IN THE SUPREME COURT OF FLORIDA

FLORIDA PATIENT'S COMPENSATION FUND,

PETITIONER,

V.

DARRYL MOXLEY, ETC., ET AL.,

RESPONDENTS.

CASE NO. 74,431

NEIL J. KARLIN, M.D., ET AL.,

PETITIONERS,

VS.

DARRYL MOXLEY, ETC., ET AL.,

RESPONDENTS.

CASE NO. 74,480

PETITIONER'S (FPCF'S) REPLY BRIEF
CASE NO. 74,431

Submitted by:

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SUMMARY OF THE ARGUMENT

In this case, this Court is asked to apply its statement that in no event shall a fee award exceed the agreement between the plaintiff and his attorney. Florida Patients Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985). A review of the relevant case law and the model fee agreements created by the legislature and this Court lead to but one conclusion: the percentage formula is a cap to a fee award in a plaintiff's case just as an hourly rate is a cap to a fee award in an hourly defense case. Perez-Borroto v. Brea, 544 So.2d 1022 Fla. 1989).

The fee agreement in this case provided a guaranteed percentage of the recovery. Pursuant to this Court's dictate in Rowe, the plaintiffs are limited to the percentage bargained for in the fee agreement. The certified question should be answered in the affirmative and the fee reduced to $77,837.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT FAILED TO LIMIT THE ATTORNEY'S FEE3 AWARD TO THE PERCENTAGE AGREEMENT BETWEEN THE PLAINTIFFS AND THEIR ATTORNEYS.

Despite the plaintiffs' suggestion, the Florida Patient's Compensation Fund [the Fund] is not requesting this Court to change its statement in Florida Patient's Compensation Fund v. Rowe, 472 So.2d **1145, 1151** (Fla. **1985).** Rather, the Fund is requesting this Court to enforce its statement that "in no case should the court-awarded fee exceed the meaning of the fee agreement reached by the attorney and his client." Id.

A pure application of the statement to the facts of this case reveals that the fee should not have exceeded the percentage formula called for in the contract between the plaintiffs and their attorneys. The agreement did not provide for an alternative award of a "reasonable" fee. Therefore, this Court need not alter the wording of its statement in Rowe in order to reduce the fee award in this case.

This Court did not use the wards "percentage formula" in its limitation statement in Rowe. It used the words "fee agreement". The fee agreement in this case, however, employed the use of a percentage formula. Thus, the agreement, by its own terms, restricts a fee award to the percentage formula employed. Because the plaintiffs' attorneys chose to guarantee themselves a percentage of the recovery, they are now bound to an award within the confines of their guaranteed percentage.

Attorneys should not be permitted to use an alternative approach. Once an attorney guarantees a percentage of his success, he is limited to that amount. More importantly, however, the agreement in this case did not provide for such an alternative approach.

The agreement in this case provided:

> In the event 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). An objective review of this language reveals that any court-awarded fee would be applied to reduce the guaranteed percentage. The first sentence clearly states, however, that "the fees owed" are determined by "the above schedule." There is no suggestion that the plaintiffs owed their attorneys a "reasonable" fee.

The second relevant sentence of the agreement merely states that the attorney's will be entitled to any amount awarded that exceeds the guaranteed percentage set forth in the schedule. These attorneys did not bargain for a "reasonable" fee. Rather, these attorneys guaranteed themselves a percentage of any judgment plus any amount that the court may award in excess of the guaranteed percentage. There is no doubt that these attorneys foresaw a potential windfall. As the attorney's fees judgment now stands, they will reap that windfall. There is also

no doubt, however, that their fee was designed to be determined by the "above schedule."

The plaintiffs suggest that the Fund did not question the alternative formulas in the subject fee agreement. (See Moxley's Brief at 3). While the Fund disputes that alternative formulas were provided in the subject fee agreement, it does not contest the actual percentage schedule. The Fund disagrees, however, that alternative formulas may be used to guarantee success and then provide for an alternative "windfall."

The Fund does not quarrel with the trial court's determination of a reasonable hourly rate and the number of hours expended. In fact, the defense expert agreed that a contingency risk multiplier of 2 was appropriate. However, this testimony was offset by the corresponding limitation advocated by the Fund that in no event shall the award exceed the percentage formula employed in the fee agreement.

Under the Rowe guidelines, a reasonable hourly rate is based upon the factors set forth in disciplinary rule 2-106, with the exception of the "time and labor required," the "novelty and difficulty of the question involved," the "results obtained," and "whether the fee is fixed or contingent." Id. at 1151. It is "the risk factor" that allows attorneys to receive a large percentage of the damages recovered. As this court noted, because the plaintiffs' attorney is not guaranteed a remuneration and will not be paid fees if the case is lost, the contingency risk multiplier may be applied. However, a form of guarantee is

provided by a percentage fee agreement. In this case, the plaintiffs' attorneys received the benefit of the contingency risk multiplier, but should now be limited by the percentage guarantee set forth in their fee agreement, which reflects the amount owed to them by their client.

The plaintiffs ask why a court-awarded fee should be controlled by the percentage formula instead of a reasonableness test. The reason is that a contingency risk multiplier is an enhancement provided because of the risk factor involved only to be balanced by a corresponding cap. The total formula provides for a reasonable fee, anything less than a total formula results in an unreasonable fee. The reasonable cap articulated by this Court is found in the subject fee agreenent itself.

The plaintiffs next suggest that Rule 4-1.5 does not place a limit on fees. The plaintiffs argue that the Rule merely requires court approval before a tee exceeds the percentages contained in the rule. While the Rule appears to allow for court approval of a fee in excess of the percentages set forth, it also presumes a fee in excess of the percentages called for is excessive.

The Fund agrees that section 768.56 does not limit a fee to a percentage formula. The Fund has never suggested otherwise. This Court has articulated the appropriate standard for determining a reasonable attorney's fee. The standard includes the discretionary use of a multiplier, offset by a cap based upon the agreement between the attorney and his client. Had the

complete formula been applied in this case, the fee would have been reasonable. Because the trial court failed to apply the cap, the fee in this case is unreasonably high.

The plaintiffs next request this Court to reconsider its statement in Rowe in light of the United States Supreme Court's decision in Blanchard v. Bergeron, 109 S.Ct. 939 (1989). In Blanchard, the United States Supreme Court held that attorney's fees awarded pursuant to section 1988 are not limited to a percentage fee provided in an agreement between a plaintiff and his attorney. Blanchard is not dispositive, however, because of the vast difference between civil rights cases and the present medical malpractice action.

Section 1988 specifically provides that the court "may allow . . . reasonable attorney's fees . . . ." See 109 S. Ct. at 943 (emphasis added). Thus, a court is not required to award an attorney's fee in a civil rights case. On the other hand, a court is required to award an attorney's fee to a prevailing party in a medical malpractice action, pursuant to Fla. Stat. §768.56.

Perhaps more importantly, section 1988 was enacted to insure civil rights victims access to the courts. "The intention of Congress was to encourage successful civil rights litigation, not to create a special incentive to prove damages and short-change efforts to seek effective injunctive or declaratory relief." 109 S. Ct. at 945. Civil rights claims involve the potential for injunctive and declaratory relief unlike a medical

malpractice action, which simply seeks monetary damages. The U.S. Supreme Court specifically held that a contingent fee model is inappropriate in determining fees under section 1988. That just isn't so in the context of prevailing party's attorney's fees in a medical malpractice action under §768.56.

The plaintiffs suggest that section 768.56 was designed to encourage aggrieved persons to seek relief in a court for medical negligence. Nothing could be further from the truth. Section 768.56 was designed to prevent the filing of frivolous actions.

The preamble to the statute reveals its intention to discourage "non-meritorious medical malpractice claims." See Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145-1147 (Fla. 1985)(citing ch. 80-67, Laws of Fla.). In fact, it is common knowledge that this statutory provision failed to accomplish its goal and backfired by encouraging the filing of malpractice actions. It provided "special incentive to prove damages"; it did not encourage the filing of civil rights claims for injunctive and declaratory relief. Id. at 945.

Unlike a civil rights claim, a medical malpractice action does not seek to enjoin a doctor from continuing to practice. The Department of Professional Regulation is designed for that purpose. Section 768.56 simply was not designed for and does not serve the same laudable goal as section 1988.

In an attempt to support their position that a medical malpractice action serves a similar public purpose, the

plaintiffs rely upon the First District Court of Appeal's decision in Baker v. Varela, 416 So.2d 1190 (Fla. 1st DCA 1982). Baker preceded this Court's decision in Rowe and did not involve the use of a contingency risk multiplier. In fact, in Baker, the court multiplied a reasonable number of hours expended by a reasonable hourly rate (based upon the same factors outlined by this Court in Rowe) to determine a reasonable fee. There was no contingency risk multiplier used and, therefore, no corresponding cap. Baker does not mandate a ruling adverse to the Fund.

Perhaps this is an appropriate time to reconsider the use of the contingency risk multiplier. If a trial court awards a reasonable fee based upon a reasonable number of hours expended and a reasonable hourly rate, which accounts for the various factors outlined in 2-106, there really is no need for the application of a contingency risk multiplier. The hourly rate may account for the contingent nature of the contract. The abolition of the contingency risk multiplier would obviate the need for the corresponding cap.

Despite this Court's statement that a contingency risk multiplier "may" be applied, trial courts have consistently applied the contingency risk multiplier as if mandated. If the contingency risk multiplier and its corresponding cap were abandoned, then parties would be limited to a "reasonable" fee. But, as long as this Court adheres to the contingency risk multiplier, its corresponding limitation based upon the agreement between the party and its attorney must be applied.

As this Court noted in Miami Children's Hospital v. Tamavo, 529 So.2d 667 (Fla. 1988), "all the factors contained in Rowe apply whenever the lodestar approach applies. . . ." This Court applied this philosophy to limit the fee award in Tamavo to the percentage agreement between the plaintiff and his attorney. It should also have been applied in this case.

This Court reiterated its concern over windfall fee awards in Perez-Borroto v. Brea, 544 So.2d 1022 (Fla. 1989). In Perez-Borroto, this Court held that a fee awarded to an hourly rate attorney could not exceed the hourly rate charged by the attorney to his client, even if that hourly rate was unreasonable. The same result must occur here.

This is especially true in light of the guidelines for percentage fees called for under fee agreements in medical malpractice actions. See, e.g., Fla. Stat. 5766.109 (Fla. 1989).[1] This statute provided:

> Until such time as the Supreme Court adopts guidelines, the following schedule shall be presumed reasonable and not excessive. For recovery of damages up to $2 million:
>
> . . . .
>
> Forty-five percent of the recovery after notice of appeal is filed or post-judgment relief or action is required for recovery on the judgment.
>
> . . . .
>
> (b) It is the intent of the Legislature that fees be fair and reasonable to allow

[1]Section 766.109 expired on October 1, 1988, but is cited to exemplify the legislature's impression of a reasonable fee. Fla. Stat. §766.109(8) (1987).

> representation of the public in medical malpractice cases. Should the Supreme Court determine that the above Pee schedule is inadequate or excessive, it is the intent of the Legislature that the Supreme Court adopt such fee schedule as will be reasonable to assure proper representation, and such fee schedule shall supersede the provisions hereof.

Fla. Stat. **S766.109 (1987).** The legislature indicated that **45%** was reasonable and suggested that this Court may even find it excessive.

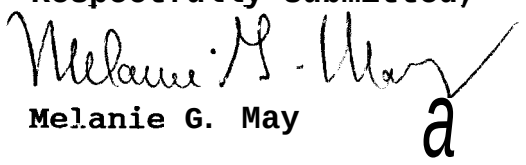
Indeed, Rule 4-1.5 of the Rules Regulating the Florida Bar provides a cap of **45%** of any recovery after an appeal. "Without prior court approval as specified below, any contingent fee which exceeds the following standards shall be presumed, unless rebutted, to be clearly excessive. **. . .**" This is clearly an indication that the fee award in this case, which is close to 100% of the recovery, is excessive.

These model fee agreements set the guidelines and the cap to which this Court referred when it stated: "in no case should the court-awarded fee exceed the fee agreement reached by the attorney and his client." This Court appears to have contemplated that the fee agreement would either contain an hourly provision or a percentage. Otherwise, the words of this Court would have been hollow and without meaning. This Court has previously indicated that its words meant what they said. In this case, the trial court erred when it exceeded the percentage formula set forth in the fee agreement.

CONCLUSION

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

Respectfully submitted,



Melanie G. May

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U. S. mail this 26th day of September, **1989**, to: MARTIN **J.** SPERRY, ESQ., **805** E. Broward Blvd., Suite 200, Fort Lauderdale, FL 33301; ALAN D. SACKRIN, ESQ., Klein & Tannen, P.A., 633 Northeast 167th Street, Suite 1111, North Miami Beach, Florida 33162; DAVID H. KRATHEN, ESQ., 524 South Andrews Avenue, Fort Lauderdale, Florida 33301 and GARY FARMER, ESQ. **888** South Andrews Avenue, Fort Lauderdale, Florida 33316.

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