IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 74,407

FLORIDA PATIENT'S COMPENSATION FUND, et al.,

Petitioners,

vs.

DORIS WASSER, as Personal Representative of the Estate of JACOB WASSER, deceased,

Respondent.

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

ANSWER BRIEF OF RESPONDENT, DORIS WASSER

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TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 1

SUMMARYOFARGUMENT 2

ARGUMENT 2

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS 3

SUPPLEMENTALARGUMENT 8

I. THE TRIAL COURT CORRECTLY APPLIED SECTION 768.54 IN DETERMINING THE FUND'S LIABILITY IN EXCESS OF THE MAXIMUM LIMIT OF THE UNDERLYING COVERAGE. 8

II. THE TRIAL COURT CORRECTLY ENTERED JUDGMENT AGAINST ALL DEFENDANTS AND IN FAVOR OF THE PLAINTIFF AS THE PREVAILING PARTY WITH THE CLARIFICATION THAT THE FUND WAS ONLY RESPONSIBLE FOR THE EXCESS OVER PRIMARY POLICY LIMITS. 9

III. THE FLORIDA PATIENT'S COMPENSATION FUND IS RESPONSIBLE FOR THE PAYMENT OF THE UNPAID BALANCE OF THE ATTORNEY'S FEE AWARD. 10

IV. THE TRIAL COURT CORRECTLY AWARDED A REASONABLE FEE BASED UPON NUMBER OF HOURS, HOURLY RATE, AND CONTINGENCY MULTIPLIER. 11

V. THE TRIAL COURT CORRECTLY REFUSED TO USE THE FUND'S PROPOSED VERDICT FORM AS IT WAS INAPPLICABLE TO THE ISSUES TO BE DECIDED BY THE JURY. 14

CONCLUSION 17

CERTIFICATE OF SERVICE 18

TABLE OF AUTHORITIES

Cases

Ahmed v. Travelers Indemnity Co.,
516 So.2d 40 (Fla. 3d DCA 1987) 12

Altchiler v. State, Department of Professional Regulation,
Division of Professions, Board of Dentistry,
442 So.2d 349 (Fla. 1st DCA 1983) 13

Applegate v. Bamett Bank of Tallahassee,
377 So.2d 1150 (Fla. 1979) 12

Associated Television & Communications, Inc. v. Cowden,
417 So.2d 1027 (Fla. 5th DCA 1982) 14

Chisholm v. Chisholm,
538 So.2d 961 (Fla. 3d DCA 1989) 12

Daniels v. Weiss,
385 So.2d 661 (Fla. 3d DCA 1980) 17

Dominguez v. Wolfe,
524 So.2d 1101 (Fla. 3d DCA 1988) 12

Fine v. Camey Bank of Broward County,
508 So.2d 558 (Fla. 4th DCA 1987) 13

Florida Patient's Compensation Fund v. Black,
460 So.2d 381 (Fla. 2d DCA 1984) 10

Florida Patient's Compensation Fund v. Bouchoc,
514 So.2d 52 (Fla. 1987) 9, 10

Florida Patient's Compensation Fund v. Rowe,
472 So.2d 1145 (Fla. 1985) 13, 14

Florida Patient's Compensation Fund v. Sitomer,
524 So.2d 671 (Fla. 4th DCA 1988) 1

Frazier v. Effman,
501 So.2d 114 (Fla. 4th DCA 1987) 16

Hillsborough County Board of County Commissioners
v. Public Employees Relations Commission,
424 So.2d 132 (Fla. 1st DCA 1982) 13

International Patrol and Detective Agency Company, Inc.
v. Aetna Casualty & Surety Company,
419 So.2d 323 (Fla. 1982) 2

Malternpo v. Cuthbert,
504 F.2d 325 (5th Cir. 1974) 17

Meyers v. Garmire,
324 So.2d 134 (Fla. 3d DCA 1975) 14

Quanstrom v. Standard Guaranty Insurance Company,
519 So.2d 1135 (Fla. 5th DCA 1988) 11

Rosenberg v. Rosenberg,
511 So.2d 593 (Fla. 3d DCA 1987), rev. den.,
520 So.2d 586 (Fla. 1988) 13

Sanchez v. Wimpey,
409 So.2d 20 (Fla. 1982) 2

Sellars v. Cosby,
289 So.2d 443 (Fla. 2d DCA 1974) 14

Smith v. Sitomer,
14 FLW 546 (Fla. October 26, 1989) 2, 17

South Florida Apartment Association, Inc. v. Dansyear,
347 So.2d 710 (Fla. 3d DCA), cert. den.,
354 So.2d 985 (Fla. 1977) 12

Spiegel v. Williams,
545 So.2d 1360 (Fla. 1989) 2, 17

Stuart v. Hertz Corporation,
351 So.2d 703 (Fla. 1977) 17

Thornber v. City of Fort Walton Beach,
534 So.2d 754 (Fla. 1st DCA 1988) 13

Variety Children's Hospital v. Osle,
292 So.2d 382 (Fla. 3d DCA 1974) 17

Vigilant Insurance Company v. Keiser,
391 So.2d 706 (Fla. 1st DCA 1980) 15

Statutes

Section 768.54, Florida Statutes (1983) 8, 10

Others

Florida Rule of Civil Procedure 1.200 14

IN THE SUPREME COURT OF FLORIDA

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FLORIDA PATIENT'S COMPENSATION FUND, et al.,

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vs.

DORIS WASSER, as Personal Representative of the Estate of JACOB WASSER, deceased,

Respondent.

INTRODUCTION

This jurisdictional brief is filed on behalf of the respondent, Doris Wasser, as personal representative of the Estate of Jacob Wasser, deceased.

STATEMENT OF THE CASE AND FACTS

Doris Wasser recovered a judgment against Dr. Wilson and the Florida Patient's Compensation Fund for damages, costs, and attorney's fees in this medical malpractice wrongful death action. The only jurisdictionally significant issue decided by the District Court of Appeal was whether the Florida Patient's Compensation Fund or Dr. Wilson's primary carrier should be held responsible for attorneys' fees in excess of primary policy limits. As the policy here was identical to the policy construed in Florida Patient's Compensation Fund v. Sitomer, 524 So.2d 671 (Fla. 4th DCA 1988), the District Court

followed its earlier precedent and placed responsibility for attorneys' fees with the primary carrier.

SUMMARY OF ARGUMENT

Subsequent to the District Court decision, this court rendered its decisions in Spiegel v. Williams, 545 So.2d 1360 (Fla. 1989) and Smith v. Sitomer, 14 FLW 546 (Fla. October 26, 1989). These decisions are controlling.

ARGUMENT

The dispute between the Florida Patient's Compensation Fund and Dr. Wilson's primary carrier is just that. Doris Wasser is entitled to satisfaction of her judgment regardless of whether it is paid by the Florida Patient's Compensation Fund, Dr. Wilson's primary carrier, or both.

Resolution of this issue is of no practical concern to Doris Wasser. Yet it is the only issue of concern to this court. It is the only issue that need be resolved in order to maintain uniformity and harmony in the law.

The Florida Patient's Compensation Fund has presented this court with four other issues unrelated to the question which prompted this court's acceptance of jurisdiction. This court should decline to consider the merits of these other matters. There is no reason for this court to allow the Florida Patient's Compensation Fund a second appeal. E.g., Sanchez v. Wimpey, 409 So.2d 20, 21 (Fla. 1982); International Patrol and Detective Agency Company. Inc. v. Aetna Casualty & Surety Company, 419

So.2d **323,** 324 (Fla. **1982)** (Alderman, C.J., concurring). The Florida Patient's Compensation Fund has already received all the appellate review it is entitled under Article V, Sections **3** and 4, Florida Constitution.

Three of the four additional issues presented by the Florida Patient's Compensation Fund were affirmed by the District Court of Appeal without comment. The fourth received a brief summary disposition in recognition of the trial court's fact-finding authority. The District Court concluded, "The trial court found that the fee agreement called for an award of reasonable attorney's fees. We agree and affirm the trial court on this issue." There is simply no reason for this court entertaining another appeal of the issues already reviewed and affirmed by the District Court of Appeal.

A comparison of the Florida Patient's Compensation Fund's main brief in this court with its main brief in the District Court of Appeal reveals their near identity. In an abundance of caution, Doris Wasser will respond to the Florida Patient's Compensation Fund's reprinting of its District Court brief in similar fashion. What follows is the essence of Doris Wasser's answer brief filed in the District Court of Appeal.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

Wasser sued Dr. Wilson for the wrongful death of her husband, alleging medical negligence in Dr. Wilson's failure to diagnose Jacob Wasser's cancer. The Fund was joined as a party defendant as required by the Fund statute, Section 768.54, Florida Statutes (1983). The joint pre-trial stipulation of the parties disclosed the following Statement of Disputed Issues of Law and Fact:

1. Breach of the Accepted Standard of Care. The Plaintiff claims that the Defendants breached the accepted standard of care in their treatment of JACOB WASSER, deceased. The Defendants deny this claim.

2. Causation. Whether the Defendants' treatment of JACOB WASSER, deceased, caused his death in June of 1985.

3. Damages. What, if any, damages the Estate of JACOB WASSER is entitled to under the Florida Wrongful Death Statute.

4. Comparative negligence.

The joint pre-trial stipulation also advised the trial court, "With regard to jury instructions the parties believe the standard forms are appropriate." The joint pre-trial stipulation further provided, "With regard to Verdicts the parties believe the standard forms are appropriate." The joint pre-trial stipulation advised that there were three peremptory challenges per side and that there were no pending motions.

On the morning of trial, the Fund announced without warning that its participation in the trial was contingent upon the trial court's approval of a special verdict interrogatory requesting a jury determination of the last date of probable survivability (R. 5). Wasser objected to the special verdict interrogatory upon the grounds of surprise and the failure of the Fund to raise the issue at any time previously. Wasser relied upon the joint pre-trial stipulation itemizing the issues to be tried and the agreement to submit the case on standard jury instructions and verdict form. Wasser also objected to the special interrogatory as irrelevant and immaterial (R. 6-8). Dr. Wilson agreed that the Fund had never indicated at any time during the course of the

litigation that the Fund was going to try to deny Dr. Wilson coverage (R. 10-12). The trial court ruled that the issue had not been properly raised and he was not going to use the Fund's special verdict interrogatory (R. 30).

Dr. Wilson was the first witness and he testified that Jacob Wasser was his patient from 1978 until 1985 (R. 92). On March 20, 1978, Dr. Wilson ordered the first of several blood studies on Jacob Wasser (R. 114). It was an abnormal report (R. 116). In October 1978, Dr. Wilson did another blood study which was also abnormal (R. 126-7). In January 1981, Dr. Wilson obtained another abnormal blood study (R. 128). During a March 1981 hospitalization, Wasser had another abnormal blood study performed (R. 131). On May 27, 1982, Dr. Wilson ordered a blood study which was done on June 1, 1982 and was reported as abnormal (R. 143). Dr. Wilson never ordered another blood study on Wasser after May 27, 1982 (R. 144).

Wasser offered expert witness testimony that the failure to order additional testing or follow-up on the abnormal blood studies was negligent and that proper care would have disclosed the cancer that ultimately caused Jacob Wasser's death (R. 227-8, 324-5). Wasser also introduced testimony that Dr. Wilson was negligent in failing to order further blood studies on a periodic basis after May 27, 1982 (R. 228-9, 318). Wasser would have survived with timely diagnosis and treatment (R. 243-4, 334).

The Fund did not participate in the trial. Outside of the presence of the jury, the Fund did "proffer" additional testimony from certain of the witnesses. From Dr. Zaravinos the Fund elicited the following:

> Q. (By Mr. Woulfe) If I understood your testimony correctly, you stated on direct when Mr. Deutsch was questioning you, that if the cancer in the particular case had been diagnosed and treated in 1982 or in 1983, that Mr. Wasser would have had a better than 50 percent or better than fifty-fifty chance, as you stated, that he would not have died in June of 1985; is that a correct statement?
>
> **A.** That is a correct statement.
>
> Q. And do you also mean - I mean that was within a reasonable degree of medical probability?
>
> **A.** Correct.
>
> Q. Do you also mean, within a reasonable degree of medical probability, that had it been diagnosed or treated in 1984, or later, that he would not have had a greater than 50 percent or greater than 50 percent chance that he would not have died in June of 1985?
>
> **A.** That is probably correct.
>
> Q. Okay, that is all. [R. 2911.

From Dr. Henry, the Fund determined:

> Q. ... And if 1 understand your testimony correctly, you have stated that if the patient had been diagnosed and treated at any time during 1981 or 1982 or 1983 that he would not have died in June of 1985; is that right?
>
> **A.** Yes. [R. 3851.

In response to Fund questioning on when Wasser dropped below a 50/50 chance of survival, Dr. Henry testified:

> **A.** ... And where is that breakpoint? I don't think that I can come up with a breakpoint. I'm not sure why '83 is so magical.

> I think that my original deposition, I still agree two to four years prior to '85 would be the time when I think it probably would be seeable, that fingernail 1.5 centimeter thing, maybe back in '81 still resectable for cure up as far as '83, but that's -- We're dealing in pure speculation. [R. 3881.

Finally, the Fund elicited from Dr. Struhl:

> Q. (By Mr. Woulfe) It is your opinion is it not it is more probably than not if the cancer Mr. Wasser had had been treated by surgery any time in 1981, 1982 or 1983 that he would not have died in June of 1985?
>
> **A.** That is my opinion, yes.
>
> Q. It is also your opinion it is more probably than not if he had been treated in 1984 he still would have died in June, 1985?
>
> **A.** I think June, 1984 is too late, no. [R. 483].

The amended final judgment includes the trial court's findings on the number of hours reasonably expended by Wasser's counsel; a reasonable hourly fee; and a contingency risk multiplier (R. 1115-6). The amended final judgment also expressly provides:

> The Court finds that Plaintiffs Attorneys' Fee Contract was a contingent contract providing that "Notwithstanding the above, in the event we prevail at trial, attorneys' fees shall be awarded against the losing party and the fee will be a reasonable fee decided by the Court, which fee may exceed the above Contingency." [R. 1116].

In its order on the Fund's motion to alter or amend the amended judgment, the trial court held that the Fund was responsible for attorney's fees in excess of the

statutory limitation of liability. But the trial court also clarified the amended final judgment by providing, "the Defendant, FLORIDA PATIENT'S COMPENSATION FUND, shall be responsible to pay for that portion of the Amended Final Judgment which exceeds $100,000.00 or the maximum limit of underlying coverage of Defendant, MAX W. WILSON, M.D. which ever is greater." (e.s.) (R. 1138). There was never a determination of the "maximum limit of underlying coverage" because the trial court was never shown the policy (R. 1036).

On October 14, 1987, a certified copy of a partial satisfaction of judgment was filed (R. 1149). This partial satisfaction of judgment fully satisfied the compensatory damage award of $94,367.05; fully satisfied the $7,753.80 cost award; partially satisfied the attorney's fee award to the extent of $5,632.95; and included payment of $2,246.20 post-judgment interest. The total of $110,000 was paid by Dr. Wilson's primary carrier in recognition of its $100,000 primary policy limits plus supplemental benefits including taxable costs and post-judgment interest.

SUPPLEMENTAL ARGUMENT

I.

THE TRIAL COURT CORRECTLY APPLIED SECTION 768.54 IN DETERMINING THE FUND'S LIABILITY IN EXCESS OF THE MAXIMUM LIMIT OF THE UNDERLYING COVERAGE.

Section 768.54 Florida Statutes (1983) makes the Fund responsible for any judgment in excess of Dr. Wilson's primary limits of liability coverage. The trial court

appropriately clarified the amended judgment to reflect this limitation on the Fund's liability.

The trial court order was one hundred percent consistent with Florida Patient's Compensation Fund v. Bouchoc, 514 So.2d 52 (Fla. 1987). The trial court held the Fund responsible for attorney's fees in excess of underlying coverage. If the primary carrier covered fees, then the Fund is relieved of that responsibility. Here, the only issue was the extent of coverage for attorney's fees under the supplemental benefit provision contained in Dr. Wilson's primary policy. That issue is the dispute between the Fund and Dr. Wilson (on behalf of the carrier).

II.

THE TRIAL COURT CORRECTLY ENTERED JUDGMENT AGAINST ALL DEFENDANTS AND IN FAVOR OF THE PLAINTIFF AS THE PREVAILING PARTY WITH THE CLARIFICATION THAT THE FUND WAS ONLY RESPONSIBLE FOR THE EXCESS OVER PRIMARY POLICY LIMITS.

The trial court did not enter a separate judgment for attorney's fees against the Fund because Wasser "prevailed" against the Fund. Wasser "prevailed" against a Fund member for whom the Fund is responsible by statute. The trial court entered a judgment inclusive of compensatory damages, attorney's fees, and costs against all defendants with the proviso that the Fund was responsible only for that portion of the judgment in excess of primary policy limits. The Fund is on the judgment because

Wasser prevailed against a Fund member and because the Fund is responsible for satisfying the judgment to the extent required by Section 768.54.

Wasser was clearly the prevailing party. Florida Patient's Compensation Fund v. Black, 460 So.2d 381 (Fla. 2d DCA 1984).

> We do not believe it was the legislature's intent to penalize a plaintiff in these circumstances for adding the Fund to a suit like this. There is no contention that the inclusion of the Fund in the suit was improper. [460 So.2d at 381].

Here again, there was no error in the trial court because the trial court order contemplated Fund responsibility in excess of primary policy limits. The measure of underlying coverage is the issue between the Fund and Dr. Wilson.

III.

THE FLORIDA PATIENT'S COMPENSATION FUND IS RESPONSIBLE FOR THE PAYMENT OF THE UNPAID BALANCE OF THE ATTORNEYS FEE AWARD.

The hearing on the motion to limit and motion to alter or amend was conducted without benefit of the primary policy (R. 1036). The hearing was also conducted without benefit of Florida Patient's Compensation Fund v. Bouchoc, 514 So.2d 52 (Fla. 1987). It is to the trial court's credit that he held the Fund responsible for attorney's fees while limiting Fund responsibility to the excess over underlying coverage.

The trial court never ruled against the Fund on this issue because the Fund never argued that attorney's fees were a supplemental benefit under Dr. Wilson's primary

policy. Indeed, the Fund never offered the policy in support of its motion. It was Wasser's counsel that sought a copy of the policy and suggested that the trial court rule that the Fund was responsible only for amounts in excess of the maximum required by the Fund statute (R. 1065).

IV.

THE TRIAL COURT CORRECTLY AWARDED A REASONABLE FEE BASED UPON NUMBER OF HOURS, HOURLY RATE, AND CONTINGENCY MULTIPLIER.

The amended final judgment included the trial court's findings on the number of hours reasonably expended by Wasser's counsel; a reasonable hourly fee; and a contingency **risk** multiplier (R. 1115-6). No one appealed those findings. The amended final judgment also expressly provided:

> The Court finds that Plaintiff's Attorneys' Fee Contract was a contingent contract providing that "Notwithstanding the above, in the event we prevail at trial, attorneys' fees shall be awarded against the losing party and the fee will be a reasonable fee decided by the Court, which fee may exceed the above Contingency." [R. 1116].

The contract between Wasser and her counsel provided that, in the event Wasser prevails at trial, the fee will be a reasonable fee decided by the court, which fee may exceed the percentage contingency fee applicable if the case settled prior to trial and without court award. The trial court correctly ruled that a reasonable fee was recoverable from the defendants.

The Fund only provided the District Court with the first of the two hearings on attorney's fees. The first hearing included Wasser's expert testimony on a reasonable fee under Rowe (R. 998-1033). It contained no objection to the attorney expert's testimony that the contract calls for a reasonable fee to be assessed by the court (R. 1014). It contained no argument or objection to a fee based upon reasonable hours multiplied by an hourly rate and contingency multiplier.

The trial court's findings are amply supported by the record and the Fund failed to present the District Court with a complete record of the testimony and evidence upon which the trial court ruled. Absent a record demonstrating error, there is no basis for reversal of the trial court's determination and award of a reasonable attorney's fee.

In case after case, the appellate courts of Florida have held that a trial court's rulings, especially his findings of fact, are presumptively correct and will be affirmed on appeal in the absence of a record which clearly demonstrates **(1)** the occurrence of error and (2) preservation of the issue for appellate review. E.g. Dominguez v. Wolfe, 524 So.2d 1101 (Fla. 3d DCA 1988); Ahmed v. Travelers Indemnity Co., 516 So.2d 40 (Fla. 3d DCA 1987); South Florida Apartment Association. Inc. v. Dansyear, 347 So.2d 710 (Fla. 3d DCA), cert. den., 354 So.2d 985 (Fla. 1977); Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979); Chisholm v. Chisholm, 538 So.2d 961, 963 (Fla. 3d DCA 1989).

The fee agreement attached to the Florida Patient's Compensation Fund's jurisdictional brief is not part of the record on appeal. The Florida Patient's Compensa-

tion Fund cannot rely upon exhibits which are not part of the record on appeal. Nor can it be offered as a supplemental or a substitute for a proper record on appeal. Rosenberq v. Rosenberg, 511 So.2d 593 (Fla. 3d DCA 1987), rev. den., 520 So.2d 586 (Fla. 1988); Thornber v. City of Fort Walton Beach, 534 So.2d 754 (Fla. 1st DCA 1988); Fine v. Carney Bank of Broward County, 508 So.2d 558 (Fla. 4th DCA 1987); Altchiler v. State, Department of Professional Regulation, Division of Professions, Board of Dentistry, 442 So.2d 349 (Fla. 1st DCA 1983); Hillsborough County Board of County Commissioners v. Public Employees Relations Commission, 424 So.2d 132 (Fla. 1st DCA 1982).

The trial court awarded a reasonable attorney's fee where the contract called for a reasonable attorney's fee. The Fourth District affirmed. This is entirely consistent Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), in which this court held:

> Through its enactment of section 768.56, the legislature has given the courts of this state the responsibility to award 'reasonable' attorney fees in medical malpractice cases. [472 So.2d at 1149].

Here, the trial court determined factually that the plaintiff's contract called for an award of "reasonable attorney's fees." Thus, the trial court and the district court of appeal both complied with the additional Rowe directive:

> [I]n no case should the court-awarded fee exceed the fee agreement reached by the attorney and his client. [472 So.2d at 1151].

The fee agreement in this case called for an award of reasonable attorney's fees, contingent upon recovery from the defendants. There is no jurisdictional basis for this court to review the district court's affirmance of the trial court's factual findings. The trial court and the district both complied fully with Florida Patient's Compensation Fund v. Rowe. There is nothing in the district court decision to suggest otherwise.

V.

THE TRIAL COURT CORRECTLY REFUSED TO USE THE FUND'S PROPOSED VERDICT FORM AS IT WAS INAPPLICABLE TO THE ISSUES TO BE DECIDED BY THE JURY.

The trial court was abundantly correct in rejecting the Fund's eleventh hour effort to interject new issues and renege on the joint pre-trial stipulation. See, Rule 1.200; Associated Television & Communications. Inc. v. Cowden, 417 So.2d 1027 (Fla. 5th DCA 1982) (no error in refusal to allow amendment to pre-trial agreement one week prior to trial); Meyers v. Garmire, 324 So.2d 134 (Fla. 3d DCA 1975) (error to permit addition of new issues outside the scope of pre-trial order at time of trial); Sellars v. Cosby, 289 So.2d 443 (Fla. 2d DCA 1974) (issues limited to those contained in pre-trial order).

The trial court was also correct in rejecting the Fund's proposed verdict form since it did not accomplish what the Fund arguably sought. The Fund's proposed verdict asked generally whether there was negligence on the part of Dr. Wilson which

was a legal cause of Jacob Wasser's death. The Fund's proposed special verdict interrogatory, appearing after comparative negligence and damage interrogatories, was:

> 5. Within a reasonable degree of medical probability, what is the latest date at which if the condition of JACOB B. WASSER had been appropriately diagnosed and treated he would not have died on June **28, 1985?**

This inquiry is nonsensical. It does not relate to any issue in the case. It certainly does not relieve the Fund of liability for the negligence of its member Wilson occurring from **1978** through June **1983** if the jury found that his negligence was a legal cause of Wasser's death. Assuming the Fund was entitled to a special verdict interrogatory on whether Dr. Wilson was negligent prior to June **30, 1983** and, if so, whether such negligence was a legal cause of Jacob Wasser's death - the Fund never asked that this question be posed to the jury.

The Fund's argument suffers the same infirmities as the arguments rejected in Vigilant Insurance Company v. Keiser, **391** So.2d **706** (Fla. 1st DCA **1980).** Vigilant tried unsuccessfully to obtain a jury verdict which would limit its responsibility for the negligence of its insured to the damages caused during its policy period. The jury was never asked the right question, however. The issue there, as here, was liability for the consequences after the end of the policy period which first arose for negligent acts during the policy period. Vigilant was responsible for all of the damage caused by its insured.

There is a third reason why no error can be shown by the Fund. The proffered testimony actually proved the case against the Fund! The Fund established that the negligence which was the legal cause of Wasser's death occurred when Dr. Wilson was a member of the Fund. In the opinion of the three experts who were asked, Dr. Wilson's failure to diagnose and treat Wasser's cancer in 1984 and 1985 was not a substantial contributing cause of Wasser's death. It was Dr. Wilson's failure to diagnose and treat the cancer in 1978, 1979, 1980, 1981, 1982, and 1983 that was the legal cause of Wasser's death, because Wasser would have survived with early diagnosis and treatment.

There was no superceding intervening cause of Wasser's death which relieves Dr. Wilson or the Fund of responsibility for his death. The Fund's reliance on Frazier v. Effman, 501 So.2d 114 (Fla. 4th DCA 1987) is wholly misplaced. The case has no application because it involves a different type of negligence and a different type of damage. The running of a statute of limitation is not a continuous or incremental destructive process. Suit may be filed at any time prior to its expiration with no untoward effect. Effman was discharged as counsel long prior to the statute running against his former client.

Jacob Wasser had a progressive disease in dire need of treatment. As each day passed, the tumor grew and his chances of survival diminished. Dr. Wilson caused Wasser's death with each abnormal blood test that went unheeded. The Fund is not excused because Dr. Wilson's negligent failure to diagnose or treat Wasser continued

after Fund coverage ended. Dr. Wilson was not discharged and replaced by another physician before any harm befell Wasser.

It is apparently the Fund's contention that Dr. Wilson was negligent after June 30, 1983 in failing to correct his prior negligence while a Fund member, thus relieving the Fund of its responsibility. A negligent physician (Wilson I) cannot escape liability simply because a subsequent treating physician (Wilson II) had the opportunity to correct the initial negligent act but failed to do so. Daniels v. Weiss, 385 So.2d 661, 664 (Fla. 3d DCA 1980); Variety Children's Hospital v. Osle, 292 So.2d 382 (Fla. 3d DCA 1974); Maltempo v. Cuthbert, 504 F.2d 325 (5th Cir. 1974). A wrongdoer is liable for the ultimate result even though a subsequent treating physician's negligence increases the damage which would otherwise have flowed from the original wrong. Stuart v. Hertz Corporation, 351 So.2d 703 (Fla. 1977).

CONCLUSION

The District Court opinion should be corrected to comport with Spiegel v. Williams and Smith v. Sitomer. The trial court should be affirmed in all respects.

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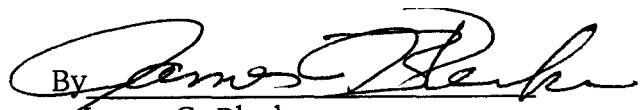
By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to: STEVEN K. DEUTSCH, ESQ., Deutsch & Blumberg, 2802 New World Tower, 100 North Biscayne Boulevard, Miami, Florida 33132; STEVEN BILLING, ESQ., Billing, Cochran & Heath, 888 Southeast Third Avenue, Suite 301, Fort Lauderdale, Florida 33316; MELANIE G. MAY, ESQ., Bunnell & Woulfe, 1080 Southeast Third Avenue, Fort Lauderdale, Florida 33316; and NANCY LITTLE HOFFMAN, ESQ., 2929 East Commercial Boulevard, Barnett Bank Tower, Suite 502, Fort Lauderdale, Florida 33308, this 20th day of November, 1989.

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