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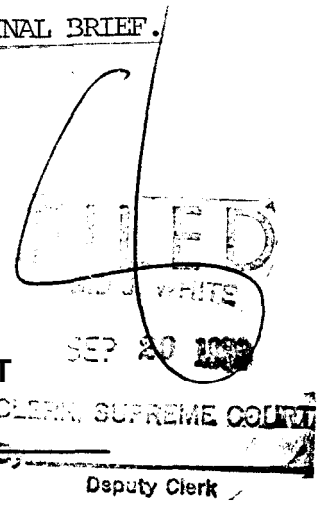

FLORIDA SUPREME COURT

CASE NO. 74,183

PAUL G. LANE, et al.,

Petitioners,

v.

THOMAS A. HEAD, et al.,

Respondents.

On Appeal from the District Court of Appeal of Florida, Fourth District

ACADEMY OF FLORIDA TRIAL LAWYERS AMICUS CURIAE BRIEF

THE ACADEMY OF FLORIDA TRIAL LAWYERS

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TABLE OF AUTHORITIES

INTRODUCTION

This Amicus Brief is submitted on behalf of the Academy of Florida Trial Lawyers, a statewide organization of trial lawyers interested in the issues by this case. Petitioners/Appellee/Plaintiff, PAUL G. LANE, will be referred to as LANE.

Respondents/Appellants/Defendants, THOMAS A. HEAD, ROBERT G. CURRIE and HERBERT SCHAFFER, will be referred to collectively as HEAD.

All emphasis is supplied by counsel unless otherwise indicated.

References to the Petitioner's Appendix are by (A. .

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STATEMENT OF THE FACTS AND CASE[1]

LANE retained counsel to represent him in a shareholders' derivative action against the majority stockholders of Pine Creek Development Corporation (PINE CREEK) for their usurpation of a corporate opportunity. The fee agreement provided that LANE would be charged "$100.00 per hour for attorney's fees plus any costs incurred...[plus] 25% of any amount recovered, however, if there is a recovery, you will be given credit for any amount of attorney's fees paid to this firm." (A. 1).

The Trial Court found for PINE CREEK and awarded damages of $604,800.00. (A.1-3). LANE filed a Motion for Attorney's Fees, pursuant to §607.147(5), Fla. Stat. The Trial Court found that 278 hours had been reasonably expended in the prosecution of the case, and that $150.00 per hour was a reasonable rate for Plaintiffs' counsel for a lodestar fee of $41,700.00. The Trial Court further found that the likelihood of success at the outset was even and, therefore, applied a contingency multiplier of 2 to the lodestar amount for a total fee of $83,400.00. Initially, the Trial Court

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[1] This Statement is taken from the Petitioners' and Respondents' Briefs in the District Court, as well as the Opinion of the Court. It is not intended to be all inclusive, but rather to emphasize the facts important to the broader concerns addressed in this Brief.

reduced this award to $37,500.00[2] as a result of applying the maximum fee limitation in the contract of 25% to $151,000.00. The Trial Court used $151,000.00 instead of $604,800.00 because that was the amount LANE would supposedly be entitled to from the final judgment of $604,800.00, as a 25% shareholder of PINE CREEK (AS-6). The Trial Court later amended this order to award the full $83,400.00, relying on the Third District's decision in Tamayo v. Miami Children's Hosp., 511 So.2d 1091 (Fla. 3d DCA 1987), because the fee contract predated, Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985) (ROWE).

The Fourth District, relying on Lake Tippecanoe Owners Association. Inc. v. Hanauer, 494 So.2d 226 (Fla. 2d DCA 1986), held that no multiplier was appropriate when the fee was partially contingent and reversed the fee award for recomputation without using a multiplier. Because the Court allowed no multiplier, it did not discuss the effect of this Court's decision reversing the Third District's TAMAYO decision. Miami Children's Hospital v. Tamavo, 529 So.2d 667 (Fla. 1988)

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[2]This amount should have been $37,800.00 even by the Trial Court's erroneous method of calculation i.e., $604,800.00 x 25% = $151,200.00: $151,200.00 x 25% = $37,800.00.

SUMMARY OF THE ARGUMENT

A contingency multiplier should be used in calculating a reasonable fee under ROWE when the fee agreement is partially contingent; however the multiplier should only be applied to that portion of the lodestar fee that has not been actually paid by the client.

The limitation of the fee to the maximum amount specified in the fee contract applies to this case, but the Trial Court incorrectly used $151,000.00, instead of $604,800.00, as the amount recovered in calculating the maximum. PINE CREEK recovered a judgment for $604,800. The maximum fee should have been calculated on $604,800.00 as PINE CREEK, not LANE, will recover this amount, and reasonable fees and costs are to be awarded from the fund recovered for the corporation. §607.147(5).

ARGUMENT

I. ENTITLEMENT TO A MULTIPLIER

As has long been recognized, the contingent fee is the poor man's key to the Courthouse. This Court, recognized this when it adopted the contingency risk multiplier in determining prevailing party attorney's fees, whether by statute or contract. ROWE, at 1151.

This case presents the question of whether a middle-class person, who can afford some fee but not the full fee of the attorney of his choice, should be denied access to the Courts. If the attorney will not take the case unless paid a partial fee, plus a fee contingent upon the outcome of the case, the middle-class person is denied access to Court the same as the person without any money. The partial fee could be, as here, a reduced hourly rate, or an initial flat fee not tied to the total number of hours or any hourly rate. It could be an hourly fee that part way through the case the client runs out of money and the attorney continues on a

contingency[3] rather than withdraw. Regardless how it happens, the attorney receives some fee without risk. Nevertheless, the attorney would not accept the client or continue the representation without the contingent portion of the fee, which he does accept all risk of recovering.

The fee contract and §607.147(5) create an unusual situation in this case. The contract calls for a contingent fee of 25% of the recovery, with credit for the hourly fee paid. The Statute, however, limits the fee to a reasonable fee, plus expenses, payable from the award. Plaintiffs must then "account to the corporation for the remainder of the proceeds so received by him or them." §607.147(5). Thus, the 25% in the contract is virtually meaningless since LANE may not pay his counsel more than the amount determined by the Court to be a reasonable fee and expenses. Compare, S627.428 Fla. Stat. Here, 25% of the recovery is $151,200.00.[4] The

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[3]The likelihood of success for determining the risk multipliers should be determined at the time the contingency is established. To prevent manipulation of the risk multiplier, if the likelihood of recovery is more likely than not when the fee is converted from a fixed fee to a contingency, the multiplier should be "1", if even, 1.5, and if less likely than not, from 2 to 3.

[4]The Trial Court erroneously reduced the final judgment amount to 25% in computing the maximum fee on the premise that LANE would receive 25% of the final judgment. The corporation, not LANE, will receive the total judgment less fees and costs.

Court awarded a fee of $83,400.00. Thus, the 25% in the contract is transformed into a reasonable fee determined by the Court.

The Trial Court found that HEAD wrongfully usurped a corporate opportunity. The Fourth District affirmed the merits without comment. Clearly, this case deserved to be brought. We suggest that there are many, many cases like this one where justice can only be done when a lawyer assumes all or part of the risk of being paid in accepting the case. The sole purpose of the judicial system is to correct the wrongs committed in our society. If Plaintiff's counsel had known no contingency multiplier was allowed, this case probably would never have been brought. Three people would have profited from their breach of fiduciary duty because their victim could not afford to go to court. What justice would there be in that?

11. APPLICATION OF THE MULTIPLIER TO THIS CASE

The Trial Court incorrectly applied the multiplier. The Trial Court did not distinguish between the fees already paid by the client and the contingent portion, but applied it to the whole lodestar fee. The calculations should have been done by determining the reasonable number of hours expended

and the appropriate hourly rate to determine the lodestar amount, i.e.

278 x $150.00 = $41,700.00

From the lodestar amount should be subtracted the amount actually paid to the attorney as the case progressed. In this case that may or may not be $100 x 278, because the client may not have been able to pay all along the costs and fees as they were billed. The client and lawyer should not be penalized because the client ultimately was unable to live up to the contract. On the other hand, the Trial Court may determine that the reasonable number of hours expended were less than what the client actually paid. For instance, the client may have been billed and paid for 350 hours at $100.00 per hour, but the Trial Court determined 278 hours were reasonably expended. Thus, the amount to which the multiplier should be applied would be calculated as follows:

LODESTAR FEE	$41,700	LODESTAR FEE	$41,700
Hourly Fees Paid	27,800	Hourly Fees Paid	35,000
Contingent Amount	13,900	Contingent Amount	6,700
Multiplier	x2	Multiplier	x2
	27,800		13,400
	+41,700		+41,700
Total Fee	$69,500	Total Fee	$55,100

The Third District's decision in First State Insurance Company v. General Electric Credit, Auto Lease, Inc., 518 So.2d 927 (Fla. 3d DCA 1987), failed to recognize any offset for fees actually paid by the client when the fee is

partially contingent. In Lake Tippecanoe Owners Association v. Hanauer, 497 So.2d 226 (Fla. 2d DCA 1986), the Second District correctly refused to apply a multiplier when the fee agreement had no contingency. But, because the fee contract in Lake Tippecanoe had no contingency, it provides no support for the decision below that no multiplier applies when the fee is partially contingent.

Neither the Third District's nor the Fouth District's decision properly balances the competing interests. The Courthouse must remain open, and attorney's fees must remain reasonable. Application of the multiplier to only the contingent portion of the fee will do both.

CONCLUSION

The decision of the Court of Appeal should be quashed with directions to remand the case for application of the contingent risk multiplier to only that portion of the lodestar fee not already paid by the client, with the maximum fee limited to 25% of the total final judgment of $604,800.00.

Respectfully submitted,

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WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 15th day of September, 1989, to: BRUCE ZEIDEL, ESQ., 618 U.S. Highway One, North Palm Beach, Florida 33408; KAREN A. GAGLIANO, ESQ., 2600 North Military Trail, Fourth Floor, Boca Raton, Florida 33431-0904; and HERBERT SCHAFFER, 335 N.W. 5th Avenue, Suite 1, Delray Beach, FL 33444.

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