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IN THE SUPREME COURT OF FLORIDA

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.

APPEAL FROM TWO ORDERS OF THE FIRST DISTRICT COURT OF APPEALS

REPLY BRIEF OF RESPONDENT

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ATTORNEY FOR RESPONDENT

While counsel for Mrs. Bodiford would have this Court believe that the trial court rewrote and misinterpreted the language appearing in the fee agreement; the trial court, in fact, took the only logical interpretation of the contract language available. The contract language states that:

> "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."

To apply the percentage attorney fee figure to anything other than the proceeds derived from the insurance policy and accrued interest would be a gross misinterpretation of the purposes of §627.428, Florida Statutes. The award of attorney's fees under that statute is designed to ensure that the insured is made whole by receiving both the insurance policy proceeds as well as the amount of attorney's fees he agreed to pay his counsel. Those fees, particularly when derived from a contingent fee agreement, are not meant to be a punishment to the insurance company.

Consider the point in time when the attorney fee contract was made between Mrs. Bodiford and her lawyer. From the beginning, the full amount of the credit life insurance policy, $19,400.00 was the amount that would be recovered by Mrs. Bodiford if she prevailed. With this knowledge, the parties executed the form employment contract knowing the amount "at risk." If Mrs. Bodiford lost her case at trial, no attorney's fees would be owed; and if she won, a percentage of the policy amount would be

paid to her attorney. Since the parties chose not to specify that statutorily awarded attorney's fees were to be included in the "gross amount received," they cannot, at this late date, attempt to amend their agreement to so read.

In a recent decision, St. Paul Fire and Marine Insurance Company v. Sample, 13 FLW 2553 (Fla. 2nd DCA November, 1988) the Second District Court of Appeals rejected a lower court's award of $30,000.00 in attorney's fees following a hearing pursuant to the guidelines set out in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), where the insured recovered only $19,230.77 on a claim for uninsured motorist coverage. The Sample court rejected the argument that a $30,000.00 attorney fee was not excessive since it was less than 40% of the total amount of uninsured motorist coverage available to Sample ($100,000.00). The Court stated that:

> "Under a contingency fee agreement such as the one in this case, the fee is calculated on the basis of the specified percent of recovery." Page 2553

In a strikingly similar factual situation to this case, the Second District Court of Appeals has clearly stated that while the Rowe hearing may determine a reasonable attorney's fee, the amount of attorney's fees shall be determined by applying the agreed upon percentage to the insurance proceeds recovered. To hold otherwise would be a severe penalty to the insurance company and the award of an excessive fee to the attorney.

TABLE OF CITATIONS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a copy of the foregoing Reply Brief of Appellant to Michel L. Stone, attorney for Appellee, 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 12th day of December, 1988.

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