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.

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JURISDICTIONAL 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

Petitioner Department seeks to invoke this Court's jurisdiction to review a decision of the First District Court of Appeal setting the amount of attorneys' fees to be awarded against the Department arising out of a successful appeal by Respondent Ganson of an administrative action taken by the Department.

The underlying administrative action was brought by Respondent Ganson pursuant to §120.57(1), Fla. Stat. (1987), for recovery of health insurance benefits due Respondent under the State Group Health Insurance Plan. 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 6120.68, Fla. Stat. (1987), and timely moved for an award of attorneys' fees and costs 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 reversing the Petitioner Department's Final Order and granting Respondent's motion for attorneys' fees pursuant to §120.57(1)(b)10., Fla. Stat. (1987), based upon a finding that "theagency action which precipitated the appeal was a gross abuse of the agency's discretion".[2]

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, and the Hearing Officer issued his recommendations to the Court on

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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, 14 **F.L.W.** 1594 (Fla. 1st DCA Jul. 7,1989).

October 12,1989. The determination of the amount of fees involved application of the ***Rowe***[1] methodology, including 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 $501.94 to Respondent. ***Ganson v. State*** of ***Florida Department of Administration,*** Off ***ice*** of ***State Employees' Insurance,*** No. 88-1568 (Fla. 1st DCA Dec. 22,1989) (opinion and order on attorney fee).[2]

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,*** No. 72,100 (Fla. Jan. 11,1990); ***State Farm Fire & Casualty*** Co. ***v. Palma,*** No. 72,730 (Fla. Jan. 11,1990); and ***Bankers Life Ins. Co. v. Owens,*** No. 73,319 (Fla. Jan. 11, 1990).[3] 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.***

SUMMARY OF ARGUMENT

Regardless of whether conflict jurisdiction exists, the sole question of policy and law which Petitioner Department presents here for review is whether or not the application of a contingency risk multiplier is mandatory or discretionary under the ***Rowe*** methodology when a contingency fee

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1. Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985).

2. It is this decision which Petitioner State is asking this Court to review, and it will be cited herein as Ganson. In accordance with Fla. R. App. P. 9.120(d), a conformed copy of the decision is attached hereto as Appendix A.

3. 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.

arrangement is involved. At the time *Ganson* was issued, there 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, Palma,* and *Bankers Life*. Because *Ganson* bears a sufficient similarity to *Palma*, and because the ambiguity which once existed under *Rowe* on the broad issue of contingency risk multipliers has now been resolved completely, no further purpose in this regard will be served by this Court exercising its discretionary jurisdiction.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the supreme court or another district court of appeal on the same point of law. Art. V §(3)(b)(3) Fla. Const. (1980); Fla. R. App. P. 9.030(a)(2)(A)(iv).

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 decisions in *Rowe, Quanstrom*, and *Banker's Life*. As pointed out in *The Florida Star v. B.J.F.,* 530 So.2d 286 (Fla. 1988), this Court has final and inherent power to determine what constitutes express and direct conflict for purposes of Art. V §(3)(b) Fla. Const. (1980). However, to exist at all, that conflict must not merely be implied; it must exist within the "four corners of the decision." *Department of Health and Rehabilitative Services v. National Adoption Counseling Service, Inc.*, 498 So.2d 888 (Fla. 1986); *Reaves v. State*, 485 So.2d 829 (Fla. 1986).

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]

Therefore, this Court's discretionary jurisdiction appears to exist under Art. V 8(3)(b)(3) Fla. Const. (1980).

ARGUMENT

I. EVEN IF JURISDICTION EXISTS, THE COURT SHOULD DECLINE TO EXERCISE ITS DISCRETION TO REVIEW THE CASE BECAUSE THE DECISION OF THE DISTRICT COURT OF APPEAL CLOSELY RESEMBLES AND IS CONSISTENT WITH THE RECENT DECISION OF THE SUPREME COURT IN *PALMA*.

In its jurisdictional brief, the Department addressed but two-thirds of this Court's recent trilogy of contingency fee cases. Conspicuously absent from Petitioner's brief was the second case in the sequence of three contingency fee cases decided by this Court on January 11,1990. The missing case is ***Palma***[2], and, in it, this Court approved the decision of the Fourth District Court of Appeal in

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1. See Ganson; Appendix A, pages 9-10.

Notwithstanding this statement by the First District Court of Appeal regarding the better reasoned view, the Court did not explicitly hold that contingency risk multipliers are mandatory. It should be noted that Ganson also contains language which can be read to give rise to an inference that the Court did not feel that it had no discretion in awarding a contingency risk multiplier. In its discussion of the contingency risk multiplier at pages 10-12, 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. (emphasis added)

Respondent concedes, however, that any ambiguity so created does not clearly obviate the superficially apparent existence of conflict jurisdiction.

2. A copy of State Farm Fire & Casualty Co. v. Palma, No. 72,730 (Fla. Jan. 11,1990) is included as Appendix **B.**

State Farm Fire & Casualty Co. v. Palma, 524 So.2d 1035 (Fla. 4th DCA 1988). *Palma* is critically important to this case because the Fourth 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* not only bears much more resemblance to *Palma* than *Quanstrom*, it is consistent with the result in *Palma*.

Examination of Paragraph 5. of the section of the *Ganson* opinion relating to calculation of attorney'sfees 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 times, but for the same points of law (including for the proposition that the application of a multiplier in contingency fees cases is mandatory)![2] Furthermore, the Court recognized the similarity between *Ganson* and the district court decisions in *Quanstrorn* and *Palma* with respect to the nature of the fee agreement[3], 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.* (emphasis added)[4]

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

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

2. See Ganson; Appendix **A,** pages 9-12.

3. See Ganson; Appendix A, page 10.

4. *Id*. at 9.

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 "becausecounsel 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

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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.

In the final case of its contingency fee trilogy, *Bankers Life,* this Court reversed the Fifth District Court of Appeal's decision in *Bankers Life Insurance Co. v. Owens,* 532 So.2d 1115 (Fla. 5th DCA 1988). That decision, a per curiam affirmance on the authority of the same Court's earlier *Quanstrom* decision[1], was remanded to the trial court for reconsideration in light of the principles set forth by this Court in *Quanstrom* and *Palma*.

Sotolongo[2], the Third District Court of Appeal case which the Department contends 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.

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. That issue is no longer in need of resolution. Within the four corners of the opinion, *Ganson* is distinguishable from all of the foregoing cases

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

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

except *Palma* which it closely mirrors and with whose result ***Ganson*** is consistent. That being the case, there is no need for this Court to accept jurisdiction of this matter.

CONCLUSION

From a public policy standpoint, review of any conflict presented by ***Ganson*** is no longer necessary. The issue presented here, whether or not the application of a contingency risk multiplier as an enhancement to the lodestar is required in contingency fee cases, has been addressed recently and extensively 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. No further statement by this Court is necessary to promote and preserve the uniformity of principle and practice within this state regarding the issue raised by Petitioner Department. Furthermore, the extent of any actual conflict which may be reflected by ***Ganson*** is overshadowed by its marked similarity to and consistency with *Palma*, one of this Court's recent simultaneous pronouncements on this issue. Therefore, Respondent, Terri J. Ganson, respectfully requests that this Court decline to exercise its discretionary jurisdiction. pursuant to Art. V 8(3)(b)(3) Fla. Const. **(1980).**

Respectfully submitted this 22nd day of February, **1990,**

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing jurisdictional brief has been furnished to the following by **U.S.** Mail this 22nd day of February, 1990.

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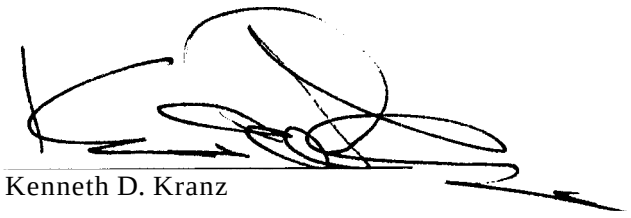

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