1-14-88

IN THE SUPREME COURT OF FLORIDA

CASE NO. **72,610**

District Court of Appeal
Fourth District Nos. **4-86-0215**
4-86-0844
4-86-0285
4-86-0967

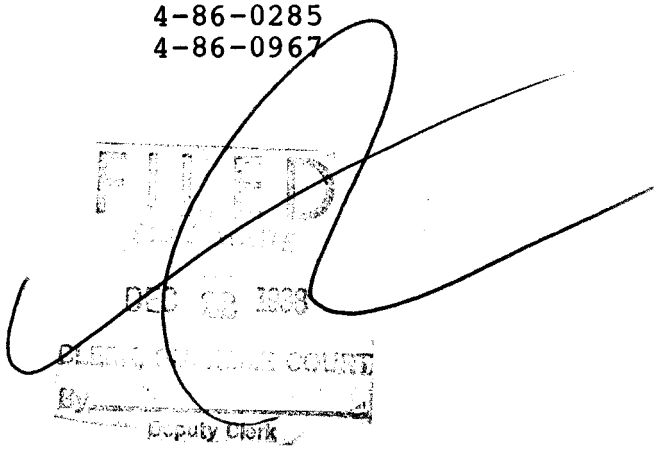
ROBERT B. SMITH, M.D. and
ROBERT B. SMITH, M.D., P.A.,

Petitioners,

vs.

HARRIET R. SITOMER and
THE FLORIDA PATIENTS
COMPENSATION FUND,

Respondents.
_____/



BRIEF OF RESPONDENT SITOMER ON THE MERITS

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TOPICAL INDEX

LIST OF CITATION8 AND AUTHORITIES

I.

INTRODUCTION

The parties will alternately be referred to herein as they stand before this Court and as follows: petitioner as "DR. SMITH;"* and respondents, respectively as "SITOMER" and "PCF." The symbols "R," "TRA" and "TRB" shall stand respectively for the record on appeal and the transcripts of the continued attorneys' fee hearing which are paginated separately.

All emphasis appearing in this brief is supplied by counsel unless otherwise noted.

II.

STATEMENT OF CASE AND FACTS

A.

PREFACE

Insofar as DR. SMITH challenges the appellate court's affirmance of the trial court's award of attorneys' fees as to quantum, it must be emphasized that the trial court sat here in a dual capacity as both law and fact/credibility finder. Therefore, SITOMER is entitled to have this record viewed in the light most favorable to her and the attorney fee judgment(s) rendered by the trial court. All reasonable inferences of fact, intendments of testimony and credibility questions must be so resolved.**

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* It should not go unnoticed that the real, real party in interest here is DR. SMITH'S insurer.

** See cases cited in the argument section of this brief, infra.

The statement of case and facts contained in DR. SMITH'S brief is argumentative to the extreme and views the record in the light most favorable to the wrong party. It is, therefore, rejected in its entirety. SITOMER will herein, infra, state the facts in their proper light.

B.

THE ACTION--THE JURY VERDICT--THE FINAL JUDGMENT RENDERED IN FAVOR OF SITOMER.

This was a medical malpractice case. PCF was a statutory perforce party. The trial culminated in a jury verdict in favor of SITOMER assessing her damages at **$1,250,000.** Final judgment was rendered in accordance with the verdict.

C.

EVIDENCE ADDUCED BY SITOMER AT FEE HEARING

SITOMER was represented by three law firms during the course of this case--R. James Stadelman, Salvatore F. Fiscina and Hoppe & Backmeyer.

At the attorneys' fee hearing Mr. Stadelman testified, in essence, as follows:

1. He was the first attorney retained by SITOMER. He and SITOMER had a standard--33%/40%/50%--contingent fee contract. **(R. 938-941; TRB 38-41)**

2. Mr. Stadelman didn't pretend to be a medical malpractice expert or a trial lawyer. That's why he got two expert law firms to assist him, Dr. Fiscina and Hoppe & Backmeyer. (R. **938-940; TRB 38-40)**

3. From start to finish he spent approximately **115** hours in the representation of SITOMER which were not duplica-

tive of the hours expended by Dr. Fiscina and Hoppe & Backmeyer. (See affidavit Stadelman--R. **825-826)**

Dr. Fiscina testified, in essence as follows:

1. He is an experienced doctor who later became a lawyer. He teaches law and medicine at George Washington Law School. He was retained to represent SITOMER because his unusual training and expertise enabled him to analyze medical malpractice cases in a more thorough-going and understanding fashion. (R. **876-878;** TRA **12-14)**

2. The case involved a myriad of difficult medical and legal problems, particularly evidentiary problems. (R. **878-879;** TRA **14-15)**

3. He does not keep time records. He estimated that over a three-year period, conservatively, he spent **468** hours on this case which was not duplicative of the time expended by Mr. Stadelman and Hoppe & Backmeyer. He would normally bill **$200** an hour, but represented SITOMER on a contingent fee basis. (See affidavit Fiscina R. **817-824; 879, 881;** TRA **15-18, 24-25)**

Mr. Backmeyer, in essence, testified as follows:

1. Hoppe & Backmeyer were retained later in the day as trial specialists. The firm does not keep time records. They worked here on a contingent fee basis. They would normally bill **$250** an hour.

2. Hoppe & Backmeyer spent approximately **239** hours on this case which were not duplicative of the hours expended by Mr. Stadelman and Dr. Fiscina. (R. See affidavit Backmeyer R.

811-816; 869-875; TRA 5-11)

Attorney Walter Campbell testified as an expert on SITOMER'S behalf, in essence, as follows:

1. He reviewed the time affidavits and the file.

2. He felt that this was a ROWE contingent fee factor 3 case and explained why. (R. 902-909)

3. In his opinion a reasonable fee for all three law firms involved would be $475,000 on the low side and $515,000 on the high side. (R. 908; TRB 8)

Attorney Thomas C. Heath testified as an expert witness on behalf of DR. SMITH and PCF, He felt that no more than 350 hours total should be allowed for attorneys' services in this case, at something from $100 to $150 an hour. He felt this was a ROWE category 2 contingent fee case. (R. 960-961; TRB 60-61)

D.

THE JUDGMENT APPEALED

The trial court, being fully aware of everything which transpired during the course of this litigation, and having heard the evidence adduced by the parties at the attorneys fee hearing, rendered "Findings of Fact and Conclusions of Law" (R. 804-8071, which in pertinent part, provide:

* * *

> "THE COURT is hereby making findings of fact and conclusions of law with regard to Plaintiff's request under Florida Statute 768.56 to determine and assess attorneys' fees in the above-styled case. This Court was the trial court which oversaw this case from the filing of the Complaint in May of 1983. This Court handled all pretrial motions and sat as the trial judge during the trial of this cause, which occurred November 18 through November 22, 1985. This Court has sat

through all post-trial motions.

"With regard to Plaintiff's petition for attorneys fees, the Court has heard testimony on February 4 and on February 14, 1986. The Court has heard the testimony of Plaintiff's attorneys, Thomas Backmeyer, Bill Hoppe, Salvatore Fiscina, James Stadelman, as well as testimony of Plaintiff's expert witness, Walter G. Campbell. The Court has further inspected the court file and the affidavits with regard to time expended by the individual Plaintiff's attorneys.

"The Court takes into account in making this ruling, Florida Statute 768.56, Disciplinary Rule 2.106 of the Code of Professional Responsibility, and Florida Patients Compensation Fund v. Rowe, 472 So. 2d 115.

"The Court finds as a matter of law that the following are reasonable hours for the prosecution of this case and that the following are reasonable hourly fees for the work involved.

	HOURS	HOURLY RATE
SALVATORE FISCINA	400	$200.00
JAMES STADELMAN	110	$125.00
BILL HOPPE and TOM BACKMEYER	239	$225.00

"In determining the hourly rate for Salvatore Fiscina, the Court has taken into account the fact that Dr. Fiscina is a licensed medical doctor, as well as a practicing attorney, and that the medical issues in the case were intricate and varied requiring expertise beyond that usually required in personal injury cases. In determining the number of hours expended by Dr. Fiscina, the complicated nature of the case and the number of conferences with proposed experts, as well as the detailed and meticulous preparation of the case by Dr. Fiscina, as exhibited by Exhibit Pl, has been considered.

"In determining the hourly rate of James Stadelman, the Court has considered the number of years of experience of Mr. Stadelman and the fact that he neither prepared to try the case nor did the intricate medical research. His efforts were directed primarily to pleading preparation, discovery attendance and most significantly, client contact and information gathering. In determining the number of hours reasonably expended, the fact that Mr. Stadelman was primarily responsible for client contact for the three plus years of the pendency of this claim is given special emphasis. The Court further considered the fact

that Mr. Stadelman resides in the locality of the Plaintiff. Dr. Fiscina resides in Washington, D.C. Hoppe & Backmeyer did not get involved in the case until long after litigation commenced.

"In determining the hourly rate of Hoppe & Backmeyer, the Court has taken into account that both attorneys are experienced personal injury trial specialists with nineteen and sixteen years of experience, respectively. Both are Board Certified civil trial specialists by the Florida Bar and the National Board of Trial Advocacy. In determining the number of hours reasonably expended by them, the Court considers the fact that this complicated case required numerous hours of preparation, both before and during trial. The billing time for pleading review, the Court finds to be fair estimates with some times being more than could be reasonably consumed in the activities and others less. However, it is determined by the Court that some minimal time increment for pleading time must be used and overall the pleading times are fair and reasonable.

"The Court has considered and taken into account in determining the number of hours to be ascribed to each attorney any duplication of effort occasioned by three law firms being involved.

"The Court further finds that this is a contingency-fee case. The claim involved a complicated medical malpractice case, also involving a statute of limitations defense. The recovery achieved was well in excess of any amount offered to settle the claim. The last settlement offer was $60,000. The last settlement demand was **$200,000.** The jury verdict was **$1,250,000.** It is therefore obvious that this was a case with a very high degree of risk of an adverse result for the Plaintiff, a fact illustrated by the Plaintiff's last demand and the Defendants' last offer. Therefore, the Plaintiff is entitled to enhancement by a risk multiplier of **2.7.**

"In determining the hourly rate of each of the Plaintiff's attorneys, the number of hours expended by each and the 'risk multiplier,' the Court has relied upon the testimony of Walter G. Campbell.

"Based upon the above findings of fact and conclusions of law, the Court hereby enters judgment for attorneys' fees against the Defendants, Robert B. Smith, M.D., P.A., Robert B. Smith, M.D. and the Florida Patients Compensation Fund in the amount of **$425,317.50. "**

* * *

The final judgment(s) for attorneys' fees appealed was entered in accordance with the above Findings of Fact and Conclusions of Law. It should be emphasized that the trial court reduced the 822 hours claimed collectively by SITOMER'S counsel to 749. The court did not allow travel time in computing the fees.

E.

REPLY TO ARGUMENTATIVE FACTUAL STATEMENT OF FACTS CONTAINED IN PCF'S MERITS BRIEF.

SITOMER would make the following observations regarding the statement of case and facts contained in the merits brief filed by DR. SMITH:

1. This statement is argumentative to the extreme and views the record in the light most favorable to the wrong party.

2. This statement ignores the fact that the trial court sat in a dual capacity as both law and factfinder.

3. The question presented ~~is~~ whether the evidence adduced by SITOMER supports the attorney fee judgment(s) appealed, not whether the evidence adduced by DR. SMITH and PCF--which was rejected by the trial court factfinder--could have supported a lower award.

4. DR. SMITH is way off base in detailing the expert testimony adduced by him at the hearing. It was rejected by the trial court and must, therefore, be ignored by this Court.

F.

THE APPEAL TO THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT

PCF, District Court Case No. 86-0215, and DR. SMITH,

District Court Case No. **86-0285,** appealed from the final money judgment rendered in favor of SITOMER. Subsequently, PCF, District Court Case No. **86-0844,** and DR. SMITH, District Court Case No. **86-0967,** filed companion appeals seeking review of the cost judgment(s). The District Court of Appeal consolidated the four appeals for purposes of filing one record on appeal. However, the merits appeals and the cost judgment appeals were briefed separately.

On appeal, as here, DR. SMITH argued--(1) PCF and not his insurer should pay the entire attorneys' fee award; (2) alternatively, the award should be allocated between PCF and DR. SMITH; and (3) the award was excessive. PCF contended that--(1) DR. SMITH'S insurer should pay the entire award; (2) there should be no allocation; and (3) the award was excessive.

In the decision sought to be reviewed, the District Court of Appeal, Fourth District, ruled in favor of SITOMER across the board. The court affirmed the attorneys' fee award as to quantum and held that DR. SMITH'S insurer must pay the award. It rejected the "allocation" argument made by DR. SMITH.

G.

SUPREME COURT PROCEEDINGS AND THE EVENTS WHICH TRANSPIRED DURING THE PENDENCY THEREOF.

On June **15, 1988,** DR. SMITH timely filed a "notice to invoke discretionary jurisdiction'' of the Supreme Court with the District Court of Appeal, Fourth District. On June **16,**

1988, PCF followed suit.

Prior to the filing of jurisdictional briefs with this Court, PCF and DR. SMITH settled with SITOMER.

Copies of the letters inter se SITOMER'S counsel and DR. SMITH'S counsel regarding the terms of the settlement are attached hereto as A. 1-4. SITOMER'S counsel, in good faith and with justification, believed that the entire matter had been settled and the only question which would be involved on certiorari proceedings to this Court was who would pay the attorneys' fee award. It was counsel's understanding that the quantum of the award would not be challenged before this Court. PCF obviously took the same view of the situation because on July **29, 1988,** it voluntarily dismissed its petition for issuance of writ of certiorari.

The situation being as counsel for SITOMER thought it was, SITOMER did not even file a jurisdictional brief.

After the writ issued, SITOMER'S counsel received what he thought to be a courtesy copy of DR. SMITH'S merits brief. It was only then that SITOMER'S counsel realized that DR. SMITH took an entirely different view of the settlement agreement and in fact was challenging the quantum of the trial court's fee award.

III.

MERITS POINTS RAISED BY DR. SMITH

POINT I

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

POINT II

WHETHER SECTION 768.56 MANDATES THAT THE ATTORNEYS' FEE AWARD BE ALLOCATED EQUITABLY.

POINT III

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

IV.

SUMMARY OF ARGUMENT

SITOMER contends:

1. With regard to DR. SMITH'S Point I--up to this point in time SITOMER had always felt assured that the entire attorneys' fee award would be paid by either DR. SMITH or PCF dependent upon the ruling of this Court. She did not, therefore, take sides in the dispute inter se PCF and DR. SMITH. In view of the argument now advanced by DR. SMITH, it would be in SITOMER'S best interest to insist that PCF be held responsible for payment of the entire attorneys' fee award. SITOMER still will not take sides. She must remind the Court, however, that PCF--having voluntarily dismissed its certiorari proceedings is not positioned to challenge the quantum of the fee award. In no circumstances should any decision be rendered here which results in only a partial satisfaction of

the award.

2. With regard to DR. SMITH'S Point 11, the equitable allocation point--SITOMER again insists that if a ruling is made on this point and allocation suggested, this Court must in equity and good conscience render a decision which will result in SITOMER'S receiving full and complete satisfaction of the attorneys' fee judgment(s) from PCF and/or DR. SMITH.

3. With regard to DR. SMITH'S Point 111--DR. SMITH has woefully failed here, as he did in the District Court of Appeal, to make a showing that the quantum of the award was illegal, excessive or the result of an abuse of discretion by the trial court.

V.

ARGUMENT

POINT I

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

POINT II

WHETHER SECTION 768.56 MANDATES THAT THE ATTORNEYS' FEE AWARD BE ALLOCATED EQUITABLY.

These two points are closely interrelated and will be argued together.

In good conscience, DR. SMITH should pay every penny of the award. On this record equity and good conscience demand that whatever disposition this Court might make of the disputes inter se PCF and DR. SMITH, the Court should make it crystal clear that one way or the other, PCF or DR. SMITH or

PCF and DR. SMITH must fully and completely satisfy the attorneys' fee judgment(s) rendered in favor of SITOMER by the trial court and affirmed by the District Court of Appeal, Fourth District.

POINT III

THE AWARD OF $567.85 PER HOUR FOR ATTORNEYS' FEES IS NOT GROSSLY EXCESSIVE AND DOES NOT CONSTITUTE AN ABUSE OF DISCRETION.

The trial judge here acted in a dual capacity both as law nd factfinder. Therefore, the conclusions he reached have the weight of a jury verdict and come before this Court clothed with a presumption of correctness. This Court must interpret the evidence contained in the record in the light most favorable to sustaining the trial judge's conclusions. As stated in OCEANIC INTERN. CORP. v. LANTANA BOAT YARD, 402 So. 2d 507, at 511-512 (Fla. 4 DCA 1981):

* * *

> "It is the function of the trial court to evaluate and weigh the testimony and other evidence in order to arrive at findings of fact to which the rules of law are then applied. The appellate court has no opportunity to observe the witnesses and thereby to judge their credibility. For this and other good reasons certain rules of review have been formulated that define and limit the appellate function. In Shaw v. Shaw, 334 So. 2d 13 (Fla. 1976), the court succinctly deals with those limitations in the following language:
>
> > "'It is not the function of the appellate court to substitute its judgment for that of the trial court through re-evaluation of the testimony and evidence from the record on appeal before it. The test, as pointed out in Westerman, supra, is whether the judgment of the trial court is supported by competent evidence, Subject to the appellate court's right to reject 'inherently incredible and

improbable testimony or evidence, it is not the prerogative of an appellate court, upon a de novo consideration of the record, to substitute its judgment for that of the trial court. Id. at 16 (Footnote omitted).'

"A more exhaustive and extremely illuminating statement of the principles involved is set out by the court in In re Estate of Donner, 364 So. 2d 742, 748 (Fla. 3d DCA 1978) where, in discussing findings of fact and the appellate function, the court said:

"'These findings of fact come to this court clothed with the presumption of correctness and will not be disturbed upon appellate review absent a showing that they are clearly erroneous or totally without any substantial evidence in their support. Department of Transportation v. Morehouse, 350 So. 2d 529 (Fla. 3d DCA 1977); Courshon v. Fontainebleau Hotel Corp., 307 So. 2d 901 (Fla. 3d DCA 1975). We are not however bound by the trial court's legal conclusions where those conclusions conflict with established law. Holland v. Gross, 89 So. 2d 255 (Fla. 1956).

"'A finding of fact by the trial court in a non-jury case will not be set aside on review unless there is no substantial evidence to sustain it, unless it is clearly against the weight of the evidence, or unless it was induced by an erroneous view of the law. A finding which rests on conclusions drawn from undisputed evidence, rather than on conflicts in the testimony, does not carry with it the same conclusiveness as a finding resting on probative disputed facts, but is rather in the nature of a legal conclusion. 3 Am. Jur. 471. When the appellate court is convinced that an express or inferential finding of the trial court is without support of any substantial evidence is clearly against the weight of the evidence or that the trial court has misapplied the law to the established facts, then the decision is 'clearly erroneous' and the appellate

> court will reverse because the trial court has 'failed to give legal effect to the evidence' in its entirety.' Id. at 258."
>
> * * *

Accord--CLEGG v. CHIPOLA AVIATION, INC., 458 So. 2d 1186 (Fla. 1 DCA 1984); DIVERSIFIED COMMERCIAL DEVELOPERS, INC. v. FORMRITE, INC., 450 So. 2d 533 (Fla. 4 DCA 1984); TURNER v. LORBER, 360 So. 2d 101 (Fla. 3 DCA 1978); CUNA MUTUAL INSURANCE SOCIETY v. ADAMIDES, 334 So. 2d 75 (Fla. 3 DCA 1976); and DELALIO V. FOOD PALACE, INC., 330 So. 2d 835 (Fla. 3 DCA 1976)

Reverting to the case at Bar, for the reasons which follow the arguments advanced by DR. SMITH in this regard are without merit:

1. DR. SMITH simply views this record in the light most favorable to the wrong party.

2. The arguments advanced by DR. SMITH ignore the fact that the trial court sat in a dual capacity as both law and factfinder.

3. The question presented is whether the evidence adduced by SITOMER supports the judgment(s) appealed, not whether the evidence adduced by DR. SMITH--which was rejected by the trial court factfinder--could have supported a lower award.

4. The evidence adduced by SITOMER is more than sufficient to support the trial court's finding as to the quantum of fee. It must be remembered that the trial court reduced the 822 hours claimed collectively by SITOMER'S counsel to 749

hours.

5. Considering the medical and legal complexity of this case, the trial court was justified in assigning a 2.7 ROWE contingency factor to the case.

6. The trial court carefully considered the matter and entered detailed findings of fact all of which have evidentiary support.

VI.

CONCLUSION

It is respectfully submitted that for the reasons stated herein, this Court must affirm the attorneys' fee judgment in favor of SITOMER rendered by the trial court and affirmed by the District Court of Appeal as to quantum. This Court, at the very least, must make it crystal clear in any decision rendered regarding the dispute inter se PCF and DR. SMITH that as a bottom line, PCF or DR. SMITH must satisfy the entire attorneys' fee award or PCF and DR. SMITH must satisfy the entire attorneys' fee award.

Respectfully submitted,

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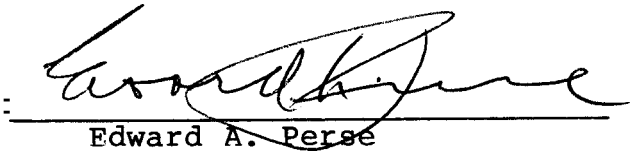
By: 
Edward A. Perse

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Brief of Respondent on the Merits was mailed to the following counsel of record this 20 day of December, **1988.**

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