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AUG 20 1992
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IN THE SUPREME COURT OF FLORIDA

STATE FARM FIRE & CASUALTY COMPANY,

Petitioner

Vs. CASE NO. 78,766

MARGARITA J. PALMA,

Respondent

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Defendant and Counterplaintiff in an action arising from medical expenses in an automobile accident and the Appellant in the District Court of Appeal. Respondent was the Plaintiff, Counterdefendant and Appellee respectively. The parties will be referred to as they appear before this Court.

The symbol "A" followed by a number will refer to the Appendix to this Brief. The symbol "R" will refer to the record on appeal.

STATEMENT OF THE CASE AND FACTS

This cause began when Respondent was injured in an automobile accident and sought no fault benefits. Petitioner paid her medical bills, except for a thermography bill which it considered unnecessary.

The Trial Judge agreed with Petitioner that the procedure was unnecessary and refused to order payment. The Fourth District disagreed and reversed, Palma v. State Farm Fire and Casualty Co., 489 So.2d 147 (Fla. 4DCA 1986), rev.den. 496 So.2d 143.

Upon remand, the trial Court awarded attorney's fees for the trial and the appeal. Because the representation of Defendant was on a contingency basis, the Judge applied a multiplier of 2.6.

On appeal, Respondent challenged the amount of attorney's fees, but not the entitlement. The Fourth District affirmed, State Farm Fire and Casualty Co. v. Palma, 524 So.2d 1035 (Fla. 4DCA 1988).

This Court granted Petitioner review, and approved the Fourth District's decision, State Farm Fire and Casualty Co. v. Palma, 555 So.2d 836 (Fla. 1990). Though this Court had just limited contingency multipliers to 2.5 in Standard Guaranty Insurance Co. v. Quanstrom, 555 So.2d 828 (Fla. 1970), this Court did not

apply that decision to this case. This Court said:

> "While the multiplier in this case exceeds the new range set forth in Quanstrom, we hold that it was applied properly in accordance with Rowe. The reduced multiplier range has only prospective application to attorney's fees determined after the date of the release of Quanstrom."

(555 So.2d at 838).

By separate order the Fourth District granted Respondent's motion for attorney's fees and remanded to the trial Court for determination of entitlement and amount. By separate order, this Court remanded Respondent's motion for attorney's fees to the trial Court for determination of entitlement and amount (R28).

The cause came on for hearing on attorney's fees on April 18, 1990 (R95). Petitioner raised issues relating to entitlement, modification of Rowe, and whether there should be a multiplier (R97). Respondent suggested that the Fourth District had already determined entitlement in its order (R98-99).

Attorney Alvarez indicated that his agreement with Respondent was that he would receive no fee unless he prevailed and he would accept whatever fee this Court awarded if he prevailed (R100)(A1). Attorney Klein testified that his agreement with Respondent was the same (R101)(A2).

Attorney Klein, who handled the case only in this Court, agreed that the only argument Petitioner presented in this Court was as to the amount of attorney's fees (R103)(A3). This included a challenge to the use of the multiplier (R104)(A4).

Philip Burlington testified that he considered the relevant market in this case to require a multiplier because it's a contingency case where there would be no recovery unless counsel prevailed, and because the amount in issue was so small there would be no way to recover from the gross recovery (R107-108). He also opined that there was no way to mitigate the risk of nonpayment, because the client had no resources (R108).

Burlington evaluated the chances of success as less than likely when attorney Alvarez took the case, and said the appropriate multiplier was the one initially used by the trial Court and approved on review (R110-111).

He also evaluated the chance of success as less than likely when attorney Klein entered the case in this Court because of a recent United States Supreme Court ruling casting doubt on the basis for the Rowe decision (R111-112).

Petitioner's objection that the chances of success at the start of the case were not relevant (R112) was sustained (R112-113). Burlington then testified that the chances of success were about even when the appeal begain on the issue of attorney's fees (R113). He reiterated that the same multiplier should be used again because the Fourth District did not distinguish between the trial and the appeal in affirming the fees for the underlying case (R113-114).

He testified that if the multiplier were to be revisited, it would be 2.0 under Rowe at the start of the attorney's fee appeal (R114), or 1.6 under Quanstrom (R114-115). He fixed the multiplier for the review in this Court at 2.6 under Rowe and 2.2 under Quanstrom (R115).

On cross-examination, Burlington acknowledged that attorney Alvarez was on the side of the Respondent in this Court and the Appellee in the Fourth District on review of the attorney's fees. He conceded that one in ten cases gets reversed (R116-117). He also conceded that the risk of not collecting the earlier fees went to zero when Petitioner's supersedeas bond could not be renewed after the Fourth District's affirmance and Alvarez was paid in full (R118). He conceded again that the risk factor had changed (R118-119).

Burlington did not claim that the Judge had to apply any multiplier (R120). He conceded that the Judge could refuse to do so (R121).

By Final Judgment dated August 22, 1990, the trial Judge awarded attorney Alvarez $90,002.25, attorney Klein $22,750 and attorney Burlington $900.00, for a total of $113,652.25. In fixing the amounts due to Alvarez and Klein, he applied the same 2.6 multiplier fixed for the earlier award. He called it the law of the case (R82-84).

Petitioner's Petition for Rehearing (R85-91) was denied September 10 (R92). By Notice of Appeal filed September 13 (R93-94), Petitioner sought review of the Final Judgment assessing attorney's fees.

On that latest appeal, Petitioner challenged Respondent's entitlement to attorneys' fees for the attorneys' fee appellate review under Cincinnati Insurance Company v. Palmer, 297 So.2d 96 (Fla. 4DCA 1974), because no portion of the attorney's fees awarded for that appeal and that discretionary review were to be paid over to Respondent. Petitioner also challenged what appeared to be mandatory use of a multiplier because the trial Judge thought he was bound by the law of the case, and the use of a multiplier which exceeded the range approved by this Court.

The District Court noted the conflicting decisions as to entitlement to attorneys' fees for litigating attorneys' fees. It declared this case distinguishable from Cincinnati, because Petitioner allegedly never voluntarily paid or offered to pay attorney's fees. It declared attorney's fees recoverable under Section 627.428 Fla.Stat. even where only attorney's fees are still at issue.

The District Court also rejected the argument that the trial Judge thought the multiplier mandatory, but reversed the award with directions to reduce the multiplier. State Farm Fire & Casualty Company v. Palma, 585 So.2d 329 (Fla. 4DCA 1991). (A9-18)

By separate order, the District Court granted Respondent's motion for attorney's fees for the instant appeal (A5).

Petitioner timely sought rehearing, rehearing en banc or certification of conflict(A6-7). The motion was denied September 10, 1991 (A8).

By notice filed October 9, 1991, Petitioner sought discretionary review in this Court. By order of July 21, 1992, this Court accepted jurisdiction.

SUMMARY OF ARGUMENT

The contingent fee contract here provides that counsel will accept whatever the Court awards as his fee, will not look to the client for payment of any fee, and will not pay any portion of the fee to the client. With such a contract, any service to the client is over after the underlying dispute is resolved. There is no reason in law or fact for an award of attorney's fees for time the attorneys spend litigating the amount of attorney's fees for resolving the underlying dispute (as opposed to entitlement). That is the view of the Second District Court of Appeal, but not the view of the Fourth, as reflected in the instant ruling. This Court should resolve the conflict of decisions by adopting the decision of the Second as correct and quashing the decision of the Fourth.

This Court has repeatedly held in other settings that an award of attorney's fees may not include time spent litigating over the amount of attorney's fees to be awarded. The same principle should apply here regardless of the nature of the contingency contract, and compels a finding that the Second District is right and the Fourth District is wrong.

As a result, all of the attorney's fees to be awarded under the Fourth District's ruling should be disallowed. If this Court disagrees for any reason, it should still disapprove the District Court decision and order the Court to direct the trial Judge to reconsider whether any multiplier was appropriate. This is required because the trial Judge thought he was bound by the law of the case to apply a 2.6 multiplier. Not only was that multiplier excessive, as the Fourth District holds, but it was no longer a mandatory multiplier. There was good reason not to apply any multiplier to the second set of appeals, because the factors had changed. There is good reason to doubt that the trial Judge knew he had discretion not to apply any multiplier.

POINTS INVOLVED

I. WHETHER ATTORNEY'S FEES MAY BE AWARDED TO THE INSURED'S ATTORNEYS FOR THEIR EFFORTS TO PRESERVE THEIR OWN PRIOR ATTORNEY'S FEES, PARTICULARLY WHERE NO PORTION OF THOSE FEES INURE TO THE BENEFIT OF THE INSURED?

II. WHETHER THE USE OF A MULTIPLIER ON THE ATTORNEY'S FEES AWARDED TO RESPONDENT'S ATTORNEYS SHOULD HAVE BEEN REVERSED BECAUSE THE TRIAL JUDGE THOUGHT THE MULTIPLIER WAS THE LAW OF THE CASE?

ARGUMENT

I. ATTORNEY'S FEES MAY NOT BE AWARDED TO THE INSURED'S ATTORNEYS FOR THEIR EFFORTS TO PRESERVE THEIR OWN PRIOR ATTORNEY'S FEES, PARTICULARLY WHERE NO PORTION OF THOSE FEES INURE TO THE BENEFIT OF THE INSURED

The big issue is whether attorney's fees may be awarded to the prevailing party for the time spent litigating over attorney's fees. The narrower issue is whether any entitlement to attorney's fees in an insurance case like this ceases when the underlying claim has been paid and no portion of the disputed attorney's fee will inure to the benefit of the insured.

On the narrow issue, the Second District continues to deny attorney's fees to attorneys who are litigating attorney's fees solely for their own benefit. In State Farm Mutual Automobile Insurance Company v. Moore, 597 So.2d 805 at 807 (Fla. 2DCA 1992), the Court reversed so much of the award as related to time spent litigating attorney's fees. The Court followed its own decisions in U.S. Security Insurance Company v. Cole, 579 So.2d 153 (Fla. 2DCA 1991), B&L Motors v. Bignotti, 427 So.2d 1070 (Fla. 2DCA 1983) and Service Insurance Company v. Gulf Steel Corporation, 412 So.2d 967 (Fla. 2DCA 1982).

Initially, the Second District's view was shared by the Fourth District. In Cincinnati Insurance Company v. Palmer, supra, the Court analyzed a similar contingent fee contract and found no entitlement to an award of fees after services to the client had ceased with the payment of the underlying policy proceeds. Though the District Court purports to distinguish this case from Cincinnati, supra, the

effort is unconvincing. The ruling in Cincinnati does not turn on how long the insurer fought over the underlying policy. The length of that battle affects the amount awarded to Respondent's attorneys for the first round of litigation, but Respondent's expert had to concede that her attorney was adequately rewarded for the initial trial and appeal when he received over $250,000 (R116).

Cincinnati, supra, was decided on the basis of the contract between the insured and the insurer, and in that regard, this case is indistinguishable from Cincinnati, supra. Thus, the decision in this case aligns the Fourth District with the First and Third. So does Pirretti v. Dean Witter Reynolds, Inc., 578 So.2d 474 (Fla. 4DCA 1991), in which the Fourth District affirmed an award of attorney's fees for time spent litigating over attorney's fees.

Though some members of this Court seem reluctant to take this case, this Court should answer the prayer for help contained in the Fourth District's certified question in Pirretti v. Dean Witter Reynolds, supra. It should resolve the conflicts acknowledged by the Second District in U.S. Security Insurance Company v. Cole, supra. And, when it does so, this Court should adopt the decisions of the Second District as correct.

It is axiomatic that awards of attorney's fees are in derogation of the common law and statutes awarding such fees must be strictly construed, Sunbeam Enterprises, Inc. v. Upthegrove, 316 So.2d 34 at 37 (Fla. 1975), Service Insurance Company v. Gulf Steel Corporation, supra, 412 So.2d at 968. Where, as here, the underlying policy dispute has been resolved, the reason for awarding attorney's fees under the statute ceases, particularly where, as here, the insured has no obligation to pay her attorneys those fees and no portion of those fees will be paid to her.

The pertinent statute in our case is that set out at footnote 2 of this Court's State Farm Fire & Casualty Company v. Palma, supra, 555 So.2d at 837. Section 627.428(1) Fla.Stat. (1983) provided:

> 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 for which the recovery is had.

The prosecution of the suit for which the recovery was had was over after stage one of the appeals. Petitioner never denied that Respondent's attorneys were entitled to be paid for the prosecution of that suit; the only argument was as to the amount. Strict construction of this statute does not permit the award of attorney's fees for the second set of appeals in this cause.[1]

Most litigants do not recover attorney's fees from their adversary unless the underlying action is deemed frivolous, and no one has yet accused Petitioner of pursuing frivolous litigation in this case. Where attorneys are litigating over attorney's fees for their own account, there is no reason in law or fact to make the adversary pay for their services to themselves.

This Court has never addressed the narrow issue, but it has addressed the larger question in other settings. May there be recovery of attorney's fees for litigating over attorney's fees.

1/ It is instructive to note the language in Section 501.2105(2) Fla.Stat. (1979). Though it includes "all the motions, hearings and appeals", the Second District limited recovery to fees in which the client has an interest, B&L Motors, Inc. v. Bignotti, supra.

Attorney's fees for litigating over attorney's fees have consistently been denied in worker's compensation cases. See e.g. Crittenden Orange Blossom Fruit v. Stone, 514 So.2d 351 at 353 (Fla. 1987), Dobbs v. Suncoast Acoustics, 590 So.2d 7 (Fla. 1DCA 1991).

The same rule applies in municipal indemnification cases (Section 111.07 Fla.Stat.) according to Thornber v. City of Fort Walton Beach, 568 So.2d 914 at 919 (Fla. 1990), and in estate cases according to In re Estate of Platt, 586 So.2d 328 at 336 (Fla. 1991).

If this Court meant what it said in cases like Platt, supra, Crittenden, supra, and Thornber, supra, it would do a great service to the bench and bar of this State by spelling out the rule for all such litigation. However, whether it addresses the big issue or the narrow issue, this Court should disapprove the award of attorney's fees in this case and quash the decision of the Fourth District approving the award as modified. It should also quash the order of the District Court of Appeal awarding attorney's fees for the most recent appeal, presently under review, for exactly the same reasons.

In asking this Court to effectively reverse the attorney's fees approved for Respondent's attorneys, Petitioner is aware that the Fourth District thought its prior order granting Respondent's motion for attorney's fees had become the law of the case.

The doctrine of law of the case never bound the District Court to approve the attorney's fees awarded here, not even the portion applicable to services in the District Court. This Court's Strazzulla v. Hendrick, 177 So.2d 1 (Fla. 1965) authorized the Fourth District to recede from its prior, erroneous ruling.

The doctrine certainly does not bind this Court, since it has never passed on the issue of entitlement in this case. To the contrary, its order remanded the issue of entitlement to the trial Court. As the Fourth District acknowledged, at least a portion of the attorney's fees awarded were not covered by it's own prior order. State Farm Fire & Casualty Company v. Palma, supra, 585 So.2d at 330-331. That portion, for services in this Court, clearly should be reversed if this Court accepts Petitioner's view on attorney's fees for litigating over attorney's fees.

If this Court adopts the view of the Second District, or applies its own Platt, Crittenden and Thornber decisions to this issue, it will eliminate the underlying basis for applying the law of the case at all here. This Court will change the law, and that is a recognized basis to recede from the law of the case, Hendrick v. Strazzulla, supra, 3M Electric Corporation v. Vizoa, 443 So.2d 111 at 112-113 (Fla. 3DCA 1983).

If this Court holds that attorney's fees are not recoverable for litigating attorney's fees, the law must allow the entire award in this to be reversed, or there is something wrong with the law.

ARGUMENT

II. THE USE OF A MULTIPLIER ON THE ATTORNEY'S FEES AWARDED TO RESPONDENT'S ATTORNEYS SHOULD HAVE BEEN REVERSED BECAUSE THE TRIAL JUDGE THOUGHT THE MULTIPLIER WAS THE LAW OF THE CASE

Because this Court has accepted jurisdiction in this case, the entire case is now before this Court for review, Tyus v. Apalachicola Northern Railroad Company, 130 So.2d 580 at 585 (Fla. 1961). Petitioner urges this Court to review an additional issue.

Under Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) a multiplier was mandatory in a contingency fee case such as this. In Quanstrom, supra, which preceded the award presently under review, this Court made application of a multiplier optional. Respondent's expert conceded in his testimony that the Judge was not required to apply any multiplier (R121).

That the change from a mandatory multiplier to a discretionary multiplier does apply retroactively is beyond dispute. It was applied in Department of Administration, Office of State Employees' Insurance v. Ganson, 566 So.2d 791 (Fla. 1990) to quash a determination that a multiplier was mandatory on fee approval which preceded Quanstrom by "a few weeks" (566 So.2d at 792).

Petitioner recognizes that Quanstrom gives the Judge discretion to apply a multiplier. The problem with what the Judge did here lies in his erroneous view that the prior award is the law of the case. He felt he had to apply the same 2.6 multiplier. Since he felt bound by the prior numerical multiplier it seems certain he did not recognize that he had discretion not to apply it at all.

There is good reason not to blindly continue to apply a multiplier to the second stage appeals. The underlying chances of success and risks of nonpayment had changed dramatically.

At the start of the first appeal, Respondent's attorneys represented the Appellant. They had to overcome the presumption of correctness. They could not obtain any fees unless they won because their client had no funds.

At the start of the second set of appeals, they represented the Appellee. The burden of overcoming the presumption of correctness had shifted to Petitioner. As Respondent's expert conceded, only one in ten appeals results in reversal (R117).

Moreover, Respondent's attorneys were assured of collecting their fees prior to the second set of appeals. They were litigating against a solvent insurance company which did not contest their entitlement to fees, only the amount.

These are among the critical factors which should have guided the Judge in deciding whether any multiplier was required after Quanstrom, supra.

The general rule that requires affirmance of an order which can be sustained on any basis is subject to a time honored exception. If the Judge does not appear to recognize the law which controls the case, his ruling should be reversed and remanded for reconsideration, Knight v. City of Miami, 127 Fla. 585, 173 So. 801 (1937).

The Fourth District has not hesitated to apply the same principle when it could not tell from the record whether a trial Judge applied the correct rule of law. See, e.g. Boelke v. Peirce, 566 So.2d 904 (Fla. 4DCA 1990), where the Court quashed a ruling rejecting the assertion of the Fifth Amendment privilege and requiring an alleged drunk driver to answer a request for admissions. The Court remanded with directions to reconsider under the test the Court established 7 years earlier. To the same effect is Cotton v. State, 588 So.2d 694 (Fla. 3DCA 1991), where the trial Judge may have erroneously believed he had no discretion in sentencing the accused.

Because there is the same grave doubt here as to whether the Judge knew he had discretion, the application of the multiplier should have been reversed with directions to reconsider in light of the change made by Quanstrom. The District Court did not do so. It accepted Petitioner's argument that the 2.6 multiplier was excessive, thus establishing that the trial Judge had an erroneous view of the law of the case. However, it failed to give Petitioner all the relief from that erroneous view Petitioner was entitled to, and that is also good reason to quash the decision of the District Court.

CONCLUSION

Because attorney's fees should not be awarded for litigating over the amount of attorney's fees, especially where the attorneys are litigating only for their own account, this Court should quash the decision of the Fourth District and direct that no award of fees for Respondent's attorneys is proper for the second set of apeals. Alternately, the cause should be remanded to the trial Judge with instructions to reconsider whether a multiplier is required.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to RONALD V. ALVAREZ, ESQUIRE, 1801 Australian Avenue South, Suite 101, West Palm Beach, Florida, 33409 and LARRY KLEIN, ESQUIRE, Klein & Walsh, P.A., Suite 503 Flagler Center, 501 South Flagler Drive, West Palm Beach, Florida, 33401, this 17th day of August, 1992.

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