County Civil Court: ATTORNEY'S FEES. The trial court correctly found the relevant market required the possibility of a multiplier in order for Appellee to obtain representation in this matter. The trial court's award of attorney's fees is affirmed and appellate attorney's fees are awarded. *Ocean Harbor Casualty Ins. Co. v. Medical Specialists of Tampa Bay, LLC*, No. 14-AP-0005-WS (Fla. 6th Cir. App. Ct. November 4, 2015).

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY
APPELLATE DIVISION

OCEAN HARBOR CASUALTY INSURANCE CO.,
Appellant,

v.

MEDICAL SPECIALISTS OF TAMPA BAY, L.L.C., d/b/a GULF COAST INJURY CENTER, a/a/o Alonzo Guzman-Giron and Antonia Gomez,
Appellee.
_____/

UCN: 512014AP0005APAXWS
Appeal No: 2014-AP-0005-WS
L.T. No: 2013-CC-1145-WS

On appeal from County Court,

Honorable Paul Firmani,

Douglas H. Stein, Esq.,
Stephanie Martinez, Esq.,
for Appellant,

Lawrence H. Liebling, Esq.,
Arthur Liebling, Esq.,
for Appellee.

ORDER AND OPINION

The Court finds no error with the trial court's application of a 2.0 contingency fee multiplier to the Appellee's award of attorney's fees. The order of the trial court is affirmed and Appellee's Motion for Appellate Attorney's Fees is granted.

STATEMENT OF THE CASE AND FACTS

Appellant was the defendant below in an action by Appellee for failure to pay personal injury protection benefits for treatment rendered as the result of an automobile accident. The trial court granted summary judgment in favor of Appellee. Appellant appealed the final order to this Court, which previously reversed in part, affirmed in part and remanded the cause to the trial court. On remand, Appellant confessed judgment by paying the claim, and did not contest Appellee's entitlement to attorney's fees. The trial court found Appellee entitled to compensation for 100.6 hours expended at the trial and appellate level as reasonable and necessary, and found a rate of $350.00 per hour was reasonable, resulting in a lodestar of $35,210.00. The trial court applied a 2.0 multiplier and awarded a total fee amount of $70,420.00, finding the relevant market required a contingency fee multiplier in order for the plaintiff to obtain representation in this case, and that it was unlikely plaintiff's attorneys or any other attorney would have accepted the case without the potential for a multiplier. Appellant challenges the trial court's application of a multiplier, alleging Appellee failed to demonstrate the relevant market required a multiplier.

STANDARD OF REVIEW

This Court's "standard of review with respect to the application of a multiplier is one of abuse of discretion." *USAA Cas. Ins. Co. v. Prime Care Chiropractic Enters., P.A.*, 93 So. 3d 345, 347 (Fla. 2d DCA 2012); *Discovery Experimental & Dev., Inc. v. Dep't of Health*, 824 So. 2d 195, 196 (Fla. 2d DCA 2002). "The application of a contingency risk multiplier must be reversed if it is not supported by competent, substantial evidence." *USAA Cas. Ins. Co.*, 93 So. 3d at 347.

LAW AND ANALYSIS

Appellant claims it was error to apply a contingency fee multiplier in this case because Appellee failed to present competent, substantial evidence that Appellee had any difficulty obtaining representation in the matter before the trial court, and therefore there was no basis for a finding that the relevant market required a multiplier in order for Appellee to obtain competent counsel.

At trial, Appellee's general manager testified that part of his duties include retaining attorneys on Appellee's behalf to prosecute PIP claims, and testified that Lawrence and Arthur Liebling, Appellee's attorney's in this matter, had been hired by Appellee in the past to prosecute PIP cases. The general manager testified that he did not contact any other attorneys prior to contacting Liebling & Liebling to request representation in this matter due to the difficulty of the case. The general manager testified Arthur Liebling was the first attorney he contacted regarding this matter, and that he accepted the case. The general manager testified that Appellee had a pre-existing agreement with the attorney's handling Appellee's PIP cases, including Mr. Liebling, and that the understanding was that the attorneys accepted the cases only on a contingent fee basis with the possibility of a multiplier. The general manager testified that this was the agreement in place when Arthur Liebling agreed to accept this case, and that Appellee could not afford to hire an attorney in this matter without this agreement.

Arthur Liebling testified that he agreed to accept the case because Appellee had been one of his largest clients. Mr. Liebling testified he would not have accepted the benefits exhausted case on a contingent fee basis without the possibility of a multiplier, although this was not discussed when he accepted the case. Lawrence Liebling also testified that he would not have accepted the case without the possibility of a multiplier. Appellee's expert testified that a 2.0 to 2.5 multiplier was applicable in this case, because a competent lawyer would not take a benefits exhausted case on a contingent fee basis without the possibility of a multiplier.

A trial court should only apply a contingency risk multiplier after consideration of the following factors:

> (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 *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla.1985), are applicable, especially, the amount involved, the results obtained, and the type of fee arrangement between the attorney and his client.

USAA Cas. Ins. Co., 93 So. 3d at 347 (citing *Standard Guar. Ins. Co. v. Quanstrom*, 555 So. 2d 828, 834 (Fla. 1990)). Before a court may adjust for any risk assumption, the evidence must support the court's finding "that without risk-enhancement plaintiff would have faced substantial difficulties in finding counsel in the local or other relevant market." *Sun Bank of Ocala*, 564 So. 2d at 1079. When "there is no evidence that the relevant market required a contingency fee multiplier to obtain competent counsel, then a multiplier should not be awarded." *USAA Cas. Ins. Co.*, 93 So. 3d at 347. *See Progressive Exp. Ins. Co. v. Shultz*, 948 So. 2d 1027, 1030 (Fla. 5th DCA 2007).

Appellant's expert witness testified that Appellee had no difficulty in obtaining representation in this case, based on the testimony that Arthur Liebling, the first attorney Appellee contacted regarding the matter, accepted the case. Appellant contends this is dispositive of the issue of whether the relevant market required a multiplier. The testimony was that Appellee's counsel was the first attorney contacted about the case, who accepted the case based on the long-standing attorney-client relationship. Appellant maintains the absence of difficulty in obtaining representation meant a multiplier could not be applied.

Appellee has four clinics and around 3,000 patients, out of which around 700 per year are PIP patients. Around 2010, when Appellant denied Appellee's claim, Appellee was receiving hundreds of PIP denials or reductions each month. Due to the number of cases, Appellee had an arrangement with certain PIP attorneys who were employed on a contingent fee basis with the possibility of a multiplier if awarded by the court. Appellee's manager testified this arrangement was necessary due to the difficulty in pursuing these numerous claims, and that Appellee could not afford to pay attorneys hourly rates for the large number of claims seeking small amounts of damages, and without this arrangement Appellee could not afford to prosecute the claims.

Appellant's argument is that Appellee's failure to testify as to any difficulty in obtaining counsel to pursue this case demonstrates the market did not require a multiplier and that there is not competent substantial evidence to support the trial court's finding to the contrary. Appellant contends that testimony by Appellee's expert witness and the testimony of Appellee's attorneys are not sufficient to prove the market required

a multiplier in this case, because expert testimony as to opinion cannot constitute proof of the facts necessary to support the expert's conclusion. *See Miller v. First American Bank and Trust*, 607 So. 2d 483, 485 (Fla. 4th DCA 1992).

Appellee responds that the record contains competent, substantial evidence to support the application of the multiplier in this case. "The competent substantial evidence standard defers to the trial court's judgment because the trial court is in the best position to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor and credibility of the witnesses." *Savage v. State*, 120 So. 3d 619, 622 (Fla. 2d DCA 2013). The question as to what the relevant market requires is one of fact. The trial court in this case issued a detailed opinion addressing each of the factors necessary to demonstrate a multiplier is appropriate. *See Quanstrom*, 555 So. 2d at 834.

Appellee cites the trial court's findings in this case that Appellee, "as a matter of sound business practice and economic necessity, was unable to pay competent attorneys on an hourly basis to pursue collection of hundreds of relatively small dollar amount PIP claims," and it would have been "extremely difficult, if not impossible," for Appellee to obtain competent representation in this matter on a contingency fee basis without the possibility of a multiplier. The record contains competent substantial evidence in the form of testimony from Appellee's general manager and Appellee's expert witness that the relevant market required a multiplier in this case in order for Appellee to obtain counsel to prosecute the underlying claim. The *Schultz* case relied on by Appellant is distinguishable in that neither the plaintiff nor plaintiff's agent testified on plaintiff's behalf in that case, and there was no evidence to support a finding that the relevant market required a multiplier. *See* 948 So. 2d at 1029. The evidence in this case supports the trial court's findings.

ATTORNEY'S FEES

Appellee filed a Motion for Sanctions and Attorney's Fees pursuant to § 57.105, Fla. Stat. and Fla. R. App. P. 9.410. Appellee contends the appeal is frivolous and seeks fees and costs as a sanction against Appellant because the appeal is without merit. *See JPMorgan Chase Bank, N.A. v. Hernandez*, 99 So. 3d 508, 513 (Fla. 3d DCA

2011). Appellee cites to Appellant's attempts to characterize the standard of review in this case as de novo, which is not the standard by which this Court reviews an award of attorney's fees that employs a multiplier. *See Bd. of Trustees of the City Pension Fund for Firefighters and Police Officers in the City of Tampa v. Parker*, 113 So. 3d 64, 69-70 (Fla. 2d DCA 2013). Appellee maintains Appellant improperly seeks to retry the factual determination of the relevant market requirement factor in this Court, by asking the Court to reweigh the evidence and substitute its judgment for that of the trial court. *See Swanigan v. Dobbs House*, 442 So. 2d 1026, 1027 (Fla. 1st DCA 1983).

We find the arguments advanced on appeal to be without merit and Appellee's Motion for Attorney's Fees well-taken. Appellant's assertion that the evidence does not support the finding as to the relevant market requirement is contradicted by the record. The Motion for Appellate Attorney's Fees is granted, with the matter remanded to the trial court for a determination of reasonable appellate attorney's fees to be assessed equally against Appellant and appellate counsel pursuant to § 57.105, Fla. Stat.

CONCLUSION

The trial court's application of a 2.0 multiplier to the award of attorney's fees in this matter is supported by competent, substantial evidence. The order of the trial court is hereby AFFIRMED. Appellee's Motion for Appellate Attorney's Fees is hereby GRANTED and the cause is remanded to the trial court for a determination of reasonable appellate attorney's fees.

It is ORDERED AND ADJUDGED that the order of the trial court is hereby AFFIRMED.

It is FURTHER ORDERED that Appellee's Motion for Attorney's Fees is GRANTED. The cause is remanded to the trial court for a determination of reasonable appellate attorney's fees.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida this 4th day of November, 2015.

Original order entered on November 4, 2015, by Circuit Judges Linda Babb, Susan Barthle and Daniel D. Diskey.