IN THE SUPREME COURT OF FLORIDA

WILLIAM BELL, et al.,

Petitioner,

v. CASE NO. 90,321

U.S.B. ACQUISITION COMPANY, INC., etc., et al.,

Respondents.
_____/

U.S.B. ACQUISITION COMPANY, INC., etc., et al.,

Petitioners,

v. CASE NO. 90,426

ALLEN G. STAMM, et al.,

Respondent.
_____/

REPLY-ANSWER BRIEF OF PETITIONER-CROSS-RESPONDENT

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STATEMENT OF THE CASE AND OF THE FACTS

The Buyers' statement of the case and of the facts at pages two through seven of their brief is superfluous because nothing there is contradictory to or inconsistent with the statement set forth at pages one through seven of the initial brief, nor does anything there contribute to a better understanding of this proceeding. Accordingly, it is rejected.

As in the initial brief, all record references are to the July 17, 1997, appendix.

It should be noted that the decision sought to be reviewed has been reported as *U.S.B. Acquisition Co., Inc. v. Stamm*, 695 So. 2d 373 (Fla. 4th DCA 1997).

REPLY ARGUMENT

I. THE BUYERS' FAILURE TO RESPOND TO THE ARGUMENT RELATIVE TO THE SOCIETAL PURPOSE OF CONTINGENCY RISK MULTIPLIERS CONSTITUTES AN ADMISSION OF THE VALIDITY OF THAT ARGUMENT.

The initial brief set forth two reasons why contingency risk multipliers apply to all contingency fee situations: first, the Fourth District's holding to the contrary was based on misinterpretation of statements contained in prior decisions of this Court; second, limiting application of contingency risk multipliers to fees arising from statutes contravenes the primary purpose of multipliers, viz., helping non-affluent persons obtain competent representation.

The Buyers' brief fails to present any argument in response to the second reason presented in the initial brief.

That failure is tantamount to an admission of the validity of that second reason, and the Buyers must be deemed to have confessed that that second reason is a correct statement of what the law is or ought to be. See *Magnolia Petroleum Co. v. Ball*, 203 Okl. 514, 223 P. 2d 136, 142 (1950); *Fisher v. Mt. Pleasant Tp. Com. School*, 514 N.E. 2d 626, 628 (Ill. App. 1986).

II. THE BUYERS FAILED TO SHOW THAT THE INITIAL BRIEF'S INTERPRETATION OF Sun Bank IS NOT MORE REASONABLE THAN THE FOURTH DISTRICT'S.

While the Buyers did present an argument in response to the first reason, that response did little more than pay homage to the *Command Credit Corp.* holding. The only attempt at grappling with the initial brief's analysis of the Supreme Court statements that the Fourth District relied on appears at pages 12-13 of the Buyers' brief. At page 12, the Buyers assert that the initial brief took the "position that this Court did not mean what it said in Sun Bank when the Court stated that it is not and never has been contemplated that a multiplier should be used to calculate a fee for attorneys in a *contractual action based upon a promissory note.*" (Emphasis added.) The initial brief took no such position; it took, rather, the position that the *Sun Bank* words "such an action", in the sentence "It is not and never has been contemplated that a court should utilize a contingent-fee mulitplier to calculate a reasonable attorney's fee in such an action" (564 So. 2d 1078, 1079), mean an action in which

the client had no difficulty in obtaining adequate representation, and do not mean a contractual action based on a promissory note. The Buyers have not shown why this interpretation of "such an action" is not more reasonable than the *Command Credit* interpretation.

III. APPLICATION OF CONTINGENCY RISK MULTIPLIERS TO FEES THAT ARISE FROM CONTRACTS DOES NOT CONSTITUTE A REWRITING OF THOSE CONTRACTS.

The only novel approach set forth in the Buyers' brief is the contention at pages 13-14 that the courts would be rewriting contracts if they applied contingency risk multipliers to fees arising from contracts that do not expressly provide for such applicaton. This overlooks the fact that contracts that contain attorney's fee provisions customarily provide for "reasonable attorney's fees". And it is in determining what a reasonable fee is in a particular situation that a court is to take into account the contingent nature of the arrangement between client and lawyer.

At page 14, the Buyers seek comfort from the absence of any legislation providing "for a multiplier in a contractual fee award case", concluding that "it is not the judiciary's role to create such a substantive right." Here again the Buyers have overlooked a crucial fact: the contingency risk multiplier is not a creature of the legislative branch of government; it is a creature of the judicial branch. It is therefore no more significant that no contract provides for a contingency risk multiplier than that no statute provides for

one. The multiplier applies to all contingency situations because such application promotes the societal purpose of helping non-affluent persons obtain competent representation.

ANSWER ARGUMENT

I. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND DECISIONS HOLDING THAT REVIEW OF JUDGMENTS INCLUDING ISSUES OTHER THAN AN AWARD OF APPELLATE ATTORNEY'S FEES MAY BE REVIEWED BY APPEAL AND NOT SOLELY BY MOTION UNDER FLORIDA APPELLATE RULE 9.400(c).

At page 16 of their brief the Buyers assert that:

> "The District Court of Appeal below found in its March 12, 1997 order that the attempt by [the Buyers] to have the appellate attorney's fee motion (sic) reviewed by separate appeal in which additional issues had been raised and which appeal had been filed timely was improper."

This assertion is incorrect. The decision below held that because the judgment that awarded Dalack appellate attorney's fees involved nothing but those fees, Rule 9.400(c) required that review of that judgment be had solely by means of a motion filed pursuant to that rule and that the Buyers could not obtain review by means of a new appeal. Therefore, contrary to the Buyers' position, there is no conflict between that holding and decisions holding that a litigant may obtain review via appeal of a judgment awarding appellate attorney's fees if that judgment also involves other appealable issues.

The attorney's fee judgments of October 7, 1996, were deliberately designed to separate for review the fees they awarded; the appellate fee judgment for Dalack (A 4-6) was

kept separate and distinct from the trial fee awards to Gwynn and to Saylor and from the combined trial and appellate awards for services rendered to Stamm (A 1-3), so that the separate appellate fee award to Dalack would be expeditiously reviewable by Rule 9.400(c) motion. For reasons best known to themselves, the Buyers sought to avoid the expeditious review of the Dalack award by joining in their November 4, 1996, notice of appeal in Case No. 96-3695 (A 7-15) the appellate attorney's fee judgment with the comprehensive attorney's fee judgment. Although they were on notice that the course to follow was set forth in Rule 9.400(c), the Buyers in their November 21, 1996, response to Dalack's November 6, 1996, Rule 9.400(c) motion for review chided Dalack for not seeking review by means of a cross-appeal in Case No. 96-3695: "...It is respectfully submitted that by virtue of the appeal in which the subject Order is part and parcel, the proper mechanism for the movants would have been through the filing of a timely cross-appeal, which was not done." (A 25.) The Buyers' now take the Fourth District to task for refusing to kowtow to their unremitting and overly zealous adherence to a course of conduct which they were on notice was mistaken. This Court ought not allow the Buyers to stand Rule 9.400(c) on its head.

II. ALTHOUGH THERE IS APPARENT CONFLICT BETWEEN THE DECISION BELOW AND DECISIONS INVOLVING FLORIDA APPELLATE RULE 9.420(d), THE RECORD ON APPEAL SHOWS THAT THERE IS NO GENUINE CONFLICT.

In material part, footnote five of the March 12, 1997, decision reads as follows: "The two separate final orders awarding attorney's fees were both entered and mailed on October 3, 1996. Allowing time for mailing, Mr. Dalack's motion for review was timely filed on November 6th." 695 So. 2d at 375.

On March 17, 1996, Dalack filed in the Fourth District a motion (A 60-67) that called to the court's attention "an apparent inconsistency and potential conflict [between the foregoing statement and] decisions holding that Rule 9.420(d) does not apply to final judgments so as to extend the time for filing notices of appeal." (A 61.) Attached to the motion were certified copies of the two judgments in question, which showed a filing date of October 7, 1996, for each (A 62, 65). The motion suggested that "A clarification of footnote five so as to show that the November 6, 1996, motion for review was timely because the order of which it sought review was filed on October 7, 1996, would eliminate any potential conflict." (A 61.)

For some inexplicable reason, the court did not make any clarification.

Clearly, the potential conflict is still there. Equally clearly, there is no genuine conflict because the record on appeal, specifically, the certified copy of the Final Judg-

ment Awarding Appellate Attorney's Fees, shows beyond dispute that that judgment was filed with the clerk of the circuit court (and, therefore, under Rule 9.020(g), rendered) on October 7, 1996, so that the November 6, 1996 motion for review was timely without resort to Rule 9.420(d).

It would benefit the bench and bar for this Court, in its resolution of this proceeding, to make the clarification requested by the March 17th motion.

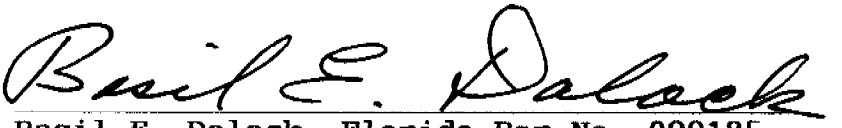
CONCLUSION

For the foregoing reasons and for the reasons set forth in the initial brief, this Court should: (a) answer the certified question in the negative and hold that contingency risk multipliers apply to all contingency fee situations, including those situations where an attorney's fee arises from a contractual provision; (b) overrule or disapprove of *Command Credit Corp. v. Mineo*; (c) quash the decision of March 12, 1997, insofar as its adherence to *Command Credit Corp. v. Mineo* is concerned; (d) approve the Fourth District's holding that, under the facts of this case, the Buyers' failure to abide by the requirements of Rule 9.400(c) precluded them from obtaining review of the October 7, 1996, final judgment awarding appellate attorney's fees; (e) direct the Fourth District to amend the decision of March 12, 1997, by revising footnote five thereof to show that the subject of the November 6, 1996, motion for review was a judgment that was filed with the clerk of the circuit court, and therefore

rendered, on October 7, 1996; and (f) direct the Fourth District to remand the cause with directions that the trial court determine the extent of the contingency risk multiplier appropriate for the appellate services rendered by the undersigned in Case No. 92-3138.

CERTIFICATE OF SERVICE

I hereby certify that a photocopy of this brief is being mailed to Marshall J. Osofsky, Esquire, 500 South Australian Avenue, Tenth Floor, West Palm Beach, Florida 33401, this Sixth day of October 1997.



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