

IN THE SUPREME COURT OF FLORIDA

Case No. 72,878

FLORIDA PATIENT'S COMPENSATION :
FUND: ENRIQUE MORALES, M.D.
and WHITE, KUMP AND MORALES,
M.D., P.A.,

Petitioners,

vs.

CLARA M. SCHERER, et al.,

Respondents.

_____ :

DISCRETIONARY REVIEW OF A DECISION OF
THE FOURTH DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONERS, ENRIQUE MORALES, M.D.,
AND WHITE, KUMP AND MORALES, M.D., P.A.

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TABLE OF CONTENTS

REPLYARGUMENT	1
I. THE COURT ERRED IN ENTERING JUDGMENT FOR ATTORNEY'S FEES UNDER SECTION 768.56 WHEN THE ALLEGED NEGLIGENT ACT OCCURRED PRIOR TO JULY 1, 1980	1
II. THE COURT ERRED IN FAILING TO LIMIT JUDGMENT AGAINST MORALES IN ACCORDANCE WITH SECTION 768.54, FLORIDA STATUTES	1
ARGUMENT ON CROSS-APPEAL	3
THE FOURTH DISTRICT CORRECTLY DENIEDTHEMOTION FOR ATTORNEY'S FEES ON APPEAL	3
CONCLUSION	4
CERTIFICATE OF SERVICE	4

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CLARA M. SCHERER, et al., :

Respondents. :

REPLY ARGUMENT

I.

THE COURT ERRED IN ENTERING JUDGMENT FOR ATTORNEY'S FEES UNDER SECTION 768.56 WHEN THE ALLEGED NEGLIGENT ACT OCCURRED PRIOR TO JULY 1, 1980.

Dr. Morales relies upon the argument contained within his main brief and the arguments advanced on behalf of the Florida Patients Compensation Fund with respect to this issue.

II.

THE COURT ERRED IN FAILING TO LIMIT JUDGMENT AGAINST MORALES IN ACCORDANCE WITH SECTION 768.54, FLORIDA STATUTES.

As is accurately reflected in the district court opinion at page four, "Scherer acknowledges ... that Morales paid his \$100,000 primary policy limits." Although the statutory prerequisites were met, the district court accepted Scherer's conten-

tion that the motion for statutory limitation of liability was untimely. The district court affirmed the trial court's denial of Dr. Morales' motion to limit liability under Section 768.54. Scherer's argument at pages 21-2 of her brief that Dr. Morales has not paid any amount of the judgment against him is untenable. The money has been paid. Scherer acknowledges that it has been paid. Regardless of what it is called, Scherer has recovered \$100,000 of the \$240,000 determined by the jury to be the full measure of her damages.

The issue raised and decided in the district court was whether Dr. Morales is entitled to statutory freedom from further liability to Scherer. The district court held the motion to limit liability was untimely. The district court's interpretation of Rule 1.530 and Florida Statute Section 768.54, Florida Statutes (1981) is the issue presented for review in this Court.

If, as Scherer argues, the trial court did not have jurisdiction to entertain the motion for limitation of liability under Rule 1.540(b), then the trial court erred in denying it on the merits and the district court erred in affirming it. Only if the motion was untimely under Rule 1.530(b) can the trial court and the district court be sustained. Dr. Morales relies upon his main brief to support his contention that the interpretation of the Rule was not correct.

ARGUMENT ON CROSS-APPEAL

THE FOURTH DISTRICT CORRECTLY DENIED THE MOTION FOR ATTORNEY'S FEES ON APPEAL.

The motion for attorney's fees was properly denied for all of the reasons argued under Point I.

The denial of attorney's fees on appeal was also correct because the trial court had already awarded the maximum fee of \$120,000, representing fifty percent of the total verdict of \$240,000. This is the maximum recovery allowed under World Service Life Insurance Company v. Bodiford, 14 FLW 66 (Fla. February 16, 1989); Miami Children's Hospital v. Tamayo, 529 So.2d 667 (Fla. 1988); and Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985). Scherer's suggestion that she is entitled to an additional fee for appellate services beyond the fifty percent contingency fee contracted for and recovered below, is unseemly if not per se contrary to Rule 4-1.5, Fees for Legal Services, Rules Regulating the Florida Bar.

CONCLUSION

The attorney's fee award should be reversed. The denial of Morales' motion to limit liability to \$100,000 in accordance with Section 768.54 should also be reversed.


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to all counsel on the attached service list this 14th day of March, 1989.

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Morales v. Scherer
17th Jud. Cir. Court Case No. 82-19511 CZ
4th DCA Case No. 86-1959
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