IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO:
5D02-3369

FIFTH DISTRICT CASE NO:5D02-3369

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,

Petitioner,

vs.

PAMELA HOLIDAY and LEONARD SHEALEY,

Respondents.
_____/

PETITIONER NATIONWIDE MUTUAL FIRE INSURANCE COMPANY'S INITIAL BRIEF ON THE MERITS

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PREFACE

In this Brief, the Petitioner NATIONWIDE MUTUAL INSURANCE COMPANY will be referred to as NATIONWIDE. Respondent PAMELA HOLIDAY will be referred to as HOLIDAY. The Respondent LEONARD SHEALEY will be referred to as SHEALEY. The following symbols will be used:

(R) -- Record on Appeal

(A) – Appendix

POINT ON APPEAL

This Court should answer the certified question in the negative and find that a multiplier can not be applied to enhance an attorneys' fee awarded under Florida Statute 627.428 in light of the fact that the legislature has not expressly authorized a fee enhancement in the statute, which must be strictly construed.

STATEMENT OF THE CASE AND FACTS

This appeal arose from attorneys' fees awards rendered in favor of NATIONWIDE'S insureds PAMELA HOLIDAY (HOLIDAY) and LEONARD SHEALEY (SHEALEY) after a jury trial in which the insureds were found to be entitled to recover insurance proceeds after an arson destroyed their home. (A.3, RI.5-6, 7) NATIONWIDE had previously denied coverage for the claim on the grounds that it appeared that SHEALEY may have set the fire and HOLIDAY'S Initial Proof of Loss inflated the value of their respective claims. [1] (A.3)

After the jury returned its verdict on September 28, 2001, both HOLIDAY and SHEALEY filed timely motions for attorneys' fees and costs, pursuant to

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[1] HOLIDAY and SHEALEY owned the home jointly and had been living together as common law husband and wife, along with their two children. (A.3-2) Shortly before the fire, HOLIDAY obtained an injunction against SHEALEY based on her allegations that he had physically and mentally abused her. (A.3-2) SHEALEY left the home escorted by sheriff's deputies, and claimed that he had not been back to the house since that day. (A.3-2) HOLIDAY had told others that she suspected that SHEALEY had in fact returned to the house when she was out and had moved certain things around. (A.3-2) Shortly after the fire, HOLIDAY told a NATIONWIDE investigator that she believed SHEALEY had been at the house before the fire because certain photo albums that she had in her bedroom were missing and SHEALEY called her the day of the fire to ask whether their animals were safe. (A.3-2) On this, the trial court observed, "[t]his was amazing, since at the time he called there was no way he could have known that a fire had occured." (A.3-2) In addition, the fire was started by the ignition of lighter fluid or some other flammable substance and originated on her side of their bed. (A.3-2) SHEALEY was never charged with arson and the fire marshal was never able to determine who started the fire.

Florida Statute 627.428. (RI. 1-2, 3-4) NATIONWIDE did not contest the insureds' entitlement to attorneys' fees and the trial court held several hearings on the issue of the amount of the fees to be awarded. (RI.100-143, 144-171, R2.172-292)

NATIONWIDE contended that HOLIDAY'S counsel's attorneys' fee contract, which was a standard contingency fee agreement, did not contain the requisite language which would permit her counsel to obtain a fee greater than the contingency percentages set forth in the agreement. (RIV.447-448) The initial contract provided, in pertinent part:

> I agree to pay to my attorneys the following fee from the total gross recovery:
>
> (a) 33 1/3% of any recovery up to $1 million prior to filing suit and after suit is filed but before an answer is filed or demand for arbitration is made;
>
> (b) 40% of any recovery up to $1 million after answer is filed or demand for arbitration is made;
>
> . . .
>
> (g) In the event attorneys' fees are recovered pursuant to any state or federal statute, I agree to pay my attorneys the greater of the statutory fee or contingency fee stated above.

(A.1. RIV.447-448) This fee agreement was undated. (A.1, RIV.447-448)

After the verdict was rendered, HOLIDAY and her counsel sought to modify

this fee agreement by signing an entirely new contingency fee contract whereby the agreement was amended to provide, "[i]n the event attorneys' fees are recovered from any adverse party pursuant to any state or federal statute, the attorney fee shall be the greater of the court awarded fee or contingency fee stated above." (A.2, RIV.449-450)

At the hearing of October 1, 2002, the trial court considered arguments on 1) whether the initial fee agreement contained language which would permit the court to award a fee greater than that provided in the contingency fee contract, pursuant to Kaufman v. McDonald, 557 So. 2d 672 (Fla. 1990) and 2) whether the court could award a multiplier to either party based on the evidence presented at the evidentiary hearings of July 1, 2002 and July 29, 2002. (RI.100-143)

On the first issue, the trial court found that the language of HOLIDAY'S first fee agreement, which provided, "(g) In the event attorneys' fees are recovered pursuant to any state or federal statute, I agree to pay my attorneys the greater of the statutory fee or contingency fee stated above," was insufficient to permit the court to award an amount in excess of that set forth in the fee agreement, which was 40% of the gross amount recovered by HOLIDAY. (RIV.452-459, A.3) As to the second fee agreement, which was admittedly executed by the parties after the jury verdict was returned, the trial court found that, pursuant to Florida law, this

attempted modification of the fee agreement to permit an award greater than the fee capped by the first fee agreement, was untimely and ineffective to cure the defective language in the first fee agreement, as having been executed after the contingency had already occurred. (RIV.452-459, A.3) For that reason, the trial court awarded HOLIDAY a fee of 33 1/3% of her gross recovery, or $22,333.[2] (RIV.456)

The trial court further found that LEONARD SHEALEY'S counsel's fee agreement, which did contain the necessary language enabling the court to award a fee greater than that set forth in the contingency agreement, also permitted an award of a multiplier to SHEALEY'S counsel. (RIV.456-459, A.3) After considering the testimony of expert witnesses, the trial court found that SHEALEY'S counsel was entitled to a multiplier of 2.0, even though the evidence did not establish that other attorneys rejected this case before SHEALEY'S counsel accepted it. (RIV.458, A.3) In its order, the Court opined:

> In order to be entitled to a multiplier, there needs to be evidence that the relevant market required a contingent fee multiplier in order to obtain competent counsel. The court finds as a matter of fact, that Ms. Holiday hired the first law firm she contacted, Morgan, Colling and Gilbert, based on an advertisement she saw for the law firm. The case was referred to another lawyer in the firm, who then assigned it to

[2] It would appear that the trial court may have made an error in calculating the fee due as 33 1/3 percent of the gross recovery, instead of 40 percent of the gross recovery since, under the terms of the agreement, once NATIONWIDE answered the Complaint, the fee rose from 33% to 40%.

> Mr. Peters, with the understanding that Mr. Peters could decline to represent her. After Mr. Peters agreed to represent Ms. Holiday, he realized that he could not represent Mr. Shealey, because there would be a conflict of interest. He then telephoned Mr. Schimmelpfennig, who agreed to represent Mr. Shealey. Thus both Ms. Holiday and Mr. Shealey were able to hire the first lawyer they contacted and neither plaintiff had difficulty hiring counsel.
>
> The court did hear testimony from the plaintiff's expert witness that very few attorneys in the greater Orlando area would have taken this case unless they could have received a multiplier and the court is persuaded that his testimony is accurate. The reason is that the likelihood of success and thus obtaining attorney's fee was small. In fact that court is persuaded that both attorneys took the case as a 'flyer' in the hope of 'getting lucky' and recovering a huge fee.
>
> Thus the issue presented to this court is one of first impression. If the plaintiffs are both able to individually hire the first attorneys they contacted, can there be evidence that, but for a multiplier, no attorney in the locality would have agreed to take the case? The court holds that despite the fact that the clients were able to hire the first attorney they saw, a multiplier was a necessary inducement in order for the attorneys to take this case. To hold otherwise would lead to a charade in those cases in which the client hires the first attorney that he sees. If the attorney wanted to recover a bonus, he would have to send the client to other attorneys in the community, so that they could inform the client that they would not take the case.

(RIV.458-459, A.3)

The order on attorneys' fees was rendered on October 14, 2002 and appealed by HOLIDAY on October 24, 2002. (RIV.452-459A.3) NATIONWIDE filed its Notice of Appeal from the trial court's order on November 5, 2002. (RIV.472-481) SHEALEY filed a Notice of Cross-Appeal on November 12, 2002.

(RIV.482-491)

On appeal, the Fifth District Court of Appeal reversed the Holiday fee judgment, remanding the case back to the trial court for the consideration of a multiplier on the Holiday fee, and affirmed the court's award of a multiplier as to the Shealey fee. In doing so, the Court noted:

> This case has caused us to consider whether in light of Sarkis v. Allstate Ins. Co., 863 So. 2d 210 (Fla. 2003), a multiplier should continue to be applicable to fee awards based on fee-shifting statutes.
>
> The Florida Supreme Court's seminal decision in Quanstrom was founded on two then recent decisions of the United States Supreme Court: Blanchard v. Bergeron, 489 U.S. 87 (1989) and Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711 (1987). Since the publication of Quanstrom, the United States Supreme Court has receded from Delaware Valley by its decision in City of Burlington v. Dague, 505 U.S. 557 (1992), in which it held that fee-shifting statutes generally do not permit enhancement of a fee award beyond the lodestar amount to reflect the fact that a party's attorneys were retained on a contingent fee basis.
>
> In Sarkis, our high court made the following observation:
>
> > Through the statutory and rule history of offers of judgment, the use of a multiplier has never been expressly authorized. Neither section 768.79 nor rule 1.442 authorizes the use of a multiplier in determining the amount of attorney fees as a sanction for the rejection of an offer. Applying a strict

> construction of the statute and rule, a multiplier therefore cannot be applied under section 768.79 or rule 1.442, and the trial court's application of a multiplier in this case was error. [citation omitted]
>
> Section 627.428, Florida Statutes (2002), the statute that was the foundation for the award of attorney's fees in the present case, likewise contains no authorization within it for the use of a multiplier. We are, of course, required to adhere to the decisions of the Supreme Court, and our opinion in this case follows the law as we believe it currently exists. Because from the most fundamental perspective, however, we cannot approve a multiplier based on this fee-shifting statute if Sarkis signals a tidal shift in this regard, we certify the following question as one of great public importance:
>
> **IN LIGHT OF THE SUPREME COURT'S DECISION IN SARKIS, MAY A MULTIPLIER BE APPLIED TO ENHANCE AN AWARD OF ATTORNEY'S FEES GRANTED UNDER A FEE-SHIFTING STATUTE SUCH AS SECTION 627.428, FLORIDA STATUTES (2002)?**

Holiday v. Nationwide Mutual Fire Ins. Co., 864 So. 2d 1215, 1220-1221 (Fla. 5th DCA 2004).

NATIONWIDE filed a timely Notice to Invoke this Court's jurisdiction and this Court has ordered the parties to brief the merits of the certified question, but has not formally accepted jurisdiction to consider this case.

SUMMARY OF ARGUMENT

The issue before this Court is whether, in light of this Court's recent decision in Sarkis v. Allstate Ins. Co., 863 So. 2d 210 (Fla. 2003), the time is ripe to revisit application of a multiplier in cases in which the statutory authority for the fee mandates that the prevailing party be awarded a "reasonable" fee, but does not expressly authorize application of a multiplier in determining the fee to be awarded. In this case, the Fifth District Court of Appeal has certified this issue to this Court as a matter of great public importance, requesting that the Court examine the issue in the context of a fee award rendered pursuant to Florida Statute 627.428, which permits a prevailing insured or beneficiary to recover a reasonable fee from an insurance carrier. We submit that there are several reasons why this Court should reconsider its prior decisions finding that multipliers are appropriately awarded under the statute, chief among them its decision in Sarkis.

In Sarkis, this Court found that where statutory authority for attorneys' fees (in that case, the Offer of Judgment statute) does not permit consideration of a multiplier unless the statute expressly contemplates enhancement of a fee beyond that deemed reasonable. This Court determined that because fee statutes are to be strictly construed and the Offer of Judgment statute, Florida Statute 768.79, did not authorize application of a multiplier in determining the fee to be awarded, the

courts had no authority to enhance a fee above and beyond that contemplated by the statutory language. Since Florida Statute 627.428 is clear and unambiguous and does not authorize the application of a multiplier, this Court should find that multipliers may not be awarded in insurance cases.

This is especially true in light of the fact that, unlike certain public policy statutes, Florida Statute 627.428 was never designed to encourage private litigation to vindicate public policy. Rather, the statute was enacted to ensure that claimant's are not at an economic disadvantage and that, as between insurer and insured, the playing field was level. Since insurers may never recover attorneys' fees under the statute, and their counsel is most definitely not entitled to a contingency risk multiplier, permitting insureds to recover a multiplier acts as an economic club, rather than the economic equalizer envisioned by the legislature.

Moreover, the Florida Bar Rules explicitly set forth the factors that a trial court must consider when determining a reasonable fee and this Court, in Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985), determined that these factor established the foundation for the determination of a reasonable court-awarded fee. However, in that case as well as in Standard Guaranty Ins. Co. v. Quanstrom, 555 So. 2d 828 (Fla. 1990), this Court relied on United States Supreme Court cases as authority for imposition of a multiplier in addition to the

factors set forth in the Florida Bar Rules. After Quanstrom issued, the United States Supreme Court issued City of Burlington v. Dague, 505 U.S. 557 (1992) in which the Court disapproved of fee-enhancement in fee-shifting cases. One of the reasons the Supreme Court disapproved of fee enhancement in fee-shifting cases was its finding that multipliers permit a court to enhance a fee, but not reduce it where appropriate. The Florida Bar Rules expressly permit reduction of a reasonable fee in appropriate cases and therefore, the mandatory application of a multiplier in any cases in which the prevailing party has a contingency fee agreement with its counsel is in contravention to the Florida Bar factors this Court has expressly approved.

This case demonstrates precisely why this Court should reconsider its prior decisions in Rowe and Quanstrom in light of Sarkis. Fee hearings have become charades where the focal point is a battle of the fee experts who are, of necessity, called upon to testify on such theoretical issues as whether the plaintiff might had had difficulty attracting counsel to litigate against insurance companies. There is no shortage of counsel available to litigate cases against any big company who is easily collectible and the vast majority would be well and fairly compensated by a reasonable fee rendered on consideration of the factors set forth in the Bar Rules.

ARGUMENT ON APPEAL

This Court should answer the certified question in the negative and find that a multiplier can not be applied to enhance an attorneys' fee awarded under Florida Statute 627.428 in light of the fact that the legislature has not expressly authorized a fee enhancement in the statute, which must be strictly construed.

A. Standard of Review

The standard of review of a legal determination is de novo. Howard v. Savitsky, M.D., 813 So. 2d 978 (Fla. 2d DCA 2002).

B. The Merits

At issue in this Petition is whether, in light of this Court's recent decision in Sarkis v. Allstate Ins. Co., 863 So. 2d 210 (Fla. 2003), the time is ripe to revisit the application of a contingency fee multiplier in the context of fee-shifting statutes like Florida Statute 627.428, which permits an insured or beneficiary under an insurance policy to obtain a "reasonable" fee upon prevailing in a case against an insurer.[3]

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[3] That statute provides, in pertinent part:

> (1) Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

We submit that there are several reasons why the Court should revisit the issue and find that multipliers are not appropriately awarded under this statute.

First, the statute itself does not provide for enhancement of a reasonable fee and there is no basis in statutory construction to engraft a multiplier into the statute. Cf., Sarkis, 863 So. 2d 210. Second, unlike certain federal public interest statutes where the litigation itself is likely to benefit the public as a whole and not just the litigants themselves, Florida Statute 627.428 was not enacted to encourage litigation against insurance companies, but rather, was designed to "level the playing field" such that claimants' would be assured that they would be reasonably compensated for representing insureds who may not have the means to compensate counsel on an hourly basis. As such, there is no public policy to be served by requiring a trial court to consider application of a multiplier in insurance cases when, under Sarkis, they are no longer permitted to do so in Offer of Judgment cases. Third, the United States Supreme Court has found, in City of Burlington v. Dague, 505 U.S. 557 (1992), that application of a multiplier is unwarranted, legally or factually, in cases where a fee is awarded pursuant to a fee-shifting statute with language similar to that contained in Florida Statute 627.428 because the determination of a

"reasonable fee" already takes into account the factors used to determine whether a multiplier should be awarded and, if so, the amount of that multiplier. For all of these reasons, NATIONWIDE contends that this Court should find that multipliers should no longer be considered in insurance cases.

A. "Reasonable" Fees and Statutory Construction

Florida Statute 627.428 provides for an award of a "reasonable fee" to insureds or beneficiaries successful in suits against an insurer. The statute does **not** provide for a multiplier in addition to a reasonable fee. In Sarkis, this Court found that because Florida Statute 768.79, the Offer of Judgment statute, did not contain an "express directive" to the trial courts to consider application of a multiplier in addition to other specifically enumerated factors contained in the statute, the trial court had no authority to enhance a fee beyond that deemed reasonable. In doing so, this Court found that any statutory fee authorization must be strictly construed. Id. at 218.

Admittedly, in Sarkis, this Court distinguished the policy behind the Offer of Judgment statute and other fee-shifting statutes, including Florida Statute 627.428, as one of the reasons why a multiplier is unwarranted in the Offer of Judgment cases:

> The reason for an award of attorney fees authorized as a sanction for the rejection of an offer to settle is very different from the reason that we authorized the use of a multiplier in [Standard Guaranty Ins. Co. v. Quanstrom, 555 So. 2d 828 (Fla. 1990)] and [Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985)]. In those cases, we authorized the use of a multiplier to promote access to courts by encouraging lawyers to undertake representation at the inception of certain cases.

Id. at 222. While the Court also opined that "the use of a multiplier must be consistent with the purpose of the fee-authorizing statute or rule", it concluded that "statutory authorization for attorney fees is to be strictly construed." Id. We submit that under established principles of statutory construction, there is no need or occasion for the Court to determine whether use of a multiplier is "consistent" with the statutory purpose of a fee-shifting provision unless the statute itself authorizes application of a multiplier in addition to an award of a reasonable fee. Since Florida Statute 627.428 does not, as the Sarkis Court determined, there is simply no occasion to engraft that requirement into a statute when it plainly does not contemplate enhancement of a reasonable fee.

It is well established that when the language of a statute is clear and unambiguous, the Courts must give the statute its plain and ordinary meaning, without resort to further judicial interpretation. State v. VanBebber, 848 So. 2d 1046 (Fla. 2003). This Court has never found Florida Statute 627.428 or use of the

phrase "reasonable fee" to be ambiguous and therefore, there is no reason to engraft the multiplier concept into the legislative requirement that prevailing parties in insurance cases recover a reasonable fee.

B. The purpose behind Florida Statute 627.428

We agree that the obvious and primary purpose of Florida Statute 627.428 is to encourage attorneys to take insurance cases. In fact, it may fairly be said that that is the purpose behind **any** fee-shifting statute. However, encouraging attorneys to take certain types of cases is not the same thing as encouraging litigation in general. The question is whether the legislature ever intended to promote needless and expensive post-judgment litigation by rendering insurance fee awards a lottery whereby Plaintiff's attorneys will not only be fairly compensated but actually **rewarded** for litigating against an insurance company. There is nothing in the statute itself that indicates that the legislature intended the inflate the fees awarded beyond that constituting a "reasonable" fee.

In Rowe, this Court held that "[i]n determining reasonable attorney fees, courts of this state should utilize the criteria set forth in Disciplinary Rule 2-106(b) of The Florida Bar Code of Professional Responsibility . . . ." Id., 472 So. 2d at 1150. These criteria have since been amended and are now contained in Rule 4-1.5(b) of the Rules Regulating the Florida Bar. That Rule states, in pertinent part:

(b) Factors to Be Considered in Determining Reasonable Fee. Factors to be considered as guides in determining a reasonable fee include:

(1) the time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature;

(4) the significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained;

(5) the time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, diligence, and ability of the lawyer or lawyers performing the service and the skill, expertise, or efficiency of effort reflected in the actual providing of such services; and

(8) whether the fee is fixed or contingent, and, if fixed as to amount or rate, then whether the client's ability to pay rested to any significant degree on the outcome of the representation.

(c) Consideration of All Factors. In determining a reasonable fee, the time devoted to the representation and customary rate of fee need not be the sole or controlling factors. All factors set forth in this rule should be considered, and may be applied, in justification of a fee higher or lower than that which would result from application of only

the time and rate factors.

Id.

After this Court found in Rowe that the Florida Bar Rules provide trial courts with the foundation for establishing a "reasonable" fee, this Court in Quanstrom, ostensibly relying in part on the United States Supreme Court's decisions in Blanchard v. Bergeron, 489 U.S. 87 (1989) and Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711 (1987), clarified its opinion in Rowe regarding application of a multiplier in contingent fee cases. Both Blanchard and Delaware Valley involved public interest cases and the Supreme Court recognized that in those types of cases, "Congress has elected to encourage meritorious civil rights claims because of the benefits of such litigation for the named plaintiff and for society at large, irrespective of whether the actions seeks monetary damages." Blanchard, 489 U.S. at 95-96. We believe that the Quanstrom court misconstrued this portion of the Blanchard opinion to provide support for the application of a multiplier in any and all fee-shifting statutes, irrespective of whether those statutes could be deemed "public interest" statutes and/or whether the purpose behind a given statutory scheme was to "encourage" litigation. See, Quanstrom, 555 So. 2d 832-833. We submit that Blanchard was not so broad and that fee-shifting statutes do not always seek to "encourage" litigation for the public good. Nothing in

Florida Statute 627.428 or the insurance statutory scheme as a whole implies that the legislature ever sought to encourage litigation. Rather, the scheme was derived as a means to promote equality in the courts – not to provide the plaintiffs with an economic club.

Despite the distinction between public interest cases and tort/contract cases, this Court relied upon Blanchard as the springboard for its holding in Quanstrom that

> the trial court should consider the following factors in determing 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., 555 So. 2d at 834 (emphasis added). Thus, in Quanstrom, this Court essentially added language to Rule 4-1.5, implying that application of a multiplier could be used to determine a "reasonable" fee, even though the Bar Rules did not include the concept of a multiplier in its guidelines. We submit that in the absence of language in the fee-shifting statute itself, the courts are obliged to award only a reasonable fee, as that term is defined in the Bar Rules, and are not authorized to enhance that fee above what is deemed reasonable after application of the factors

set forth in the Rules. This is especially true in light of this Court's recognition in Sarkis that where, as here, the legislature has not expressly provided for application of a multiplier in the statute authorizing an award of a reasonable fee to the prevailing party, the courts have no statutory authority to award a multiplier in addition to that reasonable fee.

C. Applying Dague and Sarkis

As the Fifth District below recognized, after this Court issued its opinions in Rowe and Quanstrom, the United States Supreme Court issued City of Burlington v. Dague, 505 U.S. 557 (1992), in which the Supreme Court held that enhancement of fees above the federal lodestar (which was adopted by this Court in Rowe and Quanstrom) was not permitted under an environmental fee-shifting statute, authorizing the courts to award a reasonable fee to the prevailing party under the statute. The Supreme Court found that "we have established a 'strong presumption' that the lodestar represents the 'reasonable' fee' [citation omitted] and have placed upon the fee applicant who seeks more than that the burden of showing that 'such an adjustment is **necessary** to the determination of a reasonable fee.'" Dague, 505 U.S. 562. The Court further noted that enhancement of a reasonable fee by way of a multiplier necessarily duplicates a substantial part of the lodestar analysis. Id. The Court found that a contingency fee enhancement or

multiplier should not be awarded under fee-shifting statutes because 1) a prevailing plaintiff should not be additionally compensated because his counsel risks losing because to do so would essentially pay for the attorneys' time in cases in which he loses and 2) engrafting a contingency enhancement onto the lodestar method of calculating a reasonable fee "would be to concoct a hybrid scheme that resorts to the contingent-fee model to increase a fee award but not to reduce it." Id.

So too, the formula adopted by this Court in Quanstrom provides for fee enhancement, but does not provide for fee reduction in appropriate cases – a result inapposite to the factors set forth in Rule 4-1.5(c), which expressly permits a court to reduce the lodestar if appropriate under the given facts of the case. Thus, mandatory application of the multiplier in any and all continency fee cases is both contrary to the factors set forth in the Bar Rules, as well as contrary to Dague, which post-dated Rowe and Quanstrom. We believe that this Court should reconsider both Rowe and Quanstrom in light of Dague and this Court's own decision in Sarkis because it appears, as the Fifth District below noted, that Sarkis may signify a "tidal shift" with regard to the application of multipliers to fees awarded under fee-shifting statutes that do not expressly or by implication authorize enhancement of a reasonable fee.

D. This case

This case demonstrates precisely how far afield we have traveled from the concept of a "reasonable fee" and how much litigation has been generated by the mandatory consideration of a multiplier in each and every contingency case (other than those in which a fee is awarded under a Proposal for Settlement). The charade referred to by the trial judge in this case is one that is present in virtually every case in which a party seeks a multiplier. In all of those cases, the Court and parties are subjected to the "expert" testimony of other attorneys in the community attesting to (in most cases) the purely theoretical "difficulty" the plaintiff would have had in obtaining counsel to pursue a case against an insurance company, who is virtually always easily collectible, had there not been the potential for a multiplier often doubling the amount of fee at the end of the rainbow. There is no shortage of competent attorneys in Florida to litigate legitimate insurance cases, and certainly no shortage of counsel who would gladly accept a reasonable fee at the rates customarily awarded by the Courts. There is simply no reason for this Court to continue to adhere to the view that the trial courts must consider application of a multiplier in insurance cases in which the plaintiff's counsel has agreed, after consideration of the merits of the case, to accept the representation on the agreement that he or she could thereafter seek a reasonable fee from the Court if successful. In those rare instances in which a case presents a novel or truly

difficult issue, the Florida Bar Rules already provide a means by which the lodestar may be adjusted, higher or lower, to reflect the unique facts of each case. Mandating consideration of a multiplier only has the effect of generating additional post-trial litigation and providing plaintiffs with the uneven playing field that the legislature has sought to level.

Respectfully, this Court should reconsider its decisions in Rowe and Quanstrom and hold that multipliers are not awardable in cases in which the legal authority for the fee award does not expressly provide for application of a multiplier in addition to a "reasonable" fee.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court answer the Fifth District's certified question in the negative and hold that a multiplier may not awarded under Florida Statute 627.428.

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished, by mail, this 7th day of March, 2005 to: Brandon S. Peters, Esquire, and Randy E. Schimmelpfenning, Esq., 20 North Orange Avenue, Suite 1600, Orlando, Fla. 32801.

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I certify that this brief was typed in 14-point Times New Roman font.

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