IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,213
Third District Case Nos. 86-877 and 87-370

MIAMI CHILDREN'S HOSPITAL,

Petitioner/defendant,

vs.

ULISES TAMAYO, a minor, by and through his parents and next friends, ULISES TAMAYO and ROSARIO ESTEVEZ and ULISES TAMAYO and ROSARIO ESTEVEZ, individually,

Respondents/plaintiffs.

PETITIONER'S BRIEF ON THE MERITS

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I N D E X

TABLE OF CITATIONS AND AUTHORITIES

OTHER AUTHORITIES:

STATEMENT OF THE CASE AND FACTS

This case arrives to this Court as a result of a certification by the Third District Court of Appeal that its decision passes on a question of great public importance.

Plaintiffs appealed to the Third District a final judgment awarding attorney's fees to them in a medical malpractice action.

Plaintiffs filed the trial court action against the defendants in August, 1983 (R. 1-4). The case proceeded to trial in July, 1985, and the jury awarded the plaintiffs $5,000 by special interrogatory verdict (R. 46).

Plaintiffs subsequently filed a motion to assess attorney's fees, wherein they requested that fees be awarded in the amount of $19,200 (R. 49-54). Plaintiffs also filed the affidavit of Henry Latimer in support of the motion, wherein Mr. Latimer stated that $17,825 represented a reasonable fee (R. 56-57).

The court conducted a hearing on plaintiffs' motion to assess attorney's fees on February 19, 1986 (R. 63-74; T. 1-12). The court, relying on Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), ruled that the fee recovery was limited to the fee agreement between plaintiffs and their counsel, or forty-five (45%) percent of the $5,000 jury award (R. 72; T. 10). The court entered a final judgment awarding $2,250 in attorney's fees. Plaintiffs appealed to the Third District.

On appeal, the Third District reversed the trial court and held that:

> Rowe does not apply retroactively so as to restrict an attorney's fee award to be no more than the fee set by the contingency fee agreement between the party seeking fees and his counsel, where, as here, the said attorney's fee agreement was entered prior to the effective date of the Rowe decision. [cites omitted.].

(A. 1-2). The Third District certified the question of whether the above interpretation of Rowe "is a proper and valid interpretation of Rowe" (A. 2).

SUMMARY OF THE ARGUMENT

The trial court was correct in limiting the plaintiffs' attorney's fees to the amount of the contingent fee contract between plaintiffs and their counsel in this medical malpractice action. The Third District incorrectly decided that this Court's decision in Florida Patient's Compensation Fund v. Rowe, supra, does not apply retroactively to cases where the attorney's fee agreement was entered into before Rowe was effective.

First, the statement of law expressed by this Court in Rowe that a court-awarded fee should not exceed the contingent fee agreement between an attorney and his client is not a new statement of law. Even if the statement constitutes a change in the law, a decision of the Supreme Court which overrules a prior decision is given retrospective as well as prospective effect unless the opinion declares that it will have prospective application only. Finally, no rights of the party seeking attorney fees are impaired merely because the parties are limited to the amount of the contingent fee contract.

This case has widespread application and review should be granted by this Court.

POINT INVOLVED ON APPEAL

WHETHER THE TRIAL COURT WAS CORRECT IN LIMITING THE PLAINTIFFS' ATTORNEY'S FEES TO THE AMOUNT OF THE CONTINGENT FEE CONTRACT BETWEEN PLAINTIFFS AND THEIR COUNSEL, AND WHETHER THE THIRD DISTRICT DECISION SHOULD BE QUASHED.

ARGUMENT

THE TRIAL COURT WAS CORRECT IN LIMITING THE PLAINTIFFS' ATTORNEY'S FEES TO THE AMOUNT OF THE CONTINGENT FEE CONTRACT BETWEEN PLAINTIFFS AND THEIR COUNSEL, AND THE THIRD DISTRICT DECISION SHOULD BE QUASHED.

This Court, in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145, 1151 (Fla. 1985), unequivocally stated:

> [I]n no case should the court-awarded fee exceed the fee agreement reached by the attorney and the client. Cf. Rosenberg v. Levin, 409 So.2d 1016 (Fla. 1982).

The Third District, in the present case, ruled that Rowe does not apply retroactively to cases "to restrict an attorney's fee award to be no more than the fee set by the contingency fee agreement between the party seeking fees and his counsel" where the attorney's fee agreement was entered into before the Rowe decision was effective. Petitioner respectfully disagrees with the Third District decision for the reasons that follow.

First, the statement of law expressed by this Court in Rowe, that a court-awarded fee should not exceed the fee agreement reached by the attorney and his client, is not a new statement of law in Florida. Therefore, there is no retroactive application of the rule of law.

In Rosenberg v. Levin, supra, relied on by this Court in Rowe, this Court adopted the modified quantum meruit rule which limits recovery to the maximum amount of the contract fee

in premature discharge cases involving contingency employment. This Court refused to adopt a rule that would allow attorney's fees in excess of the maximum contract price.

In Trustees of Cameron-Brown v. Tavormina, 385 So.2d 728, 731 (Fla. 3d DCA 1980), which was cited by the Court in Rowe, the district court held that a party entitled to attorney fees "may recover the amount he must pay his lawyer, or a reasonable fee whichever is lower." The court limited its holding to instances where there is a contract between the parties and where there is contract between a party and his counsel. The Court only expressly exempted from its holding "the awarding of attorney fees by statutory authority which embodies public policy considerations not pertinent thereto." Id. The medical malpractice statute on attorney fees does not involve public policy considerations which should deter the application of the principle to medical malpractice cases. See also Pezzimenti v. L.R. Cirou, 466 So.2d 274, 277 (Fla. 2d DCA 1985); Dunn v. Sentry Insurance Co., 462 So.2d 107 (Fla. 5th DCA 1985); Jemco, Inc. v. United Parcel Service, Inc., 400 So.2d 499 (Fla. 3d DCA 1981).

Even if the subject rule of law announced by this Court in Rowe constituted a change in case law, this Court recently held that "a decision of a court of last resort which overrules a prior decision is retrospective as well as prospective in its application unless declared by the opinion to have prospective

effect only. Black v. Nesmith, 475 So.2d 963 (Fla. 1st DCA 1985)." Melendez v. Dreis and Krump Manufacturing Co., ___ So.2d ___ (Fla. 1987), opinion filed October 15, 1987, 12 FLW SC 519. The Rowe opinion did not declare the opinion as having prospective effect only and therefore should be applied retrospectively. Indeed, this Court remanded the Rowe case with directions to conduct "a new evidentiary hearing for the purpose of determining a reasonable fee in this case consistent with the appropriate factors and guidelines set forth in this opinion." 472 at 1152. See also Lowe v. Price, 437 So.2d 142 (Fla. 1983).

The Second District Court of Appeal has held that Rowe should be applied retroactively to contracts entered into before the Rowe decision. Freedom Savings and Loan Association v. Biltmore Construction Co., Inc., ___ So.2d ___ (Fla. 2d DCA 1987), opinion filed August 7, 1987, 12 FLW DCA 1928. In the decision the court held that such an application does not impair any rights of the party seeking attorney fees because Rowe "merely sets out a procedural method for the determination of those rights." See also Ford v. Swope, 492 So.2d 782 (Fla. 2d DCA 1986)(wherein the court apparently applied Rowe retroactively and found that the lower court "erred in denying appellants attorney's fees as they were the prevailing party"); Alston v. Sundeck Prod., Inc., 498 So.2d 493 (Fla. 4th DCA 1986)(wherein the court applied Rowe retroactively but noted that the Rowe statement that court-awarded fees cannot exceed the fee agreement is limited to contingent fee agreements).

Here, there is no reason to give the Rowe decision prospective application only. There is no impairment of the plaintiff's contract with his attorney by binding the parties to the contract and holding that a fee award cannot exceed the fee amount contracted for by the parties.

Additionally, §768.56, Florida Statutes, was repealed by 1985 Fla. Laws c. 85-175, §43. Section 768.595, Florida Statutes now governs attorney's fees in medical malpractice actions. This statute does not provide for the prevailing party to be awarded attorney's fees and does not mandate that lodestar method be utilized in computing attorney's fees award. The statute does require the court to utilize a lodestar analysis in determining whether a fee is illegal or excessive. §768.595(3), Fla. Stat. (1985). It does, however, provide a schedule of contingent fees that "shall be presumed reasonable and not excessive" in subsection (7)(a). Under the guidelines, forty percent (40%) of the recovery is "presumed reasonable" where "the claim is settled or judgment is satisfied prior to the filing of the notice of appeal...." §768.595(7)(a)6, Fla. Stat. (1985). Therefore, under the new statutory scheme counsel for the plaintiffs would be entitled to only forty percent (40%) of the total recovery herein, or $2,000, which the plaintiffs would have to pay, and not any windfall amount that might have been calculated under the lodestar method.

REASONS FOR GRANTING RECOVERY

Although 768.56 was repealed, Section 48 of the repealer act provides that it applies prospectively and not to actions filed on or before the effective date of October 1, 1985. There are a multitude of medical malpractice actions still pending which were filed before October 1, 1985 and to which the Rowe decision would apply.

Furthermore, Rowe has widespread application to court-awarded attorney fees and is not limited to medical malpractice actions. See, e.g., Alston v. Sundeck Products, Inc., supra (wherein Rowe applied to case involving a violation of an injunction prohibiting appellant from disclosing, disseminating or using confidential information and trade secrets obtained from appellees); Ford v. Swope, supra (wherein appellate court instructed the trial court to apply Rowe to award an attorney's fee to appellants pursuant to the terms of the contract as the prevailing party); Freedom Savings & Loan Association v. Biltmore Constr. Co., supra (wherein the appellate court applied Rowe to a breach of contract case).

The Second District Court of Appeal has now decided the same issue directly contrary to the present Third District decision. Freedom Savings and Loan Association v. Biltmore Construction Co., supra. This Court should resolve the conflict.

CONCLUSION

Based on the reasons and authorities set forth above, it is respectfully submitted that the decision of the District Court of Appeal be quashed, and the trial court final judgment on attorney fees be reinstated.

Respectfully submitted,

BY: Betsy E. Gallagher
BETSY E. GALLAGHER

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on the Merits was mailed this 26th day of October, 1987 to: ARNOLD R. GINSBERG, ESQ., 410 Concord Building, 66 West Flagler Street, Miami, Florida 33130; and to LOUIS ORDONEZ, ESQ., Suite 3450 Southeast Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131-2374.

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