IN THE SUPREME COURT OF FLORIDA

CASE NO: 72,610

DISTRICT COURT OF APPEAL
4TH DISTRICT - NO. 4-86-0215
4-86-0844
4-86-0285
& 4-86-0967

ROBERT B. SMITH, M.D.,
and ROBERT B. SMITH, M.D,
P.A.

Petitioners,

vs.

HARRIET R. SITOMER, and
the FLORIDA PATIENTS
COMPENSATION FUND,

Respondents
_____________________________/

DISCRETIONARY PROCEEDING TO REVIEW A DECISION OF THE
DISTRICT COURT OF APPEAL, FOURTH DISTRICT OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE & FACTS

Section 768.56 of the Florida Statutes -- attorney's fees in medical malpractice actions -- provides the framework for this Court's review. The petitioners, Robert B. Smith, M.D., and his P.A.,[1] challenge the Fourth District Court of Appeal's decision which extended their liability beyond the $100,000 cap provided in Fla. Stat. §768.54. The petitioners also challenge the amount of attorney's fees awarded to the plaintiff.

THE ATTORNEY'S FEES HEARING

At the hearing on the motion for attorney's fees, counsel for Dr. Smith argued that Fla. Stat. §768.54 limited his liability to $100,000. In fact, the trial court had previously entered an order limiting his liability to that statutory amount. R. at 1718. This amount was equivalent to the limits of coverage provided by Dr. Smith's insurer. The order limiting Dr. Smith's liability was never appealed by the plaintiffs or the Florida Patient's Compensation Fund [FPCF].

Counsel argued that the trial court could not assess attorney's fees or costs against Dr. Smith because of the $100,000 limitation. Dr. Smith had complied with §768.54 by obtaining underlying coverage and had paid his assessed fee to the FPCF. Relying upon case law interpreting Fla. Stat. 5768.28 -- the sovereign immunity statute -- counsel argued that the limitation of liability set forth in §768.54 prohibited an

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[1] Dr. Smith and his P.A. will be referred to collectively as Dr. Smith or the health care provider throughout this brief.

additional award of attorney's fees and costs over the $100,000 amount. R. at **1104-04.**

Counsel for the FPCF argued that case law interpreting **§768.28** was inapplicable. **R.** at **1108-09.** The FPCF's attorney submitted a copy of Dr. Smith's underlying insurance policy. He argued that the existence of a supplementary payments provision, which provided coverage for costs "taxed" against the physician above the indemnity limit of $100,000, provided coverage for attorneys' fees. The FPCF next argued that attorneys' fees should be considered costs based upon equitable principles.

The plaintiffs' counsel simply suggested that "the only reasonable thing to do is enter judgment against both of them [Dr. Smith and the FPCF] since they're only going to fight this out on another level, and see who wins in the Fourth District." R. at **1114.** The trial court entered an order awarding costs and attorney's fees of **$425,317.50** against Robert **B.** Smith, M. D., Robert B. Smith, M.D., P.A., and the Florida Patient's Compensation Fund. R. at **843; 842.**

THE TESTIMONY

The plaintiff called Walter G. Campbell, Jr., as her expert witness on attorneys' fees, Mr. Campbell testified that he had reviewed the affidavits of Dr. Fiscina and Mr. Stadelman. R. at **905.** Mr. Stadelman's affidavit reflected approximately **114-15** hours in the representation of the plaintiff. Dr. Fiscina's affidavit reflected **468** hours allegedly non-duplicative. Mr. Campbell felt that a reasonable hourly rate for

Dr. Fiscina was $200/hour. He believed that a reasonable hourly rate for Mr. Stadelman was $150/hour. R. at 906. With regard to trial counsel, Mr. Hoppe and Mr. Backmeyer, Mr. Campbell testified that a reasonable hourly rate would range between $200 to $250 an hour. Mr. Hoppe and Mr. Backmeyer had spent approximately 239 hours working on the case.

Mr. Campbell further testified that under the guidelines of Rowe, the case should be given a 3.0 contingency risk multiplier. Based upon the hourly rates, the hourly fee, and the contingency risk multiplier, Mr. Campbell opined that a low value for the services would be approximately $475,000 with a high value of approximately $515,000. R. at 906. On cross-examination, Mr. Campbell explained that all medical malpractice cases involving plastic surgeons are worth a 3.0 contingency risk multiplier. R. at 908-10. Mr. Campbell found nothing unreasonable about the periods of time charged by each of the attorneys for their respective work on the case.

William Hoppe testified concerning his credentials and verified the contents of his affidavit. He stated he had not advised the client in writing of the provisions of Fla. Stat. §768.56. R. at 995. Mr. Hoppe did not have a fee contract with Mrs. Sitomer. R. at 925. He had no understanding with Mrs. Sitomer concerning a division of fees if attorneys fees were awarded in addition to the liability judgment. R. at 926-27. Much of the testimony focused on whether the 3.0 contingency risk multiplier was appropriate in the case.

James Stadelman testified concerning his credentials and the amount of time he had spent consoling the client. R. at 939. Mr. Stadelman testified: "I was her -- her confidence was in me. I realize, again, there's some question as to how important that is in terms of my role in this representation, but in terms of the client, it was a very important role." R. at 939. Mr. Stadelman did not try the case. R. at 940.

Stadelman's testimony further revealed that Hoppe had been brought into the case after the complaint had been filed. R. at 941. He testified that the failure to sue the FPCF in the original complaint "was an oversight on my part and never -- just didn't get considered until later on after Bill Hoppe was brought into the case." R. at 942. Stadelman did not keep time sheets, but determined his hours based upon "a fairly reasonable memory." R. at 948.

Thomas C. Heath testified on behalf of the defendants. He had reviewed the <u>Rowe</u> decision, in which this Court set out the guidelines for determining attorneys' fees in medical malpractice actions. R. at 952. He had reviewed the affidavits of counsel. Based upon his review of the affidavits and his experience, he found 300-350 hours to be a reasonable amount of time to spend on the case through the trial. R. at 954. While Mr. Heath had virtually no criticism of Mr. Hoppe or Mr. Backmeyer's affidavits, he found Dr. Fiscina's affidavit to be "a joke." R. at 955.

> This man swore to this and testified to his time in this case, that he had no business in the case to begin with because he obviously has no idea what he's doing.
>
> In the alternative, the hours that are listed in Fiscina's affidavit and the characterization and subject matter that he's got by it is absolutely incredible. The affidavit as a whole is something I can't understand. Can't explain it. Wouldn't accept. I don't know how much of it is legitimate or not.

R. at 955. Mr. Heath found Stadelman's affidavit excessive. R. at 957. Mr. Heath also found a 3.0 contingency risk multiplier inappropriate in this case.

> I disagree with that wholeheartedly. The majority of plastic cases that I've seen, whether they've been malpractice or not, are usually evaluated for exposure and value as well as success based upon the photographs the plastic surgeons keep with regard to the progression as to whatever the condition is.
>
> These photographs were reviewed in your office, they are absolutely, as Mr. Campbell said, I think, gross. I don't know that's the right terminology.
>
> They are at least shocking, and very, very, very likely to inflame the passions of anybody that would see them.
>
> For that reason alone, this case would fall, in my opinion, into a more likely success category, and that would not be a contingency fee factor of 3 under Rowe.

R. at 958.

Mr. Heath believed that the hourly rate should be based upon the particular attorney's experience in the field. He believed a reasonable range would be between $100 and $150 per hour. Mr. Backmeyer and Mr. Hoppe would qualify for the higher

end of the range while Mr. Stadelman and Dr. Fiscina would warrant the bottom range. R. at 960.

THE ORDER

As a result of the hearing, the trial court made findings of fact and conclusions of law, which were submitted by plaintiff's counsel following the hearing. R. at 804-07. The trial court concluded that Dr. Fiscina should be awarded $200/hour for approximately 400 hours of work. The court concluded that Mr. Stadelman should be awarded $125/hour for 110 hours of work. The court concluded that Mr. Hoppe and Mr. Backmeyer should be awarded $225/hour for 239 hours of work. The court then multiplied these figures by a 2.7 contingency risk multiplier and came up with a total attorneys' fee award of $425,317.50.[2] From those findings of fact and final judgments, Robert B. Smith, M. D., appealed to the Fourth District Court of Appeal.

THE FOURTH'S DISTRICT COURT OF APPEAL'S DECISION

The Fourth District Court of Appeal, relying upon this Court's then recent decision in Florida Patient's Compensation Fund v. Bouchoc, 514 So.2d 52 (Fla. 1987), held that the attorneys' fees should be assessed against Dr. Smith and his insurance carrier. (See opinion at page 10; App. at 10). The Fourth District noted that Bouchoc had held the FPCF liable for a

[2] This amount reflected a mathematical miscalculation and was reduced by the Fourth District Court of Appeal to reflect $398,317.50.

prevailing party's attorneys' fees when the claim exceeded $100,000. However, the Fourth District then found that the rule did not apply in this case because the health care provider's underlying policy provided supplementary payments coverage.

The policy specifically provided:

> The Staff Fund will pay, in addition to the applicable limits of liability: (a) all expenses incurred by the Staff Fund, all costs **taxed** against the Member in any suit defended by the Staff Fund and all interest on the entire amount of any judgment . . . .

(Emphasis added). The Court found the language "sufficient to include the payment of attorney's fees. . . ." Id. at 10-11. In rendering its decision, the Fourth District aligned itself with the Third District Court of Appeal's decision in Williams v. Spiegel, 512 So.2d 1080 (Fla. 3rd DCA 1987).[3]

The Fourth District denied the motions for rehearing. From this denial and the decision of the Fourth District Court of Appeal, the defendant, Robert B. Smith, petitioned this Court for a writ of certiorari. This court accepted jurisdiction on October 28, 1988.

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3 The Williams case is currently pending before this Court.

SUMMARY OF THE ARGUMENT

Several errors in an award of attorney's fees and the Fourth District Court of Appeal's assessment of the award against Robert B. Smith, M.D., form the basis of this appeal. First, the Fourth District's determination that only Dr. Smith and his carrier are liable for the attorney's fees award is in error. Dr. Smith obtained an order limiting the amount of a judgment against him to the amount of underlying coverage, $100,000, in compliance with Fla. Stat. 5768.54. When the trial court subsequently entered two more judgments for attorney's fees and costs against Robert B. Smith, M.D., it contradicted its prior ruling and ignored Florida case law. Like the limitation provided in the sovereign immunity statute, Fla. Stat. 5768.54 is a complete limitation on liability. The Fourth District Court of Appeal erred when it affirmed the judgment and assessed the attorney's fees award against Dr. Smith.

Attorney's fees are not costs. Wiggins v. Wiggins, 446 So.2d 1078 (Fla. 1984). The provision of the underlying insurer's policy providing coverage for costs "taxed" in addition to indemnity does not provide for the payment of attorney's fees. The provision does not alter the clear language of Fla. Stat. 5768.54, which limits liability to the amount of liability coverage.

Third, the trial court erred in failing to allocate the attorney's fees award under principles of equity. Section 768.56 mandates that the trial court make an equitable distribution of

an attorney's fees award. Because the liability judgment against Robert B. Smith, M.D., was limited to $100,000, the attorney's fees award should reflect a corresponding limitation. At the most, the court should have limited the attorney's fees award to the maximum allowed under Rowe, the **40%** contingency fee in the plaintiff's contract. At the least, the award should have been proportionate to the limitation of liability provided Dr. Smith.

Fourth, the trial court erred in allowing excessive time for four lawyers in awarding attorney's fees. Fifth, the trial court used an excessive contingency risk multiplier under the circumstances of this case. For these reasons, the Fourth District Court of Appeal's decision must be quashed and the attorney's fees award in this case be vacated against Dr. Smith.

ARGUMENT

I. THE FOURTH DISTRICT COURT OF APPEAL ERRED IN RULING THAT THE FINAL JUDGMENT FOR ATTORNEY'S FEES BE ENTERED AGAINST ROBERT B. SMITH, M.D., AND HIS P.A., IN EXCESS OF THEIR STATUTORY LIMITATION OF LIABILITY.

A. Section 768.54 Limits The Liability Of The Health Care Provider.

Section 768.54 (2)(b) provides:

> A health care provider shall not be liable for an amount in excess of $100,000 per claim or $500,000 per occurrence for claims covered under sub-section (3) if the health care provider had paid the fees required pursuant to sub-section (3) for the year in which the incident occurred for which the claim is filed, and an adequate defense for the Fund is provided, and pays at least the initial $100,000 or the maximum limit of the underlying coverage maintained by the health care provider on the date when the incident occurred for which the claim is filed, whichever is greater, of any settlement or judgment against the health care provider for the claim in accordance with paragraph (3)(e).

Fla. Stat. §768.54(2)(b)(1981). This provision is labeled as a "limitation of liability." There is no dispute that Robert B. Smith, M.D., complied with the pre-requisites of section 768.54(2)(b). Thus, the trial court properly limited his liability to the amount of the underlying coverage, $100,000. R. at 718.

This Court reviewed the issue now before it in Florida Patient's Compensation Fund v. Bouchoc, 514 So.2d 52 (Fla. 1987). As this Court stated: "The issue in these cases is whether the

attorneys' fees should be paid by the Fund or by the health care providers." Id. at 53. The FPCF had argued and continues to argue in this case that a prevailing party's fees are not part of the "'claim arising out of the rendering of or failure to render medical care or services' as required by section 768.54(3)(a)." Id. This court found that "when the purpose for which the Fund was created is considered, we think that the statutory language is properly construed to require the Fund to pay the attorneys' fees." Id.

This Court also found it unreasonable to suggest that the legislature would have required health care providers to be responsible for attorneys' fees above the statutory limitation set forth in §768.54. This Court rejected the FPCF's argument that statutory language found in the original section of 768.54(3)(e)(3) referred only to attorneys' fees generated by the employment contract between the plaintiff and its attorney.

According to Bouchoc, the FPCF is liable for attorney's fees in excess of the statutory limitation as a general rule. This Court created a caveat, however. "To the extent that the plaintiffs's attorneys' fees are payable under the provisions of the health care provider's liability insurance coverage, the Fund will not be responsible because section 768.54(2)(b) provides that the Fund shall only pay the excess over $100,000 or the maximum limit of the underlying coverage, whichever is greater." Id. It is this precise language upon which the FPCF relied and the Fourth District Court of Appeal ruled that only the health

care provider in this case should be liable for attorneys' fees. However, the language upon which both the FPCF and the Fourth District relied does not state that the policy provides for the payment of attorneys' fees.

The policy provides in pertinent part: "The Staff Fund will pay, in addition to the applicable limits of liability: (a) all expenses incurred by the Staff Fund, all costs **taxed** against the Member in any suit defended by the Staff Fund and all interest on the entire amount of any judgment. . . ." R. at 829-41 (emphasis added). There is no express provision for payment of attorneys' fees. The provision specifically provided for payment of costs "taxed" against the insured. An old Latin maxim: expressio unius est exclusio alterius is applicable.

The Fund argued that attorneys' fees should be considered costs and thereby fall under the supplementary payments provision. However, attorneys' fees are not costs and certainly not taxable costs. Wiggins v. Wiggins, 446 So.2d 1078 (Fla. 1984).

The policy provides coverage for costs "taxed" against the health care provider. Unlike the policy under review in Williams, the word "taxed" in the present policy distinguishes costs covered under the policy and those which may be incurred in defense of the case. In addition, Williams involved an appeal from the order limiting the health care provider's liability. That order was not appealed in this case.

As noted by the Third District Court of Appeal in Simmons v. Schimmel, 476 So.2d 1342 (Fla. 3rd BCA 1985):

> The attorney's fee statute involved in the present case does not contain a provision making the fees a part of costs, See §768.56 Fla. Stat. (1981). Since the attorney's fees in the present case are not made a part of costs by the statute, they are not taxable costs under Rule 1.420(d). . . .

While some language appearing in opinions regarding statutory awards of fees have casually referred to attorneys' fees as costs, no case has expressly held that attorneys' fees are costs. In fact, in Reiss v. Goldman, 196 So.2d 184 (Fla. 1967), the Third District specifically stated that attorneys' fees generally are not an item of cost. In Dade County v. Strauss, 246 So.2d 137 (Fla. 3rd DCA 1971), cert. denied, 253 So.2d 864 (Fla. 1971), the court discussed the difference between costs and fees.

Costs are the expenses incurred in the defense of suit, while fees are compensation to the officers for services rendered. Id. at 138. This reasoning is particularly appropriate in this case as the supplementary payments provisions of the Staff Fund's policy specifically speaks in terms of "taxable" costs. The words of this provision should be given their plain meaning. Attorneys' fees are not "taxable" costs. Thus, since the Staff Fund's policy does not provide for the payment of attorneys' fees, the FPCF is responsible for the attorney's fees judgment in this case.

In an attempt to avoid the express language and case law interpretation of Fla. Stat. 5768.54, the FPCF relied upon the policy's language. Unfortunately for the FPCF, that language does not support the FPCF's position. Whether the underlying health care provider's insurance policy agreed to pay costs "taxed" is not the issue. The issue is whether Fla. Stat. 5768.54 requires the FPCF to pay any judgment in excess of $100,000. The answer is yes.

B. Similar Limitations Have Been Upheld.

In City of Lake Worth v. Nicholas, 434 So.2d 315 (Fla. 1983), this Court addressed the limitation of liability provision of the sovereign immunity statute. See, also, Berek v. Metropolitan Dade County, 422 So.2d 838 (Fla. 1982). The District Court of Appeal had found that although a $50,000 limitation existed, the sovereign could also be required to pay costs. This Court quashed that portion of the District Court's decision. Relying upon Fla. Stat. §768.28(5), this Court held that a trial court may render a judgment for the full amount of damages, plus costs, but that upon payment of the limitation of liability amount, the plaintiff is required to give a satisfaction of judgment.

In a subsequent decision, the Fourth District Court of Appeal reversed an award of interest and costs which exceeded the amount the statutory limitation of liability. City of Hallandale v. Arose, 435 So.2d 985 (Fla. 4th DCA 1983). In 1985, this Court again addressed the issue. Gerard v. Department of

Transportation, 472 So.2d 1170 (Fla. 1985). This time, this Court held that although payment of the limitation amount had been made, a plaintiff could continue to seek a judgment for the excess amount and pursue his remedy with a claims bill in the legislature. Unlike the sovereign immunity situation, however, there is no subsequent remedy by way of a claims bill in this case. The assessment of attorney's fees in excess of the statutory limitation should, therefore, be taxed solely against the FPCF.

The FPCF is an entity unto itself. Although it is like an insurer in many respects, it is not an insurer. The statute creating its existence is akin to a contract, which limits the liability of the health care provider to the amount of his underlying coverage in exchange for a fee assessment, procurement of underlying coverage, and providing a defense. Fla. Stat. §768.549(2)(b)(1981).

Subsection (3)(e)(3) provides:

> A person who has recovered a final judgment or a settlement approved by the Fund against a health care provider who is covered by the Fund may file a claim with the Fund to recover that portion of such judgment or settlement, which is in excess of $100,000.00 or the amount of the health care provider's basic coverage, if greater, as set forth in paragraph (2)(b).

The trial court in this case correctly limited the liability of Robert B. Smith, M. D., when it entered a judgment in the amount of $100,000. However, when the trial court subsequently assessed attorneys' fees and costs against Dr.

Smith, it entered an order inconsistent with its own prior ruling and in conflict with the law. The Fourth District continued the error when it specifically held Dr. Smith liable for attorneys' fees in this case. These errors must be corrected.

The limitation of liability provisions of Fla. Stat. §768.54 have been upheld by this Court. Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783 (Fla. 1985). The statute is constitutional, and its meaning is clear. There can be no liability against the health care provider in excess of the amount of underlying liability coverage. In this case, the underlying coverage is $100,000. That amount has been paid to the plaintiff in settlement of this case. Dr. Smith is, therefore, entitled immunity from further liability for attorneys' fees.

C. Florida Case Law Supports A Limitation Of Liability.

Other decisions from the Third and Fourth District Courts of Appeal support the position of Robert B. Smith, M. D. In Florida Patient's Compensation Fund v. Miller, 436 So.2d 932 (Fla. 3rd DCA 1983), the Third District held that the relationship created by Fla. Stat. $768.54 is analogous to that of an indemnitee/indemnitor. Once the health care provider has fulfilled its statutory obligation, the FPCF becomes liable for costs and attorneys' fees which exceed that amount.

Robert B. Smith paid his statutory membership fee to the FPCF. He provided an adequate defense for the FPCF. He has now

paid $100,000 in settlement of this case. The FPCF must, therefore, live up to its obligation and pay for any judgment in excess of the $100,000 limitation on liability. The FPCF has done *so* to the extent of the underlying liability judgment. However, it has failed to live up to its responsibility with regard to the outstanding judgment for attorneys' fees. It must be made to do **so.**

Section **768.54** specifically provides **"a** health care provider <u>shall not</u> **<u>be</u>** <u>liable</u> for an amount in excess of $100,000. . . ." Fla. Stat. **S768.54 (1981)** (emphasis added). Its meaning cannot be more clear. The supplementary payments provision of the underlying policy is not labeled "additional liability coverage." The statute specifically provides for the payment of $100,000 or the maximum amount of underlying coverage. The policy's specified limit is $100,000. Under such circumstances, the FPCF is responsible for the attorneys' fees judgment.

II. SECTION 768.56 MANDATES THAT THE ATTORNEYS' FEES AWARD BE ALLOCATED EQUITABLY.

Should this Court disagree with Robert B. Smith's initial argument, then the petitioner requests this Court to mandate that the attorneys' fees judgment be allocated equitably between Robert B. Smith, M. D., and the Florida Patient's Compensation Fund. A provision of section **768.56** provides: "When there is more than one party on one or both sides of an action, the court shall allocate its award of attorneys' fees among prevailing parties and tax such fees against non-prevailing parties in

accordance with the principles of equity." Fla. Stat. §768.56 (1985). Despite this language, the trial court simply awarded fees jointly against Robert B. Smith, M. D., and The Florida Patient's Compensation Fund.

There are two means by which the award of attorney's fees could have easily been allocated to conform with the principles of equity. First, because the liability of the health care provider was limited to $100,000, the amount of the attorney's fees assessed against the health care provider should have been limited proportionately. In this case, the total liability judgment was $1,250,000. The amount of the judgment against Robert B. Smith, M. D., was $100,000. This created a proportionate percentage factor of eight percent (8%).

The attorney's fees award in this case, although excessive, was $398,317.50. Only eight percent (8%) of that amount should have been assessed, if any, against Robert B. Smith, M.D. Thus, the most the trial court should have awarded against Robert B. Smith, if any, was $31,865.40. Such an award would have at least conformed with the provisions of Fla. Stat. §768.56 by providing an equitable allocation of the attorney's fees award.

A second method could also have been employed. Because the contingency fee contract in this case provided for a 40% award to the attorneys. Robert B. Smith, M.D., should at most have been responsible for 40% of the liability judgment against him. Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145

(Fla. 1985). In this case, the liability judgment was $100,000. Thus, a second method of equitably allocating the attorney's fees award would have called for a limitation of the attorney's fees award to forty percent of the $100,000 limitation on liability or $40,000.

The provision of Fla. Stat. §768.56, regarding this equitable allocation is stated in mandatory language: "The court shall allocate its award. . . ." Id. The trial court failed to comply with this mandatory provision. There should have been an equitable allocation of the attorney's fees award, limiting the award against Robert B. Smith, M.D., to $40,000 at the most or $31,865.40 at the least. When the Fourth District Court of Appeal assessed the entire amount against Robert B. Smith, M. D., and the P.A. it erred. If this Court should agree with the Fourth District Court of Appeal's decision as to who should pay, then the award should be allocated according to the proportionate share of liability for the underlying judgment.

III. AN AWARD OF $567.85 PER HOUR FOR ATTORNEYS' FEES IS GROSSLY EXCESSIVE AND CONSTITUTES AN ABUSE OF DISCRETION.

Section 768.56 provides for an award of attorneys' fees to the prevailing party in an action for medical malpractice. In determining the amount of such awards, Florida courts had, prior to Rowe, previously relied upon Canon II of the Code of Professional Responsibility. Dade County v. Oolite Rock Co., 311 So.2d 699, 702 (Fla. 3rd DCA 1975), cert. denied, 330 So.2d 20 (Fla. 1976). In 1985, this Court articulated the guidelines for assessment of attorneys' fees under Fla. Stat. $768.56. Florida Patient's Compensation Fund v. Rowe, 472 So.2d 145 (Fla. 1985).

> The attorneys' fee is ... a very important factor in the administration of justice, and if it is not determined with the proper relation to that fact it results in a species of social malpractice that undermines the confidence of the public in the bench and bar.

Id. at 1146 (quoting Baruch v. Giblin, 122 Fla. 59, 63, 164 So. 831, 833 (1985)). Although the trial court had attempted to determine the attorneys' fees in accordance with the requisite principles, it failed to do so.

The first step in the analysis requires the trial court to determine the number of hours reasonably expended on the litigation. In Rowe, this Court emphasized the importance of accurate time records for this purpose. "Inadequate documentation may result in a reduction in the number of hours claimed." Id. at 1146. Here, none of the attorneys kept time

records. (Hearing Transcript of February **4, 1986,** at **8 & 19** and Transcript of Hearing of February 14, **1986,** at **48;** R. at **948).**

In fact, one of the attorneys for the plaintiff, Mr. Stadelman, testified that his hours were recreated based upon a "fairly reasonable" memory. Id. Dr. Fiscina attempted to account for **468** hours of time. **A** review of his affidavit reflected, however, that no contemporaneous time records were kept as he simply totaled his hours for selected subject headings. **As** the defense expert noted:

> This man [Fiscina] swore to this and testified to his time in this case, that he had no business in this case to begin with because he obviously has no idea what he's doing.
>
> In the alternative, the hours that are listed in Fiscina's affidavit and the characterization and subject matter that he's got by it is absolutely incredible. The affidavit as a whole is something I can't understand. Can't explain it. Wouldn't accept. I don't know how much of it is legitimate or not.

R. at **955.** The plaintiff not only sought compensation for her trial lawyers, but an additional **582** hours for attorneys who didn't know enough to sue the Florida Patient's Compensation Fund in their initial complaint. R. at **942.** The court awarded compensation to four lawyers for one lawsuit, too many hours to be reasonable.

Second, the trial court is required to determine a reasonable hourly rate. The court did specify a hourly rate in compliance with the dictates of Rowe. Because the court is given discretion in awarding a hourly rate, the petitioner cannot argue

that the rate was an abuse of discretion, but the hourly rates were excessive.

Third, the trial court used an inappropriate contingency risk multiplier of 2.7. Rowe did not mandate the use of a multiplier unless appropriate. In this case, the likelihood of a liability verdict on behalf of the plaintiff was great. Yet, the trial court appeared to base its decision on the difference between the amount of money offered to settle the case and the amount of the jury verdict. This is not the basis that should be used for determining the appropriate contingency risk multiplier.

As this Court noted in Rowe:

> When the trial court determines that success was more likely than not at the outset, the multiplier should be 1.5; when the likelihood of success was approximately even at the outset, the multiplier should be 2.0; and, when success was unlikely at the time the case was initiated, the multiplier should be in the range of 2.5 and 3.0.

Id. at 1151. The likelihood of success in this case was "more likely than not" at the outset. Graphic pictures existed, which would do doubt have a sympathetic effect on the jury. R. at 909-10. In fact, over $60,000 had been offered to the plaintiff prior to the trial. R. at 966. Thus, the contingency risk multiplier of 1.5 should have been applied, if one was applied at all. At the very worst, the likelihood of success was approximately even and the multiplier should have been limited to 2.0. However, the trial court abused its discretion when it multiplied the figure by a 2.7 contingency risk multiplier.

Furthermore, in Rowe, this Court stated that the "results obtained" could provide an independent basis to reduce the fee. 472 So.2d at 1151. "In adjusting the fee based upon the success of the litigation, the court should indicate that it has considered the relationship between the amount of the fee awarded and the extent of success." Id. at 1151. The trial court again failed to do so in this case.

In this case, trial counsel asked for an award of $700,000 to $800,000. R. at 565. The jury awarded $1,250,000. R. at 711-12. Thus, the results obtained more than accounted for the 40% contract for attorneys' fees between the plaintiff and her counsel. R. at 41. The "results obtained" should have been considered by the trial court in awarding attorneys' fees. The verdict called for a reduction in any separate award of fees; not an increase based upon a 2.7 contingency risk multiplier.

There is no doubt that the trial court attempted to comply with Rowe by rendering specific findings of fact and conclusions of law, based upon a proposed order submitted by plaintiff's counsel. In fact, the first page of the trial court's findings of fact specifically refers to this Court's decision in Rowe, Disciplinary Rule 2.106, and Fla. Stat. §768.56. However, the contents of the order and final judgment belie that court's adherence to Rowe.

The trial court found that Salvatore Fiscina had expended 400 hours at an hourly rate of $200 per hour. The trial court found that James Stadelman had expended 110 hours at an hourly

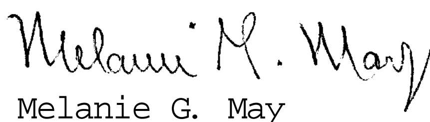
rate of $125 per hour; and that Bill Hoppe and Tom Backmeyer had expended 239 hours at a hourly rate of $225 per hour. This brought the total figure to $147,525. The trial court then multiplied this total by 2.7 and awarded $398,317.50. However, the trial court made at least three errors in doing so.

First, the trial court allowed four attorneys to submit excessive hours for the preparation of the case. Second, the trial court found that because the recovery was well in excess of any amount offered to settle the case, a 2.7 contingency risk multiplier should be applied. Third, the trial court never reduced the amount of the attorneys' fees award based upon the large award to the plaintiff in excess of the amount requested by her counsel in closing. The petitioner is aware of the abuse of discretion standard applicable to such decisions by the trial court. Linn v. Linn, 464 So.2d 614 (Fla. 4th DCA 1985). While it is difficult to overcome, the errors made by the trial court in this case are errors on which no reasonable man could differ. Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980). The attorneys' fees award must be vacated.

CONCLUSION

For the foregoing reasons, the petitioners, Robert B. Smith, M.D. and Robert B. Smith, M.D., P.A., respectfully request this Court to quash the decision of the Fourth District Court of Appeal and hold that only the Florida Patient's Compensation Fund is responsible for the attorneys' fees judgment in this case. In the alternative, the petitioners respectfully request this Court to remand this case for an allocation of the attorneys' fees award between the Florida Patient's Compensation Fund and Robert B. Smith, M. D., and his P.A. In addition, the petitioners respectfully request this Court to reduce the award or remand the case to the trial court to reduce the award, pursuant to the guidelines in Rowe.

Respectfully submitted,



Melanie G. May

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U. S. mail this 21st day of November, 1988, to: Marguerite H. Davis, Esquire, KATZ, KUTTER, HAIGLER, ALDERMAN, EATON & DAVIS, P.A., 315 S. Calhoun Street, #800, Tallahassee, Florida 32301; Ed Perse, Esquire, HORTON, PERSE & GINSBURG, 410 Concord Building, 66 W. Flagler Street, Miami, Florida 33130; K. P. Jones, Esquire, JONES, ZAIFERT & STEINBERG, 633 S. Andrews Avenue, #201, Fort Lauderdale, Florida 33301

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