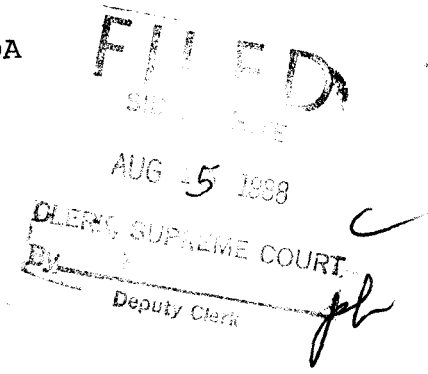
IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

CASE NO. 72,754



SOPHIE GERSHUNY,

Petitioner,

vs.

(FOURTH DCA CASE NO. 87-0918)

MARTIN McFALL MESSENGER
ANESTHESIA PROFESSIONAL
ASSOCIATION,

Respondent.
_____/

ON CERTIFIED QUESTIONS FROM THE FOURTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

SHELDON J. SCHLESINGER, P.A.
1212 Southeast Third Avenue
P. O. Box 21704
Fort Lauderdale, FL 33335
(305) 467-8800
and
JANE KREUSLER-WALSH and
LARRY KLEIN, of
KLEIN & BERANEK, P.A.
Suite 503 - Flagler Center
501 South Flagler Drive
West Palm Beach, FL 33401
(407) 659-5455

TABLE OF CONTENTS

TABLE OF CITATIONS

PREFACE

The parties will be referred to as the plaintiff and defendant.

The following symbol will be used:

R - Record.

STATEMENT OF THE CASE AND FACTS

Plaintiff brought suit against a professional association owned by physicians, however, there were no individual physicians who were parties. Negligence was alleged to have been committed by a nurse anesthetist. The defendant professional association prevailed in the suit and moved for the assessment of attorney's fees under Section 768.56, Florida Statutes (1983). The trial court refused to award attorney's fees because the professional association did not meet the definition of those parties entitled to attorney's fees under the statute. Defendant appealed and the Fourth District reversed with Judge Dell dissenting. On rehearing the Fourth District certified the questions.

CERTIFIED QUESTIONS

> WHETHER REASONABLE ATTORNEY FEES MAY BE RECOVERED UNDER SECTION 768.56, FLORIDA STATUTES, WHERE A PROFESSIONAL ASSOCIATION IS THE PREVAILING PARTY. IF THE ANSWER TO THIS QUESTION IS IN THE AFFIRMATIVE, THEN DOES SECTION 768.56 AUTHORIZE THE AWARD OF ATTORNEY FEES WHERE THE ALLEGED NEGLIGENCE IS BY AN EMPLOYEE OTHER THAN A HEALTH CARE PROVIDER ENUMERATED IN THE STATUTE.

SUMMARY OF ARGUMENT

Section 768.56, Florida Statutes (1983), provides in part:

> [T]he court shall award a reasonable attorney's fee to the prevailing party in any civil action which involves a claim for damages by reason of injury, death, or monetary loss on account of alleged malpractice by any medical or osteopathic physician, podiatrist, hospital, or health maintenance organization.

The professional association which was the only defendant in the present case is not included in any of the categories set forth in the statute. In Finkelstein v. North Broward Hospital District, 484 So.2d 1241 (Fla. 1986), this court gave a strict construction to this statute and held that in an action involving a nurse, the statute was not applicable. In the present case the individual alleged to be negligent was a nurse, just as in Finkelstein. The Fourth District erred in holding that the professional association employing the nurse was entitled to recover attorney's fees under the statute.

ARGUMENT

CERTIFIED QUESTIONS

> WHETHER REASONABLE ATTORNEY FEES MAY BE RECOVERED UNDER SECTION 768.56, FLORIDA STATUTES, WHERE A PROFESSIONAL ASSOCIATION IS THE PREVAILING PARTY. IF THE ANSWER TO THIS QUESTION IS IN THE AFFIRMATIVE, THEN DOES SECTION 768.56 AUTHORIZE THE AWARD OF ATTORNEY FEES WHERE THE ALLEGED NEGLIGENCE IS BY AN EMPLOYEE OTHER THAN A HEALTH CARE PROVIDER ENUMERATED IN THE STATUTE.

Section 768.56, Florida Statutes (1983), provides for attorney's fees to prevailing parties in malpractice actions involving "any medical or osteopathic physician, podiatrist, hospital, or health maintenance organization ... ." In Finkelstein v. North Broward Hospital District, 484 So.2d 1241 (Fla. 1986), this court stated on page 1243:

> Nurse Poore is not a medical or osteopathic physician, a podiatrist, a hospital or a health maintenance organization. Therefore, the trial court erred in assessing attorney's fees against Nurse Poore because she was not a member of any of the classes of persons enumerated in section 768.56.
>
> The principle that the mention of one thing in a statute implies the exclusion of another, Thayer v. State, 335 So.2d 815 (Fla. 1976), coupled with the requirement that statutes awarding attorney's fees must be strictly construed, Roberts v. Carter, 350 So.2d 78 (Fla. 1977), mandates reversal of the trial court's order assessing attorney's fees against Nurse Poore.

In the present case the defendant is clearly not a member of any of the classes of persons set forth in the statute.

The rationale of the Fourth District is found on page 2 of its opinion, wherein it stated:

> ... It is clear that the complaint by appellee was for medical malpractice by the group of physicians comprising the association. By seeking to hold these physicians liable, albeit as a collective group, we believe the appellee was subject to the provisions of section 768.56 in the event she failed to prevail.

The Fourth District's reasoning appears to be based on the incorrect assumption that the physicians who were the shareholders in the professional association (a corporation), could have been held liable. Such is not the case. Section 621.07, Florida Statutes (1979), regarding professional associations, provides:

> Nothing contained in this act shall be interpreted to abolish, repeal, modify, restrict, or limit the law now in effect in this state applicable to the professional relationship and liabilities between the person furnishing the professional services and the person receiving such professional service and to the standards for professional conduct; provided, however, that any officer, agent, or employee of a corporation organized under this act shall be personally liable and accountable only for negligent or wrongful acts or misconduct committed by him, or by any person under this direct supervision and control, while rendering professional service on behalf of the corporation to the person for whom such professional services were being rendered; and provided further that the personal liability of shareholders of a corporation organized under this act, in their capacity as shareholders of such corporation, shall be no greater in any aspect than that of a shareholder-employee of a corporation organized under chapter 607. The corporation shall be liable up to the full value of its

> property for any negligent or wrongful acts or misconduct committed by any of its officers, agents, or employees while they are engaged on behalf of the corporation in the rendering of professional services. (Emphasis added)

In the present case a nurse employed by the appellant professional association administered anesthesia. She was not under the direct supervision of a physician while rendering professional services within the meaning of the above statute. Accordingly, the physician shareholders could not have been held liable for her negligence. It is only the professional association which could be held liable. The physicians "comprising the association," as the Fourth District referred to them, could not have been held liable, contrary to the assumption of the Fourth District.

The Fourth District reasoned that since this was a claim for medical malpractice, attorney's fees should be awardable. This reasoning overlooks that this statute is in derogation of the common law and should therefore be strictly construed. Nor would such an interpretation be unfair, because it would work both ways. If the plaintiff had prevailed in this case, she likewise would not have been able to recover attorney's fees.

There was no health care provider, within the meaning of the statute, which was a party to this case. If the nurse who was allegedly negligent in this case had been employed by the ABC Nursing Service and the ABC Nursing Service had been sued as her employer, the statute would not authorize attorney's fees to be awarded to the prevailing party. If a nurse employed by Walt Disney World was negligent and the plaintiff sued Disney World as the nurse's employer, the statute would not apply. The professional association in this case is indistinguishable from any other corporation which might employ a nurse. The professional association was not a member of the class of persons enumerated in the statute, and the opinion of the Fourth District should be reversed.

CONCLUSION

The certified questions should be answered in the negative.

SHELDON J. SCHLESINGER, P.A.
1212 Southeast Third Avenue
P. O. Box 21704
Fort Lauderdale, FL 33335
(305) 467-8800

JANE KREUSLER-WALSH and
LARRY KLEIN, of
KLEIN & BERANEK, P.A.
Suite 503 - Flagler Center
501 South Flagler Drive
West Palm Beach, FL 33401
(407) 659-5455

By 
LARRY KLEIN

CERTIFICATE OF SERVICE

I CERTIFY that copy of the foregoing, together with appendix attached, has been furnished, by mail, this 11th day of August, 1988, to:

REX CONRAD
CONRAD, SCHERER & JAMES
P. O. Box 14723
Fort Lauderdale, FL 33302

ROBERT J. COUSINS
BERNARD & MAURO
P. O. Box 14126
Fort Lauderdale, FL 33302

ELLEN MILLS GIBBS
GIBBS & ZEI, P.A.
224 S.E. 9th Street
Fort Lauderdale, FL 33316

LARRY KLEIN