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CLERK, SUPREME COURT

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IN THE SUPREME COURT OF FLORIDA

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WORLD SERVICE LIFE INSURANCE COMPANY,

Petitioner,

vs.

Case No. 72,631

DCA-1: 87-1369

ELEANOR V. BODIFORD, as Personal  
Representative of the Estate of  
GROVER T. BODIFORD, Deceased,

Respondent.

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APPEAL FROM TWO ORDERS  
OF THE FIRST DISTRICT  
COURT OF APPEALS

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INITIAL BRIEF

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INTRODUCTORY STATEMENT

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

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

ISSUE PRESENTED

WHETHER THE DISTRICT COURT OF APPEALS ERRED IN REVERSING THE LOWER COURT'S AWARD OF ATTORNEY'S FEES WHICH HAD BEEN LIMITED TO THE AMOUNT SPECIFIED IN THE RESPONDENT'S CONTINGENT FEE CONTRACT.

STATEMENT OF THE CASE

This is an appeal of two orders of the First District Court of Appeals, one which reversed the Trial Court's award of attorney's fees and the second which granted Appellate attorney's fees in favor of the Respondent.

The case was initiated by Bodiford following World's denial of a claim on a credit life insurance certificate issued in 1981. The first jury trial resulted in a verdict in favor of Bodiford. That verdict was reversed by the First District Court of Appeals because of the Trial Court's improper instruction to the jury that the verdict must be for the Plaintiff unless the jury found that Bodiford purchased the insurance certificate with the knowledge of his impending death and failed to disclose this fact to World. (Docket No. BH-135.)

Upon receiving the proper instruction that a verdict should be for the Plaintiff unless the facts showed that Bodiford misrepresented material facts at the time he signed the application for insurance and further made those misrepresentations with the conscious intent to deceive World, the second jury awarded its verdict again in favor of Bodiford. After the verdict was reduced to judgment, it was appealed to the First District Court of Appeals. (Docket No. BS-33.) The bases upon which the second appeal was made were denied by the Appellate Court. (A-5)

Following the first trial, the Trial Court heard evidence on Bodiford's request for assessment of attorney's fees and costs. The award rendered on July 3, 1985 (A-6-7) was not appealed; however it became moot as a result of the Appellate Court's reversal and remand of the first trial jury's verdict.

The Trial Court again heard evidence for the purpose of assessing attorney's fees and costs after the second trial and on September 2, 1987, issued its order (A-8-9) following this Court's interpretation of existing law set forth in Rowe and awarded attorney's fees pursuant to the terms of the contingent fee agreement (A-10).

Bodiford appealed the Trial Court's award to the First District Court of Appeals. Following that Court's consideration of the arguments and briefs of the respective parties, an order was issued reversing the lower Court's award of attorney's fees and held that the criteria set out in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) did not apply retroactively to contingent fee contracts made prior to the Rowe decision (A-1-3). World's request for rehearing was denied on May 24, 1988 (A-5) and following the Court's Order granting appellate fees to Bodiford on June 8, 1988 (A-4) this appeal ensued.

STATEMENT OF THE FACTS

Following the first trial, the Court found that Bodiford's counsel reasonably expended 107 hours of time in preparation for and participation in the trial. A reasonable hourly rate was determined to be \$75.00. The Court then applied the criteria set out in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) in establishing the contingency risk multiplier as 1.5 since the instructions given the jury by the Court made it more likely that Bodiford would be successful (A-6-7). The Trial Court awarded attorney's fees to Bodiford in the amount of \$12,037.50.

Following the second trial, a hearing on attorney's fees was again held. The guidelines set out in Rowe were applied by the Court in reaffirming the number of hours spent, reasonable rate and contingency fee multiplier previously determined and further made the following findings regarding the appellate work and preparatory work for the second trial: (1) 101.50 additional hours were spent by Bodiford's counsel; (2) a reasonable hourly rate for such work was \$85.00 and (3) the contingency fee multiplier for those additional hours is 2.0. The Court, therefore, determined that attorney's fees for the appellate proceeding following the first trial and the second trial would be \$17,255.00 (A-8-9).



In reviewing the terms of the contingency fee contract between Bodiford and her counsel, the Trial Court noted that the attorney's fee was limited to 45% of the "gross amount received, if case is appealed" (A-10). The gross amount received was found by the Court to include the following: (1) the amount of the certificate of insurance; (\$19,400.00) and (2) twelve percent interest on the certificate amount since the date of Grover Bodiford's death (December 11, 1980) through the date of the second verdict (December 10, 1986) (A-8-9). The Court incorrectly calculated the total damage amount to be \$38,290.56. The actual amount of interest should be \$13,968.00 and when added to the certificate amount of \$19,400.00 equals \$33,368.00. As a result of the Court's application of the contract limitation to the wrong damage figure, it arrived at an attorney's fee award of \$17,230.75. If the contract limitation of 45% had been applied to the actual damage amount of \$33,368.00, the award of attorney's fees should have been \$15,015.60.

### SUMMARY OF ARGUMENT

The First District Court of Appeals erred in reversing the Trial Court's award of attorney's fees on the basis that the criteria set out in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) did not apply to contingency fee contracts made prior to the Rowe decision. The appellate Court followed a series of cases which culminated with Tamayo v. Miami Children's Hospital, 511 So.2d 1091 (Fla. 3d DCA 1987).

In Tamayo, the Third District Court of Appeals held that the following language in Rowe:

"in no case should the court-awarded fee exceed the fee agreement reached by the attorney and his client," (Id. at 1092).

did not apply retroactively to contingent fee agreements made before the 1985 decision in Rowe.

Two days following the date on which the First District Court of Appeals reversed the Trial Court's award of attorney's fees in the case at bar, this Court rendered its opinion in Miami Children's Hospital v. Tamayo, 529 So.2d 667 (Fla. 1988) quashing the decision of the Third District Court of Appeals and remanding with directions to affirm the attorney's fee award which had been limited to 40% pursuant to the terms of the contingency fee contract and as had been established by the Trial Court.

The order of the First District Court of Appeals is in direct conflict with this Court's ruling in Miami and should therefore, be reversed.

## ARGUMENT

WHETHER THE DISTRICT COURT OF APPEALS ERRED  
IN REVERSING THE LOWER COURT'S AWARD OF  
ATTORNEY'S FEES WHICH HAD BEEN LIMITED TO THE  
AMOUNT SPECIFIED IN THE RESPONDENT'S CONTINGENT  
FEE CONTRACT.

The decision rendered by this Court in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) while establishing guidelines to be used by courts in determining attorney's fees statutorily awardable to a prevailing party, placed a specific limitation on those situations where a contingency fee contract had been executed between the prevailing party and his attorney. Specifically, this Court stated in Rowe:

"... in no case should the court-awarded fee exceed the fee agreement reached by the attorney and his client." Id. at 1151.

The issue whether the guidelines in Rowe were retroactively applicable to contingent fee contracts made prior to 1985 has been recently addressed by this Court in Miami Children's Hospital v. Tamayo, 529 So.2d 667 (Fla. 1988). In that case, the trial court had awarded attorney's fees to the prevailing party limited to the forty percent contingent fee payable under the terms of the contingent fee contract. The Third District Court of Appeals reversed the award on the basis that the contingent fee contract was entered into prior to the effective date of the Rowe decision. The question of the applicability of Rowe was certified to this

Court as a question of great public importance and on May 26, 1988, this Court reversed the Third District Court of Appeals and rendered its opinion that:

"The procedures we adopted in Rowe implement that statutory authorization (for attorney's fees). These procedures are no different than previous fee guidelines we have established in the Florida Code of Professional Responsibility and court cases. See e.g., Rule 4-1.5, Rules Regulating The Florida Bar (formerly Disciplinary Rule 2-106(B) of the Florida Code of Professional Responsibility) ...

"all factors contained in Rowe apply whenever the lodestar approach applies ..." Miami at 667. (Emphasis added.)

The method of determining reasonable attorney's fees utilized by the Third District Court of Appeals in Tamayo is identical to that employed by the First District Court of Appeals in the instant case. Both courts allowed the use of a contingency fee multiplier applied to an hourly rate to determine an awardable attorney's fees. No reduction in that fee was required by the Courts even though the contingent fee contracts limited the fee to 40% in Tamayo and 45% in the case at bar. (A-1-3)

In reversing the award of attorney's fees in this case, the First District Court of Appeals on May 24, 1988, specifically cited Tamayo v. Miami Children's Hospital, 511 So.2d 1091 (Fla. 3d DCA 1987) as authority for its decision that dicta from Rowe which limits the award of attorneys fees to that which has been contractually agreed upon in a contingent fee contract was not retroactively applicable to contingent fee contracts entered into prior to Rowe. (A-1-3)

Two days after the First District Court of Appeals denied the Motion for Rehearing, this Court reversed the ruling of the Third District Court of Appeals in Tamayo, destroying the basis upon which the First District Court of Appeals rendered its opinion. Thereafter, the First District Court of Appeals entered its order awarding appellate attorney's fees to Bodiford on June 8, 1988.

The specific contractual language appearing in the employment agreement of December 13, 1984, between Bodiford and her counsel states:

"As compensation for his services I agree to pay said attorney, or agree at his option that he retain out of any funds coming into his hands: ...

"45% of the gross amount received, if the case is appealed."  
(A-10)


Since the decisions of the First District Court of Appeals are in direct conflict with the opinion of this Court in Miami Children's Hospital v. Tamayo, 529 So.2d 667 (Fla. 1988) they should be quashed with direction to the lower court to correct their mathematical error in setting the amount of attorney's fees to \$15,015.60.

CONCLUSION

The First District Court of Appeal's reversal of the limited award of attorney's fees should be quashed, as the basis for its decision is in direct conflict with the opinion of this Court and directions should be given the trial court to re-calculate its previous award of attorney's fee to accurately reflect the award to be \$15,015.60.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a copy of the foregoing Initial Brief to Michel L. Stone, attorney for Respondent, at his address at 116 East 4th Street, Panama City, Florida 32401 by placing said document in the U.S. mail to that address on the 28<sup>th</sup> day of October, 1988.

  
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