IN THE

INDIANA COURT OF APPEALS

CASE NO. 49A05-1207-CC-00340

INDIANA PATIENT'S COMPENSATION FUND, Appellant/Respondent Below, vs. JUDY HOLCOMB, Personal Representative of the Estate of MABLE LOUISE COCHRAN, Deceased, Appellee/Petitioner Below.	)	Appeal from the Marion Superior Court No. 6 Cause No. 49D06-1108-CC-032645 Hon. Thomas J. Carroll

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BRIEF OF AMICUS CURIAE, INDIANA TRIAL LAWYERS ASSOCIATION

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I. BRIEF STATEMENT OF THE INTEREST OF THE *AMICUS CURIAE*

The mission of the Indiana Trial Lawyers Association (ITLA) is to preserve the constitutional rights of open access to courts and equal protection under the law for all persons in Indiana. ITLA is the main voice ensuring that every person who receives healthcare in the State has meaningful access to the court system to resolve disputes about that healthcare. A precedent which accurately interprets and applies Indiana's Medical Malpractice Act (MMA), consistent with its legislative intent, is of critical importance to citizens of Indiana. The interests of ITLA in this appeal are aligned with Appellee, Judy Holcomb, Personal Representative of the Estate of Mable Louise Cochran, deceased, and all persons who need fair and meaningful access to our courts, including persons who might receive healthcare in this State.

In the 1970's, ITLA and others helped draft legislation, Indiana's Medical Malpractice Act, to address the perception that there was a medical malpractice crisis in Indiana. The MMA included the creation of the Patient's Compensation Fund (PCF). The PCF's main purpose is to pay money damages to victims of malpractice at a hearing to be held as soon as practicable. The legislative intent was to avoid the complexities of a trial and re-litigation of matters already resolved via a simple hearing to decide the amount of excess damages with liability already established, realizing that many victims of medical malpractice would never receive full compensation because of the overall cap. This process was designed to provide for a just, speedy and inexpensive determination of the amount of excess damages.

The trial court's order in this case preserves the "balance of rights and remedies" the General Assembly pieced together as part of the Act.

II. SUMMARY OF ARGUMENT

Under Indiana statutory and case law, there is no question that the PCF is legally mandated to pay all excess damages above $250,000 in any medical malpractice case. It is also equally clear, under Indiana law, that attorney's fees, costs, and expense recovered pursuant to Indiana's Adult Wrongful Death Statute[1] are damages. Therefore, the PCF must pay attorney's fees, costs, and expenses when a trial court judgment includes attorney's fees, costs, and expenses as a damage under the Adult Wrongful Death Statute.

Although Indiana's Medical Malpractice Act[2] (MMA) contains a provision limiting attorney's fees from an award paid by the PCF to 15%, this limitation is not a limitation on damages but a limitation on the amount of attorney fees charged to the client. The statute is perfectly clear that the 15% limitation on attorney fees applies to every medical malpractice case in the State. It was not intended to place a limit on attorney fees recovered as a damage. If the legislature meant the 15% to a limitation on the damage, then it would have placed this provision in the "Limitation on Damages" section of the MMA. It did not do that.

The issue of what attorneys fees are charged to the client and attorney fees and as a damage are two wholly separate issues.

This Court should affirm the trial court's judgment in the underlying action.

[1] Ind. Code § 34-23-1-2.
[2] Ind. Code § 34-18-1-1 et seq.

III. ARGUMENT

A. The current medical malpractice environment in Indiana.

In the 1970's, the public was led to believe a medical malpractice crisis existed in Indiana by the Indiana State Medical Association (ISMA) and others. In 1975, the Act was enacted to respond to this "crisis." Among its many restrictions, the Act imposed a total cap on the amount of money a patient could recover for damages from medical negligence. *See,* Ind. Code. § 34-18-14-3.

Since 1999, the total amount a patient can recover for an act of malpractice, regardless of the amount of medical expenses, funeral expenses, lost wages, pain and suffering, and any other harm or loss, remains stagnant at $1,250,000.00. *Id*. The only way a patient can access the PCF is if a healthcare provider agrees to **"discharge its possible liability" by paying its policy limits** of $250,000.00 in cash or entering into a periodic payments agreement in accordance with I.C. § 34-18-14-4. (emphasis supplied).

In its Brief, the PCF argues that allowing the trial court's judgment to stand will open the door to disproportionately high fees from the PCF, is contrary to the intent of the legislature in establishing the PCF, and "does nothing to preserve an acceptable standard of health care and an adequate number of providers in Indiana." (Brief, p. 15). This statement has no basis in fact.

Since 1975, Indiana has seen an increase in the number of physicians practicing in this State and growth in the healthcare sector, in general.[3] The PCF has remained solvent. In fact,

[3] Fred J. Hellinger, Ph.D. and William E. Encinosa, Ph.D., *The Impact of State Laws Limiting Malpractice Awards on the Geographic Distribution of Physicians.* Agency for Healthcare Research and Quality. U.S. Department of Health and Human Services. July 3, 2003. (Table 1A) *available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1522105/ (last viewed November 27, 2012)*; and Rachel Justis, *Growth in Indiana's Health Care Sector,* 7 Incontext 7, 8 (July 2006), *available at* http://www.incontext.indiana.edu/2006/july/5.asp (last viewed November 27, 2012).

over the last five years, physicians and hospitals have seen their annual surcharges paid to the PCF decrease, but never increase:

2008[4]	Physicians' annual surcharge	*decreased*	19.1%
	Hospitals' annual surcharge	*decreased*	1.3%
2009	Physicians' annual surcharge	stayed the same	
	Hospitals' annual surcharge	stayed the same	
2010[5]	Physicians' annual surcharge	*decreased*	17.7%
	Hospitals' annual surcharge	*decreased*	28.4%
2011[6]	Physicians' annual surcharge	stayed the same	
	Hospitals' annual surcharge	*decreased*	3.8%
2012[7]	Physicians' annual surcharge	*decreased*	10.2%
	Hospitals' annual surcharge	*decreased*	1.7%

All of the monies contained within the PCF are paid by either healthcare providers or insurance companies. I.C. § 34-18-5-1 et seq[8]. No governmental monies or taxes from citizens are used to fund the PCF.

As such, the facts demonstrate that the PCF, physicians, and hospitals have seen the MMA work in their favor while Indiana patients and taxpayers (through Medicare, Medicaid and other governmental programs) are left to pay for the consequences of medical negligence. The

[4] IDOI Bulletin 159, *available at* http://www.in.gov/idoi/files/Bulletin_159__PCF_Surcharge.pdf (last viewed November 27, 2012).
[5] IDOI Bulletin 175, *available at* http://www.in.gov/idoi/files/Bulletin_175.pdf (last viewed November 27, 2012).
[6] IDOI Bulletin 182, *available at* http://www.in.gov/idoi/files/Bulletin_182.pdf (last viewed November 27, 2012).
[7] IDOI Bulletin 182, *available at* http://www.in.gov/idoi/files/Bulletin_186.2.pdf (last viewed November 27, 2012).
[8] Ind. Code **§** 34-18-5-1 states: **"**To create a source of money for the patient's compensation fund, an annual surcharge shall be levied on all health care providers in Indiana."

truth is, affirming the trial court order in this case, will simply maintain the status quo consistent with the unambiguous language and historical application of the Act.

B. The PCF is Legally Obligated to Pay Excess "Damages"

Indiana statutory law and case clearly state that the Fund is legally required to pay the damages above $250,000 in any medical malpractice case. I.C. § 34-18-14-3(c) states:

> *(c)* Any amount due from a judgment…that is in excess of the total liability of all liable health care providers...***shall be paid from the patient's compensation fund*** under IC 34-18-15.

Id. (emphasis added). The Indiana Supreme Court has also made it expressly clear that the Fund ***shall*** pay ***damages*** above $250,000:

> The Fund is financed by the surcharges collected from providers throughout the state and pays ***"excess damages***." Recovery of ***excess damages from the Fund*** is allowed only after a health care provider or the provider's insurer has paid the first $250,000, *id*. § 34-18-15-3(1), or made a settlement in which the sum of the present cash payment and cost of future periodic payments exceeds $187,000.

Atterholt v. Herbst, 902 N.E.2d 220, 222 (Ind. 2009) (emphasis added).

C. Attorney Fees, Costs, and Expenses are "Damages."

The Indiana Supreme Court has also clearly stated that attorney fees, costs, and expenses are within the ***damages*** permitted by the Adult Wrongful Death Statute:

> In conclusion, ***we hold that reasonable attorney fees*** incurred in the prosecution of an action under the Adult Wrongful Death Statute ***are within the damages*** permitted by the statute.

McCabe v. Comm'r, Ind. Dept. of Ins., 949 N.E.2d 816, 821 (Ind. 2011) (emphasis added).

It is beyond dispute that the PCF pays damages excess "damages" and attorney fees, costs, and expense awarded pursuant to the AWDS are "damages".

D. The 15% Limitation Does Not Apply

The PCF argues Ind. Code § 34-18-18-1 limits the recovery of attorney's fees to 15% of any award from the Fund. This argument has no merit because I.C. § 34-18-18-1 does not apply to the recovery of attorney's fees as a damage. Rather, I.C. § 34-18-18-1 is a limitation on the attorney's fees charged to the client. It applies to the contractual relationship between the plaintiff and the plaintiff's attorney and nothing else.

A common sense reading of the plain language of this statute makes it clear that I.C. § 34-18-18-1 does not apply to the recovery of attorney's fees as a damage. The statute says that if a plaintiff is represented by an attorney:

> "the plaintiff's attorney's fees from any award made from the patient's compensation fund may not exceed fifteen percent (15%) of any recovery from the fund."

I.C. § 34-18-18-1. It is significant to note that the statute reads that the award has already been paid – ***past tense*** – by the Fund and the 15% limitation is on the attorney's fees charged to the client (i.e. "…plaintiff's attorney's fees…" – plaintiff is the possessive). The statute does not in any way limit attorney's fees as a damage sought in an award from Fund.

The Indiana Supreme Court's opinions in *In re the Matter of Stephens II*, 867 N.E.2d 148 (Ind. 2007) and *Johnson v. St. Vincent Hospital, Inc.*, 404 N.E.2d 585 (Ind. 1980) also do not support the PCF's arguments. *Stephens II* was an attorney disciplinary case in which the Indiana Supreme Court addressed whether a plaintiff's attorney's contingency fee charged to the client was ethical given the 15% limitation on awards from the Fund[9]. Similarly, the issue in *Johnson v. St. Vincent Hospital* was whether the 15% limitation on attorney's fee charged to the client

[9] "The MMA limits a lawyer's recovery to 15% of the amount the client recovers from the Fund, see Ind. Code § 34-18-18-1, but specifies no limit on attorney fees recovered from the amount a client receives from a Qualified Provider." *In re Stephens II*, 867 N.E.2d at 150.

was constitutional[10]. The *Stephens II* and *Johnson* opinions did not address attorney's fees as a damage in any way. Furthermore, both cases dealt exclusively with the payment of attorney's fees after an award by the PCF. In the case at bar, the PCF is arguing for limitation on the payment of attorney's fees before the award.

The PCF's argument also does not consider that I.C. § 34-18-18-1 and 34-18-18-2 apply to the legal services agreement between ***every*** plaintiff and ***every*** plaintiff's attorney. Section 1 places the 15% limitation on a contingency attorney fee on ***every*** award from the Fund. Section 2 requires that ***every*** plaintiff be given the option to pay the plaintiff's attorney on a per diem basis rather than a contingency fee basis. However, not every medical malpractice case falls under the AWDS under which attorney fees, costs, and expense are a recoverable element of damage.

It makes no sense to apply the 15% limitation on attorney's fees as a damage on awards from the Fund. If the legislature intended the 15% limitation on attorney's fees as a damage (as urged by the Fund) then the legislature would have placed this section in Chapter 14 of the MMA – the chapter entitled "LIMITS ON DAMAGES" – in which the limits on damages are clearly spelled out.

Furthermore, the issue of what a plaintiff's attorney can be charged to the client as a contingent fee and the issue of a plaintiff's attorney's fees as a damage are separate issues and have no bearing on each other. *See*, *Fickle v. Scampmorte*, 183 N.E.2d 838 (Ind. 1962) (in awarding attorney fees as a damage, "[i]t goes without citation that the court is not bound by any amount fixed privately by the party and his attorney in any contract."); *Venture Enters. v.*

[10] "The limitation on attorney fees follow naturally as a means of protecting the already diminished compensation due claimants from further erosion due to improvident or unreasonable contracts for legal services." *Johnson*, 404 N.E.2d at 602.

Ardsley Distr., 669 N.E.2d 1029 (Ind. Ct. App. 1996) (holding that contingent fee agreements are not controlling as to third parties).

Finally, to the extent this Court (or the PCF) is concerned about how the damages recovered from the Fund will be distributed to the plaintiff and the plaintiff's attorney, there are sufficient safeguards in place to protect the plaintiff in this case. Every wrongful death plaintiff is protected by Rule 1.5 of the Rules of Professional Conduct. If any wrongful death plaintiff is concerned or has an issue with the attorney's fee charged to the estate after a recovery of attorney's fees as a damage in a wrongful death case, then that wrongful death plaintiff can seek the assistance of the probate court judge or file an action against their counsel with the Disciplinary Commission.

IV. CONCLUSION

The trial court's order is well reasoned, complies with the statutory intent of the Act and correct. For the foregoing reasons stated in this brief, this Court should affirm and affirm the trial court's judgment in this case.

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WORD COUNT CERTIFICATE

The undersigned hereby certifies that the foregoing Brief of Appellants complies with Indiana Appellate Rule 44 word limitation in that it contains no more than 7,000 words.

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