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, REPLY BRIEF ON ITS PETITION FOR DISCRETIONARY REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL

AUGUSTUS D. AIKENS, JR.
GENERAL COUNSEL
DEPARTMENT OF ADMINISTRATION
435 CARLTON BUILDING
TALLAHASSEE, FLORIDA 32399-1550
(904) 488-4747

TABLE OF CONTENTS

TABLE F !

STATUTES

SUMMARY OF ARGUMENT

In Ganson, the Court was operating under the mistaken impression that the application of a contingency risk multiplier was mandatory. Because of this mistake, which result was *so* fundamental to the Court's ultimate decision, it is unclear whether the same findings would have been made if discretion as sanctioned by this court in Quanstrom and Rowe, had been properly applied.

Section 120.57(1)(b)(10) does not provide for attorney's fees to be awarded to successful trial litigants. Pursuant to that statute, attorney fees are awardable only in the Court's discretion - "when there is an appeal." This Court was faced w th totally different sets of circumstances in Rowe, Quanstrom, Palma, in that those cases directly involved trial level fee authorizing statutes. Ganson does not involve a similar fee authorizing statute. Because of this distinction between Ganson and those above-mentioned cases the District Court erred in the manner that Rowe was applied in the instant case to award attorney fees.

It was error for the District Court to make an award based solely on the testimony of the attorney who stood to benefit most from such an award. Lyle v. Lyle, 167 So.2d 256 (Fla. 2d DCA 1964). The alleged fee arrangement was not produced pursuant to subpoena and in fact was never reduced to writing. The only evidence that an agreement existed was in the form of the self-serving testimony from Ganson's attorney. That testimony alone was insufficient for the District Court to make an award premised on the alleged contingent nature of the agreement.

It was error for the District Court to apply the enhancement

multiplier to all phases of this case. A multiplier of 2.0 was applied to the administrative phase, the appeal phase and the attorney fee phase, absent findings that each of these phases were equally as incapable of a "comforting prediction of success". The court is required to state with specificity the grounds upon which an enhancement or reduction factor is applied, according to the decision of this court in Rowe. That was not done by the Court in Ganson.

It was error for the District Court to award attorney fees for the recovery of attorney fees, when Ganson clearly was not obligated to pay for the work the attorney performed. As substantiated by the record, Ganson was not obligated to pay any of the attorney fees which were awarded by the Court.

Finally, it was error for the District Court to grant an hourly rate for attorney fees in excess of the amount Ganson's attorney customarily charged to clients. The court's reliance on Rowe for the proposition that an attorney is entitled a higher community service rate windfall is misplaced. Ganson testified at the hearing and verified in his affidavit that his usual hourly rate that he might have charged Ganson was $100.00 per hour. In the face of this undisputed testimony an hourly rate of $125.00 per hour should not have been granted and further enhanced under Rowe.

I

A. THE APPLICATION OF *AN* ENHANCEMENT FACTOR TO STATUTORY AWARDS OF ATTORNEY'S FEES WAS NOT APPROPRIATE IN THIS CASE.

Respondent's argument that "a contingency fee multiplier is appropriate in this case and that evidence in the record supports such a discretionary finding, whether made by this court or on remand'' should not be considered. Answer Brief page 7. Respondent is making a nonsensical argument that the First District exercised discretion in applying an enhancement factor, even though the Court said it had no discretion on whether or not to apply the enhancement multiplier. Respondent cannot escape the First District's clear reference to this Court's decision in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) when it concluded that the application of a multiplier is mandatory. The First District did not exercise any discretion because clearly the Court felt there was no discretion to exercise. It mistakenly believed that Rowe required the application of a contingency risk factor to the lodestar figure and that is precisely what the Court set out to accomplish. The First District has interpreted Rowe in similar fashion in other cases. In Inacio v. State Farm Fire and Casualty Co., 550 So.2d 92,97 (Fla. 1st DCA 1989), the First District found Rowe to require the mandatory application of an enhancement, when it opined:

> When the fee due an attorney is contingent upon effecting a recovery, application of the contingency risk factor pursuant to Rowe is mandatory if there is any question that recovery may be effected. Quanstrom v. Standard Guaranty Insurance Company, 519 So.2d 1135. Cf., Travelers Indemnity Company v. Sotolongo, 513 So.2d 1384

(Fla. 3d DCA 1987); Reliance Insurance Co. v. Harris, 503 So.2d 1321 (Fla. 1st DCA 1987). The language of the Rowe opinion leaves no discretion to disregard application of the contingency risk factor in such circumstances.

* * *

Thus, only by applying the contingency risk factor to the lodestar figure can the trial court give any effect to the contingent nature of the fee contract, assuming the Rowe directives are followed. (emphasis supplied)

The First District opinions cited above are clearly contrary to and conflict with this court's opinion in Standard Guaranty Insurance Company v. Quanstrom, 555 So.2d 828 (Fla. 1990).

Respondent would mislead this Court to believe the District Court sufficiently addressed all the necessary factors to support the enhancement. Respondent specifically states:

"In its discussion of the contingency risk multiplier at pages 528-530, the Court considered a number of factors and addressed and rejected several arguments by the Department, eventually stating that:

For all of the reasons set forth above, it is concluded that a contingency risk multiplier should be applied in this case." Answer Brief-page 6.

And finally Respondent further concludes:

"Many, if not all of the elements necessary to support a contingency risk multiplier have already been addressed by the First District in Ganson." (Page 7)

Respondent is clearly mistaken in his summation of the District Court analysis. The findings of the Court on pages 528-30 do not address any elements necessary to support the application of a contingency risk multiplier. The findings of the Court can be briefly summarized as follows:

(1) The use of the phrase "entitled to enhancement" supports a conclusion that the application of a multiplier is mandatory in contingency fee cases.

(2) FIGA v. R.V.M.P. Corp., 681 F. Supp, 806 (S.D. Fla. 1988) is not based on Florida case law is inapplicable to Ganson, and therefore the fee agreement is not required to be in existence or in writing.

(3) Contingency fee multipliers should not be limited pursuant to Pennsylvania v. Delaware Valley Citizens, Council for Clean Air, 483 U.S. 711, 107 S. Ct. 3078, 97 L. Ed. 2d 585 (1987), because Rowe expressly authorized multipliers and prescribed the permissible range. The Court especially cited Quanstrom v. Standard Guaranty Insurance Co., 519 So.2d 1135 (Fla. 5th DCA 1988) in support of the conclusion that contingency fee multipliers are mandatory.

(4) The mere size of the fee, if properly calculated pursuant to Rowe methodology, is not a basis for reduction of the fee.

After reaching the four findings above, the First District held: "For all of the reasons set forth above, it is concluded that a contingency risk multiplier should be applied in this case."

Respondent's argument that the court addressed factors necessary to support an award of a contingency risk multiplier, is clearly not supported by the record.

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

Respondent's attorney testified that at the outset he believed the possibility of being successful was likely, yet, because of the lack of a fee authorizing statute under the Administrative Procedure Act, the likelihood of even getting a fee was very low. In fact, Respondent candidly admitted in her brief

that the likelihood of recovery under Section 120.57(1)(b)10., Fla. Stat., was very speculative at the outset, and further correctly stated that a "precise set of circumstances", must occur before attorney fees can become available under the APA. Respondent never discusses the "precise set of circumstances" that were required to take place administratively before a fee could be awarded, nor does Respondent admit that those circumstances could never occur in any Chapter 120, Florida Statutes administrative action.

Even though the Legislature did not make provisions for the payment of attorney fees to administrative litigants under the APA, Respondent has made hollow unsupported allegations and misrepresentations that there are some circumstances under the APA that will trigger a fee award.

Respondent's reputed agreement with Ganson, unlike the agreement in Tallahassee Memorial Regional Medical Center v. Poole, 547 So.2d 1258, 1260 (Fla. 1st DCA 1989), does not address the representation of Ganson on appeal. Nevertheless, Respondent erroneously speaks of the potential recovery as simply being "one step further removed" even though that step is not described in the alleged agreement.

Clearly, attorney fees awarded by a district court under the APA are distinguishable from trial court attorney fee awards in public policy enforcement, tort and contract, family law, eminent domain, and estate and trust cases. This court recognized these differences in Quanstrom and emphasized that the distinction 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 and no explanation was given on how the statutory objective was being served by the upward adjustment of the lodestar. It is obvious that there was no discussion on this issue because of the mistaken belief by the Court that application of the multiplier was mandatory under Rowe.

The risk of nonpayment was not established and it could not have been established under the subject statute. Unlike the fee-authorizing statute common in Quanstrom, Rowe, Owen, and Palma, Section 120.57(1)(b) 10, F.S., does not grant attorney's fees to a prevailing party in an administrative hearing. The fees are awardable in the discretion of the reviewing district court, only "when there is an appeal".

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

Respondent argues the Department has not offered a cogent argument that the District Court's finding of the existence of a "contingency fee" arrangement is unsupported by the evidence or constitutes a clear abuse of discretion. The District Court never found Respondent had a contingency fee "arrangement". It did conclude Ganson had a contingency fee "agreement" with her attorney based solely on Ganson's attorney's testimony of that agreement.

Respondent totally ignores the long established law in Florida which precludes a court from making an award based solely

on an interested attorney's testimony. Lyle v. Lyle, 167 So.2d 256 (Fla. 2nd DCA 1964).

D. THE DISTRICT COURT FAILED TO HAKE SPECIFIC FINDINGS TO AWARD THE ENHANCED CONTINGENCY RISK RULTIPLIER.

It was error for the District Court to conclude, without specific findings, that the appeal and attorney fee phases were equally as tentative and incapable of a comforting prediction of success as the administrative phase of this case. Clearly, Ganson attorney's prediction of success in his attorney's fees portion of the case was greater than the administrative portion, because the First District Court had already 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 or not of any of the portions of Ganson's case. Without the benefit 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. Bodiford v. World Service Life Insurance Co., 524 So.2d 701 (Fla. 1st DCA 1988).

Respondent argues that a contingency risk multiplier **may** be properly applied to time spent litigating a post judgment attorney fee claim citing Tallahassee Memorial Regional Medical Center v. Poole. Poole is distinguishable however, from the instant case in several significant areas as follows:

1. Poole had a written agreement with her attorney wherein Poole was obligated to pay her attorney fees awarded by the court as part of a judgment and on appeal from a lower court.

Unlike Poole, Ganson had no agreement regarding attorney fees

on appeal. Ganson's attorney states in his affidavit that he did not anticipate the case to end up in district court. In entering the alleged agreement, Ganson did not anticipate receiving any fees under Section 120.57(1)(b)10, Florida Statutes, nor was any agreement reached regarding such fees.

2. Poole was liable to her attorney under the terms of the fee agreement.

Unlike Poole, Ganson was not liable to her attorney, in fact, Ganson had to insist on paying her attorney something for his efforts. Despite Ganson's insistence, her attorney testified he would have charged only a token amount large enough to make her "comfortable".

In Department of Agriculture and Consumer Services v. Schick, 553 So.2d 361 (Fla. 1st DCA 1989), the First District reached a decision contrary to its decision in Ganson regarding specific findings to support contingency risk enhancement factors. In Schick, the court concluded the trial court erred in awarding enhanced fees without specific findings to support the application of a multiplier. In the judgment awarding attorney fees in Schick, the lower court merely multiplied the reasonable hours by a rate of $ 150.00 per hour to arrive at a lodestar. Thereupon the court concluded the trial court erred in declaring contingency risk factors should be applied without specific reasons.

In the instant case, the First District should be directed to adhere to the same standard as set forth in Schick.

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

In analogizing this case to State Farm Fire and Casualty v. Palma, 524 So.2d 1035 (Fla. 4th DCA 1988) the 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.

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. Respondent frankly admits the decision in Ganson may have less far- reaching impact than Palma, but that the fees in issue in Ganson are but a small fraction of those in Palma. Respondent does not show how the less far-reaching impact of Ganson justifies the award in the instant case.

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

As stated previously, 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).

Respondent concedes a primary concern of this appeal on page 14 of her Answer Brief as follows:

> In Ganson, the Court was apparently operating under what we now know to be the mistaken impression that a contingency risk multiplier was mandatory. Thus, it cannot be conclusively stated whether or not the District Court would have made such a finding under the Quanstrom discretionary standard.

There is nothing in the record to justify the application of an enhancement figure, and clearly the premium enhancement figure of 2.0, which was awarded to Ganson is not justified.

II

SECTION 120.57(1)(b)10, FLORIDA STATUTES, DOES NOT AUTHORIZE AWARDS OF ATTORNEY FEES AT THE HEARING LEVEL

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. This assumption was based on the District Court's references to two cases which were decided under a repealed law that authorized attorney's fees under entirely different standards than the present law. Yet, the District Court "rubber-stamped" the Hearing Officer's remarks without addressing those different standards and in so doing the District Court has erred.

Respondent argues that it is improper for this court to review the award of attorney fees at the administrative hearing level. Respondent is wrong on that point but it is agreed as set forth by Respondent that this court upon assuming jurisdiction, may, at its discretion, consider any issue affecting this case. Canten v. Davis, 489 So.2d 18, 20 (Fla. 1986). The Hearing Officer's assumption concerning what the District Court intended and the application of repealed attorney's fees award standards by

the District Court certainly affects this case - particularly when the interpretation is contrary to the unambiguous statement of the law. It is most appropriate for this court to consider that issue.

III

ATTORNEY FEES ARE NOT 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 his efforts to secure attorney's fees was **$125.00** per hour. A lodestar of **$4,075.00** was granted for that phase alone. A contingency risk multiplier of **2** was applied which resulted in a fee of **$8,150** for the attorney's effort in securing his attorney's fees. To support the award of 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**).

The cases cited above in Respondent's brief, to support the position that attorney's fees are recoverable for time spent litigating entitlement to attorney's fees, make it abundantly clear that recovery is proper only if the client is obligated to the attorney for that work. See Poole, Bignotti, and Bill Rivers Trailers Inc., cited supra.

In this case, Ganson did not have any fee agreement that was

analogous to those in Poole, Bignotti, or Bill Rivers, and she clearly had no interest in the fee award. In fact, Ganson did not participate as a witness or otherwise in the fee hearing,, and according to Kranz's affidavit, Ganson was not obligated to him for work done for the recovery of attorney's fees. Unlike Bill Rivers Trailers, Inc., the District Court actually determined Ganson was entitled to attorney's fees in its July 7, 1989, opinion. Ganson v. Department of Administration, 554 So.2d 516, 522 (Fla. 1st DCA 1989). The subsequent proceedings were clearly for Respondent's attorney's benefit. Accordingly, the award of attorney fees to Ganson's attorney for recovering attorney fees was improper.

IV

AN ATTORNEY MAY NOT ABANDON THE FEE CUSTOMARILY CHARGED 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 erroneously awarded an hourly fee greater than his customary fee.

The District Court thereby concluded, without the benefit of specific findings on the attorney's experience level that he was entitled to the "market rate." The District Court's decision is based exclusively on the opinions of witnesses Blank and Grizzard. The Court ignores the testimony of Ganson's attorney that the hourly rate he charged his clients (including Ganson if he chose to charge her) was $100 per hour. The Court apparently believed it was bound by the testimony of the witnesses, 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.

Ganson's attorney did not customarily and reasonably receive $125.00 per hour. Accordingly this case does not follow the principles set forth in this Court's decision in Lane v. Head, opinion filed June 28, 1990, _____ So.2d _____, 1990.

CONCLUSION

Respondent best summarizes the concerns necessitating this appeal on pages 14 and 15 of her Answer Brief where she candidly stated the concerns of all parties involved:

> "In Ganson, the Court was apparently operating under what we now know to be the mistaken impression that a contingency risk multiplier was mandatory. Thus, it cannot be conclusively stated whether or not the District Court would have made such a finding under the Quanstrom discretionary standard. This Court now has the option of reviewing the record and making that determination for itself, or remanding the case to the District Court for suitable findings on this issue."

This Court is also requested to review those related issues which fundamentally affect this case. The appropriateness of awarding attorney fees for the administrative portion of the case especially when no such fees are awardable under the fee authorizing statute, and the award of attorney fees for time spent litigating entitlement to fees when the client is not obligated to the attorney are genuine questions that are relative to the issues before this Court. Finally, this Court is asked to determine whether Rowe allows an attorney to receive hourly fees in excess of the amount he customarily charges for his services.

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 3rd day **of** July, **1990.**

AUGUSTUS D. AIKENS, JR., ESQUIRE
General Counsel
Department of Administration
435 Carlton Building
Tallahassee, Florida **32399-1550**
(904) 488-4747