FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-1559

BRIAN WESSON and BRANDY WESSON,

Appellants/Cross-Appellees,

v.

FLORIDA PENINSULA INSURANCE COMPANY,

Appellee/Cross-Appellant.

On appeal from the Circuit Court for Walton County.
Jeffrey E. Lewis, Judge.

May 20, 2020

PER CURIAM.

Following a fire loss, the Wessons filed suit against their homeowner's insurance company, Florida Peninsula, for breach of contract. The trial court entered a consent final judgment, and the Wessons moved for attorney's fees pursuant to section 627.428, Florida Statutes.

The parties stipulated to a fee award of $200,000 and $10,000 in taxable costs. After an evidentiary hearing, the trial court held the Wessons were not entitled to a contingency fee multiplier. The Wessons appealed. Our disposition of companion case 1D18-4407 moots Florida Peninsula's cross-appeal.

Joyce v. Federated National Insurance Company, 228 So. 3d 1122 (Fla. 2017), determines whether a court may apply a contingency fee multiplier to an award of attorney's fees to a prevailing party. Under *Joyce*, we consider three factors in determining whether a contingency fee multiplier is required: 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. *Joyce*, 228 So. 3d at 1123–34.

Here, the lower court found the first factor, the relevant market, to be the most significant. However, under *Joyce* the lower court should not have considered the Wessons' actual difficulty in locating an attorney. In *Joyce*, the Fifth District had relied on the fact that it only took one phone call for the Joyces to secure counsel. 228 So. 3d at 1139 (citing *Federated Nat'l Ins. Co. v. Joyce*, 179 So. 3d 492, 494 (Fla. 5th DCA 2015)). The supreme court reversed and held the Fifth District erred in looking at the Joyces' "actual experience in the market rather than looking at the relevant market itself . . . ." *Joyce,* 228 So. 3d at 1134.

The trial court also erred in analyzing the second factor in *Joyce,* mitigating the risk of non-payment. The trial court found counsel did not face a substantial risk of nonpayment when the case was accepted because even if they did not prevail under Coverage A, they could recover fees and costs if they prevailed under Coverage C. Generally, the controlling consideration in determining whether an attorney can mitigate the risk of nonpayment under the second prong of *Joyce* is whether the plaintiffs can afford a retainer or hourly fees. *See Joyce,* 228 So. 3d at 1125 (affirming lower court which relied on testimony from the Joyces' attorney that the Joyces told her they could not pay a retainer, as well as testimony from the Joyces' fee expert that there was no meaningful way to have mitigated the risk of nonpayment in this case); *Eckhardt v. 424 Hintze Mgmt., LLC*, 969 So. 2d 1219

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[*] *Florida Patient's Comp. Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985).

(Fla. 1st DCA 2007) (analyzing client's ability to pay on an hourly basis when considering risk of non-payment); *Amisub (Am. Hosp.) Inc. v. Hernandez*, 817 So. 2d 870, 873 (Fla. 3d DCA 2002) (finding attorney mitigated his risk of nonpayment when attorney and client renegotiated their fee and cost arrangement after first trial ended in adverse directed verdict); *Pompano Ledger, Inc. v. Greater Pompano Beach Chamber of Commerce, Inc.*, 802 So. 2d 438, 439 (Fla. 4th DCA 2001) (finding there was no risk of nonpayment where the insurance company was paying the attorney's fees); *Wolfe v. Nazaire*, 758 So. 2d 730, 734 (Fla. 4th DCA 2000) (finding there was no "risk of nonpayment" in the fee agreement where the agreement was for the defendant to pay specified hourly rates for the lawyer's time spent defending the lawsuit).

Instead of relying on the undisputed evidence that the Wessons could not afford an hourly fee, the trial court relied on the likelihood of success under either Coverage A or Coverage C. However, the likelihood of success is something that is considered in determining the range of the multiplier rather than whether risk of non-payment is mitigated. *Joyce,* 228 So. 3d at 1126.

While there is competent, substantial evidence present in the record to support the trial court's ruling, it is unclear to what extent the trial court relied on improper considerations. Accordingly, we reverse and remand for the trial court to consider if the Wessons are entitled to a contingency fee multiplier without considering their actual experience in locating an attorney and without considering the likelihood of success as mitigating the risk of nonpayment.

REVERSED and REMANDED.

WOLF, KELSEY, and WINOKUR, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

J. Phillip Warren of Taylor, Warren & Weidner, P.A., Pensacola; C. Phil Hall of Phil Hall, P.A., Pensacola, for Appellants/Cross-Appellees.

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