IN THE SUPREME COURT OF FLORIDA

JOHN H. FARO,

Petitioner/Client,

vs.

ROBERT V. ROMANI and FARISH, FARISH & ROMANI,

Respondents.
_____/

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

REPLY 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 CITATIONS

Cases

Other

STATEMENT OF THE CASE AND FACTS

This is a reply brief by petitioner/client John Faro directed to the three briefs filed by: (1) Attorney Robert Romani, (2) Florida Academy of Trial Lawyers, as amicus, and (3) the Searcy Denney Law Firm, as amicus. The record which contains Romani's charging lien, the 195-page transcript of the hearing before Judge Miette Burnstein and her judgment granting fees is designated (R.___). The judgment is also attached to this brief.

The facts are mentioned only in the Romani brief but no serious issue is taken with the facts as previously recited in Faro's brief. Of utmost importance, Romani never suggests what the "good cause and justification" for his withdrawal might have been nor does he suggest what actual sworn evidence is in the transcript of the hearing before Judge Burnstein to support the supposed finding of good cause to withdraw aside from and in addition to the obvious dispute over settlement. Of course, it is only necessary to read Judge Burnstein's order to know that the Fourth District was wrong in stating that Judge Burnstein "found" good cause for withdrawal apart from the dispute over settlement. Judge Burnstein made no findings and the statements in the Romani brief that she did are mere pretense.

At the hearing on the charging lien, Romani testified that his reason for withdrawal was the dispute over settlement with client Faro and his fear that he would lose if he went to trial. (R.122). Romani testified that he thought there was a very good chance of losing the case and that Faro had a "different agenda" because Faro

simply wanted enough money out of the case to retire on. (R.123-4). Romani said that he did not want to be the lawyer "blindly" taking this client to trial because he was worried that Faro might sue him or report him to the Bar if he tried the case and got a poor result. (R.122-124).

Romani does not dispute the fact that he was fully prepared to go to trial before a jury. Indeed, he insists he was ready for trial. The case had been set for trial three times and Romani withdrew only shortly before the third trial date. Romani does not dispute the fact that Faro objected to his withdrawal and even retained another lawyer to go to court and voice that objection. Romani does not dispute that Faro always wanted Romani to continue as his lawyer and even demanded that Romani try the case. Romani does not dispute that he quit <u>over</u> Faro's objection rather than withdrawing with Faro's consent. At the hearing on Romani's motion to withdraw, absolutely no reason for withdrawal was given other than the motion itself which stated "irreconcilable differences."

Romani's brief says that he withdrew for "good cause" but Romani refuses to say what that "good cause" might have been and what evidence he presented to Judge Burnstein which might have justified such a finding had Judge Burnstein made such a finding which she did not.

Romani does not dispute Faro's recitation of the evidence concerning Romani's expert witness, former Judge Henry Latimer, whose entire testimony was based on the <u>false</u> assumption that Faro <u>consented</u> to withdrawal. The District Court opinion notes that

this witness was impeached because Romani did not tell him that Faro wanted him to stay in the case and not withdraw. Latimer incorrectly thought that Faro had been trying to get rid of Romani. Latimer expressly testified that the dispute over settlement constituted an irreconcilable difference and at that time Mr. Romani should have withdrawn and that he was still entitled to be paid the 30% contingency figure contained in the written contract. (R. 32-33). He said that Mr. Romani's suspicion that the client was "no longer believing or listening to his advice" meant that Romani could no longer remain in the case. (R. 34). He said that Romani withdrew because his continued representation was likely to result in a Bar complaint. (R. 35).

Romani does not dispute that he kept no time records and merely estimated 400-500 hours at the hearing without a shred of documentation. Although Latimer was presented as Romani's sole expert, Latimer had not the slightest idea how many hours Romani had actually spent on the case and Latimer had no opinion whatsoever on whether 400 hours was reasonable nor did he have any opinion on what would be a reasonable hourly rate for Mr. Romani's services. (R. 40,55). Latimer did not even testify to quantum meruit on direct examination. (R.21-33) He testified Romani was simply entitled to recover <u>on the contract</u>, that the contract said 30% and that Romani was entitled to 30% or $180,000. (R.33,47). Only on cross-examination did Latimer even mention quantum meruit. He multiplied the 400 guess-work hours times a rate of $250, arrived at $100,000, and then just added $80,000 based on

"difficulty of the case" to arrive at the precise same figure, $180,000 which was in fact the award. (R.45).

All of these facts were recited in detail and with specific transcript references in the initial Faro brief and none of them have been contested in the slightest way. It is apparent that Romani did not even intend to present an actual witness on a quantum meruit dollar figure to Judge Burnstein.

Now before this court, Romani abandons the two theories espoused by his own expert (valid withdrawal based on settlement differences and a fee purely on the 30%) but Romani neglects that this was the evidence which he presented in his case to the trial judge.

The Facts and the Amicus Position

The amicus briefs do not deal with the facts in any way. Indeed, the amicus briefs stay as far away as possible from the overall question of whether Romani had good cause and justification to withdraw. Amicus do not even comment and certainly do not dispute the suggested definition of "good cause" for a paid withdrawal as set out in Faro's initial brief. (See Faro Br. p. 18). The amicus briefs also take no strong position regarding the certified conflict of whether trial judges must make findings of fact on the attorney's fee issues pursuant to Florida Patient's Compensation Fund v. Rowe, 427 So.2d 1145 (Fla. 1985) and Standard Guarantee Ins. Co. v. Quanstrom, 555 So.2d 828 (Fla. 1980). Amicus argue only that the lodestar approach from Rowe should not apply to lawyers when they sue clients for fees because they assert the

lodestar approach to a reasonable fee under-compensates them. Amicus contend that higher fee awards are probable if only Rosenberg v. Levin, 409 So.2d 1016 (Fla. 1982) is applied and specific factual findings are not required.

Argument

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?

Issues Which Are Before this Court

The above question was certified by the Fourth District Court of Appeal as being of great public importance due to the "potential for conflicts between clients and counsel" concerning attorney fees. In addition, the District Court certified a further direct conflict in the various decisions of the District Courts of Appeal on whether trial courts must make findings of fact when lawyers sue clients for fees based on quantum meruit and a failed contingency fee contract. Despite this dual certification, Romani now argues that this court cannot reach the question of whether there was "justification and good cause for withdrawing apart from or in addition to, disagreements over settlement negotiation" as stated in the Fourth District's certified question above. More to the point -- Romani now says this court cannot read Romani's own testimony before the trial judge to see why he said he withdrew.

In Bankers Multiple Line Insurance Co. v. Farrish, 464 So.2d 530 (Fla. 1985), this Court stated at page 531:

> Once we take jurisdiction because of a conflict on one issue, we may decide all issue.

This is in keeping with this court's long standing rule that once

jurisdiction has been accepted the court has jurisdiction over the entire case and may reach any issue. Here we have both a conflict between four districts of major proportions[1] plus a certification of a question of public importance so that this court can address "the potential for conflicts between clients and counsel" concerning fees. Thus, this court can and certainly should address and decide whether Romani's withdrawal was for "good cause," in the context of withdrawing and still getting paid. In answering this question, this Court should also give much needed guidance to the bench, bar and clients by defining "good cause" upon which a lawyer may withdraw and still require payment by the client.

In the initial Faro brief we suggested a definition of "good cause" entitling a lawyer to withdraw and still be paid. That definition was:

> A set of circumstances created by the client making the lawyer's continued performance of the contract either legally impossible or professionally unethical in some way under Florida Professional Rules or Principles. (See Faro initial brief, page 18).

Neither Romani, the Searcy, Denney Law Firm nor the Florida Academy of Trial Lawyers have criticized this definition in any respect. The definition is in accordance with case law. See particularly Estate of Falco, 233 Cal.Rptr. 807 (Cal. 2d DCA 1987), Suffolk

---

[1]The Romani Brief even suggests that a conflict does not really exist. This conflict in District Court decisions and the absence of a Supreme Court decision on the issue has been the subject of a recent Florida Law Review publication; Lawrence B. Lambert, Murder by Numbers: Calculating Reasonable Attorney Fees Pursuant to Attorney Charging Liens, 45 Fla. L. Rev. 135 (1993). The recommendation by the author is that such fee disputes should be governed by the Rowe/Quanstrom standards and, most importantly, findings of facts should be required. See Point II herein.

Roadways, Inc. v. Minuse, 287 N.Y.S.2d 965 (S.Ct. 1968) and the Restatement of the Law Governing Lawyers (Tentative Draft No. 4, April 10, 1991) at §52, page 268. Since Faro did nothing making Romani's continued representation of him impossible under normal definitions of contractual impossibility nor unethical under Professional Rules or Principles, Romani did not have "good cause" to withdraw and still be paid. In short, Romani broke the contract by withdrawing over his client's objection and abandoned the client and his fee claim. Romani may not like Mr. Faro and may have become irritated by Faro's mental disabilities but these problems were the reason for the representation and suit and certainly did not give Romani grounds to withdraw and still get paid. Romani's withdrawal without "good cause" results in a forfeiture of any fee under any theory including quantum meruit.

The Restatement of the Law Governing Lawyers (Tentative Draft No. 4, April 10, 1991) has very recently become the law of the Fourth District Court of Appeal concerning attorney's fees. In Searcy, Denney Scarola, Barnhart & Shipley v. Scheller, 18 Fla.L.Wkly. D2651 (Fla. 4th DCA, Dec. 15, 1993), the Fourth District ruled in favor of the Searcy Denney Law Firm in one of its three cases against clients seeking attorneys fees under a charging lien. The Fourth District adopted and quoted extensively from the Tentative Restatement Draft. The new Searcy Denney decision is in stark conflict with the Faro opinion because it requires specific findings of fact on all issues. It is surprising that the Searcy Denney Law Firm, as amicus before this Court, has

not brought its recent victory in Scheller to the court's attention. The apparent reason for this omission concerns the District Court's ruling that trial courts must make findings of fact in denying attorneys fees to lawyers and the new case will be discussed under Point II herein. The Restatement, quoted so extensively in Scheller actually supports the Faro position herein and is devastating to the Romani position. At §52, page 268 and 269, the following discussion appears:

> e. *Forfeiture by withdrawing lawyer.* A lawyer who withdraws from a matter without justification before completing services may forfeit the right to compensation for services already performed or to be performed. See § 49 (fee forfeiture). Withdrawal without reasonable grounds burdens a client and may be a clear and serious violation of the lawyer's duty (see § 28) to render loyal and competent services.
>
> * * *
>
> **Illustration:**
>
> 5. Client retains Lawyer on a 33 1/3 percent contingent-fee contract to bring a personal injury suit against Defendant. After lawyer has performed considerable work, Defendant offers $20,000 in settlement, which Lawyer urges Client to accept. Client refuses. Lawyer withdraws from the case, asserting that the mutual confidence essential to the client-lawyer relationship no longer exists because Client has rejected Lawyer's advice. Client finds other counsel and ultimately accepts the $20,000 offer. Lawyer seeks to recover the fair value of Lawyer's services, reasonably alleged to be worth $6000. Lawyer is entitled to no compensation. Client is entitled to accept or reject a settlement proposal. See § 33. Lawyer withdrew without justification, abandoned Client in the midst of the suit, and forfeited Lawyer's right to payment. Allowing Lawyer to recover a fee would make it possible for lawyers in similar situations to pressure clients into accepting settlements by

threatening to withdraw. (emphasis supplied).

This is precisely what occurred here and is precisely what Romani and Latimer told Judge Burnstein. Obviously, at the time of his testimony and at the time of the testimony of former Judge Latimer, they were both misinformed as to the state of the law. Both of them believed that a good faith dispute over settlement destroyed the attorney-client relationship and authorized the attorney to withdraw and still demand payment on the contingency contract. This simply is not the law and Judge Burnstein was led astray by Romani and the testimony of former Judge Latimer. The Fourth District erred when it concluded, without the slightest basis, that Judge Burnstein "found" good cause for withdrawal based on something other than the settlement dispute. As indicated in Illustration 5, lawyers simply cannot coerce their clients into settling under threat of withdrawal. It is solely the client's decision as to whether or not he wants to take his case to a jury and have it tried. Even a reasonable settlement offer can be rejected and a jury trial insisted upon. The lawyer can quit -- but not quit and get paid. This is exactly the risk he assumed, i.e., trying the case. The trial still remains the most important part of the trial lawyers obligation.

The Fifth District's recent decision in Mary Kay v. Home Depot, Inc., 18 Fla.L.Wkly. D1800 (Fla. 5th DCA 1993) is also directly on point. Indeed, the facts in the Faro case are much stronger than the facts in the Mary Kay case because Mary Kay did not object to her attorney's withdrawal and Faro did object and

demand that Romani continue with this case and proceed with the trial. Romani's withdrawal was at a very crucial time -- settlement. Mary Kay holds a lawyer's withdrawal based on a good faith difference of opinion over settlement disentitles the lawyer to any fee on any theory including contract or quantum meruit. Mary Kay applies this rule even when the client consents to the withdrawal. The Mary Kay opinion was issued while the Fourth District had the Faro case under consideration.

The Fourth District opinion states that Judge Burnstein "found" good cause separate and apart from the dispute over settlement. Faro has urged, begged and even pleaded that someone should simply read Judge Burnstein's order. (R.362-3). Romani's brief does not respond to the repeated assertions that Burnstein's order is in fact silent as to "good cause" and justification for withdrawal. The order (attached to this brief) contains absolutely no findings of any nature whatsoever. Judge Burnstein certainly did not find good cause apart from settlement disputes. Indeed, if Judge Burnstein had so found she would have been rejecting the express testimony of Romani and the express testimony of Romani's expert. Both said that the dispute over settlement was good cause for Romani to withdraw and still be paid full dollar value and that he was entitled to be paid based solely upon the percentage in the contingency fee contract (R. 33,47). This testimony is recited at length in Faro's initial brief and no one has suggested that the testimony was any different.

Also, no one has suggested how the Fourth District could

simultaneously write that Judge Burnstein "found" one set of facts on withdrawal, while in the same opinion, noting the absence of any "findings in support of its award" of attorneys fees. The only way to understand the Fourth District's statement that Judge Burnstein, "FOUND . . . JUSTIFICATION AND GOOD CAUSE FOR WITHDRAWAL APART FROM . . . DISAGREEMENTS OVER SETTLEMENT" is to resort to an irrebuttable presumption of correctness that she must have made all the correct findings. Judge Burnstein ruled for Romani and thus she is presumed to have found the facts necessary to support such a ruling. This is true, but only if such presumed findings, find support in the actual evidence. Here the evidence all points in the other direction.

As previously stated, both Romani and Latimer were apparently misinformed as to the state of the law and thought that a good faith disagreement over settlement and asserted loss of confidence was good cause to withdraw. They both so testified. The fact that Judge Burnstein made no finding one way or the other as to the facts cannot be used as a basis to hold that she really found the correct reason when all of the evidence offered by the prevailing party would had to have been rejected for her to arrive at that result. An absence of factual findings does not require that the appellate court disregard uncontroverted evidence favorable to the appellant's (Faro's) position. Richards v. Dodge, 150 So.2d 477 (Fla. 2d DCA 1963).

The Romani brief at page 10 finally mentions "a review of the transcript" but there is in fact no such review in the brief.

Instead Romani relies on only one page, (R. 185). There Judge Burnstein was discussing the case with counsel during argument and stated:

> THE COURT: Well, let me ask you a question about this last case, because I got also some questions as to how difficult it can be said theoretically for a client to make the life of his lawyer before it's justified to withdraw? (R.185) (emphasis added).
>
> FARO'S COUNSEL: We got a case, the Estate of Falco, a California case. While a personality clash between parties may provide good reason for allowing the attorney to withdraw, it is not a justifiable reason for purposes of awarding attorney fees.
>
> * * * *
>
> THE COURT: What are justifiable reasons?
>
> FARO'S COUNSEL: That would be if he [Faro] wanted to lie, if he [Faro] wanted to perpetrate a fraud and that's not what you had here. That's what I purposely asked him.[2] An attorney employed on a contingency fee basis may not determine it's not worth his time to pursue the matter, instruct his client to look elsewhere for legal representation, but hedge his bet by claiming part of the recovery if there is a settlement made or recovery obtained. (R.186).

Immediately after the Judge's "theoretical" question about clients making life difficult for lawyers, Judge Burnstein stated:

> THE COURT: Let me ask a theoretical question just for the sake of discussion. (R.186).

Shortly thereafter, Judge Burnstein stated:

> THE COURT: I'm just playing the devil's advocate. I'll argue with you [Mr. Rogers, Romani's law partner] and Mr. Campbell all day. (R. 193).

In playing the devil's advocate with both sides Judge

---

[2]Romani testified that in two pretrial depositions, Faro was absolutely truthful and forthright. (R.111). Romani never suggested he thought Faro would lie at trial.

Burnstein was not making findings of fact. She certainly was not making a finding of fact of a breach of contract by the client by making life difficult for his lawyer. None of this was included in the written judgment. Indeed, she could not have found that Faro was at fault in making the case impossible to prepare and try. Romani's only evidence in this regard was that Faro had been difficult concerning one deposition of a witness which Romani admitted that he ended up taking and which turned out very well. (R.110). Of course Faro's own deposition testimony was completely truthful. (R.111). Any difficulties in discovery and trial preparation had long since passed by the time the case was set for trial the third time. Romani testified repeatedly that the case was absolutely ready to go to trial and that he was 100% prepared. He just thought there was a good chance he would lose because Faro's appearance on the stand seemed "too sharp" to convince a jury of serious mental disability. (R.111). He said he thought it imprudent to go to trial and risk losing the substantial money being offered just because Faro wanted to retire. (R.122). Romani also disliked Faro because of his "different agenda;" i.e., he wanted to get enough money out of the case to retire on. Romani may not have liked Faro's motive (retirement) but Faro certainly did not breach the contract by having such a motive nor did he prevent Romani from getting the case ready for trial. Also, Faro never fired Romani -- the opposite is true -- Romani fired his client. Obviously, financial security in retirement is a perfectly honorable motive for a client to have.

Judge Burnstein certainly did not find that Faro breached the contract by making Romani's life difficult. No such breach of contract even exists under law for all other human beings who enter into contractual obligations. A "pleasant life" is not an implied guarantee in a lawyer's contract any more than in any other contract.

Romani cites to only one case seemingly for the proposition that a breakdown in the attorney-client relationship by refusing to accept settlement is "good cause" for a lawyer to withdraw and still get paid. This case is Ambrose v. Detroit Edison Company, 237 N.W.2d 520 (Ct. of App. Mich. 1975). We invite the court to read Ambrose because it actually helps Faro's side of the case. Mr. Ambrose had been litigating over retirement benefits with his former employer, a utility company, for 18 years when he finally lost this case on appeal. He had lost every step of the way. Finally, his lawyers succeeded in getting a settlement offer from the utility company for almost exactly what Ambrose was claiming in the complaint. Even the judge was involved in long and arduous settlement discussions. Every regular employee of the utility company had to make a selection of one of two retirement options when they retired. Mr. Ambrose refused to make that option selection despite the fact that the company and his own lawyers requested it and the judge ordered him to do so. Without selecting a retirement option, no sort of settlement could be structured. In the face of Ambrose's refusal, the judge ordered him to make the selection and further told him he was being irrational and simply

wanted to carry on the lawsuit forever. The lawyers withdrew and the trial judge found "good cause" and assessed a fee based on the contingency fee contract. The fee based on the percentage in the contract was reversed but the Michigan appellate court affirmed the "good cause" holding and in doing so stated:

> We want to emphasize, however, that we view this case as embodying extreme circumstances, and we emphatically reassert the view that the client has control of the lawsuit, and can refuse even the most reasonable settlement offer. . . . Refusal to settle by a client can never be sufficient grounds to constitute 'good cause' for an attorney to withdraw. . ."

The real basis for the Ambrose ruling was that the client's irrational behavior and disobedience to court orders made it impossible for the lawyers to even move forward with the representation. This fulfills all the traditional definitions of impossibility of performance under normal contract law.

The Non-Compromise Provision

Romani also argues that the non-compromise provision in his contingency fee contract should not void the contract. Implicitly admitting the invalidity of this provision of his own contract, Romani tries to salvage the contract by saying this court should incorporate the Statement of Client's Rights into the contract. This is directly contradicted by very the provision in the Statement itself that the Statement is not a part of the actual contract. This provision was inserted when Rule 4-1.5 was adopted at the request of the Bar. The non-compromise provision in Romani's contract should be held to void the contract and to disentitle Romani to any fee whatsoever. If the contract itself is

void, no fee whatsoever is warranted. This is particularly true in the present case where there is really no question that Romani was attempting to force his client into a settlement under threat of withdrawal.

This case must be reversed with a finding that Romani forfeited any fee because he effectively fired his own client and did not have "good cause" or justification as these concepts should be legally defined. "Good cause" to withdraw and still be paid should be defined as:

> A set of circumstances created by the client making the lawyer's continue performance of the contract either legally impossible or professionally unethical in some way under Florida Professional Rules or Principles. (See Faro initial brief, page 18).

No Remand Appropriate

Last but not least under this point, this matter should not be remanded for further trial. Romani has had his day in court and presented all of the evidence that he chose to present. He had the advantage of doing it in a casual unstructured hearing where he was impervious to cross-examination because he had no time records. He merely guessed at his time assuring the trial judge that "contingent fee attorneys generally don't keep time. That's not a common practice." (R.175). Romani presented his own testimony and one attorney-expert. This evidence shows exactly why he withdrew and he does not now get to go back and change the evidence to make it coincide with the law. He said he quit because he thought settlement, not trial, was the only prudent choice. Romani, as a

certified trial lawyer, had to know that he did not get to make that choice. No further hearing is necessary or appropriate and the client Faro is entitled to a ruling that Romani is entitled to absolutely no fee. Romani should be ordered to return the fee plus interest.

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.

The Fourth District Court of Appeal opinion does not certify the lodestar approach. Instead, the Fourth District has chosen to certify the conflict in decisions on the necessity for findings of fact in attorney/client fee controversies. Although Romani and amicus are anxious to discuss their displeasure with the lodestar approach, they say almost nothing about the necessity for findings of fact other than that they would rather not have them. At page 16, Romani's brief states:

> 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. . . .

This is the only reason ever given as to why findings of fact should not be made. Obviously, Romani and Faro no longer had an agreement concerning fees and Romani does not really suggest why findings should not be made. The Searcy Denney amicus brief states in footnote 11, page 15 that amicus "will not address the findings issue except to say that Rowe is an exception to the general rule that, in Florida, a trial court is not required to make written

findings . . . ". Amicus states that its concern lies elsewhere and devotes only one footnote to the issue of necessity for findings.[3]

Faro submits that Rowe and the cases following it, particularly Standard Guaranty Insurance Company v. Quanstrom, 555 So.2d 828 (Fla. 1990) definitely require findings of fact and the application of the lodestar approach to claims by attorneys for fees against their clients. Rowe spoke in terms of "effective appellate review." In the present case we do not know how Judge Burnstein computed the fee since we have no findings of fact. Judge Burnstein's order was obviously prepared by counsel and referred solely to quantum meruit. Judge Burnstein then inserted the written words "and the contractual agreement of the parties" indicating reliance on both quantum meruit and the contract. The Fourth District Court of Appeal, in what can only be attributed to mind-reading, was somehow able to tell that Judge Burnstein did not use the 30% figure in the contract in arriving at $180,000 even though the witnesses presented by Romani told her to do so. Clearly, this case is not a model of "effective appellate review."

---

[3]Searcy Denney's footnote 11 refers to Stabinski, Funt and de Oliveira, P.A. v. Law Offices of Frank Alvarez, 490 So.2d 159 (Fla. 3d DCA), rev.den'd. 500 So.2d 545 (Fla. 1986). Stabinski was the very first case holding that Rowe did not apply to claims for attorneys fees by lawyers against clients. Stabinski was then followed in the Third District and in the Fourth District and it is really the first case on the subject. Interestingly, Stabinski holds that attorney fee disputes between lawyers and clients are matters at law subject to jury trial. We frankly think Stabinski is wrong. Rather obviously charging lien proceedings are equitable and not subject to jury trials.

The real argument by the Searcy Denney amicus is that only Rosenberg should apply, that Rosenberg allows the court to look at all the circumstances and that "when successive attorneys render services to a client under contingency fee contracts, the trial court should determine the 'market price' of the total package of legal services rendered, and divide the fee in accordance with the respective work done, or in some other equitable way." (See Searcy Denney brief, page 4). Amicus then goes on to argue that a "straight hourly fee" drastically under-compensates a lawyer and that the only fair way to do it is a pro rata apportionment of the market price of the total package of legal services rendered by both attorneys.

Frankly, if Faro had actually wrongfully caused Romani to withdraw this would not be a bad idea. However, this approach certainly did not happen here. No one asked Judge Burnstein to determine the market price of the total package of legal services involving both attorneys (Romani and subsequent counsel) and then make a pro rata distribution between them. Judge Burnstein's order makes no such findings and this concept was not even hinted at before Judge Burnstein or indeed in the Fourth District Court of Appeal.

The amicus brief gives an example of the house painter who paints 91% of the house and a successor who paints 9% of the same house. Amicus says exactly the same logic should be applied here but that things are just a little more complicated. Amicus chooses not to recognize that trying the jury trial is not at all

synonymous with completing the last 9% of the house painting job.

If the amicus "total package price/pro rata distribution" theory is adopted by this court, then a reversal in this case is absolutely mandated because that is most certainly not what Judge Burnstein did. However, adoption of such a new approach should not further prejudice the client here. At most, any new approach as suggested by Searcy Denney should have prospective effect only. To the extent that the amicus position relies solely on Rosenberg and leaves out the Rowe/Quanstrom rationale, we think it inappropriate. Faro suggests that the Rowe/Quanstrom factors do apply and most importantly, trial courts must make findings of fact as to how they set fees.

Trial Judges Must Make Written Findings When Lawyers Sue Clients for Fees

There are five good reasons why trial judges should make findings of fact:

1. This court has so ruled.
2. The Fourth District Court of Appeal has so ruled.
3. Effective appellate review requires it.
4. A strong judicial trend requires it.
5. There is no good reason not to require factual findings.

1. This Court's Decisions

The question at hand, the application of Rowe and Quanstrom versus the application of only Rosenberg's modified quantum meruit was dealt with extensively in Lawrence Lambert's recent Law Review article, Murder by Numbers: Calculating Reasonable Attorney Fees Pursuant to Attorney Charging Liens 45 Fla. Law Review 135 (1993).

The conclusion suggested therein is that the Rowe/Quanstrom factors do apply and that findings of fact are absolutely necessary. This position is sound and should be accepted by this court. Rowe and Quanstrom have already ruled that findings of fact are necessary. Quanstrom extended use of the lodestar method to tort and contract claims for attorney fees. Perez-Borroto v. Brea, 544 So.2d 1020, 1023 (Fla. 1989) held that Rowe applied to both plaintiffs and defendants seeking attorney fees under the lodestar approach.

Professor Lambert noted that ambiguities exist as to whether Rowe's purpose of providing trial courts with a more objective and consistent method of computing reasonable attorney fees superseded the more subjective guidelines described in Rosenberg. He concludes that the lodestar method should be applied and that Rowe's purpose of providing objectivity supersedes Rosenberg's generalities. He based this theory in part on the fact that Rowe adopted the Rosenberg position that in all cases attorney's fees should be limited to the maximum amount in the contract. Thus, by incorporating Rosenberg and not distinguishing its application, this court implied in Rowe that the two cases should be read together. Thus the lodestar approach should be used in a charging lien quantum meruit situation. The Law Review article concludes at page 159:

Conclusion

> Both the lodestar method of determining a base reasonable attorney fee award and a contingency risk multiplier should be used to calculate reasonable attorneys fees under valid charging liens. The lodestar method as outlined in Rowe and modified in Quanstrom does not significantly alter the criteria currently used to

> determine the fees; it simply places those criteria within a more structured, analytical framework. While such a framework may seem cumbersome, it encourages courts to be more diligent in justifying awards of attorneys fees. Moreover, because courts must point to specific evidence to justify their awards under this system, attorneys will be compelled to keep more accurate records of their time spent and work done to support their fee arguments.
>
> * * *
>
> Thus, it is imperative for the [trial] courts to point to specific findings supporting their decisions while applying an objective and consistent framework for calculating fees.

Thus, Rosenberg is not the sole rule and the amicus arguments that it is are inappropriate and should not be accepted by this court.

2. Old and New Fourth District Case Law

In a very recent case, Searcy Denney v. Scheller, supra, the Fourth District reversed a the decision by Circuit Judge Daniel Hurley which had denied a quantum meruit fee to the Searcy Denney firm based on a holding of forfeiture when Searcy Denney was found to have abandoned representation of the client. The decision was not commented upon by Searcy Denney as amicus before this court and the reason is rather obvious. The Fourth District, in an extensive opinion, reversed Judge Hurley because he had not made sufficient factual findings, despite his 45-page order. The Fourth District held Judge Hurley had not gone through the correct mental process in determining a quantum meruit fee and in determining the question of whether forfeiture should have been applied against the law firm. The decision holds that Judge Hurley should first have computed the attorney's fee based on quantum meruit in an abstract

fashion and then reduced the quantum meruit fee by any damages sustained by the client Scheller as a result of the attorney's breach and then further decided in a separate mental step whether forfeiture was appropriate after the first two steps had been completed. The case involved a situation where the Searcy Denney firm had already tried the case, won it, successfully defended all appeals and were then poised to collect on the judgment. The Searcy case concludes with the following language in the last sentence in the next to last paragraph:

> Consequently, it is necessary that we remand the case to the trial judge for appropriate findings on these issues.

Further, in footnote 12 the opinion states:

> Thus, the present findings are insufficient to a decision on precisely where the case could have been settled if Scarola had not acted as he did. On remand, the court will want to make that finding.

The trial court's decision in Scheller was 45 pages long and contained extensive findings of fact. Now the Fourth District Court of Appeal has held that such findings were insufficient in the denial of an attorney's fee. The Fourth District has remanded to the trial judge to make more findings of fact to justify the denial of fees. It is an amazing inconsistency for the Fourth District Court of Appeal to find 45 pages of facts insufficient to deny an attorney's fee but to almost simultaneously rule that no findings are perfectly fine when a court grants attorneys fees in the same kind of charging lien proceedings.

It is clear that in the Fourth District a lawyer is entitled to an amazing array of protections under the new Scheller opinion

including specific findings of fact on every issue and a list of mental processes which a judge must go through before a fee may be denied. However, a judge need not make one single finding of fact when attorney's fees are granted to a lawyer over the client's objection throughout the charging lien procedure.

It simply cannot be the law that lawyers are entitled to findings of fact and full protection while clients are entitled to no findings of fact and no protection other than the presumption of correctness applied in favor of the attorney and trial judge. The Faro decision was rendered on October 13, 1993, and the Searcy Denney opinion was rendered two months later on December 15, 1993. Both decisions cannot be correct.

Even without Rowe it should come as no surprise to the lawyers and trial judges of the Fourth District area that findings of fact are required. The requirement is not something new. In Banks v. Steinhardt, 427 So.2d 1954, 1057 (Fla. 4th DCA 1983), the court directed trial judges to make findings of fact whenever reasonably possible and stated:

> This case points out a request for assistance that we respectfully wish to make to the trial judges of this district because, uncharacteristically for this trial judge, there were no findings of fact nor conclusions of law in the final judgment. Our request is that findings of fact and conclusions of law be included when it is reasonable and feasible to do so. We base this request on our responsibility to provide meaningful appellate review, which is made much more difficult in their absence.

Also see the Fourth District's opinion in Merrill, Lynch v. Melamed, 425 So.2d 127 (Fla. 4th DCA 1983), also requiring findings.

3. Effective Appellate Review Requires It

This Court's Rowe decision and the Fourth District's Banks and Melamed decisions both make it absolutely clear that effective appellate review requires findings of fact. Again, the Fourth District's opinion in this case is strange in that the Court stated it was able to tell that Judge Burnstein had not based her fee calculation on the fee contract despite the fact that Romani's sole expert testified that she should base her calculation on the fee contract. She used the handwritten words: "and the contractual agreement" in her order and if she based the fee at least in part on the 30% in the contract then it was error. Effective appellate review was barred and the Fourth District's opinion seemed to so recognize but affirmed in any event.

4. There is a Strong Judicial and Legislative Trend

In the previous brief we cited eight cases at page 37 to demonstrate the strong trend toward requiring trial courts to make findings of fact. No one has commented on this trend. Findings of fact are required in all federal litigation. Findings of fact are, we believe, already required in attorney's fee disputes under Rowe and Quanstrom. The Second District and the First District already apply the findings mandate from Rowe in such disputes. The trend is a valid one and any remaining confusion among the districts should be resolved in favor of findings.

5. There is no Reason not to

Neither the attorney Romani nor either amicus has suggested the slightest reason why attorney's fee disputes should not involve

mandatory findings of fact by trial courts. The reason that attorneys do not want such findings is obvious. Attorneys such as Mr. Romani who never keep time records and who think it is their right not to will be prevented from simply coming to court and guessing that they spent 500 hours on a case. The requirement of findings of fact will prevent exactly what occurred in the present case which is a casual and unstructured proceeding in which the client suffers and the attorney gains.

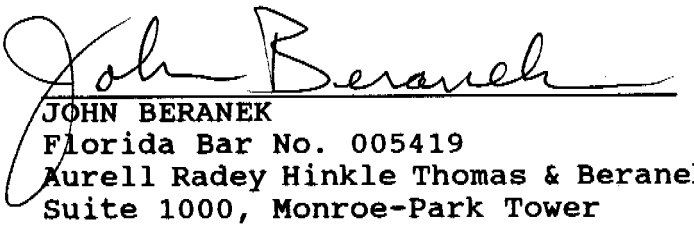
The Charging Lien Process Violates Due Process

Only one comment has been made on this argument. Romani's brief suggests that due process is not violated because all attorney charging lien proceedings are in equity before a judge who already knows a lot about the case and that judge might use her prior knowledge against the lawyer as well as in favor of the lawyer. The judge might also use this background in the case against the client or in favor of the client according to Mr. Romani. Romani even suggests that it will hurt the attorney fee contestant if they were previously "disrespectful of the trial court" in the underlying case. (See Romani brief at page 17). Romani seems to think due process is satisfied by an equal chance at unfairness. Again we respectfully suggest that this court reevaluate and reappraise the entire subject of court created charging lien procedures. The Stabinski opinion, which seems to have started the whole conflict situation, holds that such fee disputes are not even in equity but are instead at law. Charging liens can be easily abused and the present case is a stark example

of such abuse.

CONCLUSION

The judgment below should be reversed with directions to enter judgment in favor of the client Faro. The lodestar approach and the fact findings mandate should be applicable to situations when clients are sued by their lawyers for attorneys fees. Charging lien procedures should be reevaluated.



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

Corrected Certificate of Service

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States Mail this 7th day of March 1994 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

Daniel S. Pearson, Esq.
Holland & Knight
701 Brickell Avenue
Post Office Box 015441
Miami, Florida 33101-5441

Margol & Pennington
76 South Laura Street
Jacksonville, FL 32202

John Beranek