IN THE SUPREME COURT OF FLORIDA

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

REPLY BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

This is the reply 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 appendix to Petitioner's initial brief will be by the letter "A" and a page number. References to the record transmitted by the District Court, if any, will be by the letter "R" and a page number.

STATEMENT OF THE CASE AND FACTS

The statement of the case and facts contained in the initial brief will be repeated here for ease of reference, no changes have been made. Plaintiff has no disagreement with the correctness of the additional facts set forth in the answer brief of Defendant.

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ROWE, 472 So.2d 1145 (Fla. 1985), TO DETERMINE AN ATTORNEY'S FEE PURSUANT TO SECTION 768.56, FLORIDA STATUTES (1983) (REPEALED CH. 85-175)?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

ARGUMENT

In Defendant's answer brief he argues that Plaintiff desires to have the certified question in the affirmative "and thus limit the factors to be considered by the trial court in determining a statutory award of attorney's fees if trial counsel has a general employment contract with a third party." (answer brief p.6) Plaintiff made no such argument, and answering the certified question in the affirmative would involve no such result. All the factors discussed in *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985), excluding only those applicable to contingent fees, would be used in any event. The factors would have to be utilized, even if the certified question were answered in the affirmative, in order to determine if a fixed fee agreement was *excessive*, and thus not enforceable in its full amount against a non-participant in the fee contract.

Defendant contends that "most of the Florida Appellate Courts" have held that the *Rowe* limitation to contract price only applies to contingent fee contracts. (answer brief p.11) However, only cases from the Third and Fourth appellate districts are cited, and both of those courts certified the question. The Second and Fifth districts have, to Plaintiff's knowledge, yet to pass on the question, and the First District, despite Defendant's argument to the contrary, appears to apply the limit to all fee contracts. In *Multitech Corp. v. St. Johns Bluff Inv. Corp.*, 518 So.2d 427, 428 (Fla. 1st DCA 1988),

the Court found an attorney's fee award "flawed in several respects." One of those respects was that the hourly rate awarded was in excess of the agreed-upon hourly fee -- the court specifically found the fee agreement in suit was not a contingency fee contract. Defendant's reliance in this regard on *Bodiford v. World Service Life Ins. Co.*, 524 So.2d 701 (Fla. 1st DCA 1988) is totally misplaced. In the first case, *Bodiford* involved a contingency fee contract as the instant case does not. In the second case, *Bodiford* is otherwise not good law after this Court's decision in *Miami Children's Hospital v.. Tamayo*, __ So.2d __, 13 FLW 340 (Fla. 1988).

Plaintiff did not argue in her initial brief that the lodestar approach to setting fees was intended to create a mutuality of remedy. The remedy of awarding attorney's fees to a prevailing party comes, in the instant case, from the legislature. §768.56 Fla. Stat. (1983) Plaintiff's argument in this connection is that if one side is limited to the fee agreed to, both sides should be. Defendant presents no argument that such mutuality would be unfair to parties in his position.

Defendant assails an argument, with regard to insurance counsel, never advanced by Plaintiff. (answer brief p.9) Plaintiff's position is that *Rowe* simply does not allow trial courts to exceed agreed-upon fees when awarding attorney's fees. However, should the Court determine that there are some fee awards to which the *Rowe* limitation cannot be equitably applied, e.g., in divorce cases, *see Levy v. Levy*, 483 So.2d 455 (Fla. 3d DCA 1986), *review den.* 492 So.2d 1333 (Fla. 1986), it is Plaintiff's position that where a defendant is represented by insurance counsel who are paid by the insurer, the fee agreement between the insurer and its counsel is dispositive of the maximum fee which can be awarded. This involves no inequity to insurance counsel, such counsel has the advantage in virtually 100% of cases, including the case at bar, of an ongoing volume of work. Such work is eagerly sought after by attorneys. It is unlikely that many attorney's

undertook to do defense work with the idea in mind that *Rowe* would allow them to improve their income if they successfully defended cases. Defendant, or his counsel actually, appears to be crying alligator tears.

With regard to the insurer profiteering at the expense of unsuccessful malpractice plaintiffs, Plaintiff here has no idea where any increased fee would end up. The argument is equally applicable if insurance defense counsel profiteer at the expense of unsuccessful plaintiffs.

Plaintiff adheres to her argument that pre-*Rowe* law essentially limited fee applicants in non-contingent cases to their contracts. Courts were not to be mere enforcers of *excessive* contracts. Plaintiff relies on the authorities cited in her initial brief. Defendant's statement that "there is nothing in the record to show that [his] contract was negotiated with the factors set forth in *Rowe* as a guideline in establishing a reasonable hourly rate" is incomprehensible to Plaintiff. (answer brief p.10) Setting aside that *Rowe* did not exist when the contract was entered into, what the parties had in mind when entering into an attorney's fee contract is of no moment. The task of the trial court is to follow *Rowe* in determining a reasonable fee, and, if the agreed-upon fee does not exceed what is reasonable, to award a fee in the amount of the contract. This would hardly amount to "blindly" enforcing a contract contrary to the dictates of *Rowe*.

The position taken by the court in *Ronlee v. Arvida Corp.*, 515 So.2d 372 (Fla. 4th DCA 1987) is,with all due respect, untenable. It is hard to imagine that an adversary would be "exploiting" a lawyer with a corporate client who provided ongoing work at $100.00 per hour if the courts restricted the corporate lawyer's fee to that amount. The same holds true for insurance defense counsel. Why the attorney in that position was called "disadvantaged" by the Fourt District is unclear. This Court can take judicial notice, or accept the admission of counsel for Defendant in attorney's fee hearing transcript, that

insurance defense work is highly sought after and provides quite a comfortable living -- it is not undertaken with reluctance to "know from where the rent cometh." *Ronlee* should be disapproved by this Court.

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.

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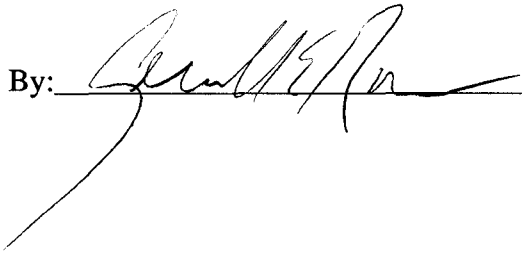
By: 

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of this brief with appendix was mailed on September 29, 1988, to: RHEA P. GROSSMAN, ESQ., Counsel for BREA, 2710 Douglas Road, Miami, FL 33133-2728.

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