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THE SUPREME COURT OF FLORIDA

JOHN H. FARO,

Appellant,

vs.

CASE NO. 82,725

4TH DCA CASE NO. 92-1907

ROBERT V. ROMANI and
FARISH, FARISH & ROMANI,

Appellees.
_____/

ANSWER BRIEF OF APPELLEES

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TABLE OF CONTENTS

ISSUES

(AS CERTIFIED BY THE DISTRICT COURT)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES CONTINUED: Page(s)

Florida Bar Rules of Professional Conduct

OTHER AUTHORITIES

PREFACE

Throughout this brief the following symbol will be used:

"R" - Will indicate a reference to the Record on Appeal to the District Court, and will be followed by the page(s) in the Record.

I.

STATEMENT OF CASE AND FACTS

Pursuant to Florida Rules of Appellant Procedure 9.210(c), Appellee submits the following **STATEMENT OF THE CASE AND FACTS** on the areas of disagreement.

Romani was hired by Attorney John Faro, to represent him for recovery of his personal injuries resulting from a single car accident, which occurred March 2, 1990, (R.92). As a professional courtesy, the fee was reduced from forty percent (40%) to thirty percent (30%) (R.93). The contract was freely and voluntarily entered into by Faro, who made absolutely no objection to any of the contract's terms or conditions until such time as he decided that he did not want to pay Romani. (R.93).

The Fourth District Court of Appeal has affirmed Judge Bernstein's finding that Romani had justification and good cause to withdraw and, therefore, recover a fee for his services. The Fourth District ruled that Judge Bernstein had sufficient facts before her to support her findings and, that there was no abuse of discretion. The Court apparently agreed with Judge Bernstein's concern when she asked Attorney Faro's trial counsel "how difficult can it be said theoretically for a client to make life, the life of his lawyer, before it is justified to withdraw?" (R.185).

Appellant says that this matter represents a failed contingency fee because the client refused to accept the settlement offer, that the withdrawal was on the eve of trial and replacement counsel had to duplicate the efforts of Romani. The facts before the Trial Court simply do not support that contention. The

findings of the Trial Court, as well as the Fourth District, affirm that these "facts" as asserted by Petitioner, are not supported. The Fourth District has specifically found that Romani had justification and good cause for withdrawing, apart from or in addition to, disagreements over settlement negotiations. Judge Bernstein specifically recognized, at the time of the hearing on the Motion to Withdraw, that it was not on the eve of trial and that their case would not be reached on that docket. (R.365-72)

Attorney Faro's case was complex with respect to his damages. His claim for damages was based on a closed head injury to his brain. There were no physical signs of injury and he required no hospitalization. (R.97). Faro denied loss of consciousness, bleeding or even abrasions. (R.98). Attorney Faro had no measurable neurological deficits that could be attributed to an injury to his brain. He did not walk with a gait, he did not slur his speech, his body and motor functions were all normal. (R.118). He had also had an extensive history of the use of tranxene and halcion, which cause similar symptoms to those which Faro claimed resulted from the accident. (R.119).

Faro's own actions frustrated and complicated the development of the case, deteriorated the relationship between Faro and Romani and raised ethical considerations as to his motivations for pursuing his action. (R.109-115). In addition to the discovery problems which were created by Faro and his admitted desire that he wanted to retire from the practice of law, as opposed to receiving a fair adjudication of his claim (R.121), Faro also ran the risk of losing his $100,000.00 per year disability benefits. (R.122).

Contrary to Appellant's representations in their Statement of Facts, Romani continued to represent Faro, despite these numerous problems, up until the effective date of the order on the Motion to withdraw.

Appellant has tried to make an issue of the fact that Romani's Motion for Withdrawal stated the reason for withdrawal as a generic "irreconcilable differences". (R.129). This was for the simple fact that while Faro's case was still pending, there was no need for Romani to put opposing counsel on notice as to the difficulties and problems that had arisen regarding this case. There was no need to air Attorney Faro's dirty laundry in public. After his withdrawal there was ample time for Faro to obtain substitute counsel, except that Faro settled the case for $725,000.00 prior to the case even being reset on a new docket by Judge Bernstein. (R.162). Settlement was for less than what Romani had told Faro he thought he could settle the case for, but Faro now thought that he could avoid paying Romani any fees or costs. Faro thus accepted the benefit of Romani's services, but refused to pay him reasonable compensation.

Contrary to Appellant's representations to this Court, there was absolutely no evidence before the Court that Romani interfered with Faro's attempts to obtain substitute counsel. (R,168). Soon after Romani's withdrawal, Faro retained Susan Rosen, with whom he had a personal relationship. They accepted a settlement for $25,000.00 less than what Romani thought he could obtain on behalf of Attorney Faro and then Faro paid Attorney Rosen $100,000.00. Faro's own testimony was that her work, although unsubstantiated by

any documentary evidence, amounted to approximately 200 hours. By his own admission he has paid Attorney Rosen $500.00 per hour. (R.162-167). If there was any prejudice on the part of Faro it was by his own actions in settling soon after Romani's withdrawal and paying Attorney Rosen an excessive fee.

Appellant repeatedly tries to assert that Romani was solely trying to recover on the contingency fee contract. This is simply not the case. Appellee recognized from the outset that this matter was controlled by Rule 4-1.5 and **Rosenberg v. Levin, 409 So.2d 1016 (Fla. 1982).** (R.5). Those authorities recognize that upon withdrawal, an attorney is entitled to a fee based on quantum meruit, but limited to the contract amount. The limitation to the contract amount becomes affective if the calculation based on quantum meruit results in a fee in excess of the contract amount. This basis of recovery and limitation thereon, was also recognized by the Court in its final order dated June 9, 1992.

II.

SUMMARY OF ARGUMENT

Contrary to what may be gleaned from the Appellant's brief, there are only two very limited issues certified to this Court. Virtually no where in his brief does the Appellant address the first issue certified by the Fourth District, that being

> "WHETHER IN AN ACTION OR A CHARGING LIEN, THE TRIER OF FACT MAY CONCLUDE ON DISPUTED EVIDENCE THAT COUNSEL IS ENTITLED TO COMPENSATION FOR SERVICES RENDERED, NOTWITHSTANDING THE CONTINGENCY OF THE FEE CONTRACT, WHERE COUNSEL IS FOUND TO HAVE JUSTIFICATION AND GOOD CAUSE FOR WITHDRAWING, APART FROM OR IN ADDITION TO DISAGREEMENTS OVER SETTLEMENT NEGOTIATIONS."

The only logical conclusion that can be drawn from Appellant's lack of argument as to that issue, is that a review of the law of Florida, as well as other states, and common good sense tells us that in such an event an attorney is entitled to compensation based on quantum meruit, but limited to maximum recovery of up to the contract fee amount. There is no reason to deny compensation to an attorney who has rendered valuable services to a client, and who is for some reason no longer able to continue properly representing his client, when the fault is not that of the attorney, but substantially all on the part of the client.

The second issue is

> WHETHER **FLORIDA PATIENT'S COMPENSATION FUND v. ROWE, 427 So.2d 1145 (Fla. 1985),** APPLIES TO A CLAIM FOR A REASONABLE ATTORNEY'S FEE ASSERTED BY AN ATTORNEY AGAINST THE PARTY CONTRACTING WITH THE ATTORNEY, AS DISTINGUISHED FROM A CLAIM FOR FEES AGAINST A THIRD PARTY.

Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), was clearly related to assessing attorneys' fees against a third party. There is privity of contract between the parties to this action, as well as notice and full knowledge of the extent and value of the services rendered. If there is any question as to the services rendered or the value of those services, Appellant was given full discovery in this matter, as he would have been in any other civil proceeding. Appellant was unable to show abuse of discretion on behalf of the Trial Court in the District Court, and if it was relevant, has failed to show an abuse of discretion in this proceeding.

III.

ARGUMENT

I

WHETHER IN AN ACTION ON A CHARGING LIEN A TRIER OF FACT MAY CONCLUDE ON DISPUTED EVIDENCE THAT COUNSEL IS ENTITLED TO COMPENSATION FOR SERVICES RENDERED, NOT WITHSTANDING THE CONTINGENCY OF THE FEE CONTRACT, WHERE COUNSEL IS FOUND TO HAVE JUSTIFICATION AND GOOD CAUSE FOR WITHDRAWING, APART FROM OR IN ADDITION TO, DISAGREEMENTS OVER SETTLEMENT NEGOTIATIONS?

The certified question as above has a clear yes answer. Contrary to Appellant's argument that the answer is dependent on the legal definition of "good cause", that issue is simply not presented by the certified question. Based on the proceeding before the Trial Court, the Fourth District has affirmed the issue as to whether or not Romani had good cause to withdraw.

It is well settled in this state that an attorney is entitled to compensation up to the time of his or her consensual withdrawal from representation, if the attorney had been retained on an hourly basis. **Fla. Jur 2d, "Attorneys at Law" § 146**. It is also well established in this state, that an attorney who is discharged without cause in a contingency fee case, is entitled to compensation based on quantum meruit. **Rosenberg v. Levin, 409 So.2d 1016 (Fla. 1982).** The only Florida case dealing with a situation where an attorney withdraws as opposed to being discharged, also holds that the attorney is entitled to the value, in quantum meruit, of his services as limited by the contingency fee contract between

the parties. **Sanchez v. Friesner, 477 So.2d 66 (Fla. 3rd DCA 1985).** Although not ruling directly on this point, the Fifth District has also supported the view that provided an attorney has contributed to the client's eventual recovery, it would result as unjust enrichment to the client if the attorney was not granted fees in quantum meruit, in cases where the client terminates the agreement or if the case develops into a situation where the attorney has good cause or justification to withdraw. **Smith v. Parker, 508 So.2d 1262 (Fla. 5th DCA 1987).**

The position supported by both **Sanchez** and **Smith** and adopted by the Trial Court sub judice, is also the accepted standard for recovery under such circumstances, adopted by courts from across the country. New York has adopted the view that an attorney who was retained on a contingent fee basis and withdrew under appropriate circumstances, was entitled to a lien on any ultimate recovery in plaintiff's personal injury action to be fixed on a quantum meruit basis. **Shaw v. Manufacturer's Hanover Trust Company, 507 N.Y.S.2d 610 (N.Y. 1986), Teichner v. W. & J. Holsteins, 489 N.Y.S.2d 36 (N.Y. 1985).** In adopting this same view, Michigan recognized that the majority view is that an attorney on a contingent fee arrangement who rightfully withdraws, is entitled to compensation for the reasonable value of his services based on quantum meruit. **Ambrose v. Detroit Edison Company, 237 N.W.2d 520 (Mich. 1975).** California has also looked upon this standard for recovery with favor. **Hensel v. Cohen, 155**

Cal.App.3d 565 (2nd District 1984). See also 7 **Am Jur, 2d "Attorneys-at-law" § 262** and **88 A.L.R. 3d 246.** Petitoner's repeated reliance on **Mary Kay v. Home Depot, Inc., 18 F.L.W. D1800 (Fla. 5th DCA 1993),** is simply not supported. In this regard, the Fourth District said

> "We have considered **Mary Kay v. Home Depot, Inc.**, and deem it inapposite, given the fact issue as to justification and good cause resolved by the Trial Court in this case."

The only dispute between client and attorney in the **Mary Kay** case was over the settlement value of the case. The Fourth District has affirmed the Trial Court's finding that Romani withdrew for good cause, which was in addition to a dispute over settlement.

Throughout Petitioner's Brief, they relied on the argument that Romani had not withdrawn for good cause. That issue has already been decided by the Trial and the Appellate Court. After arguing that Romani did not withdraw for good cause, Petitioner goes on to agree with the respondent and answered the certified question in the affirmative, that upon withdrawal for good cause an attorney is entitled to receipt of a fee based on quantum meruit. Petitioner cites as authority for that position, **Suffolk Railroads, Inc. v. Minuse, 287 N.Y.S.2d 968 (Sup.Ct. 1968)** and **Estate of Falco, 233 Cal.Rep. 807 (Cal.2d DCA 1987).** Apparently, Petitioner has no dispute with the Respondent that once there has been a finding of good cause for withdrawal, Romani was entitled to his fee based on quantum meruit. Their argument, therefore, in front of the District Court, was whether or not Judge

Bernstein abused her discretion in finding that he had good cause to withdraw. The Fourth District Court of Appeal expressly found that there was no abuse of discretion on behalf of the Trial Court. Clearly this certified question must be answered in the affirmative.

It is clear from a review of the transcript in this matter, that the conflicts between Faro and Romani started early in the course of Romani's representation of Faro and continued to build to such an extent that the Trial Court recognized that Romani had good cause to withdraw at the hearing on that Motion and at the fee hearing. (R.185). As pointed out in **Ambrose** a client's refusal to accept a settlement offer cannot in and of itself constitute good cause for an attorney to withdraw from a case, but it may be one factor for the Court to consider in evaluating the client's cooperation with his attorney. That Court further recognized that refusal to accept a reasonable settlement offer without giving legitimate reasons, the breakdown of the attorney/client relationship and the client's refusal to cooperate with his attorney, were sufficient to support the Trial Court's determination that the attorney had good cause to withdraw and recover a fee for his services, based on quantum meruit. Further, the Court in **Litman v. Fine, Jacobson, Schwartz, Nash, Block & England, 517 So.2d 88 (Fla.3rd DCA 1987)** recognized that the trier of fact, being most familiar with all of the facts and circumstances surrounding the case and the relationship between the clients

and the attorneys, is in the best position to determine whether or not, upon withdrawal, an attorney is entitled to compensation. Courts presume that when an attorney's representation of a client in a matter before it is terminated, his compensation will be based upon quantum meruit. **Security Trust Company v. Grant, 155 So.2d 805 (Fla.3rd DCA 1963).**

Petitioner tried to present an issue to this Court as to whether or not the contingency fee contract was unenforceable. Again, the certified questions presented to this Court, do not place this matter in issue. The Trial Court and the District Court of Appeal have both determined that the arguments against the enforceability of the contract simply do not have merit. It is clear that the Court accepted the argument presented by respondents, that the contract, when read in its entirety, as well as the circumstances surrounding the execution and the application of its terms to the parties, should be upheld rather than find it invalid or illegal, by giving it a fair, customary, rational and reasonable interpretation. **Hoffman v. Robinson, 213 So.2d 267 (Fla. 3rd DCA 1968), Quinerly v. Dundee, Corp., 31 So.2d 533 (Fla. 1947), Foster v. Jones, 349 So.2d 795 (Fla. 2nd DCA 1977)** and **Coast Cities Coaches, Inc. v. Whyte, 102 So.2d 848 (Fla. 3rd DCA 1958).** Petitioner also ignores the clear and unambiguous language as contained in the client's Statements of Rights, which was signed contemporaneous with the contract and is part and parcel of the attorney/client relationship. These two

writings must be considered together when interpreting the terms of this relationship. **McGee Interests, Inc. v. Alexander National Bank, 135 So. 545 (Fla. 1931).** The cases cited by Petitioner in support of their position that the contract is void, all involve some element of fraud, duress or misrepresentation. In the case at bar there is no question that the contract was entered into freely and voluntarily. There was no fraud, duress or misrepresentation. Attorney Faro was given full disclosure and an opportunity to review all of the contracts terms and object to them. He failed to object until after he had received the full benefit of Romani's efforts and until it was time for Romani to be paid. (R.376-378). **Thomas v. Ratiner, 462 So.2d 1157 (Fla. 3rd DCA 1984), Jackson v. Griffith, 421 So.2d 677 (Fla.4th DCA 1982).** The statement of Faro's rights with regard to settlement could not be more clear than that provided by paragraph ten of the Statement of Rights, which provides

> "You the client have the right to make final decision regarding settlement of your case... however, you must make the final decision to accept or reject settlement." (emphasis supplied)

II.

WHETHER **FLORIDA PATIENT'S COMPENSATION FUND v. ROWE, 472 So.2d 1145 (Fla. 1985),** APPLIES TO A CLAIM FOR A REASONABLE ATTORNEY'S FEE ASSERTED BY AN ATTORNEY AGAINST THE PARTY CONTRACTING WITH THE ATTORNEY, AS DISTINGUISHED FROM A CLAIM FOR FEES AGAINST A THIRD PARTY.

It is abundantly clear that the standard for recovery of attorneys' fees in a case such as this is controlled by

Rosenberg. **Rowe**, on the other hand, involved a completely different situation and a completely different set of equities and should not be applicable as the benchmark and methodology upon which to determine a reasonable fee for Romani's recovery, based on quantum meruit. A thorough reading of **Rowe**, **Rosenberg** and **Rule 4-1.5** of the Rules regulating the Florida Bar, clearly shows that the latter two are distinguishable from the former. The assessment of attorneys' fees against the unsuccessful litigant as in **Rowe** is purely a creature of statute. As discussed in **Rowe**, the assessment of fees could be viewed as a penalty or to discourage non-meritorious claims. When the party upon whom fees are being assessed was not a participant in the fee agreement and did not benefit from the services of the attorney upon whom is now called to pay the Courts lack any benchmark or contract upon which to base their assessment of fees. Because of the statutory mandate to assess fees, **Rowe** has set forth the factors to be considered in assessing a fee against a non-prevailing litigant who is a third party to the attorney/client relationship.

Although some of the elements cited in **Rowe**, **Rosenberg** and **Rule 4-1.5**, are similar, or even identical, they are not addressing the same basis for recovery. **Rowe** does not, at any point, discuss the concept of quantum meruit or establish that the **Rowe** criteria for determining fees is exactly equivalent to quantum meruit. **Rosenberg**, on the other hand, clearly establishes the basis for quantum meruit, in determining a fee

between the attorney and the attorney's client. A "reasonable fee" assessed against an unsuccessful litigant and third party to the fee contract, is not necessarily the same as a reasonable fee between an attorney and his client, based on **Rule 4-1.5**. The Rule does not refer to any contingency risk multipliers, but does go into the other factors which the Trial Court properly had before it, including the time and labor, novelty, complexity, difficulty, skill requisite to perform the legal service properly, the customary fee or rate of fee, the results obtained, the time limitations imposed by the client, the additional or special time demands of the client, the experience reputation, diligence and ability of the lawyer performing the services and whether or not the fees is fixed or contingent. Clearly when the Trial Court heard direct testimony from Faro that he paid his subsequent attorney, Susan Rosen, what amounted to Five Hundred Dollars 00/100 ($500.00) per hour, it was within the court's discretion to determine that a reasonable fee for Romani's services was reasonable when the simple rate x hour calculation was well below the rate Faro paid his subsequent attorney. Based on **Rosenberg** and the rule, the court is not bound to a simple rate x hours computation. Another consideration which the Trial Court had before it, which is not a factor when the fee is strictly hourly, are the results obtained. At the time of Romani's withdrawal, it is clear that if the offer had been acceptable to his client, he had ascertained a Six Hundred Thousand Dollar 00/100 ($600,000.00)

settlement offer. It was also before the Court that eventually the client settled for Seven Hundred and Twenty Five Thousand Dollars 00/100 ($725,000.00). The Trial Court had before it sufficient evidence to attribute the value or results obtained to each attorney participating, in proportion to the recovery obtained by Faro. In doing so, the Court properly recognized the value of the services provided and prevented any unjust enrichment on behalf of the client or the client's attorneys. It is also clear under **Rule 4-1.5 sub-§ C,** that an hourly rate times the customary fee need not be the sole or controlling factors. The rule provides that all factors set forth should be considered and may be applied in justifying a higher or lower fee, that would result from an application of only the time and rate factors. If the courts were bound to a simple rate x customary hourly fee, to determine a reasonable compensation, there would be no reason for the rule to require consideration of all of the other relevant factors and there would be no reason for the rule to include as a factor to determine the amount of reasonable compensation, Section(B)(8); whether or not the fee is fixed or contingent. In assessing reasonable attorneys' fees to compensate an attorney for services rendered to his own client, the court is free to apply all of these factors to determine a reasonable compensation for the services provided. Regardless off whether these factors raise or lower the ultimate recovery of the attorney, which would have been based strictly on a rate x hour computation. This application of

the rule, as an element of recovery in quantum meruit was clearly recognized in **Trend Coin Company v. Fuller, Feingold & Mallah, 538 So.2d 919 (Fla. 3rd DCA 1989).** **Trend Coin Company** properly recognized that **Rowe** had no application and that the criteria for determining the fee was based on the factors set forth in **Rule 4-1.5**. There is no need to make specific findings of fact when the parties to the disagreement have previously come to a mutual understanding of the terms of their employment and those terms are further limited or modified by **Rule 4-1.5**. **Trend Coin Company** recognized that all of the factors considered in **Rule 4-1.5** were relevant, when they found that the fee amounting to Three Thousand Dollars 00/100 ($3,000.00) per hour was excessive, but did not require that the Trial Court enter findings as to hours and rate of compensation as the sole basis for determining a reasonable fee on quantum meruit. When all factors of **Rule 4-1.5** and **Rosenberg** are considered, it is clear that a simple rate x hours computation is not the exclusive basis for determining a reasonable attorney's fee based on quantum meruit. **Rowe** does not apply and specific findings are, therefore, not required.

The charging lien process clearly does not violate the due process rights of the client. The record supports the fact that Faro had full discovery available to him. His attorneys chose the methods of discovery they deemed appropriate, which included the hiring of an expert to review all of Romani's files and taking two depositions. The only

part of the process that is different from any other trial matter is that there is no jury trial procedure. Jury trials are not guaranteed in every procedure before the Court and the lack thereof does not necessarily equate to a denial of due process. The equitable determination of attorneys fees is properly before a court in equity and before the Judge who presided over the underlying case. There is no one in a better position understand the progress of the case or relationship of the parties and the reasonableness of a fee, than the Judge who presided over the underlying case upon which or from which a fee dispute arises. **Litman, Kozich v. Kozich, 501 So.2d 1386 (Fla.4th DCA 1987).** Petitioner cites the lack of availability of legal motions or rules of evidence, however, it is clear from the motion practice which was presented before the Court and the hearing which was held by the Court, that motion practice was allowed and rules of evidence clearly applied. Petitioner alleges that a charging lien process was created by lawyers to favor lawyers, however, just because it is before the same Judge that heard the underlying case, does not necessarily bode well with the attorney, in fact, it could very likely go against an attorney who had been less than candid, forthright or respectful to the Trial Court, just like it could go against a client who the court believes has been less than candid. Additionally, to require a second lawsuit is contrary to public policy of avoiding multiplicity of suits. **Kozich**.

The District Court cites as a conflict, **Barton v.**

McGovern, 504 So.2d 457 (Fla.1st DCA 1987). **Barton** is not in conflict with the opinion of the Fourth District or the arguments expressed herein. **Barton** involved a dissolution of marriage, not a personal injury on a contingency fee. Unlike the case sub judice, rate x hours clearly applied in the dissolution case and was, therefore, the only reasonable and ethical basis to determine a fee in that case.

CONCLUSION

The question as certified by the District Court of Appeal should be answered in the affirmative. The conflict as certified by the District Court of Appeal should be resolved in favor of the Third and Fourth Districts which hold that **Rowe** does not apply to attorneys' fees disputes between the attorney and his own client.

Respectfully submitted,

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