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IN THE SUPREME COURT OF FLORIDA

MARY BARNER as guardian and natural parent of JOSEPH BURKES, a minor, and MARY BARNER, individually,

Petitioner

vs.

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

Respondents.

_______________________________/

4th DCA Case No: 93-0303

FLA. SUP. CT. Case No: 83,383

PETITIONER'S BRIEF ON JURISDICTION

On Notice To Invoke Discretionary (Conflict) Jurisdiction to Review Decision of Florida District Court Of Appeal, Fourth District

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PRELIMINARY STATEMENT

The Petitioner is MARY BARNER in her several capacities, individually and as next friend and natural guardian of JOSEPH BURKES, a minor. The Respondent, Lienor below, is SEARCY, DENNEY, SCAROLA, BARNHART & SHIPLEY, P.A. (abbreviated as "SEARCY"). Reference is made to the Record (R) (see Appendix), to the Transcript of Proceedings (T)(R-1 et seq) or to the Appendix with this Brief (APP).

STATEMENT OF THE CASE AND FACTS

This cause began initially as a medical malpractice action, brought by MARY BARNER on behalf of her son, JOSEPH BURKES, a brain damaged baby (T-69), against several health care providers, including Indian River Memorial Hospital. Mary originally retained an attorney named Norman Green (T-73, 78) who then brought her to the Respondent, SEARCY, DENNEY, SCAROLA, BARNHART & SHIPLEY. P.A., which signed her to a non-standard contingency contract providing for a contingency fee of 40% (T-77). After there arose numerous concerns over the adequacy of Respondent's handling Mary replaced it with the services of Robert Montgomery (T-450), under a 40/30/20 contingency contract (T-452). Before Mr. Montgomery became involved in the case there was a settlement offer amounting to 1.75 million dollars (T-295); following his retention, the case eventually settled for $4,237,500.00 (T: 427-429; 446).

At the ensuing hearing which took place on 12/21/92 upon the liens for fees of the several firms involved in her representation, there was testimony offered to show that Respondents' services contributed nothing to the final settlement where, for example, Mr. Montgomery relied upon none of it's work product (T-430) and where, indeed, access to such work product was denied by Respondent (T-430; 418-419). The Trial Court determined that the measure of recovery on Respondent's Lien is controlled in quantum meruit by ***Rosenburg v. Levin***, 409 So.2d 1016 (Fla. 1982) and ***Boyette v. Martha White Foods, Inc.***, 528 So.2d 539 (Fla. 1st DCA), rev. den., 538 So.2d 1255 (Fla. 1988) (T-398). In consequence, based upon what it found to be respondents' hours and customary hourly rate,

the Trial Court awarded Respondent a fee of $100,945.00 (T-398). Mr. Montgomery received a fee of $497,500.00, a figure computed by apply his 20% contingent contract to $2,487,500.00, the net difference between the settlement offer made before his intervention and the final settlement outcome (T-541); (A-1).

SEARCY appealed to the Fourth District Court of Appeal. On 2/16/94 the District Court rendered a decision reversing the Trial Court. It held that the Trial Court erred in relying upon ***Boyette*** which relied, in turn, on ***Florida Patient's Compensation Fund v. Rowe***, 472 So.2d 1145 (Fla. 1985). The Fourth District stated: "Contrary to ***Boyette***, this Court recently held in ***Faro v. Romani***, 629 So.2d 872, (Fla. 4th DCA 1993), that ***Rowe*** does not apply to fee disputes between discharged attorneys and former clients."

On 3/14/94 MARY BARNER filed with the Court Notice of Intent to Seek Discretionary Review In The Supreme Court (A-4).

SUMMARY OF ARGUMENT

The 4th DCA's opinion expressly and directly conflicts with the decision of another Court, ***Boyette v. Martha White Foods, Inc.***, 528 So.2d 539 (Fla. 1st DCA), rev. den., 538 So.2d 1255 (Fla. 1988). See also ***Riesgo v. Weinstein***, 523 So. 2d 752 (Fla. 2d DCA 1988); ***Barton v. McGovern***, 504 So.2d 457 (Fla. 1st DCA 1987). It also conflicts with decisions from this Court, ***Florida Patient's Compensation Fund v. Rowe***, 472 So.2d 1145 (Fla. 1985) and ***Standard Guaranty, Ins. Co. v. Quanstrom***, 555 So.2d 828 (Fla. 1990), where the "Loadstar" Doctrine is applied in quantum meruit to valuation of the fee of an attorney who is discharged from representation.

ARGUMENT

WHETHER THE DISTRICT COURT OF APPEALS' DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS AND OF THIS COURT APPLYING ROWE IN QUANTUM MERUIT VALUATION OF THE FEES OF A DISCHARGED ATTORNEY

MARY BARNER respectfully urges in her several capacities that this Court should exercise it's discretion to accept jurisdiction and allow briefs upon the merits where the Fourth District Court of Appeal's opinion expressly and directly conflicts with the holding and rationale of ***Boyette v. Martha White Foods, Inc.***, 528 So.2d 539 (Fla. 1st DCA), rev. den., 538 So.2d 1255 (Fla. 1988) and, further, where it conflicts with, and declines to follow, one or more decisions of this Court including ***Florida Patient's Compensation Fund v. Rowe***, 472 So.2d 1145 (Fla. 1985), and ***Standard Guaranty Ins. Co. vs. Quanstrom***, 555 So.2d 828 (Fla. 1990).

The test is whether, as here, the Appellate Court has announced a decision on a point of law which, if permitted to stand, would be out of harmony with another Court of Appeal, thereby generating confusion and instability among the precedents; the conflict is such that if the later decision and the earlier decision were rendered by the same Court the former would have the effect of overruling the later. ***Kyle v. Kyle***, 139 So.2d 885, 887 (Fla. 1962). See also ex. ***Mancini v. State***, 312 So.2d 732 (Fla. 1975). The instant opinion is indicative of pronounced confusion among the several District Courts over the proper application of this Court's original decision in ***Rosenburg v. Levin***, 409 So.2d 1016 (Fla. 1982), where a quantum meruit standard was held to apply to the fee entitlement of an

attorney who is discharged by the client and then replaced with successor counsel. ***Rosenburg*** was followed by ***Florida Patient's Compensation Fund v. Rowe***, 472 So.2d 1145 (Fla. 1985), which adopted a "Loadstar" approach in valuation of fees recoverable under statute, such approach later declared to be generally applicable in other fee settings. See ***Standard Guaranty Ins. Co. v. Quanstrom***, 555 So.2d 828 (Fla. 1990). There is now a spectrum of difference among the Districts on the law which is currently to be applied. The Fourth District aligns in ***Faro v. Romani***, 629 So.2d 872 (Fla. 4th DCA 1993), with the Third District in ***Trend Coin Co. v. Fuller, Feingold & Mallah, P.A.***, 538 So.2d 919 (Fla. 3rd DCA 1989), noting in so doing that, "The District Courts are divided over the question of whether ***Rowe*** applies to a claim for reasonable attorney's fees asserted by an attorney against the party contracting with the attorney, as distinguished from a claim for fees against a third party." It certified conflict with ***Riesgo v. Weinstein***, 523 So.2d 752 (Fla. 2nd DCA 1988); ***Boyette v. Martha White Foods, Inc.***, 528 So.2d 539 (Fla. 1st DCA), rev. den. sub. nom. ***Hall v. Boyette***, 538 So.2d 1255 (Fla. 1988); ***Barton v. McGovern***, 504 So.2d 457 (Fla. 1st DCA 1987). The Third and Fourth Districts thus employ as a measure of recovery "percentage completion" based on the original contract of representation; this is in contrast to holdings of the First and Second Districts which follow what this petitioner will respectfully urge as the correct measure of recovery, in line with the Trial Court's ruling, where there is valuation of attorney services utilizing the "Loadstar" method pronounced in ***Rowe*** and ***Standard Guaranty Ins. Co.***, which amount may then be adjusted in light of the circumstances of the withdrawal and of "the totality of the circumstances", as the Court phrased it in ***Rosenberg***. That is, in conformity with ***Boyette***, recovery is normally to be measured on a

"Loadstar" basis without upward adjustment through use of a contingency risk multiplier. Citing ***Riesgo***, the Second District recently certified conflict on this point in ***Searcy, Denney, Scarola, Barnhart & Shipley v. Poletz,*** ____ ***So.2d*** ____, Case No. 93-01000 (Fla. 2nd DCA 3/4/94), 19 FLWD 503 with ***Stabinski, Funte & deOliveria, P.A. v. Law Offices of Frank H. Alvarez***, 490 So.2d 159 (Fla. 3rd DCA 1986), rev. den. 500 So.2d 545. See also ***Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Scheller***, 629 So.2d, 947 (Fla. 4th DCA 1993).

This Court has recognized the sweeping public policy ramifications involved, where it recently directed briefing on the merits in a similar cause now pending before it, ***John H. Faro, Petitioner, versus Robert Romani & Farish & Romani*** Respondents, Case No. 82-725;

In ***Rosenberg***, the Court was intent on striking a balance between what it recognized to be competing concerns involving an attorney's right to adaquate compensation for work performed, on the one hand, and, on the other, the need for client confidence in the integrity and ability of the attorney and, therefore, the need for the client to have the ability to discharge such attorney when confidence is justifiably lost. See ***Rosenberg v. Levin***, Supra at 1019. MARY BARNER will demonstrate, if allowed to proceed, that any semblance of balance is missing in ***Faro*** and related decisions where, as here, a client is subjected to potential fee exposure amounting to as much as the sum total of two or more consecutive contingent fee contracts, 60% and more of the total recovery. Such effect will be shown to chill a client's right to discharge inadequate representation and is a direct implication of public policy interest in fostering attorney-client relationships based upon trust and respect. Mary will show that ***Boyette*** more nearly accords with the holdings and intent

of this Court by preserving such interest while simultaneously protecting the attorney's right to fair compensation, whereas the decision at bar does not.

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