

IN THE SUPREME COURT OF FLORIDA

WINTER HAVEN HOSPITAL, INC.,

Petitioner,

vs.

FLORIDA PATIENT'S COMPENSATION  
FUND,

Respondent.

NO. 69,493

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ELMER MAURER, M.D.,

Petitioner,

vs.

FLORIDA PATIENT'S COMPENSATION  
FUND,

Respondent.

NO. 69,421

On Review of Decision of  
the Second District Court of Appeal

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REPLY BRIEF OF  
PETITIONER ELMER MAURER

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#### SUMMARY OF THE ARGUMENT

The Fund incorrectly argues that statutory attorney's fees could have been awarded against the health care providers as costs. This Court held to the contrary long ago in the Barrs case and has adhered to its holding within recent years.

Attorney's fees are to be regarded as "costs" only when made so by statute. Otherwise, they are to be treated as an element of damages.

Florida case law totally rejects the Fund's alternative argument that Dr. Maurer can be held liable under a supplementary payment provision of his insurance or indemnity policy that includes "costs" taxed against him.

REPLY BRIEF OF PETITIONER  
ELMER MAURER

In its answer brief, the Fund repeats an argument that was rejected by the district court of appeal. The Fund contends that the district court "could correctly additionally have determined that these statutory attorney's fees were costs within the contemplation of the supplementary payments provisions of the underlying policies. . . ." (Answer brief at 25)(emphasis added).<sup>1</sup> The district court summarily rejected that argument:

We reject, however, FPCF's further assertion that Maurer and the Hospital should also pay the attorney's fees based upon the premise that such fees are to be treated as costs. We adhere to our view that attorney's fees are costs only when authorized by contract or statute. Grasland v. Taylor Woodrow Homes Ltd., 460 So.2d 940 (Fla. 2d DCA 1984). Neither predicate for such an award exists in the instant matter.

493 So.2d at 511.

Had it not disposed of this argument based on its own precedent, the district court would necessarily have reached the same result because of this Court's prior holdings.

The Fund's argument is rejected in the seminal Florida case of State ex rel. Royal Ins. Co. v. Barrs, 87 Fla. 168, 99 So. 668 (1924). There a plaintiff recovered damages against its insurer and was awarded attorneys' fees pursuant to a statute authorizing such fees when judgment is rendered in favor of the beneficiary in an insurance policy. Aggregation of the damages

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<sup>1</sup>The Fund did not argue that attorney's fees are costs in the Bouchoc case.

and attorneys' fees resulted in an amount exceeding the jurisdiction of the court. The plaintiff argued, as the Fund does here, that the attorneys' fees were a part of the costs and did not affect the jurisdiction of the court. Disagreeing, this Court held:

The statute in this case does not make the allowable attorney fees a part of the costs in the case, but deals with them as a separate matter of recovery; therefore the recoverable attorney fees here cannot be regarded as costs, in determining the jurisdiction of the court.

99 So. at 670.

None of the cases cited by the Fund (Br. 26-27) departs from the holding of Barrs. To the contrary, Barrs is cited as controlling authority in most of them. Although when "spot-read"<sup>2</sup> the Fund's cases appear to support its argument, when read as a whole they are not controlling on the precise issue involved here.<sup>3</sup>

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<sup>2</sup>Terrell, A.C.J., in Codomo v. Emanuel, 91 So.2d 653, 655 (Fla. 1956).

<sup>3</sup>These cases simply do not address the precise point for which the Fund has cited them. E.g., Codomo v. Emanuel, supra ("right to recover attorneys' fees as part of the costs . . . must be provided by statute or contract," citing Shavers v. Duval County, 73 So.2d 685 (Fla. 1954)); Shavers, supra ("attorney's fees cannot be taxed as costs in any cause unless provided for by contract or by statute," citing Barrs); River Road Construction Company v. Ring Power Corporation, 454 So.2d 38 (Fla. 1st DCA 1984) (cites Golub v. Golub, 336 So.2d 693 (Fla. 2d DCA 1976), which cites Barrs, for premise that "costs are statutory allowances recoverable . . . as an incident to the main adjudication").

Barrs is still good law today. Just three years ago, in Wiggins v. Wiggins, 446 So.2d 1078, 1079 (Fla. 1984), the Court said:

(T)he term "costs" is not generally understood as including attorney's fees. State ex rel. Royal Insurance Co. v. Barrs, 87 Fla. 168, 99 So. 668 (1924).

In another case involving a question of jurisdiction, the Third District Court of Appeal followed Barrs in concluding that statutory attorney's fees could not be considered costs. The court said:

In State ex rel. Royal Ins. Co. v. Barrs, 87 Fla. 168, 99 So. 668 (1924), our Supreme Court held that attorney's fees recoverable by statute are to be regarded as "costs" only when made so by statute. Otherwise, they are to be treated as an element of damages. Since Fla Stat. §627.0127, F.S.A., does not specifically provide that attorney's fees are to be regarded as costs, we must consider them as an element of the plaintiff's damages. . . .

Prudential Insurance Co. v. Lamm, 218 So.2d 219 (Fla. 3d DCA), cert. denied, 225 So.2d 529 (Fla. 1969).

In another decision, the Third District characterized the distinction between costs and attorneys' fees as "well-settled" in American jurisprudence. Dade County v. Strauss, 246 So.2d 137, 141 (Fla. 3d DCA 1971).

Most recently, the Third District noted that the statute involved here "does not contain a provision making the fees a

part of costs." Simmons v. Schimmel, 476 So.2d 1342, 1345 n. 3 (Fla. 3d DCA 1985).<sup>4</sup>

The Eleventh Circuit Court of Appeals surveyed the law of Florida on the point at issue and concluded that Florida law presently regards statutory attorney fees as costs "only when made so by statute," citing Lamm. Certain British Underwriters v. Jet Charter Service, 739 F.2d 534 (11th Cir. 1984).

To be distinguished is the circumstance present in Allen v. Estate of Dutton, 384 So.2d 171 (Fla. 5th DCA 1980), involving attorney fees awarded under section 57.105, Florida Statutes. There the Fifth District Court of Appeal divined legislative intent by placement of the statute in the chapter dealing with court costs. The court said:

Attorney's fees are properly costs in a case only when made so by statute. (Citing Barrs and other cases.) The Legislature in enacting chapter 78-275, Laws of Florida (Supp. 1978) clearly promulgated a new section to be known as section 57.105, Florida Statutes. The heading of chapter 57 in the statute books is "Court Costs." By specifically incorporating this new provision for attorney's fees into chapter 57, it is obvious that the Legislature intended to treat this award as part of the only subject matter therein, court costs. **We** therefore hold that attorney's fees **when** properly awarded under section 57.105, Florida Stat-

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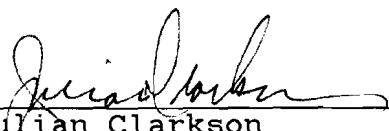
<sup>4</sup> See also Finkelstein v. North Broward Hospital District, 484 So.2d 1241 (Fla. 1986) (post-judgment motion for prevailing party attorney's fees raises a "collateral and independent" claim not within scope of court's reservation of jurisdiction to tax costs); Traveler's Indemnity Company v. Hutchins, 489 So.2d 208 (Fla. 2d DCA 1986) (attorney's fees awarded under section 627.428, Florida Statutes (1985) could not be considered as costs).

utes (Supp. 1978), may be awarded as part of court costs.

384 So.2d at 174 (emphasis in original). The Second District adopted the same view in Grasland, supra, and adhered to its ruling in the present case.

The decisions involving Chapter 57 do not aid the Fund. In enacting section 768.56,<sup>5</sup> the Legislature did not provide, either expressly or inferentially, that attorney's fees should be awarded as costs. Consequently, the trial court was entirely correct in making a separate award of attorney's fees rather than taxing them as costs.<sup>6</sup>

In sum, Florida law totally rejects the Fund's alternative argument that the health care providers can be held liable for attorney's fees under the supplementary payment provisions of their insurance or indemnity policies.

  
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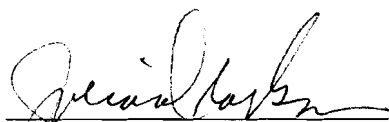
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<sup>5</sup>Chapter 80-67, Laws of Florida.

<sup>6</sup> See "Order Taxing Cost and Assessing Attorney's Fees," appendix to Petitioner's initial brief at 8.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Reply Brief of Petitioner were served by U. S. Mail upon MARGUERITE H. DAVIS, 315 South Calhoun Street, Suite 800, Tallahassee, Florida 32301; JEFFREY C. FULFORD, 1417 E. Concord Street, Suite 101, Orlando, Florida 32803; J. RON SMITH, P. O. Box 1606, Lakeland, Florida 33802; and JAMES F. PAGE, JR., P. O. Box 3068, Orlando, Florida 33801, this 26th day of March, 1987.



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