OA 10-6-93

047

IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,823
(Third DCA Case #90-1626, 90-2861, and 91-783)

JACQUES LUGASSY and DEBRA LUGASSY, his wife,

Petitioners,

vs.

INDEPENDENT FIRE INSURANCE COMPANY,

Respondent.

FILED
SID J. WHITE
JUN 14 1993
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

AMENDED PETITIONERS' BRIEF ON THE MERITS

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STATEMENT OF THE CASE[1]

On December 14, 1985, Petitioners, Jacques and Debra Lugassy's, home and contents were destroyed by a fire (R 69-77). Their insurer, Independent Fire Insurance Company, denied their claim on August 22, 1986 (Pl. Ex. 2).

On October 10, 1986, this action was filed by two sole practitioners, Milton M. Ferrell, Jr., Esq. and Frank Neuman, Esq., claiming insurance coverage for the home, contents and statutory attorney's fees (R 1-30; 1576, 1694-1696).

Respondent's Answer and Counterclaim alleged that the fire was caused by arson and mooted Petitioners' claim for their home by payment to the mortgagee December 19, 1986 (R 34-61; T 1240). In doing so Respondent transformed Petitioner's potential recovery for the loss of their home into potential liability for a counterclaim far exceeding the remaining contents claim (R 34-61).

New counsel for Petitioners, the firm of Friend and Fleck (T 1447, 1695), was retained pursuant to a specific oral contingency fee agreement that its compensation would be the contingent reasonable fee provided by Section 627.428 Florida Statutes for prevailing insureds (T 1474-1475; 1483).

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[1]The following abbreviations will be used:
R - Record on Appeal;
T - Transcript.
All emphasis is ours unless otherwise indicated.

Thereafter, this case was vigorously contested.[2] Petitioners ultimately prevailed when the jury returned its verdict awarding coverage and finding against Respondent on its counterclaim for $198,476.83 plus additional interest and attorneys' fees (R 270-271; 440).

Evan J. Langbein, Esq., then was retained for the post-verdict fee litigation and appellate services. The jury's verdict was affirmed on appeal. Independent Fire Insurance Company v. Lugassy, 593 So.2d 570 (Fla. 3d DCA 1992).[3] Respondent abandoned its petition seeking further review in this Court.

The trial court rendered a Judgment Awarding Attorneys' Fees, finding Petitioners' attorneys reasonably devoted 810 hours representing the insureds on the coverage claim and "...the related counterclaim..." (R 439-441). The court found the reasonable fee rate was $175.00 per hour, an enhancer of

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[2]The record amassed over three hundred docket entries, 19 pre-trial depositions, seven or eight sworn statements, seven different trial dates and an interlocutory appeal [Independent Fire Insurance Co. v. Lugassy, 538 So.2d 550 (Fla. 3d DCA 1989)] before a jury trial finally commenced almost four years after the fire on November 14, 1989 (T 1450-1454, 1474). The trial lasted seven working days from November 14 - November 22, 1989 (T 1511). The fee litigation was no different, entailing five (5) more depositions and three separate hearings on February 2, 1990; April 26, 1990; and May 3, 1990 (T 1424, 1541, 1572, 1574).

[3]Respondent raised five points in its appeal from the verdict. The transcript of the jury trial exceeded 1400 pages. New appellate counsel, Mr. Langbein, entered the case in 1990 with the understanding he would be compensated by a contingent reasonable fee set by the court pursuant to Section 627.428. The Third District awarded Petitioners' appellate attorney's fees and remanded to the trial court to fix that amount. The evidentiary hearing on that order has been deferred pending these proceedings.

2.0 applicable and adjudged the total reasonable fee for trial services as $315,879.80 (Ibid).[4]

Respondent appealed the attorneys' fees judgment but did not contest the reasonableness of that award. Instead, Respondent sought to infer a "cap on fees" based on Mr. Ferrell's former 1986 "Authority to Represent" contingent fee document (R 557-559). The 1986 document was prepared before suit was filed, when the claim for the home was pending and settlement deemed realistic (T 1675-1676).

Ignoring the subsequent appearance of Friend & Fleck and its oral contingency fee agreement, Respondent claimed the attorneys' fee for all trial and appellate services was "capped" by the 1986 "Authority to Represent" Ferrell document to $44,642.97 (percentage of judgment). The opinion of all the fee expert witnesses was that such "capped" amount was far below any reasonable fee amount (footnote 7, infra).

The Third District Court recognized that the 1986 Authority to Represent did not contemplate the counterclaim, and did not "cap" the fee award for those services. However, the court also opined that an absence of consideration prevented modification to the earlier agreement. The court considered the original fee agreement imposed a "cap" on the

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[4]The total fee included 94 hours litigating the fee claim but the court did not enhance that award. The court adopted the lesser of Petitioners' two expert's opinion as to the hourly rate and the Respondent's expert's as to the quantum of time reasonably devoted. (T 1595, 1562). Initially the trial court observed "...I don't think we need any more testimony to know that this is a 2 1/2 multiplier case..." (T 1605). However, the court applied a 2.0 multiplier (R 439-441).

award to the "law firm" for services devoted to the remaining coverage claim. Independent Fire Insurance Co. v. Lugassy, 609 So.2d 51, 53 (Fla. 3d DCA 1992).

This mixed and incomplete mandate seemingly required the impossible apportionment of services undeniably devoted to the inseparable, singularly dispositive issue of arson and did not determine the fee entitlement of Friend & Fleck, which the court said had no agreement.[5]

The District Court then entered an order awarding additional appellate attorneys' fees to Petitioners' appellate counsel for defense of the fee award appeal. That final mandate tacitly recognizes the nonapplicability of a partial "cap" to legal services intertwined with services not subject to a "cap." An evidentiary hearing also has been deferred on that second appellate fee order.

STATEMENT OF THE FACTS

A. The unrefuted terms of the fee contract

Richard A. Friend, Esq., testified his firm was hired late in 1986 or early 1987 upon an oral contingent fee agreement which exclusively contemplated a court awarded attorney's fees (T 1474-1475):

> "I had told Mr. and Mrs. Lugassy on a few occasions ... from the beginning of the time that I met with them, until the trial, that if we won the case we would

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[5]Respondent acknowledged the legal services rendered on the coverage claim and defense of the counterclaim involved "the very same arson" and were inseparable (T 1304). Petitioners contended below, therefore, that the "cap" did not apply, citing Peacock Construction Corp. v. Gould, 351 So.2d 394 (Fla. 2d DCA 1977). See p. 11, infra.

> be then entitled ... when I say 'we' I mean the attorneys would be entitled ... to a court-awarded fee and that the court would base that fee on the amount of time the court thought was reasonably spent and whatever rate the court felt was appropriate and the difficult factor (sic), and that that would be what we would be looking for in terms of our compensation in the case."

Mr. Friend affirmed "that was the understanding I had with the clients from the outset" (T 1475), and his testimony confirms this understanding "was consistent throughout" his firm's representation in the case (T 1483).[6]

Mr. Friend performed most of the labor in the trial court (T 1447-1458) and substantial labor in the appeals. A lawyer since 1975, Mr. Friend testified, "This was far and [away] the most demanding lawsuit I have ever been involved in ..." (T 1446, 1473). The case precluded other work, was "very fact intensive," and his "companion ... siamese twin..." for three years (T 1451, 1473).

After the verdict a letter was prepared memorializing the attorneys' fee agreement reached when Friend and Fleck first appeared (T 1678). That oral contingency fee agreement was "to allow for recovery of a court-awarded reasonable fee "...in lieu of the percentage fees..." (Ibid).

During the Section 627.428 attorneys' fee litigation, Respondent obtained Mr. Ferrell's former 1986 "Authority

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[6]When Friend & Fleck appeared, the nature of the case had just dramatically changed and new counsel was "concerned" with "getting up to speed" and not with a written memorial of compensation (T 1480-1481).

to Represent" document (R 557-559). Respondent sought to infer from that document a permanent percentage "cap" on fees for all legal services, trial and appellate, notwithstanding the uncontroverted later oral contingency fee agreement (T 1474-1475, 1483; R 560). Respondent's claimed interpretation of the 1986 document violated the intentions of the parties to that former agreement and the custom then prevailing for such legal representation (T 1625-1627, 1673-1675).

The 1986 Authority to Represent was drawn by Murray Sams, Esq., and Mr. Ferrell (T 1581). The document was intended to preserve the separate, full entitlement to the recovery of Section 627.428 attorney's fees without that award being limited by the co-existing contingency percentages in that document. (T 1625-1627, 1674). While drawn without the guidance of the much later 1990 opinions of this Court [see, e.g., Kaufman v. McDonald, 557 So.2d 572 (Fla. 1990)], that understanding of the parties, if not their fully integrated written manifestation in the agreement, was clear. (Ibid).

A paragraph (e) was included in the document to allow these two contingent fee components. The provision of the paragraph (e) component was intended to recognize the separate unlimited entitlement to a court-awarded reasonable fee under 627.428 to which a limitation might otherwise be inferred from the percentage fee component (T 1674).

Mr. Sams testified (T 1625-1627):

> It was our clear understanding that the amount we received from the insurance carrier would not be ... that we were not limiting the amount we could receive from

> the insurance carrier by entering into a contingency fee agreement with our client.

Mr. Sams stated he had relied upon the same dual component agreement in Federal Court "where the court awarded more money than the contingent fee [percentage]," validating this usage (T 1630; see also T 1628-1629).

The intended relationship between the "two components" was a "credit" of court awarded fees to the clients' obligation for a percentage fee. The clients were assured the full retention of sums awarded by the jury if the court awarded fee exceeded the percentage fee. Messrs. Ferrell and Sams testified in that event the attorneys would receive the full fee award (T 1625-1627; 1673-1674; 1691-1693). If the statutory reasonable fee award were less than the percentage fee, Petitioners would then be "credited" in the amount of the reasonable statutory fee award, and obligated to pay Ferrell the difference (T 1674).

Without such a contemplation, Mr. Sams testified, "there's no lawyer in the United States" who will handle an insurance claim since the monetary recovery may be small in relation to services ultimately devoted to insurance litigation (T 1623).

B. <u>The trial court's reasonable fee determination</u>

Adhering to the fee objectives of the original agreement, the later oral modification and the legislative criteria, the trial court found that "[t]he agreement today is that the court is allowed to award a reasonable fee..." (T

1434). The trial court observed "...the intention of the parties is unrefuted and uncontradicted..." (T 1700-1701).

The trial court's factual determination that the oral contingency fee agreement superseded the initial 1986 Authority to Represent, obviated judicial labor to harmonize the terms of the earlier document. The trial court recognized that its determination of a reasonable fee was not "capped" by the oral agreement which simply stipulated to securing the reasonable compensation due a prevailing insured vis-a- vis Section 627.428.

Two experienced and reputable trial lawyers testified a reasonable fee for Petitioners' counsel was between $496,000 and $590,000 (T 1597, 1642-1643). These experts agreed the litigation was complex, extensive, difficult and warranted contingent risk enhancement (T 1642). One expert found that the case reasonably required "massive" amounts of time performing legal work and factual investigation (T 1593, 1596). The award made by the trial court was approximately $180,000 below the lesser figure (R 439-441).

The dollar amount of the fee "cap" proffered by Respondent ($44,642.97) did not approach even the threshold amount of the reasonable fee proffered by Respondent's expert witness.[7]

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[7]Respondent's expert testified that in an "average case" plaintiff's counsel reasonably devotes 25-30% more than the defense (T 1558). Respondent's records revealed defense counsel devoted 579 hours of time before the jury trial even began. (T 1515-1516; 1571 DD-EE). Respondent's expert opined that Petitioners' lead counsel deserved an hourly professional (continued...)

Ultimately the trial court abided by the statutory requirement of awarding a reasonable attorneys' fee for Petitioners' counsel for services for the coverage claim and counterclaim, assessed "a complete reasonable fee," made appropriate findings and so rendered judgment (T 1438; 1443; R 439-441).

SUMMARY OF ARGUMENT

The District Court erred in disregarding the oral contingency fee agreement upheld by the trial court and entered into almost three years before the verdict. The District Court erred in overlooking that the basis for the "complete reasonable fee" adjudged by the trial court on the evidence was the equivalent of its mandate.

The decision conflicts with **Pendley v. Shands Teaching Hospital and Clinic, Inc.**, 577 So.2d 642 (Fla. 1st DCA 1991) [hereafter **Pendley**]. **Pendley** recognizes parties to a fee agreement are free to avoid a "cap," to a reasonable fee award inferred by their litigation adversary, and may clarify their agreement to conform to their intent to recover a reasonable fee (T 1443), pursuant to a legislative criteria.

The trial court's finding of "[t]he agreement today," clothed with the presumption of correctness on appeal, was

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[7](...continued)
rate of $125 and co-counsel $100 per hour (T 1562). Petitioners' experts testified that the reasonable hourly rate for Petitioners' counsel was $175-200 (T 1595, 1641). Using the lesser of each of Respondent's figures establishes Respondent's expert's opinion of a least possible reasonable fee of $72,375 (579 hours plus 25% = 723.75 hours x $100 an hour), before trial and without a Rowe contingency fee enhancer.

unrebutted in the record, and should not have been disturbed by the District Court. Conner v. Conner, 439 So.2d 887 (Fla. 1983); Isaak v. Chardon Corp., 532 So.2d 1364 (Fla. 2d DCA 1988).

The District Court further overlooked unrebutted evidence that the original 1986 Authority to Represent contemplated a fee award under Section 627.428, exceeding a fee determined by the co-existing percentage fee provisions (T 1625-1630, 1674).

Particularly because Respondent was neither bound by nor privy to the fee contract, Respondent lacked standing or capacity to: object to parol evidence which completed and clarified the fee contract or reformed it to the parties' intent; challenge the "consideration" for a modification or reformation of the fee contract; or to prejudice the court with frivolous accusations of ethical irregularity. Pittman v. Providence Was. Ins. Co., 394 So.2d 223 (Fla. 5th DCA 1981); Pendley, supra; Harvard Farms, Inc. v. National Cas. Co., 18 Fla. L. Weekly D1039 (Fla. 3d DCA, April 20, 1993); Genet Co. v. Annheuser-Busch, Inc., 498 So.2d 683, 685 (Fla. 3d DCA 1986).

Respondent has seized a forum for endless litigation of satellite issues in a "collateral proceeding" [see, Preamble to Ch. 4 of "Rules Regulating the Florida Bar"] substantially adding to the expense and longevity of this litigation. After the District Court's decision, Respondent assumed the identity of the client, demanding production of the attorneys' "entire

file ... including their work product." (See, "Amendment to Appellees' Motion for Leave to Amend Response.")

The District Court's remand to award a quantum meruit fee for all services defending the counterclaim, obviated any fee "cap," and should be recognized as mandating the award made by the trial court. The services defending the counterclaim involved the inseparable claim of arson alleged by Respondent to deny coverage, and therefore the "complete reasonable fee" (T 1443) found by the trial court for inseparable services deserves affirmance. Insurance Co. of N.A. v. Lexow, 602 So.2d 528 (Fla. 1992); Peacock Construction Co. v. Gould, 351 So.2d 394 (Fla. 2d DCA 1977).

The fee arrangement "cap," created by Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), should be abrogated or clarified. This "cap" endangers, and sometimes denies, compliance with the legislative directive of reasonable statutory attorneys' fee awards.

The application of a contract fee "cap" to a contingency fee arrangement made in contemplation of a recovery of a statutory reasonable fee is an "anomaly." Since such representation is secured by, and implicitly, if not explicitly, contemplates absolute entitlement to the legislatively assured reasonable fee, a "cap" on that award to ensure the award approximates what it would be without such entitlement is circuitous. A reasonable fee, by definition presents no danger of excessiveness and may not fairly be regarded as posing a potential hardship.

Moreover, when a "cap" would impose so severe a fee award limitation to result in a per se inadequate award, the flexible application of the **Rowe** guidelines should be clarified to assure that the "cap" may be lifted to arrive at compliance with the legislative directive. See, **Goodpasture v. Evans**, 570 So.2d 354 (Fla. 2d DCA 1990).

Further, the "cap's" value is illusory, and its application promotes inflexible imaginary interpretations and otherwise unauthorized challenges by strangers to a fee contract (like Respondent) which may violate the intentions of the parties inter se.

Moreover, the "cap" has generated inferior species of contingency fee agreements which instead of limiting a client's liability to counsel [as expressed in **Rosenberg v. Levin**, 409 So.2d 1016 (Fla. 1982), cited by **Rowe** as the support for the "cap"] paradoxically enhance a client's liability by exposing the client to potential liability for the greater of the court-awarded fee or a percentage fee, impairing the ability of attorney and client to contract and sacrificing the "cap" to the client's potential fee liability.

This court should validate the pre-**Rowe** "customary practice," articulated in **Inacio v. State Farm Fire & Cas. Co.**, 550 So.2d 92, 96 (Fla. 1st DCA 1989), ensuring that contingent fee agreements do not disallow recovery of the greater of the statutory reasonable fee set by the court or the contingent percentage, consistent with the unassailable objective of attorney and client.

The "cap" is particularly inappropriate to contingent fee litigation involving Section 627.428, since that legislation recognized the underlying claim recovery from insurers is typically insubstantial in relation to the legal service involved. The "uncapped" legislative directive assures the ability of insureds to secure competent counsel and discourages insurers from "going to the mat" because of their superior resources. State Farm Fire & Cas. Co. v. Palma, 555 So.2d 836 (Fla. 1990); Standard Guaranty Ins. Co. v. Quanstrom, 555 So.2d 828 (Fla. 1990); Sonora v. Star Cas. Ins. Co., 603 So.2d 661, 664 (Fla. 3d DCA 1992).

The trial court's failure to enhance the award for the fee litigation should be reversed. State Farm Fire & Cas. Co. v. Palma, 585 So.2d 329 (Fla. 4th DCA 1991), jurisdiction accepted, Case No. 78,766, 602 So.2d 942 (Fla. 1992).

The cost judgment should be affirmed because Respondent abandoned its challenge to that judgment on appeal.

ARGUMENT

POINT I

THE DISTRICT COURT INCORRECTLY DISREGARDED THE TRIAL COURT'S RECOGNITION OF THE ORAL CONTINGENCY FEE AGREEMENT AND IMPROPERLY RELIED UPON RESPONDENT'S APPLICATION AND INTERPRETATION OF A PRIOR AGREEMENT.

A. The Trial Court properly determined the applicable fee agreement.

The standard of appellate review of an award of attorneys' fees requires that the appellate court "...must accept the trial judge's conclusion or findings which resolve

factual matters as true, where there is adequate support for them in the record." Straley v. Frank, 585 So.2d 334, 347 (Fla. 2d DCA 1991), Judge Sharp, dissenting, citing Conner v. Conner, 439 So.2d 887 (Fla. 1983); see also, Sierra v. Sierra, 505 So.2d 432 (Fla. 1987).

The trial court determined that Petitioners' counsel had an oral contingency fee agreement in effect since the law firm of Friend & Fleck appeared, almost three years before the verdict and later memorialized in writing (T 1434-1435).

The oral agreement provided simply for the attorneys' contingent compensation in the reasonable amount assessed by the trial court pursuant to Section 627.428 (T 1474-1475, 1483). The trial court accepted that understanding as "uncontradicted" and as posing no stumbling block to the legislative requirement to award a "complete reasonable fee" (T 1443).

The courts of our state properly recognize the validity of oral contingency fee agreements for entitlement to fee awards as to third parties. Dept. of Adm. v. Ganson, 566 So.2d 791 (Fla. 1990) (Ganson II); Ganson v. Dept. of Adm., 554 So.2d 522, 528-29 (Fla. 1st DCA 1989) (Ganson I); Isaak v. Chardan Corp., 532 So.2d 1364 (Fla. 2d DCA 1988); Harvard Farms, Inc. v. National Cas. Co., 18 Fla. L. Weekly D1039 (Fla. 3d DCA, April 20, 1993).

Respondent argued below that the oral contingency fee agreement was unethical and therefore should be disregarded in deference to its interpretation of the original fee

contract prepared before Friend & Fleck was retained (T 1442-1445). Respondent sought to argue that percentage fee provisions in the original fee agreement "capped" the compensation allowable so that the trial court was powerless to award reasonable compensation.

Respondent thus continued its "no holds barred, go-to-the-mat" defense into this fee litigation. Without evidentiary support, Respondent accused Petitioners and counsel in the District Court of "back-dating" the written memorial of the oral contingency fee agreement so as to smear the credibility of the underlying agreement.

The original opinion of the District Court, filed August 11, 1992, evinces that Court was persuaded by Respondent's false imputation of misconduct. The District Court's original opinion, contrary to the record, declared that Friend & Fleck had "[n]o retainer agreement..." (reiterated that erroneous conclusion in its final opinion) while deleting the original opinion's acceptance of Respondent's claim of "back-dating."

The erroneous conclusion that Friend & Fleck had no fee agreement leaves the extension of a fee award "cap" to that firm, from the Ferrell contract, without a basis. Moreover, even that finding supports the reasonable fee awarded by the trial court.

The District Court was misled by Respondent's misuse of Mr. Ferrell's testimony concerning the absence of a written agreement, when Friend and Fleck was retained (T 1677-1678).

Mr. Ferrell testified the absence of "any writing" was one reason the November 22, 1989, letter was prepared (Ibid.) Respondent employed this testimony to falsely assert that "...[n]o retainer agreement was entered into" (Respondent's Brief in the District Court, p.5).

In fact, Mr. Ferrell's testimony was that Petitioners "well knew, Mr. Friend was representing them..." contemplating recovery of court-awarded fees (T 1677-1678) consistent with Mr. Friend's testimony of the oral contingency fee agreement. Respondent also claimed below that the "oral" nature of the Friend & Fleck contract fee agreement was improper and therefore invalid (T 1442-1445).

Most recently, the District Court refused such standing to assert complaints of supposed ethical irregularity as a smokescreen to escape responsibility for a full reasonable fee award. Harvard Farms, Inc. v. National Cas. Co., supra.

Unlike this case, the District Court in Harvard Farms, supra, concerned itself with an attack on the ethics of an undocumented oral contingency fee agreement between the attorney and client. Unlike this case, the District Court reversed the trial court's refusal to consider contingent risk enhancement, relying on this Court's Ganson II decision and this Court's rulemaking power in the Preamble to Ch. 4 of the "Rules of Professional Conduct" of the Rules Regulating the Florida Bar [18 Fla. L. Weekly D1039]:

> Violation of a rule should not give rise to a cause of action nor should it create

> any presumption that a legal duty has been breached. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such duty.

The District Court said [18 Fla. L. Weekly D1040]:

> ...[T]he Supreme Court in deciding Ganson II did not overlook and fail to apply its own rule; instead, out of respect to the purpose of the rule, it recognized that it had no applicability when setting a [reasonable] fee. (Citations omitted.)

In Inacio v. State Farm Fire & Cas. Co., 550 So.2d 92 (Fla. 1st DCA 1989) the court affirmed the propriety of later memorializing in writing an earlier oral change in terms of representation to reflect the intention of attorney and client to recover attorneys' fees under Section 627.428, unencumbered by a previous percentage fee agreement.[8]

The District Court characterized Friend & Fleck as "additional counsel," and found that "the parties' original agreement ..." (to which Friend & Fleck was not a party)

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[8]The Inacio decision was published shortly before the confirmatory addendum involved here and was one of the factors prompting its preparation (T 1680-1681).

"...did not authorize a higher fee..." for the "law firm's" services, except for the counterclaim.

The District Court disregarded the trial court's acceptance of the later agreement because "...new consideration must be given." Perhaps overlooking the separate identity of Friend & Fleck, or having been misled to consider the written memorialization a "connivance," the District Court's opinion erred in not recognizing consideration in the retention of "new counsel."

The opinion also fails to recognize the "consideration" of the new fee agreement in the benefit to the clients in removing any potential for fee liability from their recovery and in the contingent defense of the new counterclaim.

The court erroneously permitted Respondent to invalidate the contractual understanding on an assertion of lack of consideration. A stranger to a contract cannot question consideration therefor. 17 Am.Jur. 2d Contracts, Section 126, at page 141, citing **Stanfield v. W. C. McBride, Inc.**, 88 P.2d 1002 (Kan. Sup. Ct. 1939); Cf, **Genet Co v. Annheuser-Busch, Inc.**, 498 So.2d 683, 685 (Fla. 3d DCA 1986).

While there was an abundance of consideration, either a detriment or benefit, however small, constitutes "new consideration" for an agreement. **Mangus v. Present**, 135 So.2d 417, 419 (Fla. 1961); **Lake Sarasota, Inc. v. Pan American Surety Co.**, 140 So.2d 139, 142 (Fla. 2d DCA 1962). It may be

valuable or in the nature of a gratuity. Wallace v. Ralph Pillows Motors, Inc., 344 So.2d 949 (Fla. 1st DCA 1977).

Performance which differs from that which was previously due is consideration to support a separate promise. Greenfield v. Millman, 111 So.2d 480, 482 (Fla. 3d DCA 1959) [quoting Professor Williston on Contracts that an exchange of promises "however trifling, is enough to make new performance detrimental or the new promise a promise of something detrimental"]; King Partitions v. Donner Enterprises, 464 So.2d 715 (Fla. 4th DCA 1985).

Here "consideration" is present in: the elimination of the largest coverage claim; the introduction of a substantial counterclaim; the agreement of a new law firm to undertake representation; the mutual benefits of assuring recovery of a reasonable fee award; and fulfillment of the public policy of enabling retention of counsel.

Unforeseen difficulties in performing a contract, warranting one party to seek greater compensation and inducing the other party "as a matter of fair dealing, or to get the work done" to promise higher compensation, is consideration. 17 Am.Jur. 2d, Contracts Section 517; 78 C.J.S. Attorney and Client, Section 305(b), p.584-85; Angel v. Murray, 113 RI 482, 322 A.2d 630, 85 ALR 3d 248 (1974); Lee v. Gump, 14 Cal. App.2d, 58 P.2d 941, 943 (1936).

The District Court acknowledged that its refusal to affirm the oral contingency fee agreement, ratified by the

trial court, conflicted with **Pendley's** acceptance of the modified fee agreement between counsel and client.

Confusion not harmony will plague court-awarded fee proceedings so long as otherwise uncontested terms of representation are vulnerable to hypertechnical attacks by a stranger to the fee contract.[9] The **Pendley** court correctly recognized the freedom of attorney and client to change their contract to safeguard recovery of the statutorily guaranteed reasonable fee.

The **Pendley** court was likewise prudent in disregarding the efforts of the antagonist to that contract to foreclose the attorney and client from modifying their agreement to conform to their mutually intended benefit.

Pendley squarely recognizes that attorney and client may change their fee agreement to assure that it presents no obstacle to recovery of a full court-awarded reasonable fee. No legal barrier to the right of the parties to a fee contract precludes, or should preclude, them from doing so. In fact, the consequence of avoiding a previously unanticipated fee cap or in failing to unequivocally contract prior thereto so as to certainly avoid a "cap," is even consideration, as between the

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[9]The bestowal of such standing is an unwise judicial invitation to "a collateral proceeding," to wit: attorneys' fee litigation. It provides a stranger to a fee contract, such as Respondent, a forum for endless litigation of a multiplicity of satellite issues substantially inflating legal expenses and prolonging litigation. Indeed, after the District Court's ruling, Respondent demanded "[T]he entire files of each of [Petitioners'] attorneys ... including their work product," tantamount to becoming the client. (See, "Amendment to Appellees' Motion for Leave to Amended Response" served December 30, 1992, in the District Court.)

parties, if consideration may be questioned by their adversary. The benefits to the parties to the fee contract of assuring full recovery of the statutory fee award and the elimination of potential reduction of the client's recovery due to application of a percentage fee are also consideration.

The fact that a contractual modification between attorney and client assures that the insurer fulfills its statutory obligation to pay a reasonable fee neither confers standing on the insurer to object to a modification nor does it defeat the contracting parties' right to change their contract.

The District Court erred in substituting Respondent's unsubstantiated claim that there was no agreement to accommodate the changed nature of the litigation and identity of counsel for the contrary factual determination of the trial court. Likewise, the District Court overlooked that even its finding of no agreement, mandated ratification of the trial court's complete reasonable fee award. See, **Klarish v. Cypen**, 343 So.2d 1288 (Fla. 3d DCA 1977); 66 Am.Jur.2d, Restitution and Implied Contracts, Section 63.

B. The original agreement did not "cap" the trial court's fee award.

The evidence at the fee trial proved the original attorneys and the clients intended the agreement to allow recovery of a fee award under Section 627.428, to exceed a fee determined by the co-existing percentage fee provisions.

Mr. Sams testified at the fee hearing, in response to the trial court's inquiry, that paragraph (e) of the 1986 fee document was added to that agreement to specifically allow for such a recovery (T 1628-1629):

> THE COURT: And if the sentence in paragraph (e) says that it shall not exceed that specified by paragraph (d), you feel that that makes it so that it can be higher.
>
> THE WITNESS: Judge, I say that this agreement that we're looking at is an agreement, so if you and I enter into an agreement, say, look, I'll try to recover this for you, so and so may pay me more money, we'll be able to take that, but as far as you're concerned the most you'll pay is X number of dollars, and that's what this basically says. And up to the amount of this contingency credit would be given for what was recovered from the insurance carrier. We didn't then and I do not now look at this as a limiting factor on a reasonable attorney's fee and I say that was the clear understanding at the time and it is still my understanding as to what we were doing.

Notwithstanding that unrefuted original intention of the parties, Respondent argued that the drafters of the contract had "[f]rankly ... goofed..." (T 1612).

Admittedly, the original fee agreement was neither a model of clarity nor completeness, nor did it employ the exact terminology acceptable by later court opinions to assure automatic recognition of that mutual intent.

However, the imperfection of authorship does not, in any just way, afford an adversary the prerogative to preclude the court from considering parol evidence which consistently

completes and clarifies the writing or reforms it to the conceded intentions of the contracting parties.

Strangers to contracts lack standing and capacity to invoke the parol evidence rule or to impose a never-intended, foreign interpretation of a contract made between others. See, e.g., Roof v. Chattanooga Wood Split Pulley Co., 36 Fla. 284, 18 So. 597 (1895); Palmer v. R. S. Evans, Jacksonville, Inc., 81 So.2d 635 (Fla. 1955); Tropicana Products v. Shirley, 530 So.2d 493 (Fla. 2d DCA 1988); Pittman v. Providence Was. Insurance Co., 394 So.2d 223 (Fla. 5th DCA 1981); Bessemer Properties v. Barber, 105 So.2d 895 (Fla. 2d DCA 1958).

After detailed consideration of the original understanding, the trial court found that while the 1986 fee document contemplated the statutory fee recovery, it was incomplete in having omitted provision for "what would happen if there was an amount of [fee] recovery that is greater than the contingent -- than the 40 percent" (T 1699).

Thus, even if Respondent had standing to object to the complete terms of understanding, such evidence was properly admissible. Cf., Century Properties, Inc. v. Machtinger, 448 So.2d 570 (Fla. 2d DCA 1984).

The complete intention of the original fee agreement accorded with the customary practice of contingent fee representation in 1986. The parties contemplated recovery of the statutory fee and a "credit" of that award to the percentage fee.

If the fee award exceeded the percentage fee, the attorneys would retain it. The clients would be liable for no more. If the award were less than the percentage amount, the clients would be obliged for the difference, but no more.

The original fee contract is fully compatible with the foregoing. This traditional method of coordinating a "two-component" contingent fee representation received enlightened judicial recognition in **Inacio**, supra, [550 So.2d 96] endorsing its post-**Rowe** viability:

> . . . Counsel for both parties agreed at oral argument that prior to the Supreme Court decision in Rowe [Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985)] it had been customary practice in contingency fee cases where the right to a statutory fee award existed that the fee ultimately payable would be either the contingency percentage or the reasonable fee set by the Court, whichever may be greater. There is no reason to conclude that Rowe has now precluded the courts of this state from giving effect to such agreements.... (Emphasis added)

Accordingly, the trial court was not "precluded ... from giving effect to..." the agreement contemplated, nor was an independent action necessary to reform or perfect the earlier contract document to express the contemplation of retaining court-awarded fees greater than the percentage fee. **Milford v. Metropolitan Dade County**, 430 So.2d 951, 952 (Fla. 3d DCA 1983).[10]

In **Alexander v. Kirkman**, 365 So.2d 1038 (Fla. 3d DCA 1978), the court reformed a release to exclude a non-party

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[10]The trial court was aware that an independent action was not needed (R 393-396; T 1699-1701).

because the parties to the release mistakenly included language including the non-party, contrary to their intent. The court said [365 So.2d at 1039 and 1040-41]:

> The basis for this holding is our conclusion that the expressed and admitted mutual intent of the parties to the release (court's emphasis) should be given effect, so as to preclude reliance upon its mistaken language by the present defendants...
>
> * * *
>
> It must be pointed out the defendants in this case were neither parties to the release agreement, gave any consideration for it, nor changed their position in any way in reliance upon its terms. [footnote omitted] Compare, e.g. Barlow v. Stevens, 112 Fla. 57, 150 So. 245 (1933). They simply seek to be the donee beneficiaries of an enormous benefit, freedom from tort liability, gratuitously placed in their laps through the inadvertence of third parties. On these facts there is therefore no legal or equitable reason to interfere with the effectuation of the conceded intention of the parties to the agreement themselves. 66 Am.Jur.2d Reformation of Instruments, Section 63, p.584.

Similarly, Respondent's position lacks legal or equitable merit to reward it "donee beneficiary" status, granting it "an enormous benefit, freedom from [statutory] liability," on its contention that the contract was incomplete because its preparers "goofed" (T 1612).

This contention is really an admission that Respondent's interpretation was not sensibly intended. It is precisely "goofs" that justice is eminently correct in hastening to relieve. See generally 9 Fla. Jur. 2d, Cancellation, etc., Section 71:

> Where by inadvertence or otherwise a written contract is drafted and executed contrary to the intention of the parties thereto, a court of equity may, on the ground of mutual mistake, reform the contract so as to make it express the real agreement and intention of the parties.

The underpinning of these holdings lends abundant support to **Pendley**'s and **Inacio**'s allowance for full deference to the terms of a contractual agreement, agreed to by the parties inter se, when weighed against a non-party adversary's challenge of their contract.

C. Inseparable services not subject to "cap."

The District Court's mandate overlooked that the trial court had already adjudicated a fee award equivalent to the standard specified by the mandate. The District Court found there was "[a] separate question presented ... where there was also a successful defense against a counterclaim...." (609 So.2d 53).

The Court remanded the instruction to the trial court to base the reasonable fee pursuant to Section 627.428 "...on the original retainer agreement and the reasonable value of services rendered in defense of the counterclaim" (609 So.2d at 54). Yet, the trial court had in fact articulated that its award constituted a "complete reasonable fee," equivalent to a quantum meruit award for all services rendered(T 1443).

Importantly, Respondent admitted that the legal services in defense of the counterclaim addressed the same alleged arson interposed in defense to the coverage claim (T

1304). The services rendered were not susceptible to apportionment because of that common, central and dispositive issue. Accordingly, the trial court's single "complete reasonable fee" for the combined services of Petitioners' counsel should have been affirmed. See, **Peacock Construction Company v. Gould**, supra.

This Court recently held "[t]here is little difference between paying an insurance claim and then suing for its return and refusing to pay the claim in the first place..." **Insurance Co. of North America v. Lexow**, supra, [fees awarded for subrogation claim arising from the policy] 602 So.2d at 531. Respondent was fully liable for "uncapped" reasonable fees pursuant to Section 627.428 for the "separate question presented" by its subrogation counterclaim. Indeed, this "separate question" warranting a "complete reasonable fee" serves to emphasize the irrelevance of the amount recovered as even an arguable basis for a "cap" to the fee award based on a percentage fee.

When "the intertwining of ... related causes of action" involves "a common core of facts" -- as did Respondent's unsubstantiated allegation of arson -- "attorney's fees need not be apportioned..." See, **Chrysler Corp. v. Weinstein**, 522 So.2d 894, 896 (Fla. 3d DCA 1988), citing, Cf., **Hendry Tractor Co. v. Fernandez**, 432 So.2d 1315 (Fla. 1983).

The District Court's finding that "a quantum meruit award of fees..." (609 So.2d 53) on one of two inseparable claims, was not "capped" meant that no "cap" could then

sensibly apply. The trial court's "complete reasonable fee" awarded for exactly those inseparable services should have been affirmed. Peacock Construction Company v. Gould, supra.[11]

POINT II

THE CONTINGENCY FEE CONTRACT "CAP" OF ROWE SHOULD BE ABROGATED OR CLARIFIED.

A contingent fee contract percentage does not reflect the reasonable value of legal services from the standpoint of a fee award against a third party. Ronlee, Inc. v. P.M. Walker Co., 129 So.2d 175 (Fla. 3d DCA 1961); Universal Underwriters Ins. Co. v. Gorgei, etc., 345 So.2d 412 (Fla. 3d DCA 1977); Kaufman & Broad Homes Sys. v. Sebring Airport, 366 So.2d 1230, 1231 (Fla. 2d DCA 1979). See, National Ben Franklin Life Ins. Co. v. Cohen, 464 So.2d 1258, 1259-60 (Fla. 4th DCA 1985); Travelers Insurance Co. v. Davis, 411 F.2d 244, 248 (5th Cir. 1969) [Section 627.428 fees awarded from objective vantage "of the presiding trial judge"]. Accordingly, a "cap," arbitrarily derived from a percentage provision is not a proper device, per se, in seeking to determine the amount of a reasonable fee. When a fee award is "capped" at an amount less than the court determines is reasonable, it is proper for the court to award a greater amount in the interest of the manifest justice of the cause. Goodpasture v. Evans, supra.

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[11]It appears indisputable that when representation is on a contingent basis, a quantum meruit court award of fees should follow Rowe in assessing the reasonable value of services. Isaak v. Chardon Corp., supra; Harvard Farms, Inc. v. National Cas. Co., supra. The trial court already had adjudged that which the remand ostensibly instructed.

In putting the "cap" into practice, it has been erroneously assumed that the presence of percentage fee provisions in a fee contract is inconsistent with, and somehow precludes, the contemplation of and entitlement to statutory or contractually created and co-existing fee recovery authorization.

The party from whom a court-awarded fee is sought, and who is not bound by the fee agreement, is empowered by such a "cap" to infer that a percentage fee conclusively establishes an attorney's contemplation to be compensated solely by a percentage of the client's recovery, exclusive of court-awarded fees. This is fanciful, since to effectuate such an understanding would literally forego entitlement to the recovery of the court-awarded fee and waive such a recovery, since the client, a non-lawyer, could not otherwise enforce it.

Such an inference similarly disregards the co-existing entitlement to separately prescribed (or under Sections 57.105, or 768.79, Fla. Stat. potential entitlement to) reasonable court-awarded fees.

Several reported cases demonstrate that in fact such fee agreements often contemplate adding the attorneys' fee award to the recovery so that the percentage fee includes, rather than fictionally limits, the statutory fee recovery. See, Pendley, supra; World Services Life Ins. Co. v. Bodiford, 537 So.2d 1381 (Fla. 1989).[12]

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[12]Section 627.428(3) provides the fee award "...shall be included in the judgment...," supporting this practice. See (continued...)

Similarly, such agreements may contemplate the separate entitlement to a fee award as a credit and supplement to a percentage fee. See, **Pendley**, supra. Therefore, the courts should be allowed, if they are to apply such agreements, to recognize the particular contemplation of each.

In the case sub judice the attorneys who prepared the initial fee contract testified they contemplated compensation based on the latter of the two customary practices.

While that agreement was replaced by a later oral contingency fee agreement identical to **Quanstrom**, supra, nonetheless, the percentage provisions of the original agreement were excised and employed by Respondent to prop its imaginary fee agreement in which the contemplation concerning the court-awarded attorneys' fee of the parties to the contract was ignored.

In any event, percentage contingency fee provisions were obviously never intended, nor would they be sensibly intended, by lawyer and client to limit the court's ability to award reasonable fees by calculating that percentage before the

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[12](...continued)
also, Clay v. Prudential Ins. Co., 18 Fla. L. Weekly D1081 (Fla. 4th DCA, April 28, 1993), infra. The testimony of Mrs. Lugassy was proffered that Petitioners initially believed the fee (consistent with the legislative directive of Subsection (3) of the statute) was "included" in a judgment as part of the overall recovery (T 1439-1442). The trial court recognized that Mr. Ferrell's 1986 document was susceptible to this understanding (T 1603). At worst, there was "no agreement" (i.e., no meeting of the minds). If so, the "complete" reasonable quantum meruit fee awarded by the trial court still should be affirmed. Klarish v. Cypen, supra.

award and therefore in reverse sequence to its unquestioned routine use.

In practice, the standard contingent fee percentage caps only the client's obligation to pay fees up to the percentage amount when a court-awarded fee exceeds the percentage. It does not exclude or diminish the client's statutory benefits, i.e., the right to then retain the full amount of the verdict (or settlement) or the statutory right to full, fair and reasonable compensation for all services performed, which enabled retention of counsel in the first instance.

This operation assures the fulfillment of the public policy objective of Section 627.428, and does not "cap" its operative effect. **Rosenberg v. Levin**, supra, does not apply because the client suffers no loss of bargain and no additional contractual liability.

This Court's opinions in **Quanstrom**, supra, and **Palma**, supra, maintain that the contingency fee contract "cap" is triggered when the fee is "dependent on the amount involved and the result achieved..." to ensure "...that the fee would not be significantly different in amount than it would be absent the statutory provision." **Quanstrom**, 555 So.2d at 831; **Palma**, 555 So.2d at 838.

Since F.S. 627.428 fees are provided because otherwise "...clearly [the insured] would have been unable to retain an attorney without it..." [**Sonora v. Star Cas. Ins. Co.**, 603 So.2d 661, 664 (Fla. 3d DCA 1992)], the fee award made by the court under Section 627.428 may not logically be limited to

the "...amount it would be absent the statutory provision." Quanstrom, 555 So.2d at 831. Absent the statutory provision there would be no representation and therefore no fee at all. Since it is the statute which first enables the client to secure counsel, it is futile speculation to assume what the fee, if any, might otherwise be. Contemplation of the statutory fee recovery is the essence of that fee - at least such should be properly presumed the legislative determination.

As so long noted, the contingent fee percentage agreement in a claim against one's own insurance carrier is "something of an anomaly" since a fee is authorized under Section 627.428. Universal Underwriters Ins. Co. v. Gorgei, etc., supra, [345 So.2d 413]. This "anomaly" is best explained by realization of the orderly and logical "customary practice" of applying the percentage fee provision after the statutory fee recovery.

The extension of the client's percentage fee "cap" to the statutory liability of an insurance company to pay a reasonable fee assures that the insurer is not encouraged (nor penalized) for failure to resolve the controversy or satisfy the statutory liability, once the level of service meeting the percentage provisions is reached. Moreover, the complete fee reasonably contemplated by counsel in these cases caps the client's fee liability while still assuring the attorney reasonable compensation once the promise of compensation is earned.

The "cap" therefore effectively abolishes the legislated public necessity protections by substituting a "cap" as the final word for the reasonableness standard declared by the legislature. See, **American Liberty Ins. Co. v. West and Conyers**, 491 So.2d 573 (Fla. 2d DCA 1986).

If the basis for limiting a fee award to the amount the prevailing parties may be liable for fees to their counsel under a standard contingency agreement is indemnification, such a rationale is also fallacious. First, as earlier recognized, such agreements contemplate the entitlement to recover such awards unencumbered by the percentage provisions; second, assuming the contrary, any court award less than the full percentage amount would deprive the client of full indemnification; and third, as next explored, any effectiveness of the "cap" has been rendered obsolete at the public's expense.

The creation of a "cap," derived from the percentage provisions of a fee contract on the ability of a trial court to award reasonable attorneys' fees, not only overlooks the objectives and operation of traditional insurance litigation contingent fee contracts but also jeopardizes, and in some cases, denies realization of the reasonable compensation rationale of **Rowe** and the legislative directive of a reasonable fee award. This "cap" ironically violates **Rosenberg v. Levin**, supra.

The contracts crafted to circumvent this misplaced "cap" demonstrate its illusory value, and injure the ability of attorney and client to contract to the client's detriment.

The evolution of contingency fee contracts drafted to dodge the "cap" has now established the superfluous doctrine of law of **Kaufman** that the court-awarded fee may not exceed the contract unless the contract says it may. It is reasonable to therefrom conclude that such a "cap" has been rendered obsolete. However, these contracts require clients to agree to indefinite fee arrangements and potential liability for fees in excess of a percentage of recovery by the substitution of a one or the other alternative for the coordinated two component tradition.

The "**Kaufman**" fee contract now in vogue makes the client liable for the greater of alternative amounts, which in some circumstances will cause the client to forfeit his or her recovery to counsel (e.g. insolvent insurer), unreasonably delay the client's receipt of his or her insurance benefits, and mandate fee litigation to determine the court-awarded fee amount before the client's fee obligation is known, promoting rather than discouraging claim litigation under Section 627.428.

It is ironic that **Rosenberg v Levin**, supra, was decided to foreclose such enhanced client liability, and yet was the citation in **Rowe** for the fee "cap."[13]

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[13]The mistaken premise for the troublesome and confusing dictum in Rowe imposing a "cap" based on the fee arrangement (continued...)

Since the courts allow a **Kaufman**-type contract, to engage in the dual fiction that the "cap" enforces the percentage fee, or that client and attorney ever would agree to limit their recovery of a statutory reasonable fee, is unsound and judicially rewrites fee contracts with absurd terms.

Insurers should not be permitted to dictate terms of contingent fee representation which disallow attorneys from limiting the liability of their clients for fees, as now has become widespread in **Kaufman**-type fee agreements.

An inflexible percentage "cap" to reasonable fee awards defeats the legislative directive which is completely upended by such a "cap" on the fee awards under Section 627.428. The insured is compelled to settle once such a "cap" on fees is

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[13](...continued)
between the prevailing party and its attorney was this Court's extension of Rosenberg v. Levin, supra, overlooking that the rationale supporting Rosenberg does not apply to extend that holding to a reasonable fee award under statutes such as Section 627.428 but rather is in contradiction to that separate right of recovery. While Rosenberg rightly assured the client the benefit of his or her bargain in the fee contract with its own attorney, the additional fee contract that an insurance company makes by virtue of Section 627.428 is to pay a reasonable fee determined at the end of the litigation. This right is a substantive provision of all insurance policies in this state. Sonora v. Star Casualty Insurance Co., supra. Thus, the obligation to pay such a reasonable fee should not be impaired by the separate fee contract between the attorney and client nor that the contract cap impaired by the statutory entitlement.

These problems result from the mistaken fiction that percentage contingency fee contracts cannot operate, and were not intended to operate, after recovery of or with separate contemplation of the court-awarded fee. See, Kaufman, supra. These conflicts arise from futile attempts to integrate two contracts having different objects such that the right to contract with one's own attorney is made subordinate to the separate statutory entitlement to recover attorneys' fees, in disregard of the fact that it was the statute, which first enabled attorney and client to agree to the representation.

reached, because it no longer is economically sensible to continue litigation with the recalcitrant insurer if the fee is then frozen.

A noble objective of **Rowe** is to assure that court awards of attorneys' fees for contingency fee representation consider enhancement to compensate the attorney for undertaking the burdens of uncertain and deferred compensation and in doing so affording access to the legal system to persons otherwise lacking the necessary resources (472 So.2d 1151).

Similarly, the legislative directive of Section 627.428 is to enable insureds to retain counsel to litigate against their insurers by assuring the recovery of reasonable attorneys' fees for their full representation if they prevail. Since the right to that recovery is "a matter of substantive law properly under the aegis of the legislature,..." [**Rowe**, 472 So.2d at 1149], any procedure which denies a reasonable attorney's fee recovery is unconstitutional. See, **Fla. Const. Art. II, Sec. 3**; Cf., **Pepper v. Pepper**, 66 So.2d 280, 284 (Fla. 1953).

The Court recently held "...it would be contrary to the legislative intent..." to deny a prevailing insured "...the entire attorney's fee award from at least the date that fees were first awarded and fixed...." **Clay v. Prudential Ins. Co. of America**, supra, 18 Fla. L. Weekly. at 1083. Thus, the court in **Clay** recognized that any court-awarded fee must be held to the legislated standard, which in this case, must be "reasonable" to pass constitutional muster.

When a "cap" arising from the insurer's inference of an insured's attorneys' fee contract collides as to pre-empt the legislative mandate, the "cap" must be subordinated to the legislative mandate requiring a reasonable fee.

This Court in **Quanstrom** eschewed "caps on fees" in cases which may involve "...a relatively small amount of damages in proportion to the fees established..." 555 So.2d at 833 quoting LaFerney v. Scott Smith Oldsmobile, Inc., 410 So.2d 534, 536 (Fla. 5th DCA 1982).[14]

Rule 4-1.5(b)(4) of the Rules Regulating the Florida Bar provides that in assessing "the results obtained" the court must also evaluate "...the significance of ... the subject matter of ... [and] the responsibility involved in the

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[14]Quanstrom recognized "consumer protection" cases often produce this result. Yet, Palma treated an insured's claims differently. As this case, Inacio and Palma demonstrate, the protection afforded consumers of insurance, vis-a-vis Section 627.428, is the legislative determination that such representation in prosecution or defense against one's own insurer is undertaken due to the statutory promise of reasonable compensation rather than based upon the amount of affirmative claim recovery. The courts are bound to give great weight to legislative fact determinations. Miami Home Milk Producers Ass'n. v. Milk Control Board, 124 Fla. 797, 169 So. 541 (1936). The fee authorizing statute in Rowe [Section 768.56] benefited the prevailing party, and was not legislatively intended to protect a class of consumers against the disparate resources of an organized industry like Section 627.428.

This Court has held: "...the business of insurance is effected with a public interest as much as any other business conducted in the United States... The statute [awarding attorneys' fees against insurer] is a part of the public policy of the State of Florida and its purpose is to discourage the contesting of policies in Florida courts..." and to enable insureds to secure counsel. Feller v. Equitable Life Assurance Society, 57 So.2d 582, 586 (Fla. 1952); Insurance Co. of N.A. v. Lexow, supra, 602 So.2d 531; see also Lumbermans Mutual Cas. Co. v. Renuart-Bailey-Cheely L & S Co., 392 F.2d 556 (5th Cir. 1968); Sonora v. Star Cas. Ins. Co., supra.

representation..." In an insurance coverage case, involving a claim of arson, these factors take priority to the amount of recovery. See, Palma, Inacio, and Clay v. Prudential Ins. Co., supra.

Appellant urged a "cap" which would produce a shockingly inadequate and punitive fee limitation of less than one-third (1/3) of the lodestar amount. This per se unreasonable fee amount even Appellant's expert witness would not endorse. See footnote 7, supra.

In this case, the District Court averted an outrageously unreasonable "cap" [tantamount to a court-created unreasonable fee, see Rule 4-1.5(b), Rules Regulating the Florida Bar] by "uncapping" fees for inseparable services performed defending the counterclaim. See, Askowitz v. Susan Feuer Interior Design, Inc., 563 So.2d 752 (Fla. 3d DCA 1990).

This Court should expressly declare that when a "cap" precludes a court's award of a reasonable fee and thus denies reasonable compensation, the flexible application of the principles utilized in computing a reasonable fee authorizes the court to set aside the "cap." See, Goodpasture v. Evans, supra, when the court held squarely that a reasonable fee supported by the record in the sum of $10,000 must take priority to a fee "cap" which would otherwise have resulted in an unreasonable fee of $4,500.

This clarification is needed to sufficiently recognize that a trial court's first-hand determination of the amount of

its award, necessary to fulfill a standard of reasonableness, is due a presumption of correctness. Conner v. Conner, supra.

Inflexible resort to the "cap" Respondent sought in this case would result in an unreasonable fee award, contrary to the "manifest judgment of the cause." Compare, Palma with Miller v. First American Bank and Trust, 607 So.2d 483 (Fla. 4th DCA 1992); Ziontz v. Ocean Trial Unit Owners Ass'n, Inc., 18 Fla. L. Weekly. D1146 (Fla. 4th DCA, May 5, 1993).

Rowe should not serve as the "quick fix" -- providing automatic or inflexible "caps" or formulae -- in substitution for the painstaking chore of a trial court (as here, encompassing 3 thorough hearings) to consider and set a reasonable fee, predicated on the evidence in the particular case. Sierra v. Sierra, supra.

The "cap" involved here is not the only variable in the Rowe approach demonstrating substantive inequities arising from rigid allegiance to inflexible criteria in setting court-awarded fees. See, Quanstrom. Some courts have described the vulnerability of Rowe's inflexible formula to "exaggeration" or "invention," "as a virus loose in Florida." Ziontz v. Ocean Trial Unit Owners Ass'n, Inc., supra.

Assuming for argument's sake, that the Court agrees with the District Court's analysis applying a "cap on fees," such a "cap" should not be applied to the trial court's lodestar findings to be faithful to its original context.

In Quanstrom, this court said "...a cap on the fee" applied only when a contingent risk multiplier was sought and

awarded (555 So.2d 831) and "...the type of fee arrangement between the attorney and his client..." comes into consideration only "...to justify the utilization of a multiplier..." (555 So.2d 834). See also, **Sheehan**, supra, and **Askowitz**, supra.

Both **Financial Services, Inc. v. Sheehan**, 537 So.2d 1111, 1112 (Fla. 3d DCA 1989), and **Askowitz**, supra, rejected a "cap" applicable to the lodestar. Both **Sheehan** and **Askowitz** held a reasonable lodestar fee should be awarded "...even though the rate was in excess of that agreed upon between appellee and her attorney (citations omitted)." **Sheehan**, supra, 537 So.2d 112; **Askowitz**, supra, 563 So.2d 754. In other words, even if the "arrangement between the prevailing party and their attorney" produces a "cap" to a reasonable court-awarded fee, the lodestar (unenhanced reasonable fee), as defined by **Rowe**, establishes the "suitable foundation of an objective structure" below which the court may not set a reasonable fee. **Rowe**, 472 So.2d 1150; **Quanstrom**, 555 So.2d at 830.

If a "cap" is imposed, its application should be limited to the portion of the fees arguably subject to it, to wit: the enhanced de minimus time of Mr. Ferrell's firm devoted before the counterclaim was filed and Friend & Fleck appeared, if that amount exceeds the "cap."

If an insurer has reason to believe its insureds attorneys' fees may be "capped" the insurance company will have lost the incentive to fulfill the statutory objective promot-

ing settlement, rather it will be relentless in availing itself of the full advantage of its superior resources.

This Court should state clearly that no "cap" applies to the lodestar product, even if the lodestar exceeds the "cap."

POINT III

PETITIONERS ARE ENTITLED TO CONTINGENT RISK ENHANCEMENT FOR SERVICES RENDERED LITIGATING A CONTESTED RIGHT TO REASONABLE ATTORNEYS' FEES.

The same policy reasons for fee awards under Section 627.428 enabling insureds to attract counsel, support the recovery of a reasonable fee for the entire legal services devoted to an ensuing fee contest. See, **State Farm Fire & Cas. Co. v. Palma**, 585 So.2d 329 (Fla. 4th DCA 1991), jurisdiction accepted, Case No. 78,766, 602 So.2d 942 (Fla. 1992).

The trial court orally recognized the services devoted to the fee litigation warranted contingent risk enhancement (T 1571-GG-HH). Without explanation, the court omitted such enhancement from the final judgment awarding attorneys' fees (R 439-441).

This Court should restore that earned enhancement because the essential contingent nature of representation continued, and absent that properly found enhancement, counsel would be denied compensation in full as already determined.

Pursuant to Section 627.428, "...the insured is entitled to an attorney's fees award ... for prosecuting the entire claim..." **Sonora**, supra, 603 So.2d 663. A judgment in favor of the insured does not "eliminate the contingent nature..."

of the case. Tallahassee Memorial Regional Medical Center, Inc. v. Poole, 547 So.2d 1258, 1260 (Fla. 1st DCA 1989).

Section 627.428(3) provides "...fees of the attorney shall be included in the judgment or decree rendered in the case." The statute "evinces a legislative intent" that the fee is for the "entire case." Clay v. Prudential Ins. Co., supra, 18 Fla. L. Weekly. D1082. Accordingly, an "entire case" cannot be of a "contingent nature" prior to judgment, then change its nature when the insurer contests the fee award.

The risk of non-payment and certainty of deferred payment inherent to a contingent fee contract, may be aggravated by dilution if the recovery of the compensation awarded under the statute is prolonged by extended appellate proceedings contesting the fee award itself. It is contrary to the public policy directives of 627.428 to allow its protection to abruptly vanish for the services rendered to secure its enforcement. It is therefore appropriate that the fee recovery completely compensate counsel for all services reasonably and necessarily devoted to the litigation uniformly. See, Palma, supra.

The trial court was uncertain of the continued "contingency" nature of the representation after the verdict, and apparently for that reason did not enhance the award for litigation of the fee entitlement. Attorneys' fees are a substantive recovery under the Respondent's policy and a full

reasonable fee for all services (including enhancement for all services) should be awarded.

POINT IV

THE COST JUDGMENT SHOULD BE AFFIRMED.

On December 11, 1990, the trial court rendered its Judgment Awarding Costs in the sum of $11,912.96 plus interest (R 441-A). Respondent appealed it, Case No. 91-783 in the District Court.

The only point raised by Respondent on appeal of that cost judgment was that it should be reversed if the judgment on the verdict were reversed (pg. 14 of Respondent's Initial Brief in the District Court). The judgment on the verdict was affirmed.

Points not raised in appeal are abandoned. **Chaachou v. Chaachou**, 135 So.2d 206, 221-222 (Fla. 1961). The District Court, without comment, reversed the cost judgment.

The trial on costs was finally completed a year after the verdict; Respondent contested every penny (R 570-676). Petitioners should not be required to re-litigate the cost judgment abandoned by Respondent on appeal.

CONCLUSION

The District Court's decision should be quashed and remanded with instructions to affirm the trial court's Judgment Awarding Attorneys' Fees and the Judgment Awarding Costs. The trial court's failure to enhance the fee awarded for the contested right to a reasonable statutory fee should

be reversed with instructions to apply the contingent risk enhancement uniformly to that portion of the fee award.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy hereof has been furnished by mail to: **Alvin N. Weinstein, Esq.**, Weinstein, Bavly & Moon, 920 Biscayne Building, 19 West Flagler Street, Miami, Florida 33130; and to **Arthur J. Morburger,**

Esq., Penthouse I, 155 South Miami Avenue, Miami, Florida 33130, on this 11th day of June, 1993.

By _____
Evan J. Langbein

EJL\Lugassy\SupCourt\B.2\mm

IN THE SUPREME COURT OF FLORIDA

JACQUES LUGASSY and DEBRA LUGASSY, his wife, Petitioners, vs. INDEPENDENT FIRE INSURANCE COMPANY, Respondent.	CASE NO. 80,823 (Third DCA Case #90-1626, 90-2861, and 91-783)

AMENDED APPENDIX TO AMENDED PETITIONERS' BRIEF ON THE MERITS

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INDEX TO AMENDED APPENDIX

1

Manuel Rico PEREZ, M.D., etc., et al., Appellants,

v.

Yadira ACOSTA, Appellee.

No. 92-0045.

District Court of Appeal of Florida, Third District.

July 21, 1992.

Rehearing Denied Aug. 11, 1992.

Upon review of the briefs and record, the court concludes that it is without jurisdiction to entertain this appeal. See *Fineman v. Greenberg*, 575 So.2d 1316 (Fla. 3d DCA 1991); *Page v. Ezell*, 452 So.2d 582 (Fla. 3d DCA 1984); *Braddon v. Doran Jason Co.*, 453 So.2d 56 (Fla. 3d DCA 1983). Appeal dismissed.

NESBITT, JORGENSON and GODERICH, JJ., concur.

2

INDEPENDENT FIRE INSURANCE COMPANY, Appellant,

v.

Jacques LUGASSY and Debra Lugassy, Appellees.

Nos. 90-1626, 90-2861, 91-783.

District Court of Appeal of Florida, Third District.

Oct. 20, 1992.

Rehearing Denied Jan. 5, 1993.

Insureds brought action against insurer to recover on claim for fire loss. The Circuit Court, Dade County, Steven D. Robinson, J., entered judgment in favor of insureds, and awarded attorney fees and costs. Insurer appealed. On motion for clarification, the District Court of Appeal, Ferguson, J., held that: (1) insureds were not entitled to award of statutory fees in excess of contingent fee cap in original retainer agreement, despite attempted posttrial modification of that agreement, but (2) plaintiffs were entitled to award for reasonable value of services rendered by their attorneys in successful defense of counterclaim.

Reversed and remanded with instructions.

1. Insurance ⇐675

In making award of attorney fees under statute allowing fees to prevailing party in suit against insurer, trial court is not free to exceed fee agreement stipulated to by prevailing party and his attorney. West's F.S.A. § 627.428.

2. Attorney and Client ⇐137

Under general rules of contract law, attorney and client are free to alter terms of retainer agreement, but new consideration must be given.

3. Attorney and Client ⇐137

For purposes of determining whether new consideration has been given to support alteration of retainer agreement, no new consideration passes between client and attorney and no new detriment is suffered by either with regard to legal services already performed.

4. Insurance ⇐675

Insureds who prevailed in action against insurer to recover for fire loss were not entitled to award of statutory attorney fees in excess of contingent fee cap in original retainer agreement; original agreement was not effectively altered by posttrial modification for which no new consideration was given. West's F.S.A. § 627.428.

5. Insurance ⇐675

Although insureds who prevailed in action against insurer were not entitled, with respect to prosecution of claim, to award of statutory fees in excess of contingent fee cap in original retainer agreement, insureds were entitled to quantum meruit

award of fees, over and above contingent fee, for work performed by same attorneys in successful defense against counterclaim. West's F.S.A. § 627.428.

Arthur J. Morburger, Weinstein, Bavly & Moon and Alvin N. Weinstein, Miami, for appellant.

Ferrell, Cardenas, Fertel, Rodriguez & Mishael, Miami, Friend, Fleck & Gettis, South Miami, Evan J. Langbein, Miami, for appellees.

Before NESBITT, FERGUSON and LEVY, JJ.

ON MOTION FOR CLARIFICATION

FERGUSON, Judge.

Jacques and Debra Lugassy filed a claim for loss of personal property with their insurer, Independent Fire Insurance Company, after their home and its contents were destroyed by fire. The insurer denied the claim asserting that the loss was caused by the Lugassys' arson and not covered under the policy. This lawsuit was brought for loss benefits totalling $135,000. A jury found in the Lugassys' favor, and awarded $67,250.60 to which the court added $31,956.60 in prejudgment interest.[1] Pursuant to section 627.428, Florida Statutes (1991), the trial court awarded $315,879.80 in attorney's fees and $11,912.96 in costs. This appeal is from the order awarding costs and fees.

Independent's principal contention on appeal is that the award of fees in a sum which exceeded the fee agreement between the Lugassys and their lawyers was impermissible. We agree and reverse. The facts relating to the fee agreement are as follows.

In 1986, the Lugassys entered into a retainer agreement with attorney Milton M. Ferrell, Jr. The agreement provided that Ferrell would be paid on a contingency basis and the total fee due Ferrell would not exceed 45 percent of any recovery.

The law firm of Friend & Fleck and attorney David Mishael later appeared as additional counsel. No retainer agreement was entered into regarding new counsel. In November 1989, the case went to trial. After the jury retired to deliberate a verdict, a discussion allegedly took place between the Lugassys and their attorneys about the previously agreed-upon fee arrangement. On the Monday following the successful jury verdict, attorney Mishael and the Lugassys signed a letter memorializing their attorneys' fee discussion. The letter provided:

> As you know we had a discussion today while the jury was out, referable to the retainer agreement concerning this action.
>
> As I reminded you in our discussion, the Court, by virtue of Florida case law can, and should, award attorneys' fees should we prevail. You indicated during our conversation that you understood our initial contract and the intent of that contract to allow for recovery by Friend & Fleck and Ferrell, Williams, P.A. of such court awarded attorneys' fees in lieu of the percentage fees. I wanted to reiterate our intent and understanding and reconfirmation of this intent this afternoon.
>
> To the extent that this letter modifies, in any way, shape, or form our existing fee contract, the contract is heretofore so modified. Please sign this letter confirming the intent of our agreement as stated above.

At a post-trial hearing on attorney's fees, counsel for Independent argued that the parties were bound by the fee agreement established in the Authority to Represent. The trial court agreed that the Authority to Represent clearly set the contingency percentage as the maximum awardable fee, but ruled that the letter written after the jury had reached its verdict had retroactively changed or modified the terms of the Authority to Represent. The court concluded that the post-verdict letter

1. We affirmed that verdict in *Independent Fire Ins. Co. v. Lugassy*, 593 So.2d 570 (Fla. 3d DCA 1992).

nated the cap on fees previous
lished by the retainer agreement
fied the higher award. We disa

[1] In making an award of
fees under section 627.428, Florid
(1991), the trial court is not free
the fee agreement stipulated to b
vailing party and his attorney.
v. Head, 566 So.2d 508 (Fla.1990)
Patient's Compensation Fund
472 So.2d 1145 (Fla.1985); *Go*
Employees Ins. Co. v. Robinson,
230 (Fla. 3d DCA1991), *rev. de*
So.2d 557 (Fla.1992). Although t
were free to fashion an employm
ment which permitted the court t
reasonable fee in excess of the co
fee, *see e.g., Florida Patient's C*
tion Fund v. Moxley, 557 So.2d
1990); *Kaufman v. MacDonald*,
572 (Fla.1990), the parties' origi
ment did not authorize a higher
absence of such a provision doom
judgment claim for a higher fee i
Regional Medical Center, Inc.
lewski, 573 So.2d 876 (Fla. 5th
rev. denied, 583 So.2d 1036
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contract permitting recovery of
able attorney fee, if awarded and
than the agreed percentage of
gross award.... The absence
three little words is fatal to the
party's] position." *Id.* at 882.
Pendley v. Shands Teaching
So.2d 642 (Fla. 1st DCA1991).[2]

[2–4] Under general rules o
law, parties are free to alter the
retainer agreement, 4 Fla.Jur.2d
at Law § 139, at 299 (1978), how
consideration must be given. *F.*
Co. v. Powell, 94 Fla. 550, 11
(1927); *In re Estate of Johnson*,

2. The *Pendley* court did not address
the propriety of a post-trial modific
fee contract to award a fee greater t
plated by the client and counsel in
ment where there was no claim or
new consideration. In note 1 of th

cluded that the post-verdict letter had eliminated the cap on fees previously established by the retainer agreement and justified the higher award. We disagree.

[1] In making an award of attorney's fees under section 627.428, Florida Statutes (1991), the trial court is not free to exceed the fee agreement stipulated to by the prevailing party and his attorney. *See Lane v. Head*, 566 So.2d 508 (Fla.1990); *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla.1985); *Government Employees Ins. Co. v. Robinson*, 581 So.2d 230 (Fla. 3d DCA1991), *rev. denied*, 595 So.2d 557 (Fla.1992). Although the parties were free to fashion an employment agreement which permitted the court to award a reasonable fee in excess of the contingency fee, *see e.g., Florida Patient's Compensation Fund v. Moxley*, 557 So.2d 863 (Fla. 1990); *Kaufman v. MacDonald*, 557 So.2d 572 (Fla.1990), the parties' original agreement did not authorize a higher fee. The absence of such a provision doomed a post-judgment claim for a higher fee in *Orlando Regional Medical Center, Inc. v. Chmielewski*, 573 So.2d 876 (Fla. 5th DCA1990), *rev. denied*, 583 So.2d 1036 (Fla.1991). There the fifth district, in limiting attorneys fees to the 45 percent contingency cap set by the attorney-client contract, wrote "there was no additional language in the contract permitting recovery of a reasonable attorney fee, if awarded and *if greater than* the agreed percentage of the total gross award.... The absence of those three little words is fatal to the [prevailing party's] position." *Id.* at 882. *But see Pendley v. Shands Teaching Hosp.*, 577 So.2d 642 (Fla. 1st DCA1991).[2]

[2–4] Under general rules of contract law, parties are free to alter the terms of a retainer agreement, 4 Fla.Jur.2d *Attorneys at Law* § 139, at 299 (1978), however, new consideration must be given. *F.L. Stitt & Co. v. Powell*, 94 Fla. 550, 114 So. 375 (1927); *In re Estate of Johnson*, 566 So.2d 1345 (Fla. 4th DCA1990). With regard to legal services already performed, no new consideration passes between client and attorney and no new detriment is suffered by either. *See generally* 1A *Corbin on Contracts* § 175, at 123 (1983) (if a promisor is bound by contract to perform a service at an agreed price, it is generally held that his performance of that duty is not a sufficient consideration for the promisee's agreement to pay increased compensation). The original retainer agreement set a 45 percent contingency cap on attorney's fees which, for the foregoing reason, was not effectively altered by the post-trial modification letter.

[5] A separate question presented is whether a prevailing plaintiff under a contract which provides for fees may be compensated an amount in excess of that fixed by the agreement where there was also a successful defense against a counterclaim. In *Erickson Enters., Inc. v. Louis Wohl & Sons*, 422 So.2d 1085 (Fla. 3d DCA 1982), we held that where a plaintiff is required to prevail on a counterclaim as well as his own claim in order to recover, the fee amount fixed by a contract does not preclude an award of fees for the defense of the counterclaim. *See also Askowitz v. Susan Feuer Interior Design, Inc.*, 563 So.2d 752 (Fla. 3d DCA1990) (reversing the enhancement of lodestar fee and affirming fee award for defense of counterclaim), *rev. denied*, 576 So.2d 292 (Fla.1991).

The law firm is therefore bound by the Authority to Represent for work performed in the prosecution of the Lugassys' claim as there was no consideration to support additional compensation. Based on the authority of *Erickson* and *Askowitz*, however, the law firm is entitled to a quantum meruit award of fees for work performed on the counterclaim as those services were not contemplated by the Authority to Represent.

2. The *Pendley* court did not address the issue of the propriety of a post-trial modification of the fee contract to award a fee greater than contemplated by the client and counsel in their agreement where there was no claim or showing of new consideration. In note 1 of the opinion it is clear that a contingent risk multiplier was applied to modify the contract so as to enhance the fee—precisely what this court in *Robinson*, 581 So.2d at 231, said could not be done. We therefore recognize conflict with *Pendley*.

Reversed and remanded with instructions to base the fee award on the original retainer agreement and the reasonable value of services rendered in defense of the counterclaim.

Bruce F. IDEN, et al., Appellants,

v.

Paul KASDEN, Appellee.

Nos. 91-1933, 91-2476.

District Court of Appeal of Florida, Third District.

Oct. 20, 1992.

Rehearing Denied Jan. 5, 1993.

Vendor brought suit against purchaser's attorneys for fraudulent misrepresentation arising out of attorneys' failure to place funds in escrow. The Circuit Court for Dade County, Amy Steele Donner, J., entered judgment against attorneys, and they appealed. The District Court of Appeal, Nesbitt, J., held that attorneys were not guilty of fraudulent misrepresentation.

Reversed and remanded with directions.

1. Fraud ⇐3

To recover damages for fraud, claimant must prove defendant made false statement of material fact, defendant knew at time it was made that such statement was false, defendant intended false statement to induce claimant to act upon it and claimant justifiably relied on false statement resulting in injury to him.

2. Attorney and Client ⇐26

Despite vendor's assumption that purchaser's entire $200,000 deposit was held by purchaser's attorneys in escrow, attorneys were not guilty of any fraudulent misrepresentation, where contract only provided for attorneys to act as escrow agents for $40,000, and there was nothing in one attorney's letter that would have led reasonably prudent businessman to conclude that attorneys were holding additional funds in escrow.

3. Customs and Usages ⇐15(1), 17

While custom or usage may be employed in explanation and qualification of terms of contract that would otherwise be ambiguous, it cannot operate to contravene express instructions or to contradict express contract to contrary.

4. Evidence ⇐555.2

There was no reason to consider expert's opinion testimony where there were no foundational facts upon which opinion could be based.

Thomson, Murard & Razook and Parker Thomson and Susan Aprill and Karen Williams Kammer, Miami, for appellants.

Joe N. Unger, Miami, S. David Sheffman, Miami Beach, for appellee.

Before NESBITT, FERGUSON and GODERICH, JJ.

NESBITT, Judge.

Allan Milledge and Bruce Iden, attorneys, appeal a money judgment entered against them on a claim of fraudulent misrepresentation in a real estate transaction. Their claim here is the insufficiency of the evidence to support the verdict and judgment. We agree and reverse with directions to grant their motion for directed verdict.

The attorneys represented the Bainbridge Company as purchaser of the Delano Hotel from Paul Kasden, owner and seller. Of the $2.6 million selling price, the seller wanted $200,000 by October 1, 1988. To this end, the sales contract provided Bainbridge would immediately pay to Milledge and Iden $40,000, to be placed in an escrow account. The contract also provided $160,000 "additional deposit to be paid on or before October 1, 1988." Bainbridge placed the $40,000 in escrow. The buyer's

concern that the hotel might contain tos prompted the parties to the cont provide for this contingency in th tract. Before the October 1 date, th er detected asbestos and, as per pro in the contract, Kasden elected to cu remove it. The $160,000 deposit was paid to Kasden when inspection prov asbestos had been removed.

Kasden claims that Milledge an made representations in the course subsequent negotiation both prior a ing the asbestos removal which led to believe and rely upon the fact th $160,000, as well as the original $ was being held in escrow. He claim he spent $200,000 in removing the as and that Bainbridge thereafter wro refused to close under the contract

Kasden sued Bainbridge for c damages. He also brought this against Milledge and Iden claimin they had agreed to escrow the full $ which should have been paid to hi completion of the asbestos removal den claims that the attorneys' c chiefly a letter sent to Kasden by I Kasden to believe and rely upon sumption that Milledge and Iden we ing the additional $160,000 in e Kasden offered the letter, reprod footnote 1, into evidence, together v testimony of an attorney qualifie expert in land sales transactions. T tract negotiations between the at and Kasden in the weeks preced October 1 date and completion of th tos removal, led the expert to concl

1. The letter in full stated:

Re: Kasden Sale to Bainbridge Stre ration Contract for Sale and Purcha 7-21-88

Dear Bob:

Thank you for your letter of Sept 1988. This letter will confirm that receipt of additional funds in connec the above-noted transaction. These fu sent to me by the Purchasers in connec their efforts to reach an accommoda the Seller regarding the asbestos mat

With regard to the release of this please refer to paragraph 32(c) of t referenced Contract. The deposit wi released until such time as the cur have been completed by the Seller an by the Purchasers.