4D

IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,407

4th DCA CASE NOS: **87-1820** and **87-2555**

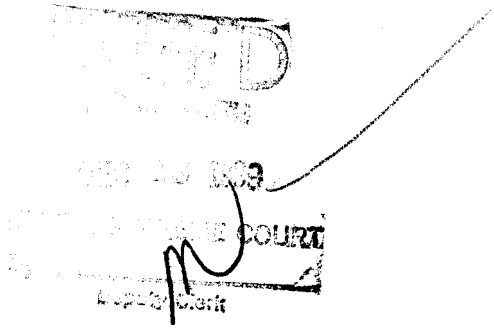
FLORIDA PATIENT'S COMPENSATION FUND and MAX W. WILSON, M.D., and WILSON, MEIGS, MASTROLE and SUTHERLAND, M.D., P.A.,

Petitioners,

v.

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

Respondent,



PETITIONER (FPCF'S) REPLY BRIEF ON THE MERITS

Submitted by:

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SUMMARY OF THE *ARGUMENT*

Because the plaintiff did not prevail against the Fund in the underlying action, it is not entitled to collect attorneys fees from the Fund. In addition, the trial court erred when it awarded an attorneys fee in excess of the percentage schedule provided in the plaintiff's fee agreement. If this Court affirms the award of attorney's fees against the Fund, then the award should be reduced by the percentage limitation set forth in the fee agreement.

The Fund was deprived of a fair opportunity to be heard and present its case. Because the .Fund did not have an opportunity to present its case, it should not be held liable for the attorney's fees award. If this Court affirms the award of attorney's fees against the Fund, then the case should be remanded for a new trial on the coverage issue.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT AWARDED THE PLAINTIFF ATTORNEY'S FEES AGAINST THE FUND WHEN THE PLAINTIFF WAS NOT A "PREVAILING PARTY" AGAINST THE FUND.

The Fund acknowledges this Court's recent decision in Florida Patients Compensation Fund v. Sitomer, 550 So.2d 461 (Fla. 1989). In Sitomer, this Court held that an identical supplementary payments provision in an identical policy did not extend to the payment of attorney's fees, thereby rendering the Fund liable for the award of fees.. However, Sitomer did not involve an underlying judgment below the coverage afforded by the underlying insurance carrier. As such, the facts of this case are distinguishable from Sitomer.

This case provides yet another "twist" on the responsibility for attorneys fees. The Fund should not be responsible for attorneys fees when the underlying judgment did not exceed the underlying coverage. Without a judgment against the Fund, the plaintiff was not a prevailing party, entitled to an assessment of fees against the Fund.

The plaintiff relies on the Second District Court of Appeal's decision in Florida Patient's Compensation Fund v. Black, 460 So.2d 381 (Fla. 2nd DCA 1984). However, since Black was decided, this Court has held that the Fund is a separate and distinct entity, which requires a plaintiff to

sue the Fund within the applicable statute of limitations. Florida Patients Compensation Fund v. Taddiken, **478** So.2d **1058** (Fla. **1985);** and Florida Patient's Compensation Fund v. Tillman, **487** So.2d 1032 (Fla. **1986).** As a separate entity, the plaintiff must prevail against the Fund before it is entitled to attorney's fees.

In Black, the Second District held that the Fund should not be entitled to seek attorneys fees against a plaintiff when the verdict failed to exhaust the limits of underlying coverage. However, the Court did not address the issue presented here. In this case, the Fund seeks to protect itself from having fees assessed against it when the plaintiff failed to obtain a judgment against the Fund. Thus, Black does not mandate a ruling adverse to the Fund.

The plaintiff argues that it should not be penalized for adding the Fund when the judgment fails to exceed the underlying coverage. More importantly, the Fund should not be penalized for having to provide a defense in a case in which no judgment is entered against it. If the jury had rendered a defense verdict, then the Fund would be entitled to attorneys fees against the Plaintiff. The outcome should be no different if the verdict fails to exceed the amount of underlying coverage.

The plaintiff was not a prevailing party as to the Fund. Because the Plaintiff fails to satisfy the "prevailing party" requirement as it relates to the Florida Patient's

Compensation Fund, the Fund cannot be responsible for the attorneys fees awarded in this case.

11. THE TRIAL COURT ERRED WHEN IT FAILED TO LIMIT THE ATTORNEY'S FEES AWARD TO THE PERCENTAGE FEE AGREEMENT BETWEEN THE PLAINTIFF AND HER ATTORNEYS.

The Plaintiff suggests that this Court should not review this issue because the fee agreement was not made a part of the record. (See Wasser's brief at 12). The Fund respectfully disagrees. The transcript provided to the Fourth District Court of Appeal contained the testimony of Mr. Kirsch, the expert witness for the Plaintiff.

> Q. Did you have an opportunity in reviewing my file to review my contract of the file?
>
> A. I did.
>
> Q. And did my contract -- **and we intend to put it in evidence.** Prior to the trial of the case in terms of what a reasonable fee should be?
>
> A. Yes.

(R. at 1013)(emphasis added). The transcript included the introduction into evidence of the fee agreement between the plaintiff and her attorney. (R. at 1021).

The Fourth District expressed concern during oral argument that the fee agreement was not in the physical record transmitted to the Court. The Florida Patient's Compensation Fund filed a copy of the fee agreement for the Court's review. This was done by stipulation of all parties because of the importance of the language employed by the fee agreement.

The Plaintiff relies upon the trial court's statement 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. at **1115-16).** The Plaintiff argues that since the contract envisioned a statutory award of fees in excess of the contingency fee, the trial court correctly determined a reasonable fee unbridled by the scaled percentage. The plaintiff cannot undermine the clear dictates of this Court.

This Court has consistently held that "all the factors contained in Rowe apply whenever the lodestar approach applies...." Miami Children's Hospital v. Tamayo, 529 So.2d **667** (Fla. 1988). By applying "all the factors contained in Rowe," the plaintiff's attorney is limited to the percentage fee set forth in its fee agreement. An attorney should not be permitted to guarantee a percentage of the judgment for a fee and then opt for more if he can convince the Court to apply a contingency risk multiplier. While the fee agreement in this case attempts to circumvent the clear dictates of Rowe. It should not be permitted to do ***so.***

111. THE TRIAL COURT ERRED IN DENYING THE FUND'S RIGHT TO A FAIR OPPORTUNITY TO BE HEARD.

The plaintiff argues that the trial court correctly rejected the Fund's attempt to prove its coverage defense at trial. It is suggested that Rule 1.200 precluded the Fund from arguing its legal issue at the time of trial. The Fund respectfully disagrees.

The Joint Pre-Trial Stipulation addressed the issue in paragraph 111. 2. Causation: "whether the defendants' treatment of Jacob Wasser, deceased, caused his death in June, 1985." (R. 1-11) (emphasis added). Causation was the factual issue that the Fund requested the trial court to allow the jury to answer. Once answered, the trial court could then rule as a matter of law on the coverage issue. Neither Rule 1.200 nor the cases cited by the plaintiff precluded this issue from being presented at trial.

The plaintiff next argues that the trial court correctly rejected the Fund's proposed special interrogatory. The Fund again disagrees. The Fund proposed the following question:

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

Had the jury been allowed to answer this question, the trial court could have then determined as a matter of law

there was no Fund coverage for the negligence, which resulted in Mr. Wasser's death. However, the trial court did not allow the jury to answer this question. The trial court's ruling requires a reversal.

The plaintiff suggests the inquiry was "nonsensical." (See Appellee's Brief at **15**). In support of its position, the plaintiff cites Vigilant Insurance Co. v. Keiser, **391** So.2d 706 (Fla. 1st DCA **1980**). While this decision discusses similar issues, it does not mandate an adverse result.

In Vigilant, the plaintiff alleged a doctor had been negligent in his treatment for approximately two years. During the early part of that time, the doctor had been employed by a clinic, insured by Vigilant Insurance Company. During the later course of treatment, the doctor had been employed by a municipal clinic, not insured by Vigilant.

The carrier argued for an apportionment of damages during the two time periods so that the court could determine which carrier was responsible for a percentage of the damages, which occurred during its period of coverage. The jury was asked to determine the percentage of damage suffered by the plaintiff during each period. The jury found that 20% of the damages had occurred during the time Vigilant insured the clinic. Eighty percent of the damages occurred when Vigilant did not provide insurance for the doctor. However, the trial court found that because the experts had unanimously testified that it was "medically impossible to

allocate any of the damages suffered by the plaintiff to any time period," the application of a percentage of damages to a time period was inappropriate.

In addition, the court found that because treatment by a subsequent physician could be attributed to the originally neglect physician, Vigilant provided coverage for all of the damages. The facts distinguish Vigilant from the present case.

The trial court suggested that if Vigilant had requested a special interrogatory to determine if the plaintiff had suffered injury as a result of the negligence during a certain period, that question might have been germane to the issue of coverage. Id. at 710. This is precisely the type of question requested by the Fund in this case. Unlike Visilant, there was no testimony in this case to suggest that it was impossible to determine when the actual damage occurred. The Fund asked for the same "type" of question approved by the court in Vigilant. For these reasons, Vigilant is not dispositive.

The Fund specifically asked the court to allow the jury to determine what time frame of negligence actually caused the death of Mr. Wasser. Had the jury answered this question, the trial court could have applied the law and rendered a decision regarding coverage. The Fund raised these issues in its Answer, but was prohibited from presenting its defense at trial. For this reason, the Fund

should be allowed a new trial should this court rule adversely on the issue of liability for attorney's fees.

The plaintiff next argues that the Fund's reliance on Frazier v. Effman, 501 So.2d 114 (Fla. 4th DCA 1987) is misplaced. In support of its position, the plaintiff cites Daniels v. Weiss, 385 So.2d 661 (Fla 3rd DCA 1980); Variety Children's Hospital v. Osle, 292 So.2d 382 (Fla. 3rd DCA 1974); and Maltempo v. Cuthbert, 504 F.2d 325 (5th Cir. 1974). Each of the cases stands for the proposition that a negligent physician cannot be exonerated from liability simply because a subsequent physician takes over the case. Significantly, each of these cases was decided prior to Frazier v. Effman.

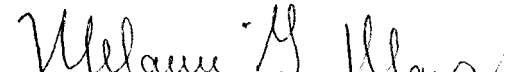
In Frazier, the Fourth District crystallized the issue of causation in a time frame. Until such time as the negligence cannot be remedied, the plaintiff remains undamaged, "causation has not occurred,'' and no cause of action has accrued. In this case, the Fund was able to elicit testimony to establish that had Mr. Wasser been diagnosed as late as December, 1983, he had a better than 50% chance of survival. Causation did not crystalize until then. The Fund did not cover Dr. Wilson at that time. There was, therefore, no coverage for this incident under the statutory coverage provided by the Florida Patient's Compensation Fund. If this court does not vacate the attorney's fees judgment against the Fund, the case should be remanded for a trial

limited to the "factual" causation issue and the "legal" issue of coverage.

CONCLUSION

For the foregoing reasons, the petitioner, the FLORIDA PATIENT'S COMPENSATION FUND, respectfully requests this Court to affirm the Fourth District Court of Appeal's decision on the issue of Dr. Wilson and his P.A.'s liability for the attorney's fees award. In the alternative, the case should be remanded for a reduction of the attorney's fees awarded in this case. In the event the Court does not vacate or remand the attorney's fees judgment against the FPCF, the petitioner respectfully requests this Court to remand the case for a new trial on the coverage of the issue.

Respectfully submitted,



Melanie G. May

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U. S. mail this 15th day of December, 1989, to STEVE K. DEUTSCH, Deutsch & Blumberg, P.A., New World Tower, Suite 2802, 100 North Biscayne Boulevard, Miami, Florida 33132; STEVE BILLING, ESQ., Billing, Cochran & Heath, P.A., Legal Center Building, 888 S.E. Third Avenue, Suite 301, Fort Lauderdale, Florida 33316; NANCY LITTLE HOFFMA", ESQ., 2929 East Commercial Blvd., Barnett Bank Tower, Suite 502, Fort Lauderdale, Florida 33308; and JAMES C. BLECKE, ESQ., Biscayne Building, Suite 705, 19 West Flagler Street, Miami, Florida 33130.

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