IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

MICHAEL ROHRBACHER,

Petitioner,

CASE NO. SC16-2232
L.T. CASE NO. 5D16-393

v.

GARRISON PROPERTY AND
CASUALTY INSURANCE COMPANY,

Respondent.
_____/

PETITIONER'S BRIEF ON JURISDICTION

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REFERENCE, CITATION TO RECORD, AND EMPHASIS IN BRIEF

Petitioner, Michael Rohrbacher, will be referred to as "Rohrbacher". Respondent, Garrison Property and Casualty Insurance Company, will be referred to as "Garrison." The Appendix filed with this Brief will be cited as [A:(page number)]. All emphasis is supplied by undersigned counsel.

SUMMARY

The Fifth District Court of Appeal quashed the Circuit Court's Order in which the Circuit Court determined that the trial court abused its discretion in denying Rohrbacher a contingency risk multiplier in this first-party insurance litigation. [A:1-3]. The sole reason given by the Fifth District for quashing the Circuit Court's Order and reinstating the trial court's order denying Rohrbacher a contingency fee multiplier was:

> The circuit court correctly stated that Bradford, presented with a **difficult case**, attained an **unlikely success where others had failed**. However, the difficulty of the case alone cannot overcome the presumption against a multiplier. *See State Farm Fla. Ins. Co. v. Alvarez*, 175 So. 3d 352, 358 (Fla. 3d DCA 2015). Furthermore, as we have previously stated, "Our docket, and the dockets of the trial courts in Central Florida, have hundreds, and perhaps thousands, of PIP suits pending at any given time. **It seems that few insureds, if any, have difficulty obtaining competent counsel to represent them**." *Progressive Exp. Ins. Co. v. Schultz*, 948 So. 2d 1027, 1031 (Fla. 5th DCA 2007).

[A:3]

This Court has accepted jurisdiction of *Joyce v. Federated National Ins. Co*. Case No.: SC16-103, on asserted conflict with *Quanstrom v. Standard Guarantee Ins. Co.*, 555 So. 2d 828 (Fla. 1990) and *Bell v. USB Acquisition Co.*, 734 So. 2d 403 (Fla. 1999).

Subsequent to *Joyce*, in the case of *Wagner v. Florida Peninsula Ins. Co.*, SC16-1423, the Petitioner asserted conflict with *Quanstrom* and *Bell*. This Court has stayed all proceedings in the case of *Wagner v. Florida Peninsula Ins. Co.*, SC16-1423, pending disposition of *Joyce v. Federated National Ins. Co*., Case No. SC16-103.

Finally, in *Mone, et al. v. Sawgrass Mutual Ins. Co.*, SC16-1943, the Petitioner asserted conflict with *Quanstrom* and *Bell*. This Court has stayed *Mone* pending disposition of *Joyce v. Federated National Ins. Co*., Case No. SC16-103.

Rohrbacher hereby asks this Court to accept conflict jurisdiction of this case.

STATEMENT OF THE CASE AND FACTS

In the underlying case, Michael Rohrbacher, the plaintiff-insured, filed suit against Garrison for its denial of his PIP coverage, resulting in a confession of judgment and a stipulation to Rohrbacher's entitlement to fees and costs. [A:2]. Prior to retaining Attorney Rutledge Bradford, Rohrbacher had approximately 10 prior attorneys. [A:2]. The Circuit Court agreed that this case was a difficult case, and that Attorney Bradford had obtained an "unlikely success where others had

failed". [A:2]. At the fee hearing, Rohrbacher's fee expert, Attorney Kevin Weiss, testified that he and other attorneys would not have taken Rohrbacher's case without the possibility of a contingency risk multiplier. [A:2-3]. The trial court denied Rohrbacher's request for a fee multiplier.

Rohrbacher appealed to the 18th Judicial Circuit, sitting in its appellate capacity, which reversed the county court's denial and awarded Rohrbacher a multiplier to be determined by the trial court. [A:2]

Garrison thereafter filed a petition for certiorari review in the Fifth District Court of Appeal. The Fifth District granted the petition, quashed the order of the Circuit Court, and reinstated the trial court's order denying Rohrbacher's request for a multiplier. [A:3]. While the Fifth District agreed that Rohrbacher's case was a difficult case, and that Rohrbacher's counsel had obtained an unlikely success, and noted that Rohrbacher's fee expert testified that he nor other attorneys would have taken this case without a fee multiplier, the Fifth District reasoned that "the difficulty of the case alone cannot overcome the presumption against a multiplier." [A:3]. The Fifth District went on to state that "[o]ur docket, and the dockets of the trial courts in Central Florida, have hundreds, and perhaps thousands, of PIP suits pending at any given time. It seems that few insureds, if any, have difficulty obtaining competent counsel to represent them." [A:3].

STANDARD OF REVIEW

Rohrbacher seeks jurisdiction under Fla. R. App. P. 9.030(a)(2)(A)(iv). Because this Court's initial decision to accept this case is based on conflict jurisdiction, it does not review the decision of an underlying court on the merits. Rather, this Court determines, as a matter of law, whether there is conflict between the decisions. The Fifth District's opinion need not identify the conflict to create jurisdiction based on an express and direct conflict. *Ford Motor Co. v. Kikas*, 401 So. 2d 1341, 1342 (Fla. 1982).

ARGUMENT

In this case, the Fifth District's opinion is in direct conflict with controlling caselaw regarding contingency risk multipliers, and impermissibly went beyond the jurisdiction established for certiorari review of Circuit Court opinions. [A:3]. Specifically, the Fifth District's decision conflicts with this Court's decisions in *Rowe*, *Quanstrom* and *Bell* wherein this Court has unambiguously set forth the standard for application of contingency risk multipliers.

I. *Rowe* Established The Lodestar And Contingency Risk Multiplier For Attorney Fee Calculations.

In *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985), this Court adopted a two-step approach to determining an attorney fee award in contingency risk cases.

Step one: determine the reasonable hourly rate(s) and multiply that by the reasonable hours. The shorthand name for this step is calculating the "lodestar."

Id. at 1151. The lodestar was adopted from the federal approach to attorneys' fees awards. *Id.* at 1146. The *Rowe* opinion further explained that the criteria set forth in Disciplinary Rule 2-106(b) of the Florida Bar Code of Professional Responsibility should be utilized to calculate the loadstar. *Id.* at 1150. For example, this Court stated that "the novelty and difficulty of the question involved" should be considered in determining the number of hours reasonably expended. *Id.*

Step two: determine whether to enhance the lodestar by a contingency risk multiplier to account for the risk of nonpayment. *Id.* at 1151. This Court adopted step two from "the decisions of other jurisdictions and commentaries on the subject." *Id.* This Court instructed that after calculating the lodestar, the court "may add or subtract from the fee based upon a 'contingency risk' factor and the 'results obtained.'" *Id.* at 1151. Although courts are precluded from considering the contingent nature of the fee when determining a reasonable hourly rate, this factor should be taken into account when determining whether a multiplier is appropriate. This Court expressly recognized the economic reality that attorneys who work on a contingent fee basis only receive compensation if they prevail, and thus must charge a higher fee than if they had been guaranteed an hourly rate. *Id.*

II. *Quanstrom* Supports The Circuit Court's Finding That Rohrbacher Is Entitled To A Contingency Risk Multiplier.

After *Rowe* was published, the United States Supreme Court issued two opinions which effectively eliminated the use of contingency risk multipliers in

federal cases. In *Standard Guaranty Insurance Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1990), this Court revisited *Rowe* in light of these federal decisions:

> We find it necessary to reexamine our decision in *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985), in view of the recent decisions by the United States Supreme Court in *Blanchard v. Bergeron*, 489 U.S. 87, 109 S. Ct. 939, 103 L. Ed. 2d 67 (1989), and *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 97 L. Ed. 2d 585, 107 S. Ct. 3078 (1987), **which effectively eliminated the use of contingency fee multipliers in computing fees under the lodestar approach**.

Quanstrom, 555 So. 2d at 829.[1] This Court expressly recognized that these federal cases, only allowed multipliers in "very exceptional" and "rare" cases:

> The plurality opinion [in *Delaware Valley*, more commonly known as *Delaware Valley II*] would allow a contingency fee multiplier in **very exceptional cases**. *Id.* at 728, 107 S.Ct. at 3088. Further, the court indicated that in **those rare cases** the multiplier could not exceed one and one-third, *id.* at 730, 107 S.Ct. at 3089, and that "[a]ny additional adjustment would require the most exacting justification." *Id.* **It is evident that the use of the multiplier has been substantially restricted, if not eliminated, by this decision**.

Quanstrom at 832.

After reviewing the federal case law, this Court specifically rejected the federal "rare" and "exceptional" multiplier standard in contingency cases,

[1]*Quanstrom* involved the application of a contingency risk multiplier to a § 627.428, Fla. Stat., attorney fee claim.

including § 627.428 cases.[2] In rejecting the federal multiplier approach, and reaffirming *Rowe*, this Court stated:

> Here, **we reaffirm the principles set forth in *Rowe***, including the code provisions, and find that **the trial court should consider the following factors in determining whether a multiplier is necessary: (1) whether the relevant market requires a contingency fee multiplier to obtain competent counsel; (2) whether the attorney was able to mitigate the risk of nonpayment in any way; and (3) whether any of the factors set forth in *Rowe* are applicable, especially, the amount involved, the results obtained, and the type of fee arrangement between the attorney and his client**. Evidence of these factors must be presented to justify the utilization of a multiplier. **We find that the multiplier is still a useful tool which can assist trial courts in determining a reasonable fee in this category of cases when a risk of nonpayment is established**.

Quanstrom at 834. The *Quanstrom* Court then set forth the multiplier amounts available in fee awards:

> If the trial court determines that success was more likely than not at the outset, it may apply a multiplier of 1 to 1.5; if the trial court determines that the likelihood of success was approximately even at the outset, the trial judge may apply a multiplier of 1.5 to 2.0; and if the trial court determines that success was unlikely at the outset of the case, it may apply a multiplier of 2.0 to 2.5.

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[2] Indeed, *Quanstrom* was not a rare and exceptional case by any stretch of the imagination. It was a PIP dispute over $2,066.04. In *Quanstrom*, a passenger in a car accident was seeking PIP benefits from the host vehicle's insurer. That insurer denied the claim, asserting the passenger owned her own car and therefore was not entitled to the host vehicle's PIP. The passenger claimed that she was entitled to the host vehicle PIP because her vehicle was inoperable. The law was clear: if the passenger's vehicle was inoperable at the time of the crash she was entitled to the host vehicle's PIP. Thus, the entire litigation concerned the question of whether the passenger's vehicle was operable or inoperable at the time of the crash. *Id.* at 829-30.

Id. As if it wasn't clear already that this Court rejected the rare and exceptional standard, the very fact that a 1 to 1.5 multiplier is available if the claimant's likelihood of success was more likely than not at the outset makes it obvious that this Court was not limiting multipliers to rare and exceptional cases.

In *Bell v. U.S.B. Acquisition Co*., 734 So. 2d 403 (Fla. 1999), this Court reiterated the purpose and holding in *Quanstrom*. *Bell* at 407. *Bell* recognized that the U.S. Supreme Court had heavily restricted, if not eliminated, a multiplier as a means of enhancing statutorily authorized fees (*id.*); however, this Court again reaffirmed the use of a contingency risk multiplier in § 627.428 cases. *Id*. at 411. This Court noted "the availability of the multiplier levels the playing field between parties with unequal abilities to secure legal representation." *Id.*

III. In Conflict With *Quanstrom* and *Bell*, The Fifth District Applied the More Restrictive Federal Multiplier Standard in This Case.

It is undisputed, as set forth in the Fifth District's opinion, that this was a difficult case for Rohrbacher. Not only was this a difficult case, but Rohrbacher's counsel obtained an unlikely success where others had failed. And the expert testimony in this case from Attorney Kevin Weiss was that he would not have taken this case without the possibility of a contingency risk multiplier, nor would any other "competent counsel". According to *Quanstrom* and *Bell*, the Circuit Court correctly held that Rohrbacher was entitled to a multiplier.

The Fifth District's "strong presumption" against multipliers is in line only with the federal standard restricting multipliers to "rare" and "exceptional" circumstances, which standard has been expressly rejected by this Court in *Quanstrom* and *Bell*. *See i.e. Joyce v. Federated National Ins. Co*. Case No.: SC16-103; *Mone, et al. v. Sawgrass Mutual Ins. Co.*, SC16-1943. In reversing the Circuit Court in this case, the Fifth District relied on its decision in *Progressive Express Ins. Co. v. Schultz*, 948 So. 2d 1027 (Fla. 5th DCA 2007). In *Schultz*, the Fifth District applied the federal standard regarding multipliers when it stated:

> The federal lodestar approach establishes a "strong presumption" that the lodestar represents the "reasonable fee." *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565, 106 S. Ct. 3088, 92 L. Ed. 2d 439 (1986).

Id. at 1030.

This Court however has rejected the "strong presumption" standard established by the federal courts. *See Quanstrom*, at 833 ("Although we reaffirm our decision in *Rowe* concerning the lodestar approach as the basic starting point, we find that the use of the contingency fee multiplier should be modified."); *see also Bell*, at 408-09 ("Thus, in *Quanstrom* we did not eliminate the consideration of a contingency risk multiplier in contract cases. Instead, we concluded that in tort and contract cases the multiplier is 'a useful tool which can assist trial courts in determining a reasonable fee in this category of cases when a risk of nonpayment

is established,' while emphasizing that 'the criteria and factors utilized in these cases must be consistent with the purpose of the fee-authorizing statute or rule.'").

Whether or not the federal multiplier was adopted by this Court is currently pending before this Court in the cases of *Joyce v. Federated National Ins. Co*. Case No.: SC16-103; *Mone, et al. v. Sawgrass Mutual Ins. Co.*, SC16-1943; and *Wagner v. Florida Peninsula Ins. Co.*, SC16-1423. It is Rohrbacher's position that the Fifth District's reliance on *Schultz*, and application of the federal multiplier standard is in violation of this Court's precedent in *Quanstrom* and *Bell*.

The Fifth District's opinion in this case is not only in conflict with established Florida law, but also effectively denies a contingency risk multiplier in all cases except rare and exceptional circumstances.

CONCLUSION

In conflict with this Court's opinions in *Quanstrom* and *Bell*, the Fifth District as adopted the federal standard with regard to contingency risk multipliers and has held that there is a strong presumption that the lodestar is a reasonable fee which can only be overcome in rare and exceptional circumstances. Based on that wrong standard, the Fifth District reversed the multiplier awarded in this case. It is respectfully requested that this Court accept jurisdiction in this matter.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was filed with the Clerk of the Courts using the Florida Courts E-Filing Portal and that a copy hereof has been furnished to the following recipients via electronic mail: Mr. Douglas Stein, Esquire, Association Law Group, PL, 1200 Brickell Avenue, PH 2000, Miami, FL 33131, at Doug@algpl.com on this 27th day of December, 2016.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY in compliance with 9.100(l), the font used in this Brief is Times New Roman 14-point font.

Respectfully submitted,

s/Chad A. Barr