

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

YULEXI EXPOSITIO, on behalf of
and as parent and natural
guardian of STEPHANIE GONZALEZ,
a minor,

Petitioner,

vs.

Case No. 10-10320N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY
COMPENSATION ASSOCIATION,

Respondent,

and

LESLIE CAROLINE MCLEOD, M.D.;
NATHALIE DAUPHIN MCKENZIE,
M.D.; MARION FREDERIC COLAS-
LACOMBE, M.D.; JERRY M. GILLES,
M.D.; PUBLIC HEALTH TRUST OF
MIAMI-DADE COUNTY, d/b/a
JACKSON MEMORIAL HOSPITAL;
UNIVERSITY OF MIAMI, d/b/a
UNIVERSITY OF MIAMI SCHOOL OF
MEDICINE; and HUGO GONZALEZ-
QUINTERO, M.D.,

Intervenors.

FINAL ORDER OF DISMISSAL ON ATTORNEYS' FEES

On February 4, 2013, Petitioner, Yulexi Expositio, as parent
and natural guardian of Stephanie Gonzalez, a minor, filed
Petitioner's Motion for Attorneys' Fees and Costs Pursuant to
Florida Statute §57.105, requesting that Petitioner be awarded

attorneys' fees and costs "for having to engage in and litigate a frivolous and unwarranted NICA matter in DOAH which led to a frivolous and costly appeal, again initiated by Intervenor." The certificate of service showed that the motion had been served on Intervenor and Respondent on February 4, 2013.

On July 30, 2013, a telephonic case management conference was held. Having noted that the motion was served on the same date that it was filed, the undersigned requested that Petitioner file a memorandum of law on the issue of whether Petitioner complied with the safe harbor provision of section 57.105(4), Florida Statutes. Petitioner did not file a memorandum of law as requested but did file copies of the following documents: (1) a letter dated June 22, 2011, to the defendants in a medical malpractice action in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, Exposito v. Public Health Trust of Miami Dade County, Case No. 10-36684 CA-25, advising that Petitioner intended to file a motion for attorneys' fees pursuant to section 57.105 if the defendants did not withdraw their motion for stay and appeal of the Summary Final Order of Dismissal in the instant case; (2) a copy of the motion for attorneys' fees at issue; (3) a copy of the motion for attorneys' fees filed in the circuit action; and (4) a copy of the motion for attorneys' fees filed in the Third District Court of Appeal.

On August 27, 2013, a telephonic conference was held on the issue of whether Petitioner had complied with the safe harbor provision of section 57.105(4).

FINDINGS OF FACT

1. On November 22, 2010, Petitioner filed a Petition for Benefits Pursuant to Florida Statute Section 766.301 et seq. On May 20, 2011, a Summary Final Order of Dismissal was entered dismissing Petitioner's Petition for Benefits Pursuant to Florida Statute Section 766.301 et seq., finding that the claim was not compensable and was barred by section 766.313.

2. On June 16, 2011, the University of Miami, d/b/a University of Miami School of Medicine appealed the final order to the Third District Court of Appeal. On June 20, 2011, Leslie Caroline McLeod, M.D.; Nathalie Dauphine McKenzie, M.D.; Marion Frederic Colas-Lacombe, M.D.; Jerry M. Giles, M.D.; Hugo Gonzalez-Quintero, M.D.; and the Public Health Trust of Miami-Dade County, d/b/a Jackson Memorial Hospital filed a Notice of Joinder of the Notice of Appeal of the Final Administrative Action.

3. The defendants in the medical practice action filed a Motion for Stay Pending Appeal in the circuit court.

4. By letter dated June 22, 2011, Petitioner sent a letter to the defendants in the medical malpractice action, who were also the appellants in the appeal. The letter advised that

Petitioner would be filing motions for attorneys' fees if the defendant/appellants did not withdraw the notice of appeal, joinder of appeal, and motion for stay. Copies of the motions for fees, which Petitioner intended to file in the Third District Court of Appeal and the circuit court accompanied the letter. The letter did not mention fees for the administrative action which was on appeal.

5. On January 3, 2012, Petitioner filed Appellee's Motion for Attorneys' Fees as a Sanction Pursuant to Fla. R. App. P. 9.410(B) and § 57.105, Fla. Stat., seeking attorneys' fees as a sanction against Appellants/Intervenors. The Third District Court of Appeal granted the motion and remanded the case to the Division of Administrative Hearings to conduct a hearing on the amount of fees to be awarded.

6. On February 4, 2013, the final hearing on the fees awarded by the Third District Court of Appeal commenced. On the same date, Petitioner filed Petitioner's Motion for Attorneys' Fees and Costs Pursuant to Florida Statutes § 57.105 with the Division of Administrative Hearings. The motion seeks attorneys' fees for the administrative action on Petitioner's claim for benefits under the plan administered by the Florida Birth-Related Neurological Injury Compensation Association.

7. A Final Order on Fees was entered on May 23, 2013, which determined the amount of attorneys' fees to be awarded to

Petitioner pursuant to the order of the Third District Court of Appeal. Included in the amount awarded were fees associated with the Notice of Appeal and the Motion for Stay Pending Appeal.

CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of these proceedings. §§ 57.105 and 766.301-766.316, Fla. Stat.

9. Section 57.105 provides that an administrative law judge may award a reasonable attorney's fee as a sanction. Section 57.105(4), provides:

A motion by a party seeking sanctions under this section must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

10. The only notice that Petitioner provided to Intervenors that Petitioner intended to file motions for sanctions was the June 22, 2011, letter, which was sent after the conclusion of the administrative proceeding. The letter advised that Petitioner would be seeking attorneys' fees if Intervenors did not withdraw the notice of appeal, joinder of appeal, and motion for stay. No mention was made of any actions in the concluded administrative proceeding for which Petitioner would be seeking fees. The June 22, 2011, letter enclosed copies of motions for fees which Petitioner intended to file in the circuit court medical

malpractice action and in the Third District Court of Appeal. Petitioner did not enclose a copy of the motion which was filed with the Division of Administrative Hearings on February 4, 2013.

11. Petitioner has failed to comply with the safe harbor provision of section 57.105(4). Petitioner did not provide Intervenor with notice that she intended to seek sanctions for Intervenor's actions in the administrative proceeding. Thus, Intervenor had no opportunity to withdraw any motions that it may have filed in the administrative proceeding.

12. The actual motion must be served on the party against whom the sanction is sought 21 days before the motion is filed. The motion at issue was served and filed on the same date.

13. Petitioner contends that the letter dated June 22, 2011, was sufficient to put Intervenor on notice and satisfy section 57.105(4). A letter does not comply with the provisions of section 57.105. Nathan v. Bates, 998 So. 2d 1178 (Fla. 3rd DCA 2008). Even if the letter were sufficient to satisfy the requirements of section 57.105(4), Petitioner has been awarded fees for the notice of appeal, joinder in appeal, and motion for stay in the Final Order on Fees entered May 23, 2013.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner is not entitled to attorneys' fees pursuant to section 57.105.

DONE AND ORDERED this 11th day of September, 2013, in
Tallahassee, Leon County, Florida.

Susan Belyeu Kirklund

SUSAN BELYEU KIRKLAND
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of September, 2013.

COPIES FURNISHED:
(Via certified mail)

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NOTICE OF RIGHT TO JUDICIAL REVIEW

Review of a final order of an administrative law judge shall be by appeal to the District Court of Appeal pursuant to section 766.311(1), Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy, accompanied by filing fees prescribed by law, with the clerk of the appropriate District Court of Appeal. See § 766.311(1), Fla. Stat., and Fla. Birth-Related Neurological Injury Comp. Ass'n v. Carreras, 598 So. 2d 299 (Fla. 1st DCA 1992).