097

FILED
SID J. WHITE
DEC 20 1993
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

1/14

IN THE SUPREME COURT OF FLORIDA

JOHN H. FARO,

Petitioner/Client,

vs.

CASE NO. 82,725
4th DCA Case No. 92-1907

ROBERT V. ROMANI and FARISH, FARISH & ROMANI,

Respondents.
_____/

BRIEF ON THE MERITS OF PETITIONER/CLIENT JOHN FARO

JOHN BERANEK
Florida Bar No. 005419
Aurell Radey Hinkle Thomas
& Beranek
Suite 1000, Monroe-Park Tower
101 North Monroe Street
Post Office Drawer 11307
Tallahassee, FL 32301
(904) 681-7766

WALTER G. CAMPBELL
KRUPNICK, CAMPBELL, MALONE,
ROSELLI, BUSER & SLAMA, P.A.
700 Southeast Third Avenue
Courthouse Law Plaza, Suite 100
Fort Lauderdale, Florida 33316
(305) 763-8181

and

AMANDA K. ESQUIBEL
Fla. Bar No. 826618
EILEEN L. TILGHMAN
Fla. Bar No. 570524
TILGHMAN & ESQUIBEL, P.A.
9703 South Dixie Highway
Miami, Florida 33156
(305) 253-7081

Table of Contents

Table of Contents Cont'd

Table of Citations

Table of Citations Cont'd

Other Authorities

Statement Of The Case And Facts

Introduction

This is a merits brief directed to an opinion by the Fourth District Court of Appeal in an attorney's charging lien proceeding. The petitioner John Faro was the client in a personal injury suit. The respondent, Robert Romani, was the attorney who initially represented Faro in the suit under a contingency fee contract. Romani withdrew from the case but not because the representation would have caused him to do anything unethical. The district court's opinion affirming a fee award to Romani was issued October 13, 1993. The opinion certified one question regarding attorney's fees after withdrawal as a matter of great public importance and further certified a conflict between districts on a separate issue of whether findings of fact are necessary in attorney fees/breach of contract cases. This brief is accompanied by an appendix which contains the opinion of the district court of appeal and Judge Burnstein's order below.[1]

Throughout this brief "good cause" will be used to mean: legally sufficient grounds upon which a lawyer may withdraw from a contingency fee contract and still be entitled to payment of a fee from the client. Petitioner (the client here) suggests that "good cause" should be defined by this court solely as: a circumstance caused exclusively by the client which makes the lawyer's performance of the contract either (i) impossible under Florida

---

[1] The 195 page transcript of the hearing on the charging lien before Judge Miette Bernstein is referred to as (Tr._) and the pleadings are designated as (R._).

law, or (2) unethical under Florida Professional Rules or principles. All contracts of any nature have an implied escape hatch based on impossibility of performance. Attorney fee contracts, with their overriding ethical duties, should have the additional escape hatch based on unethical conduct. However, if a lawyer can continue to perform his side of the contract both legally and ethically, then he can not withdraw early and still demand a fee. Of course the lawyer, for his own reasons, can always walk away from the representation and the contract and abandon his fee.

Factual Overview

This matter involves an attorney's successful assertion of a charging lien for fees based on a failed contingency fee contract despite (1) the lawyer's voluntary withdrawal because of his client's refusal to accept a settlement offer, (2) the client's objections to the withdrawal, (3) the adverse effect of the timing of the withdrawal at the critical stage of settlement negotiations shortly before trial, and (4) the necessity to hire and pay replacement counsel who then duplicated the first lawyer's services in obtaining a higher recovery despite prejudice resulting from the withdrawal. Faro is himself a lawyer but never represented himself herein. In short, trial counsel Robert Romani fired his client Faro on the eve of trial because trial counsel thought the case should be settled for less than the client was willing to accept. Faro always sought to have Romani continue with his representation and demanded he proceed with the scheduled jury trial.

Mr. Faro suffered injury and resulting mental rather than physical disability in an automobile accident. There has never been any question that there was a serious accident and a legitimate injury. (Tr.97). Faro, who does patent work, retained attorney Robert Romani, a certified personal injury trial lawyer, to represent him. (R.375-76). Faro entered into a written contingency fee contract with Romani and the firm of Farish, Farish & Romani. (R.375-76). In general, Romani promised to pursue Client Faro's claim through trial and appeal and assumed the risk of receiving no fee in the event of no recovery. (R.375-76). In return for this promise and assumed risk, Client Faro agreed that he would pay the costs of the litigation and, in the event of a recovery by Attorney Romani, to pay him 30% of such recovery. (R.375-76).

Unlike the standard form of agreement, Romani included in this Contingent Fee Contract the following "anti-compromise" provision requiring Romani's consent to any settlement:

> Said suit or claim shall not be in any manner settled or compromised without the consent and to the mutual satisfaction of both parties to this agreement. (R.375-76).

In October of 1990, Romani filed suit against Faro's uninsured motorist carrier, Amica Mutual Insurance Company for the injuries Faro had sustained eight months earlier. (R.196-98). The primary damage claim was for mental disability from a blow to the head. The case was set for trial three times, initially on the docket of March 11, then on July 1 and ultimately for September 23, 1991. (R.7, 205, 221-22, 271; Tr.7).

Negotiations with Amica resulted in a settlement offer which Faro rejected. Faro and Attorney Romani gave conflicting testimony as to the terms of this offer. Client Faro's understanding of the offer obtained orally from Romani was that it was a structured settlement with a present value of approximately $600,000. (Tr.160). Client Faro understood that Romani was to receive the cash portion of the settlement as his "negotiated fee" with Faro receiving the future annuity payments. (Tr.160). Romani testified that Amica also made an alternative cash offer of $600,000, but Romani presented no documentation of the offer. Romani never contested that he had negotiated his cash fee as part of the initial structured settlement offer. (Tr.168-69).

Faro rejected the settlement offer and at this point Romani said the situation deteriorated because he learned Faro had "a different agenda." (Tr.122). Romani explained what he meant by this phrase. According to this explanation, Romani's "agenda" was a fair evaluation of the merits of the case while Faro's "different agenda" was simply to get enough money from the case to retire from law practice. (Tr.120, 122, 123). Following this rejected offer, Romani said he asked for authority to settle the claim for $750,000 which he said Faro refused. (R.143-44, 158). Faro said Romani merely wanted blanket authority to settle the case. In any event, Romani received no other offers and the demand of Faro for settlement authority was the last "effort" made by him on Faro's behalf. (R.159-60).

Client Faro's rejection of the $600,000 offer and Romani's strong belief that the case ought to be settled and definitely not taken to trial were the reasons Attorney Romani filed his motion to withdraw just before the third trial date. Obviously the case had been fully prepared by then and Romani testified he was absolutely ready to go to trial. (Tr.148). Although there had been some early difficulty regarding depositions, Romani had been successful in completing discovery and being fully ready to try the case. (Tr.110, 148). Romani also agreed that his client, Mr. Faro, had testified truthfully and forthrightly on his own two pretrial depositions. (Tr.111). Although Romani was somewhat disappointed with Faro's good appearance which he described as being too "sharp", there was no problem whatsoever with Faro truthfulness. (Tr.111). Romani had evaluated Faro's personal injury claim as a 90% chance of a poor result because he was afraid the jury would not think Faro had a substantial mental disability. Romani strongly advised that the case should be settled. He said the case definitely should not be tried. Client Faro disagreed and told Romani he wanted him to proceed with the trial. Romani's motion to withdraw stated only that there were "irreconcilable differences" which could not be resolved.

The hearing on the motion to withdraw was extremely brief. Despite Faro's objections through substitute counsel, Judge Burnstein merely stated that there were lots of other lawyers and Faro could certainly find one he could get along with. (R.367-69). Romani merely said that he was "[t]here on a motion to withdraw"

and the judge granted it automatically without the slightest question. (R.367-68).

The hearing on the motion to withdraw was on October 18, 1992 at which there was not the slightest indication that Romani would later contend that Faro's actions had caused him to withdraw and that these actions constituted "good cause" or a breach of the fee contract by Faro. It was always Faro's position that he wanted Romani to continue representing him even through trial and Romani admitted he simply did not want to proceed with the trial. (Tr.123-24).

Left without counsel at this critical stage Faro made several unsuccessful attempts to retain substitute counsel and there was some evidence of interference or at least a lack of cooperation by Attorney Romani. (Tr.159-60). Eventually, Faro retained attorney Susan Rosen to represent him and paid her a substantial attorney's fee. Ms. Rosen was a close personal friend of Faro's but there was no question as to her valuable services. (R.161). In January of 1992, after learning the case, reevaluating it, researching it, developing a strategy, and conducting motion practice, Ms. Rosen settled the case for a cash payment of $725,000 which was $125,000 more than the $600,000 offer pending at the time of Attorney Romani's voluntary, and objected to withdrawal. (Tr.160-62, 166). Faro testified he believed Romani's withdrawal prejudiced his case, seriously undermined Ms. Rosen's efforts and coerced his acceptance of the $725,000 offer which he believed was still substantially less than the true value of the case. (Tr.161-62). An expert at

the charging lien hearing would later evaluate the case at up to $1 million. (Tr.67).

In spite of Romani's voluntary withdrawal over objection and the substantially duplicated fees required by Ms. Rosen's representation, Attorney Romani nonetheless sought to impose a charging lien in the amount of $180,000 based on the Contingent Fee Contract. (R.325-26, 333-35). This was based upon the 30% figure in the Contingent Fee Contract, applied against the "$600,000 offer" outstanding at the time of Romani's withdrawal. Client Faro understood this prior settlement to be (1) structured over time and (2) to already include Attorney Romani's "negotiated fee." (Tr.160, R.333-35). On February 12, 1992, Romani moved the trial court to determine the amount of his charging lien. (R.333-35). Client Faro objected and moved to vacate or discharge the lien. (R.327-29). The charging lien did not suggest any conduct by Faro as a breach of the fee contract. Further, Romani's pleading did not suggest that he would have been required to participate in any unethical conduct by proceeding to trial.

On June 1 and 2, the trial court held a hearing on these motions. (Tr.1-195). Romani and Faro both testified and each presented one attorney expert witness on fees. Client Faro, through counsel Walter G. Campbell, maintained that Romani's withdrawal was voluntary, unjustified, prejudicial, coercive and over his objections in the critical stage of negotiations on the eve of trial and that this conduct disentitled Romani to <u>any</u> fee whatsoever on any theory. (R.1-195). With respect to his reasons

for withdrawing, Attorney Romani testified to his belief that Client Faro was making an imprudent decision in refusing to authorize settlement and that Romani thought there was a 90% chance of a bad result during trial and that Faro's disability carrier might later deny benefits. He also said he thought Faro might sue him for legal malpractice if he lost the case. (R.122-23). Romani's testimony was in relevant part as follows:

> He [Faro] wanted to be financially secure enough to retire basically and pursue a patent that he and some friends from the University of Florida ... was developing. I told him, I said if that's your agenda, then I am not going to be the one that's going to take you into the courtroom. (Tr.122).
>
> * * *
>
> I didn't think it was prudent for me or any other lawyer to risk substantial benefits that he was getting, because he wanted to retire. (Tr.122).
>
> I said I think if you are not going to listen to my advice ... it is up to you to find a lawyer who will be prepared to risk the money you are being offered in this case ... not based upon the merits of this case but because you want to retire from the practice of law. If you can find somebody to represent you on that basis, go ahead and do it. But I said I'm not going to be the one to do [it] and I told him pointblank. (Tr.123)
>
> That's when he started accusing me of not being prepared to try the case and things like that and that hurt me. (Tr.123).
>
> I felt like he was trying to set me up for our legal malpractice carrier to be an additional carrier. (Tr.123).
>
> I said if you can find somebody else to represent you on that basis, go ahead. That was essentially sort of the beginning of the end. At that point he became very alienated. I attempted to talk to him. I filed a motion to withdraw reluctantly, only after we determined the case would not be reached on that docket. (Tr.124).

Based on this evidence the trial court entered an order granting Romani a fee of $180,000. (R.362-64). The trial court made absolutely no findings of fact in the order -- stating only "that a reasonable fee . . . based on quantum meruit and the contractual agreement of the parties for the representation of John H. Faro, is $180,000." (Emphasis added). (R.362-63).

Obviously 30% x $600,000 = $180,000 and Romani's sole expert stated his opinion that the contingency fee contract should govern and that Romani was entitled to be paid the 30% in the contingency contract. (Tr.25, 33). This expert, former circuit judge Henry Latimer, testified that a disagreement over settlement negotiations was an "irreconcilable difference", that Romani had to withdraw and that he should still be paid his full 30% fee on the $600,000 offer. (Tr.25, 32, 33). This expert witness had been misinformed and all of his testimony was based on the false assumption that Faro had consented to Romani's withdrawal. (Tr.50-51). He was surprised to learn Faro had resisted the withdrawal and had wanted Romani to proceed with the trial. The district court opinion mentions this impeachment of Latimer.

When asked, for the first time on cross-examination to compute the fee pursuant to quantum meruit, this witness arrived at precisely the same $180,000 figure by multiplying an assumed 400 hours x $250 per hour resulting in a $100,000 figure and then adding on an additional $80,000 based on the "difficulty" of the case. (Tr.45). This witness testified that he had not the "slightest" idea whether 400 hours was reasonable for this case nor

did he testify that $250 per hour was reasonable for Mr. Romani's services. (Tr.42, 55). He also had no idea whether Romani had actually spent his "rough estimate" of 400 hours. Romani had absolutely no time records and never kept time records on any contingency fee case. Romani made a rough guess at the hearing of 400 to 500 hours and his expert witness just accepted it. No documents were admitted in evidence as to the fee. Romani had his secretary review the file the night before the hearing and brought in a summary prepared by the secretary which was objected to and excluded from evidence. (Tr.126-27). Earlier requests by Faro's counsel for fee documentation had been refused. (Tr.127).

The order/judgment awarding the $180,000 fee made no findings whatsoever and certainly none regarding hours or reasonable fee rates. The order states the fee is based on both the written contract and on quantum meruit. The court entered judgment for Romani in the amount of $180,000 for fees plus interest and Faro appealed to the Fourth District Court of Appeal.

The Amended Opinion Of The Fourth District Court Of Appeal

The opinion was based on the relatively simple set of facts that Attorney Romani withdrew over his client's objections halfway through the trial period of the third trial setting of the case. Counsel was completely prepared for trial at that time.

Faro hired new counsel who eventually settled the case. Before Romani's withdrawal, the defendant had offered $600,000 and the case was eventually settled by new counsel for $725,000. Romani filed a charging lien which did not assert any facts and did

not suggest Faro had breached the contingency fee contract in any way or that it would have been unethical for Romani to take the case to trial. Romani had told Faro that he was withdrawing because Romani did not want to "blindly" lead him into a trial he thought he might well lose. He also said that Faro had to accept his advice on settlement or he would quit. He did not say "quit and still get paid" and the charging lien was not filed until after the withdrawal.

After the brief hearing on the charging lien the trial court entered an order making absolutely no factual findings of any nature. The trial judge simply set a fee for Romani at $180,000 representing the 30% contingency number from the contract applied against the $600,000 settlement offer which Romani testified was on the table at the time of his withdrawal. The reason given to the trial judge during this brief hearing for the earlier withdrawal was that there had been a disagreement over settlement. (Tr.122-24). Romani's expert testified Romani was entitled to the $180,000 fee based solely on the 30% in the contract. (Tr.25, 33). The subject of quantum meruit did not even come up until cross-examination of this expert when he was questioned and said that a quantum meruit fee would be exactly the same figure, $180,000. (Tr.45).

Based on these simple facts, the district court issued its opinion stating that the trial judge "found" that Romani withdrew for "good cause" and that this "good cause" was "apart from or in addition to, disagreements over settlement negotiations". The

opinion also states that the trial judge made no findings as to the manner in which attorney's fees were computed.

The district court's opinion is difficult to understand because in fact Judge Burnstein made absolutely no factual findings on any issue whatsoever. She also did not state a conclusion that Romani had withdrawn for "good cause" and she did not say what that "good cause" might have been. She certainly did not make a finding that the "good cause" for withdrawal was something "apart from or in addition to" the dispute over settlement. There is not a hint that continued representation by Romani would have been impossible or unethical.

The opinion also concludes that Judge Burnstein did not apply the 30% contingency figure from the fee contract which would have been clear error. The opinion admits that this finding (by the appellate court) is "disputable" because rather obviously 30% x $600,000 = $180,000 and further because Judge Burnstein's order specifically states that the $180,000 was based upon both quantum meruit and the contractual agreement between the parties. Further, Romani's expert had testified to $180,000 based solely on the contract stating: "The reasonable value in my opinion would be the contract amount as called for in the contract." (Tr.25, 33). The district court held that none of this was enough to overcome the "presumption of correctness".

The district court opinion also concludes that there was expert testimony from the "appellant's [Faro's] expert" as to the reasonableness of the claimed $180,000 fee. The opinion is

obviously in error here and must have been referring to Romani's expert rather than Faro's expert who in fact testified to 125 hours as being the proper amount of time to have spent on the case resulting in a fee of only $30,000. (Tr.65). However, perhaps the court really meant "appellant's" expert because Mr. Romani's expert directly stated that he had no opinion as to the reasonableness of Mr. Romani's rough estimate of 400 hours given without the first shred of a time record. (Tr.42, 55). Romani stated that he never kept time records.

The district court concluded its opinion by noting the absence of any factual findings regarding computation of attorney's fees and the conflict among the district courts of appeal as to whether findings were necessary under Florida Patients Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985). This conflict between the Third and Fourth Districts versus the First and Second Districts was certified for resolution by this court.

In summary, the district court concluded that Judge Burnstein had made a finding that Romani withdrew for "good cause" and that this "good cause" had been found to be some reason other than the dispute over settlement. The court further concluded that Judge Burnstein had not made findings regarding the computation of attorney's fees but that such findings were unnecessary and that the district court could tell from the record that Judge Burnstein had not applied the 30% figure from the contingency fee contract. The district court's opinion relies very heavily on the presumption of correctness and employs the standard of review of "abuse of

discretion" as to whether there was "liability" for a breach of contract by the client. The basic issue is whether Romani had a legally valid "escape hatch" to get out of the contract, avoid the time and risk of a trial, and still get paid a full fee.

Issues On Review

I.

(As Certified by the District Court)

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, 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?

A. Whether good cause for withdrawal was contained in the evidence presented to the trial court.

B. Whether the trial court actually found good cause apart from and in addition to the disagreement over settlement.

C. Whether the contingency fee contract was unenforceable in any event because it contained an anti-compromise provision.

II.

WHETHER TRIAL COURTS MUST MAKE FACTUAL FINDINGS PURSUANT TO FLORIDA PATIENT'S COMPENSATION FUND v. ROWE, 472 So. 2d 1145 (FLA. 1985) IN QUANTUM MERUIT CLAIMS REGARDING ATTORNEY'S FEES WHERE A LAWYER SUES HIS CLIENT.

A. A client is entitled to know how he supposedly breached the contract and the attorney has the burden of proof.

B. The traditional charging lien process violates the due process rights of the client.

Summary Of Argument

Error occurred in the trial court and the district court of appeal. The trial judge made absolutely no findings in the judgment awarding attorney's fees against the client. This deficiency cannot be cured by the presumption of correctness on appeal. The attorney never demonstrated "good cause" entitling him to withdraw and still demand a fee from his client. The attorney was not presented with an escape hatch from the contract because he was not required to do anything unethical in the continued representation of the client and the client did not make it substantially impossible for the attorney to perform his side of the contract. A dispute over settlement is, as a matter of law, not "good cause" to abandon the contract. There is a distinction between a good reason to grant a motion to withdraw and "good cause" for withdrawal.

The contract in question gave the attorney the right to veto any settlement decision and such a provision is void and voids the entire contract. Under these circumstances the attorney was not entitled to a recovery under quantum meruit or the contingency fee contract.

In no event was the proof offered sufficient to sustain a quantum meruit recovery. The attorney's expert based his direct opinion solely on the percentage in the contract and not on quantum meruit. The lawyer kept no time records and his rough guess at hundreds and hundreds of hours is woefully short of the kind of proof necessary.

The district court's opinion curiously concludes that the trial court made findings on certain issues and did not make findings on certain other issues. It is only necessary to read the trial court's decision to see that no findings on any subject were made. A decisional conflict between four different district courts of appeal exists on whether Rowe requires specific findings of fact on attorney's fee issues. This conflict should be resolved with a clear ruling that findings of fact are necessary where a lawyer sues his client for fees. Here the evidence would not have supported any set of findings supporting an award. Judgment for the client was the only possible result under the evidence presented.

The traditional charging lien process requires reevaluation because it provides less than due process to the client.

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, 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 district court has certified the above question which does not have a yes or no answer. The answer is entirely dependent upon the legal definition of "good cause for withdrawing". As previously suggested, Client Faro submits that this court should define "good cause" which entitles a lawyer to withdraw and still get paid to be limited to circumstances created by the client making the lawyer's continued performance of the contract either legally impossible or unethical in some way under Florida Professional Rules or principles. If the lawyer's continued performance of the contract through trial has not been made impossible or unethical by the client's conduct or by some circumstance created by the client then the lawyer is still bound by the contract and cannot withdraw from it without forfeiting his fee. Attorney's fee contracts contain a professional overlay with ethical responsibilities which may override and supersede client wishes. Of course, if a client refuses to show up for trial then it obviously is impossible for the lawyer to perform his contract of representation and the lawyer can withdraw and still get paid. If the client insists on offering perjured testimony by himself or others this would force the lawyer into unethical conduct and the

lawyer is entitled to withdraw and still get paid. Thus the definition of "good cause" in this context is quite simple. A dispute over settlement does not place the lawyer in an unethical position. He simply tells his client that the case should be settled and after full disclosure of all the risks, the lawyer may proceed to trial doing the best job he can for his client. This is the client's choice rather than the lawyer's. After full disclosure, the client is not being "blindly" lead to trial as often stated by Romani.

We start with the basic principle of law which we believe the Fourth District Court of Appeal has agreed with within the certified question. It is fundamental that an attorney who withdraws without "good cause" and without the consent of his client may not recover compensation for services rendered prior to his withdrawal. See Mary Kay v. Home Depot, Inc., 18 Fla. Law Weekly D1800 (Fla. 5th DCA 1993). See also, Beaumont v. J.H. Hamlen & Son, 81 S.W.2d 24, 25 (Ark. 1935) ("The law is well settled in this and most other jurisdictions that, if an attorney, without just cause, abandons his client before the proceeding for which he was retained has been conducted to its termination, or if such attorney commits a material breach of his contract of employment, he thereby forfeits all right to compensation."); Staples v. McKnight, 763 S.W.2d 914 (Tex. Ct. App. 1988); Estate of Falco, 233 Cal. Rptr. 807 (Cal. 2d DCA 1987); Suffolk Roadways, Inc. v. Minuse, 287 N.Y.S. 2d (Sup. Ct. 1968) and 4 Fla.Jur.2d, Attorneys At Law § 146. Florida is in the national weight of

authority which holds that voluntary withdrawal without "good cause" before trial is an abandonment of any right to a fee on any theory.

In Speiser, Attorneys Fees, § 4:10, the author states the same uncontroverted rule:

> An attorney who undertakes to conduct an action impliedly stipulates that he will prosecute it to a conclusion, and he is not at liberty to abandon the suit without reasonable cause, or the consent of his client.
>
> An attorney who, without justifiable cause, and without his client's consent, voluntarily abandons or withdraws from a case before its termination, and before he has fully performed the services required of him, loses all right to compensation for services rendered, either on the retainer agreement, or on quantum meruit. [Footnotes omitted.]

It is equally undisputed that withdrawal because of a client's rejection of a settlement offer does not constitute "good cause" as a matter of law. The client, not the lawyer, has the exclusive right to decide on settlement and even an unreasonable rejection of a good settlement offer by a client is not "good cause" for the lawyer's withdrawal over the client's objection. The reverse is also true; the client may choose to accept a low offer and the lawyer may desperately want to go to trial and roll the dice in hopes of getting a much larger verdict. The client may opt for the $10,000 offer despite his lawyer's guarantees of over $1 million if he will have the courage to go to trial. Again, it is solely the client's choice.

The lawyer has two options; he can try the case and see who was right about settlement or he can quit early and abandon his

fee. See Suffolk Roadways, Inc. at page 968-69 and Estate of Falco at page 817.

Mary Kay v. Home Depot is directly on point holding explicitly that the rejection of a settlement offer even strongly recommended by trial counsel may not, as a matter of law, constitute "good cause" for withdrawal and that an attorney who withdraws even with the formal consent of his client under those circumstances forfeits any right to a fee based on either the contingency fee contract or the theory of quantum meruit. The district court herein found Mary Kay not applicable only because it concluded that here Romani's withdrawal had been found to have been for some other valid reason not based on the disagreement over settlement.

In both the trial and appellate courts below, Mr. Romani contended that he was indeed entitled to a fee even if he did not have "good cause" or just cause to withdraw. See Romani's brief in the district court at page 19 where he argues that "he [Romani] is entitled to a fee regardless of whether withdrawal is for cause or not". Of course, in the trial court and in the Fourth District Court of Appeal, Romani steadfastly argued that withdrawal over a dispute in settlement negotiations was a withdrawal for "good cause". The district court of appeal has apparently rejected this position because the certified question specifically indicates that the trial court found a withdrawal for reasons other than (apart

from or in addition to) a dispute over settlement. This is the ruling which the district court has affirmed.[2]

Good Reasons vs. Good Cause
Lawyers Are Not Forced To Try Cases -- Forfeiture Of Fees

An attorney has certain ethical responsibilities to a client but putting aside those considerations for the moment, it is apparent that an attorney can withdraw at any time for his own personal reasons and simply give up his right to get paid. Lawyers cannot be forced to try cases for clients who they truly refuse to represent. The lawyer who signs a contingency fee contract agrees to try the plaintiff's case and get paid out of the proceeds. If he quits early and does not try the case he only gets a quantum meruit fee if the withdrawal was for "good cause" as defined by law and then only if that cause is attributable to the client. This is the lawyer's unethical conduct escape hatch. See Suffolk Roadways and Estate of Falco . If a client has done nothing wrong then an attorney with a personal reason or even a good reason for withdrawal cannot do so and then force the client to pay twice -- once for the services of the withdrawn lawyer and again for the services of the replacement lawyer. This is exactly what happened to Mr. Faro.

Certainly an attorney cannot be forced to try a case if he overwhelmingly dislikes his client (as is obviously the situation here) to the extent that his animosity will prevent him from adequately representing that client. However, such contracts are

[2] Faro suggested this supposed ruling or finding never occurred at all. This is merely an additional reason for reversal.

not breached by personality conflicts and personal likes or dislikes. A client with mental problems, such as Faro, may well be disliked by his lawyer. This court should not rule that a lawyer's dislike for his client is a breach of contract by the client.

An attorney who believes that the client might sue him for malpractice if he loses the case may be simply unable to adequately represent the client. However, this may be a "good reason" for the attorney to withdraw but it is not legal "good cause" upon which the attorney can withdraw and still get paid. Unless the client is in substantial breach to the extent of rendering performance impossible or unethical, the lawyer cannot abandon the contract and still demand a fee. The Estate of Falco opinion discusses the distinction between a good reason for a court to grant a motion to withdraw and legal "good cause" for the attorney to withdraw and still get fully paid.

The lawyer cannot fire the client and still get paid unless the client is guilty of much more than being disagreeable. No client or lawyer promises to be likeable or easy to get along with in a fee contract. Certainly a personal injury client with brain damage and mental disabilities may be irritable and hard to get along with but this is exactly what the lawyer agrees to present to the jury in representing this client. Injuries and the results thereof are unpleasant but they certainly do not constitute breach of contract by the injured client.

A. Whether "good cause" for withdrawal was contained in the evidence presented to the trial court.

This case is difficult to argue because the district court of appeal seems to believe that Judge Burnstein actually made a finding that Romani's withdrawal was based on "good cause" and that Judge Burnstein actually made a further finding that the "good cause" she found was some reason other than the dispute over settlement negotiations. Since the Burnstein order does not actually contain any findings we are thus squarely presented with the question of what evidence was presented to Judge Burnstein that might possibly have supported a finding of "good cause" once settlement disputes are excluded.

This difficulty in presenting this case and in seeking "effective appellate review" without express findings of fact is not a problem attributable to the client. Romani filed a motion to withdraw using code and stating no factual grounds. The motion was granted in a hearing where Romani simply said he wanted to withdraw. Romani thereafter filed a charging lien giving not a hint of the reason for withdrawal. At that point Client Faro thought Romani had withdrawn because of the disagreement over settlement. The charging lien hearing occurred and Romani himself testified repeatedly that he withdrew because of the dispute over settlement. (Tr.122, etc.).

Now the district court of appeal has told us that Judge Burnstein really found some other "good cause" for withdrawal aside from and in addition to the dispute over settlement. We will thus

look to the transcript and fortunately the testimony was brief and can be easily analyzed.

Other than the dispute over whether the case should have been settled, Romani suggested only that Faro had been a difficult client because he was a lawyer and had his own ideas. He said that Susan Rosen did not initially want her deposition taken and screamed loudly to Romani's secretary over the phone. (Tr.110). He also said that eventually Ms. Rosen cooperated in providing her deposition and that this deposition turned out rather well. (Tr.110). Romani did not quit over the phone incident or the difficulty with one or more depositions. (Tr.110, 113). He stayed in the case for several more months fully preparing it for trial. He said that after the settlement disagreement he was concerned that Faro had lost confidence in him and might bring a malpractice action against him if he actually went to trial and lost and that Faro then suggested he was not prepared for the trial. (Tr.123, 124). Romani said this hurt his feelings. (Tr.123). Romani had demanded that they settle and not go to trial and Romani's contract did contain a veto power. Certainly the client was permitted to ask or even demand to know if he was really ready for trial. Romani would later say he was not even aware of the veto provision in the "firm's" standard contract. (Tr.143).

The possibility that a client might someday sue a lawyer for legal malpractice or make a Bar complaint against him cannot conceivably be "good cause" for the lawyer to withdraw and still get paid. It may be a good <u>reason</u> for him to quit but not "good

cause" as defined in this context. The possibility of a later malpractice action was merely mentioned in passing before Judge Burnstein. (Tr.123). Romani said he was concerned about it but he certainly did not say he withdrew for this reason which also occurred substantially before the trial date. This court should not rule that an attorney may withdraw and still get paid top dollar merely because the attorney has formed the impression that the client might later sue him for malpractice. This would put the definition of valid "good cause" for withdrawal solely in the hands of and the mind of plaintiff's counsel. In addition; suing a lawyer is occasionally the right thing to do.

Mr. Faro is not accused of actually threatening to sue for malpractice or doing anything giving any indication that he intended to do so. Indeed, even the threat of such a future action would not be grounds for withdrawal. There is certainly nothing in the contingency fee contract that prohibits a client from later suing a lawyer for malpractice or turning him into the Bar Association for an alleged ethical violation. Foreclosure of such actions by a client would be void and against public policy. It would be an extremely regressive step for this court to hold that a lawyer's fear of a future malpractice claim for his conduct which has yet to occur can somehow be considered as a breach of contract <u>by the client</u>. There is no logical or legal connection.

Since Judge Burnstein made absolutely no findings and since the district court of appeal did not give the slightest hint as to what the "good cause . . . apart from or in addition to" settlement

disputes might have been, Mr. Faro is truly shooting in the dark. Faro has now been before the trial court twice and before the district court of appeal and still does not have the slightest idea what conduct it is that constituted a legal breach of contract on his behalf. The district court has certified the question to this court again without a hint as to what the client did which violated the contract.

Attorney Romani suggested that the attorney/client relationship had deteriorated and that he did not believe Mr. Faro still trusted him. Obviously Romani did not trust Faro but Faro trusted Romani enough to try to keep him as his lawyer. Faro hired a lawyer whom he sent to the hearing on the motion to withdraw where this lawyer, on Faro's behalf, objected to the withdrawal. At all times Faro told Romani that he wanted Romani to continue representing him and to try the case. This conduct cannot possibly be deemed as some sort of an anticipatory breach of the fee contract by Faro. Indeed, Romani's expert witness, former Judge Latimer, was very surprised to learn that he had been misinformed as to Faro's supposed consent to withdrawal. Faro did not fire Romani -- the opposite is true -- Romani fired Faro. There is not the slightest suggestion that Faro intended to offer perjured testimony or that he asked Romani to do anything unethical. Romani testified that Faro's testimony in two pretrial depositions was completely honest and that he did not doubt his truthfulness. (Tr.111). Faro could have but did not hire a second lawyer to co-counsel the case with Romani. This might have made Romani's

further representation "impossible" in a legal sense. This simply did not occur.

B. Whether the trial court actually found good cause apart from and in addition to the disagreement over settlement.

It is only necessary to read Judge Burnstein's order to answer this question. The order contains absolutely no finding of fact or legal conclusion or even a hint that Romani withdrew for "good cause" and that this "good cause" was not the settlement dispute. Romani presented only two witnesses; himself and attorney Latimer. Latimer and Romani both testified that the withdrawal became necessary because of the dispute over settlement, i.e., Faro's "different agenda". Under these circumstances and in the absence of any evidence of any other valid reason as demonstrated above, one cannot indulge an irrebuttable presumption of correctness and find that Judge Burnstein must have found some other valid reason for withdrawal merely because she ruled for Romani. If she found some other reason for withdrawal then it was based on something not presented at the hearing or on pure speculation.

As previously indicated, Mr. Faro does not have the slightest idea what Mr. Romani will argue. The briefs before the district court of appeal never told us and the district court of appeal never told us despite a motion for rehearing which pled for an indication of what "good cause" for withdrawal existed in this record. The district court refused to even consider the motion for rehearing and denied it as being "moot" for reasons which we do not understand. See Order of November 2, 1993.

The district court of appeal also struck Faro's motion requesting that he be allowed to file additional argument on the new Mary Kay v. Home Depot opinion which came out after oral argument but before decision. Faro filed a notice of additional reliance on this case stating absolutely no argument. This was in accordance with Appellate Rule 9.210(g) requiring the mere citation of a new case. Then Romani filed a response to the notice of additional reliance providing argument against the application of the Mary Kay case. Faro's counsel then filed a motion requesting leave to be allowed to file argument on the Mary Kay case and the Fourth District Court of Appeal struck this motion for permission to argue as being "unauthorized". See Order of October 13, 1993. The Fourth District was wrong. A motion requesting leave to file argument is not an unauthorized motion and if the district court is going to sua sponte strike a mere request for argument by one side then Romani's actual arguments were equally unauthorized and should have been stricken. After refusing to allow argument on the Mary Kay decision, the court then held this new case inapplicable. The procedure leading up to this appellate decision was curious to say the least and probably the result of an excessive caseload and motion practice.

C. Whether the contingency fee contract was unenforceable in any event because it contained an anti-compromise provision.

Mr. Romani in effect sued his own client alleging his own client breached the fee contract and that this forced Romani into withdrawing. In doing so Faro never received a hint of notice as

to what conduct on his part constituted the breach of contract. Romani had the burden of initially demonstrating that his fee contract was valid and enforceable. Rosenberg v. Levin, 409 So. 2d 1016 (Fla. 1982). Romani could not demonstrate that his own contingency fee contract complied with Florida rules on the subject because the contract created a conflict of interest between attorney and client due to inclusion of an "anti-compromise" provision. On its face, the agreement was contrary to the rules and public policy and consequently void. The fee contract contains a provision which is not normally seen in standard form contingency fee contract in Florida as follows:

> Said suit or claim shall not be in any manner settled or compromised without the consent and to the mutual satisfaction of both parties to this agreement.

The provision is commonly referred to as an "anti-compromise clause." Such clauses are in derogation of the public policy of Florida because they abridge a client's absolute right to decide whether to settle his own action. Giving the lawyer a veto power over the client's exclusive right to decide settlement also violates the attorney's duty of loyalty to his client. It is a long standing principle that such clauses are unenforceable. See, e.g., Kansas City Elev. R. Co. v. Service, 77 Kan. 316, 94 P. 262 (Kan. 1908) (finding clause unenforceable and refusing to grant any quantum meruit fee).

In defining the client-lawyer relationship and the scope of representation, the Florida Bar Rules of Professional Conduct strictly and unqualifiedly require a lawyer to abide by his

client's decision whether to accept an offer of settlement. See Florida Bar Rules of Professional Conduct 4-1.2, Scope of Representation and The Statement of Client's Rights ¶ 10 which was quoted in Mary Kay. The client has to have the exclusive right to decide settlement and this is of course why a client's rejection of even a good settlement offer can not be "good cause" for his attorney's withdrawal. The client is only exercising his undeniable right. No matter what the risk, the client can decide he would simply prefer to have a jury decide both liability and damages.

Therefore, a provision which reserves to the lawyer a contractual right to veto the final decision to accept or reject settlement creates an inescapable and inherent conflict between the lawyer and the client from the inception of the relationship. Cf. The Florida Bar v. Doe, 550 So. 2d 1111, 1112-13 (Fla. 1989) (fee contract which impinged right of client to discharge lawyer was unethical on its face and against Supreme Court's policy).

The courts of Florida have held that an attorney fee contract which is void due to unethical conduct cannot be used as a basis for an attorney's claim for fees even on the theory of quantum meruit. See Thomas v. Ratiner, 462 So. 2d 1157 (Fla. 3d DCA 1984), rev. denied, 472 So. 2d 1182 and Spence, Payne, Masington v. Phillip M. Gerson, 483 So. 2d 775 (Fla. 3d DCA 1986), rev. denied, 492 So. 2d 1334. In the latter case the Third District reversed a trial court's decision and emphatically stated that to grant the attorney fees on a quantum meruit basis would be "to condemn

unlawful conduct on the law side of the court and approve the same unlawful conduct on the equity side of the court." Moreover, in Jackson v. Griffith, 421 So. 2d 677 (Fla. 4th DCA 1982) the quantum meruit claim was disallowed where the underlying fee contract was void due to unlawful and unethical conduct.

This court should not approve the contingency fee contract in question which included this anti-compromise provision. The contract was thus directly at odds with the statement of clients rights but that statement does not form an actual part of the contract. This issue was raised and argued below but not commented on in the court's opinion.

II.

WHETHER TRIAL COURTS MUST MAKE FACTUAL FINDINGS PURSUANT TO FLORIDA PATIENT'S COMPENSATION FUND v. ROWE, 472 So. 2d 1145 (FLA. 1985) IN QUANTUM MERUIT CLAIMS REGARDING ATTORNEY'S FEES WHERE A LAWYER SUES HIS CLIENT.

A. A client is entitled to know how he supposedly breached the contract and the attorney has the burden of proof.

Findings of fact on any issue in this case by Judge Burnstein would have been of great assistance to Mr. Faro in seeking effective appellate review before the district court of appeal. Faro is genuinely perplexed by the Fourth District's opinion and by Judge Burnstein's ruling because he has in effect been told that he rather than Romani breached the contract but no court will give him the slightest hint as to what conduct on his part constituted Romani's "good cause" or Faro's breach. In addition, Judge

Burnstein also failed to make any findings as to how she computed the attorney's fee against Mr. Faro.

The Fourth District's opinion recognizes the conflict between the various district courts on the issue of whether the Rowe case requires such findings. The Third and Fourth Districts hold that Rowe does not apply to claims for attorney's fees between attorneys and their own clients while the First and Second Districts hold that such findings are required. See Riesgo v. Weinstein, 523 So. 2d 752, 754 (Fla. 2d DCA 1988) (Rowe methodology applies in the context of an attorney seeking compensation under a quantum meruit theory and specific findings must be made by trial court); Barton v. McGovern, 504 So. 2d 457, 458 (Fla. 1st DCA 1987) (trial court's order must conform to Rowe or reversal required).

The present case is a compelling example of why the Riesgo and Barton cases are correct and findings should be made when a lawyer sues his own client for fees. Lawyers have a fiduciary duty to their clients. Lawyers have a duty to be candid and honest with their clients and when they proceed in court against their clients, the courts have a duty to give the clients at least a level playing field. Lawyers have an ethical duty not to seek an excessive fee. We are at a loss to understand why findings of fact are necessary in divorce cases or in any case where a third party is to pay the fee but findings of fact are not necessary when it is the client who is ordered to pay his lawyer's fees which are in dispute as to liability, necessity and amount. Why is everyone else entitled to know, but the client not entitled to know, how the fee was

computed? The public would be amazed and outraged to know that lawyers suing clients are entitled to the protective cloak of no findings of fact plus the presumption that the trial court made all the correct findings. Under the circumstances, effective appellate review is a nullity.

We submit that the First and Second Districts are absolutely correct in applying the Rowe "findings mandate" to claims for attorney's fees between counsel and client. In short, if there was ever an area of law where findings should be mandatory, this is it.

Of course, if Judge Burnstein simply multiplied 30% x $600,000 then no determination of hours or reasonableness was necessary. However, the district court's opinion specifically and expressly holds that Judge Burnstein did not apply the percentage from the contract because this would have been clear error. At the same time, the district court has said that Judge Burnstein need not make any findings whatsoever and that somehow the district court can tell from the record that Judge Burnstein did not multiply 30% x $600,000 to arrive at $180,000. This is precisely what Mr. Romani's expert attorney witness Latimer testified the judge should do in his direct examination. (Tr.25, 33). Former Judge Latimer said the fee should be computed based on the 30%in the contract. How or why the district court was able to conclude that Judge Burnstein did not do this is "disputable" to say the least.

Mr. Faro was entitled to "meaningful appellate review". One of the principles enunciated in the Rowe decision was that litigants who have to pay attorney's fees are entitled to such

"meaningful appellate review" and that the findings of specific facts make this "meaningful appellate review" possible. Without such findings such review is simply impossible. Meaningful appellate review did not occur in this case due to the absence of findings. Rowe was specifically argued to Judge Burnstein and the district court and rejected.

Despite the requirements of Rowe that lawyers keep time records, Mr. Romani testified that he never keeps time records. He simply came up with a rough estimate of 400 to 500 hours. His expert witness said he had no idea whether even 400 hours was reasonable or unreasonable and this expert witness did not testify that Mr. Romani's suggested rate of $250 was reasonable. Mr. Romani had not one shred of paper and simply waltzed into court, presented a witness who testified he was entitled to 30% and then when that witness was questioned on cross-examination he stated that the fee would be exactly the same ($180,000) whether it was figured on a 30% contingency or on quantum meruit. The expert's quantum meruit computation turned out to be $80,000 short and the expert witness simply filled in the additional $80,000 based on "the difficulty of the case". (Tr.45). Clients are entitled to more than this from their lawyers who choose to sue them. It is an understatement to suggest that this ruling will cause clients to hold their counsel and the courts in disrespect.

Pursuant to the Rowe decision, Mr. Romani's fee should have at least been substantially reduced since he chose to keep no records whatsoever and was thus totally immune from meaningful cross-

examination. Faro's counsel tried, but Romani could remember absolutely nothing as to the details or time of his services. No one has the slightest idea how much time Mr. Romani actually spent and it is wholly unrealistic and incredible to suggest that he can simply estimate 400 to 500 hours without having looked at the first diary or time record. Romani's proof fell woefully short of the Rowe requirements and no set of facts found based on this evidence would have supported a fee award. Romani is not entitled to a further trial to remedy these deficiencies.

Keeping time records in a contingency fee case is no more difficult than keeping time in other civil cases, probate cases, divorce cases and indeed every conceivable kind of litigation. Contingency fee lawyers are not in some special class. Rowe involved a contingency fee case. Clients should not be discriminated against in such cases by being deprived of meaningful appellate review.

This court must resolve the existing conflict in the four district court decisions and specific findings should be made mandatory statewide. This ruling should apply to this case because Rowe was argued below to both the trial and appellate courts. There is a substantial trend in both the Legislature and the appellate courts to require findings of fact on numerous issues -- this trend should be followed. See, Rowe and J. Schnarr & Co. v. Virginia-Carolina Chemical Corp., 159 So. 39 (Fla. 1934); Richards v. Dodge, 150 So. 2d 477 (Fla. 2d DCA 1963); Turner v. Lorber, 360 So. 2d 101 (Fla. 3d DCA 1978); Kirk v. Edinger, 380 So. 2d 1336

(Fla. 5th DCA 1980); Banks v. Steinhardt, 427 So. 2d 1054 (Fla. 4th DCA 1983); Vandergriff v. Vandergriff, 456 So. 2d 464 (Fla. 1984) and Commonwealth Fed. Sav. and Loan Ass'n v. Tubero, 569 So. 2d 1271 (Fla. 1990).

B. The traditional charging lien process violates the due process rights of the client.

This issue was not raised below and we therefore do not suggest that it alone could be the basis for a reversal. However, we do strongly suggest that this court should reverse on the other grounds already argued and in doing so this court should give serious consideration to a complete re-evaluation of the traditional charging lien process. We respectfully suggest that this traditional process is violative of due process and all traditional standards of justice and fair play.

When a lawyer files a charging lien against his own client in the context of the present controversy he is in effect suing him for a breach of contract. Every other breach of contract suit requires the filing of a complaint which gives the defendant notice of what is claimed against him and why. The Rules of Civil Procedure then grant both parties various procedural protections along with the full rights of discovery. A jury trial or a declaratory decree can be requested before a judge who knows nothing about the facts rather than a judge who has already been exposed to the entire underlying case. Legal motions contesting the legal sufficiency and validity of plaintiff's allegations occur in normal litigation. If the matter moves on to an eventual trial then the Rules of Evidence apply. If Romani had been required to

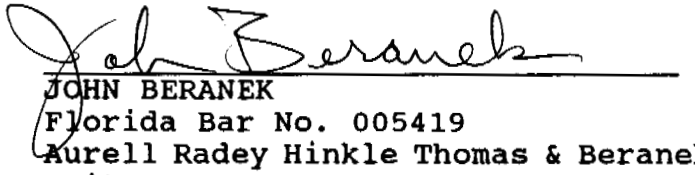
file a complaint it would have been before a different judge and he would have been forced to allege that Faro had breached the contract by doing or failing to do certain described acts. Faro would have known what the assertions were and been able to defend before a neutral judge. Faro would have known whether Romani was proceeding on the percentage figure in the contract or on the separate equitable theory of quantum meruit. Romani would never have been allowed to proceed on both theories in some sort of informal blended fashion before a judge who already knew some of the facts. (Tr.5-8). The trial court would never have simply granted a $180,000 judgment based on both quantum meruit and the written fee contract.

Traditional charging lien procedures were obviously created by lawyers and are patently favorable to lawyers and unfavorable to clients. Indeed, we wonder whether Mr. Faro would have been able to simply respond to the charging lien with a document entitled "Motion For Malpractice Damages". Could Faro then simply have walked into court before Judge Bernstein and testified that he thought Romani was guilty of malpractice and could Judge Bernstein simply have entered a judgment with no findings whatsoever holding Romani responsible for legal malpractice and awarding damages against him? Obviously the answer to this question should be no.

This court should reverse based upon the grounds previously argued and in doing so this court should re-evaluate the validity of the traditional charging lien process. The tradition should be disavowed.

Conclusion

The opinion of the district court of appeal should be vacated. The order of the circuit court should be reversed because there is no evidence supporting a finding of legal "good cause" for withdrawal. Thus, Mr. Romani's withdrawal must be considered voluntary and he has forfeited any right to a fee under either the contingency contract or quantum meruit. Judgment should be entered in favor of the Client Faro. The written contract itself was void. The decisional conflict on findings of fact in attorneys' fee claims against clients should be resolved by mandating such findings. Thus the opinion below must also be reversed on this ground. The charging lien process should be abandoned.



JOHN BERANEK
Florida Bar No. 005419
Aurell Radey Hinkle Thomas & Beranek
Suite 1000, Monroe-Park Tower
101 North Monroe Street
Post Office Drawer 11307
Tallahassee, FL 32301
(904) 681-7766

WALTER G. CAMPBELL
KRUPNICK, CAMPBELL, MALONE,
ROSELLI, BUSER & SLAMA, P.A.
700 Southeast Third Avenue
Fort Lauderdale, Florida 33316
(305) 763-8181

AMANDA K. ESQUIBEL
Fla. Bar No. 826618
EILEEN L. TILGHMAN
Fla. Bar No. 570524
TILGHMAN & ESQUIBEL, P.A.
9703 South Dixie Highway
Miami, Florida 33156
(305) 253-7081

Certificate of Service

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States Mail this 23rd day of September 1992 to the following:

Susan M. Rosen, Esq.
Susan M. Rosen, P.A.
909 N.E. 26th Avenue
Hallendale, FL 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

APPENDIX TO BRIEF ON THE MERITS OF PETITIONER/CLIENT JOHN FARO

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1993

JOHN H. FARO,

Appellant,

v.

ROBERT V. ROMANI and FARISH, FARISH & ROMANI,

Appellees.

CASE NO. 92-1907.

L.T. CASE NO. 90-31681 (21).

Opinion filed October 13, 1993

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Appeal from the Circuit Court for Broward County; Miette K. Burnstein, Judge.

Walter G. Campbell of Krupnick, Campbell, Malone, Roselli, Buser & Slama, P.A., Fort Lauderdale, Amanda K. Esquibel of Tilghman & Esquibel, P.A., Miami, and John Beranek of Aurell Radey Hinkle Thomas & Beranek, Tallahassee, for appellant.

S. Emory Rogers of Farish, Farish & Romani, West Palm Beach, for appellees.

AMENDED OPINION

STONE, J.

Sua sponte, we withdraw our opinion of September 15, 1993 and republish the opinion as follows:

Affirmed. The client appeals from an order denying his motion to vacate an attorney's charging lien and awarding attorney's fees. The fees were for services incurred prior to Plaintiff-counsel's withdrawing from the case. Appellant settled the lawsuit a few months after the representation ended.

With respect to the liability issues, we have reviewed the record and cannot conclude that the trial court abused its discretion or that Appellant has overcome the presumption of correctness. See Delgado v. Strong, 360 So. 2d 73 (Fla. 1978); Greenwood v. Oates, 251 So. 2d 665 (Fla. 1971); Applewhite v. Kreiger, 392 So. 2d 317 (Fla. 4th DCA 1980). There is evidence in the record supporting a trial court conclusion that there was justification and good cause for counsel's withdrawing and recovering a fee for his services. See The Florida Bar v. Hollander, 607 So. 2d 412, 415 (Fla. 1992); Sanchez v. Friesner, 477 So. 2d 66 (Fla. 3d DCA 1985). See also Borup v. National Airlines, Inc., 159 F. Supp. 808 (S.D.N.Y. 1958). If there is liability on this basis, we should treat the question of damages as we would one for fees claimed as a result of a discharge of counsel without cause. Sanchez, 477 So. 2d 66.

We have considered Mary Kay v. Home Depot, Inc., 18 Fla. L. Weekly D1800 (Fla. 5th DCA Aug. 13, 1993), and deem it inapposite, given the fact issue as to justification and good cause resolved by the trial court in this case.

However, recognizing the potential for conflicts between clients and counsel, and the potential for confusion in applying rule 4-1.5 of the Rules of Professional Conduct regulating The Florida Bar, we certify the following to the supreme court as a question of great public importance:

> 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, 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?

We find no error or abuse of discretion as to the damages. The record reflects that the trial court correctly recognized that any recovery is limited to the reasonable value of the services, based on quantum meruit, but may not exceed the contract amount. Rosenberg v. Levin, 409 So. 2d 1016, 1020-21 (Fla. 1982). There was testimony by counsel concerning the time expended, services performed, and surrounding circumstances. Appellant's expert witness rendered an opinion as to the reasonable value of Appellees' services, though subject to some impeachment concerning information that was not made available to the expert.

The trial court made no findings as to the specific computations used in arriving at the amount of the fee. However, the record would support a conclusion, albeit disputable, that the court did not apply a contingency percentage or multiplier, but considered the totality of the circumstances as required. See Rosenberg, 409 So. 2d at 1022; Trend Coin Co. v. Fuller, Feingold & Mallah, P.A., 538 So. 2d 919, 922 (Fla. 3d DCA 1989). See also the reasonable fee factors set out in rule 4-1.5, Rules Regulating The Florida Bar. The witnesses for each side recognized that the underlying case was a difficult one, with complex issues due to the nature of the injuries.

Additionally, we find no error in the court's failing to make specific findings in support of its award pursuant to Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145

(Fla. 1985). The district courts are divided over the question of whether Rowe 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. We agree with the Third District that Rowe is simply inapplicable to such cases. See Trend Coin Co.; 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 Trend Coin the court said:

> Rowe has no application here. The appropriate criteria for determining the value of the discharged attorney's services are enunciated in Rosenberg: "the totality of the circumstances surrounding the professional relationship between the attorney and client . . [including] . . time, the recovery sought, the skill demanded, the results obtained, and the attorney-client contract."

538 So. 2d at 922 (quoting Rosenberg, 409 So. 2d at 1022). But see 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); Barton v. McGovern, 504 So. 2d 457 (Fla. 1st DCA 1987). As to this issue, we certify conflict.

We also affirm as to all other issues raised in this appeal.

HERSEY and GUNTHER, JJ., concur.

2,555

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT. IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. 90-3168 (21)

R 362

JOHN H. FARO,

Plaintiff,

vs.

AMICA MUTUAL INSURANCE COMPANY,

Defendant.

ORDER REGARDING PLAINTIFF'S MOTION TO VACATE AND/OR DISCHARGE ATTORNEY'S CHARGING LIEN AND MOTION TO DETERMINE AMOUNT OF ATTORNEY'S CHARGING LIEN

THIS CAUSE came before the Court upon the Plaintiff's Motion to Vacate and or Discharge the Attorney's Charging Lien of Robert V. Romani and the law firm of Farish, Farish & Romani and the Motion of Robert V. Romani to determine the amount of Attorney's Charging Lien, and the Court having heard testimony of the Parties to these Motions and the testimony of Expert Witnesses to this cause and being otherwise fully advised, it is hereby

ORDERED AND ADJUDGED as follows:

1. Plaintiff's Motion to Vacate and or Discharge the Attorney's Charging Lien of Robert V. Romani and the law firm of Farish, Farish & Romani, is hereby denied.

2. The Motion of Robert V. Romani to determine the amount of Charging Lien is hereby granted.

3. The Court finds that a reasonable fee for Robert V. Romani and the law firm of Farish, Farish & Romani, based on

and the contractual agreement of the parties MKB 6/9/92
quantum meruit for the representation of JOHN H. FARO, is $180,000.00.

4. Judgment is hereby entered against JOHN H. FARO, in the amount of $180,000.00, plus costs in the amount of Twelve Thousand Four Hundred Nine and 13/100 ($12,409.12), in favor of Robert V. Romani and the law firm of Farish, Farish & Romani, together with interest from the date of this Order, until fully paid, for which let execution issue.

5. The law firm of John W. Thornton, Esquire, as Trustee, is currently holding in escrow sums attributable to and retained for the payment of Attorney's Fee to Robert V. Romani. The law firm of John W. Thornton, Esquire, as Trustee, is hereby ordered and directed to forthwith pay the sums held in escrow in total or an amount sufficient to satisfy the judgment as rendered above. Payment shall be made directly to Robert V. Romani and Farish, Farish & Romani, at 316 Banyan Boulevard, P. O. Box 3887, West Palm Beach, Florida 33402.

DONE AND ORDERED in Fort Lauderdale, Broward County, Florida, this 9 day of June, 1992.

MIETTE K. BURNSTEIN
CIRCUIT JUDGE
TRUE COPY

c.c. to:

S. Emory Rogers, Esquire
FARISH, FARISH & ROMANI
Denco Bldg. - 316 Banyan Blvd.
P. O. Box 3887
West Palm Beach, FL 33402
Attorneys for: Robert V. Romani,
Farish, Farish & Romani
407/659-3500

R364

John W. Thornton, as Trustee
THORNTON & MASTRUCCI
Biscayne Bldg. - Suite 720
19 West Flagler Street
Miami, Florida 33130-4478
305/358-2500

Walter G. Campbell, Jr., Esquire
KRUPNICK, CAMPBELL, MALONE
AND ROSELLI, P.A.
700 Southeast Third Avenue
Courthouse Law Plaza, Suite 100
Fort Lauderdale, Florida 33316
Attorneys for: Plaintiff
305/763-8181

Susan M. Rosen, P.A.
2255 Glades Road
Suite 121-A
Boca Raton, Florida 33431
407/241-7444

James J. McNally, Esquire
Biscayne Building, Suite 634
19 West Flagler Street
Miami, Florida 33030