IN THE SUPREME COURT OF FLORIDA

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

BRIEF OF PETITIONER ELMER MAURER
ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

In this case "the trial court determined the Florida Patient's Compensation Fund is solely responsible for the payment of the costs and attorney's fees taxed against Elmer Maurer, M.D. (Maurer), and the Winter Haven Hospital, Inc. (Hospital), the unsuccessful defendants in a medical malpractice action.[1]

"The litigation underlying the present proceeding was initiated against Maurer, the Hospital and the Florida Patient's Compensation Fund (FPCF) in 1982."

Prior to trial, Dr. Maurer tendered his $100,000 underlying coverage.

"A final judgment was entered upon a jury verdict awarding the plaintiff $400,000.00. The final judgment was later reduced by amendment to $385,000.00 because of a $15,000.00 settlement reached with a codefendant. Thereafter, the trial court, pursuant to section 768.56, Florida Statutes (1981), awarded the prevailing plaintiff costs totalling $15,355.30 and attorney's fees in the amount of $133,333.33. It taxed those sums against Maurer, the Hospital and FPCF, jointly and severally. Maurer and the Hospital sought to restrict their respective liabilities to the $100,000.00 level prescribed in section 768.54, Florida Statutes (1981), and the trial court entered an 'Order Granting Motions To Limit Liability' finding that FPCF was liable for the balance of the final judgment

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[1]All quoted material is taken from the opinion of the district court of appeal (A 1-2).

including the costs and attorney's fees taxed against Maurer and the Hospital."

On appeal by the Fund, the Second District Court of Appeal held that the Fund cannot be held liable for attorneys' fees and vacated the trial court's order (A 1-2).[2] In so doing, the district court adopted the reasoning of the dissenting opinion in Bouchoc v. Peterson, 490 So.2d 132 (Fla. 3d DCA 1986) (A 3-6). This case has been consolidated with Bouchoc for purposes of oral argument. Both cases present the same issue: whether the Fund may properly be held liable for attorneys' fees awarded a prevailing plaintiff under section 768.56, Florida Statutes.[3]

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[2]The district court further held that the health care providers rather than the Fund should be liable for court costs. Dr. Maurer did not challenge that premise in the district court, and does not challenge it here, solely because the record reflected that Maurer's indemnity agreement with his primary carrier provided for payment of costs in addition to the applicable limit of liability. The district court properly held that "costs" do not include attorneys' fees.

[3]As noted by the district court in its footnote 1: "Section 768.56 was repealed in the 1985 session of the legislature. Ch. 85-175, §43, Laws of Florida."

SUMMARY OF THE ARGUMENT

Under the Medical Malpractice Act, a physician desiring protection from personal liability to a patient follows two courses of action. First, he purchases primary liability insurance coverage up to $100,000. He then purchases additional coverage through the Fund to guarantee (1) full coverage and (2) a statutory limitation of personal liability to $100,000. The Act contemplates that a physician having so protected himself is secure from personal liability. The Act should be interpreted to achieve that result. It should not be interpreted, as the district court of appeal has in this case, to make the physician personally liable for potentially large awards of plaintiffs' attorney's fees.

Under the Act, the liability of health care providers is limited to $100,000. After the health care providers have paid the statutory maximum, the Fund is liable for the excess amount of a judgment, including attorney's fees awarded to a prevailing plaintiff.

In Rowe, this Court held that section 768.56 (the attorney fee statute) was adopted as a part of the Act. It should not be considered in isolation from the entire statutory scheme. In that case, the Fund did not challenge its liability for attorney fees on grounds of statutory construction as it does in this case.

ARGUMENT

THE FUND IS LIABLE FOR ALL AWARDS IN EXCESS OF THE LIMITED LIABILITY OF HEALTH CARE PROVIDERS, INCLUDING ATTORNEY FEE AWARDS. THE DISTRICT COURT OF APPEAL ERRONEOUSLY HELD TO THE CONTRARY.

The disposition achieved by the district court of appeal is totally unrealistic; it ignores the manner in which medical negligence claims are resolved. The physician does not control the litigation; the Fund and his primary carrier do. It is they in combination who decide whether to litigate or settle. Manifestly, in cases portending damages substantially in excess of the limited liability of health care providers -- as this one and Bouchoc -- the Fund is master of its own destiny.

That reality is present here. Dr. Maurer, through his primary carrier, tendered the maximum amount of his limited liability ($100,000). Having done so, he had done all he could to achieve settlement without trial. Trial was required because of the Fund's attempt to minimize payment under its excess coverage -- an attempt that forced Maurer to provide the Fund with a defense as required by the Medical Malpractice Act. The jury returned a verdict awarding the plaintiff $400,000.[4] Having gambled on trial rather than settling, the Fund is in a poor position to argue, as it successfully did in the district court of appeal, that the health care providers, rather than the Fund, should pay the plaintiff's attorneys' fees, as well as the cost

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[4]In Bouchoc, the plaintiff's verdict was $750,000.

of their own defense. Neither the trial court in this case nor the Third District Court of Appeal in the Bouchoc case was misled by the Fund's argument.

Maurer's primary carrier is not a party to this action because primary carriers are not joined in malpractice actions. But the relationship between the physician and his primary carrier is significant in apportioning responsibility under the Medical Malpractice Act. To obtain the limitation of liability under the Act, the physician must provide the underlying $100,000 either by purchasing primary insurance coverage or by becoming a self-insurer. In the former instance, he contracts with an insurer for primary coverage. The decision of the district court of appeal in this case overlooks the circumstance that a court cannot impose upon the primary carrier a responsibility for attorney's fees in excess of primary policy limits when the contract does not so provide.[5] Cf. Highway Casualty Company v. Johnston, 104 So.2d 734 (Fla. 1958).

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[5]A carrier writing $100,000 primary coverage does so with the expectation that its liability will be limited to that amount and charges a premium commensurate with the limited risk assumed. But the Fund assumes unlimited liability by the express terms of the Act creating the Fund. It sets its membership fees in recognition of this unlimited liability.

History has taught that attorney fees awarded under the Act can far exceed the statutory limitation of liability authorized for health care providers. E.g., Florida Patient's Compensation Fund v. Von Stetina, 436 So.2d 1022 (Fla. 4th DCA 1983), reversed on other grounds, 474 So.2d 783 (1985) ($4.4 million attorneys' fee awarded by trial court reduced on appeal to $1.5 million).

The decision of the Third District Court of Appeal in Bouchoc recognizes the reality of the considerations detailed above. As we shall see below, the Bouchoc majority also has achieved a just result fully compatible with the purpose of the Act and of the Fund's responsibility under it as adjudicated in every case prior to the present aberrational decision of the Second District.

The Third District's majority opinion in Bouchoc correctly based its decision on two earlier decisions, one of its own and one by this Court.

In Florida Patient's Compensation Fund v. Miller, 436 So.2d 932 (Fla. 3d DCA 1983), the Fund argued that section 768.54 of the Act does not specify attorney fees as part of a claim for which the Fund can be held liable.[6] Rejecting that argument, a majority of the panel upheld the trial court's attorney fee award against the Fund and held that the liability of the defendant health care providers was limited to $100,000 each.

More recently, in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), a decision upholding the constitutionality of section 768.56, this Court squarely answered

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[6] Miller involved a different kind of attorney fee award. There, Mt. Sinai Hospital asserted a right of common law indemnity against Miller because of his primary liability. The right to indemnity included a claim for attorney fees incurred in defending the action brought by the plaintiff. Because the Medical Malpractice Reform Act requires each health care provider to provide an adequate defense for the Fund, Judge Pearson dissented from the holding that a defendant's attorney fees could be assessed against the Fund. That distinction is not presented here.

the Fund's usual argument that the attorney fee section is not a part of the comprehensive reach of the Act. The Court said:

> The subject statute, section 768.56, was adopted as part of the Medical Malpractice Reform Act and became effective July 1, 1980.

472 So.2d at 1147 (emphasis supplied). Clearly, the Court did not intend that the 1980 amendment providing for attorney fees be considered in isolation from the statutory scheme.

The history of the Rowe case on its way to this Court is even more instructive. At the trial court level, the Fund was ordered to pay the plaintiff's costs and attorney fees after the hospital's $100,000 primary coverage level was exhausted -- the precise situation involved in the present case.[7] The Fund's appeal did not challenge that holding; instead, it urged that the attorney fee statute was unconstitutional.[8] That argument was ultimately rejected by this Court. Having lost its challenge on constitutional grounds,[9] the Fund thereafter uniformly sought to

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[7]The trial court's order in Rowe included the following finding: "The Court finds the Fund is obligated for plaintiff (sic) cost and attorney's fees set forth herein after the hospital's $100,000 limit is exhausted." (Appellant's appendix at 4, Florida Supreme Court case no. 64,459.)

[8]The Fund's Notice of Appeal identified the nature of the order appealed as follows: "The nature of the Order is a Final Order ruling on all post-trial motions, including a specific finding by the Court that . . . the FLORIDA PATIENT'S COMPENSATION FUND is obligated to pay costs and a reasonable attorneys' fee to the Plaintiff/Appellee on behalf of the Fund member." (Florida Supreme Court case no. 64,459).

[9]As noted by the majority opinion in Bouchoc: "The Fund's standing to challenge the statute rested on the unaddressed premise that the Fund could be liable to pay attorney's fees where it was a nonprevailing party." 490 So.2d at 132.

avoid responsibility for paying plaintiff's attorney fees by arguing that the health care providers should bear that burden.

In Bouchoc, the dissenting judge quoted the Fund's argument that requiring it to bear the burden of attorney fee awards exceeding a health care provider's $100,000 limit "could have a chilling effect on pre-trial settlements." 490 So.2d at 135. Of course, as this case demonstrates, the reverse is true. It was the Fund's, not the health care providers', refusal to enter into serious settlement negotiations that forced a trial of the case. Under those circumstances, it would hardly be equitable to require the health care providers rather than the Fund to pay the attorney fee award.[10]

In sum, there is nothing in the Act, in the court decisions construing it, or in principles of equity[11] that supports the argument being made by the Fund in this case.

This Court's prior constructions of the Medical Malpractice Reform Act amply refute the argument now being made by the Fund. The Court has found that the statutory scheme is

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[10]It is true that promoting settlement of claims was one of the purposes behind the 1980 attorney fee amendment. The legislative preamble provided in part: "WHEREAS, an alternative to the mediation panels is needed which will similarly screen out claims lacking in merit and which will enhance the prompt settlement of meritorious claims. . . . " Chapter 80-67, Laws of Florida (emphasis supplied).

[11]In Bouchoc, the dissenting judge posited that requiring the Fund to pay the entire plaintiff's fee assessed "effectively nullifies" the equitable allocation portion of the statute. That assertion obviously overlooks cases in which judgments lower than $100,000 are entered against health care providers.

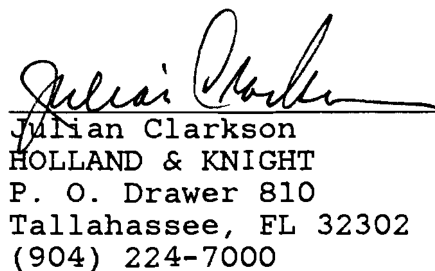
designed to ensure sufficient funding to pay substantial judgments to medical malpractice victims and has said:

> The scheme that makes the Fund party to a medical malpractice action and responsible for portions of awards in excess of $100,000 does not substantially violate or change any of the plaintiff's vested rights.

Von Stetina, supra, at 788-89 (emphasis added). The district court's refusal to adhere to that scheme requires that the decision below be quashed insofar as it exonerates the Fund from its statutory liability to pay the attorneys' fees awarded the plaintiff.

CONCLUSION

The district court's decision should be quashed with directions to enter a new order affirming that portion of the trial court's judgment adjudicating the Fund to be liable for plaintiff's attorneys' fees. The conflicting decision of the Third District Court of Appeal in Bouchoc should be approved.



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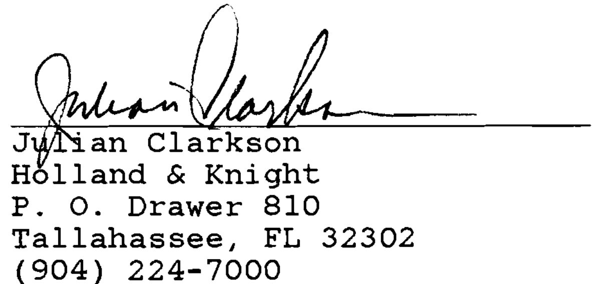
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Petitioner's Brief on the Merits 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 6th day of February, 1987.



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