IN THE SUPREME COURT OF FLORIDA

FLORIDA PATIENT'S COMPENSATION FUND,

Petitioner,

vs. CASE NO. 69,230

GEORGE BOUCHOC, et al.,

Respondents.

On Discretionary Review of
Decision of Third District Court of Appeal

BRIEF OF RESPONDENT EDNA PETERSON ON THE MERITS

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BRIEF OF RESPONDENT EDNA PETERSON ON THE MERITS

Edna Peterson[1] was plaintiff in the trial court and obtained judgment against the multiple defendants[2] in a medical malpractice action. By its petition here, Florida Patient's Compensation Fund (the Fund) challenges a second judgment, affirmed on appeal, awarding attorney fees assessed against the Fund, St. Francis Hospital, Inc., and George Bouchoc, jointly and severally.

Peterson accepts the Fund's statement of the case and facts, subject to the supplemental statement set forth below.

STATEMENT OF THE CASE AND FACTS

Shortly prior to trial, the hospital and Bouchoc, its agent, tendered in writing their insurance limits ($100,000) as full settlement of the claim against them (R 3). After verdict and judgment were rendered in plaintiff's favor for $750,000 plus $225,000 attorney fees, the trial court entered an order limiting the liability of these defendants to $100,000 (A 4).

Attorney fees were assessed against the Fund, the hospital and George Bouchoc jointly and severally. As noted above, the health care providers' liability was limited pursuant

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[1]Peterson sued as personal representative of the Estate of her husband, Frederick Peterson, for the use and benefit of herself as surviving spouse and of the estate.

[2]Defendants were St. Francis Hospital, Inc., George Bouchoc (operator of heart-lung bypass machine), Dr. Grondin (head operating surgeon) and the Florida Patient's Compensation Fund.

to statute to $100,000, which they paid. The trial court determined at the attorney fee hearing that the other health care provider, Dr. Grondin, should not be liable for the fee because his liability was vicarious (R 3).

Post-judgment, Dr. Grondin ($100,000) and the hospital and George Bouchoc ($100,000) satisfied the statutory limits of their liability. The Fund paid the balance of the judgment for damages ($550,000) but, by its appeal to the district court of appeal, challenged its liability for the attorney fee award. That court rejected the Fund's argument that it can never be held liable for a plaintiff's attorney's fee and affirmed the fee award against the Fund.

By cross-appeal in the district court, Peterson challenged the trial court's order limiting the liability of the hospital and Bouchoc to $100,000. The district court declined to address the cross-appeal, noting that "there is no showing that the Fund is unable to pay the judgment and fees."[3]

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[3]The court further noted that this Court in Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783 (Fla. 1985), expressly reserved the question whether a health care provider "has to pay the amount of the judgment which exceeds $100,000 if the Fund is unable to pay."

SUMMARY OF THE ARGUMENT

Under the Medical Malpractice Reform Act, the liability of health care providers is limited to $100,000. After the health care providers have paid the statutory maximum, the Fund is liable for the excess amount of a judgment, including attorney's fees awarded to a prevailing plaintiff.

In Rowe, this Court held that section 768.56 (the attorney fee statute) was adopted as a part of the Act. It should not be considered in isolation from the entire statutory scheme. In that case, the Fund did not challenge its liability for attorney fees on grounds of statutory construction as it does in this case.

Contrary to the Fund's argument, the decision below will not have the effect of discouraging pre-trial settlements; rather, it should encourage the Fund to enter into meaningful settlement negotiations in cases of demonstrable liability and substantial damages.

On plaintiff's cross-appeal, the Court should condition the trial court's limitation of the health care providers' liability upon the Fund's financial ability to pay the attorney fee award. Such a disposition is required by this Court's opinion in the Von Stetina case.

Should this Court quash the decision below and exonerate the Fund from any obligation to pay the attorney fee awarded, the trial court's judgments should be modified to require payment of the fee by the health care providers who are parties to this review.

ARGUMENT

I. THE FUND IS LIABLE FOR ALL AWARDS IN EXCESS OF THE LIMITED LIABILITY OF HEALTH CARE PROVIDERS, INCLUDING ATTORNEY FEE AWARDS.

The district court of appeal majority opinion correctly based its decision on two earlier decisions, one of its own and one by this Court.

In Florida Patient's Compensation Fund v. Miller, 436 So.2d 932 (Fla. 3d DCA 1983), the Fund advanced the same argument that it now presents to the Court (Br. 5-8): that section 768.54 does not specify attorney fees as part of a claim for which the Fund can be held liable.[4] Rejecting that argument, a majority of the panel upheld the trial court's attorney fee award against the Fund and held that the liability of the defendant health care providers was limited to $100,000 each.

More recently, in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), a decision upholding the constitutionality of section 768.56, Florida Statutes, this Court squarely answered the Fund's present argument (Br. 7) that the

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[4] Miller involved a different kind of attorney fee award. There, Mt. Sinai Hospital asserted a right of common law indemnity against Miller because of his primary liability. The right to indemnity included a claim for attorney fees incurred in defending the action brought by the plaintiff. Because the Medical Malpractice Reform Act requires each health care provider to provide an adequate defense for the Fund, Judge Pearson dissented from the holding that a defendant's attorney fees could be assessed against the Fund. That distinction is not presented here.

attorney fee section is not a part of the comprehensive reach of the Act. The Court said:

> The subject statute, section 768.56, was adopted as part of the Medical Malpractice Reform Act and became effective July 1, 1980.

472 So.2d at 1147 (emphasis supplied). Clearly, the Court did not intend that the 1980 amendment providing for attorney fees be considered in isolation from the statutory scheme.

The history of the Rowe case on its way to this Court is even more instructive. At the trial court level, the Fund was ordered to pay the plaintiff's costs and attorney fees after the hospital's $100,000 primary coverage level was exhausted -- the precise situation involved in the present case.[5] The Fund's appeal did not challenge that holding; instead, it urged that the attorney fee statute was unconstitutional.[6] That argument was ultimately rejected by this Court. Having lost its challenge on constitutional grounds,[7] the Fund thereafter uniformly sought to

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[5]The trial court's order in Rowe included the following finding: "The Court finds the Fund is obligated for plaintiff (sic) cost and attorney's fees set forth herein after the hospital's $100,000.00 limit is exhausted." (Appellant's appendix at 4, Florida Supreme Court case no. 64,459.)

[6]The Fund's Notice of Appeal identified the nature of the order appealed as follows: "The nature of the Order is a Final Order ruling on all post-trial motions, including a specific finding by the Court that . . . the FLORIDA PATIENT'S COMPENSATION FUND is obligated to pay costs and a reasonable attorneys' fee to the Plaintiff/Appellee on behalf of the Fund member." (Florida Supreme Court case no. 64,459.)

[7]As noted by the majority opinion in the present case: "The Fund's standing to challenge the statute rested on the unaddressed premise that the Fund could be liable to pay attorney's fees where it was a nonprevailing party." 490 So.2d at 132.

avoid responsibility for paying plaintiff's attorney fees by arguing that the health care providers should bear that burden.

As its present rationale for escaping that liability, the Fund advances the following curious statement (Br. 6-7):

> Requiring the Fund to pay attorney's fees to the plaintiff's attorney violates the statutory scheme which makes it the responsibility of the Fund member to provide the defense for any claim which potentially affects the Fund.

As noted above, footnote 4, supra, that argument was legitimately involved in the Miller case, but it fits here not at all. Here, Dr. Grondin, on the one hand, and the hospital and George Bouchoc, on the other, each did bear the cost of providing a defense through trial and entry of judgment. The Fund's argument becomes particularly ironic in light of the circumstance that settlement was precluded, and trial was required, by the Fund's refusal to pursue a fair settlement of plaintiff's claim. In this context, it is important to remember that the Fund, post-trial, was willing to satisfy the excess portion of the judgment ($550,000) rather than pursue available remedies.

Having gambled and lost, the Fund is in a poor position to argue that the health care providers, rather than the Fund, should pay the plaintiff's attorney's fees. The lower courts were not misled by that argument.

Below, the dissenting judge quoted the Fund's argument that requiring it to bear the burden of attorney fee awards exceeding a health care provider's $100,000 limit "could have a chilling effect on pre-trial settlements." 490 So.2d at 135. Of

course, as this case demonstrates, the reverse is true. It was the Fund's, not the health care providers', refusal to enter into serious settlement negotiations that forced a trial of the case. Under those circumstances, it would hardly be equitable to require the health care providers rather than the Fund to pay the attorney fee award.[8]

In sum, there is nothing in the Act, in the court decisions construing it or in principles of equity[9] that supports the argument being made by the Fund in this case.

The dissenting opinion below, relied on here by the Fund, has been adopted as correct by the Second District Court of Appeal in Florida Patient's Compensation Fund v. Maurer, 493 So.2d 510 (Fla. 2d DCA 1986), rev. granted (1987). This Court has now accepted jurisdiction of Maurer, presumably based upon conflict with the present case.[10] The Court should approve the decision of the Third District Court of Appeal as to the Fund's

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[8]It is true that promoting settlement of claims was one of the purposes behind the 1980 attorney fee amendment. The legislative preamble provided in part: "WHEREAS, an alternative to the mediation panels is needed which will similarly screen out claims lacking in merit and which will enhance the prompt settlement of meritorious claims. . . . " Chapter 80-67, Laws of Florida (emphasis supplied).

[9]Below, the dissenting judge posited that requiring the Fund to pay the entire plaintiff's fee assessed "effectively nullifies" the equitable allocation portion of the statute. Id. That assertion obviously overlooks cases in which judgments lower than $100,000 are entered against health care providers.

[10]Maurer moved to consolidate his petition for review with the present case at such time as the Court accepted jurisdiction in his case (Case No. 69,421). On January 12, the Court granted the motion and consolidated the cases for purposes of oral argument.

liability in the present case and disapprove the conflicting decision of the Second District Court of Appeal in the Maurer case.

II. THE TRIAL COURT COMMITTED ERROR IN LIMITING THE LIABILITY OF THE HEALTH CARE PROVIDERS WITHOUT QUALIFICATION. (Raised by cross-appeal in the district court.)

Peterson cross-appealed in the district court because the trial court entered an order limiting the liability of the hospital and Bouchoc to $100,000 without qualification (A 4).

The judgment awarding attorney fees (A 2) correctly adjudicated the Fund, the hospital and Bouchoc to be liable jointly and severally. Consequently, there are two reasons why the limitation of the health care providers' liability should have been qualified.

The sometimes precarious financial plight of the Fund is well documented in reported appellate decisions.[11] In Florida Patient's Compensation Fund v. Von Stetina, supra, this Court expressed the following caveat:

> The scheme that makes the Fund party to a medical malpractice action and responsible for portions of awards in excess of $100,000 does not substantially violate or change any of the plaintiff's vested rights. We caution, however, that we do not address in this action the constitutional right of a plaintiff to levy against a health care provider when the Fund is fiscally incapable of or otherwise prohibited from paying validly entered judgments within a reasonable time because of inadequate rates and assessments.

474 So.2d at 788-89.

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[11]E.g., Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815 (Fla. 1983).

Because the Fund's financial status and this Court's resolution of that problem are still open questions at the present time, the trial court should have conditioned the health care providers' limitation of liability upon the Fund's financial ability to pay the judgment.[12] This Court should now address the issue and remedy that oversight.

Peterson's cross-appeal was necessary for another reason. Should this Court quash the decision below and reverse the attorney fee judgment against the Fund based on the arguments set forth in its initial brief, Peterson would surely be entitled to proceed against the hospital and Bouchoc for the full amount of that judgment. Any reversal of the judgment against the Fund should preserve Peterson's right to recover her counsel fees, the amount of which is unchallenged below or here.

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[12]Counsel for the Fund advised counsel for Peterson during post-trial proceedings that the Fund was then financially unable to supersede the attorney fee judgment.

CONCLUSION

This Court's prior constructions of the Medical Malpractice Reform Act amply refute the argument now being made by the Fund. The Court has found that the statutory scheme is designed to ensure sufficient funding to pay substantial judgments to medical malpractice victims and has said:

> The scheme that makes the Fund party to a medical malpractice action and responsible for portions of awards in excess of $100,000 does not substantially violate or change any of the plaintiff's vested rights.

Von Stetina, supra, at 788-89 (emphasis added).

The district court's decision affirming the judgment awarding attorney fees against the Fund should be approved. The order limiting the liability of the health care providers should be modified so that the limitation is conditioned upon the Fund's financial ability to pay the judgment. Should the judgment against the Fund as to attorney fees be reversed, the health care providers should be ordered to pay the full amount of the judgment.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to JOE N. UNGER, ESQUIRE, 606 Concord Building, 66 West Flagler Street, Miami, Florida 33130; H. LAWRENCE HARDY, ESQUIRE, 299 Alhambra Circle, Coral Gables, Florida 33134; and to BETSY E. GALLAGHER, ATTORNEY AT LAW, Talbut, Kubicki, Bradley & Draper, 701 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130, this 16th day of January, 1987.

Julian Clarkson

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