

0/a 5-3-89.

**FILED**

SID J. WHITE

MAR 17 1989

CLERK, SUPREME COURT

By: Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,878

FLORIDA PATIENT'S COMPENSATION FUND, et al.

Petitioners,

vs.

CLARA M. SCHERER,

Respondent.

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**REPLY BRIEF OF PETITIONER,  
FLORIDA PATIENT'S COMPENSATION FUND,  
ON THE MERITS**

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SUMMARY OF ARGUMENT

For the purpose of commencing the running of the applicable statute of limitations, the date upon which the plaintiff discovered or should have discovered the medical malpractice incident is the critical date. For the purpose of determining whether a party to a medical malpractice action is entitled to recover attorney's fees under Section 768.56, the date upon which the medical malpractice occurred controls.

ARGUMENT

Petitioner takes no issue whatsoever with the acknowledged principle of law set forth in the various cases cited by respondent that the statute of limitations in medical malpractice actions does not begin to run until the malpractice incident is discovered or should have been discovered with due diligence. This well-accepted principle simply does not apply to the question of whether a successful plaintiff injured by the medical malpractice of a physician is entitled to recover attorney's fees under the provisions of Section 768.56 of the Florida Statutes, now repealed.

Under the applicable principle of law set forth by this Court in Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985), where a plaintiff's right to enforce a cause of action for malpractice vested prior to the effective date of Section 768.56 (July 1, 1980) there is no right to recover fees.

Under Young v. Altenhaus, a party's right to enforce a cause of action for malpractice vests when the act of medical malpractice occurs.

It is the date when the act of malpractice occurs that determines the right to recover fees. It is the date when an injured party discovers or should have discovered an act of malpractice which determines when the period begins to run within which an injured party may bring an action to recover for the damages sustained. Respondent refuses to recognize this distinction. The District Court of Appeal refused to recognize this distinction. The distinction nevertheless exists and precludes the award of statutory fees in this case.

POINT ON CROSS-APPEAL

The District Court of Appeal correctly denied the motion for attorney's fees filed by counsel for appellee, respondent here. Respondent argues that the amount awarded by the trial court ". . .related solely to the services provided at the trial level. . ." and thus was not relevant to the fees arising from the appeal. (Brief of Respondent, page 23)

The order of the trial court awarding attorney's fees notes ". . .that the fee agreement entered into by the Plaintiff and her attorneys entitle her attorneys to a fee of 50% of the total amount recovered on behalf of the plaintiff." (R.258)

Whether the contract which existed between plaintiff and plaintiff's counsel provided for a 50% fee related solely to trial services cannot be established before this Court since, to the knowledge of petitioner's counsel, the contract is not part of the record on appeal. If, on the other hand, the contract does provide for an attorney's fee of 50% of the total amount recovered solely for services in connection with the trial and additional fee for services on appeal, it would violate the provisions of Section 768.595, Florida Statutes (1987), (renumbered Section 766.109, Florida Statutes (1988)) as well as Rule 4-1.5 (F)(4), Rules of Professional Conduct, which in effect denominate any contingent fee in a medical malpractice action which exceeds 45% as excessive. The order of the District Court of Appeal denying additional fees for services on appeal was correct.

#### CONCLUSION

For the reasons set forth herein and in the main brief of petitioner on the merits, that portion of the decision rendered below which affirms the award of attorney's fees to Scherer under Section 768.56 should be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail upon all counsel on the attached Service-List, this 14th day of March, 1989

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