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### STATEMENT OF THE CASE AND FACTS

A medical malpractice action was filed against Dr. Maurer, Winter Haven Hospital, Dr. Brooks, and the Florida Patient's Compensation Fund (FPCF) for the doctors' and Winter Haven Hospital Inc.'s, (Hospital) negligent treatment of a patient.

The trial court entered final judgment in the amount of \$400,000 for the Plaintiff. This amount was reduced by a \$15,000 settlement reached with co-defendant Brooks. The trial court awarded prevailing party attorney's fees in the amount of \$133,333.33 and taxed those amounts against Dr. Maurer, the Hospital, and the Fund, jointly and severally. Upon motion by Dr. Maurer and Winter Haven Hospital to restrict their respective liabilities to the \$100,000 level prescribed in Section 768.54, Florida Statutes (1981), the trial court entered an order granting motions to limit liability and finding the FPCF liable for the balance of final judgment including the costs and Section 768.56 prevailing party attorney's fees taxed against Dr. Maurer and the Hospital. The FPCF appealed and the Second District reversed the trial court and held that the FPCF's position is correct and that Dr. Maurer and the Hospital were liable for costs under the terms of their underlying liability policies and that Dr. Maurer and the Hospital were liable for attorney's fees awarded the prevailing party plaintiff pursuant to Section

768.56, which was repealed last year. Chapter 85-175, §43, Laws of Florida (1985).

Dr. Maurer seeks review of the Second District's decision on the basis of conflict between the Second District's holding on the attorney's fee issue and the third district's holding on a similar issue relating to prevailing party attorney's fees in Bouchoc v. Peterson.

### SUMMARY OF THE ARGUMENT

The decision of the District Court of Appeal, Second District, in Florida Patient's Compensation Fund v. Maurer, Case No. 85-2734, (Fla. 2d DCA, August 22, 1986), does expressly and directly conflict with the decision of the District Court of Appeal, Third District, in Bouchoc v. Peterson, 490 So.2d 132 (Fla. 3d DCA 1986), as to the issue of whether the limitation of liability enjoyed by a health care provider pursuant to Section 768.54 (2)(b), Florida Statutes (1981) is not intended to foreclose imposing Section 768.56 prevailing plaintiff's attorney's fees upon the health care providers.

The decision of the Second District in the present case correctly reversed the trial court and correctly held that Dr. Maurer and Winter Haven Hospital, Inc., the unsuccessful defendants in a medical malpractice action, were responsible for the payment of costs of \$15,355.30 and attorney's fees in the amount of \$133,333.33 awarded the prevailing plaintiff.

The holding of the Second District regarding Dr. Maurer's and Winter Haven Hospital's liability to the plaintiff for costs does not conflict with any decision of the Supreme Court or another District Court of Appeal, and no such conflict is alleged by Petitioner.

Contrary to Petitioner's assertion of a further basis for this court acceptance of jurisdiction, Respondent points out that the Second District's decision in the present case is wholly consistent with the meaning and purpose of Section 768.54. This Court should exercise its discretionary jurisdiction to accept jurisdiction in Florida Patient's Compensation Fund v. Bouchoc, presently pending before this court on petition for review, Case No. 69,230, and quash the decision of the Third District in Bouchoc. This Court should then deny review in the present case. In the alternative, this Court should accept review of the decision of the Second District in the present case as well as Bouchoc, approve the present decision and quash the Third District's decision in Bouchoc.

## ARGUMENT

AS RELATES ONLY TO THE ISSUE ON ATTORNEY'S FEES, THE DECISION OF THE SECOND DISTRICT IN THE PRESENT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH BOUCHOC V. PETERSON, 490 So.2d 132 (FLA. 3d DCA 1986).

The Second District in the present case has reached a different conclusion than reached by the third district in Bouchoc. In the present case the Second District, consistent with the meaning and purpose of Section 768.54, Florida Statutes (1981), accurately concluded that Plaintiff's Section 768.56, prevailing party attorney's fees arise out of, but are by definition not a part of a successful claim, and that excess portion of a claim which the Fund is responsible to pay cannot include Section 768.56 prevailing party attorney's fees. The Second District in the present case reversed the trial court and vacated the Order granting motions to limit liability.

The Third District in Bouchoc, on the other hand in a brief decision, relying on the third district's earlier decision of Florida Patient's Compensation Fund v. Miller, 436 So.2d 932 (Fla. 3d DCA 1983) held that the Fund is liable for Section 768.56, prevailing party attorney's fees. The predicate of the earlier Miller decision relied upon by the Third District Court

in Bouchoc, however, was undermined by this Court's later decision in Taddiken v. Florida Patient's Compensation Fund, 478 So.2d 1058 (Fla. 1985).

CONCLUSION

If this Court accepts jurisdiction in the present case, which is within its discretion to do because of the express and direct conflict between decisions of the Second and Third Districts, this Court should approve the decision of the Second District in the present case and quash the third district's decision in Bouchoc.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copies of the foregoing Respondent's Brief on Jurisdiction were furnished by United States Mail to: JEFFREY C. FULFORD, 1417 E. Concord Street, Suite 101, Orlando, Florida 32803; J. RON SMITH, P. O. Box 1606, Lakeland, Florida 33802; JAMES F. PAGE, JR., P. O. Box 3068, Orlando, Florida 33801; and JULIAN CLARKSON, P. O. Drawer 810, Tallahassee, Florida 32302, this 16th day of October, 1986.



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