SUPREME COURT OF FLORIDA

CASE NO. 83,383
DISTRICT COURT OF APPEAL,
4TH DISTRICT NO. 93-0303

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

Petitioner,

v.

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

PETITIONERS MAIN BRIEF ON MERITS

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 parties will be referred to as they stood below at the Trial Court. The Petitioner is Mary Barner, individually and in her capacity as guardian and natural parent of Joseph Burkes, a minor. The Respondent was the lienor, Searcy, Denney, Scarola, Barnhart & Shipley, P.A. (henceforth "Searcy"). Reference will be made to the transcript of proceedings (T; at R-1 et seq.) or to the Appendix with this Brief (App).

STATEMENT OF THE CASE AND FACTS

The legal issue in this cause may be simply stated: how is there to be measured the reasonable value of a law firm's services where the firm is discharged by a dissatisfied client and where, as a result, the firm does not complete it's performance in such client's behalf?

The facts are not quite so easily put, for they show what happens when a client's best interests are subordinated by a law firm in deference to it's own. This case started out as a medical malpractice action involving a young mother, Mary Barner, and her four year old son, Joseph Burkes (T-69), who suffered initially from bowel strangulation (T-416). While Joseph was undergoing medical care rendered by defendants, he then suffered brain injury attributed to meningitis and sepsis (T-286). Terrible injury resulted from Defendants' untimely diagnosis (T-290). This child's prospect for a normal life expectancy is now very limited (T-442). The mother originally hired a lawyer whose name was Norman Green; he referred her, in turn, to "Searcy" with whom she signed a non-standard contingency contract on 7/18/89 which provided for a 40% contingency fee (T-77).

This was her first exposure to attorneys (T-70) and the experience was not a happy one. Though a medical malpractice case of this sort needs to be prosecuted expeditiously (T-224) it was another 13 months from the date the contract was signed before "Searcy" finished the initial process of gathering records (T-285). No depositions were ever taken (T-420). By November, 1990, the case had grown stale and the attorneys and defendants had lost interest (T: 437-438). The statute of limitations ran out and it was

necessary that it be extended (T:448-449). There is little to indicate that "Searcy" made effort to keep in touch with her about the progress of her son's case (T-229).

Almost another year went by before there took place a Mediation proceeding in October, 1991; such Mediation ended in an impasse where the emergency room physicians offered nothing and the hospital was unwilling to offer more than 1.75 million dollars, against a demand that the hospital pay 3.75 million dollars, in addition to payment of one million dollars in insurance coverage available to the ER doctors (T-294-295). A second meeting was scheduled but there was little or no likelihood that any settlement would have resulted in consequence (T:423-424).

A "Searcy" associate, Philip Taylor, was detailed to assist with day to day activity in the case (T:284, 287). Shortly after the mediation he resigned from the firm, effective November 21, 1991 (T-296). Eventually after a contretemps with his former employer, he brought Ms. Barner to another attorney, Robert Montgomery of Montgomery & Larmoyeux, P.A., with whom she signed a standard 40/30/20 contingency fee contract and she then discharged "Searcy" from further representation (T-308, 414, 464).

When Montgomery became involved he had to do so "from scratch" (T-450); he was not permitted access to "Searcy's" file (T-430), and requests for information were greeted with refusal (T: 418-419). Montgomery was able to place no reliance on it's "work product", having to use different experts (T-430) where "Searcy" told it's experts not to work with him (T-431). Joseph's percarious health made it important to Montgomery that the case settle quickly (T-421). His initial objective was to thus secure for Joseph the one million dollar policy limits of the ER doctors with attention to be refocused thereafter on

the deep pocket hospital Defendant (T-424). The doctors were therefore given a one-time only opportunity to settle within 30 days and did so (T:427-429). Mediation proceedings against the hospital were reinstated (T-443) and it was made clear to the hospital that the case settle then, failing which it would go to trial (T-444). The hospital did settle, for $3,237,500.00 (T-446).

Subsequently, on 12/21/92 there took place a hearing on "Searcy's" lien for fees. The Trial Court determined that the measure of recovery on "Searcy'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 (Fla. 1st DCA), rev. den., 538 So.2d 1255 (Fla. 1988) (T-398). Based upon the hours claimed by "Searcy", multiplied by it's customary hourly rate, the Trial Court awarded a fee of $100,945.00 (T-398).

Mr. Montgomery was awarded a fee of $497,500.00, a figure computed by applying 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-542).

"Searcy" appealed the Trial Court's ruling to the 4th District. While such appeal was then pending, the 4th District issued a decision in Faro v. Romani, 629 So.2d 872 (Fla. 4th DCA 1993), through which it expressed disagreement with Boyette, certifying conflict. Faro was deemed controlling in the instant proceeding and the 4th District Court thus reversed, upon direction to the trial court that it's award was to be based only upon Rosenburg v. Levin, supra (A-6). This court then accepted conflict jurisdiction (A-7).

SUMMARY OF THE ARGUMENT

Where there is currently a split among the Districts over how there is to be applied this court's decision involving compensation of discharged attorneys in Rosenburg v. Levin, supra, this court should sustain the holding of the first District in Boyette v. Martha White Foods, Inc., supra, and quash conflicting rulings, including the Fourth District's instant decision. A process of historical evolution is evident upon sequential examination of this Court's various rulings, beginning with Rosenburg, which sought, poorly, to accommodate two conflicting interests represented in predecessor counsels expectation of fair payment and a client's need for confidence in the integrity and ability of such client's attorney. There was subsequently adopted a Loadstar model for valuation of fees in Florida Patient's Compensation Fund v. Rowe, supra, where such model was thought suitable as an objective basis for setting fees. Later, in Standard Guaranty Ins. Co. v. Quanstrom, supra, there was clarification regarding use of the contingency multiplier upon application of a pure Loadstar where the Court recognized that use of a multiplier may or may not be necessary, depending upon whether it's invocation is necessary to advance a legislative or judicial objective. Standard Guaranty is now carried a step farther, in this cause, where it's analysis is applied for the purpose of demonstrating that enhancement of the Loadstar by a contingency multiplier is not required to advance any judicial objective in the case of previously discharged attorneys. Such conclusion is consistent with the First District's holding in Boyette and, more significantly, is in accord with rejection of the multiplier by the United States Supreme Court in City of Burlington v. Dague.

POINTS ON APPEAL

POINT I

WHETHER THE FOURTH DISTRICT ERRED IN AFFIRMING APPLICATION OF ROSENBURG IN VALUATION OF RESPONDENT'S CLAIM FOR FEES, WHERE IT FAILED TO FOLLOW BOYETTE AND ADDITIONALLY FAILED TO GIVE EFFECT TO ROWE AND STANDARD GUARANTEE

ARGUMENT

The instant matter concerns itself with valuation of a law firm's entitlement to attorney's fees when such firm is discharged from representation before performance on it's contingency contract is complete. This is a topic found in related form in two other cases now pending: Faro v. Romani (Case No. 82,725) and Searcy, Denney, Scarola, Barnhart and Shipley, P.A. v. Poletz, (Case No. 83,375). It is additionally one where the District Courts are seen to be deeply divided over whether it is addressed solely through reference to broad perimeters laid out in quantum meruit by Rosenburg v. Levin, 409 So.2d 1016 (Fla. 1983)[1], or in Loadstar context with two subsequent decisions, Florida Patient's

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[1] See Schwartz, Gold & Cohen, P.A. v. Streicher, 549 S.2d 1044 (Fla. 4th DCA 1989); Trend Coin Co. v. Fuller, Finegold & Mallah, P.A., 538 So.2d 919, 922 (Fla. 3rd DCA 1989); Stabinski, Fonte & DeOliveira, P.A. v. Law Offices of Frank H. Alvarez, 490 So.2d 159 (Fla. 3rd DCA), Rev. den. 500 So.2d 545 (Fla. 1986); Faro v. Romani, 629 So.2d 872 (Fla. 4th DCA 1993); Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Barner, 632 So.2d 1071 (Fla. 4th DCA 1994).

Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) and Standard Guaranty Ins. Co. v. Quanstrom, 555 So.2d 828 (Fla. 1990).[2]

The Fourth District held in the cause immediately at hand that Rosenburg alone governs such issue. Respectfully, Mary Barner urges this to be wrong. Such holding does not allow for this court's subsequent development of the Loadstar Doctrine nor is it effective application of public policy.

In Rosenberg v. Levin, supra, there was adopted the modified quantum meruit rule, ". . . which limits recovery to the maximum amount of the contract fee in all premature discharge cases involving both fixed and contingency employment contracts." id. at 1021. Subject to this cap, the trial court was permitted to award a fee based upon consideration of the "totality of the circumstances surrounding the professional relationship" including such factors as time, the recovery sought, the skill demanded, the results obtained and the attorney/client contract id. at 1022.

Several years later, there followed Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145, 472 So.2d 1145 (Fla. 1985) when this Court adopted the Federal Loadstar Approach. That was identified as a two-step process, the first being to determine the number of hours expended in litigation and the second to determine a reasonable hourly rate. id. at 1150. In evaluating these two measures, the trier of fact was to consider all of

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[2] See Barton v. McGovern, 504 So.2d 457 (Fla. 1st DCA 1987); Riesgo v. Weinstein, 523 So.2d 752 (Fla. 2nd DCA 1988); Freedom Savings and Loan Association v. Biltmore Constr. Co., 510 So.2d 1141 (Fla. 2nd DCA 1987); Boyette v. Martha White Foods, Inc., 528 So.2d 539 (Fla. 1st DCA), Rev. den. 538 So.2d 1255 (Fla. 1988); Rood v. McMakin, 538 So.2d 125 (Fla. 2nd DCA 1989); Searcy, Denney, Scarola, Barnhart & Shipley v. Poletz, ____ So.2d _____, Case No. 93-01000 (Fla. 2nd DCA 3/4/94), 19 FLWD 503.

the factors enumerated in disciplinary rule 2-106(b) of the Florida Bar Code of Professional Responsibility (identical factors are set out in the Code of Professional Responsibility -- fn. 6), except for "time and labor required", the "novelty and difficulty of the question involved", and the "results obtained" and "whether the fee is fixed or contingent". id. at 1150-51. The end result was then to be adjusted, or multiplied, on the basis of the contingent nature of the litigation. id. at 1151-52.

With certain specified exceptions, none of which includes Rosenburg's set of facts, Rowe's Loadstar approach was later declared to be the essential point of beginning in all attorney's fee cases, Standard Guaranty Ins. Co. v. Quanstrom, 555 So.2d 828, 833 (Fla. 1990):

> Although we reaffirm our decision in Rowe concerning the Loadstar approach as the basic starting point, we find that the use of the contingency fee multiplier should be modified. For a better understanding, we find it appropriate to place attorney's fee cases into the following categories: (1) Public Policy Enforcement Cases; (2) Tort and Contract Claims; and (3) Family Law, Eminent Domain, and Estate and Trust matters. ***These categories are not intended to be all - inclusive. (e.s.)***

In Standard Guaranty, the issue was whether a contingency fee multiplier must necessarily be utilized when determining the appropriate attorney's fee to be paid to a prevailing insured under Fla. Stat. §627.428. id. at 829. The Court used this decision as a vehicle for setting forth broad guidelines governing use of a contingency fee multiplier. It emphasized that use of a multiplier is to be undertaken with flexibility, there being nothing inherent in the nature of a multiplier as to necessarily make it's use mandatory in all contingency fee arrangements. id. at 835. Ultimately, supra at 833:

> Different types of cases require different criteria to achieve the **legislative or court objective** in authorizing the setting of a reasonable attorney's fee. (e.s.)

The question that Standard Guaranty leaves unanswered, and is actually the point which needs to be addressed here by this court, is whether use of a multiplier is necessary to achieve a "legislative or court objective" in the case of an attorney who is discharged and then replaced by successor counsel. There are two such objectives to be served: first, there is necessity that the attorney who is discharged receive adequate or fair compensation; second, the client should have confidence in the integrity and ability of counsel. See Rosenburg v. Levin, supra at 1019. A multiplier does not promote either interest.

First, it is unnecessary to impose a contingency multiplier to assure that respondent here will be fairly paid. That is the message of Boyette v. Martha White Foods, Inc., 528 So.2d 539 (Fla. 1st DCA), rev. den. 538 So.2d 1255 (1988), relied upon by the trial court and which Mary Barner advances as the proper standard to be applied in this instance. In Boyette the District Court held that Rowe's Loadstar applies in awarding a fee to the discharged attorney based upon time and the hourly rate but that there is to be no enhancement through use of a contingency risk multiplier. Similarly, the United State's Supreme Court now declares that enhancement of attorney's fees above the Loadstar to reflect a contingent fee arrangement is not permitted in awards under environmental fee-shifting statutes: City of Burlington v. Dague, 505 US ____, 120 L Ed2d 449, 112 S.Ct. 2638 (1992). The issue involved there was essentially identical to the one addressed, but not resolved, in Pennsylvania v. Delaware Valley Citizens Counsel for Clear Air, 483 US 711

97 L Ed2d 585, 107 S.Ct. 3078 (1987). id. at Led 2d 454. [3] Respectfully, City of Burlington is submitted to be analogous and persuasive, particularly where this court adopted, ". . . the Federal Loadstar approach (as providing) a suitable foundation for an objective structure (in setting fees)." Florida Patient's Compensation Fund v. Rowe, supra at 1150.

In City of Burlington, the court held that the Loadstar amount in cases involved in Federal fee-shifting statutes may not be enhanced to reflect that the prevailing parties attorneys were retained on a contingency fee basis. id. at 112 S.Ct. at 2643-44. There was involved a Class Action under the Solid Waste Disposal Act, 42 USC Section 6972(e), and the Federal Water Pollution Control Act, 33 USC Section 1365(d). Both of these statutes authorize the court to award attorney fees to a "prevailing party". The District Court enhanced the Loadstar amount by 25%, reasoning that the "risk of not prevailing was substantial" and that but for the opportunity for an enhancement, the class "would have faced substantial difficulty in obtaining counsel of reasonable skill and competence in this complicated field of law". id. at S.Ct. 2640. The Court of Appeals for the Second Circuit affirmed the fee award but the Supreme Court reversed, holding that enhancement for contingency is not permitted under the typical fee-shifting statute.

In so holding, the court reasoned that an attorney's risk in taking a contingency case is the product of two factors: (1) the legal and factual merits of the claim, and (2) the difficulty of establishing those merits. id. at S.Ct. 2641. The second factor is already included in the Loadstar calculations -- a difficult case will necessarily result in a

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[3] For discussion of Pennsylvania, See Standard Guar. Ins. Co. v. Quanstrom, Supra at 831.

higher fee for attorneys, either because more hours are needed to perform the more difficult case, or because the hourly rate of the attorney with the requisite skill and experience will necessarily be higher. id. Therefore, to again take this factor into account in the form of a Loadstar enhancement would amount to "double-counting". The first factor (relative merits) is not considered in calculating the Loadstar, but the court noted strong policy reasons supporting it's exclusion. For example, this factor exists in every claim to some extent, so courts would in effect always be adding a multiplier to a Loadstar calculation in contingent fee cases. Moreover, to reward counsel for taking actions of questionable merit would encourage attorneys to bring non-meritorious claims. id. at S.Ct. 2641-42.

Contingency enhancement was noted by the court to be a feature inherent in the contingent-fee model (since attorneys factor in the particular risks of a case in negotiating their fee and in deciding whether to accept the case). To engraft this feature on to the contrasting Loadstar model was believed to concoct a hybrid scheme that resorts to the contingent-fee model to increase a fee award but not to reduce it; contingency enhancement was thus not viewed as consistent with the court's general rejection of the contingent-fee model for fee awards, and unnecessary to a determination of a reasonable fee. id. at L Ed. 2d 459.

Finally, City of Burlington identified interest in, L Ed.2d 459:

> . . . ready administrability that has underlain our adoption of the Loadstar Approach (op cit) and the related interest in avoiding burdensome satellite litigation. The fee application 'should not result in a second major litigation', (op. cit.).

Contingency fee enhancement was recognized as making the setting of fees more complex

and arbitrary, hence more unpredictable and hence more litigable. id. at L Ed. 2d 459. [4]

While City of Burlington is not on "all fours" where it's discussion takes place in a setting involving fee-shifting statutes, the thinking expressed there about the lack of necessity for invocation of a contingency multiplier as a mechanism for ensuring fair compensation for discharged lawyers is respectfully submitted as fully applicable here. The first objective thus identified for protection by this court in Rosenburg, does not therefore require it's use.

Nor does the second, where there is judicial expression of interest in securing the client's confidence in the integrity and ability of counsel. See Rosenburg v. Levin, supra at 1019. Dealings between client and attorney must be characterized by a sense of absolute fairness and candor. id. The court's philosophy, therefore, is that there is 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. id. Use of a contingency multiplier is seen to be a significant element in Rosenburg, which allows the discharged attorney to recover up to the limits of, ". . . the maximum amount of the "contingency" contract fee . . ." id. at 1021. Rosenburg is thus essentially a "contingent fee model" of the sort identified in contrast to a "Loadstar model", by City of Burlington. This means that, based upon Rosenburg, there is potential ability of the discharged attorney

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[4] It is probably worth noting on this point that even as the lawyers were battling in trial court over the amount of their fees to be taken from his recovery, little Joseph was back in the hospital, his condition worsening (T-446) -- the poignancy of the images this brings to mind adds no luster to the reputation of the legal profession.

to recover the entire sum of the contingency or, in this instance, 40% of the recovery, so that by the time Mary Barner were to finish paying "Searcy" it's 40% and Mr. Montgomery his 20%, 60% of the recovery would be gone. Respondent will no doubt argue that such a result may not necessarily follow where the contingency contract is only one factor to be considered by the trial court. But where the process is, ". . . more complex and arbitrary, hence more unpredictable . . ..", City of Burlington v. Dague, supra at L Ed. 2d 459, a prudent client must nevertheless recognize there to be possibility that a severe economic penalty may be exacted as the price of changing lawyers. There cannot, under Rosenburg, be ruled out the chance that a client may end up paying a sum approaching or equaling what is provided in both contingent contracts together; imagine what might be left of the recovery, here, were Mr. Montgomery's contract, like Searcy's, to provide for a fee equivalent to 40%. The mere chance that such a prospect might occur, or the uncertainty which must cloud any effort to forecast the trial court ruling, must inevitably chill a client's decision to switch, precisely what the Rosenburg court expressed fear of. See id. at 1021.

Hence, the second judicial policy identified in Rosenburg, preserving a client's confidence, does not require use of a contingency multiplier either. Indeed, Rosenburg accommodates such interest poorly, as seen above, since its compromise was deemed necessary in balancing that against the competing interest of ensuring fair payment for predecessor counsel. But application of a pure Loadstar, based upon reasonable hours, multiplied by a reasonable rate, provides that fair compensation while at the same time making it easier for the client to reliably weigh the cost of going to another attorney, thereby eliminating the uncertainty and doubt which must otherwise cast a pall on any

decision to find a more satisfactory representative.

In sum, where there is currently a split among the Districts over how there is to be applied this courts decision involving compensation of discharged attorneys in Rosenburg v. Levin, supra, this court should sustain the holding of the first District in Boyette v. Martha White Foods, Inc., supra, and quash conflicting rulings, including the Fourth District's instant decision. A process of historical evolution is evident upon sequential examination of this Court's various rulings, beginning with Rosenburg, which sought, poorly, to accommodate two conflicting interests represented in predecessor counsels expectation of fair payment and a client's need for confidence in the integrity and ability of such client's attorney. There was subsequently adopted a Loadstar model for valuation of fees in Florida Patient's Compensation Fund v. Rowe, supra, where such model was thought suitable as an objective basis for setting fees. Later, in Standard Guaranty Ins. Co. v. Quanstrom, supra, there was clarification regarding use of the contingency multiplier upon application of a pure Loadstar where the Court recognized that use of a multiplier may or may not be necessary, depending upon whether it's invocation is necessary to advance a legislative or judicial objective. Standard Guaranty is now carried a step farther, in this cause, where it's analysis is applied for the purpose of demonstrating that enhancement of the Loadstar by a contingency multiplier is not required to advance any judicial objective in the case of previously discharged attorneys. Such conclusion is consistent with the First District's holding in Boyette and, more significantly, is in accord with rejection of the multiplier by the United States Supreme Court in City of Burlington v. Dague.

CONCLUSION

It is respectfully submitted that the District Court's decision should be quashed. The District Court should be directed to reinstate the judgement of the trial court which found respondent to be entitled to an award of reasonable attorneys fees based upon the Loadstar, without application of a "contingency risk multiplier".

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing has been furnished by U.S. Mail on this 6th day of July, 1994, to Robert M. Montgomery, Jr., Esquire, Post Office Drawer 3086, West Palm Beach, Florida 33402, John W. Mauro, Esquire, 888 S.E. 3rd Ave., Suite 301, Ft. Lauderdale, Florida 33316, Joel D. Eaton, Esquire, 25 West Flagler Street, Suite 800, Miami, Florida 33130, SEARCY, DENNEY, SCAROLA, BARNHART & SHIPLEY, P.A., Post Office Box 3626, West Palm Beach, FL 33402.

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APPENDIX

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