12-11-87

IN THE SUPREME COURT OF FLORIDA.

CASE NO. 71,213

District Court Case Nos. 86-877
and 87-370

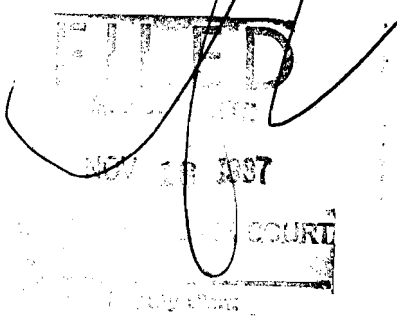
MIAMI CHILDREN'S HOSPITAL,

Petitioner,

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.



BRIEF OF RESPONDENTS ON THE MERITS

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LIST OF CITATIONS AND AUTHORITIES

I.

INTRODUCTION

The respondents, Ulises Tamayo, a minor, by and through his parents and next friends, Ulises Tamayo and Rosario Estevez and Ulises Tamayo and Rosario Estevez, individually, were the appellants in the District Court of Appeal, Third District, and were the plaintiffs in the trial court. The petitioner, Miami Children's Hospital, formerly known as Variety Children's Hospital, a Florida non-profit corporation, was the appellee/defendant. In this brief of respondents on the merits the parties will be referred to as the plaintiff(s) and the defendant and, alternatively, by name. The symbols "R" and "A" will refer to the record on appeal and the appendix to petitioner's brief on the merits, respectively. All emphasis has been supplied by counsel unless indicated to the contrary.

II.

STATEMENT OF THE CASE AND FACTS

Plaintiffs' medical negligence lawsuit culminated with a jury verdict against the defendant in an amount of $5,000. Final judgment was entered thereon and no challenge to that judgment was made.

Plaintiff, being the prevailing party, was entitled to attorney's fees as authorized by § 768.56, Florida Statutes (1983), said statute determined to be constitutional by this Court in the case of FLORIDA PATIENTS' COMPENSATION FUND v. ROWE, 472 So. 2d 1145 (Fla. 1985).

At the hearing on attorney's fees (R. 63-74) plaintiff was prepared to go forward and prove up a reasonable fee. Counsel for the defendant called to the trial court's attention that portion of ROWE, supra, wherein this Court stated:

* * *

"Further, in no case should the court-awarded fee exceed the fee agreement reached by the attorney and his client. . ." 472 So. 2d at page 1151.

* * *

The defendant advised the trial court that plaintiffs' counsel had a 45 percent contingent fee contract and concluded that since the jury verdict was in an amount of $5,000, the maximum attorney's fee that could lawfully be awarded under ROWE, supra, was $2,250. The defendant "stipulated" that it would pay such an amount. The plaintiffs (by and through counsel) objected. Plaintiffs' argument and protestations were to no avail. Although the trial court indicated it, too, had a problem with the "single sentence" ("in no case should the court-awarded fee exceed the fee agreement reached by the attorney and his client"), the court stated:

* * *

"THE COURT: I have a problem. Well, I'm going to go by the language of the court and I don't think the fee should be any more than the agreement reached, 40 percent figure, I think that is the whole concept of it.

* * *

"THE COURT: Forty-five percent, whatever the figure was. I don't think the court contemplated on a $5,000 award. That fee should be in the neighborhood of $35,000 or whatever. I just don't think that is reasonable. I think you are stuck and limited to your contract." (R. 73)

* * *

The trial court indicated that if it were wrong, it

would afford to the plaintiffs an appropriate evidentiary hearing to enable the plaintiffs to "prove up" a reasonable fee using the guidelines found in ROWE. The trial court granted the plaintiffs' motion for attorney's fees and entered the following order:

* * *

> "1. That plaintiffs' attorney's fees are limited according to Florida Patients' Compensation Fund v. Rowe, 472 So. 2d 1145, to $2,250 which sum is calculated by multiplying the fee agreement percentage of 45 percent and multiplying same by the amount of judgment awarded in this cause of $5,000."

* * *

Appeal to the District Court was taken and, in the opinion rendered, now reported, see: TAMAYO v. MIAMI CHILDREN'S HOSPITAL, 511 So. 2d 1091 (Fla. App. 3rd 1987), that court opined:

* * *

> "We reverse and remand for further proceedings based on the rule in this District 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 into prior to the effective date of the Rowe decision. Tuerk v. Allstate Insurance Co., 498 So. 2d 504 (Fla. 3rd DCA 1986), rev. denied, 506 So. 2d 1040 (Fla. 1987); Levy v. Levy, 483 So. 2d 455 (Fla. 3rd DCA), rev. denied, 492 So. 2d 1333 (Fla. 1986). . ." 511 So. 2d at page 1092.

Certification was granted by that court:

* * *

> "We nonetheless certify that our decision passes upon a question of great public importance, mainly, whether the above-stated interpretation of Rowe is a proper and valid interpretation of the Rowe decision, so as to permit further review of this case by the Florida Supreme Court. . . " 511 So. 2d at page 1092.

The District Court reversed the attorney's fee order and remanded to the trial court with directions to enter an

attorney's fee award based on the standards established by ROWE:

* * *

". . . except that the court-awarded fee may exceed the fee set by the contingent fee agreement between the plaintiff and his counsel." 511 So. 2d at page 1092.

This proceeding followed.

III.

QUESTION PRESENTED

WHETHER THE OPINION RENDERED BY THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, REACHED A LEGALLY CORRECT RESULT:

A.

ROWE, SUPRA, DOES NOT APPLY RETROACTIVELY WHERE, AS HERE, THE ATTORNEY'S FEE AGREEMENT WAS ENTERED INTO PRIOR TO THE EFFECTIVE DATE OF THE ROWE DECISION.

B.

ASSUMING ROWE APPLIES RETROACTIVELY, THIS COURT'S "HOLDING" IN ROWE IS LEGALLY INCORRECT AS THERE EXISTS NEITHER FEDERAL NOR STATE AUTHORITY TO SUPPORT THE ROWE "RESTRICTION."

IV.

SUMMARY OF ARGUMENT

Because the opinion rendered by the District Court of Appeal, Third District, reached a legally correct result, the plaintiffs contend the matter should be remanded to the trial court with directions to enter an attorney's fee award based on the standards established by ROWE except that the court-awarded fee may exceed the fee set by the contingency fee contract between the plaintiffs and their counsel.

This Court should hold that ROWE does not apply retroactively where, as here, the attorney's fee agreement was

entered into prior to the effective date of the ROWE decision. Because the ROWE opinion did not overrule any prior decision of this Court but adopted for the first time in Florida a new rule of law, it may be said that ROWE is to apply prospectively only. Further, because it may be presumptively stated that the existence, vel non, of § 768.56, Florida Statutes (1983), played a significant part in both the "negotiation" of the fee contract between the attorney and the client and also in the decision to enter into the contract and to pursue the case, any decision that ROWE would apply retroactively would impair vested rights.

Assuming ROWE were to apply retroactively, this Court's "holding" in ROWE is legally incorrect as there exists neither federal nor state authority to support the ROWE "restriction." The federal lodestar approach for computing reasonable attorney's fees encompasses no absolutes. The quantum of recovery should not control any award of attorney's fees.

The result reached by the District Court of Appeal, Third District, should be approved.

V.

ARGUMENT

THE OPINION RENDERED BY THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, REACHED A LEGALLY CORRECT RESULT.

The defendant contends at page 5 of its brief:

* * *

"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."

The plaintiffs would respectfully disagree with the defendant's conclusion. Because the District Court reached the right result, the plaintiffs contend the matter should be remanded to the trial court with directions to enter an attorney's fee award based on the standards established by ROWE except that the court-awarded fee may exceed the fee set by the contingency fee agreement between the plaintiffs and their counsel.

A.

ROWE DOES NOT APPLY RETROACTIVELY WHERE, AS HERE, THE ATTORNEY'S FEE AGREEMENT WAS ENTERED INTO PRIOR TO THE EFFECTIVE DATE OF THE ROWE DECISION.

In Florida it is generally recognized, see: MELENDEZ v. DREIS & KRUMP MANUFACTURING CO., 12 FLW 519, Supreme Court of Florida Case No. 70,225, opinion filed October 15, 1987, and BLACK v. NESMITH, 475 So. 2d 963 (Fla. App. 1st 1985), that:

* * *

"As a general rule, 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. . ." 12 FLW at page 520.

In ROWE, supra, this Court adopted for the first time in Florida the federal lodestar approach to the award of attorney's fees:

* * *

"For the reasons expressed, we hold that § 768.56 is constitutional and adopt the federal lodestar approach for computing reasonable attorney fees. . ." 472 So. 2d at 1146.

* * *

It may, therefore, be stated that since ROWE adopted for the first time a theory, rule, mechanism, etc. and did not overrule any prior decision of this Court, the defendant's reliance (see: pages 6 and 7 of the defendant's brief) upon that line of cases which hold:

* * *

"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 application only. . ."

* * *

is clearly misplaced.

In ROWE this Court stated:

* * *

"The preamble to § 768.56 indicates that the mandatory assessment of attorney fees in favor of a prevailing party in a medical malpractice action is intended to discourage non-meritorious medical malpractice claims. (Citations omitted.)

* * *

"The assessment of attorney fees against an unsuccessful litigant imposes no more of a penalty than other costs of proceedings which are more commonly assessed. . . Rather than deterring plaintiffs from litigating, the statute could actually encourage plaintiffs to proceed with well-founded malpractice claims that would otherwise be ignored because they are not economically feasible under the contingent fee system. The statute may encourage an initiating party to consider carefully the likelihood of success before bringing an action, and similarly encourage a defendant to evaluate the same factor in determining how to proceed once an action is filed. We reject the argu-

ment that § 768.56 so deters the pursuit of medical malpractice claims that it effectively denies access to the courts to either party in malpractice actions. . ." 472 So. 2d at pages 1147 and 1149.

Section 768.56, Florida Statutes (1983), states:

* * *

". . . Before initiating such a civil action on behalf of a client, it shall be the duty of the attorney to inform his client, in writing, of the provisions of this section . . ."

* * *

As a consequence of the conditions of the subject statute, it may be presumptively stated that the existence, vel non, of the statute played a significant part in the "negotiation" of not only the fee (portion of the) contract between the attorney and the client, but also in the decision to enter into the contract and to pursue the case:

* * *

"The preamble to § 768.56 indicates that the mandatory assessment of attorney fees in favor of a prevailing party in a medical malpractice action is intended to discourage non-meritorious medical malpractice claims. (Citations omitted.)" 472 So. 2d at page 1147.

As a consequence of the above, this Court should hold that the decision rendered in ROWE did more than what the District Court of Appeal, Second District, discerned in FREEDOM SAVINGS & LOAN ASSOCIATION v. BILTMORE CONSTRUCTION CO., INC., 510 So. 2d 1141 (Fla. App. 2nd 1987), to wit:

* * *

"To apply Rowe to contracts entered into prior to that decision does not impair any rights of Biltmore; rather, it merely sets out a procedural method for determination of those rights." 510 So. 2d at page 1142.

Because a judicially effected change in the law may not be retroactively implied to impair vested rights, see, for

example: FLORIDA FOREST & PARK SERVICE v. STRICKLAND, 18 So. 2d 251 (Fla. 1944) and LEVY v. LEVY, 483 So. 2d 455 (Fla. App. 3rd 1986), it is clear that neither the decision in FREEDOM SAVINGS & LOAN ASSOCIATION v. BILTMORE CONSTRUCTION CO., INC. nor the argument defendant herein advances should be approved by this Court. That this principle of law is not limited to simply domestic matters is clear. See, for example: TUERK v. ALLSTATE INSURANCE CO., 498 So. 2d 504 (Fla. App. 3rd 1986).

At page 8 of its brief the defendant argues:

* * *

> ". . . 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."

* * *

For the reasons heretofore advanced it is clear the conclusion reached by the defendant is inaccurate. The reasons behind the enactment of § 768.56, Florida Statutes, as well as the policy reasons underlying why this Court adopted the federal lodestar approach to the award of attorney's fees provide compelling reasons why ROWE should not be given retroactive application.

In concluding the argument portion of its brief the defendant argues therein that § 768.56, Florida Statutes, was repealed and that its replacement 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. . ."

* * *

The significance of this fact seems minimal. First, the pertinent issue is whether or not ROWE is to be applied retroactively. There exists herein a justiciable issue that needs to be resolved.

Second, ROWE'S application is not limited solely to § 768.56, Florida Statutes. As this Court is well aware, there appears to be conflict in the Districts concerning whether or not ROWE has limited application, to wit: to only statutorily awarded attorney's fees. Compare: SHLACHTMAN v. MITRANI, 508 So. 2d 494 (Fla. App. 3rd 1987) and FREEDOM SAVINGS & LOAN ASSOCIATION, supra.

Lastly, any argument concerning the interpretation to be given the "new" statute on fees, see: § 768.595, Florida Statutes (1985), is irrelevant. Neither the statute nor its interpretation apply here.

For the reasons advanced this Court should approve the opinion rendered by the District Court of Appeal, Third District, and hold that the decision rendered in ROWE, supra, is to be applied prospectively.

B.

ASSUMING ROWE APPLIES RETROACTIVELY, THIS COURT'S "HOLDING" IN ROWE IS LEGALLY INCORRECT AS THERE EXISTS NEITHER FEDERAL NOR STATE AUTHORITY TO SUPPORT THE ROWE "RESTRICTION."

It should again be emphasized that this Court, in deciding ROWE, supra, specifically adopted "the federal lodestar approach for computing reasonable attorney's fees." ROWE, supra, 472 So. 2d at page 1146. This Court emphasized:

* * *

"Although the amount of an attorney fee award must be determined on the facts of each case, we believe that it is incumbent upon this Court to articulate specific guidelines to aid trial judges in the setting of attorney fees. We find the federal lodestar approach, explained below, provides a suitable foundation for an objective structure. (Citations omitted.)" 472 So. 2d at page 1150.

* * *

In ROWE this Court defined "lodestar:"

* * *

"The number of hours reasonably expended. . . multiplied by a reasonable hourly rate. . . produces the lodestar, which is an objective basis for the award of attorney's fees. Once the court arrives at the lodestar figure, it may add or subtract from the fee based upon a 'contingency risk' factor and the 'results obtained.'" 472 So. 2d page 1151.

It is in the context as quoted, supra, that this Court uttered the words which form the nucleus for this litigation:

* * *

"The contingency risk factor is significant in personal injury cases. Plaintiffs benefit from the contingent fee system because it provides them with increased access to the court system and the services of attorneys. 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. When the prevailing party's counsel is employed on a contingent fee basis, the trial court must consider a contingency risk factor when awarding a statutorily directed reasonable attorney fee. However, because the party paying the fee has not participated in the fee arrangement between the prevailing party and that party's attorney, THE ARRANGEMENT MUST NOT CONTROL THE FEE AWARD: 'were the rule otherwise, courts would find themselves as instruments of enforcement, as against third parties, of excessive fee contracts (citations omitted).' FURTHER, IN NO CASE SHOULD THE COURT-AWARDED FEE EXCEED THE FEE AGREEMENT REACHED BY THE ATTORNEY AND HIS CLIENT. Cf. Rosenberg v. Levin, 409 So. 2d 1016 (Fla. 1982). . ." 472 So. 2d at page 1151.

Nowhere else in the entire opinion is there an explanation for

the meaning, significance or application of the above capitalized sentences. In point of fact, utilization of "these sentences" can produce--indeed, in this case it has produced--an award totally inconsistent with the lodestar formula.

It should be reminded that of the federal cases cited by this Court in ROWE, most, (if not all) involved "flat fee" or "hourly rate" contracts, payment of which were contingent on whether the party prevailed. Limiting the court-awarded fee to the attorney-client agreement where the contract specified a flat fee or hourly rate insures that the lodestar figure produces a reasonable attorney's fee. However, the restriction that court-awarded attorney's fees not exceed the agreement reached by the attorney and his client should not be deemed to control contingent contracts which base the fee on a percentage of the recovery. If this were so, plaintiff's attorney who received a low verdict, yet reasonably expended a great number of hours on a case, could not receive a (statutorily authorized) "reasonable" attorney's fee. Indeed, the federal courts do not subscribe to the ROWE "restriction."

It is well settled in the federal court system (under the lodestar method of computation) that the quantum of recovery should not control any award of attorney's fees. It was stated in LANASA v. CITY OF NEW ORLEANS, 619 F. Supp. 39 (U.S.D.C. E.D. La. 1985):

* * *

> "While a modest damage award should not control an attorney's fee award, it is certainly a factor to be considered."

* * *

The above holding is not of recent origin in the federal court system. In COPPER LIQUOR, INC. v. ADOLF COORS COMPANY, 624 F. 2d 575 (5th Cir. 1980), the Court, in citing to numerous federal authorities on the subject matter, had occasion to comment that while the plaintiff's recovery "was not large:"

* * *

". . . This should not be ignored, but a modest damage award should not control an attorney's fee award."

* * *

See also: RHEUARK v. SHAW, 477 F. Supp. 897, 930 (N.D. Tex. 1979), modified on other grounds, RHEUARK v. SHAW, 628 F. 2d 297 (5th Cir. 1980).

In KNIGHT v. AUCIELLO, 453 F. 2d 852 (1st Cir. 1972), the Court stated:

* * *

"The violation of an important public policy may involve little by way of actual damages, so far as a single individual is concerned, or little in comparison with the costs of vindication, as the case at Bar illustrates. If a defendant may feel that the cost of litigation, and, particularly, that the financial circumstances of an injured party may mean that the chances of suit being brought, or continued in the face of opposition, will be small, there will be little brake upon deliberate wrongdoing. . ." 453 F. 2d at page 853.

See also: OHIO-SEALY MATTRESS MANUFACTURING COMPANY v. SEALY INCORPORATED, 776 F. 2d 646 (7th Cir. 1985) and cases cited therein:

* * *

"Courts should probably ignore the percentage chosen as the contingency rate or an unreasonably high or low hourly rate, but courts may consider--and have considered--the fact that the attorney worked on a contingency or an hourly basis." 776 F. 2d at page 661.

* * *

In BLUM v. STENSON, 465 U.S. 886, 79 L. Ed. 2d 891, 104 S. Ct.

1541 (1984), the United States Supreme Court had occasion to once again address the federal lodestar formula, and in so doing emphasized:

* * *

> ". . . That the 'product of reasonable hours times a reasonable rate' normally provides a 'reasonable' attorney's fee within the meaning of the statute (citations omitted) . . . In view of our recognition that an enhanced award may be justified 'in some cases of exceptional success,' we cannot agree with petitioner's argument that an 'upward adjustment' is never permissible. The statute requires a 'reasonable fee,' and there may be circumstances in which the basic standard of reasonable rates multiplied by reasonably expended hours results in a fee that is either unreasonably low or unreasonably high. When, however, the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product is presumed to be the reasonable fee contemplated. . . " 465 U.S. at page 897, 79 L. Ed. 2d at page 901.

It is patent from an examination of the above that in the federal court system, the quantum of recovery does not (indeed, cannot) control the award of statutorily awarded attorney's fees. As with all the other lodestar considerations, it is but one factor to consider. In ROWE, this Court (in a statement immediately preceding the "restriction") recognized:

* * *

> ". . . Because the party paying the fee has not participated in the fee arrangement between the prevailing party and that party's attorney, THE ARRANGEMENT MUST NOT CONTROL THE FEE AWARD: 'Were the rule otherwise, courts would find themselves as instruments of enforcement, as against third parties, of excessive fee contracts.'" 472 So. 2d at page 1151.

* * *

The above statement is completely inconsistent with this Court's later announced "restriction." If, in no case should the court-awarded fee exceed the fee agreement reached

by the attorney and his client, then, factoring in the ROWE "restriction," the arrangement does control the fee award. This glaring inconsistency must be resolved with the removal of the ROWE "restriction."

In conclusion it cannot be said that this Court's reference in ROWE to the case of ROSENBERG v. LEVIN, 409 So. 2d 1016 (Fla. 1982) provides any basis to justify retention of the ROWE "restriction." ROSENBERG involved the amount of fees due a discharged attorney. This Court therein held that the attorney should only be allowed to recover the reasonable value of those services rendered prior to discharge and limited by the maximum contract fee. This Court explained:

* * *

> ". . . This limitation is believed necessary to provide client freedom to substitute attorneys without economic penalty. Without such a limitation, a client's right to discharge an attorney may be illusory and the client may in effect be penalized for exercising the right." 409 So. 2d at page 1020.

* * *

While ROSENBERG v. LEVIN certainly provides that in a given situation an attorney should not receive quantum meruit recovery which would exceed the (discharged attorneys) contract amount, it cannot be said that ROSENBERG v. LEVIN, supra, has any factual application to the instant cause. As a consequence the ROWE "restriction" should be removed and the result reached by the District Court of Appeal, Third District, should be approved.

VI.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the plaintiffs respectfully urge this Honorable Court to approve the opinion rendered by the District Court of Appeal, Third District, and to hold that ROWE does not apply retroactively. In addition, should this Court determine that ROWE is to operate with retroactive effect, this Court should hold that the ROWE "restriction" is legally incorrect as being inconsistent with the federal lodestar approach to an award of attorney's fees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Brief of Respondents on the Merits was mailed to the following counsel of record this 16th day of November, 1987.

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