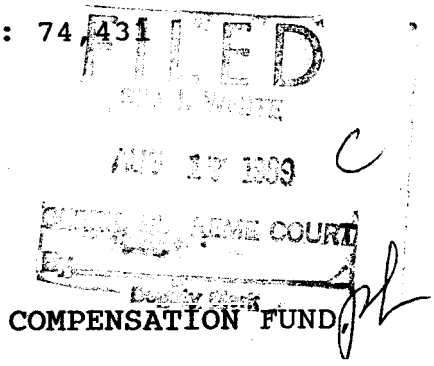
IN THE SUPREME COURT OF FLORIDA

CASE NO: 74,431



FLORIDA PATIENT'S COMPENSATION FUND,

Petitioner

v.

DARRYL MOXLEY, et al

Respondents

PETITIONER'S BRIEF ON THE MERITS

Submitted by:

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STATEMENT OF THE CASE & FACTS

Application of Fla. Stat. 5768.56 and this Court's decision in Florida Patients Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) bring this case before this Court. After a judgment for $155,674 was entered in their favor in a medical malpractice action, the plaintiffs filed a motion to tax attorney's fees and costs. (R. 22-33). The trial court awarded the plaintiffs one hundred and fifty thousand dollars ($150,000) in attorney's fees and then ordered the Florida Patients Compensation Fund [Fund] to pay the award. (R. 55-57; 58). From the attorney's fees judgment and subsequent order, the Fund appealed to the Fourth District Court of Appeal. (R. 59).

The Fourth District reversed the trial court's order which had held the Fund, and not the underlying health care provider, responsible for attorneys fees. However, the Fourth District failed to reduce the attorneys fees award to the percentage called for in the fee agreement. Instead, the Fourth District held that additional language in the fee agreement permitted the plaintiff's attorney to seek a "reasonable" fee from the court. Thus, the award was no greater than that called for in the fee agreement. From this aspect of the decision, the Fund appeals.[1]

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[1] Because the Fourth District Court of Appeal held that only the underlying health care provider was responsible for attorneys fees, the Fund is not presently responsible for the fee award. However, because the "who is responsible" issue is still pending before this Court, the Fund initially raises the quantum of the award. The underlying health care provider has also appealed to

The trial court held a hearing on the plaintiff's motion to tax attorney's fees, at which time the plaintiffs and defendants provided expert testimony regarding a reasonable hourly rate and the appropriate contingency risk multiplier. Both plaintiffs' and defendants' experts agreed that four hundred and fifty (450) hours were reasonably expended by the attorneys in litigating the case. The defense expert testified that the plaintiffs' attorneys were entitled to a reasonable hourly rate of two hundred dollars ($200) per hour. The defense expert further testified that the case was entitled to a contingency risk multiplier of two (2). Despite these figures, the defense expert opined that the fee should be limited to the percentage of recovery provided for in the contingency fee agreement between the plaintiffs and their attorneys. (R. 55-57).

The trial court held that four hundred and fifty (450) hours and an hourly rate of two hundred dollars ($200) were reasonable. Id. The trial court further found that a contingency risk multiplier of two (2) was appropriate. Based upon these findings, the court arrived at a figure of one hundred and eighty thousand dollars ($180,000). The trial court then reduced the award to one hundred and fifty thousand dollars ($150,000) since the plaintiff, Darryl Moxley, did not prevail on his individual claim for loss of consortium.

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this Court. It is anticipated that the Fourth District Court of Appeal's decision will be challenged on the "who is responsible" issue. For this reason, the Fund is compelled to proceed on the quantum issue.

Pursuant to a request to produce, the plaintiffs had provided a copy of the medical malpractice agreement for representation between themselves and their attorneys. (R. **34, 35).** The contract provided:

> 1. As compensation for such professional services, I (we) hereby agree to pay KRATHEN and SPERRY, P.A. an amount based upon the gross amount of money which KRATHEN and SPERRY, P.A., recover from me (us) on my (our) behalf (which term shall include the fair market value of any property which may be recovered, in accordance with the following schedule.)
>
> (a) **45%** whether by settlement, law suit, arbitration, or any other means up through and including the trial.
>
> (b) 50% in the event an appeal to an Appellate Court from the lower court or courts, whether interlocutory or final.
>
> 2. It is understood that in medical malpractice cases the current law of Florida may provide that the prevailing party be awarded attorney's fees. In the event that attorney's fees are awarded to you by the Court, it is understood that they will be applied to reduce the fees owed by you as determined by the above schedule. In the event the Court awards attorney's fees to you in excess of the amount as may be determined by the above schedule, then such excess, including all fees awarded shall be earned by and paid to KRATHEN and SPERRY, P.A.

The Fund argued that the fee award could not exceed the percentage outlined in the plaintiffs' fee agreement. The trial court specifically rejected the defendants' argument that Florida Patient's Compensation Fund V. Rowe, **472** So.2d **1145** (Fla. **1985)**

prohibited an award of attorney's fees in excess of the contingency fee agreement between the plaintiffs and their attorney. The Fourth District Court of Appeal agreed.

On a motion for rehearing and/or certification, the Fourth District certified the following question to be one 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?

(See Appendix at 7). The Fund has filed its notice to invoke the discretionary jurisdiction of this Court to review this question.[2]

[2]Subsequent to the Fourth District Court of Appeal's decision in this case, this Court decided Spiegel v. Williams, 14 F.L.W. 330 (Fla. July 7, 1989). As a result, the underlying health care provider filed a "motion for rehearing or motion to withdraw opinion or motion for extraordinary relief". On August 1, 1989, the Fourth District denied these motions. The underlying health care provider has appealed to this Court.

SUMMARY OF THE ARGUMENT

This Court has held that an attorney's fee award should not exceed the amount of attorney's fees designated in the agreement between the plaintiffs and their attorney. Florida Patients Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985). In fact, this Court has emphasized that all of the Rowe factors must be utilized in determining a reasonable fee. Miami Children's Hospital V. Tamayo, 529 So.2d 667 (Fla. 1988).

The fee agreement in this case provided for a 50% attorney's fee. The judgment was for $155,674. The fee award should have been no more than $77,837.

The Fund acknowledges the existence of additional language in the fee agreement that provides:

> In the event the Court awards attorney's fees to you in excess of the amount as may be determined by the above schedule, then such excess, including all fees awarded shall be earned by and paid to KRATHEN and SPERRY, P.A..

This language does not otherwise provide for an award of a "reasonable" fee. However, in any event, the plaintiff should not be permitted to enhance an award by use of a contingency risk multiplier, guarantee a percentage of the overall recovery, and then not be limited to the percentage called for in the fee agreement. The fee award must be reduced.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT FAILED TO LIMIT THE ATTORNEY'S FEES AWARD TO THE PERCENTAGE AGREEMENT BETWEEN THE PLAINTIFFS AND THEIR ATTORNEYS.

In August, **1985,** this Court rendered its decision in Florida Patient's Compensation Fund v. Rowe, 472 So.2d **1145** (Fla. **1985).** This Court articulated the method by which to compute a reasonable attorney's fee. This Court recognized the "impact of attorneys' fees on the credibility of the court system and the legal profession...."

> There is but little analogy between the elements that control the determination of a lawyer's fee and those which determine the compensation of skilled craftsmen in other fields. Lawyers are officers of the court. The court is an instrument of society for the administration of justice. Justice should be administered economically, efficiently, and expeditiously. The attorney's fee is, therefore, a very important factor in the administration of justice, and if it is not determined with proper relation to that fact it results in a species of social malpractice that undermines the confidence of the public in the bench and bar. It does more than that. It brings the court into dispute and destroys its power to perform adequately the function of its creation.

Id. at **1149-60** (citing Baruch v. Giblin, 122 Fla. **59, 63, 165 So. 831, 833 (1985).**

The trial court partially followed this Court's instructions in determining a reasonable attorney's fees. The court determined the number of hours expended and multiplied them by an hourly rate. The court then multiplied the "lodestar" by a

contingency risk multiplier. The court erred, however, when it failed to recognize the limitation or "cap" placed upon an attorney's fee by Rowe.

> [B]ecause the party paying the fee has not participated in the fee arrangement between the prevailing party and that party's attorney, the arrangement must not control the fee award. "Were the rule otherwise, courts wold find themselves as instruments of enforcement, as against third parties, of excessive fee contracts." **Further, in no case should the court-awarded fee exceed the fee agreement reached by the attorney and his client.**

Id. at **1151** (emphasis added).

This Court provided not only the method of determining a reasonable attorney's fee, but also provided a limitation on any fee award. In no event should an attorney's fee award exceed the amount specified in the contingency fee agreement between the attorney and his client. The trial court erred when it failed to adhere to this "cap."

The agreement in this case specifically provided for the plaintiffs' attorneys to receive **45%** of the gross amount recovered by settlement, lawsuit, arbitration, or any other means up through and including the trial. The plaintiffs were entitled to **50%** in the event of an appeal. Thus, the most the plaintiffs' attorneys should have been able to recover was **50%** of the gross amount recovered under the underlying judgment.

The trial resulted in a judgment for the plaintiffs in the amount of **$155,674.** The plaintiffs' attorneys should only have been able to recover 50% of that amount or **$77,837.** The

trial court erred when it entered an award of attorney's fees of nearly twice that amount -- $150,000.

At the hearing, the plaintiffs relied upon three decisions to support their position: Pavlik v. Acousti Engineering Co. of Fla., 448 So.2d 638 (Fla. 4th DCA 1984); Alston v. Sundeck Products, Inc., 498 So.2d 493 (Fla. 4th DCA 1986); and Tamayo v. Miami Childrens' Hospital, 511 So.2d 1091 (Fla. 3rd DCA 1987). These cases were also cited in the trial court's order. None of these cases mandated a ruling adverse to the Fund.

Pavlik was decided prior to this Court's decision in Rowe. Therefore its holding should not have been persuasive. In Alston, the Fourth District held that an attorney's fees award is not limited to the agreement between the attorney and his client. Significantly, the Fourth District did not address a contingent fee agreement in Alston and limited its decision to non-contingent fee cases. This Court has since called the Alston decision into doubt. Perez-Borroto v. Brea, 544 So.2d 1022 (Fla. 1989). Thus, the authority for the trial court's ruling no longer exists.3

If the plaintiffs wish to rely on the benefit bestowed by Rowe, the contingency risk multiplier, then they must also accept the corresponding limitation. When the trial court improperly

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[3]The dissent in the Johnson decision relied upon by the Fourth District Court of Appeal also provides questionable authority. It does not appear that the slip opinion was ever reported in the bound volumes of the Southern Reporter.

awarded an amount in excess of the percentage fee agreement and the Fourth District Court of Appeal affirmed, reversible error was committed. The final order on attorney's fees should be reversed and the trial court directed to reduce the attorney's fees award to **$77,837.**

In Tamayo, this Court had the occasion to revisit the meaning of Rowe. In the decision, this Court again articulated its concern that a fee award be limited to the agreement between the plaintiff and its attorney. This Court held that the contingency risk multiplier could not be used "without the requirement contained in Rowe than an attorney's fee not exceed the fee set by the contingency agreement. . . ."

The Fund is not unmindful of the additional language in this agreement. However, the language is neither sufficient to avoid the percentage limitation nor should an attorney be able to contract around the dictates of Rowe. The agreement in this case provided:

> In the event that attorney's fees are awarded to you by the Court, it is understood that they will be applied to reduce the fees owed by you as determined by the above schedule. In the event the Court awards attorney's fees to you in excess of the amount as may be determined by the above schedule, then such excess, including all fees awarded shall be earned by and paid to KRATHEN and SPERRY, P.A.

(R. **34, 35).** A close review of this language reveals that it does not avoid the Rowe limitation.

The first sentence provides that if a fee is awarded, it will reduce the percentage of the judgment to which the attorney

would be otherwise entitled. The second sentence provides that the attorney is entitled to any amount over the percentage that the court may award. The agreement does not, however, entitle the attorney to a "reasonable" fee in excess of the percentage.

The Fourth District came to a contrary conclusion by relying upon Judge Zehmer's partial dissent in State Farm Fire & Casualty Co. v. Johnson, ____ So.2d ____ (Fla. 1st DCA 1988). In Johnson, Judge Zehmer stated that an attorney should be permitted to opt for a reasonable fee in the fee agreement. Significantly, the plaintiffs' fee agreement in this case did not provide for an award of a "reasonable" attorney's fee. In addition, it appears that this slip opinion was never published in the bound volumes of the Southern Reporter.

Furthermore, an attorney should not be permitted to guarantee a percentage of the judgment for a fee and then opt for more if it can convince a court to apply a contingency risk multiplier. While the protection of a reasonable fee may be available to a defendant, the plaintiff's lawyer gets the best of both worlds. If the plaintiff's lawyer truly wants to gamble on the contingency, then his fee agreement should provide for payment of a "reasonable" fee. However, if the plaintiff's lawyer seeks to guarantee his fee by inserting a percentage in his agreement, then he must be bound by it.

If the court were to have awarded $25,000 as the "reasonable" fee, there can be no doubt that plaintiffs' counsel would still take up to 50% of the judgment as a fee as guaranteed

by the agreement. It is only now that the fee award almost equals the judgment that the plaintiffs' counsel seeks to abandon the guaranteed percentage. If the percentage is a hedge against an unreasonably low award, it should also be a hedge against an award that exceeds the percentage called for in the fee agreement.

CONCLUSION

For the foregoing reasons, the petitioner, The Florida Patients Compensation Fund, respectfully requests this Court to accept jurisdiction of this case, answer the certified question in the negative, and reduce the attorneys' fee award to $77,837.

Respectfully submitted,

Melanie G. May

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U.S. mail this 14th day of August, **1989**, to: MARTIN **J.** SPERRY, ESQ., **805** E. Broward Blvd., Suite **200**, Fort Lauderdale, FL **33301**; LINDA A. FENNER, ESQ., Norman S. Klein, P.A., **633** Northeast 167th Street, Suite 1111, North Miami Beach, FL **33162**; DAVID H. KRATHEN, ESQ., **524** South Andrews Avenue, Fort Lauderdale, FL **33301**; and GARY FARMER, ESQ., **888** South Andrews Avenue, Fort Lauderdale, FL **33316**.

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