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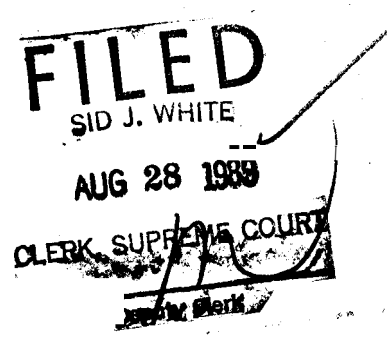
IN THE SUPREME COURT OF FLORIDA

CASE NO: 74,480 ,



NEIL J. KARLIN, M.D. and
NEIL J. KARLIN, M.D., P.A.

Petitioners

vs.

DARRYL MOXLEY, as Personal Representative
of the Estate of LAUREN RENEE MOXLEY, Deceased,
LOUISE MOXLEY, and DARRYL MOXLEY, individually,
and FLORIDA PATIENT'S COMPENSATION FUND

Respondents

PETITIONERS' BRIEF ON THE MERITS

Submitted by:

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TABLE OF CITATIONS

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STATEMENT OF THE CASE AND FACTS

The Petitioners, NEIL J. KARLIN, M.D. and NEIL J. KARLIN, M.D., P.A. [hereinafter KARLIN] invoke the discretionary jurisdiction of the Supreme Court to review the decision of the District Court of Appeal, Fourth District, in Florida Patient's Compensation ~~Fund~~ v. Darryl Moxley, ~~et al.,~~ Fourth District case nos. 87-2862 and 87-3021. (App. 1-7). The Fourth District's opinion addressed two issues. First, the Fourth District ruled that prevailing party attorney's fees in a medical malpractice action may exceed the percentage fee set forth in the plaintiff's contingent fee contract with his lawyer where the contract provided that the fee upon recovery would be the stated percentage or a larger amount if awarded by the court. Second, the Fourth District, citing Williams v. Spiegel, 512 So.2d 1080 (Fla. 3rd DCA 1987) and Florida Patient's Compensation ~~Fund~~ v. Sitomer, 524 So.2d 671 (Fla. 4th DCA 1988), held that KARLIN's insurer, as opposed to the FUND, was responsible for the payment of the plaintiff's prevailing party attorney's fees, even though KARLIN's underlying limits of liability had been exhausted, where the supplementary payments provision in the insurance policy provided that the insurer would pay, in addition to the applicable limit of liability, all defense costs. (App. 4-5; R. 45-47).

In affirming the $150,000.00 award of attorney's fees, which award amounted to approximately 97% of the final compensatory damage judgment of $155,674.00, the Fourth District, on motions by KARLIN and the FUND, certified the following issue to this Court as presenting a 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

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> 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?

This same question was certified by the Fourth District in the case of Kaufman v. MacDonald, nos. 87-2413 and 88-1363 (Fla. 4th DCA April 26, 1989).

Eight days after the Fourth District's order on rehearing which certified the above question, the Supreme Court released its decision in the case of Spiegel v. Williams, 14 F.L.W. 330 (Fla. July 7, 1989). Spiegel held that a physician's liability insurer is not responsible for the payment of the plaintiff's prevailing party attorney's fee where the limits of basic liability coverage had been exhausted, even though the insurer agreed to pay for all costs of defending a lawsuit. In the Fourth District's opinion in this case, it specifically noted that Williams v. Spiegel, 512 So.2d 1080 (Fla. 3rd DCA 1987) was pending in the Supreme Court and and in response to KARLIN's contention that Williams v. Spiegel and Florida Patient's Compensation Fund v. Sitomer, 524 So.2d 671 (Fla. 4th DCA 1988), were wrongly decided, the Fourth District commented that, "Ere long we will have an answer to that suggestion as those cases are presently pending in the Supreme Court of Florida". (App. 4).

The Florida Patient's Compensation Fund has also invoked the discretionary jurisdiction of the Supreme Court the review the District Court's decision and it has recently submitted its brief on the merits. See Supreme Court case no. 74,431. The FUND's brief only addresses the issue certified by the

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Fourth District as presenting a question of great public importance.[1] The Fund has thoroughly discussed the facts concerning the certified question and KARLIN adopts the FUND's statement of facts as if fully set forth herein. (App. 8-12). KARLIN additionally notes that the trial court authorized an attorney's fee award greatly in excess of the contingent fee schedule on the basis of its belief that the holding in Florida Patient's Compensation ~~vs.~~ ~~Rowe~~, 472 So.2d 1145 (Fla. 19851, could not be applied retroactively to a contract existing prior to the Rowe decision (R. 55-57).[2] However, the Fourth District affirmed the attorney's fee award on the alternate contention that the wording of the agreement authorized the court to award a fee larger than the fee otherwise payable by the MOXLEYS to their attorneys under the fee schedule.

KARLIN filed his notice to invoke the discretionary jurisdiction of this Court to review both the question certified by the Fourth District as well as to review the issue concerning whether the FUND or KARLIN's insurer is responsible to pay the attorney's fee.

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[1] Of course, Karlin is not stating that the Fund has abandoned its right to argue that it is not responsible for the payment of the attorney's fee inasmuch as the Fund, as this case now stands, has prevailed on that issue in the Fourth District. Certainly the Fund has the right to address this issue as a respondent in this appeal. It is submitted that Supreme Court case nos. 74,431 (the Fund's appeal) and 74,480 (Karlin's appeal) should be consolidated and Karlin will file a motion requesting same.

[2] Subsequent to the entry of the attorney's fee judgment, the Supreme Court held in Miami Children's Hospital v. Tamayo, 529 So.2d 667 (Fla. 19881, that the factors set forth in Rowe are procedural and do operate retroactivelv to limit an attorney's fee to the maximum amount set forth-in the plaintiff's contingent fee agreement with his attorney.

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SUMMARY OF THE ARGUMENT

This Court recently held that prevailing party attorney's fees in a medical malpractice action are not an item of defense costs or taxable costs and, therefore, a health care provider's insurer who has paid its underlying limits of basis liability coverage is not responsible for the payment of the prevailing party attorney's fees where the insuring agreement provides that the insurer will also pay all defense costs or costs taxed against the insured. Therefore, the Florida Patient's Compensation Fund, as opposed to KARLIN or his insurer, is responsible for the payment of the prevailing party attorney's fee.

The second issue raised in this appeal addresses the question certified by the Fourth District. KARLIN believes that the case of Florida Patient's Compensation ~~Fund v. Rowe~~, 472 So.d 1145 (Fla. 1985) and its progeny do preclude a plaintiff from obtaining a prevailing party attorney's fees in an amount exceeding the stated percentage in the fee agreement, even if the agreement provides that the fee will be the higher of the percentage or an amount awarded by the court. The language in MOXLEYS' fee agreement does not otherwise provide for an award of a "reasonable" fee and it should not constitute a legal basis for the court to award a fee larger than the amount plaintiff is obligated to pay from the gross proceeds of recovery. It would be patently unfair for a plaintiff's attorney to almost entirely eliminate the risk involved in a contingent fee agreement at the expense of the non-prevailing defendant. MOXLEYS' attorneys certainly could not have collected $150,000.00 from the gross proceeds of $155,674.00 from their client and they should not be permitted to collect such sum from the non-prevailing defendant responsible for the payment of the statutory award of attorney's fees.

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ARGUMENT

I

THE DISTRICT COURT'S OPINION EXPRESSLY ANDDJRECTLYCONFLICTSWITH THE SUPREME COURT'S DECISION IN SPIEGEL v. WILLIAMS, 14 F.L.W. 330 (FLA. July 7, 1989), AND IT WAS THEREFORE ERROR FOR THE DISTRICT COURT TO HOLD THAT KARLIN'S INSURER WAS RESPONSIBLE FOR THE PAYMENT OF MOXLEY'S PREVAILING PARTY ATTORNEY'S FEES.

I. Jurisdictional Statement

The District Court's opinion acknowledges that the determination of whether the health care provider's insurer is responsible for the payment of prevailing party attorney's fees under a supplementary payments provision in an insurance policy providing for the payment of defense costs or costs taxed against the insured would be controlled by the then pending Supreme Court decision in either the case of Williams v. Spiegel, 512 So.2d 1080 (Fla. 3rd DCA 1987) or Florida Patient's Compensation Fund v. Sitomer, 524 So.2d 671 (Fla. 4th DCA 1988). Approximately one week after the Fourth District certified to this court the issue raised in Point II of this brief, infra, (the issue addressed by the Fund in its initial brief in case no. 74,431), the Supreme Court of Florida released its decision in Spiegel v. Williams, 14 F.L.W. 330 (Fla. July 7, 1989). In Spiegel the Supreme Court specifically held that a statutory award of plaintiff's attorney's fees is not a cost of defending a suit or a species of taxable costs in the absence of the authorizing statute specifically recognizing that the award of attorney's fees be taxed as costs. 14 F.L.W. at 330. Section 768.56, Florida Statues (1981), did not specify that attorney's fees be taxed as costs. Id. Therefore, the Fourth District's opinion relied upon authority from

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another district court of appeal which has now been quashed by the Supreme Court. Jurisdiction is predicated to address this issue pursuant to Rule 9.030(a)(2)(A)(iv).

Additionally, inasmuch as the District Court of Appeal certified the issue concerning the amount of the fee as presenting a question of great public importance, the Supreme Court may address all issues raised in the case.

B. Argument on Merits

The issue raised herein is governed by the recent Supreme Court case of Spiegel v. Williams, supra. In that case, the Supreme Court was called upon to determine whether a provision in an insurance contract providing that the insurer would pay "all costs of defending a suit," included the payment of plaintiff's prevailing party attorney's fees pursuant to §768.56, Florida Statues (1981). KARLIN's limit of basic liability coverage of $100,000.00, pursuant to §768.54(2)(b), had been exhausted by the compensatory damage award of $155,674.00. The supplementary payments provision of KARLIN's policy provided for the payment of defense costs by the insurer. In Spiegel, this Court concluded that the statutory award of plaintiff's attorney's fees can not be construed to be a cost of defending a suit. 14 F.L.W. at 330. As its reasoning for such a holding, this Court explained:

> While a policy could no doubt be written specifically to cover court-awarded attorneys' fees, liability insurers are normally only responsible for the payment of plaintiff's attorneys' fees where bad faith is involved or the insurer prevails in a direct action against the company. (citations omitted). On the other hand, liability insurers have usually been responsible for the payment of taxable costs over and above the policy limits. (citation omitted) Therefore, the result reach by the district court of appeal would be

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> justified if the award of plaintiff's attorneys' fees could be considered as a species of taxable costs. Yet, ever since this Court's decision in State ex rel. Royal Insurance Company vs. Barrs, 87 Fla. 168, 99 S0.668 (1924), attorneys' fees recoverable by statute are regarded as "costs" only when specified as such by the statute which authorizes their recovery. (citation omitted). Indeed, there are some statutes which provide for an award of attorneys' fees to be taxed as costs. E.g., 5713.29, Fla. Stat. (1987). However, 9768.56, Florida Statutes (1981), did not specify that attorneys' fees could be taxed as costs.

Spiegel, 14 F.L.W. at 330.

Therefore, under this Court's controlling authority, attorney's fees in this case are chargeable to the Florida Patient's Compensation Fund and the District Court's contrary determination should be quashed. Although it appears in Spiegel that the FUND was not a party to the underlying malpractice action, the FUND appeared in the Supreme Court as as amicus curiae, most probably recognizing the controlling effect the decision would have in the cases where the FUND was joined as a party.

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ARGUMENT

II

THE TRIAL *AND* APPELLATE COURTS ERRED WHEN THEY FAILED TO LIMIT THE MAXIMUM ATTORNEY'S FEE AWARD TO THE CONTINGENT FEE SCHEDULE IN PLAINTIFFS' CONTRACT WITH THEIR ATTORNEYS

Petitioners posit that the question certified by the Fourth District should be answered in the affirmative. An attorney who undertakes to represent an injured person on a contingent fee basis should not be able to recover more attorney's fees from the adversary than he would have been entitled to recover from his own client.

This case arose out of the alleged medical malpractice causing the death of the Plaintiffs' infant child. As is customary, Plaintiffs entered into a contingent fee agreement with their attorneys which obligated plaintiffs to pay their attorneys either forty-five percent or fifty percent of the gross proceeds of recovery. (R. 34-35). The last sentence of the attorney's fee contract provided:

> 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 & SPERRY, P.A.

KARLIN and the FUND argued below the 5768.56 fee award could not exceed the dollar amount representing fifty percent of the compensatory damage award. The trial court refused to so limit the fee award, holding that the limiting language in Florida Patient's Compensation ~~Fund~~ v. ~~Rowe~~, 472 So.2d 1145 (Fla. 1985), ["in no case should the court-awarded fee exceed the fee agreement reached by the attorney and his client,"] could not be applied retroactively to

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attorney's fee contracts pre-dating the Rowe opinion, citing, among other cases, Tamayo v. Miami Children's Hospital, 511 So.2d 1091 (Fla. 3rd DCA 1987). Subsequent to the trial court's final order awarding attorney's fees, this court quashed Tamayo in Miami Children's Hospital v. Tamayo, 529 So.2d 667 (Fla. 1988), specifically holding that the factors enunciated in Rowe for determining a statutory court award of attorney's fees do apply to fee agreements entered into prior to the date of the Rowe decision. Nonetheless, the Fourth District upheld the attorney's fee award on the alternate grounds that MOXLEYS' fee agreement authorized the trial court to award an attorney's fee in an amount larger than the stated percentage, inasmuch as the fee agreement provided that the attorneys would receive the stated percentage of recovery or a higher amount, if awarded by the court. (App. 1-4). The Fourth District reasoned that since any fee which exceeds the stated percentage must be found by the court to be reasonable, the principles of Rowe are not violated by not limiting the award to the percentage. In this regard, Petitioners believe the appellate court was in error. Recognizing the importance of the issue, the district court certified the question to this Court. (App. 6-7).

Plaintiffs and their attorneys received all of the benefits bestowed upon them by the Rowe decision, including a contingency risk multiplier of two. To approve the holding of the District Court of Appeal would be tantamount to removing the risk factor associated with contingent fee contracts in any case where damages are awarded, regardless of their de minimus nature. The only instance where there would be a risk for an attorney to take a case on a contingent fee contract where fees are authorized by statute would be in the case where the defendant was exonerated from liability. This is inherently unfair to non-prevailing defendants and certainly appears to do violence both the letter

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and the spirit of the Rowe decision.

It is beyond dispute that **MOXLEYS'** attorneys could not have ethically contracted for a ninety-seven (97%) percent contingent fee upon the gross proceeds of recovery. The Rowe decision places common sense limitations on attorney's fee award to be paid by the losing party pursuant to a statute authorizing the recovery of fees. Here, the **MOXLEYS** (and their attorneys) have successfully exacted an attorney's fee from a third party (the FUND or KARLIN's insurer, depending on the outcome of Point I, supra) in an amount which the attorneys could not have charged **MOXLEY** on a contingent fee basis.

As the Supreme Court in Rowe noted, Plaintiffs benefit from the contingent fee system because it provides them with both increased access to the court system as well as the services of attorneys. **472** So.2d at **1151.** However, parties to contingent fee agreements should not be able to manipulate their agreements to the detriment of a third party payor. In the recent case of Perez-Boroto v. Brea, **544** So.2d **1022** (Fla. **1989),** this court held that the amount of attorney's fees that may be awarded by the court is limited to the maximum as defined in a non-contingent fee contract between the attorney and client. In Brea, defense counsel billed Dr. Brea's insurance carrier **$60.00** per hour under their fee agreement. At the hearing on attorney's fees, defense counsel contended that he was entitled to a fee computed at **$125.00** to **$200.00** per hour. This court concluded:

> It is our view that the principles of Rowe must apply equally to both plaintiff and defendant in this type of action. To rule that one side is limited to a prior fee agreement while the other is not would be unfair. The playing field must remain balanced and the principles of Rowe applied equally to both sides.

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544 So.2d at 1023. In light of the Brea decision, it can not be seriously contended that a defense attorney may enter into a contract providing that he be compensated at the rate of $100.00 per hour from his client, or a higher amount from a non-prevailing if the court so awards. Such a contract should have no bearing on whether there is a legal basis to award a higher fee against the losing party responsible for fees.

The cornerstone of this court's Rowe, Tamayo ~~and Brea~~ decisions is that limitations need to be placed on attorney's fees paid by the non-prevailing party. In the case of contingent fee contracts, Rowe clearly places a ceiling on prevailing party attorney's fees to the percentage stated in the contingent fee contract. A plaintiff, and for that matter a defendant, should not be able to circumvent the limiting language in Rowe by inserting the language contained in MOXLEYS' agreement.

The maximum awardable reasonable fee in this case is fifty percent of the judgment. Certainly, when MOXLEYS' attorneys undertook to represent the MOXLEYS in this case, they very well knew that the primary element of damages was non-economic, i.e. the parents' pain and suffering for the loss of their minor child. Such damage awards can and do vary greatly from jury to jury. Undoubtedly plaintiffs' counsel envisioned an award of $500,000.00 to $1,000,000.00. Since the jury awarded a much more modest amount, Plaintiffs' counsel should not now be permitted to escape the limitation called for by the fee schedule.

Furthermore, as argued by the FUND in its initial brief in Supreme Court case 74,431, a review of the contract language upon which the Fourth District authorized the larger fee award reveals that the contract did not call for the Plaintiffs' attorneys to be paid the higher of the percentage amount in

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the fee schedule or a reasonable amount set by the court. The language in the agreement that, "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, . . . shall be earned by and paid to Krathen & Sperry, P.A.," merely settles as between the MOXLEYS and their attorneys how the fee award would be distributed in the event that the court awards a fee exceeding fifty percent of the judgment. The agreement itself does not provide any legal justification or basis for the court to award a higher fee. The contract was entered into several years before the Rowe decision and therefore could not have been entered into with a mind towards circumventing the limiting language of Rowe, and it should not be so construed.

Counsel should not be permitted to enter into a contingent fee contract with impunity. The courts should not serve as guarantors of an attorney's fee which a plaintiff's attorney envisioned he would obtain from a verdict, but fell short of attaining. The amount which a plaintiff is obligated to pay his attorney out of the proceeds of the compensatory damage award must operate as a maximum amount which can be charged against the defendant under a prevailing party attorney's fee statute. Any language in fee contracts to the effect that a higher amount may be sought from the non-prevailing party is of no legal import under Florida Patient's Compensation Fund v. Rowe and its progeny.

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CONCLUSION

For the foregoing reasons, the Petitioners herein, NEIL J. KARLIN, M.D. and NEIL J. KARLIN, M.D., P.A., respectfully request the Supreme Court to accept jurisdiction of this cause, and to quash the decision of the District Court of Appeal, Fourth District, on two grounds: First, to quash the court's holding that KARLIN's insurer be responsible for the payment of the attorney's fee and to require the FUND to pay said fee and; second, to answer the certified question in the affirmative, and reduce the attorney's fee award to $77,837.00, which is fifty percent of the compensatory damage judgment.

Respectfully submitted,

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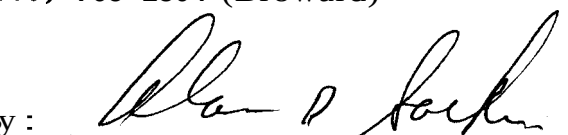
By: 
ALAN D. SACKRIN

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 25th day of August, 1989 to: MARTIN J. SPERRY, Esq., Co-Counsel for Moxley, 805 E. Broward Blvd., Suite 200, Fort Lauderdale, FL 33301; MELANIE G. MAY, Esq., Counsel for Fund, P.O. Drawer 22988, Fort Lauderdale, FL 33335; DAVID H. KRATHEN, Esq., Counsel for Moxley, 524 South Andrews Avenue, Fort Lauderdale, FL 33301 and GARY FARMER, Esq., Co-Counsel for Moxley, 888 South Andrews Avenue, Fort Lauderdale, FL 33316

By: Alan D. Sackrin
ALAN D. SACKRIN

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