IN THE SUPREME COURT OF FLORIDA

BASIL E. DALACK,

Petitioner,

v. CASE NO. 90,321

U.S. BLOCK CORPORATION and
WALTER R. SJOGREN, SR.,

Respondents.
_____/

U.S. BLOCK COPRORATION and
WALTER R. SJOGREN, SR.,

Petitioners,

v. CASE NO. 90,426

BASIL E. DALACK,

Respondent
_____/

INITIAL BRIEF OF BASIL E. DALACK PURSUANT TO A CERTIFIED QUESTION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

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STATEMENT OF THE CASE AND OF THE FACTS

This is a consolidated proceeding in which two petitioners seek review of different aspects of a March 12, 1997, decision of the District Court of Appeal, Fourth District.

Case No. 90,321 is a petition by Basil E. Dalack (appellate counsel for William Bell and Thomas Lagano, who were two of the Sellers in a transaction described later in this brief, and who, because they have no financial interest in the outcome of this consolidated proceeding, have been omitted from its caption), on authority of Article V, §3(b)(4), Florida Constitution, and Florida Appellate Rule 9.030(a)(2)(A)(v), for review pursuant to the certification that the following question, which the March 12, 1997, decision passed on, is one of great public importance: "Is a contingency risk multiplier inapplicable to a court awarded attorney's fee where the only authority for fees is predicated on a contractual provision and not a statute?"

In Case No. 90,426, U.S. Block Corporation and Walter R. Sjogren, Sr. (who were the Buyers in the transaction with the Sellers), the respondents in Case No. 90,321, invoke the conflict jurisdiction of this Court for review of the March 12, 1997, decision's holding that, under the facts of this case, a motion for review under Florida Appellate Rule 9.400(c) was the sole means by which they could obtain review of the circuit court judgment that awarded Dalack appellate

attorney's fees, payment of which was the joint and several responsibility of the Buyers.

Because the record on appeal is unpaginated, a paginated appendix is being submitted with this brief for the convenience of the Court. All record references are to that appendix.

The essential facts forming the background of the current proceeding are set forth in *U.S.B. Acquisiton Co., Inc. v. Stamm*, 660 So. 2d 1075 (Fla. 4th DCA 1995)(Case No. 92-3138). In February 1987, Allen Stamm, William Bell, and Thomas Lagano, as Sellers, entered into an asset purchase agreement with the Buyers. Difficulties arising thereafter led to a jury trial and a verdict against the Sellers for almost a million dollars. On motion by the Sellers, the trial court reduced the verdict by $800,000. The Buyers appealed from the ensuing judgment, and the Sellers cross-appealed. In August 1995 the Fourth District affirmed the $800,000 verdict reduction and ordered a further reduction of about $150,000. It also directed the trial court to award the Sellers' trial counsel attorney's fees, and it granted the motions of the Sellers' appellate counsel for fees for the services rendered to their clients in Case No. 92-3138.

On October 7, 1996, the Palm Beach County Circuit Court rendered two orders. One, entitled "FINAL JUDGMENT ON ATTORNEY'S FEES" (A 1-3), directed the Buyers to (a) pay Stamm $230,000 for the services his attorneys had rendered

him in this cause, (b) pay Robert L. Saylor $85,000 for the services he had rendered to Lagano in the circuit court, and (c) pay Mary A. Gwynn $42,500 for the services she rendered to Bell in the circuit court. The other, entitled "FINAL JUDGMENT AWARDING APPELLATE ATTORNEY'S FEES" (A 4-6) directed the Buyers to pay Dalack $42,500 for the services he had rendered to Bell and Lagano in Fourth District Case No. 92-3138. It also provided that because of the holding in *Command Credit Corp. v. Mineo*, 664 So. 2d 1123 (Fla. 4th DCA 1995) (a contingency risk multiplier cannot be applied to an attorney's fee that arises from a contract), the circuit court could not apply a contingency risk multiplier to the lodestar award payable to Dalack, even though the criteria for such a multiplier had been met (A 4). (The judgment concerning Gwynn's and Saylor's fees for the circuit court proceedings contained a similar provisison as to their lodestar fees (A 2).)

On November 4, 1997, the Buyers filed in the circuit court a notice of appeal (A 7-15) that sought Fourth District review of the two October 7, 1996, attorney's fees judgments. That appeal was designated as Case No. 96-3695.

On November 6, 1996, Dalack, pursuant to Florida Appellate Rule 9.400(c), filed in Case No. 92-3138 a motion for review of the October 7, 1996, judgment concerning his award of appellate attorney's fees, asking the Fourth District to recede from *Command Credit Corp. v. Mineo* and to

direct the circuit court to apply a contingency risk multiplier to the lodestar award (A 16-18).

On November 14, 1996, Gwynn and Saylor filed a notice of cross-appeal from the October 7, 1996, judgment concerning their trial court attorney's fees (A 19-20). Six days later, the Buyers moved the Fourth District to consolidate Case No. 96-3695 with Case No. 96-3200, which was an appeal by the Buyers from a final judgment in favor of the Sellers that had been entered pursuant to the August 1995 decision of the Fourth District (A 21-23).

On November 21, 1996, the Buyers filed in Case No. 92-3138 a response to Dalack's November 6, 1996, motion for review, contending that (a) the trial court's following of *Command Credit Corp. v. Mineo* was correct, and (b):

> "Further, the Order that is the subject of the Motion for Review of Trial Court Order Awarding Appellate Attorney's Fees has also been filed as part of the appeal in Case No. 96-03695, currently pending before this Court. It is respectfully submitted that by virtue of the filing of the appeal in which the subject Order is part and parcel, the proper mechanism for the movants [sic] would have been through the filing of a timely cross-appeal, which was not done." (A 25.)

The response concluded by asserting that Dalack had committed procedural error in filing his motion for review (A 26).

The Fourth District on December 2, 1996, ordered that Case Nos. 96-3200 and 96-3695 be consolidated (A 27-28).

On December 12, 1996, the court affirmed the order awarding Dalack appellate attorney's fees (A 29), whereupon Dalack moved for reconsideration en banc (A 30-32) and for

certification (A 33), and the Buyers filed a motion (A 34-53) that asked the court to reconsider the December 12th affirmance on the ground that "By ruling on [Dalack's motion for review], this court has arguably mooted a portion of [the Buyers'] appeal in the consolidated matter without benefit of [the Buyers'] even having the opportunity to argue the merits of their appeal." (A 35.) The Buyers contended that the December 2, 1996, order of consolidation resulted in combining the issue inhering in Dalack's attorney's fee judgment (which the Buyers attacked in their November 4, 1996, notice of appeal) with the issues inhering in the other attorney's fee judgment and in the judgment for the Sellers, which the Buyers attacked in Case No. 96-3200. This combining of issues constituted an exception to the Rule 9.400(c) requirement that review of orders awarding appellate attorney's fees be had by motion filed in the underlying appellate proceeding. The Buyers asked the court to consolidate Dalack's motion with the already consolidated Case Nos. 96-3200 and 96-3695 and to review in the trebly consolidated proceedng the judgment that awarded Dalack appellate attorney's fees (A 37).

Dalack's January 13, 1997, response (A 54-56) to the foregoing motion asserted that the order awarding him attorney's fees for the appeal did not involve any issue save those concerning such fees, and so it was not subject to any exception from the requirements of Rule 9.400(c). It went on

to state that the Buyers had not filed a motion comparable to his November 6, 1996, motion and that:

> "to this day, two and a half months after the due date for such a motion, they have done nothing to present this Court with any argument to support any relief they might wish to obtain from this Court.
>
> "For this Court to consolidate this proceeding with the appeals in Case Nos. 96-3200 and 96-3695 would be to permit the Buyers to avoid the rigors of Rule 9.400(c) by giving them several months to present an argument that they are required to present within 30 days of October 7, 1996, and would penalize Dalack for his compliance with the time burden of Rule 9.400(c)." (A 55.)

On March 12, 1997, the Fourth District filed a decision which adhered to *Command Credit* but which certified to this Court the above-quoted question (A 57-59). The decision also held that because the order that awarded Dalack appellate attorney's fees involved nothing but those fees, Rule 9.400(c) required that review be solely pursuant to that rule; the Buyers' notice of appeal for review of that order, which notice the Buyers had not attempted to amend so that it might constitute a motion for review under Rule 9.400(c), did not permit the Buyers to obtain review of the order.

Dalack on March 17, 1997, filed an Extraordinary Motion For Clarification Of Opinion (A 60-67) that called the attention of the Court to a potential conflict between cases holding that the mailing of a judgment does not extend the time for filing a notice of appeal, and footnote five of the decision (which said that although the judgment awarding Dalack appellate attorney's fees had been rendered on October 3, 1996, the November 6, 1996, motion for review was

timely because of "Allowing time for mailing"). Dalack attached to that motion, among other things, a certified copy of the judgment awarding him appellate attorney's fees (A 62-64), which showed a filing date of October 7, 1996. He suggested that clarification of the opinion to reflect the October 7, 1996, filing date would eliminate any potential conflict because mailing would be irrelevant to the question of timeliness.

The Fourth District denied that motion summarily on April 8, 1997 (A 68), and Dalack invoked the discretionary jurisdiction of this Court on April 10, 1997. The Buyers invoked the discretionary jurisdiction of this Court on April 11th, and this Court, sua sponte, consolidated the petitions on May 19th, directing that Dalack file the initial brief on the merits. This brief is being filed pursuant to that direction.

SUMMARY OF ARGUMENT

The Fourth District based its conclusion that a contingency risk multiplier may be applied only to attorney's fees that arise from a statute on misinterpretations of statements of this Court in prior contingency risk decisions.

A contingency risk multiplier serves a social need: that of non-affluent persons to obtain competent representation. This need requires fulfillment regardless of the nature of the authority pursuant to which a court awards a lodestone fee. Therefore, the authority for a fee (statute, equitable

principle, or contract) is irrelevant to the question whether a contingency risk multiplier should be applied in a particular situation.

ARGUMENT

A CONTINGENCY RISK MULTIPLIER APPLIES TO ALL CONTINGENCY FEE SITUATIONS.

I. THE FOURTH DISTRICT COURT OF APPEAL MISINTERPRETED STATEMENTS THIS COURT MADE IN PRIOR DECISIONS INVOLVING CONTINGENCY RISK MULTIPLIERS.

The holding in the decision below that gave rise to the certified question was based on *Command Credit Corp. v. Mineo*, 664 So.2d 1123 (Fla. 4th DCA 1995). Therefore the starting point for resolution of the certified question is examination of the Fourth District's reasoning in *Command Credit*.

The issue in that case, as phrased by the court, was "whether an underlying statute authorizing an attorney's fee must be present in order to apply a contingency multiplier." After recognizing that neither *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985), nor *Standard Guaranty Insurance Co. v. Quanstrom*, 555 So.2d 828 (Fla. 1990), answered the question directly, the Fourth District held that an affirmative answer was inferable from language set forth in those two cases, and from a third source, *Sun Bank v. Ford*, 564 So.2d 1078 (Fla. 1990). That language is set forth earlier in *Command Credit*, as follows:

> "Appellant has a point that language from these cases suggests that a contingency fee multiplier may be applied only where fees to the pre-

vailing party are authorized by statute. *See Quanstrom*, 555 So.2d at 834 ('We emphasize that the criteria and factors utilized [in considering use of a contingency multiplier] in these [contract and tort] cases must be consistent with the purpose of the *fee-authorizing statute or rule*.' (emphasis added)); *Rowe*, 472 So.2d at 1151 ('When the prevailing party's counsel is employed on a contingent fee basis, the trial court must consider a contingency risk factor when awarding *statutorily-directed* reasonable attorney fee.' (emphasis added))."
664 So.2d at 1124.

* * *

"...the *Sun Bank* opinion...states:

> In this case the claimed right to attorney's fees is predicated on being the prevailing party in a suit on a promissory note. It is not and never has been contemplated that a court should utilize a contingent-fee multiplier to calculate a reasonable attorney's fee in such an action. [*Sun Bank*] at 1079."

664 So.2d at 1125.

A. *Sun Bank v. Ford* DOES NOT SUPPORT *Command Credit's CONCLUSION.*

The Fourth District took the words "It is not and never has been contemplated that a court should utilize a contingent-fee multiplier to calculate a reasonable attorney's fee in such an action" to mean that a contingent-fee multiplier cannot be applied to an action in which the authority for an attorney's fee award is a contractual provision. However, examination of the Sun Bank decision shows that this is an incorrect interpretation.

From this Court's opinion and from the extremely short district court opinion *Sun Bank of Ocala v. Ford*, 553 So.2d 368 (Fla. 5th DCA 1989), it appears that Sun Bank prevailed in an action to enforce a promissory note that provided for reasonable attorney's fees to the prevailing party. The a-

greement between the bank and its attorney was a partial contingent fee agreement (neither the Fifth DCA opinion nor this Court's opinion gives any further description of of that agreement). The trial court awarded $150 an hour for the attorney's time, but it rejected a request for a contingency fee multiplier. On appeal from the denial of the application of a multiplier, the Fifth District affirmed on authority of *Head v. Lane*, 541 So.2d 672 (Fla. 4th DCA 1989), which had held that a contingency risk multiplier could not be applied to a fee when the employment agreement did not provide that the attorney would receive a fee only if the client was the prevailing party, but, rather, provided for some assured payment from the client to the attorney regardless of the outcome.

Upon certification of conflict, this Court disapproved the Fifth District's reasoning, but it approved the result. The manner in which it accomplished those things shows that the Fourth District misread *Sun Bank*.

This Court began by stating that in *Lane v. Head*, 566 So.2d 508 (Fla. 1990), it had quashed the Fourth District's *Head v. Lane*, the decision the Fifth District relied on for affirming the denial of a contingency risk multiplier in the partial contingency situation presented to the Fifth District. This Court went on to say that its quashal of the Fifth District's sole authority for affirmance did not require quashal of that affirmance, *because of the facts of*

the case. This Court approved the Fifth District's affirmance because a crucial element for a contingency risk multiplier, difficulty in finding adequate representation, was absent, noting that "We are not aware of any situations where commercial banks have had difficulty finding attorneys to represent them. ...any reluctance generally yields to the reward of gaining other cases and for the business representing a bank engenders." 564 So.2d at 1079.

If the words "It is not and never has been contemplated that a court should utilize a contingent-fee multiplier to calculate a reasonable attorney's fee for an attorney in such an action" meant, as the Fourth District thought they did, that a contingency risk mulitplier could not be applied to a contingency fee in a contract action, then this Court would not have singled out the situation appearing before it (one in which the client encountered no difficulty in obtaining competent representation) for exclusion from a contingency risk multiplier. Instead, this Court would have held that whether the employment agreement was partially contingent or purely contingent was irrelevant since no contingency risk multiplier could be applied in either event, because the action on the promissory note was a contract action, and no multiplier could be applied to a fee arising from such an action. Thus, "such an action", contrary to the Fourth District's interpretation, does not mean "a contract action", but, rather, "an action in which the client had no difficulty

in obtaining adequate representation".

The Fourth District misinterpreted the language of *Sun Bank v. Ford*; that language does not support the *Command Credit* conclusion.

B. *Quanstrom* DOES NOT SUUPORT *Command Credit*'s CONCLUSION.

The Fourth District read the *Quanstrom* words that "We emphasize that the criteria and factors utilized in these cases must be consistent with the purpose of the fee-authorizing statute or rule" to mean that a fee had to arise from a statute to be subject to a multiplier. The Fourth District apparently believed that this Court was using the words "statute" and "rule" as synonyms or equivalents. However, it is more reasonable to conclude that, rather than using "rule", in the foregoing context, as the equivalent of "statute", this Court used "rule" to mean rule or principle of law, such as the rules or principles that form exceptions to the general rule that attorney's fees may not normally be recovered as costs by the prevailing party: a court may award attorney's fees when the prevailing litigant has created or preserved a fund (e.g., *Holley v. City of Naples*, 371 So.2d 501 (Fla. 2d DCA 1979)); when certain equitable principles call for an award of fees (e.g. *Glusman v. Lieberman*, 285 So.2d 29 (Fla. 4th DCA 1973); *Canadian Univ. Ins. Co. v. Employees Sur. Lines Ins. Co.*, 325 So.2d 29, 30 (Fla. 3d DCA 1976); or when a contract provides for fees to the prevailing party (e.g., *Stack v. Lewis*, 641 So.2d 969

(Fla. 1st DCA 1994)).

The Fourth District misinterpreted the language of *Quanstrom*; that language does not support the *Command Credit* conclusion.

C. *Rowe* DOES NOT SUPPORT *Command Credit*'s CONCLUSION.

Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), is the well-spring for Florida contingency risk multipliers. The Fourth District completely overlooked that the well-spring for *Rowe*, *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973) (see 472 So.2d at 1150), involved the application of a contingency risk multiplier to a fee that arose from the creation of a fund--not a fee that arose from a statute. Since the primary basis for this Court's adoption of the contingency risk multiplier was a federal decision that applied a multiplier to a fee in a fund creation case, it was improper for the Fourth District to read *Rowe* as constituting authority for limiting a contingency risk multiplier to a fee that arises from a statute.

II. THE PRIMARY PURPOSE OF THE CONTINGENCY RISK MULTIPLIER IS TO HELP NON-AFFLUENT PERSONS OBTAIN COMPETENT REPRESENTATION. THE AUTHORITY FOR A FEE IS THEREFORE IRRELEVANT TO THE QUESTION WHETHER TO APPLY A MULTIPLIER IN A PARTICULAR CASE.

"The contingency risk factor is significant in personal injury cases. Plaintiffs benefit from the contingent fee system because it provides them with increased access to the court system and the services of attorneys." *Rowe*, 472 So.2d

at 1151. "Attorneys should be encouraged to take cases based on a partial contingebcy fee arrangement, since this policy will also encourage attorneys to provide services to persons who could not afford the customary legal fee." *Lane v. Head*, 566 So.2d 508, 511 (Fla. 1990). "Thc justification for a contingency fee multiplier is that without providing an additional incentive for lawyers to obtain higher fees, clients with legitimate causes of action (or defenses) may not be able to obtain legal services." Id. at 513 (Grimes, J., concurring).

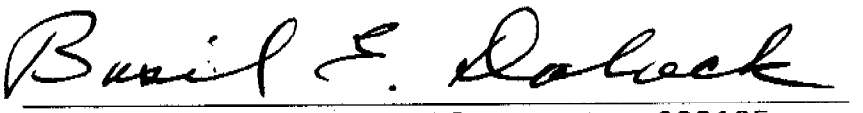
Implementation of this policy cannot be dependent on the nature of the authority for the award of the basic lodestar fee. Just as the Constitution must be color-blind, so must this policy of assuring representation for the non-affluent be source-blind. Accordingly, if the criteria for a contingency risk multiplier are met, it is improper for a court to deny application of a multiplier for the sole reason that the source of the lodestar award is not a statute.

CONCLUSION

For the foregoing reasons, this Court should quash the decision of March 12, 1997, disapprove of *Command Credit Corp. v. Mineo*, and remand this cause with directions for a further remand to the circuit court for reconsideration of the request for application of a contingency risk multiplier.

CERTIFICATE OF SERVICE

I hereby certify that a photocopy of this brief and of the appendix accompanying that brief are being delivered to Marshall J. Osofsky, Esquire, 500 South Australian Avenue, Tenth Floor, West Palm Beach, Florida 33401, this Seventeenth day of July 1997.



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