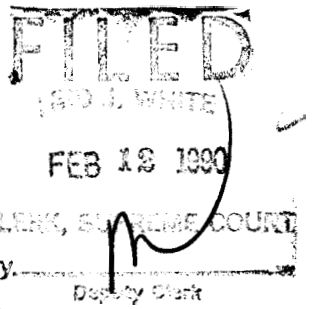
SUPREME COURT OF FLORIDA



SUN BANK OF OCALA,

Petitioner,

vs.

JACQUES FORD,

Respondent.

Case No. 75,299

Fifth District - No. 89-507

INITIAL BRIEF OF PETITIONER ON THE MERITS

Appeal from the
District Court of Appeal
of the State of Florida
Fifth District

Wayne C. McCall, Esquire
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PRELIMINARY STATEMENT

In this brief, Petitioner, SUN BANK OF OCALA, has:

(a) Referred to the Respondent, JACQUES FORD, as "Respondent";

(b) Referred to Sun Bank of Ocala as "Petitioner"; and

(c) Cited the Appendix with "A" followed by the appropriate page or pages, all of which is in parentheses.

POINT ON APPEAL

WHETHER THE TRIAL COURT PROPERLY DETERMINED THAT THE FEE AGREEMENT BETWEEN PETITIONER AND ITS ATTORNEYS IS NOT CONTINGENT OR PARTIALLY CONTINGENT AND PROPERLY REFUSED TO CONSIDER THE CONTINGENCY RISK FACTOR IN DECIDING WHETHER TO ENHANCE THE AWARD OF ATTORNEYS FEES WHEN THE FEE AGREEMENT BETWEEN PETITIONER AND ITS ATTORNEYS MADE PAYMENT OF AN AMOUNT IN EXCESS OF $100.00 PER HOUR CONTINGENT UPON SUCCESS AND AWARD BY THE COURT AND THE COURT AWARDED $150.00 PER HOUR.

STATEMENT OF THE FACTS AND OF THE CASE

This is an appeal from the trial court's determination, affirmed by the District Court of Appeal of the State of Florida, Fifth District, in awarding attorneys' fees that the fee agreement between Petitioner and its attorneys is not contingent and that the trial court need not consider the contingency risk factor in deciding whether to enhance the fees awarded.

This action arises from the execution and delivery to Petitioner by Respondent of a promissory note. (A 1-4) Respondent not only defaulted on the note but sued the Petitioner. (A 1-4) The Petitioner counterclaimed to enforce payment of the note. (A 1-4)

On December 1, 1987, the trial court entered Final Summary Judgment in favor of Petitioner on all issues, including Petitioner's counterclaim to enforce payment of the promissory note. (A 1-4) The judgment awarded attorneys fees and costs of the Petitioner.

After Respondent unsuccessfully appealed, the trial court heard argument and evidence on Petitioner's claim for attorneys fees and costs. On February 6, 1989, the trial court entered the Judgment for Attorneys' Fees and Costs and Expenses of Collection in which the court awarded Petitioner $27,450.00 in attorneys fees and found, in part, (A 5-7) that:

(a) One hundred fifty and no/100 dollars ($150.00) per hour is a reasonable rate charged in this community by lawyers of reasonable, comparable skill, experience and reputation for similar services as those provided in this action.

(b) One hundred eighty-three **(183)** hours to the time of the hearing on January 20, **1989**, is an amount of time which would be reasonably expended to perform the services in this action.

(c) Petitioner agreed to pay their attorneys a reasonable fee for the services rendered in this action. Petitioner and Ayres, Cluster, Curry, McCall & Briggs, P.A., agreed that such fee would be set by the court, that Ayres, Cluster, Curry, McCall & Briggs, P.A., would periodically bill Petitioner at the rate of $100.00 per hour to be applied against the fee awarded by the court, that Ayres, Cluster, Curry, McCall & Briggs, P.A., would be paid no less than $100.00 per hour and that payment of fees in excess of $100.00 per hour would be contingent upon success, an award by this court and recovery from Respondent.

(d) The fee contract is an agreement to pay a reasonable fee set by the court, not a contingent or partially contingent fee.

(e) Under the standards set by the Florida Supreme Court in Florida Patients' Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), the attorneys for Petitioner are not, therefore, entitled to enhancement of fees on the grounds of contingency or results obtained. (A 5-7)

On March 8, 1989, Petitioner appealed the trial court's decision not to enhance the award of attorneys' fees. On December 7, 1989, the District Court of Appeal of the State of Florida, Fifth District, affirmed the decision of the trial court and certified conflict with First State Insurance Co. v. General Electric Auto Lease, Inc., 518 So.2d 927 (Fla. 3d DCA 1987). Sun Bank of Ocala v. Ford, 14 FLW 2820 (Fla. 5th DCA 1989) (A 8) On January 2, 1990, Petitioner filed its timely Notice to Invoke Discretionary Jurisdiction.

SUMMARY OF ARGUMENT

Point On Appeal

SINCE THE FEE AGREEMENT BETWEEN PETITIONER AND ITS ATTORNEYS MADE PAYMENT OF AN AMOUNT IN EXCESS OF $100.00 PER HOUR CONTINGENT UPON SUCCESS AND AWARD BY THE COURT AND THE COURT AWARDED **$150.00** PER HOUR, THE TRIAL COURT ERRED BY DETERMINING THAT THE FEE AGREEMENT BETWEEN PETITIONER AND ITS ATTORNEYS IS NOT CONTINGENT OR PARTIALLY CONTINGENT AND BY REFUSING TO CONSIDER THE CONTINGENCY RISK FACTOR IN DECIDING WHETHER TO ENHANCE THE AWARD OF ATTORNEYS FEES.

The trial court found that the Petitioner agreed to pay its attorneys a reasonable fee for the services rendered in this action; that such fee would be set by the court; that the attorneys would periodically bill Petitioner at the rate of $100.00 per hour to be applied against the fee set by the court; that the attorneys would be paid no less than $100.00 per hour; and that payment of fees in excess of **$100.00** per hour would be contingent upon success, an award by the court and recovery from Respondent. The trial court, applying Florida Patients' Compensation Fund v. Rowe, 472 So.2d **1145** (Fla. **1985),** determined that **$150.00** per hour is a reasonable hourly rate and that 183 hours is an amount of time reasonably expended but refused to apply a contingency risk factor to enhance the fees because the fee agreement was an agreement to pay a reasonable fee set by the court, not a contingent or partially contingent fee. The trial court erred.

A fee agreement that if an attorney ultimately prevails, he would receive an amount allowed by the court rather than a

percentage of the recovery is a contingency fee agreement and a trial court must consider the contingency risk factor in determining whether to enhance the fee. Since the Petitioner's attorneys' recovery in excess of $100.00 per hour was contingent upon success and award by the trial court, the fee agreement was partially contingent. The trial court erred by finding that the fee agreement was not contingent or partially contingent and by refusing to consider the contingency risk factor in deciding whether to enhance the fee.

ARGUMENT

Point On Appeal

SINCE THE FEE AGREEMENT BETWEEN PETITIONER AND ITS ATTORNEYS MADE PAYMENT OF AN AMOUNT IN EXCESS OF $100.00 PER HOUR CONTINGENT UPON SUCCESS AND AWARD BY THE COURT AND THE COURT AWARDED $150.00 PER HOUR, THE TRIAL COURT ERRED BY DETERMINING THAT THE FEE AGREEMENT BETWEEN PETITIONER AND ITS ATTORNEYS IS NOT CONTINGENT OR PARTIALLY CONTINGENT AND BY REFUSING TO CONSIDER THE CONTINGENCY RISK FACTOR IN DECIDING WHETHER TO ENHANCE THE AWARD OF ATTORNEYS FEES.

The trial court found that the Petitioner agreed: to pay its attorneys a reasonable fee for the services rendered in this action: that such fee would be set by the court; that the attorneys would periodically bill Petitioner at the rate of $100.00 per hour to be applied against the fee set by the court; that the attorneys would be paid no less than $100.00 per hour: and that payment of fees in excess of $100.00 per hour would be contingent upon success, an award by the court and recovery from Respondent. The trial court, applying Florida Patients' Compensation Fund v. Rowe, **472 So.2d 1145** (Fla. 1985), determined that **$150.00** per hour is a reasonable hourly rate and that 183 hours is an amount of time reasonably expended but refused to apply a contingent risk factor to enhance the fees because the trial court found the agreement was to pay a reasonable fee set by the court, not a contingent or partially contingent fee. The trial court erred because the fee agreement is partially contingent and a trial court must consider a contingency risk factor when awarding fees in cases in which the agreement between the attorney and his client is a contingent

fee agreement. Chrysler Corporation v. Weinstein, 522 So.2d 894, 896 (Fla. 3d DCA 1988); First State Insurance Company v. General Electric Credit Auto Lease, Inc., 518 So.2d 927 (Fla. 3d DCA 1987); See, Standard Guaranty Insurance Company v. Quanstrom, 15 FLW S23 (Fla. 1990)

At the time of entry of the order appealed in this action, the trial court was bound by the District Court of Appeal of the State of Florida, Fifth District, ruling that (1) under Florida Pat ients' Compensation Fund v. Rowe, a trial court must enhance court awarded fees where the fee agreement is contingent and (2) an agreement that if an attorney ultimately prevailed, the attorney would be entitled to a reasonable fee set by the court (rather than a percentage of the recovery) constituted a contingency fee agreement. Quanstrom v. Standard Guaranty Insurance Company, 519 So.2d 1135 (Fla. 5th DCA 1988)

In Standard Guaranty Insurance Company v. Quanstrom, this Court affirmed the ruling that such an agreement constitutes a contingency fee arrangement but reversed the ruling that a trial court must enhance fees which are contingent. Standard Guaranty Insurance Company v. Quanstrom, 15 FLW S23, S26. Instead, this Court concluded that the trial court must only consider the contingency risk factor in determining whether to enhance the fee. Id. Since the trial court had rejected the application of the multiplier because of the erroneous conclusion that it was not a contingency fee agreement, this Court remanded the case to

the trial court to determine whether to apply a contingency fee multiplier under the circumstances. Id.

In the Standard Guaranty Insurance Company v. Quanstrom decision, this Court also re-examined Florida Patients' Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), established categories of cases in which court awarded fees can be enhanced and explained what should be considered in each category.

The instant action falls within the tort and contract cases category described in Standard v. Quanstrom. Id. at S26. In such cases, the Rowe multiplier is still a useful tool when it can assist a trial court in determining a reasonable fee when "a risk of nonpayment is established." Id.

In the instant action, the trial court determined that $150.00 per hour is a reasonable fee for similar services by a similar firm in the area. By agreeing to make recovery in excess of $100.00 per hour contingent, Petitioner's attorneys risked nonpayment of $50.00 per hour.

While the fact that the fee agreement was only partially contingent may affect the size of the multiplier, it should not affect the entitlement to have the contingency risk factor considered. First State Insurance Company v. General Electric Credit Auto Lease, Inc., supra at 928. Alternatively, this Court may decide that in partially contingent fee cases, only that portion of the fee that is contingent may be enhanced. The trial court should, however, consider the contingency risk

factor in determining whether to enhance the fees in partially contingent fee cases.

To hold that a trial court must consider the contingency risk factor only where the fee is totally contingent would create distinctions without a rational basis. For example, if the recovery was $25,000 and the attorney was to receive one-third of the recovery with no guaranty, the trial court, in awarding fees, could consider the contingency risk factor but could not if the attorney received a $1,000 nonrefundable retainer plus twenty-five percent of the recovery. Similarly, if the fee were not based upon the amount of the recovery, the trial court could consider the contingency risk factor if the attorney was to receive a reasonable fee set by the court with no guaranty but could not if the attorney was to receive a $1,000 nonrefundable retainer plus a reasonable fee set by the court.

The more reasonable rule is allow the trial court to consider the contingency risk factor even in cases where the fee is only partially contingent and to adjust the amount of the multiplier or to apply the multiplier to only the portion of the fee that is contingent. The smaller the risk of nonpayment, the smaller the multiplier or portion of the fee that is enhanced.

Such a rule is not only reasonable and flexible but would also increase the chances that each public policy enforcement case (first category in Standard Guaranty Insurance Company v. Quanstrom) and each meritorious tort and contract claim (second

category in Standard Guaranty Insurance Company v. Quanstrom) receives the representation the case deserves and could be applied in those extraordinary cases in which a contingency risk multiplier may be justified in family law, eminent domain, estate and trust proceedings (third category in Standard Guaranty Insurance Company v. Quanstrom).

Since the trial court rejected the application of the multiplier on the erroneous conclusion that the fee agreement between Petitioner and its attorneys is not a contingency fee agreement, this Court should remand the case to the trial court to consider the contingency risk factor in determining whether to enhance the fee.

CONCLUSION

Since the fee agreement between Petitioner and its attorneys made payment of an amount in excess of $100.00 per hour contingent upon success and award by the court and the court awarded $150.00 per hour, the trial court erred by finding the agreement was not contingent or partially contingent and by refusing to consider the contingency risk factor in determining whether to enhance the award of attorneys fees. The Petitioner requests the court to reverse the judgment, find that the fee agreement is contingent, and remand the case to the trial court to consider the contingency risk factor in determining whether to apply a contingency fee multiplier under the circumstances.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was served by U.S. Mail to Michael J. Cooper, Esquire, 321 N.E. Third Avenue, Ocala, Florida 32670; and Robert W. Batsel, Esquire, Post Office Box 2530, Ocala, Florida 32678, this 9th day of February, 1990.

AYRES, CLUSTER, CURRY,
McCALL & BRIGGS, P.A.

BY: Wayne C. McCall

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