IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,230

THE FLORIDA PATIENT'S COMPENSATION FUND,

Petitioner,

vs.

GEORGE BOUCHOC, ST. FRANCIS HOSPITAL and EDNA PETERSON,

Respondents.

PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL THIRD DISTRICT OF FLORIDA

ANSWER BRIEF OF RESPONDENT, PIERRE GRONDIN, M.D.

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INTRODUCTION

This brief is filed on behalf of Dr. Pierre Grondin, one of the defendants in this medical negligence action and a nominal respondent to this petition under Rule 9.020(f)(4). The petitioner, Florida Patient's Compensation Fund, will be referred to simply as "the Fund." St. Francis Hospital will be referred to as "the Hospital."

STATEMENT OF THE CASE AND FACTS

The Fund's statement of the case and facts is acceptable with one correction. The attorney's fee award was not against all defendants. Section 768.56, Florida Statutes (1983) authorizes equitable allocation of fees among the defendants and the trial court allocated none against Dr. Grondin. Dr. Grondin was found not guilty of any personal negligence by the jury. His responsibility to the plaintiff was vicarious. The equities thus

favored full allocation against the Hospital and the Fund. This allocation of fees was never challenged below.

ISSUE

WHETHER THE FUND IS RESPONSIBLE FOR ATTORNEY'S FEES UNDER SECTION 768.56.

SUMMARY OF ARGUMENT

The Florida Patient's Compensation Fund is a creature of statute, the legislature its Frankenstein. Both physicians and claimants have been terrorized by the beast. At times the Fund aligns itself with the physician against the claimant, at other times it aligns itself with the claimant against the physician. In this case it is aligned with neither to the detriment of both.

This brief is written from the perspective of the physician. The physician desirous of protecting himself from personal liability to a patient plaintiff does so in two ways. He purchases primary liability insurance coverage for $100,000. He also purchases Fund coverage to guarantee (1) full coverage and (2) a statutory limitation of personal liability to $100,000. Having thus protected himself, the physician should be secure from personal liability. The relevant statutes should be interpreted to fulfill the physician's understanding and intent. They should not, as the Fund contends, make the physician personally liable for potentially millions of dollars in attorney's fees awarded or awardable to patient plaintiffs.

ARGUMENT

When the Fund was initially created by the legislature, the statute imposed unlimited liability on the Fund and limited the physician's liability to $100,000 or primary policy limits. The statute made express reference to the Fund's responsibility for payment of the claimant's attorney's fees. §768.54(3)(e)(3), Fla. Stat. (1979). The 1980 enactment of section 768.56, the attorney's fee statute, came at a time when the Fund statute still provided for unlimited Fund coverage and still limited the physician's liability to $100,000 or primary coverage. Knowing this, the legislature gave to the prevailing party a right to recover attorney's fees. The existing statutory provision for Fund payment of the claimant's attorney's fees remained intact. The legislature did not amend the Fund statute and did not exempt the Fund from the prevailing party attorney's fee statute.

From its inception in 1975 until 1982, the Fund could limit payment of compensatory damages to $100,000 per year until paid. "Court costs and reasonable attorney's fees," however, had to be paid in lump sum within 90 days after rendition of the judgment. §768.54(3)(e)(3), Fla. Stat. (1981). In 1982 the statute was amended, eliminating the $100,000 annual payment provision. Ch. 82-236, §1, Laws of Fla. The statute now reads, "The amount of liability of the fund under a judgment, including court costs, reasonable attorney's fees, and interest, shall be paid in a lump sum, except that claims for future special damages ... shall be paid periodically as they are incurred by the

claimant." This 1982 amendment occurred after enactment of section 768.56 and in obvious contemplation of the Fund's responsibility for reasonable attorney's fees awarded under that statute. In 1983, section 768.54(3)(e)(3) was renumbered 768.54(3)(f)(3) without change.

Originally, the Fund recognized its responsibility for attorney's fees under the statute. In Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783 (Fla. 1985), the Fund did not contest its responsibility for attorney's fees, only the excessiveness of the amount awarded. In Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), the Fund did not contest its responsibility for attorney's fees under the statute, only its constitutionality. In now trying to avoid attorney's fees altogether, the Fund seeks to shift responsibility for the payment of claimants' attorney's fees to the physicians and hospitals.

In Rowe, this court said, "The appellant, Florida Patient's Compensation Fund, is responsible for payment of the portion of the judgment against the hospital that exceeds the $100,000 primary coverage." 472 So.2d at 1146. The excess included the attorney's fees.

In Von Stetina, this court held that the legislature could limit the liability of a health care provider to $100,000 and shift excess liability to the Florida Patient's Compensation Fund. The statutory limitation of liability in Von Stetina was inclusive of attorney's fees. "The Fund provides a statutory

scheme of pooling the risk of losses and placing major losses in the entity that can best spread the risk of loss as well as control the conduct of those at fault." 474 So.2d at 788.

The district court in Florida Patient's Compensation Fund v. Maurer, 493 So.2d 510 (Fla. 2d DCA 1986) either is naive or has ignored the manner in which medical negligence claims are resolved. The physician has little to say in the conduct of litigation against him. The primary carrier and the Fund control the litigation, not the physician. They decide whether to litigate or settle. The physician is a bystander to the battle fought by others.

Here the judge awarded a $225,000 attorney's fee on a $750,000 verdict. The Hospital was responsible for $100,000, the Fund the balance. The jury awarded Von Stetina $12,473,250. Of this total, the health care provider was responsible for $100,000 and the Fund $12,373,250. In addition to compensatory damages, Von Stetina was awarded $4,400,000 attorney's fees, reduced on appeal to $1,500,000. Fee awards are usually proportional to the total recovery. Responsibility for fees should parallel responsibility for the judgments. When primary limits are exhausted, the Fund takes over.

The health care provider entitled to a statutory $100,000 limitation of liability should not be individually responsible for a $4.4 million, $1.5 million, or $225,000 attorney's fee when the control of the litigation in the catastrophic loss case rests squarely with the Fund. The Fund has the risk and the Fund

decides whether to try the case or settle the case. If the Fund's decision to litigate rather than settle is erroneously made, this is the conduct arguably penalized with payment of the claimant's attorney's fees. It is a penalty that should not be visited upon the physician.

Although the primary carrier is not a party to this or any malpractice action, the relationship between the physician and the primary carrier should be considered. To obtain the statutory limitation of liability, the physician must provide the underlying $100,000 in one fashion or another. The physician may self-insure or may purchase primary insurance coverage. The contract for primary coverage is just that, a contract. The courts cannot impose upon the primary carrier a responsibility for attorney's fees in excess of primary policy limits when the contract does not so provide. Cf. Highway Casualty Company v. Johnston, 104 So.2d 734 (Fla. 1958).

The carrier that writes $100,000 primary coverage does so with the expectation that its liability will be limited to $100,000. The carrier charges a premium commensurate with the limited risk assumed. Additional liability, beyond that contracted, is not the responsibility of the primary carrier. The Fund, however, assumes unlimited liability by the express terms of the statute which created the Fund. The Fund set its membership fees in recognition of this unlimited liability and should be responsible for the liability assumed. The health care

provider who joins the Fund and pays its premium is entitled to the statutory limitation of liability.

CONCLUSION

The Third District decision should be approved.

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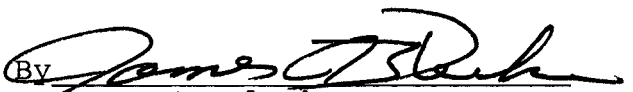
By 
James C. Blecke

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondent, Pierre Grondin, M.D., was mailed to all counsel listed on the attached service list, this 20th day of January, 1987.

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