IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,375

SEARCY, DENNEY, SCAROLA,
BARNHART & SHIPLEY, P.A.,

Petitioner,

PAIGE N. POLETZ, a minor, by
and through her parents, WILLIAM
RANDOLPH POLETZ, et al.,

Respondents.
_____/

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

BRIEF OF RESPONDENTS

JOHNSON, BLAKELY, POPE, BOKOR,
RUPPEL & BURNS, P.A.
P.O. Box 1368
Clearwater, Fla. 34617
(813) 461-1818

Attorneys for Respondents

By: F. WALLACE POPE, JR.
Fla. Bar No. 124449

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PRELIMINARY STATEMENT

For ease of reference, Respondents will use the same transcript reference symbols as does Petitioner. The transcript of trial testimony was prepared by two different court reporters, so it is not consecutively paginated. Volumes I and II of the transcript are contained in the "Second Supplemental Record." References to them will be preceded by the symbols T1 and T2, followed by the appropriate page number. Volumes III and IV of the transcript are contained in the "Supplemental Record." References to them will be preceded by the symbols T3 and T4, followed by the appropriate page number.

For the convenience of the court, certain record references are included in the appendix to this appeal and are identified by the symbol "A."

STATEMENT OF THE CASE AND FACTS

This case involves much more than an abstract conflict of legal principles among district courts of appeal. Petitioner has sanitized or excluded many of the facts that troubled the trial court and formed the basis of its order awarding attorneys' fees, and in some instances, Petitioner's fact statements are erroneous.

Paige Poletz and her parents got caught in the crossfire of an unseemly war between lawyers over clients and fees. Sadly, this case is an example of the kind of lawyer hubris and overreaching that gives lawyers and their fees a bad name. The

trial court recognized these embarrassing facts in the order on appeal (R-902;A-1, p.6):

> While this Court is not concerned with proceedings and rulings in other venues, it has not escaped the attention of the court that an inordinate amount of time and legal effort have been expended around this state to retain clients, recover costs and litigate disputed fees. It is the opinion of this Court that essentially there were no legal efforts made by Searcy, et al. after November 27, 1991 which benefited or advanced the cause of Paige Poletz. In fact, the opposite is true. Searcy, et al. muzzled the expert witnesses and began a pleading frenzy on both coasts attempting to retain clients. All hours claimed by the firm after November 27, 1991 have been struck by the Court and are not compensable since they in no way represent time expended in the legal representation of the client. Rather, the time spent after November 27, 1991 was spent in the representation of the interests of the law firm.

Dennis DeVlaming, a Clearwater attorney who was a law school friend of Christian Searcy, referred Randy and Mindy Poletz to Mr. Searcy for representation. Mr. Searcy did not previously know the Poletzes or their child. (T2,100) The Searcy firm refused to accept the case on the customary 40/30/20 maximum contingency allowed by Florida Bar Rule 4-1.5. Instead, the Searcy firm demanded a "40% across the board" contingency agreement and thereafter obtained court approval of the enhanced fee agreement (T2,102-103; T3,36 et seq.) Mr. and Mrs. Poletz began their relationship with the Searcy firm in March, 1989, and Mr. Searcy assigned Phil Taylor, an associate who was awaiting

admission to the Florida Bar, to assist Mr. Searcy in the development of the case (T2,104). Mr. Taylor was a surgeon who became a lawyer (T2,105). Although Mr. Searcy considered Taylor "absolutely" not competent to try the case, Mr. Searcy considered Taylor's services to be worth $300 an hour because of his medical background (T2,106). Mr. Searcy testified that Phil Taylor "spent a tremendous amount of time on the phone with both Randy and Mindy Poletz" (T2,119). Mr. Searcy encouraged Mr. Taylor to spend a great deal of time communicating with Mr. and Mrs. Poletz (T2,120), and Mr. Taylor spent more time on the Poletz case than on any other case on which he was assisting. (T3,9). Of course, this close contact fostered the bond of trust that developed between Mr. Taylor and Mr. and Mrs. Poletz.

Mr. Searcy admitted that although the Searcy firm worked on the case for two and one-half years (from March, 1989, through November, 1991), Mr. Searcy did not meet Mr. and Mrs. Poletz personally until the hearing on the motion for substitution of counsel on November 27, 1991 (T3,49). He conceded that his only contact with the Poletzes during those two and one-half years had been, at most, three brief telephone conversations. (T3,51).

On November 21, 1991, Phil Taylor submitted a letter of resignation to the Searcy firm, and on November 22, 1991, the Poletzes wrote a letter to the Searcy firm discharging the firm as their counsel, and indicating that they would be represented in the future by Phil Taylor who was joining a different law firm (T3,27). At this point, according to Mr. Searcy, his firm

developed a "reasonable" concern about whether Mr. Taylor would reimburse the Searcy firm its costs. (T3,30).

While he was an employee of the Searcy firm, Mr. Taylor was encouraged to keep in close contact with the Poletzes; he was the principal contact between the Searcy firm and the Poletzes; he did most of the work on the case; and the work he did while at the Searcy firm was worth $300 an hour. But upon his departure from the Searcy firm, Mr. Searcy took a different view of Mr. Taylor:

> Mr. Taylor's background was quite unstable. He had a history of two prior bankruptcies, alcoholism, drug addiction; and he was on a conditional admission to The Bar. (T3,30)

As long as Mr. Taylor was employed at the Searcy firm, there was no problem preventing him from playing a major role in the Poletz and other representations, but upon his departure he was tarred as a former alcoholic, bankrupt and dope addict.

When Mr. Taylor tried to substitute himself and his new firm as counsel, Mr. Searcy resisted the motion for substitution purportedly as a part of his "efforts to act in the best interest of Paige Poletz...." (T3,55). Mr. Searcy's attitude about the substitution is revealed in this testimony (T2,133):

> [W]e tried to take a position for the best interest of Paige Poletz so that her case wouldn't be ruined.[1]

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[1]This remark carries with it the implication that the Poletzes' right to choose their own counsel is overridden by the Searcy firm's brilliance in medical malpractice matters. That is not the law. The client is absolutely free to choose his or her own

On November 27, 1991, when Mr. and Mrs. Poletz discharged the Searcy firm, the trial court entered an order setting the case for trial beginning April 6, 1992 (R-206;A-2).

Upon receipt of the Poletzes' discharge letter in November, 1991, the Searcy firm launched a series of furious efforts to prevent Mr. and Mrs. Poletz from utilizing the services of Taylor or any other firm:

1. The Searcy firm immediately filed a retaining lien (T3,26 et seq.).

2. The Searcy firm resisted the motion for substitution of counsel of Phil Taylor on the grounds that it was not in the best interests of Paige Poletz (T3,55), but on December 9, 1991, the trial court granted the motion for substitution of counsel (R-209-210;A-3).

3. On February 12, 1992, the Searcy firm filed a petition for reconsideration of the court's order allowing substitution (R-312).

4. On March 20, 1992, four months after the Searcy firm received their first notification that the firm had been discharged by Mr. and Mrs. Poletz, in a further effort to wrest control of the case from Paige Poletz's own parents and natural guardians, the Searcy firm filed a motion for appointment of guardian ad litem (R-534, et seq.) to decide who should represent

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counsel, even at the cost of an improvident and unjust discharge of competent counsel. Rosenberg v. Levin, 409 So.2d 1016 (Fla. 1982); Larson v. Grossman, 604 So.2d 1275 (Fla. 4th DCA 1992).

the child and her parents. That motion was not ruled upon, but when a guardian ad litem was ultimately appointed, the Searcy firm strenuously objected to allowing the guardian ad litem to have any "recommending, fact finding or quasi-judicial role" regarding the firm's claims for fees and costs (R-55-57, Appeal Record in Second District Case No. 93-1886; the record on appeal in this court is a consolidated record of two separate appeals in the Second District).

5. The Searcy firm asserted that Phil Taylor was guilty of "stealing a case" from the firm (T3,61).

6. The Searcy firm paid for airline tickets to fly Mrs. Poletz to West Palm Beach to persuade her to stay with the Searcy firm as counsel in the malpractice case (T3,63). Even though the Searcy firm spent two hours with her and showed her around the firm, she still elected to have Robert Montgomery's firm represent her (T3,63-64).

7. When successor counsel, Robert Montgomery, notified his former partner, Christian Searcy, that Montgomery was counsel for the Poletzes and wanted access to the file, the Searcy firm refused Montgomery access to the file unless the retaining lien was paid in full or security was given for the payment of the retaining lien. (T3,70-71).

8. The Searcy firm refused to stipulate to a substitution of the firm of Montgomery & Larmoyeux as counsel and a contested hearing was required (R-654,665;A-4 & 5).

9. Mr. Searcy instructed the experts he retained on the Poletz case not to cooperate with successor counsel until the retaining lien had been paid or secured (T3,71), and in doing so, Mr. Searcy testified:

> I thought I was acting in accordance with the child's best interests. (T3,72)

10. On May 5, 1992, after a struggle lasting almost a half year, Mr. and Mrs. Poletz were able to obtain a circuit court order granting their motion to substitute Montgomery and Larmoyeux as their counsel. The order contained a provision requiring plaintiffs to reimburse the Searcy firm costs of approximately $70,000 within 60 days of the conclusion of the case. (R-665;A-5).

11. Obviously, Mr. and Mrs. Poletz could not be ready for trial on April 6, 1992, the court-ordered trial date, because on that date they were still under assault by the Searcy firm, and had not been able to substitute counsel of their choosing.

12. The Searcy firm filed an amended retaining lien in April, 1992, and another amended retaining lien in June, 1992 (R-899).

Because of the obstructionist tactics of the Searcy firm, Mr. and Mrs. Poletz were required to struggle for almost six months just to achieve the goal of having counsel of their own choosing represent them and their child. The trial court summarized that six month struggle as follows (R-898-899;A-1, p.2-3):

On November 21, 1991, Phillip H. Taylor, the associate assigned to the case, resigned from the firm of Searcy, et al. Subsequently, Mr. and Mrs. Poletz sent a letter of discharge to Searcy, et al. and Phillip H. Taylor filed a Motion to Substitute the firm of Gary, Williams, Parenti, and Taylor, P.A. in the civil case pending in the Sixth Judicial Circuit. On November 27, 1991, Judge Howard P. Rives, Circuit Judge, Sixth Judicial Circuit, ordered substitution of Gary, Williams, Parenti, and Taylor, P.A., as counsel. Following that order, Mr. Christian D. Searcy filed a retaining lien for costs expended and a lien for attorney's fees and costs. Searcy, et al. refused to provide substituted counsel with a copy of the file and with the work product from that file and instructed its experts not to speak to substituted counsel until they reimbursed Searcy, et al. for its costs, or gave Searcy, et al adequate security for its costs.

On November 27, 1991, the 15th Judicial Circuit in Palm Beach entered a Temporary Injunction for Relief without notice against Phillip H. Taylor and an order denying a motion to dissolve the temporary injunctive relief. Phillip A. Taylor filed a motion in Pinellas County for protective order on January 6, 1992. On January 14, 1992 Judge Rives recused himself from the case. Upon reassignment of the case, Judge Catherine Harlan, Circuit Judge, Sixth Judicial Circuit, recused herself on February 12, 1992 and Judge Philip Federico recused himself on February 13, 1992. Upon reconsideration of the motion to substitute Gary, Williams, Parenti, and Taylor, P.A. before Acting Circuit Judge Radford Smith on March 31, 1993, Phillip H. Taylor and his firm withdrew from any representation of Mr. and Mrs. Poletz. Judge Smith thereupon ruled that the firm of Searcy, et al remained counsel of record for Mr. and Mrs. Poletz and vacated the previous order to the contrary. [Prior to this hearing Mr. Searcy had also petitioned to the court to appoint a guardian ad litem to determine which firm should

> represent Mr. and Mrs. Poletz but the issue became moot when Mr. Taylor withdrew.]
>
> On April 17, 1992, Mr. Searcy received a letter from William Randall and Mindy Poletz discharging him as their counsel. Robert M. Montgomery filed a motion for substitution of counsel and to compel Searcy, et al to produce the client file. Mr. Searcy again filed a lien for attorney costs and fees and a retaining lien for costs expended. [Mr. Searcy also filed a subsequent amended lien on June 8, 1992.] On May 5, 1992, Judge William Overton, Acting Circuit Court Judge, Sixth Judicial Circuit, entered an order granting the motion to substitute Montgomery and Larmoyeux as counsel for plaintiff.

At the fee hearing, the Searcy firm sought to assess against Mr. and Mrs. Poletz all of the time the Searcy firm spent trying to thwart the Poletzes' effort to substitute counsel. The Searcy firm did not keep time records for the Poletz case, so the firm had to "reconstruct" its time. (T2,106, et seq.) Based upon these "reconstructed" time records, the Searcy firm contended that its hourly work had a value of $127,147.50, with Mr. Searcy's time at $500 an hour. (T2,109-110) Mr. Taylor's time was valued at $150 per hour before admission to the Bar, and $250 and $300 per hour after admission (T2,120). Apart from the "reconstructed" time, Mr. Searcy testified that there were "very significant expenditures of time" that he could not account for, but that he knew was expended on the Poletz case. (T2,119). Mr. Searcy believed he could safely say that the Searcy firm had

invested twice the time that was shown on his hourly "reconstruction" (T2,120).[2]

Mr. Searcy testified that it would be appropriate to apply a multiplier of 2.5 to the "reconstructed" Searcy firm hours of $127,147.50. That would yield a fee of $317,868.75. (T2,123,126). But Mr. Searcy further testified that if one doubled the "reconstructed" hours spent by the Searcy firm on the matter, (this would presumably represent the "real" time spent on the case) and applied a 2.5 multiplier, the fee would be $605,837. (T2,126-127). According to Mr. Searcy, a reasonable fee would be between $317,000 and $400,000. The $400,000 was the cap on the fee because 40% of the million dollar settlement was the maximum allowable under the Searcy firm's contract. (T2,127). Mr. Searcy testified that if the court did not apply a multiplier of 2.5, the fee would be between $127,147 and $242,335, which Mr. Searcy characterized as "less than reasonable." (T2,128)

The trial court struck all of the Searcy firm's claimed hours after November 27, 1991, because those hours not only failed to benefit or advance the cause of Paige Poletz, but actually hindered the cause of Paige Poletz because of the Searcy firm's muzzling of the expert witnesses and the "pleading frenzy"

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[2]Since the Florida Supreme Court decision in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), the Bar has been on notice that the keeping of adequate time records is essential for court awarded fee claims. In the face of this clear law, if a law firm fails to keep contemporaneous time records, it does so at its peril. The trial court properly found that there was "no competent evidence to support an increase in the hours that had been reconstructed." (R-903;A-1 at p.7).

that the Searcy firm undertook to prevent the clients from exercising their right of free choice. (R-902;A-1 at p. 6).

Successor counsel, Robert Montgomery, had a contingent fee contract with Mr. and Mrs. Poletz for 40% of the recovery of the first million dollars. Initially, he voluntarily reduced that amount to 25% of the first million dollars, and the guardian ad litem recommended that Montgomery receive a $250,000 fee; however, in the only act of grace that appears in this entire record, Montgomery waived the fee for the benefit of his clients, Mr. and Mrs. Poletz and their child. (R-900-901;A-1 at 4-5). Mr. Montgomery received no fee from the $1,000,000 settlement from Dr. Weible, and instead was compensated from the separate settlement with the hospital.[3]

SUMMARY OF ARGUMENT

Petitioner owed its former clients substantive and ethical duties to cooperate with them and successor counsel to mitigate adverse consequences. Petitioner breached these duties, and the trial court properly took the breaches into consideration in its fee and cost award. The Respondents, young parents of a badly injured child, were merely trying to continue their relationship

[3]Petitioner contends on pages 2 and 3 of its brief that Phillip Taylor "found employment with the Montgomery firm, under an agreement by which he was to receive 50% of any fee recovered in the Poletzes' case. (R.899;T4.201-02)." Review of T4-201-02 reveals this is not so. The agreement was that if Mr. Montgomery co-counseled the case with the Gary firm while Mr. Taylor was a member of that firm, the fee would be divided 50-50 between the two firms; however, once Mr. Taylor became an employee of the Montgomery firm, there was no agreement to divide the fee on a 50-50 basis with Mr. Taylor, who was simply an employee of the Montgomery firm.

with the only lawyer who worked on their case, after that lawyer left Petitioner's firm. Petitioner's claim that Respondents have received a "windfall" at Petitioner's expense, and that Petitioner is a "victim" are belied by the facts. If this court relies on the Restatement of the Law Governing Lawyers, the court should rely on those provisions dealing with a lawyer's duties to a former client, abusive fee collection methods, the forfeiture of a lawyer's fee, and the Restatement's ideal "that lawyers should moderate their own interests in order to further the effective representation of their clients...."

Petitioner urges the court to disassociate calculation of its fee from hours and hourly rates and, instead, adopt a "market price" theory. Ironically, in arriving at Petitioner's conclusion that it did 90% of the work on the case, Petitioner points solely to the "reconstructed" hours it claims it invested in the case. Petitioner's "market price" theory is nothing more than the "contract rule," which this court rejected in Rosenberg v. Levin, 409 So.2d 1016 (Fla. 1982).

On the facts of this case, the trial court would reach the same result, irrespective of the legal standard applied. The court should therefore decline jurisdiction.

If the court accepts jurisdiction, the court should apply Rowe/Quanstrom principles, with discretion granted to trial courts to use multipliers and whole or partial forfeitures to adjust fees based upon "the totality of the circumstances surrounding the professional relationship between the attorney and client."

ARGUMENT

THE TRIAL COURT'S AWARD OF FEES TO THE SEARCY FIRM WAS MORE THAN REASONABLE GIVEN THE "TOTALITY OF THE CIRCUMSTANCES SURROUNDING THE PROFESSIONAL RELATIONSHIP" BETWEEN MR. AND MRS. POLETZ AND THE SEARCY FIRM.

A. INTRODUCTION

Clients are not property. Lawyers do not own clients. Mr. and Mrs. Poletz discharged the Searcy firm, according to their absolute right to select counsel. Upon termination, the Searcy firm had a right to file its lien to protect its fee and cost claim, but it had no right to obstruct, harass and attempt to thwart the Poletzes' right to choose counsel. It had no right to treat the Poletz case as property of the firm that had been "stolen" by a former associate.

B. THE DISCHARGED LAWYER'S DUTY

For years, Florida followed the "contract rule" to measure compensation for an attorney discharged without cause. Under that rule, the measure of damages was the full contract price, less an allowance for services and expenses not expended by the discharged attorney. But in Rosenberg v. Levin, 409 So.2d 1016 (Fla. 1982), this court abandoned the "contract rule" and adopted the "quantum meruit rule." The philosophical underpinning of the quantum meruit rule is the client's unrestricted freedom to discharge his attorney. The quantum meruit rule gives clients a "greater freedom in substituting counsel" and promotes "confidence in the legal profession ...." Id. at 1020. This court observed (409 So.2d at 1021):

> The attorney-client relationship is one of special trust and confidence. The client must rely entirely on the good faith efforts of the attorney in representing his interest. This reliance requires that the client have complete confidence in the integrity and ability of the attorney and that absolute fairness and candor characterize all dealings between them. These considerations dictate that clients be given greater freedom to change legal representatives than might be tolerated in other employment relationships. We approve the philosophy that there is an overriding need to allow clients freedom to substitute attorneys without economic penalty as a means of accomplishing the broad objective of fostering public confidence in the legal profession. Failure to limit quantum meruit recovery defeats the policy against penalizing the client for exercising his right to discharge. However, attorneys should not be penalized either and should have the opportunity to recover for services performed. [emphasis added]

This court gave trial courts broad discretion (409 So.2d at 1022):

> In computing the reasonable value of the discharged attorney's services, the trial court can consider the totality of the circumstances surrounding the professional relationship between the attorney and client.

The Searcy firm's conduct after discharge struck at the heart of Rosenberg v. Levin, supra. If the discharged law firm is free to thwart the client's choice of successor counsel, Rosenberg v. Levin is an empty shell. A California appellate court recognized this in Kallen v. Delug, 203 Cal. Rptr. 879, 885, 157 Cal.App.3d 940, 951 (Cal 2d DCA 1984):

> [A] client's power to substitute one attorney for another has little meaning unless its exercise is accompanied by the original attorney's prompt execution of a substitution of attorney. The original attorney's refusal to comply works a serious hardship on the client and puts the client's interest at risk. As Hulland v. State Bar, (1972) 8 Cal 3d 440, 448, 105 Cal. Rptr. 152, 503 P.2d 608 recognized, 'When an attorney in his zeal to insure the collection of his fee, assumes a position inimical to the interests of his client, he violates his duty of fidelity to his client.' The same principle must apply with equal force to a discharged attorney's duty to his former client. Accordingly, an attorney breaches his ethical duty as defined in Rule 2-11(A)(2) when he uses his refusal to execute a substitution of attorney as a device to protect his fees. [emphasis added]

When this court promulgated Rule 4-1.16(d) of The Florida Bar's Rules of Professional Conduct, it clearly spelled out a lawyer's duty to the client who discharges the lawyer:

> **Protection of Client's Interest**. Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which to the client is entitled, and refunding any advance payment of fee that has not been earned. The lawyer may retain papers and other property relating to or belonging to the client to the extent permitted by law. [emphasis added]

Lest there be any misunderstanding, the comment to Rule 4-1.16(d) further clarifies the lawyer's duty, even if discharged unfairly and without cause:

> Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers and other property as security for a fee only to the extent permitted by law. [emphasis added]

The Searcy firm had a legal right to file its retaining liens, which it did in profusion. But the Searcy firm had no right to wage war against the Poletzes and the other attorneys they were attempting to retain. The law firm crossed the line and took action detrimental to its former clients' interests. The trial court specifically so held. (A-1,p.6):

> It is the opinion of this court that essentially there were no legal efforts made by Searcy, et al after November 27, 1991 which benefited or advanced the cause of Paige Poletz. It fact, the opposite is true. Searcy, et al. muzzled the expert witnesses and began a pleading frenzy on both coasts attempting to retain clients. [emphasis added]

Thus, as a matter of both substantive law and professional ethics, the Searcy firm breached its obligation to assist its former clients rather than embroil them in the unseemly struggle that followed. The trial court was justified in considering this breach in setting the petitioner's fee, particularly the trial court's refusal to apply a contingency multiplier. This court made it clear in Standard Guaranty Insurance Co. v. Quanstrom, 555 So.2d 828 (Fla. 1990) that the application of a contingency multiplier is discretionary.

C. THE "WINDFALL" AND "VICTIM" ARGUMENTS

On several occasions, Petitioner claims that Respondents are beneficiaries of a "windfall" and that Petitioner is a "victim." There is thus an implication running throughout petitioner's brief, that Randy and Mindy Poletz are street-wise schemers deliberately trying to avail themselves of an opportunity for a "windfall." Nothing could be further from the truth.

The Poletzes are a young couple who suffered a great tragedy: their first child was rendered a lifetime invalid because of medical negligence at birth. They contacted their local lawyer, who, in turn, referred them to the Searcy firm, one of the state's premiere firms in the area of medical negligence. There, almost 100% of their contact was with Phillip Taylor, a doctor turned lawyer, who did the great bulk of the work on the case. When Mr. Taylor decided to leave the Searcy firm, the Poletzes did what most clients would do: they followed the lawyer who was handling the case. There is nothing sinister, underhanded or devious in this conduct. The Poletzes fully expected to pay a fee to both the Searcy firm and to their new counsel. This court knows that clients bond to individual lawyers -- not to law firms. When a lawyer leaves a firm, it is the client's choice alone whether to remain with the firm or to retain the lawyer who left the firm. Professional Ethics of The Florida Bar, Opinions 69-1, 70-18 and 71-62; Rosenberg v. Levin, 409 So.2d 1016 (Fla. 1982); State ex rel. Branch v. DuVal, 249 So.2d 468 (Fla. 3d DCA 1971); Larson v. Goodman, 604 So.2d 1274

(Fla. 4th DCA 1992) and Chauvet v. Estate of Chauvet, 599 So.2d 740 (Fla. 3d DCA 1992).

Neither the numbers nor the circumstances establish a "windfall" to the Poletzes at Petitioner's expense. The trial court awarded Petitioner $78,195 in attorney's fees and an additional $74,490.79 in costs. (A-1,p.10) The report of the guardian ad litem on attorney's fees recommended that successor counsel, Robert Montgomery, receive a fee of $250,000. (A-6;R-636-37). If the trial court had adopted the guardian ad litem's recommendation, the Poletzes' total fee liability from the $1,000,000 settlement would be $328,195. Mr. Searcy himself testified that a reasonable fee to his firm would lie between $317,000 and $400,000 (T2, 127). Thus, at the time Robert Montgomery graciously waived his claim to a fee, Mr. and Mrs. Poletz were looking at $328,195 in fee liability, and an additional $74,490.79 in costs, for a total of $402,685.79. Under these circumstances, Petitioner cannot so facilely convert Robert Montgomery's act of grace into a windfall for Randy and Mindy Poletz at Petitioner's expense.

Related to the "windfall" argument is the "Taylor stole our case" argument. On page 25 of its brief, Petitioner argues that the Poletzes "obtained an enormous windfall which they would never have received if they had not followed Mr. Taylor's unethical importuning and allowed him to steal their case from the Searcy firm after it had been substantially prepared." Lawyers and law firms do not "own" cases or clients. Rosenberg v. Levin makes this clear. It is a curious logic that first

treats the Poletz case as a piece of property belonging to the Searcy firm, and then accuses the "property" of allowing itself to be "stolen" from the firm that owned it. Mr. and Mrs. Poletz merely did what every client under similar circumstances would do: they followed the lawyer whom they had come to know and trust.

D. THE RESTATEMENT OF THE LAW GOVERNING LAWYERS

On pages 12-19 of its brief, Petitioner quotes at length from the Restatement of the Law Governing Lawyers (Tentative Draft No. 4, April 10, 1991). If the court is inclined to rely upon the Restatement, there are several other provisions the court should consider (quoted from Tentative Draft No. 5, March 16, 1992):

> §45. **A Lawyer's Duties to a Former Client**
>
> (1) Upon termination of a representation, a lawyer shall take reasonable steps to protect a client's interest, such as giving notice to the client of the termination, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee the lawyer has not earned.
>
> (2) A lawyer shall:
>
> (a) Follow requirements stated in other provisions of this Restatement concerning former clients such as those dealing with ... fee collection (§53); ...

Comment b to §45 provides:

Protecting the client's interest when representation ends.

> Especially when a representation ends before a lawyer has completed a matter, its ending poses special problems for a client. Previous counsel must be paid, new counsel must be found, papers and property retrieved or transferred, imminent deadlines extended and tribunals and opposing parties notified to deal with new counsel. Without safeguards, the client may be exposed to harm from opposing parties or from a departing lawyer seeking compensation.
>
> Withdrawing and discharged lawyers must therefore take reasonably appropriate and practicable measures to protect clients when representation terminates. What efforts are appropriate and practicable depends upon the circumstances... The lawyer must advise the client of the implications of termination, assist in finding a new lawyer, and devote reasonable efforts to transferring responsibility for the matter. The lawyer must make the client's property and papers available to the client or the client's new lawyer, except to the extent that the lawyer is entitled to retain them.... Failure to take such steps may give rise to disciplinary sanctions and malpractice liability. In some situations, the lawyer will be considered still to be the client's representative and therefore liable for failing to continue protecting the client's interest.

Comment f to §45 provides:

> After the client-lawyer relationship ends, the lawyer's efforts to collect compensation continue to be governed by the requirements stated in Chapter 3. The lawyer may not use abusive fee-collection methods (§53) ...."

Section #53 of the Restatement (Tentative Draft No. 4, April 10, 1991), provides:

Abusive Fee Collection Methods

> In seeking claimed compensation from a client or former client, a lawyer may not ...harass the client.

Section 49 of the Restatement (Tentative Draft No. 4, April 10, 1991), provides:

> **Forfeiture of a Lawyer's Fee**
>
> A lawyer engaging in clear serious violation of duty to a client may forfeit some or all of the lawyer's compensation for the matter. In determining whether and to what extent forfeiture is appropriate, relevant considerations include the extent of the violation, its willfulness, any threatened or actual harm to the client, and the adequacy of other remedies.

The introductory note to Chapter 3 ("**Client and Lawyer: The Financial and Property Relationship**") of Tentative Draft No. 4 gets to the heart of the problem with the Searcy firm's conduct:

> [These rules] seek to promote the traditional ideal that lawyers should moderate their own interests in order to further the effective representation of their clients, while maintaining the right to compensation essential to the existence of a private bar. [emphasis added].

Our system cannot function without a sense of balance and restraint by the lawyers who make it work. If fee controversies routinely escalate into the relentless pursuit found in this case, we are doomed. The Searcy firm could have protected itself by filing its charging lien and cooperating with successor counsel and the experts, thereby protecting the interests of its former clients, and hastening an award of reasonable compensation to the firm. It is highly likely that if the Searcy firm had

adopted that course, there would have been no need for a contested fee hearing because the clients and attorneys could have worked out a reasonable apportionment of the fee. But the Searcy firm did not choose that course, and now, this young couple, who merely wanted recompense for the injuries to their first child, find themselves still struggling with the Searcy firm in the highest court of the state. What the Restatement identifies as "the traditional ideal that lawyers should moderate their own interests in order to further the effective representation of their clients" is not to be found in this matter.

E. THE ARGUMENT THAT PETITIONER DID 90% OF THE WORK ON THE CASE

Petitioner repeats on several occasions that it did 90% of the work in the Poletz case, and Mr. Montgomery only did 10% of the work. Careful examination of Petitioner's brief reveals that this contention is based entirely on a comparison of hours the Searcy firm invested in the case versus hours Montgomery purportedly[4] invested in the case (Petitioner's brief at page 3, 10, 11, 12, 14, 17 and 25). There is a serious flaw in the

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[4]The method petitioner uses to conclude that Mr. Montgomery only invested 20 hours in the case is suspect. Petitioner explains how it drew this conclusion in footnote 4, page 3 of its brief:

> At one point, Mr. Montgomery testified that he spent much more than 20 hours on the case (T4.194-95). Shortly thereafter, however, he conceded that a fee award of $40,000.00 to him would amount to compensation of $2,000.00 per hour - - which is an admission that he spent 20 hours on the case (T4.219).

A review of the testimony at (T4 194-195; 219) reveals that petitioner's claim that Robert Montgomery only invested 20 hours in the case is tenuous.

Petitioner's logic. Petitioner implores the court to disassociate the calculation of its fee from hours and hourly rates. Instead, Petitioner asks the court to determine the "market price," and then divide the market price between the two law firms "based upon their respective contributions" to the result. So how does Petitioner arrive at a calculation of its "respective contribution to the result?" It does so by the simple expedient of comparing the "reconstructed" hours it invested in the case to the purported hours Robert Montgomery invested in the case. Petitioner mentions no other factor to support its 90% conclusion. The irony is obvious.

In Mashburn v. National Health Card, Inc., 684 F.Supp. 679, 689 (M.D. Ala. 1988), the court quoted the following truism from Hornstein, "Legal Therapeutics: The 'Salvage' Factor in Counsel Fee Awards," 69 Harv.L.Rev. 658 (1956):

> One thousand plodding hours may be far less productive than one imaginative, brilliant hour. A surgeon who skillfully performs an appendectomy in seven minutes is entitled to no smaller fee than one who takes an hour; many a patient would think he is entitled to more.

In the present case, the record contains no evidence that any defendant made any settlement offer while the Searcy firm was handling the case through Phillip Taylor. It would therefore appear that "20" imaginative Robert Montgomery hours may have more value than several hundred "plodding" Phillip Taylor hours. Clearly, when the results are considered, this court cannot

accept Petitioner's facile conclusion that it contributed 90% to the result while Mr. Montgomery only contributed 10%.

F. POLICY CONSIDERATIONS

Petitioner asks this court to adopt a rule of law that would award Petitioner the "market price," less a pro rata share allocated to successor counsel for work Petitioner did not have to do because of the discharge. Petitioner tells us (Petitioner's brief at 11) that the "market price" in the present case is $400,000, and that Petitioner is entitled to 90% of that because Petitioner did 90% of the work. Therefore, Petitioner should receive $360,000, and successor counsel should receive $40,000. Petitioner's real request is that this court discard the quantum meruit rule of Rosenberg v. Levin, 409 So.2d 1016 (Fla. 1982), and resurrect the "contract rule" that Rosenberg v. Levin cast aside. Rosenberg v. Levin describes the contract rule as follows (Id. at 1019):

> The traditional contract rule adopted by a number of jurisdictions holds that an attorney discharged without cause may recover damages for breach of contract under traditional contract principles. The measure of damages is usually the full contract price, although some courts deduct a fair allowance for services and expenses not expended by the discharged attorney in performing the balance of the contract. [emphasis added]

The reason this court rejected the contract rule in favor of quantum meruit is to preserve the right of the client to discharge counsel without undue restriction. If the court were to adopt Petitioner's "market price" theory, which is nothing

more than the "contract rule" in disguise, the court would destroy the major right bestowed by Rosenberg v. Levin: the client's unrestricted freedom to discharge his attorney.

Rosenberg v. Levin relies upon Francasse v. Brent, 6 Cal.3d 784, 494 P.2d 9, 100 Cal. Rptr. 385 (1972), which makes it clear that the quantum meruit rule is intended to be a limitation on the attorney's right to recover. In short, the quantum meruit rule was designed to limit a discharged attorney's recovery to something less than the attorney would have recovered under the "contract rule"/"market price" theory.

Of the various factors mentioned by Rosenberg v. Levin, "time" is by far the easiest to measure. Indeed, that is the sole factor to which Petitioner points in support of its claim that it contributed 90% to the $1 million settlement result. Because of its ease of measurement, time has formed the cornerstone of this court's opinions in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) and Standard Guaranty Insurance Co. v. Quanstrom, 555 So.2d 828 (Fla. 1990). Market hourly rates for various legal services may also be established at any given time with relative ease. To be sure, lawyers who accept contingency fee cases should not necessarily be held to a fee computed strictly on the basis of hours and hourly rates. For that reason, Quanstram allows, but does not require, the application of a multiplier to increase a discharged attorney's fee where the circumstances justify it. This formula is intended as a limitation on the ability of a discharged attorney to recover the full "contract"/"market" price. This is

the price we, as lawyers, must pay to preserve the client's unrestricted freedom to discharge counsel.

The Bar has been operating under Florida Patient's Compensation Fund v. Rowe for almost ten years. Attorneys and judges are familiar with the process and the standards. The application of Rowe/Quanstrom principles to Rosenberg v. Levin guarantees that the client's unrestricted right to choose counsel will not be destroyed. More importantly, this solution maintains and promotes "the traditional ideal that lawyers should moderate their own interests in order to further the effective representation of their clients...." Restatement, supra, Introductory Note to Chapter 3 of Tentative Draft No. 4.

G. THE TRIAL COURT REACHED THE CORRECT RESULT IRRESPECTIVE OF THE LEGAL STANDARD APPLIED

Under Rosenberg v. Levin, supra, the trial court's task was to hear the evidence and award the Searcy firm a reasonable fee based upon the theory of quantum meruit. Although quantum meruit is legal in nature and based upon a theory of implied contract, Florida courts routinely apply equitable principles in deciding such claims. Lance Holding Co. v. Ashe, 533 So.2d 929, 930 n. 2 (Fla. 5th DCA 1988). There, the court applied equitable principles to reverse an award of attorneys fees in favor of a Florida attorney who concealed from his client his prior criminal record and suspension from The Florida Bar. See also, Brownell v. City of St. Petersburg, 38 F.Supp. 1003, 1007 (S.D. Fla. 1941); rev'd on other grounds, 128 F.2d 721 (5th Cir. 1942); and

Sharp v. Bowling, 511 So.2d 363, 365 (Fla. 5th DCA 1987). Thus, the trial court was authorized to apply equitable principles to Petitioner's claim for fees.

In addition to the foregoing authority, because this case involves a minor, the circuit court has inherent jurisdiction and right to protect minors and their property. This authority includes the power to determine whether a contract on behalf of a minor for payment of legal fees is reasonable. Phillips v. Nationwide Mutual Insurance Co., 347 So.2d 465 (Fla. 2d DCA 1977). More recently, the Second District expressly held where a minor is involved, the trial court has the discretion to reduce the attorney's fee if such an action is shown to be in the best interest of the minor. Loper v. Apfelbeck, 541 So.2d 1222 (Fla. 2d DCA 1989).

There is a fee methodology conflict between Rood v. McMakin, 538 So.2d 125 (Fla. 2d DCA 1989) and Resigo v. Weinstein, 523 So.2d 752 (Fla. 2d DCA 1988), on the one hand, and Stabinski, Funt & De Oliveira, P.A. v. Law Offices of Frank H. Alvarez, 490 So.2d 159 (Fla. 3d DCA) review denied, 500 So.2d 545 (Fla. 1986) and Faro v. Romani, 629 So.2d 872 (Fla. 4th DCA 1993) on the other. Nevertheless, the result reached by the trial court in this case should be the same, irrespective of the line of authority applied.

If the trial court were to decide the fee solely under Rosenberg v. Levin, that decision makes it clear that "time" is a major consideration. Id., at 1022. Under Rosenberg v. Levin, the court would be correct to consider the hours expended; to

trim hours that did not advance the cause of the client; to set an hourly rate that is higher than standard hourly fees where remuneration is guaranteed; to reject the application of a contingency enhancement based upon a consideration of the equities of the matter and the fact that a minor is involved; and to arrive at a reasonable fee, as the trial court did in the present case. This result is consistent with Rosenberg v. Levin, this court's leading case on fee awards to discharged counsel in contingent fee cases.

CONCLUSION

The Petitioner's conduct in this matter is disgraceful. It is completely contrary to "the traditional ideal that lawyers should moderate their own interests in order to further the effective representation of their clients." Because the result in this case should be the same irrespective of the line of authority followed by the trial court, this court would be justified in declining jurisdiction. If the court should accept jurisdiction, the court should not resurrect the "contract rule" as urged by Petitioner in the guise of its "market price" theory. Instead, to protect the client's unrestricted freedom to discharge counsel, the court should apply the principles of Rowe and Quanstrom, and grant trial courts discretion to adjust fees upward or downward with multipliers and full or partial forfeitures, depending upon the "totality of the circumstances

surrounding the professional relationship between the attorney and client."

Respectfully submitted,

F. Wallace Pope, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been served upon Christian D. Searcy, Esq., P.O. Drawer 3626, West Palm Beach, Fla. 33402 and Joel D. Eaton, Esq., Podhurst, Orseck, et al., 25 West Flagler Street, Suite 800, Miami, Fla. 33130 by regular U.S. mail, this 28th day of April, 1994.

JOHNSON, BLAKELY, POPE, BOKOR,
RUPPEL & BURNS, P.A.

By: _____
F. WALLACE POPE, JR.
Post Office Box 1368
Clearwater, Florida 34617
(813) 461-1818
Attorneys for Appellees

FLA. BAR #124449

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