IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,396
FIRST DISTRICT CASE NO. 88-1568

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

Petitioner,

vs.

TERRI J. GANSON,

Respondent.

_____/

PETITIONER, STATE OF FLORIDA, DEPARTMENT OF ADMINISTRATION, OFFICE OF STATE EMPLOYEES, INSURANCE, INITIAL MERITS BRIEF ON ITS PETITION FOR DISCRETIONARY REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL

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ST TEMENT OF THE CASE AND FACTS

The present controversy reaches this court pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), and Article V, Section 3(b)(3), of the Florida Constitution, following the First District Court of Appeals's December 22, 1989, decision.[1]

The First District adopted the Report and Recommendation submitted to it by an administrative Hearing Officer as "the order and opinion of the court". The First District Court's adopted opinion interpreted Florida Patients Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985)[2] as holding that the application of a multiplier is mandatory in contingent fee cases. As additional authority, the First District cited the opinions in Quanstrom v. Standard Guaranty Insurance Co., 519 So.2d 1135 (Fla. 5th DCA 1988) and State Farm Fire & Casualty Co. v. Palma, 524 So.2d 1035 (Fla. 4th DCA 1988).

The First District recognized its decision expressly and directly conflicted with the Third District Court of Appeal's decisions in Travelers Indemnity Company v. Sotolongo, 513 So.2d

1. A conformed copy of the First District Court of Appeal's decision in Ganson v. State of Florida, Department of Administration Office of State Employees' Insurance, 554 So.2d 522 (Fla. 1st DCA 1989), is attached hereto as required by Florida Rule of Appellate Procedure 9.120(d), and is designated (A-1).

2. A copy of Florida Patients Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), is attached hereto as part of the Appendix allowed by Florida Rule of Appellate Procedure 9.220 because of its centrality to the issues, and is designated (A-2).

Insurance Company v. Quanstrom, 555 So.2d 828 (Fla. 1990).[4] In Quanstrom, this court approved the proposition in Travelers Indemnity Co. v. Sotolongo, 513 So.2d 1384 (Fla. 3rd DCA 1987), that the application of a multiplier is not mandatory, under Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985), when the prevailing party's counsel is employed on a contingency fee basis.

The underlying controversy arises out of a relatively simple administrative dispute involving the administration of the State Health Insurance Plan. TERRI J. GANSON (here-after GANSON) initiated litigation against STATE OF FLORIDA, DEPARTMENT OF ADMINISTRATION, OFFICE OF STATE EMPLOYEES' INSURANCE (here-after DOA), seeking recovery of $5,682.15.[5] The only issue in dispute in the underlying controversy centered on DOA's interpretation of the term "mental or nervous disorder" under the State Employees' Group Health Insurance Benefit Document.

3. A copy of Travelers Indemnity Company v. Sotolong, 513 So.2d 1384 (Fla. 3d DCA 1987), is attached hereto pursuant to Florida Rule of Appellate Procedure 9.220, and designated (A-3).

4. Standard Guaranty Insurance Company v. Quanstrom, 555 So.2d 828 is attached here pursuant to Florida Rule of Appellate Procedure 9.220, and designated (A-4).

5. The dollar amount in dispute was never controverted.

Specifically, Respondent challenged the policy relating to a limitation in the State Group Health Insurance (Plan) against payment for any illness that the insured received diagnostic treatment or received services within one year prior to enrollment in the plan. (R-154-155)

In this case, the Respondent was treated for depression prior to her employment by the state and simultaneous enrollment in the Plan in January, 1986. (R-64-65, 85-88) Subsequent to her enrollment in the plan, she was hospitalized in April, 1986, and was diagnosed and treated for manic depressive illness otherwise known as bipolar affective disorder. (R-187-189)

The Department denied Respondent's claims for reimbursement for treatment of bipolar affective disorder throughout her first year of enrollment in the Plan (February 1, 1986 to January 31, 1987) because of her pre-existing mental condition. (R-72-73)

The State Group Health Insurance Plan Benefit Document defines what is covered under the Plan, lists the conditions under which benefits are paid, defines limitations for certain conditions or expenses, and lists illnesses, accidents, or expenses which are specifically excluded by the Plan. (R-128) The Benefit Document is created and maintained by the Department of Administration and approved by the Legislature. (R-128)

The pre-existing condition exclusion in the State Group Health Insurance Plan Benefit Document specified in relevant part that:

> For any accident or illness for which an insured received diagnostic treatment or received services within three-hundred and sixty-five consecutive days prior to the effective date of

> coverage, no payment will be allowed for services related to such accident or illness which are received during the three hundred and sixty-five consecutive days subsequent to the effective date of coverage... (R-154)

The Benefit Document further defines "illness" as: "...physical sickness or disease, pregnancy, bodily injury congenital anomaly or mental or nervous disorder...," (e.s.) (R-155)

Respondent was formally notified of the denial of these claims and timely requested a 120.57, Florida Statutes, hearing on the denial of reimbursement. (R 1-4) Prior to the hearing, the parties entered into a prehearing stipulation (R-9A-9F) A formal hearing was held on October 6, 1987.

The Hearing Officer concluded that Respondent's condition was not a pre-existing condition within the meaning of the pre-existing condition exclusion of the Plan (R-31), and recommended that Respondent be reimbursed for the medical claims in dispute in the stipulated amount of $5,682.15. (R-39-40)

Subsequently, on May 3, 1988, Secretary Adis M. Vila of the Department of Administration issued a final order rejecting the finding of the Hearing Officer that Respondent's condition was not pre-existing. (R-44-53)

GANSON appealed, pursuant to Section 120.68, Florida Statutes, the final administrative order of DOA denying Ganson's claim for health insurance benefits.

The First District reversed DOA's final order and granted GANSON's motion for attorney's fees under section 120.57(1)(b)10, Florida Statutes (1987), based upon the assertion that the failure

to adopt the Hearing Officer's Recommended Order was a gross abuse of the agency's discretion. (A-6)

The District Court directed the DOA to refer the matter back to that administrative Hearing Officer for an evidentiary hearing to determine the amount of reasonable attorney's fees. (A-8)

The Hearing Officer, took evidence and determined an enhancement equal to the lodestar award of $24,125.00, was required under Rowe for the recover of $5,682.15 in an administrative action which primarily consisted of filing an administrative petition, attending a 4 hour administrative hearing, taking two depositions, and filing one appeal. (A-7)

The First District adopted the hearing officer's analysis in total without comment. (A-6)

Following the First District Court of Appeal's decision on December 22, 1989, DOA filed its Notice To Invoke Discretionary Jurisdiction of this court pursuant to Florida Rule of Appellate Procedure 9.120 on January 19, 1990. The Department seeks review of the decision of the First District Court of Appeal which is in express and direct conflict with decisions of the Florida Supreme Court and the Third District Court of Appeal on the application of contingency risk multipliers in awarding reasonable attorney's fees under Rowe.

Therefore, the order of the First District Court of Appeal should be overturned.

SUMMARY OF ARGUMENT

In this case the First District awarded an attorney's fee of $48,250.00 which was recommended by an administrative hearing officer where the $24,125.00 lodestar amount was "mandatorily" enhanced by a 2.0 contingency fee multiplier. That First District decision expressly conflicts with decisions of this Court and the Third District Court of Appeal.

As authority for its decision, the First District referred to language at page 1151 of Rowe which stated:

> Based on our review of the decision of other jurisdictions and commentaries on the subject, we conclude that in contingent fee cases, the lodestar figure calculated by the Court is entitled to enhancement by an appropriate contingency risk multiplier in the range of 1.5 to 3. (emphasis in original)

Following a review of this Rowe language, the First District concluded: "The use of the phase 'entitled to enhancement' supports a conclusion that the application of a multiplier is mandatory in contingent fee cases, and Florida appellant courts in two districts have so held." When faced with contrary decisions from the Third District Court of Appeal, the First District concluded: "unless and until this matter is clarified by the Florida Supreme Court, it would appear that the better reasoned view... is that the contingency risk multiplier should be treated as mandatory.. ."

Because of this erroneous conclusion, the First District Court never considered whether the circumstances warranted the

application of a contingency fee multiplier.

The First District decision conflicts with this court's decision in Rowe by utilizing the same factors to determine an award of attorney's fees under the Administrative Procedure Act as other courts have utilized to award of attorney's fees under Section 627.428, Florida Statutes.

This court in Quanstrom emphasized "that the criteria and factors utilized in contingency fee multiplier cases must be consistent with the purpose of the fee-authorizing statute or rule. No such determination was made by the District Court in the instant case.

Unlike the fee-authorizing statutes in Quanstrom, Rowe, Owens, and Palma, Section 120.57(1)(b) 10, Florida Statutes, does not grant attorney's fees to a prevailing party at hearing. An attorney's fee is awardable only in the court's discretion-"when there is an appeal;" whereas, attorney's fees under Section 627.428, Florida Statutes, shall be awarded after a favorable recovery.

The First District misapplies Rowe in concluding Ganson had a contingency fee agreement that was quite similar to the fee arrangement addressed in Quanstrom and Palma.

This alleged fee arrangement between Ganson and her attorney was never reduced to writing. The only evidence of any agreement is in the form of self-serving testimony given by Ganson's attorney. The self-serving nature of that testimony precluded the court from making an award based solely on the attorney's testimony Lyle v. Lyle, 167 So.2d 256 (Fla. 2nd DCA 1964).

Even if the First District was correct in concluding the unwritten arrangement created a contingency fee agreement, it nonetheless is an unconscionable agreement. Unconscionable agreements can not support a contingency fee multiplier. Aperm of Florida v. Trans-Coastal Maintenance Co., 505 So.2d 459 (Fla. 4th DCA 1987).

The First District decision also misapplies Rowe in its selection of the appropriate multiplier. Citing Appalachian, Inc. v. Ackman, 507 So.2d 150 (Fla. 2d DCA 1987), the court held: "At the outset the outcome of this case was tentative and incapable of a comforting prediction of success. Under such circumstances, Rowe requires a multiplier of 2."

The First District thereupon applied the multiplier to the administrative phase, appeal phase, and attorney fee phase. There was no finding that each of these phases were equally as incapable of a "comforting prediction of success". Surely, the attorney fee portion had a greater prediction of success than did the administrative portion. Rowe requires the Court to state the grounds on which it justifies the enhancement or reduction with specificity. That was not done in Ganson.

The Hearing Officer erred in assuming the District Court intended to award attorney fees under Section 120.57(1)(b) **10**, Florida Statutes, to the administrative and attorney fee phases merely by the reference to 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). While Purvis and Johnston allowed attorney's fees to the

administrative and appellate phases, both cases were decided under a pre-amended version of Section 120.57(1)(b) 10, Florida Statutes.

The District Court erred in awarding attorney fees to recover attorney's fees where the client was not obligated to the attorney for the work. Ganson was not obligated to her attorney for any of the fees awarded to her attorney by the District Court. Ganson's award conflicts with Service Insurance Co. v. Gulf Steel Corp., 412 So.2d 967 (Fla. 2d DCA 1983).

Finally, the First District's decision misapplies Rowe; Perez-Borro v. Brea, 544 So.2d 1022, (Fla. 1989); and Miami Children's Hospital v. Tamayo, 529 So.2d 667 (Fla. 1988), in concluding an attorney is entitled to abandon the fee customarily charged to his clients in favor of a higher community service rate. In Ganson, the First District awarded Ganson's attorney $125 per hour even though Ganson's attorney testified and stated in his affidavit that his usual hourly rate was $100 per hour.

ARGUMENT

I. FLORIDA PATIENT'S COMPENSATION FUND v. ROWE, 472 So.2d 1145 (FLA. 1985), AND STANDARD GUARANTY INS. CO. v. QUANSTROM, 555 So.2d 828 (FLA. 1990), DO NOT MANDATE THE APPLICATION OF *AN* ENHANCEMENT FACTOR TO STATUTORY AWARDS OF ATTORNEY'S FEES.

At the outset, it is informative to consider the history and background of Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985). In that case this court adopted the federal lodestar analysis in an effort to establish some consistency and moderation in attorney's fee awards. As later decisions reveal, Rowe's goal was to inject some objectively into the awards and create caps for unreasonable and outrageous attorney's fee awards. Stabinski, Funt & De Oliveria, P.A. v. Alvarez, 490 So.2d 159 (Fla. 3rd DCA 1986).

In Standard Guaranty Insurance Co. v. Quanstrom, 555 So.2d 828 (Fla. 1990), the Supreme Court detailed its efforts to place caps on the fees awarded under Rowe: "The factors and caps ensured that the fee would not be significantly different in amount than it would be absent the statutory provision." Id. at 831. The Court explained there clearly was no intent on the part of the legislature to increase the amount of attorney's fees when awarding a statutorily-directed reasonable attorney's fee in contingency fee cases.

The federal lodestar approach, as this court recognized in Rowe, is a two-fold process. First, the court must determine the number of hours reasonably expended in the defense or prosecution of a particular action. Once the reasonable number of hours is

established, that figure is multiplied by a reasonable hourly rate. The sum of those two numbers yields "the lodestar", which is a relatively objective basis for attorney's fee awards. Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985); Aperm of Florida, Inc. v. Trans-Coastal Maintenance Co., 505 So.2d 459 (Fla. 4th DCA 1987).

Determining the reasonable number of hours and the reasonable hourly rate encompasses virtually all of the individual factors expressly set out in The Florida Bar Code of Professional Responsibility Rule 4-1.5. More specifically, Rule 4-1.5 lists eight factors as guides in determining the reasonableness of an attorney's fee, including:

1. The time and labor required, the novelty and difficulty in the questions involved, and the skill requisite to perform the legal service properly;
2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
3. The fee customarily charged in the locality for similar legal services;
4. The amount involved and the results obtained;
5. The time limitations imposed by the client or by the circumstances;
6. The nature and length of the professional relationship with the client;
7. The experience, reputation, and ability of the lawyer or lawyers performing the services; and
8. Whether the fee is fixed or contingent.

Rowe recognized these factors help determine both the reasonable hourly rate and the reasonable number of hours necessary for a

particular proceeding. In fact, they subsume virtually every factor suggested as a basis for the multiplier analysis including the "contingency" nature of the representation (number 8), which is the second phase of the lodestar calculation. See also, Aperm of Florida, Inc. v. Trans-Coastal Maintenance Company, 505 So.2d 459 (Fla. 4th DCA 1987); Winterbotham v. Winterbotham, 500 So.2d 723 (Fla. 2d DCA 1987); and FIGA v. R.V.M.P. Corp., 681 F. Supp. 806 (S.D. Fla. 1988),

Once the initial lodestar figure is reached, it may be increased or decreased in unusual or unique circumstances. This court specifically held the following in Rowe:

> Once the court arrives at the lodestar figure, it may add or subtract from the fee based upon a "contingency risk" factor and the "results obtained", (emphasis added) Id. at 1151.

The Rowe court did not give extensive guidance on when it was proper to add or subtract from the lodestar figure, or if such calculations were mandatory or permissive. Because of this lack of guidance and subsequent inconsistent decisions from the various Florida District Courts of Appeal, this Court resolved the issue in Quanstrom.[6] Consequently, the first question under consideration is the discretionary nature of applying the enhancement factor to the lodestar figure.

6. The very basis of this appeal which is the conflict between Standard Guaranty Insurance Company v. Quanstrom, 555 So.2d 828 (Fla. 1990), and Travelers Indemnity Company v. Sotolongo, 513 So.2d 1384 (Fla. 3d DCA 1987), reflects the divergent attitudes toward application of the enhancement figure.

A. Application Of An Enhancement Or Reduction Factor Is Discretionary With The Trial Judge.

In the underlying appeal the First District was persuaded that Rowe's language "is entitled to enhancement by an appropriate contingency risk multiplier", created a guaranteed enhancement for attorneys working under a contingency fee contract. The First District Court in Ganson concluded it had no discretion whether or not to apply an enhancement multiplier and opined the following in reference to the Rowe decision:

> The use of the phrase "entitle to enhancement" supports a conclusion that the application of a multiplier is mandatory in contingency fee cases, and Florida appellate courts in two districts have so held. See State Farm Fire & Casualty Co. v. Palma, 524 So.2d 1035 (Fla. 4th DCA 1988); Quanstrom v. Standard Guaranty Insurance Company, 519 So.2d 1135 (Fla. 5th DCA 1988).

Id at 528

The Ganson decision is clearly in conflict with the Quanstrom decision where this Court clarified the language of Rowe that has lead to contrary results in cases with similar factual and legal issues. Quanstrom unequivocally found the application of a multiplier is not mandatory and specifically stated:

> We approve Travelers Indemnity Co. v. Sotolongo for the proposition that the application of a multiplier is not mandatory under Rowe when the prevailing party's counsel is employed on a contingency fee basis, an we disapprove the contrary view set forth in the opinion below. Id at 835

The First District Court in Ganson clearly recognized its interpretation of Rowe was contrary to the opinions adopted by

other district courts; nevertheless, the Ganson court adhered to the position that the mandatory application of a contingency risk multiplier was the better reasoned view. That position was unmistakably rejected by this court in Quanstrom. The Ganson court held in pertinent part:

> 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. (emphasis added) Id at 528

Contrary to the lower court's position, it is indisputable that the application of an enhancement or detraction figure from the lodestar is discretionary under Rowe. This court clearly recognized the discretionary nature of the enhancement when it held:

> Once the court arrives at the lodestar figure, it may add or subtract from the fee based upon a "contingency risk" factor and the ''results obtained." Rowe at 1155. (Emphasis added).

The Florida Supreme Court utilized the term "may", which has for decades been recognized as a permissive and not a mandatory verb. McDonald v. Rowland, 65 So.2d 12 (Fla. 1953). In spite of this specific language in Rowe supra, that dictates discretion in applying an enhancement, the First District Court in Ganson found the mandatory application of the contingency risk multiplier was the better reasoned view, and applied it as such. The Ganson decision is flagrantly contrary to this Court's decision in Rowe, and defies the primary purpose of Rowe, which was to supply

uniformity in the application of reasonable attorney fees among the district courts of this state.

This Court also issued an opinion in Bankers Life Insurance Co. v. Owens, 554 So.2d 1165, (Fla. 1990) rejecting the Fifth District Court's reliance on Quanstrom for the proposition that the application of a multiplier was mandatory. This Court remanded the cause to the trial court for reconsideration in light of the principles set forth in Quanstrom. While a remand in the instant case is equally appropriate in view of the court's deviation from the principles of Rowe, the First District's misapplication of several key provisions of law will undoubtedly be repeated on remand without this court's guidance. A detailed discussion of those key areas follows in this brief.

As far as the application of a multiplier, this court has made it absolutely clear that Rowe did not require the mandatory application of a contingency risk multiplier:

> The Fifth District Court of Appeal reversed the trial court, finding that this was a contingency fee agreement and that " the application of a multiplier factor is mandatory on the trial judge when the prevailing party's counsel is employed on a contingency fee basis and a reasonable attorney's fee is being calculated as directed in Rowe." 519 So.2d at 1136. We disagree with the holding that a multiplier must be applied under these circumstances.
>
> * * *
>
> In view of the Fifth District Court of Appeal's holding in the instant case, we emphasize that the words "must consider" do not mean "must apply", but rather means "must consider whether or not to apply" the contingency fee multiplier.

Quanstrom at 830. This Court has removed all doubt that trial courts should exercise discretion in determining the appropriateness of applying a multiplier. In the instant case, the hearing officer did not exercise that discretion because of his belief that the application of a multiplier was mandatory.

Recognizing the United States Supreme Court, in Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U. S. 711 (1987), unanimously rejected that portion of the lodestar approach pertaining to the contingency fee multiplier, this Court concluded: "It is evident that the use of the multiplier has been substantially restricted if not eliminated by this decision." Id at 832. Given these modifications in the calculation of the contingency risk multiplier, this court reexamined Rowe:

> We find it necessary to reexamine our decision in Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985), in view of the recent decisions by the United States Supreme Court in Blanchard v. Bergeron, 109 S.Ct. 939 (1989), and Pennsylvania v. Delaware Valley Citizen' Council for Clean Air, 483 U. S. 711 (1987), which effectively eliminated the use of contingency fee multipliers in computing fees under the lodestar approach.

Id at 829. At the conclusion of its review, this Court reaffirmed the lodestar approach as the basic starting point and modified the use of the contingency fee multiplier. This court concluded:

> Different types of cases require different criteria to achieve the legislative or court objective in authorizing the setting of a reasonable attorney's fee. Although we reaffirm our decision in Rowe concerning the lodestar approach as the basic starting point, we find that the use of the contingency fee multiplier should be modified. For a better understanding, we find it appropriate to place attorney's fee cases into the following three categories: (1) Public policy enforcement cases; (2)tort and contract claims; and (3)

> family law, eminent domain, and estate and trust matters. These categories are not intended to be all-inclusive.

Id at 833. The subject award of attorney fees following review of an administrative action does not fall within any of the three categories, recognized by this court and must be placed in a separate fourth category. This categorizing is permitted under Quanstrom because the Court specifically recognized that the cited categories were not intended to be "all-inclusive".

B. THE RISK OF NON PAYMENT WAS NOT SUFFICIENTLY ESTABLISHED IN ACCORDANCE WITH THE ADMINISTRATIVE PROCEDURE ACT FEE STATUTE TO JUSTIFY A CONTINGENCY RISK MULTIPLIER?

The Rowe Court determined the reason for the contingency risk factor was simply to recognize the risk the attorney was taking.

The purpose of considering risk in enhancing the lodestar in contingency fee cases has been addressed by the United States Court of Appeals for the District of Columbia Circuit in Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980). Copeland was a Title VII action in which the plaintiff prevailed on her claim for gender discrimination. Because Title VII provided for the award of attorney fees to the prevailing plaintiff, the court was required to review the award of fees to the plaintiff under the federal lodestar approach. When discussing the enhancement of the lodestar because of a contingency risk, the court carefully pointed out that when speaking of contingency multipliers, the term "contingency" should not be confused with a contingency fee arrangement. Under a contingency fee arrangement, typically, an attorney in a personal injury case would take a percentage of the

recovery. In contrast, the "contingency" under the federal lodestar system is merely a recognition of the likelihood a claim will not be successful and, thus, the attorney risks not being paid. As stated by the court:

> It is important to recognize that the contingency adjustment is designed solely to compensate for the possibility at the outset that the litigation will be unsuccessful and that no fee will obtained. Contingency adjustments of this sort are entirely unrelated to the "contingent fee" arrangements that are typical in plaintiffs' tort representation. In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery. Such is not the case in contingency adjustments of the kind we describe herein. The contingency adjustment is a percentage increase of the "lodestar" to reflect the risk that no fee will be obtained. The contingency risk is not a percentage increase based on the amount of recovery.

Id. at 893. Accord Blum v. Stenson, 465 U.S. 886, 904 (1984) (Marshall, J., concurring).

This Court in Quanstrom at page 833, adopted this federal court analysis and application of a contingency risk multiplier to enhance the lodestar.

In the instant case, Respondent's attorney testified that at the outset he believed the possibility of being successful was likely. Yet because of the Administrative Procedure Act, the likelihood of even getting a fee out of it was very low:

> A. That was the essential contingency, right. The likelihood at the front end, as I've said already, I thought the likelihood of the case being resolved in her favor was high, I though that was good, reasonably good. The likelihood of my ever getting a fee of any consequence out of it, if it went full term I thought it was, was very low.

Q. So you never had an agreement with her that you would pick up 33 and a third percent of the amount awarded?

A. No. It was never a fee like that. It was--it was more in the nature of what I thought she could afford, what she--more in the nature of what she wanted to give me I think is probably the fairest way to characterize it. (Trans. P.26)

In point of fact, Respondent's arrangement with her attorney, did not fall within the concept of a contingency fee arrangement because the attorney did not receive a percentage of the amount of damages recovered.

Similarly, Ganson's arrangement with her attorney did not fall within the concept of a contingency adjustment because of the absence of a fee authorizing statute "at the outset of the litigation". The application of the adjustment to enhance the lodestar is clearly contrary to the purpose of attorney's fees awards under the Administrative Procedure Act.

The courts have repeatedly held that the 1974 Administrative Procedure Act (APA) enforces its discipline on all agency action, unless specifically exempted, which affects the substantial interests of a party. E. g., State ex rel. Dept. of General Services v. Willis, 344 So.2d 580 (Fla. 1st DCA 1977); School Board of Leon County v. Mitchell, 346 So.2d 562 (Fla. 1st DCA 1977); McDonald v. Dept. of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977). The Act subjects all such agency action to the judicial review which Ganson here seeks. Section 120.68.

See also Graham Contracting, Inc. v. Department of General Services, 363 So.2d 809 (Fla. 1st DCA 1978), dismissed, 364 So.2d

892 (Fla. 1978); 363 So.2d 810 (Fla. 1st DCA 1978), Cert. denied, 373 So.2d 457 (Fla. 1979).

In Graham Contracting v. Dept. of General Services, the court determined the agency's private contract with Graham Contracting did not exempt the department from the APA, and if it did it would not be given effect over the APA itself.

Section 120.52(1)(b) of the APA expressly includes within its ambit all departments of the executive branch, as well as all divisions, bureaus, sections and subsections within each department. No executive department (or unit within a department) is exempt or can be exempt from the APA without direct statutory amendment to the APA or by statutory exclusion in another area of law.

Clearly, attorney fees awarded by a district court under the APA is distinguishable from trial court attorney fee awards in public policy enforcement, tort and contract, or family law, eminent domain, and estate and trust cases. This court recognized these difference and emphasized in Quanstrom the difference might warrant consideration of different factors to remain consistent with the legislative intent.

The Quanstrom court held: "we emphasize that the criteria and factors utilized in these cases must be consistent with the purpose of the fee – authorizing statute or rule. No such determination was made by the district court in the instant case. Neither the hearing officer, nor district court explained how the statutory objective was being served in the upward adjustment of the lodestar. Obviously, there was no discussion because of the

mistaken belief that the multiplier was mandatory under Rowe. In the entire opinion the only reference to the fee-authorizing statute was contained on page 524 where the statute was merely summarized as follows:

> The statutory provision pursuant to which the court has granted an award of attorney fees, Section 120.57(1)(b)(10), Florida Statutes (1987), reads as follows, in pertinent part:
>
> When there is an appeal, the court in its discretion may award reasonable attorney's fees and costs to the prevailing party if the court finds that the appeal was frivolous, meritless, or an abuse of the appellate process or that the agency action which precipitated the appeal was a gross abuse of the agency's discretion.

The risk of nonpayment was never established - nor could it be under the subject statute. Unlike the fee-authorizing statute in Quanstrom, Rowe, Owens, and Palma, section 120.57(1)(b) 10. F.S., does not grant attorney's fees to a prevailing party at an administrative hearing. The fees are awardable in the discretion of the reviewing district court, "when there is an appeal".

This fee-authorizing statute must be contrasted with the insurance attorney's fees statute on which Quanstrom, Palmer, and Owen are foundationed:

Section 627.428, Florida Statutes (1987), states, in pertinent part:

> (1) Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is

had. (emphasis supplied)

The ward of a reasonable attorney s fee is not discretionary with the court.

Consequently, it is understandable why an attorney and his client would enter into an agreement, as was the case in Quanstrom, that if the attorney was successful, he would be entitled to that guaranteed fee which would be set by the court pursuant to Section 627.428, Florida Statutes, and would not, as in the instant case, enter into a similar agreement under Section 120.57(1)(b)10, Florida Statutes. For these reasons, the risk of non payment was not sufficiently established to justify the contingency fee multiplier

C. THE DISTRICT COURT ERRED IN FINDING GANSON HAD A CONTINGENCY FEE AGREEMENT.

Without referencing any fee-authorizing statute, the District Court concluded Ganson's agreement was quite similar to the fee arrangement addressed in Quanstrom v. Standard Guaranty Insurance Co., 519 So.2d 1135 (Fla. 5th DCA 1988), and State Farm Fire and Casualty Co. v. Palma, 524 So.2d 1035 (Fla. 4th DCA 1988).

The fee arrangement between Ganson and her attorney was never reduced to writing because the attorney did not want to establish a real formal arrangement:

> Q. Okay. Turning your attention a moment to your contingency fee arrangement with your client, why wasn't that reduced to writing?
>
> A. I didn't really feel it was necessary at the time. Again, I didn't really want to establish a real formal arrangement with Ms. Ganson on this.
>
> Q. Now, you--you realize, of course, that the Rules of Court requires that any contingency fee

arrangement be reduced to writing.

A. I am now aw re of that, that the discip inary rules of the Bar require that.

The only evidence of any agreement is solely contained in Kranz's Affidavit[7] where Kranz states his "primary motivation (in accepting the case) was to rectify a wrong that had been committed against an acquaintance..." The court quoted from that affidavit thusly:

> "upon being advised at the outset that an eventual award of fees appeared very unlikely, the client initially insisted that she wanted to pay me something if we ultimately won on the merits, but did not prevail on the issue of fees. I perceived that it was very important to her not to consider herself to be taking advantage of me. I agreed and said that we would decide on a fee later if that situation arose. We never discussed an amount certain, but it was my intention that, if we ended up in this situation, I would charge her, if anything, a token amount only large enough to make her comfortable. Realistically, no significant fee (if any) would have been paid by the client; any fees bearing rational relationship to the work required in this case could only have come from an award against the Department."
>
> Id at 527.

In that affidavit, Kranz admits: "Had the Department's adverse Final Order not been appealed, no fees would have been due." (A-7 p.9)

Kranz also states in that affidavit that he did not anticipate the case would end up in district court. Therefore, in entering the alleged agreement he could not have anticipated receiving any fees under Section 120.57(1)(b)10, Florida Statutes.

7. A copy of the affidavit is attached hereto pursuant to Florida Rule of Appellate Procedure 9.220, and designated (A-7).

Ganson's attorney also states in his affidavit that his client insisted on paying him something for his efforts and agreed that he would decide on a fee later. By his testimony, the fee would have been only $500.00. Ganson at 527.

Significantly, Ganson's attorney acknowledged his representation was not an "arms length translation" with a client because he undertook this case to help an acquaintance. (Trans. p.23) The satisfaction in helping an acquaintance "rectify her situation" was both an inducement to accept the case and a form of compensation itself.

The risk of nonpayment under Rowe cannot be established, in the absence of a fee-authorizing statute. 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. An acceptance of a case by an attorney under circumstances where there is no guarantee of payment can only be classified as Pro Bono representation which is required of each lawyer. Rule 4-6.1, Rules of Professional Conduct.

The District Court erred in determining Ganson had a contingency fee agreement with her attorney, based solely on the affidavit of Ganson's attorney. The Hearing Officer quoted the testimony of the attorney as proof of the existence of the contingency fee agreement. The self serving nature of testimony given by the attorney, who performed services for which attorney's fees is sought, precludes the court from making an award based solely on the attorney's testimony. Lyle v. Lyle, 167 So.2d 256

(Fla. 2d **DCA 1964).**

Ganson's attorney failed to produce the contingency fee agreement allegedly entered in this case. Despite the Department's request for copies of the written contingency agreement, required by Rule 4-1.5(f) of the Rules Regulating the Florida Bar, a written agreement was not produced. Instead, Ganson's attorney merely produced self serving statements at the hearing, as he had done on page 8 of his affidavit, stating that he and Ganson had agreed he should collect as much from the State as he could. Ganson's attorney's justification for not reducing the agreement to writing because of his desire not to establish a "real formal arrangement with Ms. Ganson", can not be accepted as an excuse "particularly where someone other than the client may pay the fee". Rowe at **1150.** Ganson's attorney's belated, self-serving, and unconscionable contract should have been dismissed outright. The Hearing Officer and the District Court should have given the unwritten agreement the same treatment as the court gave to a similar unwritten agreement in FIGA v. R.V.M.P. CORP., 681 Fed. Supp. 806 (S.D. Fla. 1988).

In FIGA the court held:

> "Because this contingency fee arrangement was never reduced to a writing, it is an unconscionable contract. The Rules Regulating the Florida Bar, in particular Rule 4-1.5(D)(1), (2)(1987), provide that every lawyer who accepts a contingency fee arrangement must reduce the arrangement to a writing signed by the client. This obviously is not the case here. Because the proposed arrangement violates this rule of professional responsibility, the contingency fee arrangement here is unconscionable and, therefore, void. See Citizens Bank & Trust Co. v. Mabry, 102 Fla. 1084, 136 So. 714 (1931). Because the contingency fee arrangement here is unconscionable, the court will not apply a contingent

risk factor. See Aperm of Fla., Inc. v. Trans-Coastal Maintenance Co., 505 So.2d 459 (Fla. 4th DCA 1987)."

Likewise, the Court in Aperm of Florida v. Trans-Coastal Maintenance at 463 would not apply the contingency risk factor to an unconscionable agreement. Curiously, the District Court improperly dismissed FIGA because it was allegedly "not based on Florida case law". The inference from such a conclusion is that procedures which are contrary to Florida Bar Rules of Professional Conduct are sanctioned by the courts.

D. THE DISTRICT COURT FAILED TO MAKE SPECIFIC FINDINGS FOR AWARDING THE ENHANCED CONTINGENCY RISK MULTIPLIER.

It was error for the District Court to conclude, without specific findings, that the appeal and attorney fee phases were equally as tentative and as incapable of a comforting prediction of success as the administrative portion of this case. Clearly, Ganson attorney's prediction of success in the attorney's fees portion of the case was greater than the administrative portion. After all, the First District Court had already order granted attorney's fees. Ganson v. State Department of Administration, 554 So.2d 516 (Fla. 1st DCA 1989). The Hearing Officer failed to consider the likelihood of success of any of the portions of Ganson's case. Without the benefits of specific findings, there is no reasonable means of comparing the administrative, attorney fees and appellate phases of the case. Nonetheless, the hearing officer erroneously applied the same risk factor for all phases. See Bodiford v. World Service Life Insurance Co., 524 So.2d 701

(Fla. 1st DCA 1988) where the First District Court found no error in the trial court's application of the enhanced contingency risk multiplier only to work performed, after the first trial. The trial court had found the application of law was less favorable to applicant in the second trial.

On the contrary, the District Court in Ganson simply concluded "Rowe required a multiplier of 2," without reaching specific findings on whether a contingency risk multiplier of 2 was equally appropriate at all stages of this litigation.

In Reliance Insurance Co. v. Harris, 503 So.2d 1321 (Fla. 1st DCA 1987), the trial court granted Harris' motion for rehearing, amended the initial award of $4,575 in fees and increased the fee by a contingency risk multiplier of two on "the results obtained," thereby awarding a total fee in the sum of $9,150.00. The First District Court reversed the application of the multiplier and stated: "We first hold that applying the contingency risk multiplier was improper since no contingency was involved..." The court concluded that while there was some question on the amount that would be recovered by Harris under the insurance policy, there was no question that Harris would recover damages.

In Ganson, the District Court merely concluded "the results obtained component of Rowe does not provide a basis for reducing the fee. No findings were made to substantiate enhancing the fee other than the Court's view that the multiplier was mandatory. Ganson at 528. Consequently, Ganson is devoid of any specific finding for enhancing the award as required by Harris and Trans-costal Maintenance.

E. THE DISTRICT COURT ERRED IN COMPARING GANSON TO PALMA.

In analogizing this case to Palma, supra, the District Court parenthetically noted: "(The Palma court noted that the litigation in that case had become protracted due to 'stalwart defense' and 'militant resistance;' characteristics which are to some extent shared by the litigation in this case.)'' The extent of those similarities are not discussed. Certainly, the court could not have concluded the 3.5 hour administrative hearing in this case was similar to the 6 day trial of Palma, where eleven medical doctors and a chiropractic physician testified to all aspects of the medical procedure and study known as thermography and which culminated in a 28 page final judgment. Unlike Palma, there was no evidence in this case that the state was trying to prove any point which would avail it in other cases nationally. Ganson's attorney's affidavit reported only 66.2 of the 193 hours were involved in the administrative phase. That hardly proves a stalwart defense.

F. GANSON DID NOT CARRY THE BURDEN OF ESTABLISHING A JUSTIFICATION FOR ENHANCEMENT OF ITS LODESTAR.

As discussed above, the burden of establishing either extraordinary circumstances or some justification for enhancement of the lodestar figure rests squarely with the requesting party. As this court recognized in Rowe, if a court decides to adjust the lodestar, it must state the grounds on which it justifies the enhancement or reduction with specificity. See also: Aperm of Florida, Inc. v. Trans-Coastal Maintenance Co., 505 So.2d 459

(Fla. 4th DCA 1987); Alston v. Sundeck Products, Inc., 498 So.2d 493 (Fla. 4th DCA 1986). Clearly, Ganson never met this burden.

The Supreme Court in Blum v. Stenson, 465 U.S. 886 (1984) "squarely held, a fee applicant bears the burden of providing that an upward adjustment of the lodestar is necessary to produce a reasonable fee. This burden is satisfied only if the applicant makes a specific claim for an upward adjustment based upon a particular factor. This claim must be supported by specific evidence of the need for an enhancement of the lodestar." Murray v. Weinberger, 741 F.2d 1423, 1428 (D.C.C. 1984), (emphasis in original). There is nothing in the record to justify the application of an enhancement figure, and clearly the premium enhancement figure 2.0, awarded to Ganson is not justified.

II. WHETHER SECTION 120.57(1)(b)10, FLORIDA STATUTES, AUTHORIZES AWARDS OF ATTORNEY FEES AT THE HEARING LEVEL?

Section 120.57(1)(b)10, provides in pertinent part:

> When there is an appeal, the court in its discretion may award reasonable attorney's fees and costs to the prevailing party if the court finds that the appeal was frivolous, meritless, or an abuse of the appellate process or that the agency action which precipitated the appeal was a gross abuse of the agency's discretion.

Although the District Court's opinion in Ganson v. State Department of Administration, 554 So.2d 516, never mentioned awarding attorney fees for all phases of the litigation, the Hearing Officer assumed that is what the District Court intended by opining:

> It would appear from the court's specific mention of 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), that the court envisioned an award of attorney fees "at the hearing level", as well as on appeal.
>
> * * *
>
> For purposes of this report and recommendation, I have assumed that the courts's award of attorney fees encompassed all three phases of activity in this litigation; the "administrative phase" (from the commencement of the administrative claim until the department's final order), the "appeal phase" (from the Department's final Order until the appellate court opinion), and the "attorney fee phase" (from the appellate court opinion to the present).

Id at 525. The District Court "rubber-stamped" the Hearing Officer's remarks without comment and in *so* doing the District Court has erred.

Johnston v. Department of Professional Regulation was decided

by the First District in September 1984. In that case, the Court construed the 1983 Florida Statutes version of Section 120.57 (1)(b)10, even though the 1984 Legislature had modified the subject language, effective October 1, 1984. This previously numbered Section 120. 57(1)(b)(9), Florida Statutes (1983), read in pertinent part:

> In the event a court reverses the order of an agency, the court in its discretion may award attorneys fees and costs to the aggrieved prevailing party.

Considering all of the evidence, the District Court concluded the attorney fee should apply for all proceedings:

> Additionally, in light of the overwhelming evidence in favor of Dr. Johnston which the board callously overlooked behind its veil of "special insight" we find that application of section 120.57(1)(b)9 is appropriate in this case and that Dr. Johnston is entitled to an award of attorney's fees for all proceedings including this appeal and costs to be taxed against appellees pursuant to that statute.

In November 1984, the First District Court also decided Purvis v. Department of Professional Regulation. Although the revised statutes had been in effect for one month, Purvis did not cite or discuss the revised statute.

Purvis concludes:

> As in Johnston v. Department of Professional Regulation, supra, we conclude that, under the circumstances shown by the record, Dr. Purvis is entitled to an award of attorney's fees for all proceedings, including this appeal, an costs to be taxed against appellees pursuant to that statute.

Petitioner freely admits Purvis and Johnston were correctly decided under Section 120.57(1)(b)9, Florida Statutes (1983).

Likewise, had Ganson been decided under that law, the District Court's award of attorney's fees for the administrative portion would also have been correct. Under the 1983 law, if the Court reversed an agency, it was free to award attorney's fees in it's discretion. However, effective October 1, 1984, Chapter 84-203, Laws of Florida, amended Section 120.57 (1)(b)9, F.S., in two important respects: (1) it authorized the award of cost and attorney fees to *any* prevailing party "when there is an appeal"; and (2) it established standards for the award of attorney fees to agencies and non-agency parties. **(A-10)** These standards, for the first time authorized an agency to collect attorney fees and limited awards against agencies to a gross abuses of discretion standard.

Under the prior statute, state agencies were unable to collect attorney's fees even for clear cases of abuse of the appellate process. Shuler v. School Board of Liberty County, 366 So.2d 1184 (Fla. 1st DCA 1978). Relief was accorded to the agencies by the 1984 Legislature. Attorney fees under the revised statute could be awarded to an agency if the appeal by a non-agency party was frivolous, meritless or an abuse of the appellate process. Under the revised language, awards against an agency required a higher Standard before the agency was subject to payment of attorney's fees. Gone were the days where attorney's fees were due based on a mere reversal by the court. Noticeably absent from the revised law is any expressed intent that agency errors must receive harsher treatment than non-agency party errors.

The positive benefit of the amended statute can be seen in RHPC, Inc. v. Department of Health and Rehabilitative Services, 509 So.2d 1267 (Fla. 1st DCA 1987), where the First District Court awarded attorney fees to the Department. Clearly the 1984 amendment was not intended to be more punitive on the agencies than to non-agency parties. If that was the intent then there would not have been any need for the amendment, because the prior statute was already more punitive.

See also Clay Oil Corp. v. Fla Unemployment Appeals Commission, 506 So.2d 442, (Fla. 1st DCA 1987), where ill advised conduct on the part of an agency did not constitute gross abuse of discretion warranting award of attorney fees; and Boca Raton Artificial Kidney Center Inc. v. Department of HRS, 514 So.2d 1114 (Fla. 1st DCA 1987).

Unlike the pre 1984 law, reversals of agency action no longer entitle appellants to an award of attorney fees. See for example Shackelton v. Fla. Unemployment Appeals Commission, 534 So.2d 753 (Fla. 1st DCA 1988); White Construction v. Department of Transportation, 535 So.2d 684, (Fla. 1st DCA 1988); and Department of Professional Regulation v. Baggett, 535 So.2d 319 (Fla. 1st DCA 1988).

In a most unusual 1986 opinion, the Second District Court ignored the revised 1984 law and concluded: "within the foregoing backdrop, we elect to follow Purvis v. Dept. of Professional Regulation and Johnston v. Department of Professional Regulation; UCH is entitled to recover cost for each stage of the litigation." University Community Hospital v. Department of Health and

Rehabilitative Services, 493 So.2d 2 (Fla. 2nd DCA 1986).

To justify this result in light of the 1984 amendment, the District Court concluded: "...the statute is functionally unchanged from its pre-1984 statute". (emphasis supplied) Such a construction is purely punitive on the agencies and inconsistent with the legislative equality sought by Chapter 84-203, Laws of Florida. The Ganson Court also follows this punitive approach without explanation. Non agency parties have not been assessed attorney's fees for all phases of an appeal. See RHPC v. HRS, supra.

The award of attorney's fees to Ganson by the District Court thereby results in a multiple punishment. First, the District Court awarded $8,275.00 for the administrative phase, and tops it all off with $4,075.00 for litigating the attorney's fees phase. Secondly, the District Court doubles those fees to $24,700 through a contingency risk multiplier-all over a $5,600 claim! This punitive action was not contemplated by the Legislature under Section 120.57(1)(b)10. If the Legislature wanted to award attorney fees for the administrative portion, it would have said so. It did not. An award of attorney's fees is in derogation of the common law, and statutes allowing for the award of such fees should be strictly construed. Service Ins. Co. v. Gulf Steel Corp., 412 So.2d 967 (Fla. 2d DCA 1982). Clearly, the District Court is being used as an instrument of enforcing an excessive fee award.

One of the underlying theories which has not been borne out, behind the fee shifting statutes was assuring access to competent

legal representation in low monetary value cases. Pennsylvania v. Delaware Valley (I). Regardless of the underlying purpose, this court and other courts have recognized the Court must not be used as instruments to enforce excessive fee awards against individuals and entities who have no means of protecting themselves other than waiving their rights to a judicial determination of contested legal issues. Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985); Murray v. Weinberger, 741 F. 2d 1423 (D.C.C. 1984).

The federal courts, in redefining the lodestar analysis have been quite outspoken. Judge Wilkey, speaking for the leading District of Columbia Circuit in Murray v. Weinberger, noted the purpose of fee shifting statutes is to benefit meritorious claimants, not to subsidize the legal profession for unsuccessful suits. This philosophy was further refined in one of the most definitive discussions on attorney's fee awards and the lodestar analysis ever published. In re: Agent Orange Product Liability Litigation, 611 F. Supp. 1296 (E.D.N.Y. 1985) modified other grounds, 818 F.2d 226 (2d Cir, 1987). In this case the court recognized there must be a "philosophy of adequacy" rather than generosity, and the courts must avoid even the "appearance" of a windfall to the attorney receiving the award. Id at 1305. The award of $48,250.00 to Ganson's attorney can be scrutinized as nothing short of a windfall.

111. WHETHER ATTORNEY FEES ARE RECOVERABLE FOR TIME SPENT LITIGATING ENTITLEMENT TO ATTORNEY FEES?

The District Court determined Ganson was entitled to 32.6 hours for litigating the attorney fee phase. The Court also determined a reasonable hourly rate for securing the attorney's fees was $125.00 per hour which resulted in a lodestar of $4,075.00 for that phase alone. A contingency risk multiplier of 2 was awarded which resulted in a fee of $8,150 for the attorney's effort in securing the attorney's fees.

In awarding attorney's fees for obtaining attorney's fees, the District Court concluded:

> And it also appears to be well settled that attorney fees may also be recoverable for the time spent litigating entitlement to attorney fees. See Bill Rivers Trailers. Inc. v. Miller, 489 So.2d 1139 (Fla. 1st DCA 1986); B & L Motors, Inc. v. Big Inotti (sic) 427 So.2d 1070 (Fla. 2d DCA 1983). See also Albert Heisler v. Department of Professional Regulation, Construction Industry Licensing Board, 11 FALR 3309 (DOAH Final Order issued May 19, 1989).

Id at 525. These cases do not support the conclusion implied by the District Court. A leading case on the payment of attorney fees for time spent in recovering fees and cost is B & L Motors v. Bignotti. In reviewing the case law on this subject, Judge Lehan concluded:

> Case law construing other statutes which provide for attorney's fees has held that fees for an attorney's work to recover fees are not recoverable when the client is not obligated to the attorney for that work. Service Ins. Co. V. Gulf Steel Corp., 412 So.2d 967 (Fla. 2d DCA 1982); Cincinnati Ins. Co. v. Palmer, 297 So. 2d 96 (Fla. 4th DCA 1974). The rationale is that statutorily authorized attorney's fees are for the benefit of the prevailing party, and an attorney may not recover such fees for work done for the attorney's sole benefit. Cf.

> Susman v. Schuyler, 328 So.2d 30, 32 (Fla. 3d DCA 1976)(characterizing these statutorily types of fees as in the nature of "special damages to compensate for the wrong done"). Attorney's fees which are recoverable in antitrust actions may be generally considered to be for the benefit of the client by relieving the client of the obligation to pay them to his attorney. See Hills, Antitrust Advisor (2d Ed. 1978), Section 11.38.

Id at 1073. Service Ins. Co. involved a disallowance of fees awarded for attorney's work after the final judgment had been satisfied. The fee arrangement, like the alleged arrangement in Ganson, provided the attorneys would accept as fees the award of the Court. The court concluded the client had no interest in the fee award because the award would not be shared with the client. Accordingly, it was held that the attorney fees award could not include an amount for work performed to recover the award. Following a general discussion of Service Insurance Company the court in Bignotti concluded:

> Therefore we remand for a determination of whether appellee did have such an interest in the fee award and whether the appellee owed appellee's attorney's for their work to obtain the statutory attorney's fee award. If not, then no such award was proper, and the trial court was correct.

Id at 1074. Similarly, Bill Rivers Trailer, Inc. v. Miller, cites Bignotti with approval. In Miller, the award of attorney's fees after an arbitration award was permitted because "the record reflects that Miller's fee agreement with his attorney contemplated payment for the work involved in securing the attorney's fee. Unlike the instant case, the parties also executed an arbitration agreement which provided, in the event of an award, the court should decide "the interest, cost, and

attorney's fees to be assessed, if any." The arbitration hearing was held November 27, 1984. Miller's motions for attorney fees was not filed until February 1, 1985. On April 10, 1985, the trial court entered a final judgment finding (1) Miller was entitled to attorney's fees; and (2) Miller was entitled to attorney fees subsequent to arbitration.

In the instant case, Ganson had no similar agreement with her attorney or interest in the fee award. In fact, she did not participate as a witness or otherwise in the fee hearing. According to Kranz's affidavit, Ganson was not obligated to him for work done for the recovery of attorney fees. Unlike Miller the District Court determined Ganson was entitled to attorney's fees in its July 7, 1989, opinion. It did not determine Ganson was entitled to attorney's fees subsequent the date of its order. Ganson v. Department of Administration, 554 So.2d 516, 522 (Fla. 1st DCA 1989). Accordingly, the award of attorney fees to Ganson's attorney for recovering attorney fees was improper.

IV. WHETHER FLORIDA PATIENT'S COMPENSATION FUND V. ROWE, 472 SO.2D 1145 (FLA. 1985); PEREZ-BORROTO V. BREA, 544 SO.2D 1022 (FLA. 1989); CHILDREN'S HOSPITAL V. TAMAYO, 529 SO.2D 667 (FLA 1988) ENTITLE *AN* ATTORNEY TO ABANDON THE FEE CUSTOMARILY CHARGED TO HIS CLIENT IN FAVOR OF A HIGHER COMMUNITY SERVICE RATE?

In addition to the added fees for the administrative and attorney's fees litigation, and doubling those fees based on a contingency risk multiplier, Ganson's attorney was awarded a hourly fee greater than his customary fee. Ganson's attorney testified in his affidavit as follows:

> E. FEE CUSTOMARILY CHARGED
>
> 1. Virtually all of the administrative work done by this firm is on an hourly fee for service basis. Lobbying services have been performed on both an hourly basis and on a flat fee basis; depending upon the client and the circumstances. (This situation has changed over time with long-standing lobbying clients - currently all of my lobbying contracts are for a lump sum amount, whereas previously most were being charged on an hourly basis.) Hourly charged for my services (both for hourly rate lobbying and administrative and appellate litigation) have typically been $100.00 per hour; although this rate has recently been raised to $125.00 per hour for CON work. (A-7 p. 8)

Similarly, Ganson's attorney testified his hourly rate was $100.00:

> Q. Now is it your testimony that your hourly rate is $100.00 an hour?
>
> A. Yes, it is. Or it is not right now but during essentially all times relevant to this case it was $100.00 an hour. My rate has been $100.00 since I first went with Mr. Tilton's firm. We've recently raised it to $125.00.
>
> Q. How recent was that?
>
> A. A month ago, I think it was last month. It may

have been July. (Trans. p. 38, 39)

The District Court thereby concluded, without the benefit of specific finding on the attorney's experience level that he was entitled to the "market rate." The Court held:

> The parties disagree on what constitutes a reasonable hourly rate for Ganson's attorney. Ganson contents that the rate should be $125 per hour, basing the contention largely on the opinions in the Blank and Grizzard affidavits to the effect that $125 is the "market rate" in the Tallahassee legal community for services of the nature provided in this case. The Department contends, based primarily on its notions about the experience level of Mr. Kranz and on what Mr. Kranz has charged other clients for legal work, that a reasonable hourly rate would be $75 for legal work at the administrative phase and $100 per hour for legal work at the appeal phase and thereafter.

The District Court's decision is based exclusively on the opinions of witnesses Blank and Grizzard. The Court ignores Ganson's attorney's testimony that his hourly rate was $100 per hour. The Court apparently believed it was bound by the witnesses testimony despite the holding of Fatolitis v. Fatolitis, 271 So.2d 227 (Fla. 2d DCA 1973) which held:

> While the testimony of an expert witness is persuasive only, Lyle v. Lyle, Fla. App. 1964, 167 So.2d 256, and such testimony is neither conclusive nor binding on the Court, Folmar v. Davis, Fla.App. 1959, 108 So.2d 772, the amount of attorneys' fees must be supported by competent substantial-evidence, Lyle v. Lyle, supra; Ortiz v. Ortiz, Fla. App.1968, 211 So.2d 243.

Although the Hearing Officer correctly refers to the standard found in Rowe, no report or finding was made which demonstrated that Ganson's attorney possessed reasonably comparable skill, experience or reputation as witnesses Blank or Grizzard possessed or that he knew of others that possessed such similar experience.

Witness Grizzard knew of others with experiences similar to his but limited his opinion to his hourly rate:

> 12. In my opinion, the hourly rate requests herein (125.00) is entirely reasonable. That is my normal billing rate, and has been so since I entered private practice in 1987. I have been seriously considering raising that rate for about six months now, and I am personally aware of several attorneys in the Tallahassee area with directly comparable experience and qualifications who charge $150.00 per hour for such representation. (emphasis supplied)

* * *

Witness Blank believed Mr. Kranz's usual hourly billing rate of $100.00 was low and proceeded to express his opinion on the amount he would have charged (considering his experience) to represent Ganson. He did not express an opinion on a reasonable hourly rate for an attorney in the community that possessed Mr. Kranz's experience.

> 8. I believe Mr. Kranz's usual hourly billing rate of $100.00 per hour to be unreasonably low for this type of work in this community by a lawyer of Mr. Kranz's experience and qualifications. My usual hourly rate in administrative cases in $150.00 per hour, and would have been so had I taken this case on an hourly basis. In my experience the prevailing market rate charged by other practitioners (regardless of experience?) in this community for such work is no less than $125.00 per hour. I believe $125.00 per hour would be a very conservative reasonable hourly rate to use in determining the lodestar fee for Mr. Kranz's work in this case, both for work on each stage of the litigation and overall, and there is justification for a higher rate.

Kranz's affidavit indicated the instant case presented his second hearing experience as lead counsel in an administrative hearing. Furthermore, this case was the first appellate matter Mr. Kranz had handled exclusively from start to finish.

The hearing officer correctly established that "Rowe places on the party seeking attorney fees, the burden of establishing 'the rate charged in that community by lawyers of reasonable comparable skill, experience and reputation, for similar services'." Id. at 526. Without the benefit of any competent evidence, the hearing officer made a finding that the appropriate rate was $125 per hour.

Although Ganson's attorney claims his agreement with Ganson was he would only charge an amount she felt comfortable in paying, there is no indication the amount would have exceeded his customary hourly rate of $100.00 per hour as he testified. In fact he testified he told her his usual billing rate was $100.00 per hour. (Trans. p. 25) Under the authority of Brea and Tamayo, Ganson's attorney fees hourly rate can not exceed $100 per hour.

In the instant case, the District Court failed to apply the procedures recited by the Florida Supreme Court in reaching a determination that all of the hours claimed by Ganson's attorney were reasonable. Rowe adopted the federal lodestar approach for determining reasonable attorney fees. Under Rowe, the initial step is to determine the number of reasonable hours expended, based on accurate records of the attorney. In determining a reasonable attorney fee the court must use the lodestar approach and make specific findings as to each criteria mandated by Rowe. Riesgo v. Weinstein, 523 So.2d 752 (Fla. 2nd DCA 1988).

The District Court did not make specific findings on the reasonableness of the number of hours claimed by Ganson's

attorney. The evidence of record does not support the conclusion of the Hearing Officer that Ganson's attor ey submitted contemporaneously prepared, detailed time records.(Trans. 59-62) Ganson's attorney was unable to produce contemporaneously prepared time records in response to subpoena. The information submitted pursuant to the subpoena was summaries of a series of different computer programs; a 1989 desk calendar which was devoid of any significant notes, time records, or other marking with any semblance of being his contemporaneously kept records; and two untranscribed computer diskettes. Similarly, Petitioner's Exhibit 3, entitled "Affidavit of Kenneth D. Kranz, re Attorney Fees and Costs", which was prepared for filing in this proceeding, carried no indication that any of the claimed time was contemporaneously documented.

CONCLUSION

In determining an attorney's fee award under Florida Statute Section 120.57(1)(b)10, Florida courts must avoid windfall gains, or even the appearance of windfall gains. An award of $48,250 for a $5,682.00 recovery strains the bounds of credibility, runs afoul of Rule 4-1.5, and clearly constitutes an excessive fee based upon the record before this court.

Moreover, the application of a multiplier to enhance the base lodestar figure is unjustified absent rare and extraordinary circumstances. A successful result and an alleged contingency fee contract, if in fact one exists in this case within the meaning of Rowe, justifies the application of a multiplier. The factors

regarding skill, experience, and successful representation are already factored into the lodestar base figure. The existence of a risk of non payment is not sufficient to justify application of a multiplier or enhancement figure. There is no reason in this case to believe such a factor was necessary to assure adequate representation.

This court adopted the federal lodestar analysis in Rowe as a means of controlling and putting some objectivity into attorney's fee awards. The federal courts have wrestled with the lodestar analysis for significantly more years than the Florida courts, and have concluded that a multiplier or enhancement factor is unjustified except in the most extraordinary circumstances. The record in this case is devoid of any of the elements and circumstance that the federal courts and this court have recognized substantiates the application of an enhancement factor.

Therefore, Petitioner, State of Florida, Department of Administration, respectfully requests this court reverse the First District Court of Appeal decision and, if remand is appropriate, do so with sufficient instructions to insure full and complete compliance with the terms and spirit of Rowe and Quanstrom.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Kenneth Kranz, Esquire, Attorney for Respondent, Eric B. Tilton, P.A., 241-B East Virginia Street, Tallahassee, Florida 32301 this 14th day of May, 1990.

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