SUPREME COURT OF FLORIDA

PAUL G. LANE, et al,

Petitioners,

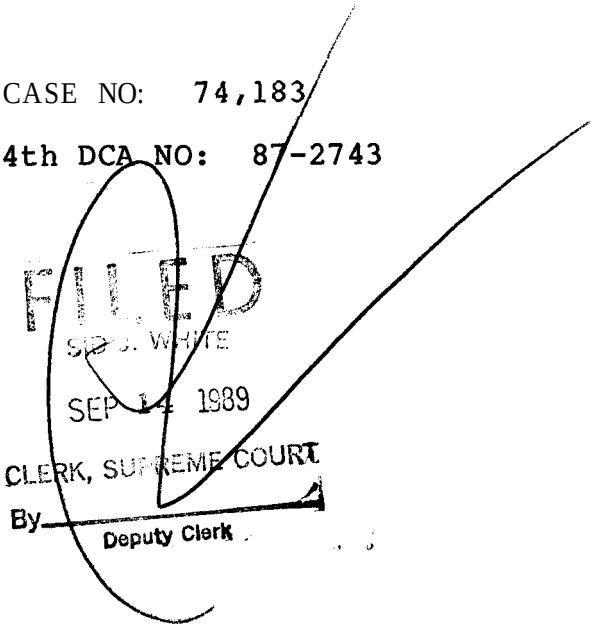
vs.

THOMAS A. HEAD, et al,

Respondents.

CASE NO: 74,183

4th DCA NO: 87-2743



INITIAL BRIEF OF PETITIONERS

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STATEMENT OF THE CASE AND FACTS

This litigation involves a claim by the Petitioner (who is a minority stockholder of a Florida corporation known as Pine Creek Development Corporation) against the Respondents (who are majority stockholders) for breach of a corporate opportunity. (A–1–31. The Trial Court found that the Respondents had taken a corporate opportunity rightfully belonging to Pine Creek Development Corporation and awarded a Judgment against the Respondents for $614,800.00 (later amended to $604,800.00 (A–4)). The Trial Court, in the Final Judgment, reserved jurisdiction for an award of attorney's fees and costs. (A–1–3).

The Trial Court made a finding of fact that the Petitioner had a fee agreement with his attorney in which he agreed to pay his attorney $100.00 per hour for legal services rendered, regardless of the outcome, or a 25% contingency fee, if the outcome was in his favor. (A-5,6). The expert testimony presented by both the Petitioner and the Respondents showed that the $100.00 minimum rate to which the attorney had agreed was lower than the rate which would have been reasonable for an attorney of Petitioner's attorney's experience, skill and reputation. (A-5,6). Therefore, the Trial Court and the Appellate Court found that the attorney's fee agreement was partially contingent. (A-5,6; 7,8; 9–11).

The Trial Court determined that $150.00 per hour to be a reasonable hourly rate and 278 hours to be a reasonable time to

accomplish the services. This case resulted in two separate trials and two appeals. The first Judgment obtained against the Respondents was reversed and remanded for a new trial. Head vs. Lane, 495 So2d 821 (Fla. 4th DCA 1986). The Petitioner was awarded $83,400.00 as attorney's fees. (A-7,8). The Petitioner had presented testimony by his expert witness that a reasonable fee in this case would be $103,000.00. (A-13-19). This fee was not to be in addition to the Judgment of $604,800.00, but would be paid from said Judgment. (A-7,8). The Trial Judge computed a lode star figure of $41,700.00 ($150.00 x 278 hours) and then applied a contingent risk factor of 2 after finding that the Petitioner had a 50-50 chance of prevailing at the outset of the case. The authority for the application of the enhancement of an award of attorney's fees through application of a contingency risk factor in contingency fee cases is Florida Patients Compensation Fund vs. Rowe, 472 So2d 1145 (Fla. 1985).

The Respondents filed an Appeal of the Judgment and the award of attorney's fees to the Fourth District Court of Appeal. The Fourth District Court of Appeal affirmed on the issue of liability but reversed as to the amount of attorney's fees awarded. The Fourth District Court of Appeal, in its decision reversing the award of attorney's fees, found that the agreement for legal services was partially contingent and, therefore, the enhancement factor did not apply. The Fourth District Court of Appeal, in its decision, specifically rejected the holding of the Third District Court of Appeal in the case of First State Insurance Company vs.

General Electric Credit, Auto Lease, Inc., 518 So2d 927 (Fla. 3rd DCA 1987), which stands for the proposition that a contingency risk factor shall be applied when the fee agreement between the attorney and the client is partially contingent. (A-9-11]. A Motion for Rehearing was filed by the Petitioner and denied by the Fourth District Court of Appeal. (A-12).

Petitioners then filed a Petition to Invoke the Discretionary Jurisdiction of this Court on the grounds that the decision of the Fourth District Court of Appeal conflicted with the decision of the Third District Court of Appeal in the case of First State Insurance Company vs. General Electric Credit, Auto Lease, Inc., 518 So2d 927 (Fla. 3rd DCA 1987). This Court accepted jurisdiction on August 23, 1989.

SUMMARY OF ARGUMENT

The amount of attorney's fees awarded by the Trial Court was less than the expert witness at trial testified would be a reasonable fee. The amount of attorney's fees to be awarded is a matter largely within the sound discretion of the Trial Judge and his determination should not be disturbed unless he has abused his discretion. Since the Trial Court did not abuse his discretion in this case, the Appellate Court erred in reversing the award of attorney's fees.

The Fourth District Court of Appeal reversed the award of attorney's fees because the Trial Court, in awarding fees, found the fee agreement between the attorney and the client to be partially contingent. The Trial Court reasoned because the fee agreement was partially contingent, an enhancement factor or multiplier should be applied to determine a reasonable fee. The Trial Court relied on the case of Florida Patients Compensation Fund vs. Rowe, 472 So2d 1145 (Fla. 1985), which permits a multiplier or enhancement factor for contingent fee cases. The Fourth District Court of Appeal held that a litigant was not entitled to an enhancement factor if the fee agreement was partially contingent. The Fourth District Court of Appeal, in its decision, cited the case of Lake Tippecanoe Owners Association, Inc. vs. Hanauer, 494 So2d 226 (Fla. 2nd DCA 1986). The Fourth District Court of Appeal's reliance on the Lake Tippecanoe case is misplaced because a careful reading of that case reflects that

there was no contingency involved in the fee agreement. Therefore, the Court, in the Lake Tippecanoe case, held that there was no contingency risk factor to be considered.

The decision of the Fourth District Court of Appeal, in the present case, which denies a multiplier or enhancement factor, when the fee agreement is partially contingent is in direct conflict with the case of First State Insurance Company vs. General Electric Credit, Auto Lease, Inc., 518 So2d 927 (Fla. 3rd DCA 1987), which permits an enhancement factor when the fee agreement between the attorney and the client is partially contingent. The analysis and the logic of the Third District Court of Appeal in allowing enhancement factors in partially contingent fee cases is more persuasive than the Fourth District Court of Appeal's refusal to permit an enhancement factor when the fee agreement is partially contingent. This is so because by allowing an enhancement factor in partially contingent cases, it permits greater flexibility by the Trial Court and allows the Trial Court to adjust the fee to fit the particular situation. It permits the Trial Court to adjust the size of the multiplier based upon the amount of contingent risk involved, or to apply a multiplier to that portion which is contingent. This procedure is much more logical than an absolute ban on all enhancement factors regardless of the amount of the contingency or the reason for the contingency.

ARGUMENT

The Trial Court and the Fourth District Court of Appeal, in the present case, both determined that the fee agreement between the Petitioner and his attorney was a partially contingent fee contract. The Petitioner had a fee agreement with his attorney in which he agreed to pay his attorney $100.00 per hour for legal services rendered, regardless of the outcome, or a 25% contingency fee, if the outcome was in his favor. The expert testimony presented by both the Petitioner and Respondents showed that the $100.00 minimum fee rate to which the attorney had agreed was lower than the rate which would have been reasonable for an attorney of the Petitioner's attorney's experience, skill and reputation.

This Court, in Florida Patients Compensation Fund vs. Rowe, 472 So2d 1145 (Fla. 1985), stated that the Trial Court should, when appropriate, adjust the fee on the basis of the contingent nature of the litigation. The amount of attorney's fees to be awarded is a matter largely within the sound discretion of the Trial Judge and his determination should not be disturbed unless he has abused his discretion. Tietig vs. Kusik, 279 So2d 890 (3rd DCA 1973). Since the amount awarded was within the range that the testimony showed to be reasonable (A-13-19), there was no abuse of discretion on the part of the Trial Judge. Therefore, the Fourth District Court of Appeal by reversing the award of attorney's fees where there was no abuse of discretion on the part of the Trial

Court, committed reversible error.

The Fourth District Court of Appeal in holding that an enhancement factor did not apply to partially contingent fee agreements, cited the case of Lake Timecanoe Owners Association, Inc. vs. Hanauer 494 So2d 226 (Fla. 2nd DCA 1986). However, the Fourth District Court of Appeal's reliance on the Lake Timecanoe decision is misplaced because the fee agreement in that case was an hourly fee with no contingency. Therefore, the Court in Lake Timecanoe correctly stated that there was no contingency risk factor to be considered.

The Fourth District Court of Appeal's decision is flawed, not only because of its misplaced reliance on the Lake Tippecanoe case, but also because it has advanced an unworkable formula to determine attorney's fees. It does not allow the Trial Court to adjust the fee to fit the particular situation. If the Trial Court is permitted to adjust the size of the multiplier based upon the amount of contingent risk involved rather than completely eliminating an enhancement factor if there is a partial contingency it will serve two purposes. First, it will permit litigants with meritorious claims who cannot pay the attorney's standard hourly fee to retain an attorney who may not be willing to take the case on a totally contingent basis. Second, it will give the Trial Court more flexibility in taking into account all factors (including the amount of contingent risk involved) in arriving at the amount of attorney's fees to award.

If the Court follows the holding of the Fourth District Court

of Appeal in the present case and holds that there should be no enhancement factor on partially contingent cases, it will be promulgating a rule with no flexibility. For instance, in the case of Chrysler Corporation vs. Weinstein 522 So2d 894 (3rd DCA 1988), the fee agreement between the Plaintiff and her attorneys called for the attorney to be paid a flat fee of $1,500.00 with the balance of the fee to be contingent on the outcome of the case. The Court was able to determine what part of the fee was contingent and applied the enhancement factor to that portion of the fee. If the Court had applied the Fourth District Court of Appeal's reasoning (which states that since the agreement was partially contingent, no enhancement factor would be applied) it would have resulted in an arbitrary and unjust result. This is so because the payment of $1,500.00 was a relatively minor sum compared with the total number of hours (80.25) which were involved in the prosecution of the case for the Plaintiff.

Another example of the inflexibility of the Fourth District Court of Appeal's approach is a situation where the attorney agrees to handle the case on an hourly basis and during the course of the litigation, the client is no longer able to pay his hourly fee. If the rationale of the Fourth District Court of Appeal is applied because the fee agreement is not contingent from the beginning, the attorney either is forced to withdraw from the case because of nonpayment, or represents the client for no fee. If the exact factual situation of an initial hourly fee agreement and the client becoming insolvent during the litigation is applied to

the Third District Court of Appeals formula, as set forth in First State Insurance Company vs. General Electric Credit, Auto Lease, Inc., 518 So2d 927 (Fla. 3rd DCA 1987), the more reasonable result is apparent. The attorney could continue to represent the now insolvent client on a contingent fee basis. The attorney would be permitted to receive an enhancement factor if there is a recovery because the Third District Court of Appeal permits an enhancement factor for partially contingent fee agreements.

Therefore, by allowing the Trial Court to adjust the amount of the multiplier and/or to only apply the multiplier to that portion of the fee agreement which is contingent, this Court will promulgate a principle which is workable in all situations. Conversely, by not allowing a multiplier, if there is a partial contingency (regardless as to how minor the fixed fee is in relation to the total recovery), it provides a rule that is inflexible and takes from the Trial Court the discretion to award a reasonable fee in light of all the circumstances. The fact that the fee was partially contingent should affect the size of the multiplier but not the entitlement to such a factor. First State Insurance Company vs. General Electric Credit, Auto Lease, Inc., 518 So2d 927 (Fla. 3rd DCA 1987),

CONCLUSION

The decision of the Fourth District Court of Appeal which reversed the award of attorney's fees should be reversed. The case should be remanded for computation of the attorney's fees, including fees for appeal to this Court, by application of the multiplier for the partial contingent risk factor.

Respectfully Submitted,

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Attorneys for Petitioners

By: _____
Bruce Zeidel, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to: KAREN A. GAGLIANO, ESQ., Lavalle, Wochna, et al, 2600 North Military Trail, Fourth Floor, Boca Raton, FL 33431-0904 and HERBERT SCHAFFER, 355 Northwest 5th Avenue, Suite 1, Delray Beach, FL 33444, this 12 day of September, 1989.

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