IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,725

JOHN H. FARO,

Petitioner,

v.

ROBERT V. ROMANI and
FARISH, FARISH & ROMANI,

Respondents.

AMENDED BRIEF OF AMICUS CURIAE SEARCY, DENNEY, SCAROLA, BARNHART & SHIPLEY, P.A.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

Daniel S. Pearson
HOLLAND & KNIGHT
701 Brickell Avenue
P. O. Box 015441
Miami, Florida 33101
(305) 374-8500

Counsel for Amicus Curiae
Searcy, Denney, Scarola,
Barnhart & Shipley, P.A.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES

CASES continued PAGE

CASES continued PAGE

OTHER AUTHORITIES

INTRODUCTION
AND INTEREST OF AMICUS CURIAE

When the law firm of Searcy, Denney, Scarola, Barnhart & Shipley, P.A. moved for leave to appear as amicus curiae, it expressed the concern of trial lawyers throughout this state who, with the full approval of the Bar and the courts of this state, of necessity utilize contingent fee agreements in providing legal services. Its concern was this. In Rosenberg v. Levin, 409 So. 2d 1016 (Fla. 1982) this Court had announced that an attorney discharged without cause (or its functional equivalent, withdrawing with cause), before any recovery under the contingent fee agreement, is entitled to a fee based on quantum meruit but not to exceed the maximum fee provided in the fee agreement; the Court did not however provide a guideline to determine the reasonable value of the service of this discharged attorney who had done substantial work under the contingent fee contract but, for example, had not actually obtained the signatures on the dotted line and the settlement proceeds. Thus it was that, striking out on their own, the First and Second Districts concluded that the "lodestar" method adopted in Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985) for statutory "prevailing party" attorney's fees is the appropriate method to determine the reasonable value of the discharged attorney's services. In contrast, however, the Third District, and the Fourth District in the case now before this Court, concluded that Rowe is simply inapplicable,[1] and the reasonable value is to be determined by applying Rosenberg.

---

[1]Compare Riesgo v. Weinstein, 523 So. 2d 752 (Fla. 2d DCA 1988), Boyette v. Martha White Foods, Inc., 528 So. 2d 539 (Fla. 1st DCA), rev. denied sub nom. Hall v. Boyette, 538 So. 2d 1255 (Fla. 1988) and Barton v. McGovern, 504 So. 2d 457 (Fla. 1st DCA 1987) with Trend Coin Co. v. Fuller, Feingold & Mallah, P.A., 538 So. 2d 919 (Fla. 3d DCA 1989) and Stabinski, Funt & De Oliveira, P.A. v. Law Offices of Frank H. Alvarez, 490 So. 2d 159 (Fla. 3d DCA) rev. denied, 500 So. 2d 545 (Fla. 1986).

Most assuredly, Rosenberg tells us that

> [i]n computing the reasonable value of the discharged attorney's services, the trial court can consider the totality of the circumstances surrounding the professional relationship between the attorney and client. Factors such as time, the recovery sought, the skill demanded, the results obtained, and the attorney-client contract itself will necessarily be relevant considerations.

409 So. 2d at 1022.

But given the disagreement and disarray in later district court decisions purporting to use Rosenberg as a beacon, it is apparent that this guidance was not enough.

Searcy, Denney, Scarola, Barnhart & Shipley, P.A. (the Searcy firm or Searcy) comes to this court, as it has said, having been directly affected by trial court decisions -- now pending on appeal -- using Rowe. In one -- a medical malpractice case[2] -- the Searcy firm was, after it had extensively investigated and prepared the case, discharged without cause[3] when an associate who had worked on the case while at Searcy left and solicited the client to go to another firm the associate had joined. The trial court, acknowledging that the result was unfair but adhering to the First District's decision in Boyette v. Martha White Foods, Inc., 528 So. 2d 539 (Fla. 1st DCA 1988), awarded the Searcy firm a straight hourly fee amounting to 17% of the total fees awarded notwithstanding it had done 91% of the work, while, concomitantly, Searcy's successor received 83% for doing 9% of the work. Searcy attorneys were compensated

---

[2]Now pending on appeal as Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Mary Barner (4th DCA Case No. 93-00303).

[3]The respondents in the present case, Farish, Farish & Romani, were found by the trial court to have withdrawn with cause. In his brief, the petitioner, Faro, does not contend that withdrawing with cause is qualitatively different from being discharged without cause. He merely contends that the finding that the Farish firm withdrew with cause is not supported by the record.

at rates of $250 to $500 per hour; the successor was the recipient of a contingent fee amounting to $12,500 per hour.[4]

Searcy's other pending case is much the same.[5] There the trial court, again multiplying by reasonable rates the hours the Searcy attorneys worked before being discharged without cause, awarded the Searcy firm less than 10% of the recovery after they had done more than 90% of the work leading to recovery.

SUMMARY OF THE ARGUMENT

Recovery for legal services under the doctrine of quantum meruit should be measured by the "market price" of what it would have cost the client to obtain services similar to those rendered by the attorney, so that the client is not unjustly enriched at the attorney's expense by discharging the attorney. Conflicting claims to a contingency fee can fairly be resolved by pro rata apportionment. When the initial attorney does a disproportionately greater share of the work, and the successor attorney does substantially less of the work, it is both logical and fair that the "market price" of the total package of services be divided on a pro rata basis between the two firms, according to their respective contributions to the final result.

This court in Rosenberg v. Levin, 409 So. 2d 1016 (Fla. 1982) did not expressly set guidelines to determine the reasonable value of the service of a discharged attorney who had

---

[4]Because the Searcy firm had been offered a sizable settlement, rejected by Barner before she discharged them, the successor was not awarded a contingency on that part. Since Searcy simply received a fee based solely on the hours the firm had worked, the client ended up with the windfall of paying only 14% of the recovery rather than the standard contingency agreed upon.

[5]Now pending as Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Poletz (2d DCA Case No. 93-1699).

done substantial work under a contingent fee contract but had not actually concluded the case. We submit, however, that the language of the Rosenberg decision itself, as well as the authorities it relied on, show that it intended that when successive attorneys render services to a client under contingent fee contracts, the trial court should determine the "market price" of the total package of legal services rendered, and divide that fee in accordance with the respective work done, or in some other equitable way.

The several district court decisions which have been rendered on the subject are in disarray, and some of them are based on a total misunderstanding of the doctrine of quantum meruit. The First and Second Districts concluded that the "lodestar" method adopted in Florida Patients' Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985) for statutory "prevailing party" attorney's fees is the appropriate method to determine the reasonable value of the discharged attorney's services. In contrast, however, the Third District, and the Fourth District in the case now before this Court, concluded that Rowe is inapplicable, and the reasonable value is to be determined by applying Rosenberg. We contend that Rowe does not apply to the determination of a discharged attorney's fee under the quasi-contractual remedy of quantum meruit. No decision of this Court says so, and all of the cases in which this Court has applied Rowe involve statutorily authorized attorney's fees. Instead, Rosenberg clearly applies, and nothing in Rosenberg suggests that the determination of a discharged attorney's fee under the doctrine of quantum meruit should be limited to a straight hourly fee notwithstanding that the discharged attorney was hired under a contingent fee contract, when the discharged attorney has done a disproportionately greater share of the work required to obtain a very substantial settlement. Pro rata apportionment is the only fair and logical solution to this type of

controversy, and it will not place any restraint upon a client's right to discharge an attorney, because the client will still pay no more than the "market price" fee for the total package of legal services received.

There is no basis at all in logic, fairness or sound public policy to justify disturbing the result reached by both the trial court and the district court of appeal in the present case.

ARGUMENT

THE PROPER MEASURE OF QUANTUM MERUIT RECOVERY: AS MUCH AS THE ATTORNEY DESERVES

A.

The basic principle of the measurement of a recovery under the doctrine of quantum meruit[6] is expressed in Section 371 of the Restatement of Contracts:

> If a sum of money is awarded to protect a party's restitution interest, it may as justice requires be measured by either
>
> (a) the reasonable value to the other party of what he received in terms of what it would have cost him to obtain it from a person in the claimant's position, or
>
> (b) the extent to which the other party's property has been increased in value or his other interests advanced.

Restatement (Second) of Contracts § 371 (1981). Only subsection (a) of this provision is applicable here.

The thrust of subsection (a) is that a recovery for legal services under the doctrine of quantum meruit should be measured not by some artificial valuation of what the attorney might have charged for individual increments of the part performance under a hypothetical contract

---

[6]The Latin phrase "quantum meruit" means simply "as much as [the attorney] deserves." Black's Law Dictionary 1119 (5th ed. 1979).

which did not exist between the parties, but by the "market price" of what it would have cost the client to have obtained services similar to those rendered by the attorney, so that the client is not unjustly enriched at the attorney's expense by discharging the attorney. See Restatement (Second) of Contracts § 371 cmt. a (1981). As a general rule, the contract itself is deemed the best evidence of that "market price," and a pro rata recovery of the contract price for the part performance rendered is therefore the ordinary measure of recovery under the doctrine of quantum meruit. See 12 Samuel Williston, A Treatise on the Law of Contracts, §§ 1483, 1485 (3d ed. 1970). See also Restatement (Second) of Contracts § 377 cmt. b (1981) (requiring pro rata recovery of contract price where quantum meruit becomes appropriate remedy because contract performance has been frustrated or rendered impracticable).

In most commercial contexts, the computation is relatively simple. If a painter is discharged without cause after painting 91% of a house, for example, the successor painter will normally charge only for painting the remaining 9% of the house, and the "market price" of the total undertaking is easily prorated 91% to the first painter without the need to resolve a conflicting claim by the second painter. The circumstances presented by a fee dispute where a contingent fee contract is involved are unusual, because a successor attorney employed under a contingent fee contract normally contracts for the whole (rather than for the uncompleted portion of the litigation), since it is usually impossible to know at the outset of the relationship how much time and effort will be involved to complete the contract. As a result, when the contingency ultimately occurs, there are two conflicting claims to the whole to be resolved. As we will demonstrate, however, these conflicting claims can fairly be resolved by the same type of pro rata apportionment available in the more ordinary case of our hypothetical painters, so

the circumstances presented by the facts in this case are simply a complication; they are not an obstacle to fair compensation for both sets of attorneys.

When the trial court in the present case applied these same principles it produced a perfectly logical and eminently fair result. The "market price" for engaging Farish, Farish & Romani to prosecute Faro's personal injury case was, as agreed upon as a matter of professional courtesy, a contingent fee of only 30%. The Farish firm, as the trial court found, withdrew for cause after it had extensively prepared the case and negotiated a $600,000 settlement offer. When Faro's successor attorney settled the case for $725,000 the trial court awarded the Farish firm $180,000 in fees (30% of $600,000). There is simply no reason why Faro should not expect to pay an attorney that amount for the successful prosecution of his case. That he chose to hire two successive sets of attorneys to see his case through to conclusion should not change that fact. He should still expect to pay a contingent fee of up to 30% for the successful prosecution of his case, because that is the "market price" of the total package of services he would receive. And when the initial firm does a disproportionately greater share of the work, and the other firm does substantially less of the work, it is both logical and fair that this "market price" of the total package of services be divided on a pro rata basis between the two firms, according to their respective contributions to the final result.[7]

This, incidentally, is precisely the way the American Law Institute recommends that the problem be handled in the more specific Restatement it is presently considering. On the

---

[7]We do not suggest that a pro rata distribution of the total fees awarded be bottomed upon hours expended alone. Certainly some discretion would exist to adjust these numbers for things like quality of performance, the result available at time of discharge, the status of the case (for example, has discovery been completed? is it ready for trial?), unnecessarily expended time, and the like.

measurement of quantum meruit recoveries by discharged attorneys, section 52 of the Restatement of the Law Governing Lawyers provides in pertinent part as follows:

> When the client-lawyer relationship ends before the lawyer has completed the services due for a matter:
>
> (1) A lawyer who has been discharged without forfeiting the lawyer's fee under §49 [such as "without cause"] and after substantially performing the services due, or any severable part of them, may recover the compensation provided by any otherwise enforceable agreement, less the value of the services covered by that contractual compensation that the lawyer did not provide because of the discharge; . . .

Restatement of the Law Governing Lawyers § 52 (Tentative Draft No. 4, April 10, 1991).

This provision is explained in Comment b to Section 52 as follows:

> b. *Recovery of contractual fee when client discharges lawyer after services (or a severable part of them) were substantially complete.* A lawyer is entitled to the contractual fee (less the value of any services the lawyer did not provide that are covered by that fee) when the lawyer has substantially earned the contractual fee at the time of termination, except when forfeiture is warranted. The typical case occurs when a client discharges a contingent-fee lawyer without cause just before the contingency occurs and then argues that the lawyer should receive only the fair value of the lawyer's services, not the contractual percentage fee. There is no need to protect the client's right to change lawyers during the case, because the case is in substance finished and a new lawyer is either unnecessary or could be hired for a small fee. Allowing a client to avoid paying the agreed fee by discharging the lawyer at the last minute would be unfair.
>
> For similar reasons, a client who discharges a lawyer is liable on the basis of the fee contract with the lawyer who has substantially completed a severable part of the services contracted for, without any conduct by the lawyer that would warrant forfeiture. Services are severable when a new lawyer would not reasonably have to repeat what has already been done in order to complete the representation and when (for example, because the parties had agreed to an hourly fee) it is possible with reasonable accuracy to determine the portion of the contractual fee allocable to the

> services already performed. If those conditions are met, recovery of the contractual fee will not inappropriately deter clients who wish to change lawyers, and denying such a recovery would make it possible for clients to obtain useful services at less than the agreed fee.
>
> * * *
>
> Allowing the lawyer to recover under the contract when discharged at a point when the lawyer's services (or a severable part of them) are substantially complete does not wholly prevent abuse by the client, who could discharge the lawyer just before substantial completion and thereby deprive the lawyer of the benefit of the contract fee. The client runs some risk by doing so, however, because the client normally must pay another lawyer to complete the services and because the client may have mistakenly concluded that the services were not substantially complete.
>
> Services should be found to be substantially completed when the client had no significant reason for discharging the lawyer other [t]han avoiding the contractual fee. When the services were substantially complete but the lawyer, because of discharge, did not perform some services otherwise due, the value of those services, valued at the contractual rate, should be deducted from the lawyer's contractual recovery.

Restatement of the Law Governing Lawyers § 52 cmt. b (Tentative Draft No. 4, April 10, 1991) (citations omitted).

In a case where the successor attorney does not have to duplicate any of the work performed by the first attorney, the first attorney clearly completed a "severable part" of the contract. We suggest that the quantum meruit recovery represented by section 52 of the Restatement is what the Rosenberg court meant when it adopted quantum meruit as the measure of a discharged attorney's fee in Florida, and the trial court should determine the "market price" of the total package of legal services rendered to the client by the two law firms that represented

the client, and divide that fee in accordance with the respective work done, or in some other equitable way.

In our view, there are two good reasons to believe that this is exactly what the Rosenberg court intended. First, in its general catalogue of factors to be considered when computing a reasonable fee under the doctrine of quantum meruit, the Court expressly required consideration of "the totality of the circumstances surrounding the professional relationship," including "time," "the results obtained, and the attorney-client contract itself." Rosenberg, 409 So. 2d at 1022. Surely, consideration of all three of these factors (plus the other factors in the catalogue) points to something entirely different from some straight hourly fee to the discharged attorney. At the very least, there is certainly no indication in this catalogue that a client who hires two successive law firms to prosecute a serious personal injury or medical malpractice case should be allowed to pay a much smaller percentage of the total recovery to the two firms, when the "market price" for their legal services is, as evidenced by the contract itself, considerably higher. Neither is there any indication in this catalogue that a firm which does, for example, more than 90% of the work could fairly be compensated by receiving, for example, less than 20% of that market price as its fee.

The second good reason to believe that the Rosenberg court intended application of the doctrine of quantum meruit as that doctrine is ordinarily applied can be found in the fact that it followed the California decisions on the question. In California the measure of a discharged attorney's quantum meruit recovery is exactly the measure spelled out in section 52 of the

Restatement of the Law Governing Lawyers. As the Court of Appeal reasoned in Cazares v. Saenz, 256 Cal. Rptr. 209 (Cal. Ct. App. 1989):[8]

> Our decision requires that we remand the case to the trial court for a determination of the reasonable value of the services rendered by Cazares & Tosdal on the Gutierrez case. Because the hourly fee is the prevailing price structure in the legal profession, it is sometimes assumed that the quantum meruit standard applied to legal services includes nothing more than a reasonable hourly rate, multiplied by the amount of time spent on the case. As even Saenz's counsel candidly recognizes, however, this is an overly narrow view of the quantum meruit standard applied in the context of a contingent fee agreement which, through no fault of either party, could not be performed.
>
> A
>
> As a matter of professional responsibility, California lawyers are entitled to charge clients no more than a reasonable fee for legal services. What is reasonable in a given case depends on a host of circumstances. Moreover, there may be a significant difference between what is reasonable in the context of a negotiated fee and the otherwise calculated reasonable value of legal services rendered. A party to a contract may agree to pay a higher-than-market price for services, but where the bargaining process is a fair one, courts traditionally defer to the parties' agreement as the best measure of the value of the contract performance.
>
> The hourly fee is the standard price structure in the legal profession. Where a lawyer normally charges for work on the basis of an hourly fee, it is a fairly simple matter to calculate the reasonable value of services rendered even in the absence of a negotiated fee. The lawyer's customary hourly rate can be evaluated by comparison to the rate charged by others in the legal community with similar experience. The number of hours expended by the lawyer can also be evaluated in light of how long it would have taken other attorneys to perform the same tasks. Properly evaluated and adjusted, the product of the hourly rate and

[8]We ordinarily would not include such an extensive quotation in a brief. However, this statement by the court in Cazares explains our position as well as it can be explained and will, we hope, be helpful to the Court.

the number of hours expended should yield the reasonable value of the work completed.

Where a lawyer has contracted to provide services in exchange for a contingent percentage fee, calculation of the reasonable value of services rendered in partial performance of the contract becomes a more complicated task. It has been repeatedly recognized that a contingent fee "'may properly provide for a larger compensation than would otherwise be reasonable.'" This is because a contingent fee involves economic considerations separate and apart from the attorney's work on the case.

In addition to compensation for the legal services rendered, there is the raison d'etre for the contingent fee: the contingency. The lawyer on a contingent fee contract receives nothing unless the plaintiff obtains a recovery. Thus, in theory, a contingent fee in a case with a 50 percent chance of success should be twice the amount of a non-contingent fee for the same case. Usually, the fee is contingent not only on the ultimate success of the case but also on the amount recovered; that is, the fee is measured as a percentage of the total recovery. Thus, the lawyer runs the risk that even if successful, the amount recovered will yield a percentage fee which does not provide adequate compensation.

Finally, even putting aside the contingent nature of the fee, the lawyer under such an arrangement agrees to delay receiving his fee until the conclusion of the case, which is often years in the future. The lawyer in effect finances the case for the client during the pendency of the lawsuit. If a lawyer was forced to borrow against the legal services already performed on a case which took five years to complete, the cost of such a financing arrangement could be significant.

Where the calculation of an attorney's reasonable fee requires evidence and analysis of all these factors, it can be a formidable undertaking. Fortunately, when an attorney partially performs on a contingency fee contract, we already have the parties' agreement as to what was a reasonable fee for the entire case. If the trial court can determine what portion of the contract was performed, calculating the reasonable value of that partial performance becomes a relatively simple procedure.

To determine the extent of partial performance, the trial judge must calculate a fraction where the numerator is the value of the

> legal services rendered by the particular attorney or firm at issue and the denominator is the aggregate value of all the legal services rendered by any attorney in the case. This may be as simple as adding up the total number of hours spent by all attorneys on the matter, but it is by no means limited to "straight time." The trial court may adjust the fraction upward or downward to account for difficulty of the work or other relevant factors.
>
> The fraction thus calculated represents the attorney's or firm's proportionate work on the case and, if multiplied by the total fee due under the contract, should yield a reasonable approximation of the proportional fee due the attorney or firm. In effect, then, the reasonable value of the services rendered is measured by the attorney's or firm's pro rata share of the contract price.

Id. at 213-15 (footnotes and citations omitted). Accord Spires v. American Bus Lines, 204 Cal. Rptr. 531 (Cal. Ct. App. 1984). See Joseph E. Di Loreto, Inc. v. O'Neill, 1 Cal. Rptr. 2d 636 (Cal. Ct. App. 1991); Schneider v. Kaiser Found. Hosps., 264 Cal. Rptr. 227 (Cal. Ct. App. 1989), rev. denied, 1990 Cal. LEXIS 645 (Cal. Feb. 15, 1990). The law in New York is essentially the same. See Cheng v. Modansky Leasing Co., 539 N.E.2d 570 (N.Y. 1989).[9] We suggest that the reasoning of Cazares is what the court in Rosenberg meant when it adopted California law on the subject, and that therefore trial courts should determine the "market price" of the total package of legal services rendered to the client by two successive law firms, and divide that fee in an equitable fashion between the firms.

---

[9]Nine additional decisions supporting Comment b of section 52 of the Restatement of the Law Governing Lawyers, are cited in the "Reporter's Note" to section 52. For additional decisions supporting our position here, see Annotation, Limitation to Quantum Meruit Recovery, Where Attorney Employed under Contingent Fee Contract is Discharged Without Cause, 92 A.L.R.3d 690 (1979) (and supplement thereto).

B.

The several district court decisions which have been rendered on the subject are in disarray and, in our view, some of them are bottomed upon a total misunderstanding of the doctrine of quantum meruit. To begin with, the problem presented by this type of case in the various appellate courts is mired in a confusion between the recovery of fees under the doctrine of quantum meruit and the recovery of fees under a statutory authorization. Simply stated, some courts have assumed that Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985), governing the computation of fees under a statutory authorization, also governs the computation of fees under the doctrine of quantum meruit. The confusion perhaps is understandable, given this Court's use of the single phrase "reasonable value of services" to describe the measure of both recoveries. But the two concepts are entirely different and, in our view, the formula set forth in Rowe is an inappropriate measure of recovery under the doctrine of quantum meruit (which, according to Rosenberg, is the appropriate doctrine governing recovery in cases like this one).[10] We are reinforced in that conclusion by the American Law Institute's position on the point:

> The "fair value" fee recoverable under this Section is not measured by the standards applied when a party recovers a reasonable attorney's fee from an opposing party under a fee-award statute or doctrine. The latter kind of fee often implicates factors -- such as

---

[10]Standard Guar. Ins. Co. v. Quanstrom, 555 So. 2d 828 (Fla. 1990), did nothing to extend Rowe's 'lodestar' formula, in one form or another, to virtually all forms of litigation. Quanstrom dealt with a prevailing-party attorney's fee award authorized by section 627.428; its entire discussion is limited to statutorily-authorized prevailing-party attorney's fees; and it nowhere even arguably suggests that the "lodestar" method adopted in Rowe for determining statutorily-authorized prevailing-party attorney's fees is to be used to determine the measure of a discharged attorney's fee under the doctrine of quantum meruit. Rosenberg v. Levin clearly continues to govern that entirely different problem.

> a legislative intent to encourage such suits or to limit fee awards to less than full compensation (for example, when the main purpose of the fee award is to deter misconduct by the fee-paying party) -- not present in quantum meruit recovery under this Section.

Restatement of the Law Governing Lawyers § 51 cmt. a (Tentative Draft No. 4, April 10, 1991) (discussing quantum meruit recoveries from clients for services rendered without a fee contract).

Our position is also supported by several decisions of the Third District. The issue first arose in Stabinski, Funt & de Oliveira, P.A. v. Law Offices of Frank H. Alvarez, 490 So. 2d 159 (Fla. 3d DCA), rev. denied, 500 So. 2d 545 (Fla. 1986). In that case, a discharged attorney who was unhappy with the size of his quantum meruit recovery argued a single issue on appeal -- that the trial court's final order was deficient for failing to set forth specific findings to support the fee award, as Rowe required.[11] The district court rejected this contention, holding that Rowe was entirely inapplicable to the recovery of fees under the doctrine of quantum meruit adopted as the measure of recovery in Rosenberg:

> We reject this contention upon the holding that Rowe and the federal lodestar method it adopts applies only to fees imposed ancillary to the primary action against a non-client either under common law principles . . . or, as in Rowe itself . . . , pursuant to statutory authorization; they do not affect the assessment of attorney's fees which are due, as here, as damages for breach of an agreement for the payment of such fees by the client or other contracting party. This conclusion is in accordance with both the entire thrust of the Rowe decision -- which seeks to protect third parties from excessive awards over which they have no contractual

---

[11]Faro devotes the second half of his brief to making the same point here. Since our concern lies elsewhere, we will not address the findings issue except to say that Rowe is an exception to the general rule that, in Florida, a trial court is not *required* to make written findings, see, e.g., Vandergriff v. Vandergriff, 456 So. 2d 464, 466 (Fla. 1984) ("We are not prepared to hold . . . that trial judges must support their decisions with factual findings."), and, as Stabinski holds, if Rowe doesn't apply, then no findings are required when determining fees.

> or adversarial control -- as well as with much of its specific language.

Stabinski, 490 So. 2d at 160 (citation omitted).

Of course Stabinski is absolutely correct in saying that its conclusion is in accordance with the entire thrust and language of Rowe. As this Court explained in Rowe:

> When the prevailing party's counsel is employed on a contingent fee basis, the trial court must consider a contingency risk factor when awarding a statutorily-directed reasonable attorney fee. However, because the party paying the fee has not participated in the fee arrangement between the prevailing party and that party's attorney, the arrangement must not control the fee award: "Were the rule otherwise, courts would find themselves as instruments of enforcement, *as against third parties*, of excessive fee contracts."

Rowe, 472 So. 2d at 1151 (emphasis supplied) (quoting Trustees of Cameron-Brown Inv. Group v. Tavormina, 385 So. 2d 728, (Fla. 3d DCA 1980)).

The holding in Stabinski was followed in two subsequent decisions. In Trend Coin Co. v. Fuller, Feingold & Mallah, P.A., 538 So. 2d 919 (Fla. 3d DCA 1989), the district court held that a discharged attorney's quantum meruit recovery is governed by the catalogue of factors in Rosenberg rather than the factors set forth in Rowe. And in David B. Mishael, P.A. v. Farrell, Cardenas, Fertel, Rodriguez & Mishael, P.A., 606 So. 2d 651 (Fla. 3d DCA 1992), rev. denied, 618 So. 2d 209 (Fla. 1993), the district court rejected a discharged attorney's claim of entitlement to a "contingency risk multiplier" in computing fees under the doctrine of quantum meruit, because the Rowe factors are inapplicable in such a computation. We believe these decisions are correct insofar as they reject application of Rowe to the type of fee dispute in issue in this case. When computing a discharged attorney's quantum meruit recovery, the catalogue of factors set forth in Rosenberg governs -- not the factors set forth in Rowe. And because that

general catalogue of factors is sufficiently broad to accommodate the type of pro rata recovery which is the type of recovery ordinarily available under the quasi-contractual remedy of quantum meruit, we believe that these Third District decisions (which contain no language preventing such an analysis of Rosenberg), and, of course, the decision under review here, fully support our position.

The waters become considerably muddied as we look to the north. The Second District in Riesgo v. Weinstein, 523 So. 2d 752 (Fla. 2d DCA 1988), has reached a conclusion contrary to that reached by the Third District and contrary to the decision of the Fourth District in the present case. There, it explicitly announced its disagreement with Stabinski, and held that the determination of a discharged attorney's fee under the doctrine of quantum meruit is to be made by applying the several factors in Rowe (though presumably including its "contingency risk multiplier"). The same court announced a similar conclusion in a related context in Rood v. McMakin, 538 So. 2d 125 (Fla. 2d DCA 1989). Since we have already stated our agreement with Stabinski and the Fourth District's decision in the present case, our disagreement with these cases necessarily follows.[12]

---

[12]The Riesgo court bottomed its disagreement with Stabinski upon its earlier holding in Freedom Sav. & Loan Ass'n v. Biltmore Constr. Co., 510 So. 2d 1141 (Fla. 2d DCA 1987), that Rowe applies whether the entitlement to attorney's fees arises from a statute or from a provision in a contract between the plaintiff and defendant which is the subject of the litigation. It is here, we believe, that the Second District confused two quite different concepts, and therefore reached the wrong conclusion. Rowe may very well apply when determining the amount of an attorney's fee to be awarded to a "prevailing party" in a contract dispute, where the contract provides for such an award. The district courts are split on this question. In the Third District, Rowe applies only to fees authorized by statute, and not to fees authorized by contract. See Financial Servs., Inc. v. Sheehan, 537 So. 2d 1111 (Fla. 3d DCA 1989). In the First and Fourth Districts, like the Second District, Rowe applies to "prevailing party" attorney's fees authorized by both statute and contract. See Giltex Corp. v. Diehl, 583 So. 2d 734 (Fla. (continued...)

Further to the north, the First District has announced what we consider to be an entirely anomalous and logically insupportable rule. In Boyette v. Martha White Foods, Inc., 528 So. 2d 539, it disagreed with Stabinski, agreed with Riesgo, and held that the Rowe factors govern determination of a discharged attorney's quantum meruit recovery under Rosenberg. It then disagreed with Riesgo, however, and held that the quantum meruit recovery contemplated by Rosenberg did not include the "contingency risk multiplier" authorized by Rowe.[13] This is a hybrid which is bound to be infertile, and the rule announced in Boyette simply makes no sense.[14] Either Rosenberg's catalogue of factors (which allows consideration of "the

---

[12](...continued)
1st DCA 1991); Alston v. Sundeck Prods., Inc., 498 So. 2d 493 (Fla. 4th DCA 1986).

These cases are inapposite to the type of problem presented in Riesgo, however, because the issue presented there was how a discharged attorney with no contract was to be compensated under the doctrine of quantum meruit, not the amount of fees to be assessed as additional damages against a losing litigant in a contract dispute, where the contract authorized an award of fees to the "prevailing party." In our judgment, "prevailing party" attorney's fees arising under a contractual authorization can be appropriately analogized to "prevailing party" attorney's fees arising under a statutory authorization, but neither can appropriately be analogized to a discharged attorney's recovery of fees for services rendered to a former client under the quasi-contractual remedy of quantum meruit. In cases like Riesgo, Rosenberg, not Rowe, should apply.

[13]Actually, the Boyette court purported to "distinguish" Riesgo on this point, stating that "[t]he issue in Riesgo dealt with factors affecting the amount of the attorney's fee other than the contingency risk multiplier." Boyette, 528 So. 2d at 541. In our judgment, this is an inaccurate reading of Riesgo. Although the specific factor of a "contingency risk multiplier" was not discussed in Riesgo, that factor was clearly subsumed in the Riesgo court's all-embracing holding that, "[i]n determining the reasonable value of the attorney's services, the trial court must utilize the criteria set forth in Rowe . . . ." Riesgo, 523 So. 2d at 754.

[14]Conceivably one might argue that the Third District's decisions also disallow use of a "contingency risk multiplier" in computing a discharged attorney's fee. The Third District certainly does disallow the use of such a multiplier, but that is because it disallows application of Rowe altogether in the computation of a discharged attorney's fee under the doctrine of quantum meruit. No decision of the Third District is even remotely consistent with Boyette, which requires application of some of Rowe's factors and disallows use of one of them.

attorney-client contract itself") applies, or Rowe's catalogue of factors (which includes a "contingency risk multiplier") applies. And if Rowe applies, as Boyette holds, it is simply impossible that only some of the factors contained in Rowe apply.[15] We therefore disagree with Boyette as well.

Again we are not alone. The Fourth District, agreeing with our basic position as it did again in the present case, has expressly criticized Boyette's limitation of a discharged attorney's fee to a straight hourly rate:

> *The establishment of a reasonable fee for [a discharged] attorney's service is not simply the number of hours times the hourly rate.* As the supreme court stated in Rosenberg, in determining the reasonable fee the trial court
>
> > can consider the totality of the circumstances surrounding the professional relationship between the attorney and client. Factors such as time, the recovery sought, the skill demanded, the results obtained, and the attorney-client contract itself will necessarily be relevant considerations.

Schwartz, Gold & Cohen, P.A. v. Streicher, 549 So. 2d 1044, 1046 (Fla. 4th DCA 1989) (emphasis supplied) (quoting Rosenberg, 409 So. 2d at 1022).

We should also point out that Boyette appears to be in conflict with an earlier First District decision on the point -- Sohn v. Brockington, 371 So. 2d 1089 (Fla. 1st DCA 1979), cert. denied, 383 So. 2d 1202 (Fla. 1980) -- a decision which was rendered before this Court's decision in Rosenberg, and which this Court in Rosenberg purported to follow in several

---

[15]More recently, in a case involving assessment of a statutorily-authorized attorney's fee, the First District held that consideration of a "contingency risk multiplier" is mandatory under Rowe. Loper v. Allstate Ins. Co., 616 So. 2d 1055 (Fla. 1st DCA 1993).

respects.[16] In Sohn, which involved a dispute between a discharged attorney and a successor attorney over how the first attorney was to be compensated out of the proceeds of a settlement obtained by the successor attorney, the district court held that the second attorney's contingent fee of $30,000.00 was to be apportioned between the attorneys based upon the respective contributions of the two attorneys to the ultimate settlement. Sohn, 371 So. 2d at 1095. That, of course, is exactly what we suggest is the fairest and most logical disposition of these types of controversies -- and we therefore urge the Court to follow Sohn, as it appears to have done in Rosenberg.

Sohn brings us back to where we began: Rowe simply does not apply to the determination of a discharged attorney's fee under the quasi-contractual remedy of quantum meruit. No decision of this Court says so, and all of the cases in which this Court has applied Rowe involve statutorily-authorized attorney's fees. Instead, Rosenberg clearly applies -- and there is nothing in Rosenberg's general catalogue of factors that even arguably suggests that the determination of a discharged attorney's fee under the doctrine of quantum meruit should be limited to a type of straight hourly fee notwithstanding that the discharged attorney was hired under a contingent fee contract, when the discharged attorney has done -- as the Searcy firm did -- 91% of the work required to obtain $4,237,500.00 in settlement of one client's claims. Indeed, Rosenberg's implicit approval of Sohn, as well as its express approval of California's

---

[16]The only aspect of Sohn which this Court in Rosenberg did not follow was its conclusion that the cause of action for a quantum meruit recovery accrued immediately upon discharge of the attorney. This Court in Rosenberg held that the cause of action did not accrue until the contingency occurred. All other aspects of Sohn appear to have been endorsed by the Rosenberg decision.

solution to the problem, strongly suggests that the type of pro rata apportionment we propose is the proper way to resolve this type of controversy.[17]

Moreover, our suggested type of pro rata apportionment is the only solution to this type of controversy which is founded in simple logic and fundamental fairness. Neither will the solution we propose place any restraint whatsoever upon a client's right to discharge an attorney for any reason or no reason at all, because the client will still pay no more than the "market

---

[17]If this Court should conclude that Rowe governs determination of the amount of the quantum meruit recovery under Rosenberg, trial courts should at least be compelled to enhance any clearly inadequate compensation and reduce a client's and successor attorney's unjustified windfall by a "contingency risk multiplier," as Rowe plainly requires.

The anomalous conclusion reached in Boyette makes little sense. If Rowe applies, then all of its factors must apply: "We emphasize again that *all* the factors contained in Rowe apply whenever the lodestar approach applies.'" Perez-Borroto v. Brea, 544 So. 2d 1022, 1023 (Fla. 1989), quoting Miami Children's Hosp. v. Tamayo, 529 So. 2d 667, 668 (Fla. 1988). See Standard Guar. Ins. Co. v. Quanstrom, 555 So. 2d 828 (Fla. 1990) (although use of a "contingency risk multiplier" is not mandatory in every case in which plaintiff's counsel has a contingent fee contract, it is mandatory that the trial court at least consider whether or not a "contingency risk multiplier" would be appropriate under the facts); Lane v. Head, 566 So. 2d 508 (Fla. 1990) (similar).

The reason why such a multiplier should be applied in appropriate cases is, we submit, perfectly obvious. As Rowe itself explains, "[b]ecause the attorney working under a contingent fee contract receives no compensation when his client does not prevail, he must charge a client more than the attorney who is guaranteed remuneration for his services." Rowe, 472 So. 2d at 1151. In measuring the "reasonable value of services" rendered by an attorney employed under a contingent fee contract, it is wholly inappropriate to measure it solely by the hourly fee which the attorney would have charged if the attorney's remuneration had been guaranteed. The point is also nicely explained in the lengthy quotation from Cazares v. Saenz, 256 Cal. Rptr. 209 (Cal. Ct. App. 1989), we have set out above.

Because, however, the existing 2.5 maximum multiplier would be wholly inadequate in the cases we have described, there will hardly be an equitable quantum meruit where there are very substantial recoveries. Raising the maximum multiplier would solve that problem of course but if that were done to accomplish an equitable and just result, it would be no more or less than the application of Rosenberg in the first place.

price" fee for the total package of legal services received, and the predecessor and successor attorneys will simply divide that fee between themselves in realistic and equitable shares. In contrast, the straight hourly fee solution has nothing in logic or fairness to commend it, and it provides a strong economic incentive for contingent-fee clients to discharge their initial attorneys after a substantial amount of the work has been done. Worse, it provides a strong economic incentive for associate attorneys and other competitors to encourage represented plaintiffs to terminate existing contracts.

We do not believe that there is a basis -- any at all -- in logic or fairness or sound public policy to justify disturbing the result reached by both the trial court and the district court of appeal in the present case. The only disposition of this or any like controversy that makes any sense at all is the pro rata apportionment required by the doctrine of quantum meruit -- as that doctrine is ordinarily applied, as it was applied in Sohn, and as it is presently applied by the California courts upon which this Court in Rosenberg relied.

CONCLUSION

We respectfully submit that the district court's decision is correct and this Court should approve it and adopt the view of the Third and Fourth Districts that Rosenberg, not Rowe, governs the issue presented here, and clarify that the Rosenberg formulation of quantum meruit is far more expansive than the simplistic multiplication of hours spent times a reasonable hourly rate. By so doing this Court will establish that proper contingent fee contracts will be respected and enforced and that lawyers who succeed to the representation of clients who have discharged lawyers be awarded a fair fee only, not a windfall inheritance.

Respectfully submitted,

HOLLAND & KNIGHT
Counsel for Amicus Curiae
701 Brickell Avenue
Suite 3000
Miami, Florida 33131
(305) 374-8500

By: Daniel S. Pearson
Daniel S. Pearson
Florida Bar No. 062079

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Amended Brief of Amicus Curiae was mailed this 2d day of February, 1994 to: Susan M. Rosen, Esq., Susan M. Rosen, P.A., 909 N.E. 26th Avenue, Hallandale, Florida 33009; Robert V. Romani, Esq., Farish, Farish & Romani, P.O. Box 3887, West Palm Beach, Florida 33402; John W. Thornton, as Trustee, Thornton & Mastrucci, Biscayne Building, Suite 720, 19 West Flagler Street, Miami, Florida 33130-4478; James J. McNally, Esq., James J. McNally, P.A., Biscayne Building, Suite 634, 19 West Flagler Street, Miami, Florida 33130; John Beranek, Esq., Aurell Radey Hinkle Thomas & Beranek, Suite 1000, Monroe-Park Tower, 101 North Monroe Street, Post Office Drawer 11307, Tallahassee, Florida 32301; Walter G. Campbell, Esq., Krupnick, Campbell, Malone, Roselli, Buser & Slama, P.A., 700 Southeast Third Avenue, Courthouse Law Plaza, Suite 100, Ft. Lauderdale, Florida 33316; Amanda K. Esquibel, Esq., Tilghman & Esquibel, P.A., 9703 South Dixie Highway, Miami, Florida 33156; C. Rufus Pennington, III, Esq., Margol & Pennington, P.A., Suite 1702, American Heritage Tower, 76 South Laura Street, Jacksonville, Florida 32202; and Christian D. Searcy, Esq., Searcy, Denney, Scarola, Barnhart & Shipley, P.A., 2139 Palm Beach Lakes Blvd., West Palm Beach, Florida 33402.

Daniel S. Pearson

Daniel S. Pearson