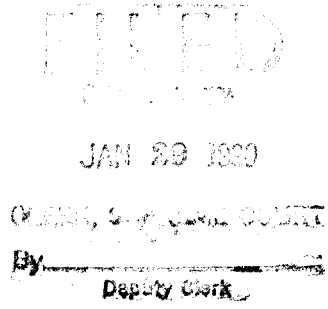
IN THE SUPREME COURT OF FLORIDA

CASE NO.
FIRST DISTRICT CASE NO. 88-1568



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

Petitioner,

vs.

TERRI J. GANSON,

Respondent.

_____/

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

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES

OTHER AUTHORITY

STATEMENT 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 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

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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, _____So.2d _____ (Fla. 1st DCA 1989), is attached hereto as required by Florida Rule of Appellate Procedure 9.120(d), and designated A. 1-15.

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 designate A. 16-23.

1384 (Fla. 3d DCA 1987),[3] Bankers Insurance Company v. Valmore Gonzalez 545 So.2d 907 (Fla. 3d DCA 1989),[4] and National Foundation Life Insurance Company v. Wellington, 526 So.2d.766 (Fla. 3d DCA 1988).[5]

The First District opinion expressly and directly conflicts with the Supreme Court of Florida's holding in Standard Guaranty Insurance Company v. Quanstrom, Case No. 72, 100, opinion issued January 11, 1990. 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 insurance coverage administrative dispute. 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.[6] The only issue in dispute, exclusive of attorney's fees, in the underlying controversy centered on the definition of the term

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. 24-25.

4. A copy of Bankers Insurance Company v. Valmore Gonzalez, 545 So.2d 907 (Fla. 3d DCA 1989) is attached hereto as part of the Appendix allowed by Florida Rules of Appellate 9.220 because of its centrality to the issues, and is designated A. 26-28.

5. A copy of National Foundation Life Insurance Company v. Wellington, 526 So.2d 766 (Fla. 3d DCA 1988) is attached hereto as part of the Appendix allowed by Florida Rules of Appellate Procedure 9.220 because of its centrality to the issues, and is designated A. 29-30.

6. The dollar amount in dispute was never controverted.

"mental or nervous disorder" under the State Employees' Group Health Insurance Benefit Document.

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

The First District reversed DOA's final order and granted GANSON's motion for attorney fees under section 120.57(1)(b)10, Florida Statutes (1987), based upon her assertion that DOA's final order was a gross abuse of the agency's discretion.

The District Court directed the DOA to refer the matter to the administrative hearing officer for an evidentiary hearing to determine the amount of reasonable attorney fees.

The hearing officer, after taking evidence, determined an enhancement to the award of $24,125.00, for recovering $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, was required under Rowe.

The First District adopted the hearing officer's analysis totally and without comment.

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 First District Court of Appeal's decision which is in express and direct conflict with decisions of the Florida Supreme Court and the Third District Court of Appeal.

SUMMARY OF [illegible]

The First District Court of [illegible] decision in [illegible] v. State of Florida, Department of Administration, Office of State Employees' Insurance, _____So.2d_____(Fla. 1st DCA 1989) is in express and direct conflict with the Supreme Court decisions in Standard Guaranty Ins. Co. v. Quanstrom, _____So.2d_____(Fla. 1990), and Bankers Life Ins. Co. v. Owen, _____So.2d_____(Fla. 1990), and Florida Patients Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), which cases expressly make the enhancement factor discretionary. Thus, this court has jurisdiction pursuant to Art. V, Section 3, Fla. Const. and Florida Rule of Appellate Procedure 9.030.

ARGUMENT I

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN GANSON V. STATE OF FLORIDA, DEPARTMENT OF ADMINISTRATION, _____ SO.2D _____ (FLA. 1989), IS EXPRESSLY AND DIRECTLY IN CONFLICT WITH THE DECISIONS OF THE SUPREME COURT IN STANDARD GUARANTY INSURANCE COMPANY V. QUANSTROM, _____ SO.2D _____ (FLA. 1990), AND WITH FLORIDA PATIENTS COMPENSATION FUND V. ROWE, 472 SO.2D 1145 (FLA. 1985).

The decision of the First District Court in Ganson is in direct conflict with this Court's recent opinion in Standard Guaranty Insurance Co. v. Quanstrom, _____ So.2d _____ (Fla. 1990) which resolved inconsistent interpretations applied to Rowe.

Historically, the decision of this Court in Florida Patients Compensation Fund v. Rowe, has been interpreted and applied so differently in the various District Courts of this State that the outcome of attorney fee requests in contingency cases became unreasonable and unpredictable. The credibility of the court

system and the legal system was sacrificed at the expense of unsuccessful litigants. This unpredictability stemmed from an interpretation of this Court's opinion in Rowe: whether an enhancement multiplier is mandatory or permissive.

The First District Court in Ganson clearly recognized the divergent interpretations and differing results that have been reached by courts on whether the application of an enhancement multiplier in contingency fee cases is mandatory or not, pursuant to Rowe. After specific consideration of the language in Rowe, and other decisions where opposite conclusions on similar facts have been reached, the Ganson court took the position, which was rejected by this Court in Quanstrom, that the mandatory application of a risk multiplier is the better reasoned view. The court in pertinent part held:

> 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)

Under Rowe it is indisputable that the application of an enhancement or detraction figure from the lodestar is discretionary. This court expressly 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 discretionary language in Rowe, supra, the First District Court in Ganson found that the mandatory application of the contingency risk multiplier was the better reasoned view, and applied it as such. Ganson is so flagrantly contrary to this Court's primary purpose in Rowe, of supplying uniformity among the district courts, that clearly there is a conflict.

In Quanstrom the parties disputed the definition of the term "inoperable" under Florida's no-fault statute. The court ultimately determined Quanstrom was entitled to personal injury protection benefits under an automobile policy in the amount of $2,066.41. She subsequently made a claim for $8,100 in attorney's fees with an enhancement multiplier of 3. This Court summarily dismissed the decision of the Fifth District Court which held the application of the multiplier to be mandatory in contingency fee cases according to Rowe. In so finding to the contrary, this Court specifically held:

> 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, and we disapprove the contrary view set forth in the opinion below.

In the instant case, medical coverage for Ganson's pre-existing mental condition was disputed under certain pre-existing conditions exclusions in the State Group Health Insurance Plan Benefit Document. The condition was deemed covered by the Court. The First District Court approved a lodestar of 24,125.00 and applied an enhancement of 2 to arrive at an approved attorney fee of $48,250.00. The First District Court concluded the trial court had no discretion whether or not to apply an enhancement multiplier and opined 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 contingent 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).

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

The conflict between the results reached in Ganson and the results reached by the Supreme Court in Rowe and Quanstrom are of the nature that Article V, Section 3, Constitution of Florida, and Rule 9.030, Florida Rules of Appellate Procedure, were designed to address. Therefore this court is respectfully requested to accept jurisdiction and resolve the conflict on the merits.

Furthermore, this Court issued an opinion in Bankers Life Insurance Co. v. Owens, _____ So.2d _____, (Fla. 1990) rejecting the Fifth District Court's reliance on Quanstrom for the mandatory fee enhancement proposition. This Court remanded the cause to the trial court for reconsideration in the light of the principles set forth in Quanstrom. In so doing, this Court made it abundantly clear that the trial court should exercise its discretion in determining the appropriateness of applying a multiplier. In the instant case, the hearing officer, never exercised any discretion because he believed the application of a multiplier was mandatory.

ARGUMENT' II

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN GANSON V. STATE OF FLORIDA, DEPARTMENT OF ADMINISTRATION, _____ SO.2D _____ (Fla. 1ST DCA, 1989), IS EXPRESSLY AND DIRECTLY IN CONFLICT WITH THE DECISION OF THE THIRD DISTRICT COURT OF APPEALS IN TRAVELERS INDEMNITY COMPANY V. SOTOLONGO, 513 SO.2D 1384 (Fla. 3RD DCA 1984).

The Third District Court expressly found the enhancement multiplier was not mandatory while the First District Court expressly adopted the view that application of the enhancement multiplier is mandatory. The factual and legal similarities between Ganson v. Department of Administration and Travelers Indemnity Company v. Sotolongo, are striking. Again, both cases involved disputes over insurance coverage, both cases sought recovery of attorney fees, and the decisions reached on the attorney fees are contrary and conflicting.

In Ganson, the Court interpreted Rowe for the proposition that multipliers are mandatory in contingency fee cases. At the outset, the Court cited specific language from Rowe and interpreted the phrase "entitlement to enhancement" in support of its conclusion that the application of a multiplier is mandatory. The language in pertinent part reads:

> Based on our review of the decisions 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 from 1.5 to 3.

Additionally, the Court expressly relied upon Quanstrom v. Standard Guaranty Insurance Co., 519 So.2d 1135 (5th DCA 1988) and State Farm Fire and Casualty Co. v. Palma, 524 So.2d 1035 (4th DCA 1988), solely for the proposition that application of the multiplier is mandatory. That proposition was clearly disapproved in both of those cases on appeal to this Court. In Quanstrom, it was emphasized that the words "must consider" do not mean "must apply", but "means must consider whether or not to apply" the contingency fee multiplier.

CONCLUSION

The importance of this Court reviewing the conflicts presented by Ganson cannot be overstated. The First District Court's decision in Ganson expressly adopted a position that not only conflicts with the Third District Court of Appeal's decision in Travelers Indemnity Company v. Sotolongo, but to a greater extent conflicts with this Court's decisions in Rowe, Quanstrom, and Bankers Life. The First District, in agreement with the Fifth

District in Quanstrom, concluded the multiplier to be mandatory. That conclusion was clearly rejected by this Court's opinions.

Therefore, the State of Florida, Department of Administration, respectfully requests this Court to accept jurisdiction to correct the conflict created by this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Kenneth D. Kranz, Esquire, 241-B East Virginia Street, Tallahassee, Florida 32301, by U.S. Mail, this 29th day of January, 1990.

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