W00A

IN THE SUPREME COURT OF FLORIDA

WORLD SERVICE LIFE INSURANCE COMPANY,

Petitioner,

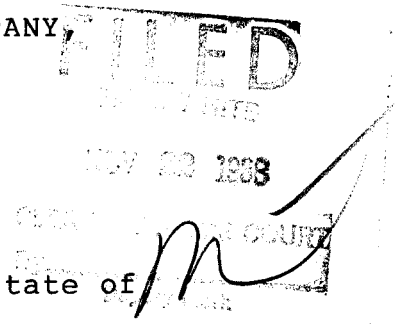
vs.

ELEANOR V. BODIFORD,

as Personal Representative of the Estate of

GROVER T. BODIFORD, Deceased,

Respondent.



CASE NO.: 72,631

(1st DCA: 87-1369)

DISCRETIONARY REVIEW OF NON-FINAL ORDER
OF THE
FIRST DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF

MICHEL L. STONE
(Florida Bar No.: 0256791)
STONE & SUTTON, P.A.
116 East Fourth Street
Panama City, FL 32401
(904) 785-7272

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTORY STATEMENT 1

ISSUES PRESENTED 2

STATEMENT OF THE CASE AND OF THE FACTS 3

SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. THE DECISION BELOW SHOULD BE AFFIRMED IF CORRECT ON ANY LEGAL BASIS 9

II. THE RESULT REACHED BY THE FIRST DISTRICT COURT OF APPEAL COMPORTS WITH THE PROPER APPLICATION OF ROWE 11

A. The trial court rewrote the contract between attorney and client by misinterpreting the phrase, "gross amount received." 11

B. By rewriting the fee contract, the trial court defeated the purpose both of Rowe and of the attorney fee award statute itself. . . 17

III. WORLD SERVICE IS ESTOPPED TO CLAIM A REDUCTION OF THE ATTORNEY'S FEE AWARDED BY THE TRIAL COURT . . 21

CONCLUSION 22

CERTIFICATE OF SERVICE 24

APPENDIX A1

TABLE OF AUTHORITIES

Cases — Page

Cincinnati Insurance Company v. Palmer, 297 So.2d 96 (Fla. 4th DCA 1974) 8, 15, 18, 19

Congregation Temple De Hirsch v. Aronson, 128 So.2d 585 (Fla. 1961) 7, 9

Florida Patients Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) 4-7, 10-14, 16, 17, 19, 22

Gibson v. Walker, 380 So.2d 531 (Fla. 5th DCA 1980) . 8, 15, 17, 19

Henriquez v. Publix Super Markets, Inc., 434 So.2d 53 (Fla. 3d DCA 1983) 9

Miami Children's Hospital v. Tamayo, 529 So.2d 667 (Fla. 1988) . 13, 14, 22

Parker v. Gordon, 442 So.2d 273 (Fla. 4th DCA 1983) 9

Re Estate of Yohn, 238 So.2d 290 (Fla. 1970) 9

Rosenberg v. Levin, 409 So.2d 1016 (Fla. 1982) 12

State Plant Board v. Smith, 110 So.2d 401 (Fla. 1959) . . . 7, 9

Tamayo v. Miami Children's Hospital, 511 So.2d 1091 (Fla. 3d DCA 1987) 13

Universal Underwriters Insurance Company v. Gorgei Enterprises, Inc., 345 So.2d 412 (Fla. 2d DCA 1977) 8, 16-18

Statutes

Ch. 80-67, Laws of Fla. 14

Section 627.428, Fla. Stat. (1979) 8, 14, 17, 19, 20

Section 768.56, Fla. Stat. (1981) 14

Other authorities

3 Fla.Jur.2d, Appellate Review, Section 296 (1978) 9

INTRODUCTORY STATEMENT

The Respondent, Eleanor V. Bodiford, as Personal Representative of the Estate of Grover T. Bodiford, Deceased, will be designated as "the plaintiff." The Petitioner, World Service Life Insurance Company, will be designated as "the defendant" or "World Service."

References to the Appendix accompanying this brief will be designated by the symbol "A," followed by the page number(s).

ISSUES PRESENTED

I. THE DECISION BELOW SHOULD BE AFFIRMED IF CORRECT ON ANY LEGAL BASIS

II. THE RESULT REACHED BY THE FIRST DISTRICT COURT OF APPEAL COMPORTS WITH THE PROPER APPLICATION OF ROWE

A. The trial court rewrote the contract between attorney and client by misinterpreting the phrase, "gross amount."

B. By rewriting the fee contract, the trial court defeated the purpose both of Rowe and of the attorney fee award statute itself.

III. WORLD SERVICE IS ESTOPPED TO CLAIM A REDUCTION OF THE ATTORNEY'S FEE AWARDED BY THE TRIAL COURT

STATEMENT OF THE CASE AND OF THE FACTS

This case is before the Court on a grant of certiorari to a judgment of the First District Court of Appeal, which reversed a non-final order awarding attorneys' fees and costs, entered upon an authorized motion therefor at the conclusion of a second trial.

The case arose out of the denial of credit life insurance benefits. It had previously been before the First DCA sub nom. World Service Life Insurance Company v. Eleanor V. Bodiford, as Personal Representative of the Estate of Grover T. Bodiford, Deceased, Docket No. BH-135. There, the court reversed judgment for the plaintiff and remanded for a new trial, holding inter alia that the jury was improperly instructed that its verdict must be for the plaintiff unless it found that the insured purchased the insurance with the knowledge that he was soon to die and purposely concealed this fact from the insurer; and that the correct standard was whether the insured misrepresented material facts with the conscious intent to deceive the insurer.

The case was tried again in December 1986, again resulting in a favorable jury verdict and judgment for the plaintiff. The judgment was again appealed and was per curiam affirmed by the First DCA sub nom. World Service Life Insurance Company v. Eleanor V. Bodiford, as Personal Representative of the Estate of Grover T. Bodiford, Deceased, Docket No. BS-33.

After the first trial, motion was made in the trial court for the assessment of reasonable attorneys' fees and costs. The

court took evidence and issued its judgment for attorneys' fees and costs on July 3, 1985. [A7-8]. This judgment was not appealed, but its efficacy was of course mooted by the reversal and remand by the First DCA in Docket No. BH-135.

After the second trial, motion was again made in the trial court for the assessment of reasonable attorneys' fees and costs. The court again took evidence and, on September 2, 1987, issued the order that was reversed below and now comes to this Court. [A9-10].

The facts are relatively simple. After the first trial, the court found 107 hours of time reasonably expended by plaintiff's counsel. It further found that $75.00 was a reasonable hourly rate under the circumstances. [A7]. Then, applying the guidelines set forth in Florida Patients Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), the court determined that a reasonable contingency risk multiplier was 1.5, since, based on the instructions given to the jury, it appeared that the plaintiff's prospects for success at the outset were more likely than not. [A7-8]. The court also had before it the plaintiff's contingency fee arrangement with counsel, which called for a lawyer's fee calculated as a percentage (depending upon the stage of litigation reached) of "the gross amount received." [A11]. Based upon all of the above, the trial court awarded a fee of $12,037.50.

After the second trial, the court again applied the guidelines in Rowe and made findings of fact accordingly. The

court recited and adhered to its previous findings as to a reasonable attorney's fee for work performed through the first trial. [A9]. As to appellate and trial work performed thereafter, the court made the following findings: (a) the hours expended were 101.50; (b) a reasonable hourly rate is $85.00; (c) the appropriate contingency risk multiplier is 2.0. Based on these findings, the court concluded that a reasonable attorney's fee for work performed since the first trial was $17,255.00. [A9].

Instead of awarding these amounts, however, the court then referred to plaintiff's fee agreement and found that the language, "45% of the gross amount received, if case is appealed," means that

> [b]ased on the recoverable damages as of December 10, 1986 [the date of the second verdict], the plaintiff's attorneys are entitled to a contract fee of $17,230.75.

[A10] (emphasis added). It is apparent from other findings in the court's order (see Paragraph 3, [A9]) that it determined the plaintiff's "recoverable damages" by taking the original benefits amount ($19,400.00) and adding 12% interest thereon from the date of death (December 11, 1980) through the date of the second verdict (December 10, 1986), which, according to the trial court, totals $38,290.56. The court apparently arrived at the "contract fee" by taking 45% of this total. The court explicitly based its finding thus limiting the fee award on language in Rowe, supra, which states that "in no case should the court-awarded fee exceed the fee agreement reached by the attorney and his client."

[A1Ø].

Thus, while the trial court found that a reasonable attorney's fee for all work performed since the inception of the litigation would be $29,292.5Ø, it apparently felt constrained by the above-quoted language in Rowe and the terms of plaintiff's fee agreement to reduce that award to $17,23Ø.75.

The plaintiff appealed, and the First District Court of Appeal reversed, holding that the reasonable attorney's fee determined by the trial court using the Rowe factors, viz., $29,292.5Ø, should not have been reduced. [A2-4].

This Court granted certiorari.

SUMMARY OF ARGUMENT

Although the First District Court of Appeal erroneously held that Florida Patients Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) does not apply to fee agreements entered into before the date of Rowe's decision, the result it reached was correct for a different reason and should be affirmed. Congregation Temple De Hirsch v. Aronson, 128 So.2d 585 (Fla. 1961); State Plant Board v. Smith, 110 So.2d 401 (Fla. 1959).

The trial court erred, not by applying Rowe to this case, but by applying it incorrectly.

The court correctly applied the Rowe "lodestar" factors to determine a reasonable attorney's fee for the period from the inception of the litigation through the first trial, and for the period since the first trial through final judgment. The total was $29,292.50. This, added to the judgment for policy benefits plus interest of $38,290.56, would have yielded a total damages award of $67,583.06.

Then the court incorrectly ruled that to award an attorney's fee of $29,292.50 would be to violate Rowe's injunction that the court-awarded fee should never exceed the amount agreed upon between lawyer and client. In fact, this sum does not exceed the amount agreed upon between lawyer and client. Under a contingent fee contract which called for attorney's fee of 45% of the "gross amount received," the lawyer's fee on the total damages award would have been $30,412.37.

The trial court reduced the total amount drastically by misinterpreting the plaintiff's contingent fee agreement with counsel. The court interpreted an arrangement which called for a straight percentage of "the gross amount received" as one by which counsel's fee was limited to a percentage of the "recoverable damages." The latter phrase was arbitrarily introduced by the court and then implicitly defined to equate with the amount of benefits originally due under the policy, plus interest.

The trial court's reasoning would restrict attorney fee awards in contingent fee settings to a percentage of the policy benefits at issue, regardless of the amount of time necessary to vindicate the plaintiff's claim. This violates the purpose of Section 627.428, Fla. Stat. (1979), which is to discourage litigation and encourage prompt disposition of valid first-party claims by the insurance company. Gibson v. Walker, 380 So.2d 531 (Fla. 5th DCA 1980); Universal Underwriters Insurance Company v. Gorgei Enterprises, Inc., 345 So.2d 412 (Fla. 2d DCA 1977); Cincinnati Insurance Company v. Palmer, 297 So.2d 96 (Fla. 4th DCA 1974).

Moreover, the trial court's reasoning was based on a too-narrow definition of what constitutes "recoverable damages" in first-party insurance cases, since it is well understood that attorney's fees themselves are part of the damages recoverable under insurance contracts governed by Section 627.428. Gibson v. Walker, supra; Cincinnati Insurance Company v. Palmer, supra.

ARGUMENT

I. THE DECISION BELOW SHOULD BE AFFIRMED IF CORRECT ON ANY LEGAL BASIS

As argued in Point II, infra, the decision of the First District Court of Appeal was correct, even if the cited legal basis for that decision was in error. It is the settled rule of appellate review that the decision of a lower tribunal should be affirmed if that court has arrived at a correct result.

> The process of reasoning by which the trial court reached its conclusion is not regarded as the controlling factor in entering a reversal or affirmance. The court will therefore affirm rather than reverse a judgment or decree if the result is correct, though the trial judge states erroneous reasons for reaching his decision.

3 Fla.Jur.2d, Appellate Review, Section 296 at 351-352 (1978) (footnotes omitted). See also Congregation Temple De Hirsch v. Aronson, 128 So.2d 585 (Fla. 1961); State Plant Board v. Smith, 110 So.2d 401 (Fla. 1959).

Logically, this "right for the wrong reason" doctrine should apply with particular force where the error is one of law and the record demonstrates other adequate legal basis for the ruling. See, e.g., Re Estate of Yohn, 238 So.2d 290 (Fla. 1970); Henriquez v. Publix Super Markets, Inc., 434 So.2d 53 (Fla. 3d DCA 1983); Parker v. Gordon, 442 So.2d 273 (Fla. 4th DCA 1983).

In the instant case, the result reached by the First District Court of Appeal was premised on the erroneous legal

theory that Florida Patients Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) does not apply to this fee agreement, because the contract was entered into before Rowe was decided. However, the result was identical to that which the trial court should have reached had it properly applied the principles of Rowe to the facts it found.

Therefore, the decision of the First District Court of Appeal should be affirmed.

II. THE RESULT REACHED BY THE FIRST DISTRICT COURT OF APPEAL COMPORTS WITH THE PROPER APPLICATION OF ROWE

As the plaintiff argued below, the trial court should and did apply Florida Patients Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) to this case. However, the trial court erred in concluding that Rowe required a reduction of the amount of the reasonable attorney's fee properly found under the factors outlined in that case.

A. The trial court rewrote the contract between attorney and client by misinterpreting the phrase, "gross amount received."

After the first trial, the court awarded a reasonable attorney's fee of $12,037.50, based on 107 hours expended at $75.00 per hour and a contingency risk multiplier of 1.5. After the second trial, the court found that 101.5 hours had been expended on the appeal and the retrial, and, applying an hourly rate of $85.00 and a contingency risk multiplier of 2.0, the court found that a reasonable attorney's fee for that part of the work was $17,255.00. [A9]. Had the trial court's analysis stopped there, the total award for all work would have been $29,292.50, which is the amount awarded by the First DCA.

But the trial court did not stop there. The court went on to note, correctly, that the plaintiff's contingency fee contract called for attorneys' fees in the amount of "45% of the gross amount received, if case is appealed." [A9-10]. Then the court

turned to dictum appearing in Florida Patients Compensation Fund v. Rowe, supra, 472 So.2d at 1151 (Fla. 1985):

> 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).

Based on this statement, the court found that the total attorneys' fees recoverable are $17,230.75, which represents 45% of what the court found the plaintiff's "recoverable damages" to be as of the date of the second verdict. [A10]. From the court's order it is clear that by "recoverable damages" the court meant the original amount of the insurance benefits ($19,400.00), plus interest on that amount from the time of the original entitlement thereto. (See Paragraph 3, [A9]).

It is submitted that this was error. In effect, the court rewrote the fee agreement between the parties to read "45% of the `recoverable damages,' if the case is appealed," then used the rewritten contract to limit the attorneys' fee award according to the quoted dictum in Rowe. But the fee agreement is a straight contingent fee arrangement. Under it, fees upon recovery at various stages of litigation are based upon "the gross amount received"---not upon what the insurance company should have paid the insured at the outset of the claim. It is therefore improper to reduce drastically the amount found by the court to be reasonable based upon an imagined limitation supplied by the fee agreement.

This becomes clearer when we examine the authority cited by the Rowe Court for the dictum quoted above. Rosenberg v. Levin,

supra, was a case in which a lawyer was discharged by his client without cause prior to recovery. The fee agreement had specified a fixed sum ($10,000) plus a 50% contingency on amounts recovered in excess of $600,000. The trial court determined the fee in quantum meruit at $55,000. The district court of appeal and this Court held that the fee should have been limited to $10,000--- since the contingency did not occur. Plainly, that is not the situation here. Where, as here, the fee agreement is purely contingent, and the plaintiff prevails, the court should determine the statutory fee award with reference to the criteria set forth in Rowe, supra.

Miami Children's Hospital v. Tamayo, 529 So.2d 667 (Fla. 1988), does not compel a different result. There, as already noted, the holding was that Rowe, and its language forbidding a fee award in excess of the agreement between lawyer and client, applies to contingency fee contracts entered into before its date of decision. However, the opinion does not closely examine the fee agreement itself. The entire discussion is as follows:

> The facts show that the respondents prevailed in a medical malpractice action and recovered a $5,000 judgment. They and their attorney had entered into a forty percent contingency fee contract.

There is even less discussion of the nature of the fee contract in the lower court opinion, Tamayo v. Miami Children's Hospital, 511 So.2d 1091 (Fla. 3d DCA 1987), where it is referred to simply as a "contingency fee agreement".

The wording of the contract is crucial. If the agreement in

Tamayo said, for example, "40% of the judgment," or "40% of the damages awarded," then the computation might well be different from that under the present agreement, which specifies a percentage "of the gross amount received". Neither of the Tamayo opinions addresses, nor purports to address, the question of how the fee agreement is to be interpreted in the first instance.

A second problem with Tamayo is that it, like Rowe itself, concerns fee awards under Fla. Stat. Section 768.56, not Section 627.428. The policy considerations are different. As this Court noted in Rowe, Section 768.56 requires the assessment of fees in favor of a prevailing party in a medical malpractice action and is intended to discourage non-meritorious medical malpractice claims. See also, Ch. 80-67, Laws of Fla. Section 627.428, on the other hand, is one-sided, awarding fees only to prevailing plaintiffs in first-party insurance actions, the purpose being not to discourage litigation generally, but to encourage the prompt disposition by insurers of the valid claims of their insureds. See discussion under Point B., infra. The distinction is important, because although the insurer does not participate in the fee agreement between plaintiff and lawyer in first-party cases, liability for a reasonable attorney's fee is part of the insurance company's contractual obligation to its insured. That obligation ought not be defeated by a rewriting of the plain words of the fee agreement, as here occurred at the trial level.

The trial court's basic error lay in its implicit definition of the contract words, "gross amount received." For this phrase,

the court substituted "recoverable damages," then erroneously defined "recoverable damages" to mean policy benefits plus interest. As discussed more fully below, the attorney fee statute, deemed a part of the policy, provides an additional measure of damages for breach of the insurance contract. See Gibson v. Walker, 380 So.2d 531 (Fla. 5th DCA 1980); Cincinnati Insurance Company v. Palmer, 297 So.2d 96 (Fla. 4th DCA 1974). Any reasonable definition of "recoverable damages" should include not only the face amount of the policy, but also the attorney's fee award that is triggered by the wrongful refusal to pay those benefits. Certainly the phrase, "gross amount received," should not be construed more narrowly than this.

By doing so, the trial court not only reduced the amount of fees that counsel will recover, but also reduced the plaintiff's recovery, in effect capping one element of her damages. Let us be very clear. Under this fee agreement, lawyer and client share in all of the elements of damages recovered. After appeal (or, in this case, repeated appeals) the lawyer receives 45% of the reasonable fee awarded, and 45% of any other component of the damages received. Likewise, the client receives 55% of the reasonable fee awarded, and 55% of all other components of the "gross amount received."

This phrase, "the gross amount received," is nowhere modified or limited in the fee agreement. Clearly, it was the intent of the parties that the lawyer's fee should be a percentage of "any funds coming into his hands," including

whatever amount the trial court might ultimately determine constituted a reasonable attorney's fee.

The contract here is quite similar to that considered in Universal Underwriters Insurance Company v. Gorgei Enterprises, Inc., 345 So.2d 412 (Fla. 2d DCA 1977). There, the plaintiff had agreed to pay its lawyer, upon the filing of suit, 40% of any recovery. The court observed that,

> [a]s worded, the contract provided for the attorney to receive not only 40% of the recovery on the insurance claim but also 40% of any court awarded fee.

345 So.2d at 413 n.2. Although noting that a contingent fee contract in a case where the law permits assessment of attorney's fees against the insurer is "something of an anomaly," the court went on to say:

> Nevertheless, we know of nothing which would preclude a contingent fee contract for the prosecution of such a claim in which a party could agree to pay a fee which might exceed the amount awarded by the court.

Id. at 413.1

If the trial court had construed the fee agreement here in this manner, it would have found that Rowe does not prohibit the award of the reasonable fee the court calculated. That fee was $29,292.50. The court determined policy benefits plus accrued interest to total $38,290.56. The "gross amount received" would

---

1 The Gorgei court also pointed out and held that the trial court should not be bound by the terms of the contingent fee contract in determining what is a reasonable fee, but instead should determine independently the reasonableness of the fee for the services actually performed.

total $67,583.06. As between lawyer and client, the contract would then yield an attorney's fee of $30,412.37, and a net client recovery of $37,170.69. These numbers are fully consistent with Rowe's injunction that the court-awarded fee must not exceed the fee specified in the contract.2

B. By rewriting the fee contract, the trial court defeated the purpose both of Rowe and of the attorney fee award statute itself.

The court's rewriting of the fee agreement leads to results which violate public policy and legislative intent. It is well known that the purpose of statutes like Section 627.428 is to encourage the settlement of first-party disputes without litigation because of the additional leverage the (growing) plaintiff's fee award should give her as against the insurer's leverage, which is premised in the time-value of money. See, e.g., Gibson v. Walker, 380 So.2d 531, 533 (Fla. 5th DCA 1980), in which the court stated that the purpose of Section 627.428

> is to discourage litigation and encourage prompt disposition of valid insurance claims without litigation.

---

2 Below, the insurance company called it a "strained interpretation" of Section 627.428 and its legislative intent for a "non-lawyer" insured to receive as damages part of the amount designated by the court as reasonable attorney's fees. However, since the purpose of the statute is "to discourage litigation and encourage prompt disposition of valid insurance claims without litigation" (Gibson v. Walker, supra, 380 So.2d at 533), it would appear to make no difference to the statutory objective how a client and her lawyer choose to divide the award. Moreover, as already pointed out, such a contract, though perhaps "anomalous," has not been discountenanced. See Universal Underwriters Insurance Company v. Gorgei Enterprises, Inc., supra, 345 So.2d 412 (Fla. 2d DCA 1977).

See also Universal Underwriters Insurance Company v. Gorgei Enterprises, Inc., 345 So.2d 412 (Fla. 2d DCA 1977); Cincinnati Insurance Company v. Palmer, 297 So.2d 96 (Fla. 4th DCA 1974). But under the trial court's rationale, insurance companies would be encouraged to extend litigation unduly, since the plaintiff's fee award would be limited in any contingent fee situation to an amount that cannot grow past a certain point.3 That rationale should be rejected.

It proceeds from a misconception. As already noted, the trial court in effect introduced a distinction between "recoverable damages" and attorneys' fees, tying and limiting the latter to a determination of the former---as if the fee award constituted no part of the insured's "recoverable damages" against the insurer. This view was specifically rejected by the court in Cincinnati Insurance Company v. Palmer, supra, where one of the issues presented was whether liability for plaintiff's attorneys' fees existed if the insurer tendered the entire policy proceeds after suit was filed but before final judgment.

> . . . [U]pon the suit being filed, the relief sought was both the policy proceeds and attorney's fees, and so long as the insurer failed to voluntarily pay any part of the

---

3 Since the face amount of the policy is fixed ($19,400.00), the attorney's fee can grow only with the accumulation of interest on that amount. If we assume one year's interest to be $2,328.00, then the attorney's fee cap for this period, regardless of the nature and extent of the work performed, is .45 x $2,328.00, or $1,047.00. It is not hard to see that, under the trial court's rationale, the litigation of first-party claims founded on relatively small face amounts would never be economically feasible.

> relief sought, it continued to contest the policy, [citation omitted] and thus even though the claim at that point is limited to the recovery of attorney's fees, it is nonetheless a claim under the policy.

297 So.2d at 99 (emphasis in original). Likewise, in Gibson v. Walker, supra, where the issue was similar, the court adopted Cincinnati's view that Section 627.428

> becomes a part of every insurance policy of which the insurer is bound to take notice as it does any other provision of the policy.

380 So.2d at 533. In Gibson, although the insurer had tendered the full policy proceeds, it failed to pay either interest or attorneys' fees, and lengthy litigation was required. The court remanded for the determination of a reasonable attorney's fee

> in the prosecution of this suit from its inception through final judgment. Neither is the trial court bound by the contingency fee arrangement which the record discloses exists between the insured and his attorney, [citation omitted], but the reasonable value of such services should be based on established criteria. [Citations omitted].

Id. at 533-534.4

So, here, having applied the established criteria now set forth in Rowe and determined a reasonable attorney's fee for work done from the inception of this matter through final judgment,

---

4 Thus, it could be argued that the trial court's only error was in its implicit definition of "recoverable damages." The cited authorities establish that a reasonable attorney's fee is, in fact, a part of the plaintiff's "recoverable damages" whenever (a) an insurance company fails to pay benefits required under a policy governed by Section 627.428, and (b) the plaintiff has to hire a lawyer to collect. Thus properly defined, the phrase "recoverable damages" could never operate as a limitation upon the court's determination and award of a reasonable attorney's fee in a contingent fee situation.

the trial court should have simply awarded this amount---as it did at the conclusion of the first trial. By limiting the total award to less than the amount the court determined was reasonable for work since the first trial, the trial judge did violence to the purpose of Section 627.428 and to the plain meaning of this contingent fee agreement.

III. WORLD SERVICE IS ESTOPPED TO CLAIM A REDUCTION OF THE ATTORNEY'S FEE AWARDED BY THE TRIAL COURT

The insurance company is not content with seeking a reversal of the orders below. It also wants this Court to reduce the amount of the attorney's fee awarded by the trial court!

World Service argues (in its statement of facts) that the trial court must have made a mathematical error in its determination of the amount of the policy benefits plus interest, and that the attorney's fee award should therefore be reduced to $15,015.60. See Petitioner's initial brief at 9.

This argument comes too late. World Service did not quarrel with the trial court's determination of the judgment amount, nor did it appeal the trial court's award. The insurance company now seeks reversal of the First District Court of Appeal's orders. Yet it did not raise the computation issue in that court, either. The law of the case and the record on appeal cannot be changed by mere assertion.

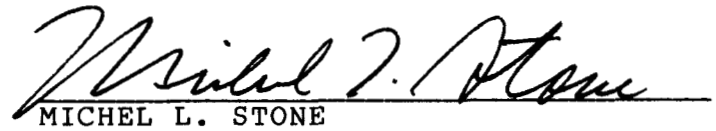
We believe it is clear that World Service is not entitled to reversal of the judgment of the First DCA; much less is it entitled to reversal of both the appellate court and the trial court.

CONCLUSION

This dispute and subsequent litigation has dragged on for almost eight years. No law firm could economically have undertaken to represent the plaintiff had it known that it was signing on for two trials and two plenary appeals, not to mention the fee litigation, unless there were the contingent possibility of recovering a reasonable fee award in the event of success. Not only would World Service's argument make it more difficult for plaintiffs to get lawyers in credit life cases (or any other case in which the "damages," according to the insurance company, are fixed), it would also encourage the non-adjustment of valid claims---precisely the opposite effect of what the attorney fee statute is designed to promote. For, by calculating the attorney's fee on the basis, not of work performed, but of the face amount of the policy plus interest (as the trial court did), the insurer knows that, after a certain point in time in the litigation, plaintiff's counsel can be forced to work virtually without fee. We are confident that neither Rowe nor Tamayo were intended by this Court to countenance such a result.

For all of the foregoing reasons, it is submitted that the orders of the First District Court of Appeal should be affirmed, or, in the alternative, that the appeal should be dismissed as one in which discretionary jurisdiction has been improvidently granted.

Respectfully submitted,

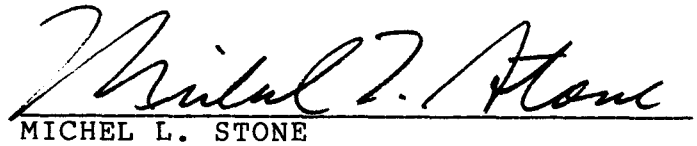


MICHEL L. STONE
STONE & SUTTON, P.A.
116 East Fourth Street
Panama City, FL 32401
(904) 785-7272

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief of Respondent, together with attached Appendix, has been furnished by hand delivery to Deborah M. Overstreet, Attorney for Petitioner, P.O. Box 70, Panama City, FL 32402, this 21st day of November, 1988.



MICHEL L. STONE