

IN THE SUPREME COURT OF FLORIDA

CASE NO: 74,407

4TH DCA CASE NO: 87-1820 and
87-2555

FLORIDA PATIENT'S COMPENSATION
FUND, et al.,

Petitioners,

v.

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

Respondents.

DISCRETIONARY PROCEEDING TO REVIEW A
DECISION OF THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

PETITIONER'S BRIEF ON JURISDICTION

Submitted by:

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STATEMENT OF THE CASE & FACTS

Respondent, Doris Wasser ["Wasser"], as Personal Representative of the Estate of Jacob Wasser, filed a wrongful death action against Max W. Wilson, M.D., Wilson, Meigs, Mastriole & Sutherland, M.D., P.A. ["Wilson"] and the Florida Patient's Compensation Fund ["the Fund"]. The jury returned a verdict in the amount of \$4,367.05 for the estate and \$90,000.00 for Wasser for a total judgment of \$94,367.05. The trial court awarded attorney's fees in the amount of \$101,700.00 and costs in the amount of \$7,753.80 against both Wilson and the Fund. The trial court clarified the final judgment and held that the Fund was responsible for that portion of the judgment exceeding \$100,000.00, Wilson's underlying insurance coverage.

The Fund and Wilson appealed the attorney's fee award to the Fourth District Court of Appeal. The Fund advanced several arguments. The Fund argued that the trial court erred by entering a judgment for attorney's fees against the Fund when the plaintiff was not a prevailing party against the Fund. Further, the Fund contended that the health care provider's underlying insurance policy provided coverage for attorney's fees.

The Fund also argued that the trial court erred in awarding an attorney's fee in excess of the contingency fee agreement between the client and her attorneys. The client, Wasser, had entered into a fee agreement with her attorneys which provided for a 40% contingency fee "[I]f an appeal is taken from the lower Court." The agreement also provided:

Notwithstanding the above in the event we prevail at trial attorney's 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.

(A.4).

The Fund argued that this Court's decision in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) mandated that the court awarded attorney's fee be limited to the contingency percentage agreement between Wasser and her attorneys.

The Fourth District Court of Appeal rendered its opinion on June 14, 1989. Relying on Florida Patient's Compensation Fund v. Sitomer, 524 So.2d 671 (Fla. 4th DCA 1988), the court held that Wilson's carrier and not the Fund was liable for Wasser's attorney's fees. The court affirmed, however, the trial court's award of reasonable attorney's fees, rather than a fee award limited to the contingency percentage in the fee agreement.

(A.1-3).

Petitioner, the Fund, now seeks this court's discretionary jurisdiction to review the June 14, 1989 decision.

SUMMARY OF THE ARGUMENT

This Court may review the June 14, 1989 decision of the Fourth District Court of Appeal, pursuant to Article V, section 3 (b)(3), of the Florida Constitution. The Fourth District's decision, awarding an attorney's fee in excess of the contingency fee agreement between the plaintiff and her attorneys, expressly and directly conflicts with this Court's decision in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985).

Additionally, The Fourth District's opinion relied on a decision that is pending before this Court. The pendency of that case constitutes prima facie express conflict.

ARGUMENT

1. THE FOURTH DISTRICT COURT OF APPEAL'S OPINION AWARDING ATTORNEY'S FEES IN EXCESS OF THE CONTINGENCY FEE AGREEMENT BETWEEN THE PLAINTIFF AND HER ATTORNEYS, DIRECTLY AND EXPRESSLY CONFLICTS WITH THIS COURT'S DECISION IN FLORIDA PATIENT'S COMPENSATION FUND V. ROWE.

Article V, sec. 3(b)(3), of the Florida Constitution bestows this Court with jurisdiction to review a decision of a District Court of Appeal that expressly and directly conflicts with a decision of The Supreme Court on the same question of law. The Fourth District Court of Appeal's decision - that an award of attorney's fees need not be limited to the contingency fee agreement between the plaintiff and her attorneys - expressly and directly conflicts with this Court's decision in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985).

In Rowe, this Court articulated guidelines for determining the amount of attorney's fees for the prevailing party in medical malpractice cases. 472 So.2d at 1150. After enunciating the lodestar and contingency risk factor methodology, this Court noted: "In no case should the court-awarded fee exceed the fee agreement reached by the attorney and his client." Id. at 1151.

The Fourth District Court of Appeal has held that the plaintiff and his or her counsel can contract for an attorney's fee based upon a contingent percentage of the recovery or a reasonable fee to be fixed by the court, whichever is greater. Florida Patient's Compensation Fund v. Moxley, 14 F.L.W. 1145 (Fla. 4th DCA May 19, 1989). The Fourth District Court of

Appeal's opinion in the present case adopts the same reasoning. Wasser's fee agreement with her counsel provided for a percentage of recovery or a court awarded fee, even if higher than the percentage. The trial court awarded and the Fourth District Court of Appeal affirmed an attorney's fee award in excess of the contingent percentage.

The Fourth District Court of Appeal's holding on this issue expressly and directly conflicts with this Court's mandate in Rowe - that the court-awarded fee be limited by the fee agreement between the attorney and client. Plaintiffs in medical malpractice cases may not circumvent the dictates of Rowe by including an escape clause in their fee agreements allowing for a court awarded fee in excess of the agreed contingency percentage. The language of Rowe forbids it. Indeed, the Fourth District Court of Appeal has acknowledged a potential conflict with Rowe and has certified to this Court the following question of great public importance:

Does the holding in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) preclude an attorney's fee in a medical malpractice action above the percentage amount set out in the contingency fee agreement between claimant and her counsel, where the agreement provides that the fee upon recovery shall be the higher of the percentage amount or an amount awarded by the court?

Florida Patient's Compensation Fund v. Moxley, 14 F.L.W. 1547 (Fla. 4th DCA June 28, 1989). See also, Kaufman v. MacDonald, 14 F.L.W. 1031 (Fla. 4th DCA April 26, 1989).

This question should be answered in the affirmative. The express, direct conflict between the Fourth District Court of Appeal's holding in Wasser and this Court's holding in Rowe gives this Court jurisdiction.

Moreover, the Fourth District Court of Appeal's failure to limit the attorney's fee award to the contingent percentage conflicts with this Court's recent decision in Perez-Borroto v. Brea, 14 F.L.W. 271 (Fla. June 8, 1989). In Brea, this Court held that the attorney's fees awarded to a medical malpractice defendant are limited by the fee agreement between the defendant and his counsel. While the Brea case involved a non-contingent fee agreement, the principles enunciated by this Court apply equally to the present case. This Court held "all the factors contained in Rowe apply whenever the lodestar approach applies." Id. at 272.

In the present case, the lodestar approach applied. However, the Fourth District Court of Appeal failed to apply all the factors in Rowe. The court did not heed Rowe's mandate which sets the prevailing party's agreed contingent percentage as a limit to the fee award. The Fourth District Court of Appeal's holding expressly and directly conflicts with this Court's decisions in Perez-Borroto and Rowe. This Court should exercise its jurisdiction to accept this case pursuant to Art. V, sec. 3(b)(3), Fla. Const.

2. THIS COURT MAY ACCEPT JURISDICTION TO REVIEW THE FOURTH DISTRICT COURT OF APPEAL'S OPINION SINCE IT RELIES ON A CASE WHICH IS PENDING BEFORE THIS COURT.

The Fourth District relied on its previous decision Florida Patient's Compensation Fund v. Sitomer, 524 So.2d 671 (Fla. 4th DCA 1988) in deciding Wasser. The Wasser court held "On the authority of Sitomer, we conclude that Wilson's carrier is liable for the legal fees of Wasser and therefore reverse the final judgment entered against the Fund." (A-3). The Sitomer case is now pending before this Court sub. nom. Smith v. Sitomer, Case No: 72,610. A District Court of Appeal opinion which cites as controlling authority a decision that is pending review by the Florida Supreme Court constitutes "prima facie express conflict". Jollie v. State, 405 So.2d 418 (Fla. 1981). The pendency of the Sitomer case thus confers conflict jurisdiction to this Court.

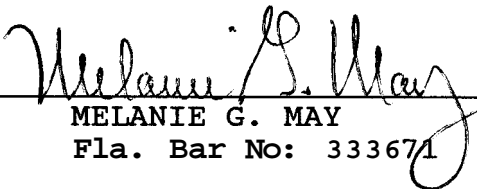
While the Fourth District Court of Appeal's opinion in Wasser is favorable to the Fund on the issue of whether the underlying carrier or the Fund must pay attorney's fees, this Court has recently decided Speigel v. Williams, 14 F.L.W. 330 (Fla. July 6, 1989). In Speigel, this Court examined the issue of who is responsible for the payment of attorney's fees. This Court again confirmed that the Fund was responsible for the fees unless the underlying insurance policy provided for the payment of such fees. This Court then examined whether the underlying policy provided for payment of attorney's fees. The Court determined that it did not.

This Court's opinion in Speigel may alter the outcome of this case. Accordingly, this Court should accept jurisdiction of the present case to resolve the issue of payment of attorney's fees.

CONCLUSION

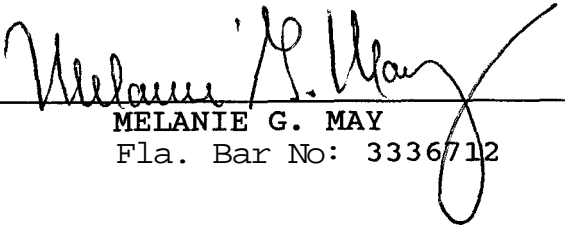
Wherefore, Petitioner requests this Court accept jurisdiction of this case.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States mail this 20th day of July, 1989 to: STEVEN BILLING, ESQUIRE, Billing, Cochran, Heath, Lyles & Mauro, P.A., 888 Southeast Third Avenue, Suite 301, Fort Lauderdale, Florida 33316; STEVEN K. DEUTSCH, ESQ., Deutsch & Blumberg, P.A., New World Tower, Suite 2802, 100 N. Biscayne Boulevard, Miami, Florida 33132; JAMES C. BLECKE, ESQ., James C. Blecke, P.A., Biscayne Building, Suite 705, 19 West Flagler Street, Miami, FL 33130; and NANCY LITTLE HOFFMANN, ESQ., Nancy Little Hoffman, P.A., 2929 E. Commercial Boulevard, Barnett Bank Tower, Suite 502, Fort Lauderdale, Florida 33308.

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