STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KENNETH STAHL, M.D.,

Petitioner,

vs. Case No. 15-6760F

DEPARTMENT OF HEALTH, BOARD OF MEDICINE,

Respondent.
_____/

FINAL ORDER

This matter has come before F. Scott Boyd, a designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH"), on Petitioner's Amended Motion for Attorneys' Fees, filed on November 24, 2015, by Kenneth D. Stahl, M.D., against the Department of Health, Board of Medicine.

APPEARANCES

For Petitioner: Monica Felder Rodriguez, Esquire
Dresnick and Rodriguez, P.A.
7301 Wiles Road, Suite 107
Coral Springs, Florida 33067

For Respondent: John B. Fricke, Jr., Esquire
Jay Patrick Reynolds, Esquire
Corynn Colleen Gasbarro, Esquire
Department of Health
Prosecution Services Unit
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

The issue in this case is whether Kenneth D. Stahl, M.D. ("Dr. Stahl" or "Petitioner"), is entitled to an award of attorneys' fees and costs to be paid by the Department of Health, Board of Medicine ("Department" or "Respondent"), pursuant to section 57.105, Florida Statutes (2014).[1/]

PRELIMINARY STATEMENT

Respondent rendered a Final Order adopting recommended Findings of Fact and Conclusions of Law and dismissing the Second Administrative Complaint that had been filed against Petitioner in Department of Health v. Kenneth D. Stahl, Case No. 15-0775PL (Fla. DOAH July 15, 2015; Fla. DOH Oct. 22, 2015)("the underlying proceeding"). That Final Order was not appealed.

Dr. Stahl, who had filed an earlier motion for attorneys' fees in DOAH Case No. 15-0775PL, renewed that motion on November 19, 2015. The motion asserted that he was the prevailing party in the underlying proceeding and that Respondent knew or should have known that, at the time the Administrative Complaint was served, it was not supported by the material facts necessary to establish its claims and was not supported by the application of then-existing law to those material facts. DOAH Case No. 15-6760F was opened on November 24, 2015.

Respondent's Response to Petitioner's Amended Motion for Attorney's Fees was filed on November 25, 2015, reiterating facts

that were undisputed at hearing in the underlying proceeding and maintaining that the undisputed facts and then-existing law clearly supported the Administrative Complaint. The response also alleged that because the Recommended Order did not reserve jurisdiction to determine attorneys' fees, that DOAH had no jurisdiction.

Following a telephonic case management conference on December 1, 2015, it was agreed by the parties that entitlement to attorneys' fees could be determined based upon the pleadings in this case, and the pleadings, record, and Orders in the underlying proceeding, without the need for an evidentiary hearing. It was agreed that, if it was determined that Petitioner was entitled to fees, and the parties could not agree on the amount of the award, a separate hearing would then be convened to address that issue.

FINDINGS OF FACT

1. Review of the record indicates that, at the time the Administrative Complaint was filed at DOAH, the following facts were known by Respondent, as later stated in the Findings of Fact of the Final Order of the underlying case:

a. In February 2011, Patient C.C., a 52-year-old female, was admitted to Jackson Memorial Hospital ("JMH") with a diagnosis of perforated appendicitis. She also had a perirectal abscess. Her records indicate that she was treated with percutaneous drainage

and a course of intravenous antibiotics. She was discharged on March 4, 2011.

b. On June 22, 2011, Patient C.C. presented to the JMH Emergency Department complaining of 12 hours of abdominal pain in her right lower quadrant with associated nausea and vomiting. Shortly after her arrival, she described her pain to a nurse as "10" on a scale of one to ten.

c. A computed tomography ("CT") scan of Patient C.C.'s abdomen was conducted. The CT report noted that the "the uterus is surgically absent," and "the ovaries are not identified." It noted that "the perirectal abscess that was drained previously is no longer visualized" and that the "appendix appears inflamed and dilated." No other inflamed organs were noted. The radiologist's impression was that the findings of the CT scan were consistent with non-perforated appendicitis.

d. Patient C.C.'s pre-operative history listed a "total abdominal hysterectomy" on May 4, 2005. Patient C.C.'s prior surgeries and earlier infections had resulted in extensive scar tissue in her abdomen.

e. Patient C.C. was scheduled for an emergency appendectomy and signed a "Consent to Operations or Procedures" form for performance of a laparoscopic appendectomy, possible open appendectomy, and other indicated procedures.

f. Patient C.C. was taken to surgery at approximately 1:00 a.m. on June 23, 2011. Dr. Stahl was the attending physician, and notes indicate that he was present throughout the critical steps of the procedure.

g. The Operative Report was dictated by Dr. Eddie Manning after the surgery and electronically signed by Dr. Stahl on June 23, 2011. The report documents the post-operative diagnosis as "acute on chronic appendicitis" and describes the dissected and removed organ as the appendix.

h. Progress notes completed by the nursing staff record that, on June 23, 2011, at 8:00 a.m., Patient C.C. "denies pain" and that the laparoscopic incision is intact.

i. Similar notes indicate that at 5:00 p.m. on June 23, 2011, Patient C.C. "tolerated well reg diet" and was waiting for approval for discharge.

j. Patient C.C. was discharged on June 24, 2011, a little after noon, in stable condition.

k. On June 24, 2011, the Surgical Pathology Report indicated that the specimen removed from Patient C.C. was not an appendix, but instead was an ovary and a portion of a fallopian tube. The report noted that inflammatory cells were seen.

l. Surgery to remove an ovary is an oophorectomy and surgery to remove a fallopian tube is a salpingectomy.

m. On Friday, June 24, 2011, Dr. Nicholas Namias, chief of the Division of Acute Care Surgery, Trauma, and Critical Care, was notified by the pathologist of the results of the pathology report, because Dr. Stahl had left on vacation. Dr. Namias arranged a meeting with Patient C.C. in the clinic the following Monday. At the meeting, Patient C.C. made statements to Dr. Namias regarding her then-existing physical condition, including that she was not in pain, was tolerating her diet, and had no complaints. Dr. Namias explained to Patient C.C. that her pain may have been caused by the inflamed ovary and fallopian tube or may have been caused by appendicitis that resolved medically, and she might have appendicitis again. He explained that her options were to undergo a second operation at that time and search for the appendix or wait and see if appendicitis recurred. He advised against the immediate surgery option because she was "asymptomatic."

2. The Second Amended Administrative Complaint alleged that Dr. Stahl performed a wrong procedure when he performed an appendectomy which resulted in the removal of Patient C.C.'s ovary and a portion of her fallopian tube instead.

3. The Final Order concluded that the evidence did not clearly show that the wrong procedure was performed. It concluded that it was more likely that exactly the right procedure was performed on Patient C.C. That is, it was likely that an

oophorectomy and salpingectomy were the right procedures to remove the inflamed organs and address the abdominal pain that caused Patient C.C. to present at the JMH emergency room, but that the right procedure was initially denominated incorrectly as an "appendectomy," as a result of patient history and erroneous interpretation of the CT scan.

CONCLUSIONS OF LAW

4. Respondent asserts that DOAH lacks jurisdiction. Section 57.105 provides, in pertinent part:

> (4) 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.
>
> (5) In administrative proceedings under chapter 120, an administrative law judge shall award a reasonable attorney's fee and damages to be paid to the prevailing party in equal amounts by the losing party and a losing party's attorney or qualified representative in the same manner and upon the same basis as provided in subsections (1)-(4). Such award shall be a final order subject to judicial review pursuant to s. 120.68. If the losing party is an agency as defined in s. 120.52(1), the award to the prevailing party shall be against and paid by the agency. A voluntary dismissal by a nonprevailing party does not divest the administrative law judge of jurisdiction to make the award described in this subsection.

5. Respondent asserts that DOAH has no jurisdiction because Petitioner's Proposed Recommended Order did not discuss attorneys' fees, and the Recommended Order did not reserve jurisdiction.

6. Respondent is correct that the Recommended Order contained no reservation of jurisdiction to consider attorneys' fees. There was no indication in the pleadings that fees were at issue. Petitioner here filed no answer to the Administrative Complaint in the underlying proceeding.[2/] The first motion for attorneys' fees was not filed until September 16, 2015, about two months after the Recommended Order had been issued on July 15, 2015. The Final Order was issued on October 23, 2015, and a renewed motion for fees was filed on November 19, 2015.

7. Unlike some other attorneys' fees provisions,[3/] section 57.105 contains no direction as to when or how a request for attorneys' fees shall be made. The language quoted above, that the award of fees in an administrative proceeding shall be awarded "in the same manner" and upon the same basis as in civil proceedings, requires consideration. The Florida Supreme Court in Stockman v. Downs, 573 So. 2d 835, 837 (Fla. 1991), held:

> Our review of the case law leads us to the conclusion that the better view is the one expressed in our earlier cases--a claim for attorney's fees, whether based on statute or contract, must be pled. The fundamental concern is one of notice. Modern pleading requirements serve to notify the opposing party of the claims alleged and prevent

> unfair surprise. 40 Fla. Jur 2d Pleadings Section 2 (1982). Raising entitlement to attorney's fees only after judgement fails to serve either of these objectives. The existence or nonexistence of a motion for attorney's fees may play an important role in decisions affecting a case. For example, the potential that one may be required to pay an opposing party's attorney's fees may often be determinative in a decision on whether to pursue a claim, dismiss it, or settle. A party should not have to speculate throughout the entire course of an action about what claims ultimately may be alleged against him. Accordingly, we hold that a claim for attorney's fees, whether based on statute or contract, must be pled. Failure to do so constitutes a waiver of the claim.

The court went on to hold that once pled, proof of attorneys' fees could be presented after judgment, upon motion within a reasonable time.

8. Shortly afterwards, in Ganz v. Hzj, 605 So. 2d 871, 872-73 (Fla. 1992), the court considered an earlier version of section 57.105 and declined to apply the "no plea, no fees" rule of Stockman. The court found that it would be extremely difficult, if not impossible, for a party to plead in good faith its entitlement to attorneys' fees under section 57.105 before the case ended, because only then could a reasonable judgment be made as to whether only frivolous issues had been raised.

9. It might reasonably be argued that the Ganz opinion was predicated upon the "complete absence of a justiciable issue of either law or fact" language that then appeared in

section 57.105, since repealed, and that therefore the pleading requirement of Stockman should now be applied.[4/] However, section 57.105 now also includes subsection (4), the "safe harbor" provision quoted above, which requires a party seeking fees to serve the motion but not file it until at least 21 days later, allowing the challenged claim or contention to be withdrawn or corrected. In compliance with this provision, it is undisputed that Petitioner served Respondent with his motion for fees on March 20, 2015.

10. This notice requirement brings section 57.105 within an exception recognized by Stockman itself, at page 838:

> Where a party has notice that an opponent claims entitlement to attorney's fees, and by its conduct recognizes or acquiesces to that claim or otherwise fails to object to the failure to plead entitlement, that party waives any objection to the failure to plead a claim for attorney's fees.

11. Respondent, aware of Petitioner's motion for fees, did not object during hearing to Petitioner's failure to plead entitlement, and so waived that objection.

12. As for the timeliness of the motion, prior to the adoption of Florida Rule of Civil Procedure 1.525 in 2001, Florida case law permitted motions for attorneys' fees to be filed within a "reasonable time" of the plaintiff's abandonment of the claim or within a reasonable time after the final judgment

was entered. Barco v. Sch. Bd., 975 So. 2d 1116, 1119 (Fla. 2008). Florida Rule of Civil Procedure 1.525 was adopted to establish an explicit time requirement for service of fee and cost motions in order to resolve the uncertainties caused by the "reasonable time" standard. See Saia Motor Freight Line, Inc. v. Reid, 930 So. 2d 598, 600 (Fla. 2006).

13. As the Uniform Rules applicable to administrative proceedings still contain no guidance as to the appropriate time to file fee or cost motions, these "uncertainties" may remain, but in this case, the motion was filed 27 days after the Final Order that made Petitioner a prevailing party, raising no issue. The motion was timely.

14. By the explicit terms of the statute, a request for award of attorneys' fees made pursuant to section 57.105(5) is to be considered by an administrative law judge. The determination is a final order subject to judicial review. § 57.105(5), Fla. Stat.; Jain v. Fla. Agric. & Mech. Univ., 914 So. 2d 998, 999 (Fla. 1st DCA 2005).

15. DOAH has jurisdiction over the parties and the subject matter of this proceeding under sections 120.569, 120.57(1), and 57.105(5), Florida Statutes (2015).

16. Petitioner has the burden of proving by a preponderance of the evidence that he is entitled to an award of attorneys' fees. Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla.

1st DCA 1981); Balino v. Dep't of HRS, 348 So. 2d 349 (Fla. 1st DCA 1977); § 120.57(1)(j), Fla. Stat.

17. The standard for award of fees established by section 57.105 reads, in pertinent part, as follows:

> (1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee, . . . on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:
>
> (a) Was not supported by the material facts necessary to establish the claim or defense; or
>
> (b) Would not be supported by the application of then-existing law to those material facts.

18. Petitioner first argues that Respondent knew, or should have known, that the Administrative Complaint was not supported by the material facts necessary to establish its claims. The phrase "supported by material facts" was defined in Albritton v. Ferrera, 913 So. 2d 5, 7 n.1 (Fla. 1st DCA 2005), to mean that the "party possesses admissible evidence sufficient to establish the fact if accepted by the finder of fact." If the losing party "presents competent, substantial evidence in support of the claim . . . and the trial court determines the issue of fact adversely to the losing party based on conflicting evidence," fees are not warranted. Siegel v. Rowe, 71 So. 3d 205, 212 (Fla. 2d DCA 2011).

19. There was competent, substantial evidence introduced by Respondent at hearing, undisputed by Petitioner, showing that: (1) the patient had earlier been diagnosed with a perforated appendix; (2) based upon the patient's history and the CT scan, the reasonable initial diagnosis was acute appendicitis; (3) Dr. Stahl was scheduled to perform an appendectomy and believed he was performing an appendectomy throughout the procedure; and (4) that he actually performed a different procedure.

20. Section 456.072(1)(bb), Florida Statutes, provides that the act of performing a wrong procedure constitutes grounds for which disciplinary action may be taken. Whether Dr. Stahl committed that act is a question of ultimate fact. This was the critical dispute between the parties.

21. Ultimate facts are "those facts found in that vaguely defined field lying between evidential facts on the one side and the primary issue or conclusion of law on the other, being but the logical results of the proofs, or, in other words, mere conclusions of fact." Tedder v. Fla. Unemp. App. Comm'n, 697 So. 2d 900, 902 (Fla. 2d DCA 1997)(Danahy, A.C.J., specially concurring)(citing Black's Law Dictionary 1365 (5th ed. 1979). Ultimate facts are those facts which are necessary to determine the issues in a case, as distinguished from the evidentiary facts supporting them. Id.

22. There was no evidence presented at hearing to bolster the pre-operative diagnosis of acute appendicitis, and Dr. Stahl was convincing in his demonstration that he acted reasonably in removing an infected organ he wrongly thought was the appendix. It was determined in the Final Order that Respondent failed to prove the ultimate fact that, when Dr. Stahl performed the oophorectomy and salpingectomy, these were the wrong procedures.

23. But fees are not necessarily appropriate just because the underlying proceeding was decided in Petitioner's favor. Even when the party seeking fees succeeds in obtaining dismissal of the action or a summary judgment, fees are not automatic. Read v. Taylor, 832 So. 2d 219, 222 (Fla. 4th DCA 2002).

24. While the Final Order made a finding of ultimate fact contrary to the position of Respondent, Respondent did present competent, substantial evidence in support of its position that might have convinced another trier of fact, but was simply not accepted. It cannot be concluded that Respondent's complaint was meritless or not supported by material facts. Martin Cnty. Conser. Alliance v. Martin Cnty., 73 So. 3d 856, 857 (Fla. 1st DCA 2011)(party wrongfully required to defend against meritless claim is entitled to recoup attorneys' fees).

25. Petitioner failed to prove that he is entitled to attorneys' fees under section 57.105(1)(a).

26. Petitioner also seeks to sanction Respondent's counsel,[5/] claiming that they knew or should have known that the Administrative Complaint was not supported under existing law. Petitioner asserts that in every other "wrong procedure" case Respondent has prosecuted, the "patient had to be taken back to surgery shortly after the initial procedure to have the correct procedure performed."

27. Even assuming that Petitioner is correct that a rapid return to the operating room is more than simply a factual difference and should be considered a necessary element of any wrong procedure case, Petitioner failed to cite any existing law so holding. Neither did Respondent cite any existing law confirming its position. This was not surprising. A surgeon who is scheduled to perform one operation and believes he is performing it throughout the procedure, but actually performs a different procedure that turns out to the one needed by the patient is highly unusual. Application of the statute to those facts was a case of first impression.

28. When there is a lack of applicable case law, the existence of two different legal theories does not provide a basis for imposition of sanctions under section 57.105(1)(b). See Jelencovich v. Dodge Enters., 2010 U.S. Dist. LEXIS 9453, *2 (S.D. Fla. Jan. 8, 2010)(considering both section 57.105 and

Federal Rule 11 and citing Laborers Local 938 Joint Health & Welfare Trust Fund v. B.R. Starnes Co. of Fla., 827 F.2d 1454, 1458 (11th Cir. 1987)("Rule 11 is intended to deter frivolous suits, not to deter novel legal arguments or cases of first impression.")).

29. Petitioner failed to prove that he is entitled to fees from Respondent's attorneys under section 57.105(1)(b).

30. Although the Recommended Order and Final Order in the underlying proceeding were favorable to Petitioners, it was not shown that Respondent knew or should have known that the Administrative Complaint was unsupported by the material facts necessary to establish its claims or that it was not supported by the application of then-existing law to those facts so as to warrant an award of attorneys' fees under section 57.105.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby:

ORDERED that Petitioner's Amended Motion for Attorneys' Fees is denied.

DONE AND ORDERED this 23rd day of December, 2015, in Tallahassee, Leon County, Florida.

F. SCOTT BOYD
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of December, 2015.

ENDNOTES

[1/] Unless otherwise indicated, all references to the Florida Statutes are to the 2014 codification in effect at the time the Department initiated the Administrative Complaint against Petitioner.

[2/] An answer is permitted, but not required, under Florida Administrative Code Rule 28-106.203.

[3/] Compare section 57.111(4)(b)2., providing that application for attorneys' fees must be made within 60 days after the small business party becomes a prevailing party.

[4/] The rule in Ganz might be understood to distinguish between statutes that provide entitlement to fees because of the inherent nature of the underlying claim or defense, in which the basis for fees is known from the outset, and statutes that provide entitlement to fees based on some event that occurs during the cause of action, which cannot be anticipated. Advanced Chiropractic & Rehab. Ctr. v. United Auto. Ins. Co., 140 So. 3d 529, 536 (Fla. 2014). Section 57.105 provides fees in both situations.

[5/] See § 57.105(3)(c), Fla. Stat.; Waddington v. Baptist Med. Ctr. of the Beaches, Inc., 78 So. 3d 114, 117 (Fla. 1st DCA 2012)(fees awarded under section 57.105(1)(b) must be paid in full by offending party's counsel, if the party is represented).

COPIES FURNISHED:

John B. Fricke, Jr., Esquire
Jay Patrick Reynolds, Esquire
Corynn Colleen Gasbarro, Esquire
Department of Health
Prosecution Services Unit
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399
(eServed)

Monica Felder Rodriguez, Esquire
Dresnick and Rodriguez, P.A.
7301 Wiles Road, Suite 107
Coral Springs, Florida 33067
(eServed)

Nichole C. Geary, General Counsel
Department of Health
4052 Bald Cypress Way, Bin A-02
Tallahassee, Florida 32399-1701
(eServed)

John H. Armstrong, M.D., F.A.C.S.
State Surgeon General
Department of Health
4052 Bald Cypress Way, Bin A-00
Tallahassee, Florida 32399-1701
(eServed)

Andre Ourso, Executive Director
Board of Medicine
Department of Health
4052 Bald Cypress Way, Bin C-03
Tallahassee, Florida 32399-3253
(eServed)

Edward A. Tellechea, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050
(eServed)

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, 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 of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.