IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC16-2232

MICHAEL ROHRBACHER

Petitioner,

vs.

GARRISON PROPERTY AND CASUALTY INSURANCE COMPANY,

Respondent.
_____/

RESPONDENT'S RESPONSE TO ORDER DATED NOVEMBER 8, 2017
(With Separate Appendix)

Respondent, Garrison Property and Casualty Insurance Company ("Garrison"), hereby responds to this Court's Order dated November 8, 2017.

INTRODUCTION

This Court has ordered Garrison to show cause why this Court should not accept jurisdiction in this case, summarily quash the decision being reviewed (which is reported at *Garrison Property and Casualty Insurance Co. v. Rohrbacher*, 204 So. 3d 154 (Fla. 5th DCA 2016)), and remand to the district court of appeal for reconsideration in light of the recent decision in *William Joyce, et al. v. Federated National Insurance Company*, No. SC16-103, 2017 WL 46843552

(Fla. Oct. 19, 2017). As Garrison will demonstrate below, this Court should neither accept jurisdiction in this case nor quash the decision being reviewed because there is no conflict with *Joyce*, and the decision being reviewed is in no manner contrary to the holding of *Joyce.*

ARGUMENT

I. THIS COURT SHOULD NOT ACCEPT JURISDICTION BECAUSE THERE IS NO CONFLICT.

A. A Review Of *William Joyce, et al. v. Federated National Insurance Company*, No. SC16-103, 2017 WL 46843552 (Fla. Oct. 19, 2017).

In *Joyce,* this Court accepted jurisdiction on the basis that the decision of the Fifth District conflicted with this Court's previous decision in *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985), and others. The issue in *Joyce* was whether the Fifth District considered the appropriate factors when considering whether a contingency fee multiplier could apply to an attorney's fee that had been awarded pursuant to Florida Statue §627.428.

In *Joyce*, the plaintiffs hired an attorney on a contingency basis to sue their homeowner's insurer who had denied their claim. The plaintiffs prevailed and the parties stipulated that the plaintiffs were entitled to an award of attorney's fees pursuant to §627.428. The trial court then considered the application of a contingency fee multiplier by analyzing the three (3) factors set forth in *Standard*

Guaranty Insurance Co. v. Quanstrom, 555 So. 2d 828 (Fla. 1990): (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. *Id.* at 834.

The trial court conducted a fee hearing at which the plaintiffs' attorney and their expert both testified. *Joyce* at *1. The plaintiffs' attorney testified that she was unaware of any other attorneys in St. Johns County who specialized in representing first-party plaintiffs against insurer companies. She also testified that she took the case with the "hope and expectation" that, should she be successful, she would be awarded a contingency fee multiplier.

The plaintiffs' expert also testified that he was unaware of any other attorneys in St. Johns County who specialized in representing first-party plaintiffs against insurer companies. The expert also testified that a contingency fee multiplier was necessary to obtain competent counsel based on him having "interviewed attorneys that accept claims against insurance companies where claims have been denied."

After the hearing, the trial court applied a 2.0 contingency fee multiplier. *Id.* *2. As to the first *Quanstrom* factor, the trial court determined that there were no other attorneys in the St. Augustine area who undertake this type of work and that the plaintiffs would likely not have found another competent attorney in that area who would have agreed to take the case. As to the second factor, the trial court found that the plaintiffs were unable to mitigate the risk of nonpayment in any way. As to the third factor, the trial court found that the *Rowe* factors were met, including that the case was difficult and involved complex issues.

The defendant appealed. *Id*. *3. The Fifth District affirmed the lodestar amount, but reversed the contingency fee multiplier. Citing to language in *State Farm Florida Insurance Co. v. Alvarez*, 175 So. 3d 352 (Fla. 3d DCA 2015), the Fifth District imposed a standard that a contingency fee multiplier should only be used in "rare" and "exceptional" circumstances. The Fifth District also found that the case was not complex and that the plaintiffs had no trouble finding an attorney to represent them.

On review, this Court first considered the Fifth District's ruling that a contingency fee multiplier should only be used in "rare" and "exceptional" circumstances. This Court traced the history of the use of contingency fee multipliers and concluded that "this Court has never limited the use of contingency

fee multipliers to only 'rare' and 'exceptional' circumstances." *Id*. at *9. This Court rejected the "rare and exceptional circumstances" standard and reconfirmed its holdings in *Rowe* and *Quanstrom*. *Id*. at *11.

This Court then went on to analyze whether a contingency fee multiplier was applicable in the case under review. This Court first determined that the case was a "complex" case. *Id*. at *11.

This Court than considered whether the relevant market necessitated a contingency fee multiplier. This Court reviewed the evidence in the record and relied on two (2) conclusions arising from the evidence. First, the evidence "indicated that there were no other attorneys in St. Johns County who specialized in this type of litigation." *Id*. at *11. Second, "the [plaintiffs'] attorney testified that she took the case with the hope and expectation that if she was successful, the court would apply a contingency fee multiplier, and she would not have taken the case without the possibility of a multiplier . . . " *Id*. at *11.

In its conclusion, this Court reaffirmed the use of contingency fee multipliers, and held that that there is no "rare and exceptional circumstances" requirement before a contingency fee multiplier can apply. *Id*. at *12. This Court quashed the decision of the Fifth District and disapproved of the Third District's decision in *Alvarez* to the extent that it is inconsistent with *Joyce*. *Id*. at *12.

B. <u>This Court Should Not Accept Jurisdiction Because The Fifth District's Decision In The Instant Case Does Not Conflict With *Joyce*.</u>

This Court has jurisdiction to review "any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Art. V, §3(b)(3), Fla. Const. The law has been long-settled by this Court that in order for an opinion of a district court of appeal under review to be in conflict with a previous case, only the facts as recited in the opinion under review may be considered to determine whether there is a conflict:

> As in all petitions seeking this Court's discretionary jurisdiction pursuant to article V, section 3(b)(3), we are confined to consider only those facts contained within the four corners of the district court's majority opinion.

Wells v. State, 132 So. 3d 1110, 1111 (Fla. 2014). *See also*, *Hardee v. State*, 534 So. 2d 706, 708 n. * (Fla. 1988); *Reaves v. State*, 485 So. 2d 829, 830 n. 3 (Fla. 1986).

Additionally, there is no express and direct conflict affording this Court jurisdiction when the facts recited in the opinion of the district court of appeal under review are distinguishable from the facts recited in the opinion with which it is claimed to be in conflict. *See Ortiz v. State*, 963 So. 2d 226 (Fla. 2007); *Gillis v. State*, 959 So. 2d 194 (Fla. 2007); *Robinson v. State*, 770 So. 2d 1167 (Fla. 2000);

Ackers v. State, 614 So. 2d 494, 495 (Fla. 1993); *Department of Revenue v. Johnston*, 442 So. 2d 950 (Fla. 1983). In order to satisfy the requirements of "conflict jurisdiction," the cases claimed to be in conflict must concern "substantially similar factual scenario[s]." *Wallace v. Dean*, 3 So. 3d 1035, 1039 (Fla. 2009). In regard to *Joyce*, the instant case does not satisfy the requirements for conflict jurisdiction.

First, in regard to the issue of the proper standard for determining whether a contingency fee multiplier should apply in any particular case, here the Fifth District did not apply a "rare and exceptional circumstances" requirement. Rather, it expressly applied the standard imposed by *Quanstrom*. *Rohrbacher*, 204 So. 3d at 155. Although the Fifth District did cite to *Alvarez*, it did not do so to impose a "rare and exceptional circumstances" requirement. Rather, it cited to *Alvarez* for the proposition that the difficulty of a case, although a factor to consider, is not alone enough to warrant a contingency fee multiplier. *Id*. at 156.[1]

Second, *Joyce* and the instant case do not concern substantially similar factual scenarios. In fact, they are completely distinguishable.

The facts of the instant case, as contained in the Fifth District's opinion are scant:

[1] In the instant case, the Fifth District confirmed the trial court's acknowledgment that this was a "difficult case." *Id*. at 156.

> The county and circuit court both accepted the undisputed fee hearing testimony that Rohrbacher retained approximately ten lawyers to represent him in his PIP case before hiring Rutledge Bradford, who actually won the case. Neither court expressly found that the prospect of a multiplier was needed to secure competent counsel, or that Bradford even considered the possibility of a multiplier before taking the case. Although a competing expert asserted that he and other attorneys would not have taken the case without a multiplier, competent substantial evidence otherwise supported the finding that Rohrbacher repeatedly obtained counsel without consideration of a multiplier.

Rohrbacher, 204 So. 3d at 155-56.

Thus, the facts recited in the opinion are that:

(1) Rohrbacher was able to find and hire approximately ten (10) different attorneys to represent him in this case;

(2) There is no evidence that Bradford even considered the possibility of a contingency fee multiplier before agreeing to represent Rohrbacher; and

(3) Rohrbacher's expert testified that he would personally not have taken the case without a contingency fee multiplier and that there were other attorneys who also would not have taken the case without a contingency fee multiplier. However, there is no evidence that Rohrbacher's expert spoke with any other attorneys as to

whether they would accept the instant case without the prospect of a multiplier.

Those facts are completely distinguishable from the facts recited in *Joyce*, which are that:

(1) There is no indication whatsoever that the plaintiffs were able to find and hire any, let alone ten (10) different attorneys to represent them in the case;

(2) Unlike the instant case where there was no evidence that Bradford even considered the possibility of a contingency fee multiplier before agreeing to represent Rohrbacher, in *Joyce* the attorney testified that she took the case with the "hope and expectation" that, should she be successful, she would be awarded a contingency fee multiplier.

(3) Unlike the instant case where the expert testified that he personally would not take this case without a contingency fee multiplier, and there were other attorneys who also would not have taken the case without a contingency fee multiplier, (and there is no indication in the opinion upon which that opinion is based), in *Joyce* the expert testified that based on him having "interviewed attorneys

> that accept claims against insurance companies where claims have been denied," he was unaware of "any" other attorneys in St. Johns County who specialized in representing first-party plaintiffs against insurer companies and that a contingency fee multiplier was necessary to obtain competent counsel. Although the fact, as stated in *Joyce*, that no attorney would take the case is relevant to the determination of whether a contingency fee multiplier should apply, the fact, as stated in the instant case, that there were attorneys other than the expert who would also not take the case, does not mandate the finding that no attorney would take the case, and does not even suggest that a contingency fee multiplier was necessary.

There are no facts recited in the Fifth District's instant opinion that even approximate the facts of *Joyce* which this Court determined warranted the application of a contingency fee multiplier. Accordingly, there are no grounds upon which this Court should exercise jurisdiction to review the instant case.

Lastly, but certainly not least, the standard of review for an award of prevailing party attorney fees is abuse of discretion. *Shands Teaching Hosp. & Clinics, Inc. v. Mercury Ins. Co. of Fla.*, 97 So. 3d 204 (Fla. 2012). This includes the application of a contingency fee multiplier. *Sawgrass Mut. Ins. Co. v. Mone*,

201 So. 3d 182, 183 (Fla. 5th DCA 2016). Although in *Joyce* the trial court applied a contingency fee multiplier, and in the instant case the trial court declined to apply a contingency fee multiplier, that difference is irrelevant in regard to determining this Court's jurisdiction. What is extremely relevant, however, is that upon applying the *Quanstrom* factors to the evidence in each case, this Court in *Joyce*, and the Fifth District in the instant case, both affirmed the respective trial courts' application of their discretion.

Thus, there is no conflict between *Joyce* and the instant case. The facts in each case are palpably dissimilar, which itself precludes a conflict, and the trial courts in those cases properly exercised their discretion, based on those facts, to reach their respective rulings. This Court in *Joyce* and the Fifth District in the instant case reached the same holding - - a trial court's determination of whether a contingency fee multiplier should apply, will be upheld when it is based on the application of the *Quanstrom* factors to the substantial competent evidence in the record. There are no grounds upon which this Court should exercise jurisdiction in this case.

II. EVEN IF THIS COURT ACCEPTS JURISDICTION, IT SHOULD NOT QUASH THE FIFTH DISTRICT'S DECISION.

The Fifth District's decision is not contrary to *Joyce*, and is in accord with all applicable law. Upon reviewing the merits of this case, this Court will have received the Record on Appeal. That Record will contain the evidentiary fee hearing and the trial court's Final Judgment wherein it made relevant findings of fact, both of which Garrison has provided to this Court in a separate Appendix ("A.") to this Response.[2]

Various witnesses testified at that hearing regarding the application of a multiplier. First was Michelle Kelson, an attorney who on behalf of Rohrbacher, sent Garrison a pre-suit demand. (A. 32). Ms. Kelson had no discussion with Rohrbacher about the prospects of a contingency fee multiplier. Ms. Kelson ultimately withdrew from representing Rohrbacher. (A. 41).

Second was Rohrbacher who testified that after Garrison declined to pay his claim, he was represented by nine (9) different lawyers who were unable to resolve his claim. (A. 48-61). Rohrbacher described himself as "unbearable" to deal with.

[2]The only *Quanstrom* factor at issue in the instant case is whether the relevant market requires a contingency fee multiplier to obtain competent counsel. On appeal Garrison did not contest that the attorney was unable to mitigate the risk of nonpayment or that the applicable factors set forth in *Rowe* were met.

(A. 48). His ninth lawyer referred him to Bradford, who ultimately resolved his claim against Garrison. (A. 62, 70-71).

Rohrbacher testified that he signed a retainer agreement with each and every of his ten (10) attorneys. He also testified that he was familiar with the concept of a contingency fee multiplier and that none of his ten (10) attorneys ever discussed with him the prospect of obtaining a contingency fee multiplier. (A. 76-77).

Third was Bradford who did not testify at all regarding the application of a multiplier. (A. 81-94).

Fourth was Kevin Weiss, Rohrbacher's expert. Mr. Weiss testified that a contingency fee multiplier of 2.0 to 2.5 was warranted in this case. (A. 108, 121). He would not have accepted the case without the possibility of a contingency fee multiplier, and he did not know of anybody that would. (A. 114-15, 119). Contrary to Rohrbacher's testimony that all of the attorneys he consulted with had signed retainer agreements, Mr. Weiss testified that many attorneys had turned down Mr. Rohrbacher's case. (A. 115, 120). Mr. Weiss also testified that Rohrbacher's case was difficult (A. 116-17) and that Bradford had no way of mitigating the risk of non-payment. (A. 121).

Lastly, Kenneth Hazouri testified as Garrison's expert. Mr. Hazouri testified that no contingency fee multiplier was warranted in this case because Rohrbacher

had no difficulty finding competent counsel in the relevant market to represent him, *i.e.* ten (10) different lawyers represented him. (A. 138-43). Mr. Hazouri testified that there were many competent attorneys who would have, and in fact did take Mr. Rohrbacher's case. (A. 145-46).

After the hearing, the trial court entered a Final Judgment exercising its discretion to decline to apply a contingency fee multiplier. (A. 185-93). The trial court made various factual determinations and expressly found that Rohrbacher had not sustained his burden of proving that the relevant market required the application of a contingency fee multiplier to obtain competent counsel:

> [T]he undisputed evidence established that in some instances, Mr. Rohrbacher himself, not the attorneys, terminated the attorney/client relationship. In those cases, Mr. Rohrbacher successfully retained counsel and could have continued with the attorney/client relationship but for his own decision to terminate the relationship.

(A. 192).

> In the instant case, the evidence was undisputed that Rohrbacher formally and successfully retained 7-9 different law firms to represent him on PIP, bodily injury, and uninsured motorist claims arising out of the subject automobile accident, including the Bradford Cederberg firm. Rohrbacher did not have a discussion about the award of a multiplier with anyone at those law firms before retaining them as his counsel. Rohrbacher had no difficulty retaining counsel without the promise of a multiplier.

(A. 191).

The facts, as determined by the fact finder, *i.e*. the trial court, establish that no contingency fee multiplier was warranted in this case. It is long-settled in this State that the movant for a contingency fee multiplier has the burden of presenting competent substantial evidence that the relevant market requires a contingency fee multiplier to obtain competent counsel:

> Before adjusting for risk assumption, there should be evidence in the record, and the trial court should so find, that without risk-enhancement plaintiff would have faced substantial difficulties in finding counsel in the local or other relevant market.

Sun Bank of Ocala v. Ford, 564 So. 2d 1078, 1079 (Fla. 1990)(quoting *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987)). *See also, State Farm Fire & Cas. Co. v. Palma*, 555 So. 2d 836 (Fla. 1990).

Indeed, that factor is the most important of the *Quanstrom* factors for a trial court to consider:

> [T]he justification for a contingency fee multiplier is that without providing an added incentive for lawyers to obtain higher fees, clients with legitimate causes of action (or defenses) may not be able to obtain legal services. The importance of this policy consideration is highlighted by the fact that the very first factor listed in *Quanstrom* for courts to consider in determining if a multiplier should be utilized in tort and contract cases is whether the relevant market requires a contingency fee multiplier *to obtain competent counsel*."

Bell v. U.S.B. Acquisition Co., 734 So. 2d 403, 411 (Fla. 1999)(citations omitted, italics in original).

Here, Rohrbacher presented no competent evidence that the relevant market required a contingency fee multiplier to obtain competent counsel. On the contrary, the evidence was undisputed that Rohrbacher successfully retained ten (10) different attorneys to represent him throughout this litigation. Moreover, none of those attorneys discussed with Rohrbacher the prospect of a contingency fee multiplier before agreeing to represent him, and none testified that they would not have accepted the case without the prospect of a contingency fee multiplier. This included Bradford who is the attorney on whose behalf Rohrbacher is seeking the contingency fee multiplier. That evidence is in dire contrast to the testimony of the attorney in *Joyce* that she took the case with the "hope and expectation" that, if successful, she would be awarded a contingency fee multiplier.

Additionally, although Mr. Weiss, Rohrbacher's expert, testified that he would not have accepted the case without a contingency fee multiplier, that in no manner excluded the possibility, and the reality, that there were many lawyers who would, and did. Additionally, Mr. Weiss's testimony that he knew of no attorney that would accept the case without the prospect of a contingency fee multiplier is irrelevant in light of the fact established by the evidence that ten (10) attorneys did

accept the case, and there is no evidence that any of them would only have done so if a contingency fee multiplier was a possibility.

Rohrbacher's failure to establish his claim by competent substantial evidence was alone enough for the trial court to deny the requested contingency fee multiplier. However, even if Rohrbacher had submitted the necessary evidence, Garrison presented its expert, Mr. Hazouri, who testified that there were many competent attorneys in the relevant market who would have, and did in fact, take Rohrbacher's case. To the extent that Mr. Hazouri's testimony conflicted with Mr. Weiss's testimony, it certainly was within the province of the trial court, as the finder of fact, to reject Mr. Weiss's opinion, and accept Mr. Hazouri's opinion. *Department of Agric. & Consumer Servs. v. Bogoroff*, 35 So. 3d 84, 88 (Fla. 4th DCA), *rev. denied*, 48 So. 3d 835 (Fla. 2010)("[T]he finder of fact is free to determine the reliability and credibility of expert opinions and if conflicting, to weigh them as the finder sees fit.").

There was no competent evidence that a contingency fee multiplier was necessary to obtain competent counsel in the relevant market. To the contrary, the evidence established that Rohrbacher was able to retain a multitude of attorneys who would, and in fact did, accept his case. The fact that Rohrbacher fired some of those attorneys, and others fired him, because of his difficult nature as a client,

does not change the fact that he had no difficulty finding competent counsel to accept his case without regard to the prospect of a contingency fee multiplier.

Based on the evidence in the Record, it cannot be said that the trial court abused its discretion in declining to apply a contingency fee multiplier. The Fifth District properly quashed the decision of the Circuit Court and re-established the ruling of the trial court.

CONCLUSION

This Court should not accept jurisdiction in this case as there is no conflict with *Joyce* or any other case. If this Court is to determine that it has jurisdiction, the decision of the Fifth District should not be quashed as *Joyce* is totally distinguishable from the instant case and the trial court did not abuse its discretion in declining to apply a contingency fee multiplier.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was sent via e-mail transmission this 14th day of November, 2017 to: Chad A. Barr, Esq., service@chadbarrlaw.com, chad@chadbarrlaw.com, 986 Douglas Avenue, Suite 100, Altamonte Springs, Florida 32714.

By: /s/ Douglas H. Stein
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