o/a 5289

IN THE SUPREME COURT OF THE STATE OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO: 72,878

FLORIDA PATIENT'S COMPENSATION FUND, et al.,

Petitioners/Cross-Respondent,

-vs-

CLARA M. SCHERER,

Respondent/Cross-Petitioner.
_____/

BRIEF OF RESPONDENT/CROSS-PETITIONER ON MERITS

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INDEX

CITATIONS OF AUTHORITY

PREFACE

This case is before the Court on discretionary review. In the trial court the Petitioners were the Defendants and the Respondent was the Plaintiff. The parties will be referred to by their proper names or as they appeared in the trial court. Dr. Morales and White, Kump and Morales, P.A. will be referred to collectively as Morales. The following designation will be used:

(R) - Record-on-Appeal

(A) - Respondent's Appendix

STATEMENT OF THE CASE AND FACTS

With respect to the issue regarding the Plaintiff's right to attorney's fees at the trial level, she will accept the Statement of the Case and Facts presented by Petitioners, with one clarification. In Morales' Brief, it is stated that the jury determined that the Plaintiff did not discover or with due diligence should have discovered her cause of action against Morales more than two years prior to filing her claim. The actual interrogatory presented to the jury in the verdict was whether the Plaintiff "knew or should have known that she had been injured by Morales' actions" more than two years prior to filing her claim (R176).

With respect to Morales' contention that he was entitled to limitation of judgment pursuant to ~~Fla~~. ~~Stat~~. S768.54, a more detailed presentation of the procedural facts is necessary in order for this Court to properly analyze this issue.

The verdict in this case was returned by the jury on February 28, 1986, finding that the Plaintiff had suffered damages of $400,000, that Morales had been negligent in causing those injuries, and that the Plaintiff had been 40% comparatively negligent (R176-77). The Final Judgment was entered for the net amount of the verdict, i.e., $240,000, on that same day (but apparently not filed until March 3, 1986) (R183).

Immediately after the entry of the Judgment, Morales filed a Motion to Limit Final Judgment arguing, inter alia, that pursuant to Fla. Stat. §768.31(5)(a) (relating to contribution among tortfeasors) he was entitled to a reduction of the jury verdict in the amount of $100,000 "which constituted a pretrial settlement" (R178). That motion did not raise any claim that he was entitled to limitation of liability under Fla. Stat. §768.54. Attached to the motion as evidence of the terms and conditions of the settlement was a letter from Plaintiff's counsel to defense counsel which stated, in pertinent part (R180):

> The settlement agreement is that we will voluntarily dismiss Dr. Schultz in exchange for your assurances to pay the $100,000 in behalf of Morales, regardless of whether or not any of the Defendants, including Dr. Morales, prevail, either on the statute of limitations, affirmative defense or on any other defense, including the merits of this case.

The letter also included a postscript which stated (R180), "Where is the $100,000 you said you would get me immediately?"

Thereafter, Defendants filed the customary post-trial motions seeking remititur, judgment notwithstanding the verdict,

and a new trial (R184-85, 188-89, 190-91). Those motions were denied (R201-03).

On March 12, 1986, Plaintiff filed a Motion to Compel Transmittal of Funds and Motion for Sanctions, requesting the court to enforce the pretrial settlement and require that the Defendants pay the $100,000 to the Plaintiff as agreed (R186-87). No ruling was sought on that motion because the money was soon paid (see R368[1]). On April 7, 1986, the trial court entered an Order on Motion to Limit Final Judgment granting Defendants' request for a set-off for the $100,000 paid pursuant to the pretrial settlement, but reserving ruling on the other issues raised in that motion pending submission of memoranda (R204).

On July 25, 1986, the trial court entered a Final Order on Motion to Limit Final Judgment which reiterated Morales' entitlement to a set-off for the $100,000 settlement, but denied all other requested set-offs (R257). On that same day, the trial court entered the Order and Final Judgment granting Plaintiff's Motion for Attorney's Fees and Costs (R258-59).

Morales filed a Notice of Appeal from those two orders on August 19, 1986 (R260-61). The Plaintiff filed a Notice of Cross-Appeal with respect to the Final Order on Motion to Limit

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[1]/At the attorney's fee hearing on June 30, 1986 (misdesignated August 30, 1986 in the transcript), Plaintiff's counsel informed the court that the $100,000 had been paid "about two weeks after the verdict came in" (R368).

Final Judgment seeking review of Morales' entitlement to the set-off (R289).

On August 27, 1986, Morales filed a Motion for Limitation of Liability raising, for the first time, his contention that he was also entitled to a limitation of the Judgment as to him personally pursuant to Fla. Stat. S768.54 as the result of the $100,000 pretrial settlement (R269-70). The Motion for Limitation of Liability did not state the procedural basis for the motion, i.e., whether it was filed pursuant to Fla.R.Civ.P. 1.530 or Fla.R.Civ.P. 1.540. Morales did not obtain a relinquishment of jurisdiction from the Fourth District to permit the trial court to rule on the motion. The trial court entered an order denying, without discussion, the Motion for Limitation of Liability (R282). Morales then amended his Notice of Appeal to include the Order denying his Motion for Limitation of Liability (R290-92).

The appeal proceeded and on February 10, 1988, the Fourth District issued a decision affirming the trial court's ruling on attorney's fees. With respect to Morales' contention that the trial court should have limited his liability pursuant to Fla. Stat. S768.54, the Fourth District noted that Morales "failed to raise the issue at the trial court until after filing the Notice of Appeal" (A4). The Court agreed with the Plaintiff's contention that Morales' Motion for Limitation of Liability was untimely, noting that Morales failed to move to limit his liability within the time frame of Rule 1.530(b).

The Fourth District ruled in favor of the Plaintiff on her cross-appeal, concluding that Morales was not entitled to a set-off for the $100,000 pretrial settlement. The Court stated (A5):

> Morales paid $100,000 pretrial to Scherer in order to have another doctor defendant dismissed from the instant litigation. Apparently this was done to permit the doctor to avoid discipline under section 458.331, Florida Statutes.
>
> Under section 458.331(1)(t) "gross or repeated'' malpractice is grounds for disciplinary action by the Board of Medical Examiners. "Repeated malpractice'' includes by definition three or more claims for medical malpractice within a five-year period resulting in a judgment or settlement in excess of $10,000. Although the agreement for dismissal was between Scherer and Morales, the dismissal actually enured to the benefit of the other doctor. The situation anticipated under section 768.31(5) does not include such an arrangement. Since the pretrial settlement agreement does not fall within the plain meaning of section 768.31(5), we reverse the set-off award of $100,000 for the pretrial settlement.

Judge Anstead dissented with respect to the court's ruling on the attorney's fees and the cross-appeal (A6). The Fourth District denied, without discussion, Plaintiff's Motion for Attorney's Fees for the appeal (A7).

The parties filed Motions for Rehearing. In his Motion for Rehearing, Morales argued, for the first time, that his Motion to Limit Liability was filed pursuant to Fla.R.Civ.P. 1.540(b) and, therefore, was not untimely. The Plaintiff sought rehearing of the Order denying her attorney's fees for the appeal. All

Motions for Rehearing were subsequently denied, with Judge Anstead again dissenting (A8-9).

Morales and the Florida Patient's Compensation Fund filed Notices to Invoke Discretionary Jurisdiction, and the Plaintiff filed a Cross Notice to Invoke Discretionary Jurisdiction. After briefing on the jurisdictional issue, this Court entered an order accepting jurisdiction.

POINTS ON APPEAL

POINT I

THE TRIAL COURT DID NOT ERR IN AWARDING THE PLAINTIFF ATTORNEY'S FEES.

POINT II

THE FOURTH DISTRICT DID NOT ERR IN UPHOLDING THE TRIAL COURT'S DENIAL OF MORALES' MOTION TO LIMIT JUDGMENT PURSUANT TO FLA. STAT. S768.54.

POINT ON CROSS-APPEAL

THE FOURTH DISTRICT ERRED IN DENYING PLAINTIFF'S COUNSEL FEES FOR THE APPEAL.

SUMMARY OF *ARGUMENT*

The trial court did not err in awarding attorney's fees to the Plaintiff since her cause of action did not accrue until she discovered that she had been injured by Dr. Morales' malpractice. The trial court's ruling is not inconsistent with YOUNG v. ALTENHAUS, 472 So.2d 1152 (Fla. 1985) because that case simply held that the entitlement to attorney's fees is determined as of

the date the Plaintiff's cause of action accrued. Since the Plaintiff's cause of action did not accrue until she discovered (or reasonably should have discovered) Dr. Morales' malpractice, that is the operative date for determining her entitlement to attorney's fees. Since the jury's resolution of that issue in favor of the Plaintiff has not been challenged, the factual predicate is undisputed and supports Plaintiff's entitlement to attorney's fees.

The trial court did not err in denying Morales' Motion for Limitation of Liability. That motion was filed after Morales had filed his Notice of Appeal from the underlying Judgment and the Judgment on attorney's fees. Morales argued, for the first time, in his Motion for Rehearing before the Fourth District that that motion was filed pursuant to Fla.R.Civ.P. 1.540 and that the trial court had jurisdiction to rule upon it. However, settled case law provides that when a Notice of Appeal has been filed from the underlying judgment, the trial court does not have authority to grant relief from that judgment absent a relinquishment of jurisdiction from the appellate court. No such relinquishment was obtained in this case and, therefore, the trial court did not have jurisdiction to grant the motion.

Additionally, the $100,000 paid pursuant to the pretrial settlement did not constitute the type of payment contemplated pursuant to ~~Fla~~. ~~Stat~~. S768.54. That $100,000 was paid to the Plaintiff in order to have a different doctor dismissed from the action *so* that he would not be disciplined for "repeated malpractice.'' The settlement agreement provided that that amount

would be paid regardless of the outcome of the case as to Morales. Therefore, that amount cannot be considered as a payment toward a settlement with respect to Morales or any judgment against him. Since that was not the type of payment contemplated by ~~Fla~~. ~~Stat~~. §768.54, Morales is not entitled to a limitation of liability based thereon.

On cross-appeal, this Court should reverse the Fourth District's Order denying Plaintiff fees on the appeal. While the trial court determined that the award of fees to the Plaintiff at the trial level was limited by the **"cap",** i.e., the maximum recoverable under the attorney's fee contract, that contract did not apply to the services on appeal and, therefore, does not support denial of the attorney's fees incurred on appeal. For that reason, this Court should reverse the order and remand for entry of an order awarding the Plaintiff attorney's fees for the appeal.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN AWARDING THE PLAINTIFF ATTORNEY'S FEES.

Morales and the Florida Patient's Compensation Fund (hereafter "the Fund") both argue that the trial court improperly awarded the Plaintiff attorney's fees, claiming that the Plaintiff's cause of action accrued prior to July 1, 1980. Morales argues that the Plaintiff's cause of action accrued at the time of her injury, while the Fund argues that the cause of action accrued at the time of Morales' tortious conduct. However, it appears clear that the Plaintiff's cause of action did not accrue until she discovered that she had been injured by Dr. Morales. Therefore, since the jury determined that she did not discover the fact of her injury until after July 1, 1980, she was entitled to an award of attorney's fees.

~~Fla~~. ~~Stat~~. §95.11(4)(b) provides in an action for medical malpractice shall be commenced within two years from the time of the incident giving rise to the action or two years from the time the incident is discovered, or should have been discovered with the exercise of due diligence (with an additional provision applying where there has been fraud, concealment or intentional misrepresentation of fact preventing the discovery of the injury). Morales and the Fund rely on YOUNG v. ALTENHAUS, 472 So.2d 1152 (Fla. 1985) as controlling. Morales relies on YOUNG for the statement that a plaintiff is not entitled to recover attorney's fees when the cause of action accrued prior to July 1, 1980; while the Fund relies on it for the proposition that the

Plaintiff's cause of action accrues when the malpractice incident or tortious conduct of the doctor occurs. However, neither of the District Court cases reviewed in YOUNG v. ALTENHAUS, supra, involved a situation where the date of the plaintiff's discovery of the medical incident was at issue. Therefore, while YOUNG v. ALTENHAUS, supra, is certainly relevant to this case, it is not controlling because it does not address the specific situation at issue. This is particularly clear when reviewing prior case law regarding the accrual of a medical malpractice cause of action in which the Plaintiff's discovery of the incident is at issue. When considered in light of that case law, the trial court's ruling does not conflict with YOUNG v. ALTHENHAUS, supra, since this Court determined that the relevant date for determining the entitlement to attorney's fees is the date the cause of action accrues. In the case sub judice, Plaintiff's claim accrued when she discovered the medical malpractice incident and, therefore, that is the operative date for determining her entitlement to attorney's fees.

In DADE COUNTY v. FERRO, 384 So.2d 1283 (Fla. 1980), this Court addressed an issue regarding the statute of repose contained in Fla. Stat. §95.11(4)(b). In that case, the plaintiff had been treated by the defendant between December, 1970 and May, 1971, but did not discover the alleged malpractice until September, 1975. Plaintiff filed a medical mediation claim in April, 1977, within two years after discovery of the alleged malpractice, but more than four years after the treatment. In determining that the statute of repose contained in Fla. Stat.

§95.11(4)(b), Florida Statutes (1975) could not be applied to the plaintiff, this Court discussed the accrual of a medical malpractice cause of action where the date of the Plaintiffs discovery of the incident is crucial. This Court noted that under the predecessor statute, Fla. Stat. §95.11(6)(1972), it was specifically provided that the cause of action for medical malpractice is "not to be deemed to have accrued until the plaintiff discovers, or through use of reasonable care should have discovered, the injury", (384 So.2d at 1284). This Court then stated (Ibid):

> This amendment essentially codified existing case law respecting the date upon which medical malpractice claims accrued. [Citing, inter alia, NARDONE v. REYNOLDS, 333 So.2d 25 (Fla. 1976)]

In the context of that discussion, this Court cited with approval JOHNSON v. SZYMANSKI, 368 So.2d 370 (Fla. 2d DCA 1979), cert. den., 378 So.2d 350 (Fla. 1979). The issue before the court in JOHNSON was whether the two year limitation period provided in ~~Fla~~. ~~Stat~~. §95.11(6)(1973) applied to plaintiff's cause of action or whether the four year limitation provided in ~~Fla~~. ~~Stat~~. §95.11(4)(1971) was applicable. There was no dispute that the defendant's malpractice occurred before July 1, 1972 and that the plaintiff could not have reasonably discovered it until after the effective date of Fla. Stat. §95.11(6)(1973). Under the latter statute, the plaintiff's claim would have been extinguished. The plaintiff in JOHNSON argued that his cause of action accrued when the malpractice occurred and that the discovery rule did nothing more than toll the running of the

limitations period until the plaintiff discovered the malpractice. The Second District rejected that argument, relying on the language in Fla. Stat. §95.11(6)(1973) to the effect that the cause of action would not be deemed to have accrued until the plaintiff discovered, or should have discovered, the act of malpractice. The court also relied on general tort principles regarding the accrual of a cause of action, stating (368 So.2d at 372):

> A cause of action accrues "when the plaintiff could first have maintained his action to a successful result...when the person in whose favor it arises is first entitled to institute a judicial proceeding for the enforcement of his rights." 1 Am.Jur.2d, Actions §88 (1962) (Footnotes omitted); see also Black's Law Dictionary 37 (4th Ed. 1957).

The court in JOHNSON also noted two other District Court cases in which the applicable statute of limitations was determined based on the date of plaintiff's discovery of the malpractice incident and not the date of the malpractice, SALVAGGIO v. AUSTIN, 336 So.2d 1282 (Fla. 2d DCA 1976); HILL v. VIRGIN, 359 So.2d 918 (Fla. 3d DCA 1978).

In DADE COUNTY v. FERRO, supra, this Court concluded that the JOHNSON decision did not apply with respect to the statute of repose contained in ~~Fla~~. ~~Stat~~. §95.11(4)(b), but noted (384 So.2d at 1286): "[T]he reasoning of the district court in JOHNSON is applicable to the two-year limitation period of section 95.11(4)(b)."

Therefore, under DADE COUNTY v. FERRO, supra, and JOHNSON v. SZYMANSKI, supra, it appears clear that in the case sub judice,

the Plaintiff's cause of action for malpractice did not accrue until she discovered, or reasonably should have discovered, that she had been injured by Morales' malpractice. Further support for this conclusion can be found in NARDONE v. REYNOLDS, supra, (333 So.2d at 33), in which this Court stated:

> We agree with the United States District Court that since in 1965 the nature of the child's condition was obvious and known to the plaintiffs, it was then that the cause of action accrued and the statute of limitations commenced to run....

Therefore, since the Plaintiff's cause of action did not accrue until she discovered that her injury was caused by Morales' medical malpractice, the trial court's award of attorney's fees did not violate this Court's holding in YOUNG v. ALTENHAUS, supra.

Morales' reliance on Fla. Stat. §95.031(1) to support the contention that the date of discovery does not constitute the date of accrual of the cause of action is inconsistent with the Court's decision in JOHNSON and DADE COUNTY which relied on general tort principles, in addition to the statutory language, to reach the conclusion that the cause of action accrues when the Plaintiff discovers the act of malpractice. Furthermore, it should be noted that the language relied upon in Fla. Stat. §95.031(1) was enacted in 1975 and yet, nonetheless, this Court in DADE COUNTY v. FERRO, supra, approved the application of JOHNSON to Fla. Stat. §95.11(4)(b)(1975).

Morales and the Fund argue that the award of attorney's fees in this case violates the constitutional due process prohibition

against ex post facto legislation, citing, inter alia, L. ROSS, INC. v. R.W. ROBERTS CONSTRUCTION COMPANY, INC., 466 So.2d 1096 (Fla. 5th DCA 1985), approved, 481 So.2d 484 (Fla. 1986). In the Fifth District decision in **ROSS,** Judge Cowart noted that (466 So.2d at 1098):

> The right to recover attorney's fees ancillary to another particular underlying cause of action always accrues at the time the other, underlying, cause of action accrues. This means substantive rights and obligations as to attorney's fees and particular types of litigation vest and accrue as of the time the underlying cause of action accrues.
>
> It is a facet of constitutional due process that, after they vest, substantive rights cannot be adversely affected by the enactment of legislation...[L]egislature cannot constitutionally increase an existing obligation, burden or penalty as to a set of facts after those facts have occurred. [Footnote deleted.]

Under the authorities cited above, the Plaintiff's cause of action did not accrue until she discovered the medical malpractice incident and, therefore, the award of attorney's fees in this case does not violate any constitutional due process principle. The "set of facts" to which the obligation of attorney's fees applies includes the Plaintiff's discovery of the medical malpractice incident.

The Fund argues that the accrual of a cause of action for purposes of the statute of limitations differs from the accrual of the action for other purposes. No authority is cited which authorizes that distinction. It should be noted that in JOHNSON, supra, the court determined the accrual date of Plaintiff's

action for purpose of determining which statute of limitations applies, which is a substantive issue, see CELOTEX CORPORATION v. MEEHAN, 523 So.2d 141, 144 (Fla. 1988).

Moreover, the Fund's argument that the operative date for determining the accrual of the cause of action is the "malpractice incident" does not mean that the action accrues on the date of the doctor's malpractice. Numerous cases have held that a malpractice "incident" includes three elements, (1) a medical procedure, (2) tortiously performed, (3) which injures the patient, FLORIDA PATIENT'S COMPENSATION FUND v. TILLMAN, 453 So.2d 1376, 1379 (Fla. 4th DCA 1984), approved in relevant part, 487 So.2d 1032 (Fla. 1986); see also, COHEN v. BAXT, 473 So.2d 1340, 1343 (Fla. 4th DCA 1985), approved in relevant part, 488 So.2d 56 (Fla. 1986); WILLIAMS v. SPIEGEL, 512 So.2d 1080 (Fla. 3d DCA 1987); JACKSON v. LYTLE, 528 So.2d 95 (Fla. 1st DCA 1988); ELLIOT v. BARROW, 526 So.2d 989 (Fla. 1st DCA 1988). Therefore, even under the Fund's analysis, the time of accrual is not the date of the malpractice, but the date when the damage occurs to the plaintiff. Put another way, until the plaintiff is damaged by the defendant's negligence, he or she has no cause of action.

In CITY OF MIAMI v. BROOKS, 70 So.2d 306 (Fla. 1954), the plaintiff received an overdose of x-ray therapy treatment in 1944. No injury manifested itself until 1949 at which time she brought suit. The trial court granted a directed verdict on the basis of statute of limitations. Relying on URIE v. THOMPSON, 337 U.S. 163 (1949), this Court reversed, stating (70 So.2d at 309):

> In the instant case, at the time of the x-ray treatment there was nothing to indicate any injury or to put the plaintiff on notice of such, or that there had been an invasion of her legal rights. It is the testimony of one of the expert witnesses that injury from treatment of this kind may develop anywhere within one to ten years after the treatment, so that the statute must be held to attach when the plaintiff was first put upon notice or had reason to believe that her right of action had accrued.

This Court again relied on URIE, supra, in SEABOARD AIR LINE RAILROAD COMPANY v. FORD, **92** So.2d **160, 164** (Fla. **1956)** (per curiam on rehearing), when it held that:

> [U]ntil an occupational disease has manifested itself, there has been no "injury" to start the running of the statute [of limitations]. But we have concluded that when the existence of a disease of the kind here involved (contact dermatitis) is manifested and its nature as an occupational disease is fairly discoverable, the statute begins to run even though the exact substance causing the disease has not been determined. This is so because when the disease manifests itself, the employee has been "injured" so as to start the running of the statute....

See also, UNIVERSAL ENGINEERING CORPORATION v. PEREZ, **451** So.2d **463** (Fla. **1984);** CELOTEX CORPORATION v. COPELAND, **471** So.2d **533** (Fla. **1985).** For this reason, the Fund's contention that the date of the tortious conduct is the operative date for determining the accrual of the action is unacceptable, because the injury may not be deemed to have occurred until much later.

This analysis is not inconsistent with McCORD v. SMITH, **43** So.2d **704, 709** (Fla. **1949),** wherein this Court stated that the retrospective provision of a legislative act is not invalid unless it creates a new obligation or duty with respect to

"transactions or considerations previously had or expiated." That language simply begs the issue of what "transactions or considerations" are relevant to the cause of action. Clearly, the "transactions" or "considerations" at issue must include the Plaintiff's injury and, when relevant, the date the Plaintiff discovered or should have discovered the malpractice incident.

In summary, the Plaintiff's cause of action accrued when she discovered she had been injured by Morales' malpractice. Since the jury determined that that occurred after July 1, 1980, the Plaintiff is entitled to an award of attorney's fees under Fla. Stat. §768.56(1980). Application of the statute in this matter does not violate any due process principles since the substantive rights of the parties did not vest until the accrual of the cause of action and, therefore, application of the statute does not retroactively interfere with those rights.

POINT II

THE FOURTH DISTRICT DID NOT ERR IN UPHOLDING THE TRIAL COURT'S DENIAL OF MORALES' MOTION TO LIMIT JUDGMENT PURSUANT TO FLA. STAT. S768.54.

The trial court properly denied Morales' Motion to Limit Judgment pursuant to Fla. Stat. §768.54 because it did not have jurisdiction to grant the relief requested. Additionally, based on the Fourth District's ruling, which has not been challenged by Petitioners, that Morales was not entitled to a set-off for the $100,000 pretrial settlement, Morales is not entitled to claim a limitation of liability for that payment pursuant to Fla. Stat.

S768.54 since that amount was not paid with respect to a judgment or settlement as to him. Therefore, the Fourth District should be affirmed as to this issue.

In his brief before this Court, Morales contends that the trial court had jurisdiction to rule on his Motion for Limitation of Liability pursuant to Fla.R.Civ.P. 1.540(b)(5). No authority is cited for that proposition. To the contrary, it appears clear that the trial court did not have jurisdiction to rule on that motion. The trial court had previously entered a Final Judgment granting the Motion for Attorney's Fees and Costs and an Order on Defendants' Motion to Limit Final Judgment, which motion had been made within the time constraints of Fla.R.Civ.P. 1.530(b). Morales filed a Notice of Appeal from those orders on August 19, 1986 (R260-61). Not until after his Notice of Appeal had been filed did Morales file his Motion for Limitation of Liability (R269-70). That motion did not specify its procedural basis. Morales now claims that it was filed pursuant to Fla.R.Civ.P. 1.540(b)(5).

It is settled law in Florida that a trial court does not have jurisdiction to rule on a motion for relief from judgment after a Notice of Appeal from the final judgment has been filed, EDWARD J. DeBARTOLO CORP. v. DRWIT SYSTEMS, INC., 368 So.2d 85 (Fla. 2d DCA 1979); LEO GOODWIN FOUNDATION, INC. v. RIGGS NATIONAL BANK OF WASHINGTON, D.C., 374 So.2d 1018 (Fla. 4th DCA 1979); GLATSTEIN v. CITY OF MIAMI, 391 So.2d 297 (Fla. 3d DCA 1980); FERRARA v. BELCHER INDUSTRIES, INC., 483 So.2d 477 (Fla. 3d DCA 1986); GEORGES v. INSURANCE TECHNICIANS, INC., 486 So.2d

700 (Fla. 4th DCA 1986). Since Morales never requested a relinquishment of jurisdiction from the Fourth District, it is clear that the trial court did not have authority to rule on any motions filed pursuant to Fla.R.Civ.P. 1.540(b) after Morales had filed his Notice of Appeal. His contention, first raised in this Motion for Rehearing before the Fourth District, that his motion was filed pursuant to Fla.R.Civ.P. 1.540 is inconsistent with the pleadings he filed in the Fourth District. There, he filed a Notice of Appeal after the Final Judgment on Attorney's Fees and the Order on his Motion to Limit Final Judgment and, subsequently, amended it to include the Order denying his Motion for Limitation of Liability. Rulings on motions filed pursuant to Fla.R.Civ.P. 1.540 are reviewable under the non-final rule, see Fla.R.App.P. 9.130(a)(5). Therefore, his attempt to amend his Notice of Appeal to include that ruling must have been predicated on the theory that the motion had tolled the time for the filing of the Notice of Appeal from the Final Judgment, which a motion filed pursuant to Fla.R.Civ.P. 1.540 does not do, see Fla.R.App.P. 9.020(g).

The Fourth District was correct in ruling that Morales' Motion for Limitation of Liability was untimely since it was filed after the Notice of Appeal. The Fourth District's reference to Fla.R.Civ.P. 1.530(b) must be considered in light of the fact that it was not until Morales filed his Motion for Rehearing that he ever argued that his Motion for Limitation of Liability was filed pursuant to Fla.R.Civ.P. 1.540. All of Morales' previous conduct in the case indicated that he

considered his motion to have been made pursuant to Fla.R.Civ.P. 1.530, even though his motion never designated the procedural basis.

Morales has never provided any basis for his failure to comply with the time frame provided in Fla.R.Civ.P. 1.530(b). As noted supra, pg.3, the $100,000 was intended to be paid prior to trial, but instead was paid approximately two weeks after the Judgment. While a motion filed pursuant to Rule 1.530 must be made within ten days of the return of the verdict or filing of the Judgment, the Rule specifically provides that a timely motion may be amended to state new grounds, Fla.R.Civ.P. 1.530(b). Morales had filed a Motion to Limit Judgment which was filed within the time frame of Fla.R.Civ.P. 1.530(b). No justification has been presented why he did not seek relief until after the Notice of Appeal, five months after the payment was made.[2] Therefore, on jurisdictional grounds alone, the Fourth District's ruling with respect to the Motion for Limitation of Liability was proper and should be affirmed.

An additional grounds for affirmance of the Fourth District is that the $100,000 pretrial settlement does not qualify as the required payment contemplated by ~~Fla~~. ~~Stat~~. §768.54(2)(b). The

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[2]/Perhaps the delay was due to the fact that Morales' request for a set-off pursuant to Fla. Stat. §768.31 would appear inconsistent since that statute addresses contribution among tortfeasors, whereas his Motion to Limit Liability pursuant to ~~Fla~~. ~~Stat~~. $768.54 applies when a health care provider has paid $100,000 towards his own judgment or settlement, see Argument, infra.

Fourth District reversed the trial court's ruling that Morales was entitled to a set-off for the pretrial settlement because it did not satisfy the requirements of Fla. Stat. §768.31(5). The Fourth District noted that the settlement enured to the benefit of Dr. Schultz, solely by preventing him from being disciplined for "repeated malpractice." As indicated in the letter agreement, the $100,000 was to be paid regardless of the outcome of this suit as to any Defendant, including Dr. Morales (R180). Since the Fourth District ruled that Morales was not entitled to a set-off of the Judgment for that settlement (and he has not challenged that ruling in this Court), that payment does not satisfy the requirements of ~~Fla~~. ~~Stat~~. §768.54(2)(b).

~~Fla~~. ~~Stat~~. §768.54(2)(b) provides:

> Whenever a claim covered under subsection (3) results in a settlement or judgment against a health care provider, the fund shall pay to the extent of its coverage if the health care provider has paid the fees and any assessments required pursuant to subsection (3) for the year in which the incident occurred for which the claim is filed, provides an adequate defense for the fund, and pays the initial amount of the claim up to the applicable amount set forth in paragraph (f) 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.

It is, of course, undisputed that the Plaintiff's claim in this case resulted in a Judgment against Morales. Subsection (2)(f) provides that: "Each health care provider shall be responsible for paying the amount of each settlement or judgment for each claim up to the fund entry level amount it selects." Since the

Fourth District has ruled that Morales is not entitled to a set-off for the pretrial settlement, Morales has not paid any amount of the Judgment against him as required by Fla. Stat. §768.54(2)(f).

~~Fla~~. ~~Stat~~. §768.54(e)(6)(f)(3) provides:

> A person who has recovered a final judgment against the fund or 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 which is in excess of the applicable amount set forth in paragraph (2)(f) or the amount of the health care provider's basic coverage, if greater, as set forth in paragraph (2)(b).

Thus, if Morales is entitled to utilize the pretrial settlement as his payment of a judgment pursuant to subsection (2)(b), that would circumvent the holding of the Fourth District that Morales was not entitled to a set-off for that amount. It should be noted that the amount paid in the pretrial settlement was agreed to be paid regardless of the outcome of the suit as to Morales. Therefore, it cannot be construed as constituting a settlement as to any claim against him nor, obviously, as satisfying any part of the Judgment as to him.

For the reasons stated above, the ruling of the Fourth District upholding the trial court's denial of Morales' Motion for Limitation of Liability should be affirmed.