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STATEMENT OF THE CASE AND THE FACTS

The Florida Patient's Compensation Fund (FPCF) and St. Joseph's Hospital, Inc. appealed the trial court's final judgment which required each of them to pay a pro rata share of section 768.56 prevailing party attorney's fees awarded to Plaintiff.

The FPCF argued to the Second District that the legislative scheme creating the FPCF and encompassed within section 768.54 does not contemplate that the FPCF is liable for section 768.56 prevailing party attorney's fees as a part of the "claim" which the FPCF may be obligated to pay. The Second District agreed with the FPCF's position, held that the FPCF is not liable for these attorney's fees and that Defendant St. Joseph's Hospital is liable for such fees, vacated the final judgment of the trial court, and remanded to the trial court for entry of a final judgment consistent with its decision. The Second District, in Florida Patient's Compensation Fund v. Maurer, 493 So.2d 510 (Fla. 2d DCA 1986), reaffirmed and followed its previous decision in Maurer which is presently pending review in this Court. The Second District acknowledged conflict with the Third District's decision in Bouchoc v. Peterson, 490 So.2d 132 (Fla. 3d DCA 1986).

St. Joseph's Hospital seeks review of the decision of the Second District on the basis of conflict between the Second District's holding on the issue of liability for attorney's fees

and the Third District's holdings on a similar issue in Bouchoc v. Peterson, 490 So.2d 132 (Fla. 3d DCA 1986) and Florida Patient's Compensation Fund v. Miller, 436 So.2d 1145 (Fla. 3d DCA 1983). Review was sought to this Court in both Bouchoc and Maurer which are presently scheduled for Oral Argument on May 8, 1987.

SUMMARY OF THE ARGUMENT

The decision of the District Court of Appeal, Second District, in Florida Patient's Compensation Fund v. Coxon, Case Nos. 86-814 and 86-815, 12 F.L.W. 654 (Fla. 2d DCA Feb 27, 1987), expressly and directly 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 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 attorney's fees upon the negligent health care provider. This decision, however, does not conflict with this Court's decision in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), because the issue involved in the present case was neither raised nor addressed in Rowe.

The decision of the Second District in the present case correctly reversed in part the judgment of the trial court which imposed pro rata liability for attorney's fees on the FPCF and correctly held that St. Joseph's Hospital, Inc., the unsuccessful defendant in the medical malpractice action, was responsible for payment of section 768.56 prevailing party attorney's fees awarded the prevailing plaintiff. (Section 768.56 was repealed by Chapter 85-175, Laws of Florida (1985)).

The Second District's decision is consistent with the meaning and purpose of section 768.54. This Court has exercised 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 has set that case and the case of Maurer v. Florida Patient's Compensation Fund Case No. 69,421 for oral argument. This Court should withhold deciding whether to accept jurisdiction to review the present decision until it has decided the Bouchoc and Maurer cases on the merits. If this Court approves the Second District's decision in Maurer, that decision will resolve any conflict that may have existed, and this Court may then deny review in the present case.

JURISDICTIONAL ARGUMENT

THE PRESENT DECISION OF THE DISTRICT COURT, SECOND DISTRICT, EXPRESSLY AND DIRECTLY CONFLICTS WITH BOUCHOC V. PETERSON, 490 So.2d 132 (Fla. 3d DCA 1986), BUT IT DOES NOT CONFLICT WITH FLORIDA PATIENT'S COMPENSATION FUND V. ROWE, 472 So.2d 1145 (Fla. 1985).

The Second District in the present case has reached a different conclusion than was 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 concludes that the prevailing party attorney's fees arise out of, but are by definition not a part of, a successful claim, and that the excess portion of a claim which the FPCF is responsible to pay cannot include section 768.56 prevailing party attorney's fees. The Second District in the present case reversed the holding of the trial court which imposed a pro rata liability for attorney's fees on the FPCF, vacated the final order, and remanded for entry of a final judgment.

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

In Miller, the Third District affirmed the trial court's holding that Mt. Sinai Hospital of Greater Miami, Inc. had established its right of common law indemnity against Dr. Saul Miller and that the Florida Patient's Compensation Fund, as the physician's insurance carrier, was obligated to pay on behalf of Dr. Miller all damage awards including the hospital's attorney's fees rendered against Dr. Miller in excess of \$100,000, the statutory limit which had been paid by Dr. Miller. Subsequent to the decision of the Third District in Miller which was premised on that court's finding that the Florida Patient's Compensation Fund was the liability insurer of the doctor, the Florida Supreme Court in Taddiken v. Florida Patient's Compensation Fund, has recently held that the FPCF is not an insurer of its health care provider members. Rather, the Supreme Court held that the FPCF is a unique entity created by statute as a limitation of liability device and is not an insurance company. The underlying rationale of Miller is no longer tenable in light of the Supreme Court's very recent decision in Taddiken.

Contrary to Petitioner's contention that Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) conflicts with the present case, the FPCF did not raise, nor did this Court address, the issue now decided by the Second District of whether

the nonprevailing FPCF member health care provider is limited from payment of attorney's fees to the prevailing party. In Rowe, this Court addressed the constitutionality of section 768.56 and its retroactive application. This Court upheld this statute's validity, established a standard for determining a reasonable attorney's fee, and held that section 768.56 applied only to causes of action accruing after its effective date.

In the present case, the District Court properly decided that the trial court correctly determined that the \$100,000 statutory limitation of liability provided by section 768.54(2)(b), Florida Statutes (1981), does not encompass a limitation of liability for the payment of section 768.56 attorney's fees to the prevailing party, but that the trial court erred in deciding that the FPCF was liable for a portion of the attorney's fees awarded to the prevailing party pursuant to section 768.56 because the contract between the FPCF member and the FPCF, expressly established by section 768.54, does not allow for the FPCF's payment of prevailing party attorney's fees.


The only decision with which the present decision directly and expressly conflicts is Bouchoc, which is presently pending on review in this Court. This Court should withhold determining jurisdiction in the present case until this Court decides Bouchoc and Maurer.

Resolution of those cases may resolve conflict and jurisdiction of the present case may then be denied.

CONCLUSION

This Court should withhold determining jurisdiction until its decides Bouchoc and Maurer. If this Court accepts jurisdiction in the present case, which is within its discretion to do, this Court should approve the decision of the Second District in the present case.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to: T. PAINE KELLY, JR., ESQUIRE, Post Office Box 1531, Tampa, Florida 33601; LARRY I. GRAMOVOT, ESQUIRE, 705 East Kennedy Boulevard, Tampa, Florida 33602, this 10th day of April, 1987.


MARGUERITE H. DAVIS