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IN THE SUPREME COURT OF FLORIDA

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WINTER HAVEN HOSPITAL, INC. Petitioner, v. FLORIDA PATIENT'S COMPENSATION FUND, Respondent.	:	CASE NO.: 69,493

DISCRETIONARY REVIEW OF THE
THIRD DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON JURISDICTION

MARGUERITE H. DAVIS
SWANN & HADDOCK, P.A.
315 South Calhoun St.
Suite 800
Tallahassee, Fl 32301
904/224-9634

Attorneys for Florida
Patient's Compensation Fund

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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. This action resulted in final judgment for the Plaintiff. The trial court then pursuant to Section 768.56, Florida Statutes (1981), 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 Dr. Maurer and Winter Haven 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and the Hospital were liable for attorney's fees awarded the prevailing party plaintiff pursuant to Section 768.56, repealed last year. Chapter 85-175, §43, Laws of Florida (1985).

Winter Haven Hospital, Inc. 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. Review from the present decision of the Second District has already been sought by Dr. Maurer in Case No. 69,421. Jurisdictional briefs have been filed in that case by both petitioner, Dr. Maurer, and the Respondent, Florida Patient's Compensation Fund.

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), conflicts with the decision of the District Court of Appeal, Third District, in Bouchoc v. Peterson, 490 So.2d 132 (Fla. 3d DCA 1986), on the issue of liability for the Section 768.56 prevailing plaintiff's attorney's fees.

The decision of the Second District in the present case correctly reversed the trial court and 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 pursuant to the terms of their underlying insurance coverage policies and for the payment attorney's fees in the amount of $133,333.33 awarded the prevailing plaintiff.

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).

Again Respondent would point out that Section 768.56, pursuant to which attorney's fees were awarded the prevailing party in the present case, has now been repealed.

CONCLUSION

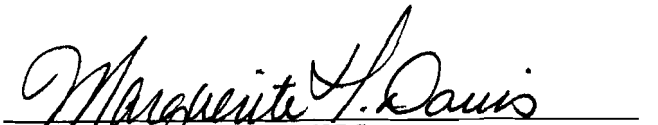
If this Court accepts jurisdiction in the present case, which is within its discretion to do because of the express and direct conflict between decisions of the Second and Third Districts, this Court should approve the decision of the Second District in the present case and quash the Third District's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

MARGUERITE H. DAVIS
SWANN & HADDOCK, P.A.
315 South Calhoun St.
Suite 800
Tallahassee, FL 32301
904/224-9634

Attorneys for Respondent

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 21st day of October, 1986.



MARGUERITE H. DAVIS
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315 South Calhoun St.
Suite 800
Tallahassee, FL 32301
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Attorneys for Respondent