IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florid

CASE NO. 72,754 SID J.WHITE

By.

SEP 19 1988

CLERK, SUFREME COURT

Deputy Clerk (FOURTH DCA CASE NO. 87-0918)

SOPHIE GERSHUNY,

Petitioner,

vs.

MARTIN McFALL MESSENGER ANESTHESIA PROFESSIONAL ASSOCIATION,

Respondent.

ON CERTIFIED QUESTIONS FROM THE FOURTH DISTRICT COURT OF APPEAL

PETITIONER'S REPLY 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

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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.

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ARGUMENT

CERTIFIED QUESTIONS

REASONABLE ATTORNEY FEES MAY BE WHETHER SECTION 768.56, FLORIDA RECOVERED UNDER STATUTES, WHERE A PROFESSIONAL ASSOCIATION IS IF THE ANSWER TO THIS THE PREVAILING PARTY. OUESTION 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.

Respondent argues throughout its brief that there is no evidence in the record that the nurse who administered the anesthesia in this case was acting independently and not under the direct supervision of a physician. If there is in this record it is because the anvthing lacking respondent, which was the appellant in the Fourth District, did not include the trial transcript when it took this appeal to the Fourth District. The lack of supervision of a physician is not being raised for the first time on this appeal. Appellee's brief in the Fourth District included the following in the statement of the case and facts:

> There is no transcript of the trial and accordingly no evidence before this court as to what occurred at trial. There is a transcript of the hearing on post trial motions on December 12, 1986, and at that hearing one of the lawyers pointed out to the court that was no physician anesthesiologist there It was a nurse/ attending this patient. anesthetist administering the anesthetic who employee of defendant Anesthesia was an Professional Associates. (R 15-16).

Appellee did not take issue with this before the Fourth District.

If a physician had been involved in the negligence in this case, the plaintiff would obviously have sued that physician. This was not some scheme contrived to avoid paying attorney's fees if plaintiff lost the suit. Plaintiff assumed she would prevail on her suit (and she did against another defendant). She would certainly not have sued a nurse alone if a physician had also been responsible for the nurse's negligence.

The other problem with respondent's argument is that it refuses to recognize that respondent is a professional association, which is in fact a corporation. It is not, as respondent says on page 5: "... nothing more than a group of physicians"

Respondent argues on page 5 that where hospitals are sued for the negligence of nurses, attorney's fees are recoverable. What respondent apparently fails to understand is that a hospital is a health care provider specifically named in Section 768.56, Florida Statutes (1983), as being authorized to recover attorney's fees if it is a prevailing party in a malpractice case. A mere corporation clearly is not.

Respondent also argues that the "collective group" of physicians comprising the association is liable for the nurse's negligence, when in fact respondent knows this is not true. It is only the professional association, a corporation, which is liable, and the individual physicians who are shareholders of that corporation are no more liable than the shareholders of Florida Power & Light are liable when Florida Power & Light is negligent. Section 621.07, Florida Statutes (1979).

CONCLUSION

The opinion of the Fourth District should be reversed.

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 RRY KLEIN

CERTIFICATE OF SERVICE

that copy of the foregoing has been CERTIFY Ι furnished, by mail, this 16th day of September, 1988, to: REX CONRAD ROBERT J. COUSINS CONRAD, SCHERER & JAMES BERNARD & MAURO P. O. Box 14723 P. O. Box 14126 Fort Lauderdale, FL 33302 Fort Lauderdale, FL 33302 ELLEN MILLS GIBBS GIBBS & ZEI, P.A. 224 S.E. 9th Street Fort Lauderdale, FL 33316 LARRY KLEIN