IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,178

Florida Bar No: 184170

GERALD S. KAUFMAN, D.P.M., and GERALD S. KAUFMAN, D.P.M., P.A.,

Petitioners,

vs.

PATRICIA MACDONALD,

Respondent.

ON PETITION FOR DISCRETIONARY JURISDICTION
FROM THE FOURTH DISTRICT COURT OF APPEAL

AMENDED

REPLY BRIEF OF PETITIONERS ON THE MERITS GERALD S. KAUFMAN, D.P.M., and GERALD S. KAUFMAN, D.P.M., P.A.

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TABLE OF CITATIONS

REFERENCES

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REPLY ARGUMENT

TO ALLOW A FEE GREATER THAN THE CONTINGENCY AMOUNT, AND IN THIS CASE MORE THAN THE PLAINTIFF HERSELF RECEIVED, WOULD MAKE LAWYERS "BOUNTY HUNTERS".

If this Court were to rule that attorneys' fees could be awarded greater than the 40% contingency approved by the Supreme Court, and in this case more than the Plaintiff herself recovered, this would make lawyers in effect "bounty hunters", with license to roam searching for insubstantial wrongs, knowing that a pot of gold "bounty" lay at the end, for remedying an inconsequential wrong.

As long as the 40% contingency is applied there is some assurance that substantial wrongs, and not inconsequential ones will be remedied. However with no limit, and with the attorney allowed to recover more than the Plaintiff herself, this would be contrary to the public policy of the law to discourage litigation, and particularly unnecessary litigation.

The jury awarded the Plaintiff $58,980 and the court awarded her attorney fees of $60,000; which was more than the Plaintiff herself received. In other words, the attorney received more than double the amount provided for in the contingency fee arrangement between Mrs. MacDonald and her lawyer. While the Plaintiff concedes that Florida law forbids this, she argues to this Court that Florida law is simply wrong and should be reversed so her attorney can recover more than what the Plaintiff herself recovered. The Plaintiff admits that as recently as a month ago this Court determined that an attorney fee award in a medical malpractice case may <u>not</u> exceed the contingency fee

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percentage agreement. Perez-Borroto v. Brea, 14 F.L.W. 271 (Fla. June 8, 1989). Under settled Florida law the certified question must be answered in the affirmative; requiring the reversal of the trial court award of $60,000 in attorneys' fees; which is two and a half times greater than the agreed to 40% contingency amount of $23,592, on a jury verdict of $58,980.

Conspicuously absent from the Brief of Respondent is any law, Florida or otherwise, to support the totally bizarre and prejudicial jury instruction given below. Even at trial, both the lawyers for Plaintiff and Defendant, as well as the judge, all admitted that in their experience no such instruction had ever been given to a jury in Florida. Therefore, even if the attorneys' fee issue were not certified to this Court it is clear that this Court, would have jurisdiction to review the bizarre instruction, which contained six factual allegations from the Plaintiff's Complaint; as a case of first impression in Florida, being in direct and express conflict with numerous Florida decisions precluding such an instruction.

Almost a hundred years ago this Court stated that the trial judge has no right to charge a jury with respect to matters of fact and therefore the Respondents argument in and of itself is a basis for reversal; where his only justification for the giving of the bizarre jury instruction was that the judge was simply telling the jury what the case was about. Therefore the decision was in direct and express conflict with this Court's decisions in Hanover Fire Insurance Co. v. Lewis, 28 Fla. 209, 10 So. 297 (1891); Williams v. Dickinson, 28 Fla. 90, 9 So. 847 (1891);

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Escambia County Electric Light & Power Co. v. Sutherland, 61 Fla. 167, 55 So.83 (1911). Suffice it to say that this Court certainly has independent jurisdiction to review the jury instruction question, if it came to the Court separately from the certified question.

The Plaintiff has gone to great lengths to prevent this Court from reviewing the highly prejudicial jury instruction given; which simply underscores the fact that this Court should review the jury instruction issue, to prevent the use of this type of highly improper and prejudicial jury instruction in future trials in Florida.

Law Requires Reversal of the Attorney Fee Award; Which was More Than Double the Amount Provided for in the Contingency Fee Agreement in this Medical Malpractice Case

As previously mentioned the Plaintiff has conceded that settled Florida law required reversal of the excessive attorney fee award in this medical malpractice case. In an attempt to avoid the precedent of this Court, the Plaintiff suggests that the dicta in two United States Supreme Court cases requires reversal of this Court's holding in Perez-Borotto, supra, and Miami Children's Hospital v. Tamayo, 529 So.2d 667 (Fla. 1988). Blanchard v. Bergeron, 109 S.Ct. 939 (1989). The United States Supreme Court held that a 40% contingency fee agreement did not place a ceiling on attorneys' fees recoverable by a prevailing plaintiff, in a civil rights action, under the Civil Rights Attorneys' Fee Act. In that case the Supreme Court found that contingency fee contract did not impose an automatic ceiling on an award of attorneys' fees, as this would be inconsistent with

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the civil rights statute and its policy and purpose. The Court found in Blanchard, that 42 U.S.C. Section 1988 was intended to encourage meritorious claims, irrespective of their nature because of the benefits of civil rights litigation for the named plaintiff and for society at large. Blanchard, 945. More importantly, the Supreme Court held that attorneys' fees awarded under a Section 1983 action, should not be modeled upon the contingency fee arrangements used in personal injury litigation, which benefits only the individual plaintiff. Blanchard, 945. Therefore the actual holding in Blanchard is that a contingency fee arrangement in a civil rights action does not necessarily cap the amount of money to be awarded the prevailing party, after the application of the federal lodestar procedure.

In Blanchard the Supreme Court expressly rejected the use of contingency fee arrangements found in personal injury litigation, such as the one currently under review between Mrs. MacDonald and her attorney, for civil rights cases:

> It should be noted that we have not accepted the contention that fee awards in Section 1983 damages cases should be modeled upon the contingent fee arrangements used in personal injury litigation. "[W]e reject the notion that a civil rights action for damages constitutes nothing more than a private tort suit benefiting only the individual plaintiffs whose rights were violated. Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." Riverside v. Rivera, 477 U.S. 561, 574, 106 S.Ct., 2686, 2694, 91 L.Ed.2d 466 (1986).
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> Blanchard. 945.

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Therefore the holding by the United States Supreme Court does not require that this Court answer the certified question in the negative allowing the type of excessive awards made below. The Plaintiff attempts to get around the Supreme Court's holding in Blanchard, by arguing that her "modest" medical malpractice suit involves important public interest issues and therefore the logic used by the Supreme Court in Blanchard should be applied to Florida Statute Section 768.56; to allow an attorney fee award which is two and a half times greater than what was agreed to between Mrs. MacDonald and her attorney.

However MacDonald's argument that her individual, "modest", medical malpractice claim serves the public interest falls flat, in light of the very cases cited by MacDonald from the Supreme Court. First, Blanchard itself rejects the idea that a civil rights action should be equated with an individual personal injury suit. Blanchard, 945.

Second, in Hensley v. Eckhart, 103 S.Ct. 1933 (1983), the Supreme Court in another civil rights case relied on in Blanchard and cited by the Plaintiff, discusses the true nature of civil rights litigation and shows that it is far different from an individual tort case. The Supreme Court stated that civil rights plaintiffs with meritorious claims "appear before the court cloaked in a mantle of public interest". Hensley, 1944. The Supreme Court noted in Hensley that Congress granted civil rights plaintiffs a statutory right to attorneys' fees, in addition to any rights they have under fee rules of general applicability. Hensley, 1944.

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By enacting Section 1988, Congress rejected the traditional assumption that private choices whether to litigate, compromise, or forego a potential claim will yield a social desirable level of enforcement, as far as the enumerated civil rights statutes are concerned. Hensley, 1945. In other words in private litigation there is little incentive to go forward with extended and protracted litigation, as opposed to just settling or compromising a claim, where the only result is a recovery by the individual plaintiff. By enacting the Civil Rights Attorneys' Fee Act of 1976, 42 U.S.C. Section 1988, Congress provided a method for private citizens with little or no money to vindicate important Congressional policies contained in the civil rights law. Hensley, 1945. The fee award provides the incentive to stick to full litigation of civil rights claims; as opposed to settling it, which would not benefit the public at large.

Unlike civil rights actions, in private law claims the public interest lies primarily in providing a neutral, easily available forum for resolving the dispute between the plaintiff and the defendant. Henslev, 1945.

> A plaintiff's choice to compromise a claim or to forego it all together, based on his private calculation that what he stands to gain does not justify the cost of pursuing his claim, is of little public concern.
>
> Henslev, 1945.

The Supreme Court has expressly stated in Hensley that there is little public interest in the private plaintiff's tort claim, as to the individual's choice as to whether proceed with litigation or settle out of court. However, by enacting Section

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1988 Congress determined that the public as a whole had an interest in the vindication of the rights conferred by the civil rights statute, over and above the value of the civil rights claim to a particular plaintiff. In other words, Congress decided that if attorneys' fees awards were available, beyond any other common law availability in civil rights actions, the plaintiffs would be more inclined to enforce civil rights laws through the judicial process, than would result if the plaintiffs were left to finance their own cases and perhaps just settle or dismiss their claims. Hensley, 1945.

There is little or no public interest advanced by Mrs. MacDonald's medical malpractice claim against Dr. Kaufman, if at any point in the litigation Mrs. MacDonald settled the lawsuit. There is no doubt that the attorney fee award contained in Section 768.56 was not to enhance vigorous, protracted litigation in the courts to vindicate important constitutional rights; but the purpose was to provide incentive to settle malpractice claims. The express provisions of the medical malpractice act clearly point out that the legislative purpose of the attorneys' fee statute was to encourage settlement and to punish those who did not settle, as well as screen out frivolous medical malpractice suits. In other words, the express purpose of Florida Statute Section 768.56 is the exact opposite of the purpose of 42 U.S.C. Section 1988; which is to encourage plaintiffs to litigate in order to effectuate a vindication of civil rights law; as opposed to merely settling or dropping the suit.

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In Blanchard the court stated that if a contingency fee arrangement was used as a strict limitation on the award of attorneys' fees in civil rights actions, an undesirable emphasis might be placed on the importance of recovery of damages in civil rights litigation. Blanchard, 945. The Supreme Court goes on to say that the intention of Congress was to encourage a successful civil rights litigation, not to create a special incentive to prove damages and short change efforts to seek effective, injunctive or delcaratory relief. Blanchard, 945. In other words Congress had elected to encourage meritorious civil right claims because of the benefits to such named plaintiff and for society at large, irrespective of whether the action seeks monetary damages. Blanchard, 945. This is the exact opposite situation from the private tort claim, where damages are the premier goal.

In contrast with the purpose of encouraging litigation to enforce civil rights, the purpose of Florida Statute 768.56 is an award of fees against the party which would not settle, an otherwise meritorious, medical malpractice claim.

Florida Statute Section 768.56 (Repealed) expressly provided that the prevailing party in a malpractice action be awarded reasonable attorneys' fees.

The statute also stated that if an offer of judgement had been made, the party would not have to pay fees if the final judgment was not more favorable than the offer:

> A party who makes an offer to allow judgment to be taken again him shall not be taxed for the prevailing party's attorneys' fees which

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> accrue subsequent to such offer of judgment if the final judgment is not more favorable to the prevailing party that the offer.
>
> Fla.Stat. Section 768.56 (Repealed).

These sections clearly show the legislative intent in passing this section, which was to screen out frivolous malpractice suits and to encourage settlement of these cases.

The preamble to this law tracks the background of the statute. It noted that the Florida Supreme Court found the Medical Mediation Act was unconstitutional (See, Aldana v. Holub, 381 So.2d 231 (Fla. 1980)); and that it was necessary therefore to provide another mechanism for preventing non-meritorious claims, to stop further increase in the malpractice crisis. It was also desirable to enhance the prompt settlement of valid malpractice claims. The preamble read:

> WHEREAS, an alternative to the mediation panels is needed which will similarly screen out claims lacking in merit and which will enhance the prompt settlement of meritorious claims, and ...
>
> WHEREAS, individuals required to pay attorneys' fees to the prevailing party will seriously evaluate the merits of a potential medical malpractice claim, NOW, THEREFORE, ...
>
> Preamble-Laws 1980 Ch. 80-67.

This Court in Rowe found this language indicative of the legislative intent to discourage non-meritorious malpractice claims:

> The preamble to section 768.56 indicated that the mandatory assessment of attorney fees in favor of a prevailing party in a medical malpractice action is intended to discourage non-meritorious medical

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malpractice claims. See ch. **80-67**, Laws of Fla.; cf. Bill Analysis, House Committee on Insurance, CS/HB **1133 (5-19-80).**

Florida Patient's Compensation Fund v. Rowe, **472** So.2d **1145, 1147** (Fla. 1985).

In spite of the Plaintiff's lawyer argument to the contrary, the purpose and legislative intent of Fla. Statute Section **768.56** is clearly expressed in the Preamble to the statute, in the statutory language itself and through judicial interpretation by this Court. Unlike the federal civil rights attorneys' fees statute, Section **768.56** was not to encourage extensive litigation to vindicate important public constitutional rights; but rather was to encourage settlement of medical malpractice suits and to prevent the filing of frivolous medical malpractice claims. Therefore there is no public policy reason to apply the Supreme Court's decision in Blanchard involving the civil rights to Florida's Malpractice Attorneys' Fee Statute, Section **768.56.**

Of course Blanchard is not controlling at any rate, since it expressly holds that under the civil rights act the case should not be interpreted as adopting the contingency fee arrangements in medical malpractice suits. There is absolutely nothing in the Blanchard decision that states that the U.S. Supreme Court has found that a contingency fee contract limitation is contrary to the lodestar process and that the States are not free to cap statutorily granted fee awards to the percentage amount contained in the contingency fee agreement.

It is hard to imagine how the Plaintiff can argue that the fee award in the present case is not a windfall; where the

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attorney agreed that her expectations of a reasonable fee would be 40% of the Plaintiff's recovery. In this case 40% of the Plaintiff's recovery was $23,092. The trial court awarded $60,000 in attorneys' fees, which is almost triple what the parties agreed to as reasonable; so that the attorney recovered even more than the Plaintiff herself received. It defies logic and common sense for the Plaintiff to claim that an attorney fees award, which is two and a half times greater than the fee agreed to between the Plaintiff and the attorney, can in any way be in the public interest. See generally, Auerbach v. McKinney, 14 F.L.W. 1516 (Fla. 3d DCA June 20, 1989).

Nor can it be said that the excessive fee award in the present case is permissible or serves the public interest, where Rule 4-1.5 of the Rules Regulating the Florida Bar specifically states that a fee award greater than 40% of any recovery up to $1 million dollars through to the trial of the case is "clearly excessive"!

Under the stated legislative intent and the purpose behind Florida Statute, Section 768.56 and this Court's decisions in Rowe, Tamayo and Perez-Borroto, it is respectfully submitted that the certified question must be answered in the affirmative; that the Rowe decision precludes an attorney fee award in a medical malpractice action above the percentage amount set out in the contingency fee agreement between *the* claimant and her counsel. The excessive fee must be reversed and this Court's decision in Rowe; Tamayo and Perez-Borroto affirmed.

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Non-Standard Jury Instruction Reversible Error

The Plaintiff's lawyer argument, unsubstantiated by any caselaw whatsoever, in no way supports the bizarre jury instruction in this case. The Plaintiff argues only that the judge was simply telling the jury what the case was all about. It is respectfully submitted that closing argument is the time to tell the jury what the case is about and this is done by the parties' attorneys, not the judge. Moreover there is a wealth of Florida law that prohibits the judge from commenting on the evidence and facts and restricts jury instructions to the law, applicable to the facts. Closing argument is the correct and proper time to tell the jury what the case is all about and this is clearly not the job of the trial judge.

For the trial court to insert factual allegations verbatim from the Plaintiff's Complaint, directly into a jury instruction was clear reversible error, under numerous cases cited by the Petitioners in their Brief on the Merits. Understandably none of the caselaw is addressed by the Plaintiff, who has absolutely no legal authority whatsoever to provide to this Court, in order to uphold the jury instruction below. Florida law is clearly contrary to the giving of the jury instruction below and it is important for this Court to address the issue in this appeal.

Plaintiff's counsel apparently decided in this case to test out some new and novel approaches to a personal injury trial. First, she had the contingency agreement drawn up so that it allegedly would allow the trial court awarded attorneys' fees greater than the percentage fee the Plaintiff agreed to.

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Plaintiff's counsel then insisted on a bizarre jury instruction, containing factual allegations quoted verbatim from the Plaintiff's Complaint, under the theory that no other lawyer in Florida had tried it and therefore it was time that somebody did. There is little doubt that should this Court decide not to address the jury instruction question, that this highly prejudicial and inflammatory jury instruction will be reappearing with rapid frequency in personal injury trials in South Florida and throughout the State. It is respectfully submitted that this Court has jurisdiction to address the jury instruction issue and the Fourth District's finding of no error regarding this jury instruction is in direct and express conflict with numerous Florida cases, many out of this Court.

The Defendants argue below that the non-standard jury instruction was prejudicial reversible error, that it was argumentative and improper comment on the evidence and that it was given without the required specific fact finding by the trial court, as to why the standard jury instruction on negligence could not be given. The jury below returned a verdict for almost $100,000 for the Plaintiff's complaint that her feet hurt; after the undisputed expert testimony was that Dr. Kaufman's surgical procedures did not deviate from the standard of care in the community. Dr. Kaufman performed successful surgery on the Plaintiff's feet. The Plaintiff choose to have the surgery repeated and the outcome of the subsequent surgery was the exact same result obtained by Dr. Kaufman. Therefore it was clearly harmful prejudicial error for the trial court to refuse to give

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the standard jury instruction, but instead gave an instruction that was unnecessarily repetitive, argumentative and was an improper comment on the evidence by the trial court.

The Plaintiff does not justify the instruction nor attempts to legally challenge the fact that the instruction was highly prejudicial and inflammatory. The instruction contained statements, such as the Defendant could be found negligent for "having carelessly performed foot/toe surgery on the Plaintiff's feet so as to cause Plaintiff intense suffering and disability". The jury instruction assumed five factual allegations as proven and the jury was instructed as a matter of law, regarding those facts, which were supposed to be solved by the jury during deliberations. There is no question that the refusal to give the standard charge on negligence and the giving of the modified charge was harmful error requiring reversal of the verdict and the granting of a new trial.

The Plaintiff has not addressed a single case cited by the Petitioners regarding the jury instruction; as all of the cases cited by the Petitioners hold that the giving of such a bizarre jury instruction containing factual allegations quoted verbatim from the Plaintiff's complaint is harmful reversible error. It is respectfully submitted that the jury instruction issue has been properly brought before this Court and that this Court has ample jurisdiction over the question. The jury instruction issue should be addressed on the merits, as an affirmance of the jury instruction will result in a wealth of confusion in Florida trial courts. In other words if this Court chooses not to address the

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jury instruction issue, the law in Florida will be that the jury instruction is proper. Throughout the State plaintiffs will be adding all type of factual allegations to the standard jury instructions. This is clearly in violation of Florida caselaw and contrary to the very purpose of having standard jury instructions. It is respectfully requested that this Court address the issue of the bizarre jury instruction in this case on the merits and hold that it was reversible error to include factual allegations in the jury instruction and for the trial court to refuse to give Florida standard jury instruction on negligence.

CONCLUSION

It is respectfully requested that the certified question be answered in the affirmative; and that the trial court award of $60,000 in attorneys' fees, which is two and a half times greater than the amount due under the Plaintiff's contingency fee agreement and more than the Plaintiff herself received, be held excessive as a matter of law and reversed.

The trial court committed prejudicial reversible error by refusing to use the standard jury instruction on negligence and in using a non-standard jury instruction; which was repetitive, argumentative and was an improper comment on the evidence. The Defendants are entitled to a new trial, with proper standard jury instructions.

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CERTIFICATE OF SERVICE

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