FLORIDA FARM BUREAU CASUALTY INSURANCE COMPANY,

Appellant,

v.

GERALD H. GRAY AND SABRINA GRAY KING, TRACIE HESSLEY, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF RAIVYN B. SUMMERFIELD, DECEASED,

Appellees.

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D16-3118

Opinion filed September 29, 2017.

An appeal from the Circuit Court for Suwannee County.
David W. Fina, Judge.

Matthew C. Scarborough, Scarborough Attorneys at Law, Tampa, for Appellant.

Stephen C. Bullock, Brannon Brown Haley & Bullock, P.A., Lake City, for Appellee Gerald H. Gray; No appearance for Appellees Sabrina Gray King and Tracie Hessley.

LEWIS, J.

Appellant, Florida Farm Bureau Casualty Insurance Company, appeals the

trial court's Final Judgment Awarding Reasonable Attorneys' Fees. Appellant raises three issues on appeal, only one of which merits discussion and reversal. Appellant contends that the trial court erred in applying a contingency risk multiplier to the attorney's fees it awarded to Appellee, Gerald H. Gray, because the fee agreement between Appellee and his attorney was a non-contingent fee agreement. We agree with Appellant and, therefore, reverse the judgment as to the application of the multiplier, but otherwise affirm.

After a wrongful death suit was brought against Appellee, Appellant filed a Complaint for Declaratory Judgment, requesting that the trial court enter a judgment declaring that it had no duty to defend or indemnify Appellee. As a result of these actions, Appellee sought legal representation.

Appellee's attorney's fee agreement with his counsel provided in part:

> 1. You have employed our firm to represent you. We appreciate your confidence in our firm and want to acquaint you with our method of handling your matters. This letter is intended to set forth our firm's agreement with you as to the nature and scope of the legal services the firm will be performing, the manner in which the firm's fees for those services will be determined, and the terms upon which payment will be made.
>
> **OUR BILLING RATES**
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> 2. Our normal legal services would be billed at the rate of $350.00 per hour for the firm's partner attorneys' time and $250.00 for the firm's associate attorneys. We use paralegals or legal assistants when possible, and their rates are $85 per hour. However, we may record higher hourly charges and in the event the Court were to award legal fees and costs then [sic] any higher amount awarded by the Court,

including any multipliers, will then be the amount of legal fees.

INITIAL PAYMENT

> 3. We require an initial lump sum payment of $5,000.00 at the signing of this Agreement to be applied toward the final attorneys' fee amount billed and/or awarded by the Court in No. 2 above.

The fee agreement further provided that "[t]ermination of our services by you or by us shall not relieve you from payment of any amounts owed for services rendered by us through the date of termination" and that Appellee would be "responsible for reasonable attorneys' fees" in the event the "firm uses the services of an attorney to collect any sums owed on any account" of Appellee.

After Appellant admitted coverage, Appellee moved for attorney's fees, arguing in part that the trial court should apply a 2.5 multiplier given that the "fee agreement contained a contingency component for an amount to be awarded by the Court." Appellee's counsel sought $80,695 in attorney's fees.

During the attorney's fee hearing, Appellant's counsel argued in part that the fee agreement was not a contingency fee contract "because basically no matter what the fee up to a certain amount of money, in this case $350 an hour, is to be recovered whether the client win[s] or lose[s]." He also argued that the fee agreement was not a partial contingency fee contract because Appellee's counsel charged his normal hourly rate. Appellee's counsel, Stephen Bullock, later testified that his normal hourly rate is $350 an hour. When asked if he was going to charge Appellee $350

an hour "even if you were to lose the coverage action for whatever reason," Bullock replied, "What I said was that that's our normal billable rate. And then I said, however, we may record a higher hourly charge in the event the Court were to award legal fees. We're now at that juncture. . . . This was just if the court didn't – listen, if we lost the case we'd be at 350 an hour." He also testified, "If we lost the case we'd be at 350 an hour. But the agreement says if we don't lose the case the Court is going to set the hourly rate . . . ." When asked if he agreed that "this is not a full contingency fee agreement," he replied, "It's a hybrid." When asked if he agreed that it was not a partial contingency fee contract, he replied, "It's a hybrid, that's what I said." When asked if he was calling his fee agreement a "hybrid contingency fee" contract, he replied, "My – no. It's contingency only in the sense that the Court is going to set the hourly . . . . That's not what it says. Here's what it says. It says is contingent on the Court setting the amount of the fee. That's all. That's the only thing that's contingent."

Following Bullock's testimony, as well as the testimony of the parties' expert witnesses as to a reasonable fee, the trial court entered a Final Judgment Awarding Reasonable Attorney's Fees, wherein it characterized the fee agreement as a "hybrid partial contingency fee contract." The trial court accepted the testimony of Appellee's attorney and expert witness and found that Appellee's potential success in the case was unlikely at the outset and it was through the efforts and legal skill of

Appellee's counsel that positioned him for "ultimate settlement." After noting that it had considered several final judgments entered by other judges in the Third Judicial Circuit, the trial court concluded that seventy hours of time spent on the case was reasonable, as was $450 per hour for attorney Bullock and $350 per hour for an associate attorney in Bullock's firm. The trial court decided that a multiplier of 2.0 was justified, for a total amount of $72,000 in attorney's fees. This appeal followed.

The trial court awarded Appellee attorney's fees pursuant to section 627.428(1), Florida Statutes (2015), which provides:

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

Appellant does not dispute Appellee's entitlement to fees, but argues that the trial court erred in awarding a contingency fee multiplier where the fee agreement was non-contingent in nature. For the following reasons, Appellant's argument is well-taken, and reversal as to the multiplier is warranted.

In Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145, 1150-51 (Fla. 1985), the supreme court discussed the "lodestar process" of determining attorney's fees, the factors to be considered in determining a reasonable fee, and contingency risk factors. The supreme court explained, "Because the attorney working under a contingent fee contract receives no compensation when his client

does not prevail, he must charge a client more than the attorney who is guaranteed remuneration for his services." Id. at 1151. In determining whether a multiplier is necessary, a trial court is to consider: (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 in Rowe are applicable, especially the amount involved, the results obtained, and the type of fee arrangement between the attorney and his client. Standard Guar. Ins. Co. v. Quanstrom, 555 So. 2d 828, 834 (Fla. 1990).

In this case, it is undisputed that the fee agreement was not a full contingency fee agreement. The trial court found that the fee agreement was a "hybrid partial contingency fee" contract, as argued by Appellee. In Lane v. Head, 566 So. 2d 508, 510 (Fla. 1990), the supreme court explained that one of the purposes of Rowe was to encourage attorneys to take cases under contingency fee arrangements, "thereby making legal services more widely available to those who otherwise could not afford them." The supreme court explained that a multiplier is within the trial court's discretion in those instances in which the "contingency-fee arrangement is only partial" because "this policy also will encourage attorneys to provide services to persons who otherwise could not afford the customary legal fee." Id. at 510-11. The supreme court held that the fee agreement at issue constituted a partial contingency fee arrangement because the fee agreement required the appellant to pay his attorney

the greater of $100 an hour or twenty-five percent of the amount actually recovered, and the undisputed testimony established that the attorney's customary reasonable fee was $150 an hour. Id. at 509. After noting that the attorney would have received only two-thirds of his usual fee had the appellant lost the case, the supreme court set forth, "We use the term 'partial contingency-fee arrangement' to mean those instances in which an attorney is guaranteed a fee that is less than his or her customary reasonable fee if the client loses, but the opportunity for an enhanced fee if the client prevails." Id. at 513 n.1. It concluded that attorneys taking partial contingent cases are not entitled to the same enhancement of the customary reasonable fee that would be available if the fee arrangement were fully contingent. Id. at 511; see also Goodman v. Tectonics Unlimited, Inc., 861 So. 2d 485, 485 (Fla. 4th DCA 2003) (holding that the appellee's fee agreement with its attorney was a partial contingency fee arrangement "'where 'an attorney is guaranteed a fee that is less than his or her customary reasonable fee if the client loses, but the opportunity for an enhanced fee if the client prevails'" and noting that the appellee agreed to pay its appellate attorney $1,500 as a "'partial flat fee,'" the fee agreement contemplated that if the appellee prevailed in the appeal, the attorney would seek a court-awarded fee, and that if the attorney collected the awarded fee from the appellants, the attorney would refund up to $1,500 to the appellee (citation omitted)).

Here, in contrast to the fee agreement in Lane, where the attorney was guaranteed an hourly rate below his customary rate, Appellee's attorney testified that his usual billing rate is $350 an hour. The "Our Billing Rates" section of the fee agreement provided in part, "Our normal legal services would be billed at the rate of $350.00 per hour for the firm's partner attorneys' time and $250.00 for the firm's associate attorneys." The agreement required an initial payment of $5,000 "to be applied toward the final attorneys' fee amount billed and/or awarded by the Court . . . ." When asked on cross-examination if he was going to "be charging" Appellee $350 an hour if he were to lose the coverage action, Bullock replied in part, "[I]f we lost the case we'd be at 350 an hour." When asked if he was calling his contract a hybrid contingency fee agreement, Bullock replied, "It says [it] is contingent on the Court setting the amount of the fee. That's all. That's the only thing that's contingent." Based upon these facts, the trial court's determination that the fee agreement is a partial contingency fee contract is erroneous.

Although Appellee argues on appeal that he "indicated [below] that he would not and could not pay any legal fees for the declaratory action," we previously rejected a similar argument in the context of whether an inability to pay one's contracted attorney's fees transformed a fee agreement into a contingent fee agreement. See Superior Ins. Co. v. Cordle, 851 So. 2d 207, 207 (Fla. 1st DCA 2003) (agreeing with the appellant that the trial court erred in applying a "'contingent

risk'" multiplier where the insured's attorney "'would have technically been entitled to recover his fee up to $200.00 per hour from the client, win or lose'" but agreed to a reasonable fee awarded by the court and holding that the "likelihood that the client will not pay the agreed-upon hourly fee is not the criterion upon which 'contingency' in this context is based").

Accordingly, we reverse the final judgment as to the application of the multiplier, but otherwise affirm. On remand, the trial court is instructed to recalculate the attorney's fee award without applying a multiplier.

AFFIRMED in part; REVERSED in part; and REMANDED with directions. ROBERTS, J., CONCURS; WINSOR, J., CONCURS IN RESULT.