IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,823

JACQUES LUGASSY and DEBRA LUGASSY,

Petitioners

vs.

INDEPENDENT FIRE INSURANCE COMPANY,

Respondent

RESPONDENT'S AMENDED BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND OF THE FACTS

Petitioners' Statement of the Case and of the Facts is replete with material inaccuracies and omissions. Specific areas of disagreement with that Statement of the Case and of the Facts are noted in the ensuing paragraphs.

The insurance policy (Plaintiffs' Exh. 1) issued by Independent Fire Insurance Company is more accurately described as insuring the Lugassys' house and its contents and naming as insureds the Lugassys and mortgagee First Nationwide Savings. (T 461, line 24 to T 462, line 4; T 732, lines 20-24) It was pursuant to the terms of that policy that, in 1986, Independent Fire Insurance Company paid $198,476.83 in benefits directly to mortgagee First Nationwide Savings (T 1238, Plaintiffs' Exh. I-G) with regard to the explosion and fire that damaged the house on December 14, 1985 (T 1006).

Petitioners fail to report that the benefits they claimed totalled $135,000 [for damage to their personal property in the house ($115,500) and for their loss of use of the house while seeking housing elsewhere ($19,500)]. (Plaintiffs' Exh. 2 and 4) It was that claim that Independent denied; one of the stated grounds for that denial was that the mortgagors were not covered for that damage under the policy because the damage was caused by the arson of either or both of the Lugassys and that, by its terms, the policy excluded coverage for arson. (Plaintiffs' Exh. 2)

On October 10, 1986, the Lugassys, as plaintiffs, filed suit for the claimed fire insurance policy benefits, naming as defendant Independent Fire Insurance Company. (R 2) Independent's answer (R

34-61; R 110) denied the operative allegations of the complaint and alleged that plaintiffs were guilty of arson. Independent's answer included a counterclaim against the Lugassys seeking damages as subrogee of mortgagee First Nationwide, likewise alleging that the loss was caused by the arson of the Lugassys. (R 112) The subrogation was alleged to have arisen out of the policy benefits that Independent paid to additional insured First Nationwide. (Defendant's Exh. I-G; Plaintiffs' Exh. 1, p. 15, ¶ 8)

On November 22, 1989, a jury verdict was returned (a) in favor of plaintiffs on their claim in the amount of $67,250 (R 270), less than one half the $135,000 amount that plaintiffs had requested, and (b) against Independent on its counterclaim. After prejudgment interest was computed by the court, judgment was entered on that verdict in the aggregate amount of $99,206.60. (R 317) On appeal to the Third District, that judgment was affirmed. Independent Fire Insurance Co. v. Lugassy, 593 So.2d 570 (Fla. 3d DCA 1992). That judgment reserved jurisdiction to tax attorney's fees and costs at a later date. Pursuant to that reservation, two further judgments were entered in favor of plaintiffs, one for attorney's fees in the amount of $315,879.80 and the other for costs in the amount of $11,912.96. (R 439-441, R 568, and R 441A) Those latter two judgments were at issue in the consolidated appeals below.

In regard to the attorney's fee issue, there were several evidentiary hearings. (T 1424-1703) At those hearings, on the one hand, Independent took the position that the Lugassys' fee award should be limited to the retainer agreement's contingency fee cap

(quoted, infra, in the next succeeding paragraph) and, on the other hand, the Lugassys argued there should be no cap.

Petitioners' Statement of the Case and Facts only obliquely alludes to the evidence presented at those hearings that, on or about July 25, 1986, the Lugassys retained attorney Milton M. Ferrell, Jr. to represent them. (R567) Conspicuously missing from Petitioners' Statement of the Case and Facts is the following, operative provision of the retainer agreement (entitled "Authority to Represent"; R 549-551 included in Exh. 1 in evidence at the February 2, 1990 hearing; R 567):

> (d) As compensation for their services, We agree to pay our said attorneys from the proceeds of recovery, the following fee:
> * * *
> (3) 40% of any recovery up to $1 million through the trial of the case.
> * * *
> (7) 5% of any recovery if an appeal is necessary. Such 5% will be in addition to the fee limitations stated above.
>
> It is further agreed and understood that this employment is upon a contingent fee basis, and if no recovery is made, we will not be indebted to our attorneys for any sum whatsoever as attorneys' fees.
>
> (e) **In the event any attorneys' fees are recovered by MILTON M. FERRELL, JR. against Independent Fire Insurance Co. or First Nationwide Savings Bank** or any other party, firm or corporation as a result of the representation as described herein, it is agreed that all of such attorneys' fees recovered will be credited to the client hereunder, and **the total fee due MILTON M. FERRELL, JR. shall not exceed that specified by paragraph (d) above.**

Petitioners' Statement of the Case and Facts also omits Attorney Murray Sams testimony that he and Ferrell co-authored the "Authority To Represent"[1] and that it generally tracked the provi-

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[1] In fact, the text of the Authority to Represent reflects that the firm of "Sams, Ward & Neuman, P.A." was initially named in the agreement as co-counsel but was crossed out, leaving as sole

sions of his firm's "standard form contract" in "contingent fee cases" (T 1599, line 21 to T 1600, line 5) and that he had drafted "hundreds" of those contracts (T 1631, lines 6-8).

Also omitted from Petitioners' Statement of the Case and of the Facts is the following exchange between the trial court and Ferrell: the court requested that attorney Ferrell choose between alternative "A" -- whether the "Authority To Represent" incorporated the oral agreement between him and the Lugassys -- and alternative "B" -- whether he had some side oral agreement with the Lugassys (T 1690, line 4 to R 1693, line 23) and Ferrell answered that alternative "A" is correct, that he reads the "Authority To Represent" as "containing that [oral] agreement ..." (T 1693, line 24 to T 1694, line 2).

In January, 1987, the law firm of Friend & Fleck first appeared in the case as additional co-counsel with plaintiffs' counsel Ferrell (R 67).[2] Moreover, Ferrell became a member of Ferrell, Williams P. A.

Petitioners' Statement of the Case and of the Facts significantly also omits any reference to the following evidence presented at trial by the Lugassys as part of their own case:

(a) Ferrell testified that his oral agreement with Friend was

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counsel Milton M. Ferrell, Jr. (T 1675, lines 2-22).

[2] At page 6 of the Lugassys' Answer Brief, filed in the Third District, they concede that Friend did not enter the case until after January 1, 1987 -- after Rule 4-1.5, Rules Regulating the Florida Bar, was promulgated. By contrast, at page 4 of Petitioners' Brief On The Merits, filed in this Court, they seek to distance themselves from that concession by representing instead that Friend's firm "was hired late in 1986 or early in 1987."

that Friend would share in two thirds of Ferrell's fee and that the Lugassys were aware of that agreement but never gave their written consent thereto (T 1694, lines 8-22);

(b) According to plaintiffs' attorney Ferrell,

> "... there had never been an agreement with Mr. Friend nor with my firm that was agreed to by the clients, or any writing between Mr. Friend and I, for that matter, but certainly nothing with the client."

(T 1677, lines 13-16)[3],[4]

Petitioners' Statement of the Case and of the Facts also glosses over Ferrell's further testimony, as part of plaintiffs' case, that

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[3] Ferrell testified that no retainer agreement was entered into in regard to Richard Friend, Friend & Fleck, or Ferrell, Williams, P. A. (or David Mishael, an associate of Ferrell, Williams, P.A. who appeared as additional counsel). (T 1694, lines 18-22).

[4] Ignoring those aspects of their own evidence, Petitioners' Statement of the Case and Facts, at pages 1, 4, and 5, focuses rather upon Friend's testimony at T 1474-1475 and 1483 that there was an alleged pretrial oral fee agreement with the Lugassys limiting him just to any court awarded fee assessed against Independent. However, Friend did not contradict Ferrell's testimony, presented as part of plaintiffs' case, that Friend had entered into an agreement with Ferrell to divide their fees two thirds and one third. (T 1694, lines 8-22) Since Ferrell's fees were fixed by the written retainer agreement as a percentage share of the Lugassys' recovery, Friend's testimony that he had agreed to look solely to a court-awarded fee was inherently inconsistent. Moreover, since Ferrell's fees were capped by the written retainer agreement, Ferrell could not share in fees in excess of that cap for prosecuting the Lugassys' claims; therefore, by agreeing to divide fees with Ferrell, it follows that Friend could not look to recover fees in excess of that cap for prosecuting those claims. Neither did Friend attempt to explain away those inconsistencies nor did he attempt to explain away Ferrell's testimony, also presented as part of plaintiffs' case, that Friend had not entered into any agreement with the Lugassys nor did he relate any discussion with the Lugassys about whether the fee cap specified in ¶ (e) of the initial retainer agreement would be applicable.

(a) no attention was paid to the retainer agreement at any time before trial; for the first time in the course of trial, the absence of any agreement between the Lugassys and those other attorneys came to the latters' attention (T 1677, lines 4-16), and

(b) also at that time, "Mr. Friend and/or Mr. Mishael"

(i) first noted the concluding clause of the above-quoted ¶ (e) of the Authority to Represent providing that Ferrell's "total fee" shall "not exceed" the (40-45%) contingency percentage fee specified in ¶ (d) and

(ii) foresaw that Independent would argue that the maximum statutory fee that could be awarded to plaintiffs for their attorneys' services against Independent would be the aforementioned contingency fee specified in ¶ (d) of that agreement (T 1677, lines 16-20).

According to Ferrell, it was for the reasons (a) and (b)(i) and (ii), set out in the foregoing paragraph, that,

(a) for the first time, on Wednesday, November 22, 1989, after the parties had rested their cases, after the court had charged the jury, and after the jury had retired and commenced its deliberations, a discussion took place between the Lugassys and the attorneys about the retainer agreement (T 1676, line 13 to T 1677, line 20; R 554, quoted below), and

(b) the following Monday (November 27) <u>after</u> the November 22 verdict was returned (R 270), attorney David B. Mishael and the

Lugassys signed a letter back-dated to November 22[5] (T 1680, lines 5-12).

That letter (R 554) (quoted only fragmentarily in Petitioners' brief) stated:

> 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 the 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.[6]

That letter was signed by Ferrell's associate, Mishael, not by co-counsel Friend.

Yet another omission from Petitioners' Statement of the Case and of the Facts is the fact that, in the course of Ferrell's direct examination, plaintiffs' counsel asked whether that letter was prepared "<u>modifying</u> the agreement" and Ferrell answered in the

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[5] Quite perplexing is the charge in Petitioners' brief, at p. 15, that Independent's characterization of that letter as having been "back-dated" is "without evidentiary support" and is "contrary to the record." At page 6 of Independent's Initial Brief filed in the Third District, the concessions of plaintiffs' counsel, David Mishael and Evan Langbein, that the letter was prepared "the following Monday" "after the November 22 verdict and the fact that the letter was dated November 22 (and therefore "back-dated") are clearly cross-referenced to the record at T 1680, lines 5-12.

[6] The above-quoted "Authority To Represent" and November 22, 1989 letter were introduced into evidence as a composite exhibit by stipulation (T 1581, line 9 to T 1582, line 11; T 1599, lines 1-8; R 549-554; Exh. 1 in evidence at Feb. 2, 1990 hearing).

affirmative (T 1676, lines 13-25).[7]

At page 15 of Petitioners' brief, the Lugassys unjustifiably charge that Independent's alleged "misuse of Mr. Ferrell's testimony" "misled" the Third District. In support of that charge, at page 16 of their brief, they themselves "misuse" and misparaphrase Ferrell's testimony by claiming that he testified

> "... 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."

A close reading of the text to which that misstatement is cross-referenced discloses quite different testimony; witness Ferrell was there simply relating a discussion between him and "Mr. Friend and/or Mr. Mishael" that had taken place during the trial of the case. (T 1677, line 6 to T 1678, line 4)

At page 16 of their brief, they also excerpt from that testimony two words, "any writing," (at T 1677, line 15) and fabricate around those two excerpted words a misstatement that allegedly Ferrell ascribed as one reason for the November 22, 1989 letter the absence of "any writing."[8]

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[7] This same characterization of the November 22 letter as having "modified" the Authority to Represent was reiterated in the trial court in plaintiffs' own "Memorandum Re: Attorneys Fees" (R 390) and in plaintiffs' counsel's oral argument describing the letter as a "modification" (T 1432, lines 5-7), all ignored in Petitioners' brief.

[8] Note should be taken of the fact that the Lugassys have chosen to include these purported facts in the argument section of their brief, not in their Statement of the Case and Facts. That practice conflicts with the admonition in the last sentence of the second paragraph of the Committee Notes accompanying Fla. R. App. P. 9.210(b)(3).

Consistent with that pattern of miscitations, at page 5 of their brief, the Lugassys miscite "T 1678" as establishing that the November 22 letter "memorializ[ed] the attorneys' fee agreement reached when Friend and Fleck first appeared."

Omitted from Petitioners' Statement of the Case and of the Facts is the trial-court concession of attorney Evan Langbein (as the Lugassys' additional counsel) that this case falls under "category two" [of the categories delineated in **Standard Guaranty Insurance Co. v. Quanstrom**, 555 So.2d 828 (Fla. 1990)]. (T 1613, lines 22-23)

At page 14 of their brief, the Lugassys miscite "T 1434-1435" as somehow supporting their false allegation that

> " 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."

To the contrary, the trial-court rulings were as follows:

(a) At the end of the February 2, 1990 hearing, the trial court concluded that "there is no ambiguity" in the Authority to Represent, that one cannot create an ambiguity through parol evidence, that the Authority to Represent clearly set the contingency percentage as the maximum awardable fee, and that this maximum was not amended prior to the post-verdict execution of the November 22 letter agreement.[9] (T 1696, line 22 to T 1701, line 10).

(b) At the next ensuing hearing, on April 26, 1990, plain-

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[9] The court opined that the only possible avenue available to plaintiffs in seeking to look behind the Authority to Represent is to petition for reformation if they feel there was a mutual mistake. (T 1700-1702) No petition for reformation has been filed.

tiffs' attorney proffered the testimony of Debra Lugassy, Independent's attorney objected on the stated ground that, under the parol evidence rule, Mrs. Lugassy's testimony was inadmissible, and the court sustained that objection (T 1440, lines 12-17), stating as its reason that it continued to hold that the language of the Authority to Represent "is very clear" (T 1432, line 16 to T 1433, line 2; T 1445, lines 14-19). However, the court further ruled that, according to its "interpretation" of the law, the parties to a contract are always free to change the contract and that, therefore, the November 22 letter could retroactively "change" or "modify" the terms of the Authority to Represent (T 1431, line 25 to T 1435, line 2; T 1436, lines 13-14).[10] Accompanying that ruling was a determination that, by its terms, the November 22 letter eliminated the maximum limitation upon court-awarded fees established by ¶ (e) of the Authority to Represent (T 1435, line 23 to T 1436, line 2).[11] The court conceded however that its view that the

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[10] The court rejected Independent's contrary argument that the court-awarded fee provision of the retainer agreement could not be retrospectively changed without the consent of Independent to its detriment and could generate no greater entitlement to court-awarded fees for services performed prior to the change. (T 1427, line 24 to T 1428, line 16; T 1435, line 23 to T 1436, line 1; R 358) The court thereby also rejected Independent's contrary argument that the Rules Regulating the Florida Bar require that the parties to a contingency agreement set out in writing at the outset the terms of the retainer. (T 1443, line 5 to T 1445, line 2) Additionally rejected was Independent's alternative argument that the November 22 modification was of no legal effect because it was not supported by any legal consideration, i.e. the change was made without either party suffering any detriment and no benefit passed from the one party to the other (T 1428, line 20 to T 1429, line 3; R 359).

[11] Independent's counsel unsuccessfully argued that the November 22 letter does not state that the fee cap is eliminated (T 1432, lines 8-9).

retainer agreement could be changed post factum so as to eliminate the agreed cap on court-awarded fees without the consent of the insurance company, the party against whom the court-awarded fee is to be assessed, is "a debatable point" (T 1435, lines 12-22).[12]

(c) In explaining its ruling on the issue of attorneys fees, the trial judge prefaced his remarks by observing: "I personally thought the defendant probably had a 90 percent chance of winning ..." (T 1571FF, lines 19-20). From that observation, he reasoned:

> "... if you litigate a case that you're unlikely to win and you know you are going to get a higher fee, it is creating a gamble that ought not to exist, but that was granted by the Supreme Court and I am just a humble trial judge."

(T 1571GG, lines 6-11). The trial judge then announced that, because time records were not maintained, he was awarding only 60% of the time requested (810 prejudgment hours and 94 postjudgment hours for litigating the attorneys fee issues[13]) and that he would apply an hourly rate of $175 (T 1571GG, line 12 to T 1571HH, line 14). He also opted to apply a contingency risk multiplier of 2.0 (T 1571HH, lines 15-16). These oral rulings were incorporated into the ensuing judgment (R 439-441, ¶ 6) with one exception -- no multiplier was applied to the 94 hours relating to the issue of attorneys fees. The judgment recited that the 810 prejudgment hours were

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[12] The trial court's ruling that the parties were free to "change" the agreement via the post-verdict letter disproves Petitioners' erroneous assertion (in the first full paragraph of page 14 of their brief) that the trial court found that the letter merely memorialized an oral fee agreement in effect three years before the verdict.

[13] On rehearing, Independent argued that it was error to award any fee for time spent in litigating the amount of the fee (R 416) but that motion was denied (R 430).

both for prosecuting the Lugassys' claim for policy benefits and for the defense of the counterclaim (R 439, ¶ 1).[14]

Also incorporated in that judgment was an award of prejudgment interest on the fee award from the date of the verdict (R 440-441). The total award was $316,143.23.

At page 3 of their brief, the Lugassys state that Independent appealed that judgment and raised only one issue, that the fee award should have been limited to the contingency fee cap in the written retainer agreement. To the contrary, Independent raised a number of other issues, surveyed in the argument section of this brief, infra.

While that appeal was pending, the trial court amended the

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[14] Plaintiffs' expert witness, attorney Bernard Mandler, testified that he was advised by attorney Friend that the total hours devoted by plaintiffs' attorneys to the case up to the date of judgment was 1,253.42 (T 1640, lines 5-8). Attorney Friend testified that a total of 1353 hours of legal services were performed (T 1459, lines 20-21). Friend did not keep contemporaneous time records (T 1650, lines 17-18); he relied only upon his testimony, his fee affidavit, and the volume of records in his case file (Plaintiffs' Exhibit No. 7 in evidence at April 26, 1990 hearing; T 1514). Expert witness Mandler testified that the lack of time records render the time computations "suspect" (T 1652, lines 5-13), that he relied upon Mr. Friend's accuracy in formulating his opinion as to what would be a reasonable fee (T 1662, lines 19-20), and that it was his opinion that a reasonable hourly rate was $200 per hour and that a multiplier of two should be applied in computing the court-awarded fee (T 1643, lines 9-13).

Plaintiffs' second expert witness, attorney Murray Sams testified that a reasonable hourly rate would be $175, that a multiplier of two and one half should be applied, and that the fee should be awarded on the combined total of 1353 hours of pre- and post-judgment services. (T 1596, line 14-17; T 1597, lines 9-13)

Independent's expert witness, attorney Edward Corlett, testified that in his opinion a reasonable hourly rate for attorney David Mishael is $100 and for attorney Friend $125 (T 1564, lines 11-12), that a reasonable number of hours would have been between 500 and 600 hours (T 1563, lines 6-7), and that a multiplier was not mandated (T 1568, lines 3-16).

judgment, increasing the number of prejudgment hours from 810 to 812 and subtracting a $1,000 mathematical error in the computation of the fee awarded for hours relating to the issue of attorneys fees (R 568). The amended judgment was in the amount of $315,879.80.

Independent also appealed from that amendatory order.[15]

The Third District reversed and remanded the fee award with directions to limit the fee awarded for services rendered in the prosecution of the Lugassys' claim for policy benefits to the aforementioned agreed 45% contingency fee cap but authorized a quantum meruit award for legal services rendered in the defense of Independent's counterclaim. Moreover, the Third District granted the Lugassys' motion for appellate attorneys' fees and remanded that matter to the trial court.

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[15] In the main text at page 2 of Petitioners' Statement of the Case and in the accompanying footnote 3, Petitioners assert that attorney Langbein was retained in 1990 for the post-verdict fee litigation and appellate services "with the understanding that he would be compensated by a contingent reasonable fee set by the court pursuant to Section 627.428." Petitioners neglected to cross-reference the quoted assertion to any supporting evidence in the record and indeed none exists.

SUMMARY OF ARGUMENT

Since this Court's exercise of conflict jurisdiction calls up for review the merits of the appeal, the issues as presented in the court below will be discussed seriatim.

The Third District correctly held that the over-$300,000 attorneys fee awarded in favor of the Lugassys and against Independent far exceeds and violates the 45% contingency fee cap of $44,642.97 established by the Authority to Represent.

In addition to the fee stipulated in the Authority to Represent for litigating the Lugassys' claims for policy benefits, no attorneys fee was awardable against Independent for plaintiffs' attorneys' services rendered in defending the counterclaim.

That is so first because, contrary to the Third District's view, it was within the contemplation of Ferrell when he undertook to prosecute the Lugassys' claims that the policy rendered Independent a subrogee standing in the shoes of the mortgagee and that, in asserting its arson defense, it could assert an arson counterclaim as subrogee. Secondly, virtually no extra services were performed in the defense of the counterclaim that were not relevant to the prosecution of the Lugassys' claims.

Even if some fees were awardable for any such "extra" services, nevertheless, the limitation of such fees to quantum meruit would have been proper. That form of fee, not on a contingency basis, could not give rise to a contingency risk multiplier such as was erroneously applied to all fees by the trial court.

While attorney Friend was not a party to the Authority to

Represent and had entered into no agreement with the Lugassys, he was a party with Ferrell's firm to an oral agreement to share in the contingency fee or court award to which Ferrell was entitled under the Authority to Represent. If that arrangement was valid, then of course the Authority to Represent's fee cap also applied to that arrangement. If that arrangement was invalid, then Friend would be entitled to no fee -- or alternatively to quantum meruit but in an amount not violative of the 45% contingency fee cap.

The November 22, 1989 letter did not alter this analysis.

It would have been beyond the power of the Lugassys and their attorneys, without the consent of Independent, without any consideration, and while the jury was deliberating its verdict, to free the court awarded fee from the contingency fee cap retrospectively with regard to the legal service theretofore already performed.

Nor did that November 22 letter, drafted by plaintiffs' own attorneys, explicate, or even suggest any intent to abrogate, the contingency fee cap. In any event, that letter was not even signed by Friend.

Moreover, no fees are awardable for legal services rendered in litigating the issue of the amount of fee where as here Independent conceded that 45% of the recovery was the proper amount and the insured's net recovery would therefore not have been enhanced by that litigation. The trial court's award of fees for just such services was therefore also erroneous.

In like manner, the Third District erred by granting the Lugassys appellate attorney's fees for litigating the fee issue.

ARGUMENT

I. DOES THIS COURT'S EXERCISE OF CONFLICT JURISDICTION OPEN FOR REVIEW THE SAME ISSUES PROPERLY BEFORE THE DISTRICT COURT OF APPEAL ON APPEAL?

When this Court exercises its decisional conflict jurisdiction, it "proceed[s] to consider the entire cause on the merits." So held Bould v. Touchette, 349 So.2d 1181, 1183 (Fla. 1977) [quoting Tyus v. Apalachicola Northern Railroad Co., 130 So.2d 580 (Fla. 1961)]. That Bould continues to be viable after the 1980 amendment to Art. V, § 3, Fla. Const. is evidenced by this Court's more recent citation to Bould in support of its holding that its jurisdiction was not limited just to answering the question certified to it in Freund v. State, 520 So.2d 556, 557 n. 2 (Fla. 1988). Accordingly, the issues will be discussed as they were presented for review in the Third District Court of Appeal.

II. DID THE THIRD DISTRICT CORRECTLY RULE THAT THE TRIAL COURT ERRED IN AWARDING ATTORNEYS FEES FAR IN EXCESS OF 45% OF THE JUDGMENT WHERE THE ORIGINAL RETAINER AGREEMENT SET AS A CAP 45% OF THE JUDGMENT, WHERE THAT AGREEMENT WAS PURPORTEDLY MODIFIED ONLY AFTER THE VERDICT WAS RETURNED, AND WHERE THAT MODIFICATION WAS NOT SUPPORTED BY CONSIDERATION, WAS WITHOUT THE CONSENT OF INDEPENDENT, AND IN ANY EVENT FAILED EVEN TO MENTION THE SAID CAP?

A. DID THE "AUTHORITY TO REPRESENT" CAP THE FEE?

The Third District correctly ruled that the 45% contingency fee cap established by the last clause of ¶ (e) of the original retainer agreement bars any greater recovery (R 551). The trial court's $300,000 fee award far exceeds 45% of the $99,206.60 judgment on the merits (R 317). Already fully surveyed at pages 9 and 10, supra, are the trial court's oral rulings that the wording of the last clause of ¶ (e) is free of any ambiguity, "very clear,"

and sets the 45% contingency fee as the upper limit on the amount of the fee that plaintiffs may be awarded by the court. That clause's following wording could not be any clearer:

> "In the event any attorneys' fees are recovered by MILTON M. FERRELL, JR. against Independent Fire Insurance Co. ... the total fee due MILTON M. FERRELL, JR. shall not exceed that specified by paragraph (d) above."

That wording is rendered doubly dispositive in the light of the fact that it was drafted by Ferrell's "of-counsel" associate (T 1577-1584) who was no mere run-of-the-mill attorney -- the draftsman was attorney Murray Sams who by his own admission had drafted hundreds of contingency-fee retainer agreements (T 1631, lines 6-8). Indeed, in 1986, when he drafted that agreement, he had the benefit of the then-already-one-year-old clarion clear ruling of this Court in Florida Patients' Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) that a fee cap in the agreement sets an upper limit on a court-ordered fee award. Miami Children's Hospital v. Tamayo, 529 So.2d 667 (Fla. 1988) held that the fee cap applies even to an agreement that predated the Rowe decision. See also like holding in Lane v. Head, 566 So.2d 508, 512 (Fla. 1990).[16]

It is moreover axiomatic that any fancied contractual ambiguity must be construed against the party whose draftsman chose the words. It would have been a simple matter to word the agreement so as to clearly communicate an intent to set no contractual upper

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[16] There is therefore a singularly hollow ring to the Lugassys' plaint (at p. 6 of their brief) that, when the agreement was drafted, they did not have the benefit of the decision in Kaufman v. McDonald, 557 So.2d 572 (Fla. 1990), approving certain contractual language, not included in the Lugassys' agreement, that modified that cap.

limit on the amount that the court may award as was done in Kaufman v. McDonald, 557 So.2d 572. Orlando Regional Medical Center, Inc. v. Chmielewski, 573 So.2d 876 (Fla. 5th DCA 1990) (fee greater than stipulated 45% contingency could be assessed only if agreement contains following "three little words" -- that attorney will be entitled to a reasonable court-awarded fee even **"if greater than"** the contingency).[17]

In Standard Guaranty Insurance Co. v. Quanstrom, 555 So.2d 828 (Fla. 1990), the Florida Supreme Court reiterated the rule announced in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145, 1151 (Fla. 1985) that "in no case should the court-awarded fee exceed the fee agreement reached by the attorney and his client."[18]

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[17]The Lugassys' alternative argument, at pages 24-26 of their Brief, that the agreement should be treated as though it were "reformed" and that Independent Fire would not be a proper party to any such reformation is likewise specious. Amazingly, the Lugassys cite Milford v. Metropolitan Dade County, 430 So.2d 951 (Fla. 3d DCA 1983) in support of that argument. Footnote 3 to that opinion acknowledges that, while it may not be necessary to commence a new action to acquire "jurisdiction" to entertain a reformation, nonetheless, either "consent" or "some appropriate procedural device" is required. The record below is devoid of any such device or of any attempted exercise of any such jurisdiction. To the contrary, the lower court specifically advised the parties that, if they wish to "reform" the initial retainer agreement, they will have to file "a petition for reformation." (T 1700-1702) The Lugassys never bothered to file any such petition. Such a petition would have named as parties not only Independent Fire but also the Lugassys' attorneys. At the present time, not even are those attorneys parties in the court below. Neither Milford nor Alexander v. Kirkham, 365 So.2d 1038 (Fla. 3d DCA 1978) nor any other cited case would allow any such unilateral reformation either at the trial level or, as the Lugassys now propose, at the appellate level.

[18] This same rule was cited and applied in International Bankers Insurance Co. v. Wegenor, 548 So.2d 683 (Fla. 3d DCA 1989), dismissed, 557 So.2d 868, rev. dismissed, 558 So.2d 20 (Fla. 1990); State Farm Fire & Casualty Co. v. Johnson, 547 So.2d 940 (Fla. 1st DCA 1988); and Escalanti v. Dopico, 545 So.2d 496 (Fla. 3d DCA

The only exception recognized by Quanstrom, 555 So.2d at 833 is in the context of a "category 1" "public policy enforcement case." Plaintiffs' instant claims do not fall into that category. Indeed, in the trial court, plaintiffs' counsel Langbein himself conceded that their claims fall under category 2. (T 1613, lines 22-23)[19] That dispositive concession was in any event compelled because these are "contract" claims -- in this case on a fire insurance policy -- and as such fall into Quanstrom's second category, limited by the cap set in the retainer agreement. The fact that the right to the award of fees is created by statute (and is therefore an expression of a public policy of the State of Florida) does not transform that claim from a category 2 claim to a category 1 claim. E.g. Rowe, 472 So.2d 1145 (§ 768.56, Fla. Stat.); Tamayo, 529 So.2d 667 (same); Lane v. Head, 566 So.2d 508 [§ 607.147(5), Fla. Stat.]; World Service Life Insurance Co. v. Bodiford, 537 So.2d 1381 (Fla. 1989) [§ 627.428, Fla. Stat.].

At page 39 of Petitioners' brief, the Lugassys further argue that Rowe's fee cap should be abrogated. In support of that attack, they cite a Fourth District panel's comments in Ziontz v. Ocean Trial Unit Owners Ass'n, Inc., 18 Fla. L. Weekly D1146 (Fla. 4th DCA Opinion filed May 5, 1993). Ironically, Ziontz' comments were rather directed at certain Bar members' proclivity to seek excessive fees. That criticism strongly reinforces the need for the cap

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1989).

[19] That trial court concession forecloses the Lugassys' attempt to argue now before this Court that their claims fall under category 1. The point was not preserved for appellate review.

as at least a partial brake upon runaway fees. Ziontz is therefore singularly inappropriate as any manner of support for the Lugassys' instant plea for exemption from Rowe's cap to enable them to claim fees astronomically exceeding that cap.

The Lugassys alternatively argue, at page 38 of their brief, that, in category 2 cases, the cap should be made subject to the trial court's discretion in applying a rule of reasonableness. That argument was not made either at the trial court level or at the appellate level, is without precedent, and flies in the face of the doctrine of stare decisis. See, e. g., In re Seaton's Estate, 154 Fla. 446, 18 So.2d 20 (1944), applying that doctrine. This Court has spoken authoritatively on the subject of the fee cap both very recently and very often. In category 2 cases, that cap has consistently been reaffirmed.[20] In support of their argument, the Lugassys misleadingly cite Goodpaster v. Evans, 570 So.2d 354 (Fla. 2d DCA 1990) as an example of a case in which the contingency fee agreement's 45% cap was rejected in favor of a reasonable fee of $10,000. In that case, the verdict was in the amount of $60,000 so that the 45% cap would have equalled $27,000, far in excess of the

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[20] In passing, note should be taken that § 627.428, Fla. Stat. entitles the insured, not the insured's attorney, to a fee award. See Florida Trial Lawyers' amicus brief, at page 8, citing Fortune Insurance Co. v. Gollie, 576 So.2d 796, 797 (Fla. 5th DCA 1991), rev. denied, 589 So.2d 290 (Fla. 1991); but see Brown v. Vermont Mutual Insurance Co., 614 So.2d 574 (Fla. 1st DCA 1993). Under that statute, the insured is entitled only to be made whole -- to recover back the amount of fees he has paid or is obligated to pay, to the extent they are reasonable, and nothing more. Category 1 cases stand as an exception to that logic only because of special public policy considerations, not present in the case at bar.

$10,000 fee award.[21]

The Lugassys' next specious argument, at pages 38-39 of their brief, is that Quanstrom, 555 So.2d at 831 and 834 somehow abrogates Rowe's cap, as it applies to the lodestar. To the contrary, Quanstrom, at 831, faithfully reports that under Rowe there were two caps, the one discussed hereinabove and the other limiting the contingency risk multiplier range from 1.5 to 3.0, and at 834 reaffirms that "[t]he caps discussed in Rowe and explained in this opinion remain applicable in" category 2 claims -- subject only to the reduction of the "3.0" multiplier to 2.5.

B. WHERE ATTORNEYS FERRELL AND FRIEND ORALLY AGREED TO SHARE THE FEE UNDER THE AUTHORITY TO REPRESENT, WHERE FERRELL TESTIFIED THAT FRIEND ENTERED INTO NO AGREEMENT WITH THE LUGASSYS BEFORE THE JURY RETIRED AND FRIEND TESTIFIED THAT HE ENTERED INTO AN ORAL CONTINGENCY AGREEMENT WITH THE LUGASSYS, COULD THE LUGASSYS CLAIM ANY FEES FOR FRIEND'S SERVICES OVER AND ABOVE THE AUTHORITY TO REPRESENT'S FEE CAP?

This analysis is not altered by the fact that Friend, not one of the original parties to the Authority to Represent, performed legal services in prosecuting the Lugassys' claims as Ferrell's co-counsel up to and through the trial. In that regard, Respondent's prefatory Statement of the Case and Facts points out that the

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[21] The parade of horribles postulated by Petitioners and by the amicus is fanciful. Under Rowe, insurance litigation has flourished unabated. There is no danger that Rowe's cap will somehow frighten the intrepid "Plaintiffs' Bar" into contrition. Especially in the light of Ziontz's comments, there is no reason to fear that plaintiffs' lawyers will short-change themselves in their fee negotiations or that they will shy away from insurance litigation because of any such fear. They are fully protected by the body of case law allowing retainer agreements to be so drafted -- unlike the draftsmanship of the Authority to Represent in the case at bar -- as to provide for a percentage contingency or a court-awarded fee, whichever is greater.

Lugassys themselves introduced into evidence their attorney Ferrell's testimony that that Friend & Fleck had entered into an agreement with Ferrell, Williams to divide the fees specified under the capped written retainer agreement in one third and two thirds proportions. (T 1694, lines 8-17). In other words, Friend's involvement in the case was via Ferrell's retainer agreement and was therefore governed by that agreement. The Lugassys are bound by their own evidence. McNeill v. Jack, 83 So.2d 704, 706 (Fla. 1955) (party is bound by his own evidence).

That binding evidence did however not stop there. It was the Lugassys who presented the additional testimony of Ferrell

(a) that "there had never been an agreement with Mr. Friend nor with my firm that was agreed to by the clients, or any writing between Mr. Friend and I, for that matter, but certainly nothing with the client." (T 1677, lines 13-16; T 1694, lines 18-22);

(b) that no attention was paid to the retainer agreement at any time before trial; for the first time in the course of trial, the absence of any agreement between the Lugassys and those other attorneys came to the latters' attention (T 1677, lines 4-16);

(c) that the post-verdict letter was a "modification." (T1676-1677; pp. 7-8, supra).

Already noted in the Prefatory Statement of the Case and Facts, at footnote 4, supra, is the inconsistency between Ferrell's aforementioned testimony that he had a division-of-fee agreement with Friend and Friend's testimony that he had an oral contingency fee agreement with the Lugassys limiting him to court-awarded fees.

Friend's testimony is additionally offset by the proscription against oral contingency fee arrangements in Rule 4-1.5(f), Rules Regulating the Florida Bar. At page 14 of Petitioners' brief is cited Harvard Farms, Inc. v. National Casualty Co., 617 So.2d 400 (Fla. 3d DCA 1993), treating such an oral agreement as generating an entitlement to fees even though prohibited by that Rule.

Harvard Farms erroneously based its holding, in part, upon this Court's abbreviated opinion quashing the decision of the First District in Ganson v. Department of Administration, 554 So.2d 522 (Fla. 1st DCA 1989), quashed, 566 So.2d 791 (Fla. 1990). In Ganson, neither the First District nor this Court discussed the effect of Rule 4-1.5 or even referred to Ganson's agreement as "oral" nor is there in that case any hint that the effect of that Rule was argued or otherwise preserved for appellate review.

Harvard Farms' additional reliance upon the "Preamble" to those Rules is likewise incorrect.

That Preamble first of all declares that those Rules cannot serve as "a basis for civil liability." No civil liability would be imposed in the case at bar by treating those Rules as invalidating an oral contingency fee retainer agreement.

The Preamble next warns that the Rules "can be subverted" when invoked by opposing parties as "procedural weapons." The careful wording of that warning stops short of issuing a blanket proscription against the invocation of those Rules by opposing parties. That warning in any event has no application here because (a) Independent's invocation of Rule 4-1.5 would not subvert the rule and

(b) the issue of whether there is an entitlement to fees under an oral contingency agreement is certainly "substantive" and therefore cannot be viewed as a "procedural" weapon.

The next ensuing sentence of that Preamble states that one cannot "imply," from the fact that the Rule subjects a lawyer to disciplinary sanctions, that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. While Rule 4-1.5 does contemplate disciplinary sanctions, subdivision (d) of that Rule transcends those disciplinary considerations by additionally excluding from the class of "enforceable" fee agreements those that are "prohibited by this rule." In other words, the aforementioned "implication" proscribed by the Rules' Preamble does not extend to those other-than-disciplinary consequences flowing from subdivision (d). Harvard Farms omitted any discussion of that subdivision (d). Under the predecessor Florida Code of Professional Responsibility, Robert A. Shupack, P.A. v. Marcus, 606 So.2d 466 (Fla. 3d DCA 1992) treated as unenforceable a fee sharing agreement that violated the predecessor Florida Code of Professional Responsibility.[22] Shupack in turn cited back to Spence, Payne, Masington & Grossman, P.A. v. Phillip M. Gerson, P.A., 483 So.2d 775 (Fla. 3d DCA), rev. denied, 492 So.2d 1334 (Fla. 1986), disallowing any fee, either under the contract or via quantum meruit, where the solicitation of the agreement was ille-

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[22] Harvard Farms attempts to distinguish Shupack as having been decided under the predecessor Code. However, that attempted distinction has been shown by the foregoing analysis of Harvard Farms to be fallacious.

gal.

FIGA v. R.V.M.P. Corp., 681 F.Supp. 806 (S.D. Fla. 1988) likewise held an oral contingency fee arrangement to be unenforceable. However, FIGA subscribed to a somewhat different approach; rather than to hold that no fee is recoverable, the Court there held that, in the absence of a required written contingency fee contract, the court awarded fee is limited to quantum meruit and that there can be no contingency risk multiplier added to such an award. The $179,000 quantum meruit fee awarded in that case was less than the fee specified in the oral contingency fee agreement, FIGA, 681 F.Supp. at 810, n. 2.

Any result more favorable to the attorney would have been a gross perversion of the policy underlying that regulatory provision. To condemn the attorney's ethical violation, for his failure to execute a written contingency fee contract before undertaking representation in the case, and to declare the contract unenforceable, while at the same time rewarding him by exempting his service from the fee cap that would otherwise have been imposed would turn those rules regulating the Florida Bar on their head. In Heimer v. Travelers Insurance Co., 400 So.2d 771, 773 (Fla. 3d DCA 1981), it is aptly stated that "a party who is ... to be punished for willful misconduct should not reap benefits from that misconduct."

Such an attorney ought not stand even on the same footing as an attorney discharged under a written contingency fee arrangement without cause; in Rosenberg v. Levin, 409 So.2d 1016, 1017 (Fla. 1982), it was held that an attorney discharged without cause should

be awarded quantum meruit but that the award is subject to the contingency fee cap. This same principle was reaffirmed in recent litigation between attorneys Mishael and Ferrell, two of the very same attorneys whose fees are here at issue; in David A. Mishael, P.A. v. Ferrell, Cardenas, Fertel, Rodriguez & Mishael, P.A., 606 So.2d 651 (Fla. 3d DCA 1992), a fee award to Ferrell, discharged prior to settlement, was reversed because the trial court should not have applied any contingency risk multiplier to his quantum meruit fees and should have limited the fee to the maximum contract fee.

Thus, even if one were to disregard the Lugassys' own binding evidence that Friend looked to the Authority to Represent for compensation and instead were to embrace Friend's divergent testimony that he had an oral agreement with the Lugassys to prosecute their claim, the Lugassys' statutory entitlement to fees would not thereby be enhanced. The same fee cap that applied to Ferrell should apply across the board to any fee award for Friend as well.

The same mode of analysis applies to the division-of-fee agreement between Friend and Ferrell. Absent any evidence of a writing as required by Rule 4-1.5, that agreement also is unenforceable. Even if Friend would alternatively be entitled to assert a quantum meruit claim for his services, both Friend and the Lugassys would be limited by the Authority to Represent's fee cap. If on the other hand that division-of-fee agreement were to be viewed as enforceable, that fee cap would apply directly.

Applying the agreed 45% fee cap to the $99,206.60 amount of

the instant judgment on the merits would have limited the fee award to $44,642.97.[23] That amount is far less than the trial court's erroneous in-excess-of-$300,000 fee award.

C. **WHERE THE PARTIES TO THE RETAINER AGREEMENT WERE ON NOTICE OF FACTS SUGGESTING THAT INDEPENDENT'S ARSON DEFENSE MIGHT BE ACCOMPANIED BY AN ARSON COUNTERCLAIM, WHERE VIRTUALLY ALL OF THE SAME SERVICES REQUIRED TO BE PERFORMED IN LITIGATING INDEPENDENT'S ARSON COUNTERCLAIM WERE REQUIRED IN LITIGATING INDEPENDENT'S ARSON DEFENSE, AND WHERE THERE WAS NO PRE-VERDICT AGREEMENT, WRITTEN OR OTHERWISE, FOR EXTRA COMPENSATION FOR LITIGATING THAT COUNTERCLAIM, WERE THE LUGASSYS ENTITLED TO ANY EXTRA FEE AWARD OVER AND ABOVE THE FEE CAP FOR LITIGATING THAT COUNTERCLAIM?**

It will be seen that this trial court error was not obviated by the happenstance that, in this same suit, Independent, as subrogee of mortgagee First Nationwide Savings, asserted a counterclaim. Preliminarily, it should be noted that, while paragraph 1 of the trial court judgment awards fees on a contingency basis for 810 (amended to 812) hours of legal services rendered in the prosecution of plaintiffs' claims and in "the defense of the ... counterclaim" (R 439), that judgment fails to specify what portion of the award is attributable to the defense of the counterclaim. Nor did plaintiffs bother to present any evidence of what time their attorneys devoted to the defense of that counterclaim. On the face of the record, it does not in any event appear that, in addition to

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[23] In the trial court, plaintiffs adopted as their alternative position the ludicrous argument that the amount due under that fee cap is 45% of the sum of (i) the underlying $99,206.60 award and (ii) the fee award (R 367-369). That argument was unequivocally rejected by the Florida Supreme Court in World Service Life Insurance Co. v. Bodiford, 537 So.2d 1381 (Fla. 1989) and by the Third District in Dan & Sherman, M.D., P.A. v. Serrano, 578 So.2d 300 (Fla. 3d DCA 1991).

plaintiffs' counsel's already existing contractual obligation to prosecute their claim for policy benefits, any additional hours were required to defend that counterclaim (other than the minimal time required to draft the answer to the counterclaim); that pleading alleged the very same arson that was postulated as a defense in Independent's answer to the amended complaint and entailed no pretrial discovery and virtually no trial testimony in addition to that relevant to plaintiffs' claim for policy benefits. The counterclaim's additional allegation that counterclaimant Independent was acting as subrogee of First Nationwide Savings generated no additional hours of legal services because that allegation was neither contested nor contestable. Certainly, any minimal additional services rendered in regard to the counterclaim could neither add up to nor otherwise explain away the $238,057.03 disparity between the fee cap set in the contingency fee agreement and the amount awarded.

While it is true that the "Authority to Represent" made explicit reference only to the prosecution of plaintiffs' claims for policy benefits, nevertheless, the sole contested issue in regard to the counterclaim was whether the Lugassys were guilty of arson and that very same issue was asserted as the defense to the Lugassys' claims. In other words, the defense of the counterclaim entailed no substantial legal services over and above those Ferrell was already obligated to perform under the Authority to Represent. Petitioners, at pages 26-27 of their brief, concede that those same services were common to both the claims and the counterclaim. More-

over, attorney Ferrell testified that, at no time before trial, was any attention paid to the retainer agreement or was any agreement entered into between the Lugassys on the one hand and attorney Friend (T 1677, lines 4-16). Compare Roper v. Alamosa National Bank, 203 P. 663, 664 (Col. 1922), holding that, where attorney retained under contingency fee agreement to prosecute a claim was confronted with substantial extra work to defend counterclaim, he could not wait until eve of trial to insist upon additional compensation for that defense work.

> "... an attorney's contract for a contingent fee in making a collection contemplates a defense, and all things which might be reasonably expected as incident thereto, including an invalid counterclaim ..."

Id. By comparison, in the case at bar, when the Lugassys and Ferrell entered into the retainer agreement, they were charged with knowledge that the policy named as an additional insured mortgagee First Nationwide, that the policy provided that the mortgagee was entitled to fire insurance benefits regardless of whether there was arson, that Independent paid those benefits and by the terms of the policy became subrogated to the mortgagee's arson claim, and that therefore they could anticipate that Independent's arson defense would be augmented by its counterclaim as subrogee. This Court in Solar Research Corp. v. Parker, 221 So.2d 138, 141 (Fla. 1969), by way of dicta, aptly stated (in a somewhat different context) that, "had the case involved all the services contemplated and more, the attorneys, under the contract, would have been limited to the

amount agreed on."[24]

The foregoing analysis departs to some extent from that of the Third District because that Court held that the Lugassys' attorney's services performed on Independent's counterclaim "were not contemplated by the Authority to Represent." Cited in support of that ruling were Erickson Enterprises, Inc. v. Louis Wohl & Sons, 422 So.2d 1085 (Fla. 3d DCA 1982) and Askowitz v. Susan Feuer Interior Design, Inc., 563 So.2d 752 (Fla. 3d DCA 1990), rev. denied, 576 So.2d 292 (Fla. 1991). Reliance upon Erickson as support for that holding was misplaced because in that case

(i) the fee agreement made explicit provision for separate measures of compensation (a) for the prosecution of plaintiff Wohl's claim and (b) for defense of Erickson's counterclaim and

(ii) there was "competent evidence" that the parties would be able to segregate or "break down" the time devoted by Wohl's attorney as between his claim and Erickson's counterclaim.

Even though Erickson predated Rowe's fee cap ruling, nevertheless, at 1086 it held:

> "It was error to determine the amount of attorney's fees without considering the fee agreement between the claimant

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[24] The Third District opinion below cited 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 consideration."

Since the Lugassys' attorneys were already obligated to litigate the arson issue for a predetermined fee, they could not claim a different, more favorable formula for calculation of their fees simply because that issue was also common to the counterclaim.

[Wohl] and his attorney."

That case purports to rely in part upon Peacock Construction Co. v. Gould, 351 So.2d 394 (Fla. 2nd DCA 1977). Just as in the case at bar so in Peacock, the same grounds that supported defendant's affirmative defense also supported its counterclaim; it was held that the services performed in plaintiff Gould's defense of the counterclaim were "part and parcel" of the services performed in prosecuting his claim and that the services common to both the claim and the counterclaim did not diminish plaintiff Gould's entitlement to fees for those services for prosecuting his claim.

Askowitz also did not hold that a contingency fee agreement does not contemplate services in the defense of a counterclaim. Indeed, Askowitz stated that "defense of the counterclaim is part and parcel of the original action." It was for an entirely different reason that Askowitz allowed fees in excess of the fee cap. Askowitz, at 754, cited as authority for that in-excess-of-the-fee-cap award Financial Services Inc. v. Sheehan, 537 So.2d 1111 (Fla. 3d DCA 1989). Financial Services held that Rowe's fee cap does not apply to "fees imposed pursuant to a private contract." Like Financial Services, Askowitz concerned fees imposed pursuant to a private contract. In that regard, two observations should be made. First of all, Quanstrom, at 834, specifically includes actions in contract in category 2, governed by the cap. Secondly, the fee in the case at bar is pursuant rather to a statute, § 627.428, Fla. Stat., although the action is in contract.

In the case at bar, the Third District treated the legal ser-

vices, common to both the Lugassys' claims and to Independent's counterclaim, as subject to the fee cap and therefore remanded to the trial court the assessment of quantum meruit fees only for any extra legal services that the Lugassys' attorneys rendered in defense of the counterclaim. See Erickson, at 1086. The Lugassys misconstrue the Third District decision; at page 38 of their brief, they suggest that even the "inseparable services performed for defending the counterclaim" were "uncapped" and treated by the Third District as compensable via quantum meruit. That view directly conflicts with the Third District's holding that the services performed in prosecuting the Lugassys' claims were to be compensated only under the Authority to Represent and were subject to that agreement's fee cap. As is noted, supra, Ferrell (together with his associates) was already obliged by the Authority to Represent to litigate the "inseparable" issue common to both the claims and counterclaims -- the issue of whether the Lugassys had committed arson, so it was perfectly logical to treat those common services as being encompassed and governed by the express written retainer agreement rather than by the principles of implied contract (quantum meruit). If the services common to both the prosecution of the Lugassys' claim and the defense of Independent's counterclaim could be compensated first under the Authority to Represent and then again via quantum meruit, a fortiori the Lugassys would improperly be compensated for those same services **twice**.

If the Third District's view is correct that the Authority to Represent did not contemplate the defense of the counterclaim and

that any extra services performed in that defense would be compensable, those extra services would be compensable only on a quantum meruit basis, Greenfield Villages, Inc. v. Thompson, 44 So.2d 679, 682 (Fla. 1950), and counsel's entitlement thereto would not be "contingent" upon his success in defending the counterclaim.[25] In the case at bar, it follows that, even if, arguendo, such quantum meruit fees were to be viewed as taxable against Independent, nevertheless, that view would not validate

(i) the trial court judgment's treatment of all fees for pre-judgment services as "contingent";

(ii) application of a contingency risk multiplier to service relating to that counterclaim (R 440, ¶ 4); and

(iii) the trial court's award of over $238,057.13 in excess of the fee cap for any minimal additional legal services incident to the defense of the counterclaim.

Already noted, supra, are David A. Mishael, P.A. v. Ferrell, Cardenas, Fertel, Rodriguez & Mishael, P.A., 606 So.2d 651, holding that a contingency risk multiplier should not be applied to quantum meruit fees and FIGA v. R.V.M.P. Corp., 681 F. Supp. 806, disallowing a multiplier in regard to a quantum meruit award.

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[25] Note should be taken however of Friend's testimony that he had an oral agreement with the Lugassys entitling him to look only to a court-awarded fee. Such an agreement would be "contingent" upon the outcome of the case and as such would be governed by Rule 4-1.5(f). Therefore, the same analysis, presented in Argument IIB, supra, that demonstrated such an oral agreement to be unenforceable in regard to Friend's prosecution of the Lugassys' claims applies with equal force to the unenforceability of any such agreement in regard to Friend's defense against Independent's counterclaim.

D. **WHERE INSUREDS AND THEIR ATTORNEYS ATTEMPT RETROSPECTIVELY TO MODIFY A CONTINGENCY FEE AGREEMENT FOR PAST LEGAL SERVICES WITHOUT CONSIDERATION, WHERE THE ATTEMPTED MODIFICATION DOES NOT IN FACT EXPLICATE THAT THE FEE CAP IS ELIMINATED, AND WHERE ONE OF THE ATTORNEYS FAILS EVEN TO SIGN THAT MODIFICATION AGREEMENT, IS THE INSURER FORECLOSED FROM CHALLENGING THE LEGAL INSUFFICIENCY OF THAT ATTEMPTED MODIFICATION?**

Neither the fee discussions between the Lugassys and their attorneys after the jury had retired to deliberate nor the post-verdict execution of the November 22, 1989 letter by the Lugassys and their attorneys could in any manner retrospectively evade the binding effect of the 45% fee cap, established by the antecedent "Authority to Represent," upon the fee awarded for their attorneys' **pre**-verdict legal services.

To allow the fee cap to be lifted retrospectively would run counter to the public policy upon which that fee award cap is grounded. § 627.428, Fla. Stat. aims to compensate a successful insured for his reasonable legal expenses in prosecuting the action, not to fashion a device that could provide the insured or his attorney an after-the-fact windfall. In the case at bar, the amount of that windfall would be well over $238,057.13 because, at the time the pre-verdict legal services were performed, the sole, freely-bargained-for fee that plaintiffs' attorneys could look to was the **capped** 45% contingency fee (of $44,429.70) under the Authority to Represent.

Even without reference to that statute, such an after-the-fact windfall runs counter to Rowe's formula for compensating attorneys in contingent fee cases. That formula is calculated to encourage a market supply of attorneys. Rowe, 472 So.2d at 1151. In that open

market, when an attorney (such as Milton Ferrell, Jr.) freely bargains for a particular fee and thereafter performs services under that fee arrangement, Rowe's market policy is fully satisfied by assuring to him and to that market the reimbursement of the full measure of that prospectively-bargained-for amount; an attempted retrospective modification enhancing that fee after the services have already been performed would not better serve that policy than the award of the already-fixed measure of compensation that in fact was prospectively sufficient to prompt the market of attorneys in general and that attorney in particular to perform those services.[26] Rowe, 472 So.2d at 1151, aptly cites in support of that fee cap Rosenberg v. Levin, 409 So.2d 1016 (Fla. 1982); Rosenberg, 409 So.2d at 1017 held that a quantum meruit award in excess of the agreed contingency fee would be inappropriate because "the lawyer would receive more than he bargained for in his initial contract."

This market analysis is reinforced by the following further observations.

To allow a client-attorney retrospective upward modification

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[26] The Academy of Trial Lawyers, at pp. 9-10 of its amicus brief, contends that, if the Lugassys' position prevails, no windfall would be generated for them and that, to the contrary, it is rather Independent's position that would generate a windfall. Since Independent is being assessed fees and receives nothing, it could hardly be accused of receiving a "windfall." The seeming dichotomy is moreover easily resolved by recognizing the Academy's different, post-factum perspective. Chronologically, the only relevant perspective is as of the time when the insured is shopping in the marketplace for an attorney. If he and his attorney can be assured prospectively that, if the insurance claim is successfully prosecuted, the insurer will be obliged to reimburse to the insured the agreed fees, to the extent they are reasonable, that will supply the necessary incentive to place the insured on "a level playing field" with the insurer.

whose sole purpose is to enhance the fee awarded by the Court for past services against the insurer, not a party to that modification, would nonsensically invest with legal significance an otherwise wholly illusory transaction. With regard to services already performed, no new consideration passes hands between client and attorney and no new detriment is suffered by either.

If one were to view consideration for the modification to have been present in the form of some new commitment on the part of the Lugassys' lawyers to perform future (post-verdict) legal services, nevertheless, any apparent resulting upward adjustment of the formula for payment of past services would in reality be part and parcel of the agreed formula for payment of those to-be-performed future services. For example, if a modification were to increase payments due for past services by $100,000, in reality that $100,000 should logically be charged to future services because it would be in consideration for future, not past, services. If the reasonable value of those future services is less than $100,000, the difference would not be recoverable and could not be shifted back to past services in order to generate a recovery.[27]

Wilson v. Odom, 215 So.2d 37, 39 (Fla. 1st DCA 1968) aptly holds that "modification of a contract must be supported by consideration."[28] In that regard, the Third District opinion below points

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[27] Petitioners' brief, at page 19, postulates various forms of consideration, none of which can be viewed as being legally cognizable as consideration in exchange for past services.

[28] That rule's only exception carved out in Florida is to be found in the chapter of the Uniform Commercial Code relating to "sales," more particularly in Sec. 672.209(1), Fla. Stat.:

out the rule announced in 1A Corbin on Contracts § 175, at 123 (1983) that

> "... 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 consideration."

To the extent that the Lugassys' attorneys were already bound to complete their representation of their clients, they were thus precluded from bargaining for any modification in their compensation. On those same grounds, a subsequent retainer agreement providing for additional fees was held to be void for lack of consideration in Quarture v. Allegheny County, 14 A.2d 575 (Pa. 1940). Accord In re Laughlin, 265 F.2d 377 (D.C.Cir. 1959). See discussion, supra, of Roper v. Alamosa National Bank, 203 P. 663 (Col. 1922); that case held that, where the attorney retained under a contingency fee agreement to prosecute a claim was confronted with substantial extra work to defend a counterclaim, he could not wait until the eve of trial and then insist upon a new contract for additional compensation for that defense work and that an attorney's contract for a contingent fee contemplates a defense, and all things which might be reasonably expected as incident thereto, including an invalid counterclaim. Also noted, supra, is the fact that, in the case at bar, when the Lugassys and Ferrell entered into the retainer agreement, they were on notice of the possibility that

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> " An agreement modifying a contract within this chapter needs no consideration to be binding."

That exception is not applicable to the November 22, 1989 letter because it is not "an agreement ... within this chapter."

Independent might file a counterclaim. Furthermore, when in 1987 Independent filed that counterclaim, no effort was made to modify the agreement, discussion of the November 22 letter commenced after the jury retired to deliberate, there was minimal extra work generated by Independent's counterclaim, and the November 22 letter was not in any event limited to fees for any extra work relating to the counterclaim. See also Solar Research Corp. v. Parker, 221 So.2d 138, 141 (Fla. 1969) ("had the case involved all the services contemplated and more, the attorneys, under the contract, would have been limited to the amount agreed on").

Such a prejudicial modification would not be binding upon a non-consenting guarantor. Miami National Bank v. Fink, 174 So.2d 38 (Fla. 3d DCA 1964), cert. denied, 180 So.2d 658 (Fla. 1965). In regard to the then-already rendered legal services, § 627.428 places Independent in much the same position as would be a guarantor of an existing debt and ought not be bound by any attempted retrospective upward modification of the fee. In the light of Independent's integral relationship to this agreement, it would be ludicrous indeed to view Independent as a "stranger" thereto. To muzzle insurers and give free rein to insureds and their attorneys after the fact to modify the terms of the insurer's fee obligation calls up the image of the proverbial "fox" left "in charge of the hen house." See Ziontz, 18 Fla. L. Weekly 1146.

In opposition to this analysis, the Lugassys rely upon Pendley v. Shands Teaching Hospital, 577 So.2d 642 (Fla. 1st DCA 1991) and Inacio v. State Farm Fire & Casualty Co., 550 So.2d 92 (Fla. 1st

DCA 1989).

The Third District below acknowledged conflict with Pendley and it is on the basis of that conflict that this Court has accepted jurisdiction in this case. It is Independent's position that Pendley was wrongly decided and that the opposite view expressed by the Third District below is correct. Moreover, in Pendley, the agreement purportedly was entered into to correct what the parties perceived to be a violation of the Rules Regulating the Florida Bar. Even if one were to assume arguendo that such violations could be corrected retrospectively, nevertheless, the November 22 letter in the case at bar would in that regard be distinguishable from the modification in Pendley for the following reason. The November 22 letter could not be viewed as correcting Friend's previously-discussed violation of Rule 4-1.5. That Rule requires that a contingency fee contract be signed by each attorney or by an attorney acting in his behalf. Although Friend is mentioned in the letter, he did not sign it and attorney Mishael (an associate of Ferrell), who did sign it, did not accompany his signature with any wording suggesting that he was signing in behalf of Friend.

It will be seen that Inacio, 550 So.2d 92, is also distinguishable. That case concerned an initial retainer agreement between Inacio and his attorneys that dealt only with the legal services to be performed in the prosecution of his third-party tort claim. No written agreement was entered into with regard to insured Inacio's first-party insurance benefit claims against State Farm. Only after the first-party claims were settled did Inacio and his

attorneys reduce to writing their first-party claim fee arrangement. The First District held that the trial court should have looked to that writing in computing the insured's fee award. Crucial to that decision was the First District's observation that the writing was not a modification, that the said writing "purports to recite the agreement ... pursuant to which the attorneys undertook the handling of Inacio's claims against State Farm and ... neither the trial court nor we have found any reason to conclude otherwise." Id, 550 So.2d at 94. Furthermore, no mention is made in Inacio of the former Code of Professional Responsibility (in force at the time the legal services there at issue were performed) or of any issue preserved for review in regard thereto.

By contrast, in the case at bar,

(i) the only agreement that the Lugassys had entered into with an attorney before the jury retired to deliberate its verdict was with Milton Ferrell, Jr. (T 1677, lines 4-16; T 1694, lines 8-22);

(ii) that agreement specifically dealt with the Lugassys' first-party insurance claim;

(iii) that agreement was at the very outset (in 1986) reduced to writing as the "Authority to Represent";

(iv) the issues relating to Rule 4-1.5 were preserved for review; and

(v) attorney Friend did not even bother to sign the November 22 letter.

Indeed, the trial court declared that there was "no ambiguity" in that 1986 agreement on the issue of the fee cap, that parol evi-

dence was not admissible to vary that agreement, that the agreement was "very clear," and that the agreed contingency percentage was specified by that agreement as a cap on any fee award (T 1696, line 22 to T 1701, line 10; T 1432, line 16 to T 1433, line 2; T 1445, lines 14-19; T 1440, lines 12-17).

Moreover, on direct examination, Ferrell himself characterized that post-verdict November 22, 1989 letter as a "modification" (T 1676, lines 13-35) and that same characterization is reiterated in plaintiffs' "Memorandum Re: Attorneys Fees" (R 390) and in plaintiffs' counsel's oral argument (T 1432, lines 5-7). In like manner, the trial court viewed that letter as a modification (not a memorialization) of the original agreement but held that the parties to that agreement could retroactively "change" or "modify" it and that the originally agreed fee cap was thereby eliminated (T 1431, line 25 to T 1435, line 2; T 1436, lines 13-14). That sharply contrasts with Inacio's aforementioned thesis that the writing there at issue simply memorialized an oral agreement entered into before the legal services were performed.

The same analysis applies with equal force to attorney Friend. Already noted, supra at page 21-22, is the binding effect (a) of plaintiffs' own evidence that an oral agreement was entered into between Friend & Fleck and Ferrell, Williams P. A. providing two thirds of the contingency fee to be paid to Friend & Fleck and one third to Ferrell, Williams (T 1694, lines 8-17) and (b) of Ferrell's testimony that "there had never been an agreement with Mr. Friend nor with my firm that was agreed to by the clients, or any

writing between Mr. Friend and I, for that matter, but certainly nothing with the client." (T 1677, lines 13-16; T 1694, lines 18-22). It therefore cannot now be argued that, prior to the time when the jury retired to deliberate its verdict, there was ever any agreement, oral or written, between the Lugassys, on the one hand, and Friend, on the other hand, exempting a court-awarded fee in favor of Friend from the contingency fee cap.

In other words, even if the November 22, 1989 letter were to be construed as lifting that cap, nevertheless, that could not be said to be simply a reduction to writing of the oral agreement extant when the services were performed. Therefore, the reduction to writing of the parties' initial oral agreement in Inacio is equally irrelevant in regard to attorney Friend (who in any event did not even bother to sign that letter).

Even without reference to the foregoing analysis, the trial court's interpretation of the November 22, 1989 post-verdict letter is fatally flawed because that letter did not in fact purport to lift the fee cap. Nowhere in that letter is to be found any explicit reference to ¶ (e) of the Authority to Represent or to the last clause thereof establishing that fee cap. Nowhere in that letter is there to be found any reference to that fee cap. Nowhere does that letter state there is to be no fee cap. The letter merely purports to recite an intent that plaintiffs' attorneys may recover "court awarded attorneys' fees in lieu of the percentage fees."

That phrase, "in lieu of," is certainly not synonymous with the phrase, "in excess of," and cannot be read as carte blanche to

secure an award "in excess" of the percentage fee cap. A court-awarded fee was already expressly provided for in the aforementioned ¶ (e) of the Authority to Represent. The only differences between the wording of that subparagraph, on the one hand, and that of the letter, on the other hand, are that the former

(i) refers to the court awarded fee as a "credit" against the contingency fee and

(ii) sets a fee cap,

while the latter

(i) refers to that court awarded fee as being "in lieu of" the contingency fee and

(ii) is silent in regard to the previously agreed fee cap. In this context, the net effect of a capped $44,642.97 court-awarded-fee "credit" against the 45% contingency fee in that same amount would be identical to a capped $44,642.97 court awarded fee "in lieu of" that contingency fee. One must bear in mind that the November 22, 1989 letter was drafted, not by a layman, but rather by an attorney and that no great skill would have been needed to express an intent to lift the agreed fee cap.[29] See Orlando Regional Medical Center, Inc. v. Chmielewski, 573 So.2d 876 (Fla. 5th DCA 1990), disallowing a court-awarded fee in excess of the contingency fee cap; just as the contract in that case allowed for a court-awarded reasonable fee or a contingency fee but omitted any explicit provision authorizing an award in excess of the contingency fee

[29] Whether such an expression, if properly drafted, could have had a retrospective effect is a matter of separate concern more fully explored, supra.

cap, so the November 22, 1989 letter in the case at bar likewise omits any explicit language authorizing an award in excess of the contingency fee cap.

III. IS AN INSURED ENTITLED TO RECOVER ITS FEES FOR LEGAL SERVICES RENDERED IN LITIGATING THE AMOUNT OF ATTORNEYS FEES TO BE AWARDED OVER AND ABOVE ANY AMOUNT THAT WOULD BE CREDITED TO THE INSURED'S NET RECOVERY?

Point III of Petitioners' brief is premised upon the false assumption that the Lugassys are entitled to fees for litigating the fee issues in this case. In fact, the trial court erroneously included in the judgment an award (at the rate of $175.00 per hour) for 94 hours of legal services rendered in litigating the attorneys-fee issue (R 440-441, ¶ 6). Those 94 hours were devoted to litigating the amount of the fee. While the Third District made no provision for any such fees at the trial level in its opinion of reversal, its mandate of reversal included an award of fees for litigating the consolidated appeal from the fee and cost judgments.[30]

In State Farm Mutual Automobile Insurance Co. v. Moore, 597 So.2d 805, 807 (Fla. 2d DCA 1992), the Second District held:

> " An attorney cannot be awarded fees for time spent litigating the issue of attorney's fees where the client, as prevailing party, has no interest in the fee recovered. U.S. Security Insurance Co. v. Cole, 579 So.2d 153 (Fla. 2d DCA 1991)."

Applying that holding to the case at bar, the Lugassys had no

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[30] Since the appeals caused the contingency fee cap to be adjusted upward from 40% to 45%, fees on appeal were already encompassed within the Third District's mandated 45% fee award. Any additional fee would twice compensate for the same appellate services. The order granting appellate fees is discussed in Argument IV, infra.

interest in the fee litigation because Independent did not contest the inclusion in the fee award of that portion that would serve to enhance the Lugassys' net recovery (in the amount of the agreed percentage contingency fee).

Moore's and Cole's above-quoted holding was more recently approved and applied in EEZZZZ-ON Trailers, Inc. v. Bankers Insurance Co., 18 Fla. L. Weekly D1425 (Fla. 2d DCA Opinion filed June 9, 1993). The Second District noted conflict with Sonora v. Star Casualty Insurance Co., 603 So.2d 661 (Fla. 3d DCA 1992); State Farm Fire & Casualty Co. v. Palma, 585 So.2d 329 (Fla. 4th DCA 1991), jur. accepted, 602 So.2d 942 (Fla. 1992); Ganson v. State, Dep't of Administration, 554 So.2d 522 (Fla. 1st DCA 1989), rev'd on other grounds, 566 So.2d 791 (Fla. 1990); and Gibson v. Walker, 380 So.2d 531 (Fla. 5th DCA 1980).

Those conflicting decisions are well illustrated by Palma, 585 So.2d at 332-333, now under review by this Court. In Palma, the Fourth District adopted the contrary view that a claim for attorney's fees is, by virtue of § 627.428, Fla. Stat. (allowing fees for litigating insurance claims), a claim "under the policy." The fallacy in that reasoning replicates the First District's lapse in logic in Bodiford v. World Life Insurance Co. 524 So.2d 701 (Fla. 1st DCA 1988), quashed, 537 So.2d 1381 (Fla. 1989). In Bodiford, the First District mistakenly reasoned that the statutory attorney's fees are part and parcel of the benefits awardable under the policy and therefore must be taken into account in computing the percentage contingency fee. This Court quashed that decision,

explaining that the attorney's fee are "statutory"; implicit in that explanation is a recognition that those fees are not part of the recovery under the policy but rather are under the statute. If this Court were to subscribe to Palma's reasoning, it would therefore have to reject the logic of its Bodiford decision.

In Crittenden Orange Blossom Fruit v. Stone, 514 So.2d 351, 353 (Fla. 1987), this Court disallowed taxation of fees for legal services in litigating the issue of the amount of the attorneys fee to be awarded under § 440.34, Fla. Stat. Crittenden taxed just those services rendered in litigating the threshold (worker-compensation) issues triggering an entitlement to fees. Just as in the case at bar and in Moore, 597 So.2d at 807 any such fees for litigating fees would not end up increasing the insured's own net policy benefits but rather would end up only lining the attorneys' pocket, so in Crittenden a fees-for-litigating-fees award would have been paid to the attorney only and would not have increased the insured's worker's compensation benefits. Thus, Crittenden comports with the rationale adopted by the Second District. The First District has more recently adhered to Crittenden in Dobbs v. Suncoast Acoustics, 590 So.2d 7 (Fla. 1st DCA 1991).

That Crittenden's holding is not limited just to worker-compensation cases is demonstrated by the Florida Supreme Court's citation to Crittenden and reliance upon that case in the context of a probate proceeding in disallowing an award of fees for time spent in the pursuit of fees in Estate of Platt, 586 So.2d 328, 336 n. 7 (Fla. 1991).

The federal Social Security Act, allowing attorney's fees to a successful claimant, has likewise been construed as not allowing fees for litigating the issue of fees, Craig v. Secretary, Department of Health & Human Services, 864 F.2d 324, 328 (4th Cir. 1989), because those services do not benefit the client. Stocks v. Sullivan, 717 F.Supp. 400, 401 (E.D.N.C. 1989).[31]

IV. DID THE THIRD DISTRICT ERR IN GRANTING THE LUGASSYS' MOTION FOR APPELLATE FEES FOR LITIGATING THE CONSOLIDATED APPEAL FROM THE FEE AND COST JUDGMENTS?

Since this Court's acceptance of conflict jurisdiction brings up for review the same issues that were before the Third District, Bould v. Touchette, 349 So.2d at 1183, it is appropriate to review the Third District's ancillary order granting the Lugassys' motion for appellate attorney's fees. While the Third District leaves to the trial court the issue of how those fees are to be computed, any award of fees for litigating the issue of fees would in this case

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[31] Not only is Petitioners' Point III wrongly based upon the assumption that fees are awardable for litigating the fee issue, but also that Point is equally erroneous in arguing that, if the trial court deems a risk multiplier to be applicable to some of the legal services, the trial court must apply that multiplier to all of the legal services performed in the case. Any such argument runs afoul of the discretion invested by Quanstrom in trial courts to selectively apply or withhold the risk multiplier based upon the particular facts of each case. For example, post-judgment services quite simply do not partake of the same risk of non-payment as do pre-judgment services and therefore it is within the discretion of a trial court to determine that those services alone do not merit risk multiplier treatment. That is the rationale of the Ninth Circuit in Clark v. City of Los Angeles, 803 F.2d 987, 992 (9th Cir. 1986) in allowing fees for litigating the issue of fees in a category 1 case under 42 U.S.C. § 1988, but reversing the application of a multiplier in computing that fee.

be improper in the light of the analysis in Argument III, supra.[32] In other words, any such award should be limited just to that minuscule portion of the consolidated appeals relating to the cost judgment.

V. SINCE THE THIRD DISTRICT DID NOT REVERSE THE COST JUDGMENT, WOULD IT NOT BE A USELESS ACT TO REVISIT THAT JUDGMENT?

Contrary to Petitioners' argument, the Third District did not purport to reverse the cost judgment. The Third District's silence should be viewed as approving that judgment, particularly in the light of the fact -- acknowledged by Petitioners -- that the only issue raised with regard thereto was the pendency of the appeal on the merits, ultimately resolved in favor of the Lugassys.

CONCLUSION

The Third District's decision reversing the judgment for attorneys fees should be approved only insofar as it limits recovery to the 45% contingency fee cap, disapproving that portion of the opinion allowing quantum meruit fees for services rendered in the defense of the counterclaim, or alternatively if the Third District's quantum meruit award is also approved, that approval should be accompanied by the clarification or qualification that the quantum meruit award is just for those extra services rendered in the defense of the counterclaim. The Third District should be

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[32] Just as in the trial court, so in the Third District, Independent conceded that the amount of fees to which the Lugassys would be entitled is the 45% fee cap. (See "Conclusion" at page 32 of Independent's Initial Brief filed below in the Third District). In the light of that concession and of the fact that any fees in excess of that cap would not enlarge the Lugassys' net recovery, the instant fee appeal could not have benefited the Lugassys.

further instructed (a) that no risk multiplier should be applied to any such quantum meruit fees and (b) that § 627.428, Fla. Stat. does not sanction an award of fees for litigating the fee issue either at the trial level or at the appellate level.

Respectfully submitted,

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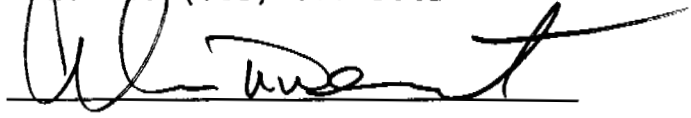

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing were mailed to Friend & Fleck 5975 Sunset Dr. Ste. 802 Miami, Fla. 33143, Ferrell, Cardenas, Fertel & Morales, P.A. 201 S. Biscayne Blvd. Miami, Fla. 33131, Evan Langbein Suite 506 20801 Biscayne Boulevard Miami, Fla. 33180 and P. Scott Russell P. O. Box 837 Jacksonville, Fla. 32202 this 23th day of September, 1993.