IN THE
SUPREME COURT OF FLORIDA

CASE NO: 73,007

MARIA ISABEL PEREZ-BORROTO,
Personal Representative of the
Estate of RENE PEREZ-BORROTO,

Petitioner,

-vs-

CESAR BREA, M.D.,

Respondent.

ON DISCRETIONARY REVIEW FROM
An Appeal from the Third District Court of Appeal
and a CERTIFIED QUESTION of great public importance

RESPONDENT'S, CESAR BREA, M.D., INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

INTRODUCTION

Pursuant to this Court's briefing schedule dated September 8, 1988, Respondent, CESAR BREA, M.D., hereby files his Initial Brief on the Merits.

Respondent, CESAR BREA, M.D., was one of three Defendants in the trial court. MARIA ISABEL PEREZ-BORROTO, as Personal Representative of the Estate of RENE PEREZ-BORROTO, the Petitioner, was the Plaintiff in the trial court.

Throughout this brief, MARIA ISABEL PEREZ-BORROTO will be referred to as "Petitioner". CESAR BREA, M.D., will be referred to as "Respondent" or "Doctor" .

The insurance carrier which offered malpractice coverage to Respondent will be referred to as "Carrier" or by proper name, if necessary, for clarity.

The symbol "R." will be used to designate the Record On Appeal. The symbol "TR."[1]/ will be used to refer to the transcripts of the post-judgment proceedings on the Motions for Fees and Costs which were held before the trial court on May 12, 1987 and September 8, 1987. These transcripts are found in Volumes VI and VIII, pages 1-170 and 171-217 repectively, of the Record-on-Appeal.

1/ The hearing on May 12, 1987 is part of the first Record on Appeal. There is another appeal arising from this cause of action but not involving the Respondent. Although the two transcripts are in separate volumes, the pages have been numbered consecutively by the clerk, to wit: pages 1-217.

STATEMENT OF THE CASE AND FACTS

The Respondent, CESAR BREA, M.D., accepts the Petitioner's Statement of the Case and Facts with the following exceptions:

1. The initial complaint filed by the Petitioner was for wrongful death arising out of a medical malpractice claim against various health care providers including Respondent (R.1-9).

2. The cause of action was presented to a jury on April 6, 1987. The jury returned a verdict finding that the Respondent was not guilty of any negligence[2]/ (R.837-840).

3. Respondent filed a motion for fees and costs pursuant to §768.56, Florida Statutes (1985). On September 28, 1987, expert testimony was presented to the trial court relating to the reasonable amount of fees to be awarded Respondent's counsel (Tr.171-217). Respondent's expert testified to the reasonable hours (711.9) expended for each of the four attorneys who worked on Respondent's defense and the "market value" of those hours which ranged from $55.00 to $150.00 per attorney (Tr.178-180). The expert then applied the factors in Disciplinary Rule 2-106(b) of the Florida Bar Code of Professional Responsibility [since January 1, 1987, these factors are contained in Rule 4-1.5 of the Rules regulating the Florida Bar], and determined that a reasonable fee for counsel would be $83,935.00 (Tr.180-181).

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[2]/ The Petitioner received a verdict and Final Judgment against other health care providers and moved for and was awarded fees in an amount of $660,000.00 against those health care providers found to be guilty of negligence as a legal cause of the demise of Petitioner's decedent.

4. Respondent's trial counsel testified that he and his firm have a **general employment contract** with the carrier and receive an average of $60.00 per billable hour (Tr.196). He further testified that his firm had 715 billable hours in the defense of Respondent (Tr. 197) and was paid approximately $43,000.00 from the carrier (Tr.215).

5. The trial court determined that Respondent's counsel was not entitled to any additional monies other than those provided by the general employment contract with the carrier because of the prohibition in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) and awarded a fee of $43,000.00 (R.934-935, 946-948).

CERTIFIED QUESTION ON REVIEW

I.

IS THE TRIAL COURT LIMITED BY THE NON-CONTINGENT FEE AGREEMENT BETWEEN ATTORNEY AND CLIENT WHEN THE TRIAL COURT APPLIES THE PRINCIPLES SET FORTH IN FLORIDA PATIENT'S COMPENSATION FUND v. ROWE, 472 So.2d 1145 (Fla. 1985), TO DETERMINE AN ATTORNEY'S FEE PURSUANT TO SECTION 768.56, FLORIDA STATUTES (1983) (REPEALED CH. 85-175)?

SUMMARY OF THE ARGUMENT

The question to be decided is the method the trial court should apply in assessing fees to counsel representing a successful health care provider in a medical malpractice suit pursuant to § 768.56, Florida Statutes.

A court awarded fee pursuant to the factors enunciated in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) **is not limited** to the contractual fee arrangement between an attorney and his client. This restriction in Rowe applies to contingency fee agreements only.

Trial counsel for Respondent should not be penalized for undertaking representation of a health care provider under a general employment contract with a malpractice insurance carrier which provides an average fee of $60.00 an hour. A **reasonable** fee can only be awarded after all the factors discussed in Rowe and Rule 4-1.5 of the Rules Regulating the Florida Bar have been considered. An award of fees based on the general contract of employment would place the trial court in a position of "rubber stamping" the fee agreement and/or having to consider collateral considerations not applicable to the award of a reasonable attorney's fee. Ronlee v. Arvida Corporation, 515 So.2d 372 (Fla. 4th DCA 1987).

ARGUMENT

ISSUE

IS THE TRIAL COURT LIMITED BY THE NON-CONTINGENT FEE AGREEMENT BETWEEN ATTORNEY AND CLIENT WHEN THE TRIAL COURT APPLIES THE PRINCIPLES SET FORTH IN FLORIDA PATIENT'S COMPENSATION FUND v. ROWE, 472 So.2d 1145 (Fla. 1985), TO DETERMINE AN ATTORNEY'S FEE PURSUANT TO SECTION 768.56, FLORIDA STATUTES (1983)(REPEALED CH.85-175)?

The Petitioner is seeking to have this court answer the certified question in the affirmative and thus limit the factors to be considered by a trial court in determining a statutory award of attorney's fees if trial counsel has a general employment contract with a third party.

Petitioner argues that to interpret the language of Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), to prohibit the awarding of fees in excess of a contingency fee contract and not to a fixed fee contract: (1) ignores a problem of lack of mutuality of remedy; (2) allows an insurance company to "profiteer" at the expense of a medical malpractice claimant; and (3) contradicts the pronoucement in Miami Children's Hospital v. Tamayo, 13 FLW 340 (Fla. Case No.:71,213, Opinion filed May 26, 1988) that Rowe does not change the substantive law on fee awards.

These issues have been considered and discussed in detail by two of Florida's appellate districts which have clearly stated their interpretation of Rowe as prohibiting fees in excess of the contract amount only when a contingency

fee contract is involved. Alston v. Sundeck Products, Inc., 498 So.2d 493 (Fla. 4th DCA 1986); Tamayo v. Miami Children's Hospital, 511 So.2d 1019 (Fla. 3rd DCA 1987) reversed (on other grounds) Miami Children's Hospital, 13 FLW 340 (Fla. Case No.: 71,213, Opinion filed May 26, 1988); Ronlee, Inc. v. Arvida Corp, 515 So.2d 372 (Fla. 4th DCA 1987); and Shlachtman v. Mitrani, 508 So.2d 494 (Fla. 3rd DCA 1987).

Petitioner has incorrectly stated that the First District Court of Appeal has maintained a contrary position in Multitech Corp. v. St. John's Bluff Invest. Corp., 518 So.2d 427 (Fla. 1st DCA 1988). In Multitech, the court reversed an award of fees that exceeded the contract between the attorney and client because there was no determination whether the fee arrangement was fixed or contingent. In fact, the First District Court of Appeal acknowledged that the limitations prohibiting fee awards from exceeding contracts between client and attorney as described in Rowe, related to contingency fee contracts. Bodiford v. World Service Life Insurance Company, 524 So.2d 701 (Fla. 1st DCA 1988).

Regardless of the holdings of the district courts, the arguments of the Petitioner are without merit.

First, the application of the Federal "lodestar" factor is not intended to create a "mutuality of remedy". The application of the "lodestar" factor is intended and designed to place contingency contracts on the same economic footing

as non-contingency employment and to do so in a more objective manner.

The federal "lodestar" has evolved from five decisions. Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933 (1983); Blum v. Stenson, 465 U.S. 886, 104 S.Ct. 1541 (1984); Riverside v. Rivera, 477 U.S. 561, 106 S.Ct. 2686 (1986); Pennsylvania v. Delaware Valley Citizens' Council, ___ U.S. ____, 106 S.Ct. 3088 (1986); Pennsylvania v. Delaware Valley Citizens' Council, ___ U.S._____, 107 S.Ct. 3078 (1987). The Supreme Court elected the "lodestar" approach because it produces a more objective estimate and ought to be a better assurance of more even results. The twelve factors derived from the ABA Code of Professional Responsibility DR 2-106 (1980) together with the factor of results obtained and, perhaps, the enchancement for contingency are the basis for fee awards.

In actuality, the "lodestar" is the starting point in determining an objective estimate of the value of a lawyer's services. That starting point begins by multiplying hours reasonably expended by a reasonable hourly rate. See, Hensley, 461 U.S. at 433. The reasonable hourly rate is determined by the prevailing market rate (to be determined on a case by case evaluation). Blum, 465 U.S. at 895, n.11.

In Rowe, this court upheld the constitutionality of the fee statute in medical malpractice claims; however, the determination of the "lodestar" was not limited to medical

malpractice claims. To exclude attorneys who work with insured defendants from the objectivity of the Rowe decision, would place these attorneys in a prejudicial and inequitable position...especially since health care providers do not all have insurance. Petitioner's position would allow a lawyer representing a health care provider without malpractice insurance, to be awarded a reasonable fee established through the application of the factors enunciated in Rowe; but an attorney representing a health care provider with insurance coverage, would only be entitled to the exact sum paid under a general employment contract between the attorney and the insurance carrier.

This brings up Petitioner's second issue that by allowing counsel for an insured heath care provider to receive a reasonable fee which would exceed the general contract of employment with the carrier, the insurance company would be profiting from the malpractice claimant. As Rowe determined, Florida Statute §768.56 is not a "penalty", but a "matter of substantive law properly under the aegis of the legislature." 472 So.2d at 1149. The purpose of assessing fees to the prevailing party was to discourage frivolous lawsuits and encourage evaluation of claims. There is nothing in the record to indicate that trial counsel for the Respondent would return to the carrier any monies received pursuant to the statute which are in excess of the contract fees paid. Petitioner's fear is unfounded and unsupportable.

Finally, Petitioner's argument that pre-Rowe law would not allow Respondent to receive fees in excess of the contract between his counsel and his insurance carrier is also without merit. Petitioner would suggest that the contract between the carrier and trial counsel is evidence of a reasonable fee. However, there is nothing in the record to show that the contract was negotiated with the factors set forth in Rowe as a guideline in establishing a reasonable hourly rate... and that determination would have to be within the guidelines of Rowe, in order to maintain the objectivity and consistency intended by adopting the Federal "lodestar" factor. The law in Federal Insurance Co. v. Sarasohn & Co., Inc., 281 So.2d 408 (Fla. 3rd DCA 1973), which is relied upon by Petitioner, allowed the court to consider the contract between parties in determining a reasonable hourly fee...it was a factor to be weighed. It was evidence of a fair market value for the attorney's services for that specific litigation. The only pre-Rowe law that restricted fees to the contract agreement was in matters relating to "fees claimed as damages" such as indemnity suits. Jemco, Inc. v. United Parcel Service, Inc., 400 So.2d 499 (Fla. 3rd DCA 1981).

In order to maintain the consistancy and objectivity intended in the assessment of fees awarded under fee shifting statutes, there can be no "exceptions" applied against attorneys employed by insurance companies. The Fourth

District Court of Appeal in Ronlee v. Arvida, 515 So.2d 372 (Fla. 4th DCA 1987), in a similar situation, rejected similar arguments and opined:

> We reject Ronlee's contentions that Arvida's lawyers are bound by the $100 per hour agreement they had with their client. Legitimate reasons exist for allowing fees against an adversary which are greater than the client's obligations to pay. Two examples of a disadvantaged client are the wife without funds caught in a contested dissolution with her bread winner husband or a materialman working out of a pick-up truck attempting to collect from a developer operating out of a stretch limosine. The disadvantaged lawyer is another legitimate reason for not restricting the fee. **Many a lawyer views the corporate client as the bird in the hand and works for a smaller hourly rate than otherwise because of the continuity of the relationship. The adversary should not be able to exploit the lawyer's willingness to take less from an ongoing client in order to know from where the rent commeth.** [emphasis added]

Thus, since Rowe and its progeny, most of the Florida Appellate Courts have held that a trial court's limitation to award a fee not in excess of the fee agreement between client and attorney, relates solely to contingency fee contracts and does not punish an attoreny who has an hourly rate contract because of industry standards. See, also, Maserati Automobiles Incorporated v. Caplan, 522 So.2d 993 (Fla. 3rd DCA 1988).

In reading Rowe, it is hard to imagine that the limitation that fees not exceed the contract between the client and his attorney apply to fixed-fee contracts, especially when the discussion in Rowe related to contingency fee contracts and the application of the multiplier to the "lodestar". 472 So.2d at 1150. The court in Rowe further pointed out that a trial court

was not to merely enforce a fee agreement. By accepting the argument of Petitioner, the trial court would be asked to blindly enforce only those contracts of employment involving insurance carriers and their counsel.

Thus, Respondent maintains that the certified question should be answered in the **NEGATIVE** and the opinion of the Third District Court of Appeal in Case No.: 88-00426 be affirmed.

CONCLUSION

For the reasons and on the basis of the law and other authorities set forth herein, Respondent respectfully requests that this Honorable Court **answer the certified question in the negative,** thus approving the opinion of the Third District Court of Appeal, Case No.: 88-00426 and remand this cause back to the trial court with directions to consider the award of a reasonable fee in light of the considerations and formula set forth in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), without the contract limitation previously applied by the trial court.

Respectfully submitted,

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DATED: October 5th , 1988.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Respondent's Initial Brief on the Merits was mailed, postage, prepaid, this 5th day of October, 1988, to: Gerald E. Rosser, Esq., Attorney for Petitioner, 1110 Brickell Avenue, Suite 406, Miami, Fl 33131.

BY: _____
RHEA P. GROSSMAN