1385(n) (1) (citing to Justice O'Connor's concurring opinion in *Pennsylvania v. Delaware Valley Systems Citizens' Counsel for Clean Air*, 106 Sup.Ct. 3078 (1988) wherein the view was expressed that legal risks and risks unique to the case were already factored in the lodestar fee and that the contingency risk factor should apply only where there is a finding that a risk multiplier is necessary to attract confident counsel in the relevant community). The Respondent cites to *Commercial Union Insurance Co. v. Plute*, 356 So.2d 54 (Fla. 4 DCA 1987), which held that the issue of attorney's fee is determined by multiplying a number of hours reasonably expended by a reasonable hourly rate. Consequently, *Plute* as well as *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); and *State Farm Fire & Cas. Co. v. Palma*, 489 So.2d 147 (Fla. 4 DCA 1986) are not support for the trial court's ruling in the instant case. They are simply authority for the award of a reasonable attorney's fee, which is Banker's position, but they are not authority for the award of a windfall to plaintiffs' counsel.

The Respondent has ignored Banker's position and argument that fees awarded pursuant to fee-shifting statutes are not "contingency fee" cases, with the result that *Rowe*,

simply does not apply. Since Owens has not addressed this issue, Bankers submits that this court may assume that Owens has conceded this point. This Court may then assume that since the instant case does not involve a contingency fee contract, the trial court did, indeed, err in applying a multiplier.

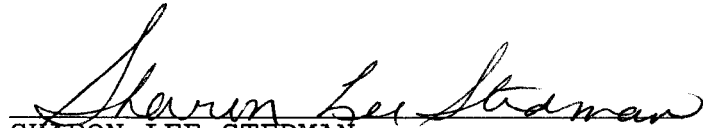
The Respondent seems to be declaring that the instant case is controlled by section **627.428**, Florida Statutes, rather than Rowe. Reply Brief at pp. 5-6. Section **627.428** is the fee-shifting statute applicable to disputes between an insured and his insurance company. The statute allows a prevailing insured to receive a reasonable attorney's fee but not a windfall via the contingency risk multiplier. That was the position advanced by Bankers in its initial brief. Obviously then the parties are now in agreement and this Court need only reverse and remand for the entry of a reasonable attorney's fee, determined by multiplying the hours reasonably expended times a reasonable hourly rate.

CONCLUSION

Based on these foregoing arguments and authorities cited therein, Bankers respectfully requests that this Honorable Court reverse the decision rendered by the Fifth District in the instant case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail this 3rd day of July, 1989, to EDWARD A. PERSE, ESQUIRE, 410 Concord Building, Miami, Florida 33130.



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