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IN THE SUPREME COURT OF FLORIDA

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CASE NUMBER 73,007

MARIA ISABEL PEREZ-BORROTO,

Petitioner,

vs.

CESAR BREA, M.D.

Respondent.

ON DISCRETIONARY REVIEW FROM THE
THIRD DISTRICT COURT OF APPEAL
CASE NO. 88-00426

INITIAL BRIEF OF PETITIONER ON THE MERITS

GERALD E. ROSSER, P.A.
Attorney for Petitioner
1110 Brickell Avenue, Suite 406
Miami, Florida 33131
(305) 358-5460

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INTRODUCTION

This is the initial brief of Petitioner MARIA ISABEL PEREZ-BORROTO, who was Plaintiff at trial and appellee below, she will be referred to throughout as Plaintiff. CESAR BREA, M.D., was a Defendant at trial and appellant below, he will be referred to throughout as Defendant.

References to the record will be by the letter "A" and a page number.

STATEMENT OF THE CASE AND FACTS

This appeal arises from an order of the Third District Court of appeal reversing an attorney's fee award in favor of Defendant, and remanding for re-setting of the fee by the trial court. (A1-2) In reversing the attorney's fee award, the Third District certified the following question as being of great public importance, having answered it in the negative:

> 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ROWE, 472 So.2d 1145 (Fla. 1985), TO DETERMINE AN ATTORNEY'S FEE PURSUANT TO SECTION 768.56, FLORIDA STATUTES (1983) (REPEALED CH. 85-175)?

Defendant became entitled to an award of attorney's fees pursuant to 768.56 Fla. Stat. (1983). The trial court awarded a fee in the amount of $43,000, based on *Rowe, supra*, and on a finding that the award could not exceed the contract price between Defendant and his attorneys. (A3-7) Defendant had been represented by counsel selected by his malpractice insurance carrier, for whom that defense lawfirm did a volume of business. The fees were at the rate of $60.00 per hour, and $700.00 per trial day. The lawfirm billed the carrier $43,000 for the work done. The trial court found that *Rowe*

prohibited an award of attorney's fees in excess of the contract price. The trial court recognized the expert testimony, offered both by Plaintiff and Defendant, that the type of representation given would command a fee ranging from $125.00 and $250.00 per hour if it were a one-shot deal. (A3-7)

Defendant appealed the fee award as inadequate, arguing that the limitation imposed by the trial court was not mandated by *Rowe*, and that the fee award should be reconsidered without consideration of such a limitation. The Third District agreed with Defendant and entered the Order presented here for review. Defendant's motion for appellate attorney's fees was granted and remanded. (A8) This Petition ensued.

ISSUE ON APPEAL

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 ARGUMENT

In *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985) this Court, after prescribing the method by which court-awarded attorney's fees are to be determined, held:

> [I]n no case should the court-awarded fee exceed the fee agreement reached between the attorney and his client.

472 So.2d at 1151. The decision of the lower tribunal is contary to the fee-limiting law announced by this Court. The order presented here for review should be reversed, and the certified question should be answered in the affirmative.

ARGUMENT

There is conflict among the District Courts on the question at bar, although only the decision below appears to have involved §768.56 (1983). The First District Court of Appeal, in *Multitech Corp. v. St. John's Bluff Invest. Corp.*, 518 So.2d 427 (Fla. 1st DCA 1988), relying on *Rowe*, reversed an attorney's fee award where the hourly rate exceeded the agreed-upon fee. In *Alston v. Sundeck Products, Inc.*, 498 So.2d 493 (Fla. 4th DCA 1986) the court held that *Rowe* limited court-awarded fees to the contract price only in contingent fee agreements; the question was certified but apparently never brought

to this Court. The Third District, in *Maserati Autos., Inc. v. Caplan*, 522 So.2d 993 (Fla. 3d DCA 1988), agreed with the Fourth District.

The decisions which appear to ignore the plain language of this Court in *Rowe* that court-awarded fees are in no case to exceed the amount agreed to between attorney and client are predicated on the fact that the fee-limiting language is contained in the section of *Rowe* in which contingent fees are discussed. It is the position of Plaintiff here that this Court did not intend that the fee limiting language was to apply only to contingent fees, but that both sides in a medical malpractice action subject to §768.56 Fla. Stat. (1983) were limited to their fee agreements when the trial court assessed a fee in favor of the prevailing party.

Although the fee limitation has limited application in certain non-§768.56 cases, e.g. divorces, *Levy v. Levy*, 483 So.2d 455 (Fla. 3d DCA 1986), *review den.* 492 So.2d 1333 (Fla. 1986), it would be unfair and inequitable if only one side in a medical malpractice action, or any other action, were limited to the contract price when fee awards are concerned. The decision below contains no discussion whatsoever of the lack of mutuality inherent in its holding. The other decisions cited above do not, since they are not medical malpractice actions and do not apparently involve contingent vs. non-contingent fees, discuss the problem of lack of mutuality of remedy, probably because, under the holdings in those cases, neither side would have been limited to the agreed-upon fee.

The one-way street endorsed by the decision below is even more unjust where, as here, the Defendant is represented by insurance counsel. The individual Defendant never had an attorney's fee obligation to start with. Presumably, in the highly competitive insurance defense legal community, there is no hardship on insurance counsel in accepting mass business at a lower hourly rate than might be appropriate in single representation situatons. Such representation involves an arm's length relationship from which both

sides benefit. Insurance carriers are not financially strapped when it comes to attracting compentent counsel of choice. It is inconceivable that this Court intended for insurance counsel to profiteer at the expense of unsuccessful medical malpractice plaintiffs.

This Court has held, in *Miami Children's Hospital v. Tamayo*, __ So.2d __, 13 FlW 340 (Fla. 1988) that the procedures adopted in *Rowe* "are no different than previous fee guidelines we have established in the Florida Code of Professional Responsibility and court cases." Under prior case law, the fee agreement between an attorney and his client was the best evidence of what was reasonable, unless excessive, and fee awards higher than that amount were disapproved. *Brett v. First [National] Bank [of Marianna]*, 97 Fla. 284, 120 So. 554 (1929); *Blount Bros. Realty Co. v. Eilenberger*, 98 Fla. 775, 124 So. 41 (1929). More recently, the Third District adhered to such prior case law in *Jemco, Inc. v. United Parcel Service, Inc.*, 400 So.2d 499 (Fla. 3d DCA 1981); and *Trustees of Cameron-Brown Invest. Gp. v. Tavormina*, 385 S0.2d 728 (Fla. 3d DCA 1980), although limiting those holdings to cases where a fee was being awarded because of a contract between the litigants and not discussing fees awarded under a fee shifting statute. However, in *Federal Ins. Co. v. Sarasohn*, 281 So.2d 408 (Fla. 3d DCA 1973) the court had earlier applied the same limitation to contract-price-unless-excessive rule to a fee-shifting statute situation under §627.428 Fla. Stat.

This Court's holding and discussion in *Rowe* make it clear that an award of reasonable attorney's fees is the same as the contract price, subject only to a determination of whether the contract price is excessive, in cases where the basis for the fee award is *not* a contract between the parties but instead is a fee shifting statute, specifically, the statute controlling the case at bar §768.56 Fla. Stat. (1983). Since this was also the law before *Rowe* , and *Rowe* did not change substantive law, it is clear that the language in *Rowe* limiting fee awards to the contract price is applicable to both sides of medical malpractice

cases, including the one at bar. Accordingly, the order presented for review is erroneous, and should be reversed with directions to affirm the judgment of the trial court. The fee award should also be reversed as a matter of course with directions to grant Plaintiff's prayer for attorney's fees. Further, the motion for attorney's fees which accompanies this brief should be granted.

CONCLUSION

Based on the foregoing authorities and argument, the order presented for review should be reversed with directions to affirm the judgment of the trial court. The order granting Defendant's motion for attorney's fees should also be reversed as a matter of course, with directions to grant Plaintiff's motion for attorney's fees below. The motion for attorney's fees which accompanies this brief should be granted and remanded for trial court determination of amount.

GERALD E. ROSSER, P.A.
Attorney for Petitioner
1110 Brickell Ave., Suite 406
Miami, FL 33131
(305) 358-5460

By:

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of this brief with appendix was mailed on October 3, 1988, to: RHEA P. GROSSMAN, ESQ., Counsel for BREA, 2710 Douglas Road, Miami, FL 33133-2728.

GERALD E. ROSSER, P.A.
Attorney for Petitioner
1110 Brickell Ave., Suite 406
Miami, FL 33131
(305) 358-5460

By:
Gerald E. Rosser