

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, DEPARTMENT
OF ADMINISTRATION, OFFICE OF
STATE EMPLOYEES' INSURANCE,

Petitioner,

v.

Case No. 75,396

TERRI J. GANSON,

Respondent.

**ANSWER BRIEF OF RESPONDENT
TERRI J. GANSON**

A Discretionary Proceeding to Review a Decision
of the District Court Appeal, First District
State of Florida

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STATEMENT OF THE CASE AND FACTS

Respondent Ganson generally accepts the statement of the case and facts in Petitioner Department's initial brief, but wishes to clarify and amplify certain areas as set forth below.

Petitioner Department has invoked this Court's conflict jurisdiction to review a decision of the First District Court of Appeal setting the amount of attorneys' fees to be awarded against the Department.' The sole issue raised by Department in its Jurisdictional Brief was the issue of whether or not the application of a contingency risk multiplier is mandatory in a case involving a contingency fee arrangement.

The underlying administrative action was brought by Respondent Ganson in April, 1987, pursuant to §120.57(1), Fla. Stat. (1987), for recovery of health insurance benefits due Respondent under the State Group Health Insurance Plan for treatments during the preceding year. Contrary to Petitioner's characterization of the original case in such a way as to attempt to minimize its scope, the case involved significant questions regarding both the factual distinction between Respondent's prior (and allegedly preexisting) and subsequent medical conditions and the propriety of the Department's interpretation and implementation of the preexisting condition exclusion provisions of the State Group Health Insurance Plan as it applied to covered employees with "mental or nervous" conditions. After an evidentiary hearing, Respondent received a favorable Recommended Order from a Division of Administrative Hearings Hearing Officer. Subsequently, however, Petitioner Department issued a Final Order which rejected the Hearing Officer's findings and recommendations and denied the claimed insurance benefits,

Respondent Ganson appealed Petitioner's Final Order to the First District Court of Appeal pursuant to §120.68, Fla. Stat. (1987), and timely moved for an award of attorneys' fees and costs

1. Ganson v. State of Florida Department of Administration, Office of State Employees' Insurance, 554 So.2d 522 (Fla. 1st DCA 1989) (opinion and order on attorney fee). In accordance with Fla. R. App. P. 9.120(d), a conformed copy of the decision is attached hereto as Appendix A. For convenience, this decision will be referred to herein as Ganson.

against Petitioner Department pursuant to §120.57(1)(b)10., Fla. Stat. (1987).¹ On July 7, 1989, the First District Court of Appeal issued its opinion in which it found that the Department had improperly rejected the hearing officer's recommended findings of fact and arbitrarily interpreted the provisions of the State Group Health Insurance Plan in a manner contrary to its plain meaning and to established insurance law.² The Court reversed the Petitioner Department's Final Order; it further found that "the agency action which precipitated the appeal was a gross abuse of the agency's discretion" and granted Respondent's motion for attorneys' fees pursuant to §120.57(1)(b)10., Fla. Stat. (1987).³

The matter was eventually remanded back to the Division of Administrative Hearings Hearing Officer for recommendations regarding the amount of reasonable attorneys' fees to be awarded. An evidentiary hearing was held at which Respondent's counsel was the only witness, and the Hearing Officer subsequently issued his recommendations to the Court on October 12, 1989. The determination of the amount of fees involved application of the *Rowe*⁴ methodology, including a finding that a contingency fee arrangement was involved and an enhancement of the lodestar fee by a contingency risk multiplier of 2.0. On December 22, 1989, the First District Court of Appeal adopted the findings and recommendations of the Hearing Officer and awarded fees of \$48,250.00 and costs of

1. Other statutory grounds for an award of fees were also alleged, but were not subsequently addressed by the Court.

2. *Ganson v. State of Florida, Department of Administration, Office of State Employees' Insurance*, 554 So.2d 516 (Fla. 1st DCA 1989); included as Appendix B. An examination of this opinion quickly reveals both that this was perhaps not as "relatively simple" a case as the Department contends and that the bald rejection of the Hearing Officer's Recommended Order was not the sole basis for the award of fees. The case involved questions of medical fact which required proof using expert witnesses and questions of both law and agency policy purportedly infused with special agency expertise. The Court found that the agency had modified and rejected the hearing officer's findings of fact which were supported by competent substantial evidence, substituted its own findings which were for the most part not supported by the record, and interpreted those facts in concert with a "strained" policy interpretation which was not supported by either the State Group Health Insurance Benefit Document or by any other evidence in the record. 554 So.2d at 520-521.

3. *Id.* at 522.

4. *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985), cited hereinafter as *Rowe*.

\$501.94 to Respondent.’

At the time the First District Court’s opinion on fees was issued (December 22, 1989), this Court had not addressed the conflict between the various districts regarding the mandatory or discretionary nature of contingency risk multipliers. On January 11, 1990, subsequent to the date on which the First District Court of Appeal’s decision on the amount of fees to be awarded against Petitioner Department became final, this Court issued a trilogy of cases in which it revisited the *Rowe* methodology regarding, among other things, whether or not a contingency risk multiplier is mandatory when a contingency fee arrangement is involved. *Standard Guaranty Ins. Co. v. Quanstrom*, 555 So.2d 828 (Fla. 1990)²; *State Farm Fire & Casualty Co. v. Palma*, 555 So.2d 836 (Fla. 1990)³; and *Bankers Life Ins. Co. v. Owens*, 554 So.2d 1165 (Fla. 1990).⁴ Petitioner Department filed a motion for rehearing on January 12, 1990, which was denied on January 26, 1990. Notice to invoke the discretionary jurisdiction of this Court was filed by Petitioner on January 22, 1990, seeking review of the First District Court of Appeal’s December 22 *Opinion and Order on Attorney Fee*. Petitioner’s jurisdictional brief raised, as the sole basis for this Court’s jurisdiction, the divergency of opinion among the district courts and Supreme Court on the question of whether or not a contingency risk multiplier is mandatory when a contingency fee arrangement is involved.

SUMMARY OF ARGUMENT

The sole question of policy and law which Petitioner Department based its appeal is whether or not the application of a contingency risk multiplier is mandatory or discretionary under the *Rowe* methodology when a contingency fee arrangement is involved. At the time *Ganson* was issued, there

1. *Ganson*, page 531; Appendix A.
2. Included as Appendix C.
3. Included as Appendix D.
4. For convenience, these decisions by the Supreme Court will be referred to herein as *Quanstrom*, *Palma*, and *Bankers Life*, respectively. Where reference is made to the respective underlying district court decisions, it will be so indicated unless clear from the context.

was a divergence of opinion among the district courts as to that issue. Now, however, as a matter of broad policy and law that question has been answered explicitly and unequivocally by this Court in *Quanstrom* and its companions: whether not to award a contingency risk multiplier in contingency fee cases is clearly a matter within the discretion of the court.

The Department contends that in *Ganson* the First District Court of Appeal enhanced the lodestar fee by a contingency risk multiplier only because it felt it was compelled to do so. Respondent contends that, even if that was the case, a contingency risk multiplier is nonetheless justified, as it was in *Palma*, and that there is sufficient evidence in the record to support such a result.

Beyond the limited issue which has brought this case before the Court, the Department has raised (some for the first time) a variety of other issues on which it disagrees with the First District Court. (The Department suggests that it concerned that the Court is otherwise condemned to repeat its original “mistakes” if this case is remanded.) By this attempt to bootstrap a variety of other issues onto the central issue, the Department is merely trying to cut its losses by attacking virtually every element of the fee determination. In doing so, it is improperly attempting to persuade this Court to retry the case and substitute its judgment for that of the First District Court of Appeal regarding a variety of factual issues.

While the Department correctly points out that the application of a contingency risk multiplier has now been definitively characterized as within the discretion of the trial judge, it loses sight of the fact that the entire matter of the determination of the amount of attorneys’ fees is also a matter within the discretion of the trial judge. Such discretionary matters are not normally disturbed in the absence of a clear showing of abuse of discretion. *In re Estate of McArthur*, 443 So.2d 1052 (Fla. 4th DCA 1984).

The risk of nonpayment of a fee in this case was greater than usual because payment was contingent upon securing an award pursuant to §120.57(1)(b)10., Fla. Stat., which authorizes fee awards against an agency *only* when that agency is found on appeal to have committed gross abuse. This clearly was a contingency fee situation within the parameters of *Palma* and *Quanstrom*. The

District Court properly determined the amount of the contingency fee multiplier and was completely justified in recognizing the parallels between this case and *Palma*. Overall, the award of a contingency risk multiplier is well supported in this case.

The Department's allegation that the 1984 amendments §120.57(1)(b)10, Fla. Stat., somehow eliminated agency liability for attorney's fees at the hearing level is totally without support.

Awards of attorney's fees, including the application of a contingency risk multiplier, for time spent litigating entitlement to attorney's fees are not uncommon in cases of this type. It was not error for the District Court's to award same in this case.

Similarly, it was not error for the First District Court to base the lodestar fee calculation on an hourly rate which it found to be the prevailing community rate, notwithstanding the fact that such rate was in excess of counsel's current rate. All of the factual findings by the District Court are based on uncontested, competent and substantial evidence in the record; and all are well within the Court's sound and permissible discretion.

Notwithstanding the discretionary nature of an award of a contingency risk multiplier, the award of same is justified in this case. The result of the decision of the First District Court of Appeal should be affirmed, or, alternatively, the matter should be remanded for the sole purpose of determining whether a multiplier should be applied.

ARGUMENT

I. NOTWITHSTANDING THE FACT THAT FLORIDA PATIENT'S COMPENSATION FUND V. ROWE AND STANDARD GUARANTY INS. CO. V. QUANSTROM DO NOT MANDATE THE APPLICATION OF AN ENHANCEMENT FACTOR TO STATUTORY AWARDS OF ATTORNEYS FEES, AN ENHANCEMENT FACTOR IS APPROPRIATE IN THIS CASE.

Petitioner Department argues that in *Ganson* the First District Court of Appeal expressly

adopted a position which conflicts with the Third District Court of Appeal's decision in *Travelers Indemnity Co. v. Sotolongo*, 513 So.2d 1384 (Fla. 3rd DCA 1987), and with the Florida Supreme Court's subsequent decisions in *Rowe*, *Quanstrom*, and *Banker's Life*. An examination of the First District Court of Appeal's decision in *Ganson* reveals an express acknowledgement of the divergent opinions in the various districts on the question of whether or not contingency risk multipliers are mandatory in contingency fee cases. Faced with these conflicting viewpoints, the First District Court of Appeal stated that:

Although the matter is not entirely free from doubt, unless and until the matter is further clarified by the Florida Supreme Court, it would appear that the better reasoned view, and the most widely accepted view, is that the contingency risk multiplier should be treated as mandatory in cases where the party seeking fees has entered into a contingent fee agreement. ¹

Immediately subsequent to The First District Court of Appeal's decision in *Ganson*, this Court explicitly resolved the differing views taken by the district courts when it stated that application of a contingency risk multiplier is not mandatory in contingency fee cases. The same issue on which this Court's jurisdiction in this case is founded, whether the application of a contingency risk multiplier as an enhancement to the lodestar is required or discretionary in contingency fee cases, was extensively addressed by this Court in *Quanstrom*, *Palma*, and *Bankers Life*. Any differences of opinion which existed between the district courts on this issue now have been resolved explicitly by this Court; the issue is no longer in need of resolution. From a public policy standpoint, review of any conflict presented by *Ganson* is no longer necessary. What remains for determination is whether a

1. See *Ganson* at 528; Appendix A.

Notwithstanding this statement by the First District Court of Appeal regarding the better reasoned view, it should be noted that *Ganson* also contains language which indicates that the Court did not feel that it had absolutely no discretion in awarding a contingency risk multiplier. In its discussion of the contingency risk multiplier at pages 528-530, the Court considered a number of factors and addressed and rejected several arguments by the Department, eventually stating that:

For all of the reasons set forth above, it is concluded that a contingency risk multiplier should be applied in this case. (e.s.)

contingency risk multiplier should be applied in *Ganson* itself and how that determination should be made.

Respondent believes that a contingency fee multiplier is appropriate in this case and that evidence already in the record supports such a discretionary finding, whether it is made by this Court or on remand. The entire matter of the determination of the amount of attorneys' fees is also a matter within the discretion of the trial judge. Such discretionary matters are not normally disturbed in the absence of a clear showing of abuse of discretion. *In re Estate of McArthur*, 443 So.2d 1052 (Fla. 4th DCA 1984). Many, if not all of the elements necessary to support a contingency risk multiplier have already been addressed by the First District Court in *Ganson*. Those findings should not be disturbed.

A. APPLICATION OF AN ENHANCEMENT OR REDUCTION FACTOR IS DISCRETIONARY WITH THE TRIAL JUDGE.

As already addressed, subsequent to The First District Court of Appeal's decision in *Ganson*, this Court explicitly resolved the differing views taken by the district courts when it stated that application of a contingency risk multiplier is not mandatory in contingency fee cases. As a general principle, this issue is no longer in need of resolution. *Quanstrom, Palma, Banker's Life*.

B. THE SUBSTANTIAL RISK OF NONPAYMENT SUFFICIENTLY JUSTIFIED A CONTINGENCY RISK MULTIPLIER.

Quanstrom identified at least three categories of attorney's fee cases: (1) Public policy enforcement cases; (2) tort and contract claims; and (3) family law, eminent domain, and estate and trust matters. It was also indicated that this was not to be considered an all-inclusive list.¹ Petitioner Department contends that *Ganson* does not fall within any of the three categories and must therefore

1. *Quanstrom* at 833; Appendix C.

be placed in a separate fourth category requiring different treatment.

In many respects, this was an unusual case which does not lend itself easily to categorization. Nominally, it was an insurance case. As such, had the insurer been anyone other than the State, the handling of every aspect of the case (including the present one) would have been well defined. However, the fact that this case did involve the State interjected a twist which not only required it to travel the administrative law route (a system which does not appear to be well equipped to handle actions such as the instant case), it infused into the case some public policy enforcement aspects.

However, Respondent does not agree with the Department's attempt to create a new standard for this class of case (or for this specific case) which, by way of some truly strained logic, appears to reach a conclusion which implies that there can *never* be a contingency risk multiplier in an administrative case. The Department's conclusion is based on the premise that the risk of non-payment cannot be established in an administrative case because of the absence of a fee authorizing statute *at the outset of the litigation*. The purported absence of a fee authorizing statute at the outset of the case is attributed by the Department to the fact that §120.57(1)(b)10., Fla. Stat., does not provide for an award of fees to a prevailing party at an administrative hearing. For good measure, the Department contends that the particular arrangement in this case was not a contingency fee arrangement because the attorney was not to receive a percentage of the amount of damages recovered. This argument eventually reaches its conclusion with the remarkable (and unsupported) statement that: "Without the availability of a fee-authorizing statute at the time the case is undertaken by the attorney, the only 'contingency fee' possible is an agreement whereby the potential fee is taken from the actual recovery".

In its convoluted attempt to reach the desired conclusion, the Department's argument simply ignores some basic premises. A clear indicia of a contingency fee arrangement is whether the attorney is to take nothing if not successful; whether or not the attorney has a contract which provides for a

percentage recovery from a judgment is *not* determinative.' Contrary to the Department's assertions, the fee authorizing statute was present at the outset of the case; potential recovery was, however, one step further removed. The likelihood of recovery under §120.57(1)(b)10., Fla. Stat., was very speculative at the outset because it required that a precise set of circumstances come to pass in order for a fee to be awarded². In short, it represents a situation which involves a *much greater* risk of nonpayment than a case involving a fee-authorizing statute which all but guarantees fees for success at the trial level³. Yet, the Department argues that this considerably *greater* risk of nonpayment is somehow obviated by the absence of the availability of fees at the administrative level (in the absence of an appeal) and thus the risk of nonpayment was not and can never be established. This argument is nonsensical and should be rejected.

It is axiomatic that the difficult burden which must be met for an award of fees under §120.57(1)(b)10., Fla. Stat., significantly increases the risk of nonpayment when payment is contingent upon obtaining such an award. That risk certainly should be considered as a factor in determining whether or not a contingency risk multiplier should be applied.

C. THE DISTRICT COURT DID NOT ERR IN FINDING GANSON HAD A CONTINGENCY FEE AGREEMENT.

The District Court specifically found that the fee arrangement in *Ganson* was quite similar to those in *Quanstrom* and *Palma* and treated it as a contingency fee arrangement? This was

1. See e.g., *Palma*

2. An award of fees under §120.57(1)(b)10., Fla. Stat., can, under these circumstances, only be obtained when there is agency action which, on appeal, is found to have been a gross abuse of agency discretion. The successful party not only has to win, it has to win by a substantial margin; merely prevailing at trial or on appeal brings absolutely no guarantee of fees.

3. e.g., 6627.428, Fla. Stat.

4. *Ganson*, page 527; Appendix A. *Palma*, which similarly did not involve a fee controlled by the size of the recovery was specifically referred to by this Court as a contingencyfee arrangement. *Palma*, page 838; Appendix D.

essentially a factual determination. Notwithstanding the Department's aforementioned novel theories concerning what is or is not a contingency fee agreement and its repeated sanctimonious attacks on the "self-serving" testimony of Respondent's counsel, the Department has offered no cogent argument or evidence that the District Court's finding of the factual existence of a "contingency fee" arrangement is unsupported by the evidence or constitutes a clear abuse of discretion.

D. THE DISTRICT COURT'S FAILURE TO MAKE SPECIFIC FINDINGS REGARDING THE SIZE OF THE CONTINGENCY RISK MULTIPLIER APPLICABLE TO EACH PHASE OF THE CASE WAS NOT ERROR.

The Department alleges that the Court erroneously failed to make specific findings for awarding the contingency risk multiplier with respect to each phase of the case. In support of this proposition, the Department cites a case in which no error was found to have been committed by a court which differentially applied a multiplier. It offers no support for the proposition that such an examination is *required*. However, it is also clear that a contingency risk multiplier may be properly applied to time spent litigating a post judgment attorney fee claim. *Tallahassee Memorial*

1. The Department would have Respondent's "belated, self-serving, and unconscionable" contract dismissed outright because it was not reduced to writing. To support this position, the Department relies upon the case of *FIGA v. R.V.M.P. Corp.*, 681 F.Supp. 806 (S.D. Fla 1988) as authority for the proposition that oral contingency fee agreements are unconscionable and void because they do not meet the requirements of the Rules Regulating the Florida Bar. This particular case involved a contingency fee agreement which was never reduced to writing and wherein the attorney was to receive one-third of the amount recovered, and, if no amount was recovered, his client would pay the costs, but not the fees, of the litigation.

Clearly the public policy served by the Disciplinary Rules is first to protect the client from unscrupulous attorneys and second to reduce controversy regarding fees. This case, in which the claimant would potentially have owed the attorney a large share of any awarded damages, is exactly the type of situation which requires the protection and mutual understanding afforded by a written agreement. It is thus factually distinguishable from the present case in which no fee (or a nominal fee) would have been payable in the event of success on the merits, but failure on the issue of entitlement to fees. In the present case, the claimant was never at risk so there is no public policy served by holding such an agreement void. In *Ganson*, the District Court found this case inapplicable. *Ganson* at 528-529.

Regional Medical Center v. Poole, 547 So.2d 1258 (Fla. 1st DCA 1989).

In an unrelated issue, the Department confuses the "results obtained" factor with the "contingency risk multiplier". As noted by the Court in *Gunson*, the former is a downward adjustment for less than complete success or for success on only part of the claim. *Rowe* at 1151.

With respect to the amount of the multiplier, the Department quotes the Court's conclusion out of context and leaves the reader with the impression that the multiplier was a random selection. To the contrary, the Court picked this multiplier based on the guidelines announced in *Rowe* as applied to its finding that "at the outset, the outcome of the case 'was tentative and incapable of a comforting prediction of success."²

Once again, the Department has made no clear showing of an abuse of discretion in this finding by the First District Court.

E. THE DISTRICT COURT'S COMPARISON OF GANSON TO PALMA WAS NOT ERROR.

The Department alleges that the District Court erred in comparing *Ganson* with *Palma*. As discussed herein Respondent contends that *Ganson* bears many striking resemblances to *Palma*. In *Palma*, this Court approved the decision of the Fourth District Court of Appeal in *State Farm Fire & Casualty Co. v. Palma*, 524 So.2d 1035 (Fla. 4th DCA 1988). Paradoxically, the District Court of Appeal's decision was cited by the First District Court of Appeal in *Ganson* for the very proposition which the Petitioner Department now contends is in conflict with *Quanstrom*. Furthermore, on the facts apparent within the "four corners of the opinion," *Ganson* bears much more resemblance to *Palma* than *Quanstrom*, and the Court should treat is similarly.

Examination of Paragraph 5. of the section of the *Ganson* opinion relating to calculation of

1. *Ganson*, pages 527-528; Appendix A.
2. *Id.*, pages 529-530.

attorney's fees reveals that the district court decisions in *Quanstrom*¹ and *Palma* are cited by the First District Court of Appeal not only an equal number of times, but for the same points of law (including for the proposition that the application of a multiplier in contingency fee cases is mandatory).² Furthermore, the Court recognized the similarity between *Ganson* and the district court decisions in *Quanstrom* and *Palma* with respect to the nature of the fee agreement³, but more importantly, it in fact specifically remarked about the similarity between *Ganson* and *Palma* in discussing the overall size of the fee award in relation to the size of the recovery:

The *Palma* court noted that the litigation in that case had become protracted due to "stalwart defense" and "militant resistance;" characteristics shared by the litigation in this case. (e.s.)⁴

The Department points out that in *Ganson*, unlike *Palma*, the state was not trying to prove any point which would avail it in other cases nationally. This is true. But *Ganson* does force a major change in the way the Department interprets and administers the State Group Health Insurance Plan for all covered state employees as it applies to any alleged preexisting mental or nervous disorder.⁵

Like *Ganson*, *Palma* involved a challenge to a trial court's award of a contingency risk multiplier. Like *Quanstrom*, *Palma* involved a dispute over automobile PIP insurance benefits (a \$600.00 medical bill), and the fee arrangement between the insured and the attorney involved an

1. *Quanstrom v. Standard Guaranty Ins. Co.*, 519 So.2d 1135 (Fla. 5th DCA 1988).

2. *Ganson*, pages 528-530; Appendix A.

3. *Id.* at 527.

4. *Id.* at 529. The Department takes issue with this specific characterization. But, it should be noted that the District Court's observations about the similarity between the attitude of the Department and that of the defendant in *Palma* are actually those of the Hearing Officer who conducted both the hearing on the merits and the hearing on the amount of fees. He was in an excellent position to comment on the nature of the Department's defense and is somewhat more likely to have been an objective judge of this matter than the Department. No error was committed by the District Court in this regard.

5. Compared to *Palma*, the decision in *Ganson* may have less far-reaching an impact, but the fees at issue in *Ganson* are also a small fraction of those involved in *Palma*.

agreement that the attorney would be entitled to a fee set by the Court under 6627.428, Fla. Stat.' On remand from the Fourth District Court of Appeal after reversal on the merits with directions to determine and award attorneys' fees, the trial court held an evidentiary hearing and awarded fees of \$253,500.00, which included enhancement by a contingency risk multiplier of 2.6. The insurer appealed the fee award, contending, among other things, that the contingency risk factor was not applicable. Citing the Fifth District Court of Appeal's decision in *Quanstrom*², the Fourth District Court of Appeal held that the contingency risk factor was applicable "because counsel took the case on a contingency basis requiring him to prevail in order to receive compensation for his services." On review, this Court approved the resulting application of a contingency risk multiplier on the facts of that case.

In contrast to *Palma* and *Ganson*, *Quanstrom* arose out of a trial court's *refusal* to consider awarding a contingency risk multiplier. Like *Palma*, the case involved a dispute over automobile PIP benefits and the fee arrangement between the insured and the attorney similarly involved an agreement that the attorney would be entitled to a fee set by the Court under 6627.428 Fla. Stat. Unlike *Palma* and *Ganson*, the trial court declined to apply a contingency risk multiplier because it did not consider this to be a contingency fee arrangement. The Fifth District Court of Appeal reversed and remanded, holding that this situation did constitute a contingency fee arrangement and, further, that application of a contingency risk multiplier is mandatory whenever a contingency fee arrangement is involved.³ Subsequently, in *Quanstrom*, this Court approved the Fifth District Court of Appeal's decision that this situation constituted a contingency fee arrangement for which a contingency risk multiplier could be applied, but expressly decided that application of a

1. Unlike any of the cases with which it is said to conflict, *Ganson* involved an award of attorney's fees pursuant to §120.57(1)(b)10., Fla. Stat.

2. *Quanstrom v. Standard Guaranty Ins. Co.*, 519 So.2d 1135 (Fla. 5th DCA 1988).

3. The Fifth District Court also specifically noted that its decision was in direct conflict with *Travelers Indemnity Co. v. Sotolongo*, 513 So.2d 1384 (Fla. 3d DCA 1984).

contingency fee multiplier was not mandatory on the trial judge. The case was remanded by this Court to the trial judge for reconsideration as to whether and how big a multiplier should be applied.

*Sotolongo*¹, the Third District Court of Appeal case which in its jurisdictional brief the Department has contended bears a "striking" factual and legal similarity to *Ganson*, arose out of a challenge to a trial court's application of a contingency risk multiplier. The case involved a dispute over benefits payable under a homeowner's policy for lost personal property. Presumably, entitlement to fees was based on 6627.428, Fla. Stat, and it can be inferred from the District Court's opinion that the trial court not only apparently felt legally compelled to award a contingency risk multiplier, but, unlike both *Palma* and *Ganson*, did so without an evidentiary hearing or any findings supporting the fee enhancement. The Third District Court of Appeal reversed and remanded, stating that "the court is not obligated to adjust the lodestar fee in every case where a successful prosecution of the claim was unlikely." The Court directed the trial court to conduct an evidentiary hearing and make findings supporting a fee enhancement. This Court, in *Quanstrom*, approved *Sotolongo* for the proposition that application of a contingency risk multiplier is not mandatory.

Ganson is distinguishable from all of the foregoing cases except *Palma* which it closely mirrors. Respondent contends that similarity supports affirmance of the result in *Ganson*. It certainly did not constitute error for the District Court to compare the two cases.

F. APPLICATION OF A CONTINGENCY RISK MULTIPLIER IS JUSTIFIED IN THIS CASE.

The Department contends that the Respondent did not carry the burden of establishing a justification for enhancement of the lodestar. In *Ganson*, the Court was apparently operating under what we now know to be the mistaken impression that a contingency risk multiplier was mandatory. Thus, it is cannot be conclusively stated whether or not the District Court would have made such a finding under the *Quanstrom* discretionary standard. This Court now has the option of reviewing the

1. Travelers Indemnity Co. v. Sotolongo, 513 So.2d 1384 (Fla. 3rd DCA 1987).

record and making that determination for itself, or remanding the case to the District Court for suitable findings on this issue.

Contrary to Department's assertion, Respondent made a specific claim for an upward enhancement of the fee specifically based upon the existence of a contingency fee situation (which effectively involved nonpayment in the absence of a fee award) and the very difficult burden which must be met in order to secure an award of attorneys fees under §120.57(1)(b)10., Fla. Stat..¹ Furthermore, it is Respondent's opinion that the record contains, and the Court had before it, competent substantial evidence on which to base specific findings supporting the enhancement of the lodestar by the contingency risk multiplier.²

Respondent believes that, should it wish to do so, this Court has ample evidence before it in the record to reach a conclusion, as it did in *Palma*, that a contingency risk multiplier is appropriate in this case, notwithstanding the District Court's reliance on an incorrect interpretation of the *Rowe* requirements.

II. NOTWITHSTANDING THE IMPROPER PRESENTATION TO THIS COURT OF THE QUESTION OF WHETHER SECTION 120.57(1)(b)10., FLORIDA STATUTES, AUTHORIZES AWARDS OF ATTORNEYS FEES AT THE HEARING LEVEL, FEES ARE AWARDBLE AT THE HEARING LEVEL PURSUANT TO THAT STATUTE.

Petitioner Department raises here for the first time the novel theory that §120.57(1)(b)10., Fla. Stat., does not authorize an award of attorneys' fees for work performed at the hearing level. In so doing, Petitioner has gone beyond the scope of the question presented for review and is attempting

1. See "Petitioner's Proposal for Amount of Attorney's Fees and Costs of Litigation", paragraphs 41-48, filed with the Hearing Officer September 14, 1989 (prior to the hearing on fees). Included as Appendix E.

2. See Affidavit of Kenneth D. Kranz - "Statement of Petitioner's Counsel" and Affidavit of Kenneth D. Kranz re Attorney's Fees and Costs, included as Appendix F, and other Exhibits filed in the hearing on attorney's fees, as well as the transcript of the proceeding below.

to attack part of the foundation for the lodestar calculation in this case. Petitioner has not before raised this issue, although it exercised its opportunity to raise objections to the hearing officer's recommendations by filing exceptions thereto.

Generally, once an appellate court has jurisdiction, it may, at its discretion, consider any issue affecting the case. *Cantor v. Davis*, 489 So.2d 18, 20 (Fla. 1986); *Trushin v. State*, 425 So.2d 1126 (Fla. 1983). However, in the absence of fundamental or jurisdictional error, it is also generally inappropriate for a party to raise an issue for the first time on appeal. *Dober v. Worrell*, 401 So.2d 1322 (Fla. 1981); *Abrams v. Paul*, 453 So.2d 826 (Fla. 1st DCA 1984). The Department has not alleged that this issue constitutes fundamental or jurisdictional error, and this Court should decline to address it.

Notwithstanding the foregoing, the Department's argument on this issue is totally without merit. In essence, the Department argues that the 1984 amendment to §120.57(1)(b), Fla. Stat., somehow cut off awards of attorney's fees for work performed at the administrative hearing level. Despite a lengthy discourse on the history of §120.57(1)(b)10., Fla. Stat., and its predecessor, the Department offers absolutely no authority in support of its position. Furthermore, to buttress its argument, it flagrantly misrepresents the Second District Court of Appeal's contemporaneous and directly on-point decision in *University Community Hospital v. Department of Health and Rehabilitative Services*, 493 So.2d 2 (Fla. 2d DCA 1986)¹ as an "unusual" opinion in which "the Second District ignored the revised 1984 law". To the contrary, even a cursory reading of this decision reveals an in-depth examination of the effect of the 1984 amendments on *exactly* this point, after which the Court concluded that *Purvis v. Department of Professional Regulation*, 461 So.2d 134 (Fla. 1st DCA 1984) and *Johnston v. Department of Professional Regulation*, 456 So.2d 939 (Fla. 1st DCA 1984) were still good law and that the aggrieved party was entitled to recover from **HRS**

1. Included as Appendix G.

fees for each stage of the litigation.' 493 So.2d at 4. These cases are still good law -- §120.57(1)(b)10., Fla. Stat., attorney fee awards include work performed at the hearing level. This argument should be rejected.

111. NOTWITHSTANDING THE IMPROPER PRESENTATION TO THIS COURT OF THE QUESTION OF WHETHER ATTORNEY'S FEES ARE RECOVERABLE FOR TIME SPENT LITIGATING ENTITLEMENT TO ATTORNEY'S FEES, SUCH FEES ARE PROPERLY AWARDABLE.

As with the preceding argument, Petitioner Department raises here for the first time the argument that attorney's fees are not recoverable for time spent litigating entitlement to attorney's fees. Once again, the Department has not alleged that this issue constitutes fundamental or jurisdictional error, and, for the reasons discussed previously, this Court should decline to address it.

Notwithstanding the foregoing, fees are frequently awarded for work performed litigating entitlement to fees in a variety of types of administrative cases, including federal civil rights cases, where there is an element of public policy enforcement. In *Williamsburg Fair Housing Committee v. Ross-Rodney Housing Corp.*, 599 F.Supp. 509 at 521 (S.D. New York Oct. 26, 1984)² the Court pointed out that the failure to compensate for time spent litigating the amount of fees would effectively lower the overall value of the award and conflict with the congressional policy of encouraging competent attorneys to represent clients in civil rights cases. In a recent Public Employees Relations Commission case involving a partial contingency fees situation, the Commission pointed out that its policy allows a prevailing party to recover for time spent litigating the appropriateness and amount of attorney's fees. *Hillsborough Community College Chapter of*

1. *Purvis* provided for an award of fees for "all proceedings, including this appeal" and directed a hearing on "the amount of awardable costs and attorney's fees for appellant at the hearing level and on this appeal". 461 So.2d at 137-138. *Johnston* provided for "an award of attorney's fees for all proceedings including this appeal and costs to be taxed against appellees". 456 So.2d at 944.

2. Included as Appendix H.

the Faculty United Service Association v. Board of Trustees For Hillsborough Community College, Case No. CA-88-021, (PERC Mar. 1, 1990)¹.

In a more typical setting, *Tallahassee Memorial Regional Medical Center v. Poole*, 547 So.2d 1258 (Fla. 1st DCA 1989) provided not only for an award of fees, but applied a contingency risk multiplier, for post-judgment work performed solely to perfect a claim for attorneys' fees. The Court pointed out that the contingent nature of the case was set as of the time of the initial fee agreement; the rendering of a judgment did not eliminate the contingent nature of the fee.

The Department has failed to make a clear showing of the Court's abuse of discretion and the award of fees for time spent litigating the amount of fees should not be disturbed. *In re Estate of McArthur*, 443 So.2d 1052 (Fla. 4th DCA 1984).

**IV. NEITHER PEREZ-BORROTO v. BREANOR
MIAMI CHILDREN'S HOSPITAL v. TAMAYO
CONSTRAIN THE HOURLY RATE UNDER THE
CIRCUMSTANCES OF THIS CASE; THE DISTRICT
COURT CORRECTLY DETERMINED THE
HOURLY RATE AND NUMBER OF HOURS IN
CALCULATING THE LODESTAR.**

Petitioner, Department, contends that *Perez-Borroto v. Brea*, 544 So.2d 1022 (Fla. 1989) and *Miami Children's Hospital v. Tamayo*, 529 So.2d 667 (Fla. 1988) prohibit the use of an hourly rate in excess of the individual attorney's hourly rate in computing the lodestar. Neither of these cases are factually or legally on point. *Perez-Borroto* involved an award of fees to a defense counsel whose fees were being paid by an insurance company under a fee agreement providing for payment of a contractual hourly rate plus a flat rate for trial days. This Court held that in such *noncontingent* situations *Rowe* limits fees to the contractual hourly rate between the client and the attorney. *Tamayo*, on the other hand, involved a limitation founded on a contractual contingency fee specifically fixed at a percentage of the recovery. To cite these cases for the principle alleged by the

1. Included as Appendix I.

Department paints with too broad a brush.

In recent months this Court has realigned the law regarding attorney's fees in a variety of cases reflecting several of the vast number of possible permutations and combinations of fee arrangements. On the continuum of possibilities, *Perez-Borroto* and *Tamayo* represent but two points, both of which fall rather far from the present case. Clearly, a separate point on the continuum is occupied by *Palma*, a case much more similar to the present case in which the only fee the claimant's attorney was to receive was as awarded by the Court. Even more recently, in *Kaufman v. MacDonald*, 557 So.2d 572 (Fla. 1990), this Court distinguished the limitation imposed by a *Tamayo* type of "pure" contingency fee arrangement and approved a fee award under an agreement which provided that the attorney was to be paid a specific percentage of the recovery or the amount awarded by the court under the prevailing party statute, *whichever was higher*. Other courts have similarly recognized these types of fee arrangements. *Inacio v. State Farm Fire and Casualty Co.*, 550 So.2d 92, 96 (Fla. 1st DCA 1989); *Tampa Bay Publications, Inc. v. Watkins*, 549 So.2d 745 (Fla. 2d DCA 1989).

Contrary to Petitioner's argument, none of the foregoing cases specifically hold that, in the absence of a fee arrangement which provides for a specific hourly rate, the hourly rate to be used in the calculation of a lodestar fee is expressly limited to the attorney's hourly rate for other clients. To the contrary, the Courts have consistently recognized that one of the factors to be considered is the "fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature" or more succinctly, "the prevailing hourly rate"². That is exactly what the Court examined in the present case,³

The Department **also** questions the competence of the evidence presented to establish the

1. Rule 4.15, Rules Regulating the Florida Bar
2. *Watkins*, *supra* at 747.
3. Ganson, page 526; Appendix A.

prevailing rate and raises a number of factual issues which were involved in the determination of the lodestar amount, including the number of hours and whether computer timekeeping (with the concomitant absence of paper timeslips) constituted contemporaneously kept time records. These are essentially factual issues which were addressed by the Court.' The Department may not agree with the trier of fact's assessment of the credibility of the evidence², but those determinations by the District Court are a matter of discretion entitled to a presumption of correctness in the absence of a clear abuse of that discretion. *In re Estate of McArthur*, 443 So.2d 1052 (Fla. 4th DCA 1984).

CONCLUSION

The sole question initially presented for review by this Court was whether the application of a contingency risk multiplier is mandatory or discretionary. As a matter of law, that question has already been resolved by this Court in a manner contrary to application of the principle by the Court below. The question remains, whether on the facts of the case, it can be determined if a contingency risk multiplier is justified and appropriate. Respondent Ganson contends that it can be determined, and that based on the totality of the findings below and the evidence in the record a contingency risk multiplier of 2.0 is justified in this case.

Petitioner, Department of Administration, expresses thinly veiled outrage and hostility at the amount of the attorney's fee awarded by the First District Court of Appeal in this case. Yet, it cannot be overlooked that it would have been very simple for Petitioner to have avoided paying *any* fees at all merely by interpreting its Benefit Document in a reasonable fashion in the first place or by accepting the Hearing Officer's Recommended Order. It might well even have been able to reject the Recommended Order without committing gross agency abuse and incurring liability for fees.

1. *Id.*, pages 525-526.

2. For example, Petitioner's comment about Ganson's Exhibit 3 "Affidavit of Kenneth D. Kranz, re Attorney Fees and Costs" carrying no indication that any of the claimed time was contemporaneously documented is unequivocally contradicted by the actual document. See paragraph 2. of the document which is included in Appendix F; it also appears in Petitioner's Appendix 7.

Furthermore, once the liability for fees attached, the Department might have taken advantage of the opportunity to present evidence at the hearing on fees in an attempt to question the factual basis for the amount of the fees. But, the Department failed to avail itself of *every* opportunity it had to make a choice which would have mitigated its losses. Instead, the Department invariably followed the path which inevitably led it to the award of fees which is here for review; had the Department not made the *wrong* choice at *every* possible turn, we would not be here today.

All of the factual issues related to calculation of the lodestar with which the Department disagrees were addressed by findings in the Hearing Officer's Report and Recommendation and adopted by the Court. At hearing, the Department offered absolutely *no* evidence to rebut the evidence presented by Respondent Ganson. This Court should not allow the Department at this late date to retrace its steps and attempt to use this Court to correct *its* errors. The Department has not made a clear showing of abuse and the District Court's determinations on all of these issues should not be disturbed.

Respondent, Terri J. Ganson, respectfully requests this Court to affirm the result of the First District Court of Appeal's decision regarding the amount of attorney's fees to be awarded. Alternatively, if this Court determines that reversal and remand are appropriate, Respondent respectfully requests that remand be only for the very limited purpose of a specific finding as to whether or not the application of a contingency risk multiplier is appropriate in this case.

Respectfully submitted this 8th day of June, 1990,

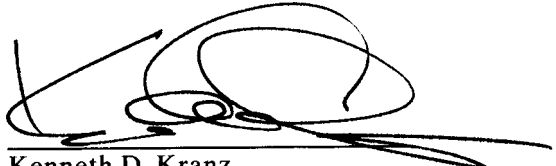


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing answer brief has been furnished to the following by U.S. Mail this 8th day of June, 1990.

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