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IN THE SUPREME COURT OF FLORIDA

NEIL J. KARLIN, etc., et al.,

Petitioners,

v.

DARRYL MOXLEY, etc., et al.,

Respondents.

* * *

No. 74,480

FILED
SID J. WHITE
SEP 7 1989
CLERK, SUPREME COURT
By
Deputy Clerk

ON CERTIFIED QUESTION
OF GREAT PUBLIC IMPORTANCE
FROM THE FLORIDA DISTRICT COURT OF APPEAL
FOURTH DISTRICT

* * *

RESPONDENTS' BRIEF ON THE MERITS

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INDEX TO BRIEF

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TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF ISSUES

A. "Does the holding in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) preclude an attorney's fee in a medical malpractice action above the percentage amount set out in the fee agreement between claimant and [their] counsel, where the agreement provides that the fee upon recovery shall be the higher of the percentage amount or an amount awarded by the court?"

B. Is a limitation of prevailing party fee awards to the amount set in the fee agreement between the claiming party and his lawyer advisable in light of a recent United States Supreme Court decision on the same subject and the likelihood that such a limitation would frustrate the legislative purpose behind prevailing party statutes to encourage victims of the covered conduct to seek relief in court.

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SUMMARY OF ARGUMENT

The Rowe dictum banning prevailing party fee awards greater than the amount set in the fee agreement does not preclude an award greater than 50% of the recovery where the contingency fee agreement between the prevailing party and his counsel set the fee as either 50% of the recovery or a greater but reasonable amount awarded by the court under the attorney's fee statute. Karlin's argument is really an attempt to rewrite Rowe to limit fee awards to the percentage amount even where the agreement has alternative formulas for calculating the fee due from the client. The limitation focuses too much attention on the single factor of results achieved and allows it to control the fee award, contrary to the general intent of Rowe.

There is nothing improper with a contingency fee agreement that provides for a fee awarded by the court if greater than a stated percentage. All court fee awards are ipso facto reasonable. The reasonability of attorney's fees has never been limited to percentage amounts, and the Bar rules currently authorize court approval of fees even greater than those percentages set forth in the rule.

This kind of disjunctive provision has the virtue of encouraging plaintiffs with only modest monetary claims to vindicate their rights in court, the very purpose of the prevailing party statute. The trial court's award of a sum greater than the percentage amount simply reflects its finding that the percentage alone would not adequately and reasonably

compensate the prevailing party's counsel and that some enhancement above the percentage amount was necessary to elevate the fee to a reasonable level,

The Rowe dictum should be reconsidered in light of the United States Supreme Court's decision in Blanchard v. Bergeron, **109** S.Ct. **939 (1989),** where the court rejected a similar limitation on prevailing party fee awards under the civil rights attorney's fee statute. The court there rejected the personal injury model only because civil rights cases are not merely private tort suits benefitting just the party involved. Similarly, as this fee statute shows, medical malpractice suits are not just private tort suits benefitting only the victim of malpractice; they also encourage practitioners scrupulously to follow their standard of care, and they identify offending practitioners for the benefit of the public and the regulatory agency in its disciplinary function,

The Supreme Court also reached the same conclusion as to awards under the Clean Air Act, an obvious counterpart to our medical malpractice legislation. It found that a fee agreement limitation was in conflict with the lodestar process it had adopted in cases relied upon by this court when it adopted the same process in Rowe. This process is especially designed to avoid "windfalls" to attorneys, and the fact that both courts below found the subject award reasonable negates any possible contention that a sum greater than the percentage formula in this case was a windfall.

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USAGE NOTE

In this brief the respondents are referred to simply as "Moxley". The doctor and his professional association who filed the subject notice invoking this court's jurisdiction are referred to either as "petitioner" or "Karlin". Unless the context otherwise requires, the "statute" is § 768.56, Fla. Stat. (1983). "Rowe" refers to this court's decision in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985).

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STATEMENT OF CASE AND FACTS

Moxley accepts petitioner's statement of the case and facts.

ARGUMENT

A. Compliance with Rowe

Essentially petitioner would change this court's dictum[1] in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145, 1151 (Fla. 1985), to read instead:

> "Further, in no case should the court-awarded fee exceed the **[percentage** formula **in]** the fee agreement reached by the attorney and his client."

[1] The "Rowe dictum" refers to the statement in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145, 1151 (Fla. 1985), that a court-awarded fee under a prevailing party statute should never exceed the amount fixed by the fee agreement between the claimant and his/her counsel. But the parties in Rowe raised no issue as to whether court-awarded fees could exceed an amount provided in the fee agreement between the claiming party and that party's counsel. Hence the court's statement was, strictly speaking, obiter dictum.

In Miami Children's Hospital v. Tamayo, 529 So.2d 667 (Fla. 1988), and Perez-Borroto v. Brea, 544 So.2d 1022 (Fla. 1989), the dictum was applied as controlling precedent without any discussion as to its wisdom, a subject which was of course not raised in Rowe itself. Thus an idea has become the settled law of this state without any discussion of the merits of the principle or any argument from contesting parties with a real stake in its consideration.

Also it is curious that the authority cited for the dictum, Rosenberg v. Levin, 409 So.2d 1016 (Fla. 1982), involves a fee dispute between a discharged attorney and his former client, as to which a court award greater than the fee agreement would have effectively destroyed the bargain between the contracting parties, a difficulty lacking in any dispute about prevailing party fees under a statute.

It is "curiouser" still that the proposition immediately preceding the dictum, that the fee arrangement between the claiming party and his/her counsel should not control the statutory award, actually contradicts the dictum. If fee agreements can't control the award, how is it that the award can be limited by the fee agreement?

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Aside from transforming the substantive content of what the court actually said to something it did not say, the change has absolutely no grounds to support it and would conflict, as we shall see, with the obvious legislative purpose underlying all prevailing party fee statutes -- encouraging persons with only modest monetary claims or those seeking other forms of relief to bring actions vindicating important rights.

The Rowe dictum limits statutory awards to the amount fixed by the fee agreement between the claiming party and his/her attorney, meaning that the limitation applies to the entire fee agreement, not just the part that the paying party finds most palatable. Thus, properly viewed, the dictum really means that if the agreement has alternative provisions to determine the fee, then the statutory award may not exceed that alternative provision which the agreement ultimately uses to fix the amount due.

The limitation is not the percentage formula, but is rather the precise provision as to how the fee will be calculated upon the occurrence of the contingency. If the parties have agreed upon a specific sum, that is the limit. If they have agreed to let the court fix the sum, that is the amount. If they have agreed upon a percentage only, the amount yielded by the percentage is the limit. If they have agreed upon alternative formulas to calculate the sum and have further provided as to which formula will be used, then the alternative specified is the limit. That is the real meaning of the Rowe dictum.

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The court should note that petitioner does not raise any real question as to the individual propriety of either of the two alternative formulas in the subject fee agreement, or suggest that either by itself would have yielded an excessive fee. There is no suggestion for example that, if there had been no percentage formula, a fee of the kind awarded would have been improper. That kind of argument would have been unusually misplaced here anyway, where even Karlin's own expert witness conceded at the fee hearing that the number of hours expended by Moxley's trial counsel were reasonable, that the hourly rate of $200 per hour was reasonable, and even that a contingency risk multiplier of 2 was proper. Thus if Moxley's fee agreement had been limited instead to a fee set by the trial court, there would be no certified question to consider.

But why should a court-awarded fee be considered improper just because the parties have, in effect, agreed that the fee paid by the client will not be less than a percentage formula, yet not greater than an amount determined by the court to be reasonable? In that precise circumstance, doesn't the court's award of a sum greater than the percentage formula reflect an obvious finding by the trial judge that the percentage alone would have resulted in a fee that was too meager -- i.e. an unfair and unreasonable fee because it failed to provide adequate compensation to the prevailing party for his lawyer's efforts -- and that some enhancement was necessary to raise the amount actually awarded to the level of reasonability?

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Petitioner's single-minded focus on the percentage that the award bears to the amount recovered is also apparently based on his assumption that an attorney's fee equal to 100% of the amount recovered for the client could never be proper. But rule **4-1.5**, Rules Reg. Fla. Bar, contains no such blanket proscription. The percentages set forth in subdivision (F)(4)(b)1 of the rule are all modified by the introductory adverbial phrase "without prior court approval". And even with prior court approval, the fee actually claimed or charged is still subject to "subsequent inquiry as to whether the fee * * * is clearly excessive [under the factors set forth in subdivisions (A) and (B)]". Therefore the Bar rule actually contemplates the possibility of court-approved fees which exceed even the percentages that petitioner says are the outside limit.

Moreover, there is nothing in § 768.56 which limits fees to percentage amounts -- or indeed to any specific formula for calculating the amount. Nor does §768.56 even limit the fee award to the amount provided in the prevailing party's fee agreement with counsel.[2] The only statutory limit is that in all

[2]To the extent that a statutory award of attorney's fees is governed by the precise language of the statute creating the right to the fees, as to an award under § 768.56, Fla. Stat. (1983), the Rowe dictum is really a judicial rewriting of the statute. Moreover this particular judicial legislation is quite unnecessary, for under the statute it is the courts who make the awards in the first place and who thus superintend the process and the amounts awarded. Hence if the dictum was prompted by this court's Article V supervisory powers over attorneys and the amounts they charge, the dictum is truly superfluous because the legislature has given the courts the primary power to make the fee awards in the first place. General constitutional powers should not be called upon where the legislature has expressly given one of the three branches the specific power to act.

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events the fee awarded must be reasonable. Here petitioner makes no challenge apart from his Rowe attack that the amount awarded was facially or otherwise unreasonable.

All court awarded fees are, by their very nature, reasonable. Both the trial court's award in this case and the district court's affirmance carry an express finding that the amount awarded to Moxley is reasonable. Because that finding is based on that alternative of the applicable fee agreement which provided for a reasonable fee to be determined by the court and is based on competent substantial evidence, it follows that the court awarded fee in this case was both reasonable and did not exceed the amount fixed by the agreement between the claiming party and his counsel. It thus complied with both § 768.56 and Rowe.

Petitioner repeatedly argues that the fee actually awarded is nearly equal to 100% of the amount recovered by Moxley on his claim, all in an effort to demonstrate his contention that the fee award offends Rowe. That argument, of course, is simply another way of saying that the results achieved in the litigation by Moxley's lawyer do not justify the fee award. But the methodology of Rowe already requires the trial judge to consider results achieved, among numerous other factors, in calculating the fee award. And there is no suggestion that the trial judge here failed to consider results achieved or accorded that factor too little or too much weight.

Nor is there any fixed rule of thumb in fee awards that the amount awarded is always measured by some result-oriented

yardstick. Indeed it was, among other reasons, precisely to get away from awarding fees based solely on some arbitrary percentage of the amount recovered that this court adopted the lodestar scheme. In that process this court assigned results achieved as but one of several factors which, if weighed together, would be more likely to yield a reasonable and fair fee. Petitioner's argument if adopted would return the fee award process to a simple arithmetical calculation using a percentage of the amount recovered to determine the fee. Therefore, rather than offending Rowe, this award is quite harmonious with it.[3]

B. Modifying Rowe

This is an appropriate occasion to reconsider the Rowe dictum in light of a recent holding by the United States Supreme Court in Blanchard v. Bergeron, 109 S.Ct. 939 (1989). The issue faced by that court was whether a court awarded attorney's fee under 42 U.S.C. § 1988 should be limited to the fee provided in a contingent fee arrangement between the prevailing plaintiff and his counsel. A unanimous court held that the court awarded fee

[3]Karlin's argument that the Moxley's fee agreement (with its disjunctive provisions as to how the fee is calculated) is "tantamount to removing the risk factor associated with contingent fee contracts in any case where damages are awarded, regardless of their de minimus nature", Brief, at 9, borders on the frivolous and misstates the reality. The risk in a contingency contract is that if there is no recovery there is no fee, in spite of substantial time and effort, during which the attorney is expected to bear the cost of the suit as well as his/her own office and staff. How does this contract remove that risk? The short answer is that it does not. It is still necessary under the agreement for Moxley to prevail in order to earn a fee. The mere fact that the fee may be calculated by a formula other than a percentage does nothing to lessen the risk -- if there is no recovery, there is no fee.

is not limited by the non-paying party's contract, The United States Supreme Court's conclusion on the very issue raised by the Rowe dictum is thus squarely contrary to the conclusion reached by this court.

The fee statute at issue in Blanchard[4], like the statute here, provides for an award to the prevailing party. The court said that the statute's purpose was to ensure access to the courts for persons with civil rights claims. Id. at 945. The same must, of course, be said of § 768.56 which is also a prevailing party statute. Such statutes are by their very nature designed to encourage persons with grievances of the kind contemplated by the statute to seek relief in a court.[5]

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[4]The attorney's fee statute there was The Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988. The text of that statute makes it a discretionary prevailing party statute rather than, as here, a mandatory award. The Supreme Court has, however, construed § 1988 *so* that its fee awards are virtually mandatory for prevailing plaintiffs. See Hensley v. Eckerhart, 461 U.S. 424, 429 (1983), and Blanchard v. Bergeron, supra, at 942, fn. 1.

Although the underlying civil rights claim basis for fee awards under § 1988 played a role in the court's determination, the court's decision does not turn solely on that aspect. Indeed the court cited with approval the following language from a case involving a Clean Air Act fee award;

> "The fee quoted to the client or the percentage of the recovery agreed to is helpful in demonstrating that attorney's fee expectations when he accepted the case." Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711 (1987)." [e.o.]

Blanchard, at 944. The obvious implication is that the Blanchard court's conclusion was not driven by the fact of a civil rights claim.

[5]It is said that § 768.56 was intended to discourage frivolous medical malpractice claims. Rowe, at 1147. That equates the motivation of the statute's proponents with the quite separate matter of "legislative intent", and the two are rarely the same. Indeed in considering the charge that the statute denies access

Although the Court in Blanchard refused to accept the contention that fees in § 1983 (civil rights) damages cases should be modeled on the contingency fee arrangements usually found in personal injury litigation, the court did not do so for any reasons that should comfort petitioner. The Court rejected the personal injury litigation model only because it concluded that a civil rights suit is not merely "a private tort suit benefitting only the individual plaintiffs whose rights were violated," Blanchard, at 945.

Inevitably the same conclusion must attach to fee awards in medical malpractice litigation, whose public importance is vividly demonstrated by the recent massive overhaul of a decade's

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to the courts, this court itself said:

> "It can be argued that, rather than deterring plaintiffs from litigating, the statute could actually encourage plaintiffs to proceed with well-founded malpractice claims that would otherwise be ignored because they are not economically feasible under the contingent fee system." [e.s.]

Rowe, at 1149,

Where a statute is absolutely clear on its face, the legislative intent must be inferred from its text and not from a preamble which does not even appear in the Florida Statutes or from extrinsic sources such as the sponsoring member's personal motivation, some committee comments, or (worse) a legislator's speeches on the floor of the House or Senate. Streeter v. Sullivan, 509 So.2d 268, 271 (Fla. 1987); Thayer v. State, 335 So.2d 815, 817 (Fla. 1976); and cf. Holly v. Auld, 450 So.2d 217 (Fla. 1984).

If the purpose here had truly been to discourage frivolous claims, then the statutory text would merely have authorized fees only when the court finds that plaintiff's claims were frivolous. Because, however, the actual text adopted by the legislature was unambiguous traditional prevailing party language, the only possible legislative intent inferable is the well-settled interpretation given to prevailing party language, i.e. encouragement of access to the courts by persons with small but meritorius claims, the same conclusion reached by the Supreme Court in Blanchard.

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worth of annual patchwork changing of the restrictions and conditions on such litigation. Indeed the adoption of the express language of § 768.56 itself shows that the legislature had then concluded that medical malpractice suits were not merely private tort suits designed to benefit only the plaintiffs suing. If they were merely private claims with no public importance or implications, why should the legislature require that the prevailing party recover legal fees?

The First District answered that question in Baker v. Varela, 416 So.2d 1190 (Fla. 1st DCA 1982), a perceptive pre-Rowe analysis of attorney's fees under § 768.56. The court there observed that medical malpractice cases are not "ordinary tort litigation" and that the legislature specifically distinguished such cases when it enacted § 768.56. Id. at 1192-1193. It also held that the amount of the recovery should not control the fee award and that an award is not "per se" unreasonable merely because it exceeds the amount of the recovery.

Medical malpractice suits have the prophylactic effect of preventing medical malpractice by encouraging medical practitioners to follow the applicable standard of care. They also serve to identify offending practitioners for the obvious benefit of the public and the regulatory agency. Hence the Blanchard rejection of the personal injury model and its rationale apply equally well to fee awards under § 768.56.

It should be especially persuasive to this court that the Blanchard court saw a fee agreement limitation as antithetical to

the lodestar process adopted by the United States Supreme Court in Hensley v. Eckerhart, 461 U.S. 424 (1983):

> "We have never suggested that a different approach is to be followed in cases where the prevailing party and his (or her) attorney have executed a contingent fee agreement. To the contrary, in Hensley and in subsequent cases, we have adopted the lodestar approach as the centerpiece of attorney's fee awards. The Johnson [v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974)] factors may be relevant in adjusting the lodestar amount but no one factor is a substitute for multiplying reasonable billing rates by a reasonable estimation of the number of hours expended on the litigation." [e.s.]

Blanchard, at 945.

It will be recalled that this court expressly relied on both Hensley and Johnson in adopting the lodestar process. Rowe, at 1150. The contract limitation actually unreasonably constrains a trial court in applying the lodestar formula under a prevailing party statute. This can only result in unfair and inadequate fee awards in cases where a claimant's monetary damages are small or other relief is more important, by forcing the trial court to give undue weight to a single factor.

Removing this artificial constriction provides no windfall[6]

[6]The term "windfall" connotes an unexpected or unearned profit, and is plainly subjective. It would be misapplied here. When Moxley engaged counsel to prosecute this medical malpractice action, the parties to the fee agreement contemplated fair and reasonable compensation to counsel if there was a favorable result. They were not content to fix that compensation solely as a percentage of the recovery, *so* they added the provision about court awarded fees exceeding the percentage. After the jury found Karlin to have negligently caused Moxley's injuries by his departure from the medical standard of care, the court found that a reasonable fee was an amount close to the amount of the recovery and that a mere half of the recovery would not sufficiently and fairly compensate counsel. That award, a reasonable fee, was foreseen (indeed expected) by the parties to

to anyone, for the trial court must still assess only a reasonable fee. As the Blanchard court pointedly stated, the lodestar process is designed to avoid windfalls to lawyers or their clients. Blanchard, at 946. In Florida, at least four judges (if there is an appeal) may pass upon the reasonability of the fee, and three of them will usually be necessary to agree on the result. The lodestar process leads to fee awards rationally fitted to the precise circumstances of the particular case in which the award is sought. The more factors that are considered, the more likely that the resulting fee award will truly be reasonable.

As Justice White summed it up for a unanimous court in Blanchard: "The trial judge should not be limited by the contractual fee agreement between plaintiff and counsel." Id. The fee contract should be neither floor nor ceiling but merely one of several gauges. In particular, it should not be used to limit the fee award to the percentage where the fee agreement provides for a fee based either on the percentage or the amount found reasonable by the trial court.

This is then an appropriate case to disavow the Rowe dictum for the same reasons which prompted the United States Supreme Court to do *so.* Only in this way will statutory fee awards approach the desired goals of both fairness and reasonability and yet serve the legislative goal of encouraging all victims of medical malpractice to seek redress -- even those whose damages

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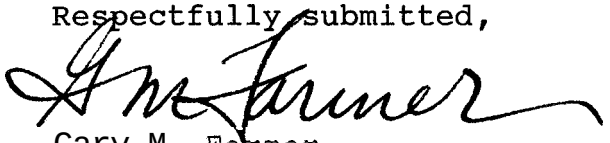
the fee agreement. Hence it hardly qualifies as a "windfall".

would not support a reasonable fee if calculated as a percent of the recovery.

CONCLUSION

The certified question should be answered in the negative and the district court's decision on the attorney's fee issue should be approved; or this court should reconsider and modify its dictum in Rowe, so that the fee agreements do not control, either as ceiling or as floor, the reasonable fee to be determined in the lodestar process.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 5th, 1989, a true and correct copy of the foregoing brief along with a motion for oral argument and a motion for attorney's fees were placed in the U. S. Mail first class postage prepaid and addressed to Melanie G. May, Esq., Bunnell and Woulfe, P.A., 1080 S.E. 3rd Avenue, P. O. Drawer 22988, Fort Lauderdale, FL 33335-2988; Alan D. Sackrin, Esq., Norman S. Klein, P.A., 633 N. E. 167th Street, Suite 1111 N. Miami Beach, FL 33162; David H. Krathen, Esq., 524 S. Andrews Avenue, Suite 203N, Ft. Lauderdale, FL 33301; and Martin J. Sperry, Esq., 805 E. Broward Blvd., Suite 300, Ft. Lauderdale, FL 33301.

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