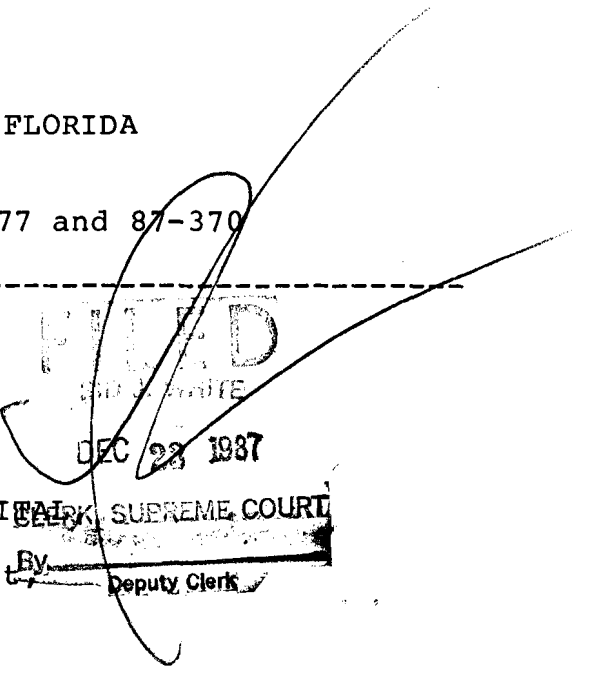
IN THE SUPREME COURT OF FLORIDA

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 REPLY BRIEF ON THE MERITS

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I N D E X

TABLE OF CITATIONS AND AUTHORITIES

I N D E X

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.

A. THE DECISION OF FLORIDA PATIENT'S COMPENSATION FUND v. ROWE[1] APPLIES RETROACTIVELY TO RESTRICT AN ATTORNEY'S FEE AWARD TO NO MORE THAN THE FEE SET BY THE CONTINGENCY FEE AGREEMENT BETWEEN THE PARTY SEEKING FEES AND HIS COUNSEL WHEN THE ATTORNEY'S FEE AGREEMENT WAS ENTERED INTO BEFORE THE ROWE DECISION WAS EFFECTIVE.

Plaintiffs request this Court to remand the case 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." Brief of Respondents, page 5. Therefore, plaintiffs essentially concede that all of Rowe's standards should have retroactive application except the requirement that a court-awarded fee not exceed the fee agreement reached by the attorney and client. Plaintiffs argue that the Supreme Court of Florida adopted a whole new approach to the award of attorneys fees and that such a judicially effected change in the law may not be retroactively applied to impair vested rights and then inconsistently ask this Court to

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[1]/ 472 So.2d 1145 (Fla. 1985).

retroactively apply all Rowe standards except the requirement that the court-awarded fee not exceed the attorney-client fee agreement. This argument makes no sense.

First, the argument ignores the fact that 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. Indeed, in Rowe, this Court relied on its earlier decision in Rosenberg v. Levin, 409 So.2d 1016 (Fla. 1982) in applying the principle. In that case, this Court adopted the modified quantum merit 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 which would allow attorney's fees in excess of the maximum contract price. See also Trustees of Cameron-Brown v. Tavormina, 385 So.2d 728, 731 (Fla. 3d DCA 1980) and the discussion of this case in the initial Brief of Petitioner, page 6.

Second, even if the subject rule of law discussed by this Court in Rowe, constituted a change in case law, it does not impair any vested substantive rights. As the Second District Court of Appeal held in its recent decision in Freedom Savings and Loan Association v. Biltmore Construction Co., Inc., 510 So.2d 1141, 1142 (Fla. 2d DCA 1987), the application of Rowe to contracts entered into before that decision "does not impair any

rights ... rather, it merely sets out a procedural method for determination of those rights. [cites omitted]." See Melendez v. Dreis and Krump Manufacturing Co., ____ So.2d ____ (Fla. 1987, opinion filed October 15, 1987, 12 FLW SC 519.

This Court clearly contemplated retroactive application of its Rowe decision because it remanded the Rowe case to the trial court for "a new evidentiary hearing for the purpose of determining a reasonable fee ... consistent with the appropriate factors and guidelines set forth in this opinion." Rowe, supra at 1152.

B. THIS COURT SHOULD ADHERE TO ITS ROWE MANDATE THAT A COURT-AWARDED FEE NOT EXCEED THE FEE AGREEMENT REACHED BY THE ATTORNEY AND HIS CLIENT.

Plaintiffs alternatively ask this Court to "remove" the Rowe restriction of fees to no more than the fee arrangement between the attorney and client. Such qualification of the fee award is supported by public policy considerations. The attorney and his client have the freedom to contract for a contingent fee, an hourly rate or to be bound by any court award when entering into the attorney-fee contract. In the case of a contingent fee agreement, which is present in this case, the courts recognize that "the fee to be paid in the event of recovery usually is set higher than would be a flat fee for the services actually performed." Trustees of Cameron-Brown v. Tavormina, supra at 731, quoting Ronlee, Inc. v. P.M. Walker Co., 129 So.2d 175, 176-77 (Fla. 3d DCA 1961). The qualification safeguards the public by

reducing the possibility of excessive fee awards. Attorneys and their clients always gamble to some degree when entering into fee arrangements. How can plaintiffs' attorney's fee entitlement be considered impaired simply by binding the plaintiffs' attorney to his contract and holding that a fee award cannot exceed the fee amount contracted by the parties?

None of the federal cases cited by plaintiffs are on point since the courts were simply addressing the "result obtained" factor to be considered in the federal lodestar approach and not the safeguard qualification adopted by this Court. Blum v. Stenson, 465 U.S. 886, 79 L.Ed.2 891, 104 S.Ct. 1541 (1984); Copper Liquor, Inc. v. Adolph Coors Co., 624 F.2d 575 (5th Cir. 1980); Rheuark v. Shaw, 477 So.2d 897, 930 (N.D. Tex. 1979), modified on other grounds, Rheuark v. Shaw, 628 F.2d 297 (5th Cir. 1980). The decision of Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972) is not applicable; it predates the adoption of the federal lodestar approach.

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 Reply Brief on the Merits was mailed this 21st day of December, 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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