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.
_____/

APPENDIX TO PETITIONER'S REPLY TO RESPONDENT'S RESPONSE TO ORDER TO SHOW CAUSE DATED NOVEMBER 8, 2017

CHAD A. BARR, ESQUIRE
Fla. Bar No.: 55365
LAW OFFICE OF CHAD A. BARR, P.A.
986 Douglas Avenue
Suite 100
Altamonte Springs, Florida 32714
Telephone: (407) 599-9036
Facsimile: (407) 960-6247
service@ChadBarrLaw.com
Chad@ChadBarrLaw.com
Paralegal@ChadBarrLaw.com

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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 8th day of December, 2017.

s/Chad A. Barr
Chad A. Barr, Esquire
Fla. Bar No.: 55365
Law Office of Chad A. Barr, P.A.
986 Douglas Avenue
Suite 100
Altamonte Springs, Florida 32714
Telephone: (407) 599-9036
Facsimile: (407) 960-6247
service@ChadBarrLaw.com
Chad@ChadBarrLaw.com
Paralegal@ChadBarrLaw.com

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY, FLORIDA

CASE NO.: 13-39-AP
L.T. CASE NO.: 10-CC-2026-20P-S

MICHAEL ROHRBACHER,

Appellant,

vs.

GARRISON PROPERTY & CASUALTY INSURANCE COMPANY,

Appellee.
_____/

Decision filed December 10, 2015.

Appeal from the County Court
for Seminole County, Florida
Honorable Jerri L. Collins,
County Court Judge.

Billie L. Bellamy, Esquire,
for Appellant

Douglas H. Stein, Esquire,
for Appellee

RECKSIEDLER, J.

The Appellant, Michael Rohrbacher (Rohrbacher), seeks review of the trial court's Final Judgment denying a contingency risk multiplier and costs, as well as reducing the amount of expert witness fees awarded as against Appellee, Garrison Property & Casualty Insurance Company (Garrison).

BACKGROUND

Rohrbacher was involved in a motor vehicle accident in December 2007, in which fault was clearly attributed to the other driver. The night of the accident, Rohrbacher was treated at Centra Care, for which he paid out of his own pocket. He did not receive any additional treatment until six to eight months later, as he was unable to get answers regarding who was responsible for his medical coverage. Thereafter, Garrison obtained three expert peer reviews wherein each physician issued a report that the treatment received by Rohrbacher was not reasonable, related, or necessary as a result of the accident. Based on these reviews, Garrison denied coverage for the entirety of the loss.

At the time of the accident, Rohrbacher had an insurance policy in effect with Garrison, which provided for $10,000 PIP benefits and $50,000 in medical payments benefits. The accident occurred at time when PIP law had sunset in Florida, so there was confusion as to what type of coverage was actually available. Prior to retaining Rutledge Bradford (Bradford), Rohrbacher retained or consulted with at least seven other law firms or attorneys. Rohrbacher did not discuss the potential for a contingency fee multiplier with any of the attorneys he retained prior to Bradford. He eventually conducted his own research into and discussed the issue with Bradford after she had been retained. None of the prior attorneys who were retained were able to make a recovery for Rohrbacher, and some could not even get policy information from Garrison. The case was described by various attorneys as not likely to go away and a "big problem case and a problem client."

In May 2010, Jeff Byrd filed the instant lawsuit, and Bradford subsequently replaced him in representing Rohrbacher. Although aware of the case's difficulty,

Bradford took the case because she believed Rohrbacher was sincere and truly injured, and that he would not get paid unless she helped.

Within ninety (90) days of Bradford's involvement, Garrison made a proposal for settlement in the amount of $1.00. A total of five Civil Remedy Notices were filed on behalf of Rohrbacher through the course of his various attorney representations. On the 59th day after the final Civil Remedy Notice was filed by Bradford, Garrison confessed judgment by paying the maximum amount of PIP and medical benefits, $60,000, plus accrued interest, for a total recovery just under $70,000.

Garrison eventually stipulated to Bradford's entitlement to reasonable attorney's fees and costs. Immediately prior to the hearing on the issue of attorney's fees, Garrison stipulated to the number of hours expended by Bradford and a portion of costs incurred during the litigation portion of the case. The remaining issues to be decided at the hearing were the hourly rates of the attorneys, whether a contingency risk multiplier was applicable, and if so, in what amount, and the amount of taxable costs recoverable, including expert witness fees. At the hearing, the court heard testimony from Rohrbacher, Bradford, Michelle Kelson, Robert Bartels, Kevin Weiss, and Ken Hazouri as to the relevant issues. The qualifications of Kevin Weiss and Ken Hazouri as expert witnesses were stipulated to by both parties.[1]

The trial court issued its Final Judgment on Attorney's Fees and Costs on October 2, 2013, laying out extensive findings of fact, setting the hourly rate for the attorneys and denying the award of a contingency risk multiplier. The court found that, because Plaintiff's counsel was not the prevailing party as to the issue of the contingency risk

[1] Although the parties stipulated as to both Mr. Hazouri and Mr. Weiss as expert witnesses, the testimony indicates that Mr. Weiss' expertise lies primarily in PIP claims as compared to Mr. Hazouri's general civil litigation reputation.

multiplier, counsel was not entitled to additional costs beyond the stipulated amount. The court, additionally, granted expert Kevin Weiss four hours for his preparation and testimony at $400 per hour. On appeal, Rohrbacher's counsel takes issue with the failure to award a multiplier, the court's ruling regarding prevailing parties, and the fees granted for Mr. Weiss's expert testimony.

DISCUSSION

Contingency Multiplier

"[T]he standard of review with respect to the application of a multiplier is one of abuse of discretion." *Holiday v. Nationwide Mut. Fire Ins.*, 864 So. 2d 1215, 1218 (Fla. 5th DCA 2004).

Under *Florida Patient's Comp. Fund v. Rowe*, 472 So. 2d 1145, 1150 (Fla. 1985) *holding modified by Standard Guar. Ins. Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1990), the federal lodestar approach is to be used in determining the amount of an attorney fee award. Such an award must be determined on the facts of each case. *Id.* Once the court arrives at the lodestar figure, it may add or subtract from the fee based upon a "contingency risk" factor and the "results obtained." *Id.* at 1151.

The Florida Supreme Court subsequently modified the *Rowe* decision, specifically in regards to calculation of the contingency risk factor and multiplier in *Standard Guaranty Ins. Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1990). In *Quanstrom*, the Supreme Court stated:

> 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.

Id. at 834 (Fla. 1990). There is a strong presumption that the lodestar amount is sufficient, and a multiplier should be awarded only on the rare occasion where there are other factors not adequately addressed in the lodestar calculation. *Allstate Indem. Co. v. Hicks*, 880 So. 2d 772, 774 (Fla. 5th DCA 2004).

"The 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." *Lane v. Head*, 566 So. 2d 508, 513 (Fla. 1990)(Grimes, J. concurring); *Bell v. U.S.B. Acquisition Co., Inc.*, 734 So. 2d 403, 411 (Fla. 1999). Importantly, "the criteria and factors utilized in these cases must be consistent with the purpose of the fee-authorizing statute or rule." *Quanstrom*, 555 So. 2d at 834. The fee-authorizing statute in the current case is section 627.428, Florida Statutes, the purpose of which is "to discourage the contesting of valid claims against insurance companies and to reimburse successful insureds for their attorney's fees when they are compelled to defend or sue to enforce their insurance contracts." *State Farm Fire & Cas. Co. v. Palma*, 629 So. 2d 830, 833 (Fla. 1993)(quoting *Ins. Co. of N. Am. v. Lexow*, 602 So. 2d 528, 531 (Fla. 1992)).

From the facts presented and outlined in the trial court's final order, it is clear that Garrison was contesting a valid claim such that Rohrbacher was forced to seek counsel in order to enforce the contract, thus making the case at hand directly on point for the stated purpose of § 627.428 and an award of fees. However, the dispute remains as to whether the justification for a multiplier was present, and specifically whether Rohrbacher could have obtained competent legal services without the promise of such a multiplier.

The last two factors under the *Quanstrom* test clearly support the application of a multiplier in this case. Specifically, there does not appear to have been any way for Bradford to have mitigated the risk of non-payment under the second *Quanstrom* factor. This was evident not only from the facts, but additionally from the testimony of the expert witness, Kevin Weiss. Additionally, Bradford was able to achieve the maximum possible results for Rohrbacher, almost $70,000, therefore supporting a multiplier under the third *Quanstrom* factor, referring back to additional *Rowe* factors. Furthermore, the fee arrangement between Bradford and Rohrbacher was a contingency fee arrangement. However, it is the first *Quanstrom* factor—whether the relevant market requires a contingency fee multiplier to obtain competent counsel—that is contested by the parties.

The key case in the Fifth District Court of Appeals in regards to this issue is *Progressive Exp. Ins. Co. v. Schultz*, 948 So. 2d 1027(Fla. 5th DCA 2007). Under *Schultz* the Fifth District Court stated that "it must be proved that but for the multiplier, plaintiff could not have obtained competent counsel in the area." *Id.* at 1030 (citing *Tetrault v. Fairchild,* 799 So.2d 226 (Fla. 5th DCA 2001)). "[W]hether plaintiff's counsel would have taken the case only on that basis is immaterial. The question is whether other competent counsel would have done so." *Id.*

At hearing, Mr. Weiss stated that he personally would not have taken the case without the potential for a multiplier and that he did not know of anyone who would take the case without the ability to obtain a multiplier. However, the expert witness for Garrison, Ken Hazouri, testified that there are a plethora of attorneys in the Central Florida area that will take "a" PIP case, however, Rohrbacher also testified as to having retained seven attorneys prior to his retention of Bradford, and that he had not discussed the potential for a contingency fee multiplier with any of the prior counsel he retained. Based

on the testimony provided, the trial court found that Rohrbacher was clearly able to obtain counsel without the possibility of a multiplier, and therefore did not award one.

Both at trial and on appeal, Bradford, on behalf of Rohrbacher, argues that the ability to retain counsel is not the same as the ability to retain "competent" counsel. The only authority cited is the Oxford dictionary definition of competent as "having the necessary ability, knowledge, or skill to do something successfully." Bradford argues that, although Rohrbacher was able to retain several attorneys prior to her, he was not able to retain an attorney who was able to achieve the results that she achieved. To that end, Mr. Weiss, testified that there are some attorneys who can handle any PIP case, while there are those that can only handle certain types of PIP cases. He further testified that Garrison's decision to settle the claim was likely due in part to the fact that Bradford was a "bulldog" attorney. While this Court does not consider the other attorneys retained by Rohrbacher to be non-competent counsel, the effectiveness of Bradford in accomplishing what seven others could not must be taken into account.

Bradford relies on *State Farm Fire & Cas. Co. v. Palma*, 555 So. 2d 836 (Fla. 1990) in support of the argument that the case was a difficult one wherein Garrison chose to "go to the mat" and not pay any bills, such that a multiplier should be awarded. In *Palma*, the insurance carrier decided to "go to the mat," arguing that the bills in question were not for necessary treatment. *Id.* at 837. The bills in *Palma* were regarding a new diagnostic tool that no court had previously addressed and with potential large scale, long-term effects for insurance companies. *Id.* The novelty of the situation, in addition to the insurance carrier's hard stance, made the case proper for a multiplier. *Id.*

In the current case, there are no novel questions of law or new diagnostic practices or procedures in question, and Mr. Hazouri testified that the presence of a delay in

treatment or peer review is not new or novel in PIP cases. However, the combination of facts in this case are extremely unique. Not only was there a delay in treatment, along with three peer reviews, the attempts at recovery occurred during a time when the status of PIP was not yet determined, with four civil remedy notices filed. Garrison chose to take a hard stand in regard to Rohrbacher's bills, refusing to pay even after receiving four civil remedy notices, and not conceding until after the fifth such notice was filed by attorney Bradford. The total demand was paid as a result of attorney Bradford's actions. Both Mr. Weiss, as well as Michelle Kelson, stated that they would not have given the claim greater than a 50% chance of success of prevailing at the outset, and yet Bradford achieved not only the best possible outcome, but an award that in itself represents a significant sum in PIP litigation.

Although "[t]he novelty and difficulty of the question involved should normally be reflected by the number of hours reasonably expended on the litigation." *Rowe*, 472 So. 2d at 1150 (internal quotations and citations omitted), the circumstances of this case are sufficiently unique that the lodestar rate alone is not adequate, and a multiplier is appropriate in order to encourage attorneys to take such challenges cases.[2]

The trial court abused its discretion in denying an award of a multiplier, based on the specific facts of this case, and the Final Judgment is reversed and remanded as to that issue.

Award of Costs and "Prevailing Party"

[2] Bradford places a good deal of focus in her arguments on Rohrbacher's personality. Although the testimony is clear that he was challenging to work with and that Bradford responded diligently, a client's difficult personality is not a factor to be considered in determining whether a multiplier should be awarded. *See Baratta v. Valley Oak Homeowners' Ass'n at the Vineyards, Inc.*, 928 So. 2d 495, 499 (Fla. 2d DCA 2006)("work that is necessitated by the client's own behavior should more properly be paid by the client than by the opposing party"); *Guthrie v. Guthrie*, 357 So. 2d 247, 248 (Fla. 4th DCA 1978) (same).

Rohrbacher next argues that the trial court incorrectly interpreted the law with regard to "prevailing party," thereby erroneously denying his request for taxable costs. Rohrbacher additionally argues that the court misapplied *State Farm Fire & Cas. Co. v. Palma*, 629 So. 2d 830 (Fla. 1993), where *Palma* referred only to attorney's fees and not costs, thereby improperly denying certain court costs. Garrison, on the other hand, argues that Rohrbacher was not the prevailing party as to the issue of the multiplier and therefore was not entitled to costs. Garrison further argues that the Uniform Guidelines for Taxation of Costs, Fla. R. Civ. P., Appendix II, are merely guidelines and that the trial court did not abuse its discretion in refusing to award costs.

"The Florida Supreme Court has adopted the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions (the Guidelines) to assist courts in determining the type of costs that should (or should not) be awarded to a prevailing party." *Winter Park Imports, Inc. v. JM Family Enterprises, Inc.*, 77 So. 3d 227, 230 (Fla. 5th DCA 2011). "The 'prevailing party' is the party that prevails on the significant issues in the litigation." *Granoff v. Seidle*, 915 So. 2d 674, 677 (Fla. 5th DCA 2005).

"The trial court's determination of which party is the 'prevailing party' is reviewed for an abuse of discretion." *Spring Lake Imp. Dist. v. Tyrrell*, 868 So. 2d 656, 659 (Fla. 2d DCA 2004). However, "[w]here a trial judge fails to apply the correct legal rule . . . the action is erroneous as a matter of law." *Canakaris v. Canakaris*, 382 So. 2d 1197, 1202 (Fla. 1980). The standard of review in such circumstances is *de novo*. *Gilliam v. Smart*, 809 So. 2d 905, 907 (Fla. 1st DCA 2002).

Garrison argues that the significant issue in regard to the hearing and depositions for which Rohrbacher is seeking costs, was the application of a multiplier. In the Final Judgment in this case, the trial court stated: "Since no multiplier is being awarded to the

Plaintiff's counsel, they are not considered the prevailing party on that issue and therefore no additional costs beyond the stipulated costs of $539.00 will be awarded." Based on this language, it appears that the trial court agreed with Garrison, focusing on the events of the fee hearing. However, this improperly fails to take into account the overall litigation, as case law requires. The only issue at litigation in this case was breach of contract by Garrison for failure to pay Rohrbacher under the insurance policy. Garrison's confession of judgment clearly makes Rohrbacher the prevailing party as to the cause of action as well as the prevailing party in regard to Garrison's own affirmative defenses. The ability to collect a multiplier was only a secondary issue in this case.

In *Hall v. Humana Hosp. Daytona Beach*, 733 So. 2d 596, 598 (Fla. 5th DCA 1999), the Fifth District Court indicated that "we decline to indulge in the theoretical possibility that one party could be determined to be 'prevailing' for purposes of an award of attorney fees and the other [party], for an award of costs under the two related statutes. Surely they must be one and the same." Although the parties stipulated only to Rohrbacher's entitlement to fees, not costs, it is unreasonable to now argue that Rohrbacher would have been the prevailing party in regards to only attorney's fees but not for an award of costs as well.

While the trial court did not misinterpret the law in using the prevailing party test, it does appear that the trial court abused its discretion in finding that Rohrbacher was not the prevailing party and therefore not entitled to costs. However, the court's additional conclusion regarding costs must be addressed to determine if remand is necessary.

Beyond its prevailing party statement, the trial court went on to note that "[a]s there are no attorney's fees to be awarded for litigating over the amount of fees to be assessed,

the same holds true for costs incurred litigating over the amount of fees," citing to *Palma*, 629 So. 2d 833.

In *Palma*, the Supreme Court of Florida held that statutory attorney's fees can be awarded for litigation as to entitlement to fees, but not as to the amount of fees. *Id.* As Rohrbacher correctly argues, the court in *Palma* did not address whether its ruling applied to costs. *See generally id.* At hearing, and in the briefs, Garrison did not put forth any argument that the *Palma* ruling should apply to both costs and fees. Rather, Garrison's argument focused solely on "prevailing party" language and the court's discretion in awarding costs. It would appear that the trial court, of its own volition, chose to extend the *Palma* holding.

No authority was found, in the Fifth District Court of Appeals or otherwise, extending *Palma* as the trial court would suggest. Rather, the Fifth District Court has consistently held that, under § 57.041, Fla. Stat., costs are not discretionary and must be awarded to the prevailing party. *Granoff v. Seidle*, 915 So. 2d at 677 ("The trial court has no discretion to deny costs under this statute-the prevailing party must be awarded costs."); *Seminole County v. Koziara*, 881 So. 2d 83, 85 (Fla. 5th DCA 2004)("section 57.041(1) mandates that a party recovering a judgment is entitled, as a matter of right, to recover lawful court costs"); *Oriental Imports, Inc. v. Alilin*, 559 So. 2d 442, 443 (Fla. 5th DCA 1990)("section 57.041 mandates that every party who recovers a judgment in a legal proceeding is entitled as a matter of right to recover lawful court costs and that a trial judge has no discretion under that statute to deny court costs to the party recovering the judgment.").

Based on the current status of the law, the trial court abused its discretion in extending *Palma* to apply to costs, and the Final Judgment as to costs is reversed and remanded as to that issue.

Expert Witness Fees

Finally, Rohrbacher argues that the trial court erred in reducing the award for Mr. Weiss' expert witness fees.

Section 92.231, Florida Statutes states that "[a]ny expert or skilled witness who shall have testified in any cause shall be allowed a witness fee including the cost of any exhibits used by such witness in an amount agreed to by the parties, and the same shall be taxed as costs." § 92.231, Fla. Stat. Rohrbacher argues that the court misapplied the statute in awarding less than the amount agreed to by Rohrbacher and Mr. Weiss.[3] This Court reviews an alleged misapplication of the law *de novo*. *Canakaris*, 382 So. 2d at 1202; *Gilliam v. Smart*, 809 So. 2d at 907.

Rohrbacher's argument as to expert fees requires a reading of § 92.231 wherein "the parties" are defined as the expert and the individual who hired them. Rohrbacher has offered no authority for such a reading, nor was any found. Although not binding authority, Garrison cites to a Federal case, wherein the court notes:

[3] "[W]hen a person is called to testify in any cause if such person is presented and accepted by the court as an expert, the party calling the witness may have an expert witness fee taxed if costs are awarded to that party." *Travieso v. Travieso*, 474 So. 2d 1184, 1185 (Fla. 1985). *Travieso* has subsequently been construed by the Second District Court of Appeals to mean that "the award of such expert fees [is] discretionary only where the testifying attorney expert does not expect to be compensated for that testimony." *Straus v. Morton F. Plant Hosp. Found., Inc.*, 478 So. 2d 472, 473 (Fla. 2d DCA 1985); *Stokus v. Phillips*, 651 So. 2d 1244 (Fla. 2d DCA 1995); *Rock v. Prairie Bldg. Solutions, Inc.*, 854 So. 2d 722 (Fla. 2d DCA 2003). Similarly, the Fifth District Court of Appeals found expert fees to be appropriate, based on *Travieso*, where the record showed that the testifying attorney did not agree to expend his time as a matter of professional courtesy. *Mangel v. Bob Dance Dodge, Inc.*, 739 So. 2d 720, 725 (Fla. 5th DCA 1999). Rohrbacher's entitlement to costs for Mr. Weiss' testimony is therefore clearly established based on the above noted case law, and this Court need only address the amount of the award.

> A definition of 'party' in Black's Law Dictionary, Revised 4th Ed. (1968), which is pertinent to this case, is as follows: "Party' is a technical word, and has a precise meaning in legal parlance. By it is understood he or they by or against whom a legal suit is brought, whether in law or equity; the party plaintiff or defendant, whether composed of one or more individuals, and whether natural or legal persons, (they are parties in the writ, and parties on the record); and all others who may be affected by the suit, indirectly or consequently, are persons interested, but not parties.

Golatte v. Mathews, 394 F. Supp. 1203, 1208 n.5 (M.D. Ala. 1975).

The proper reading of § 92.231 would be as Garrison suggests—the parties referred to are the actual parties at trial, not the individual hiring the expert and the expert himself. Otherwise, as Garrison notes, the hiring party could simply agree to any rate and any number of hours, knowing that the other party will have to pay, should the hiring party prevail.

In setting an award of expert attorney fees, "the same findings should be provided by the court as are required for the award of a party's attorney fees, including the reasonable number of hours expended, the reasonable hourly rate, and any other components which make up any part of the fee." *Stewart & Stevenson Services, Inc. v. Westchester Fire Ins. Co.*, 804 So. 2d 584, 589 (Fla. 5th DCA 2002).

In the Final Judgment, the trial court held that "Plaintiff's expert, Kevin Weiss reasonably expended four hours reviewing the file, preparing and testifying at the fee hearing. A reasonable hourly rate for Mr. Weiss is $400 per hour. Therefore he is entitled to a total expert witness fee of $1600." No additional findings of fact or recounting of the evidence was provided by the trial court.

In the absence of reasoning for a reduction in number of hours and rate awarded, this Court cannot make a determination as to whether there was an abuse of discretion

by the trial court. The issue is therefore remanded for entry of an order setting forth the trial court's specific findings as to the calculation of the expert fee awarded.[4]

REVERSED and REMANDED.

[4] Garrison argues that the trial court's decision was proper as Rohrbacher failed to meet his burden of proof under the Uniform Guidelines for Taxation of Costs. However, absent any reasoning for the trial court's decision, this Court does not address the merits of this argument.