

IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO: _____

71,338

THIRD DISTRICT CASE NO. 86-3040

FIRTH S. SPIEGEL, M.D.; RICHARD
K. EBKEN, M.D.; and SPIEGEL AND
EBKEN, M.D., P.A.,

Petitioners/Defendants

vs .

BUD PRATT WILLIAMS,

Respondent/Plaintiff.

FILED
SID J. WHITE

OCT 19 1987

CLERK, SUPREME COURT

By _____
Deputy Clerk

DISCRETIONARY PROCEEDING TO REVIEW A
DECISION OF THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

PETITIONERS' JURISDICTIONAL BRIEF

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS	ii
STATEMENT	1
SUMMARY OF ARGUMENT.	3
ISSUE	
WHETHER THE DECISION OF THE DISTRICT COURT HAS CREATED A CONFLICT BY ACCEPTING DECISIONS OF THE FLORIDA SUPREME COURT AS CONTROLLING PRECEDENT BUT ATTRIBUTING TO THOSE DECISIONS AN ERRONEOUS PRINCIPLE OF LAW	4
ARGUMENT	
THE DECISION OF THE DISTRICT COURT HAS CREATED A CONFLICT BY ACCEPTING DECISIONS OF THE FLORIDA SUPREME COURT AS CONTROLLING PRECEDENT BUT ATTRIBUTING TO THOSE DECISIONS AN ERRONEOUS PRINCIPLE OF LAW	4
CONCLUSION	8
CERTIFICATE OF SERVICE	9

TABLE OF CITATIONS

	PAGE
<u>Florida Patient's Compensation Fund vs. Bouchoc,</u> _____ So. 2d _____, 12 F.L.W. 392 (Fla. Case No.	2
<u>Florida Patient's Compensation Fund vs. Rowe,</u> 472 So. 2d 1145 (Fla. 1985)	2
<u>Gibson vs. Avis Rent-a-Car Systems, Inc.,</u> 386 So. 2d 520 (Fla. 1980)	5
<u>N & L Auto Parts Co. vs. Doman,</u> 117 So. 2d 410 (Fla. 1960)	7
<u>Pinkerton-Hayes Lumber Co. vs. Pope,</u> 127 So. 2d 441 (Fla. 1961)	5
<u>Spivey vs. Battaglia,</u> 258 So. 2d 815 (Fla. 1972)	5
<u>Wale vs. Bornes,</u> 278 So. 2d 601 (Fla. 1973)	4
 <u>Other Authorities</u>	
Florida Statute §768.54(2) (b)	

STATEMENT OF THE CASE AND FACTS

Petitioners/Defendants, FIRST S. SPIEGEL, M.D., RICHARD K. EBKEN, M.D., and SPIEGEL AND EBKEN, M.D., P.A., (hereafter "Spiegel") seek this Court's discretionary review of a decision of the Third District Court of Appeal which reversed a limitation of judgment in favor of Spiegel and against Williams.

Williams was the prevailing party in a medical malpractice case. The jury verdict and final judgment in Williams' favor was in excess of Spiegel's primary insurance limits. Spiegel's insurance policy paid Williams \$300,000 (\$100,000 on behalf of each of the three petitioners) plus taxable costs and accrued interest on the final judgment. Following this payment, the trial court entered an order limiting judgment to the amounts paid pursuant to Florida Statute §768.54(2)(b).

Spiegel's insurance policy with St. Paul provided only for payment of defense costs and did not provide coverage for an adversary's attorney's fees. The policy clearly stated:

Additional Benefits. All of the following are in addition to the limits of your coverage: . . . We'll pay all costs of defending a suit, including interest on that part of any judgment that doesn't exceed the limits of your coverage (A. 7)

The symbol "A" refers to the Petitioner's Appendix
All emphasis is added unless noted to be in the original

Williams asserted that the insurance carrier's obligation under this policy to pay "all costs of defending a suit" required Spiegel's carrier to pay Williams' statutory attorney's fees as a further prerequisite to the limiting of the judgment.

On appeal, the Third District Court of Appeal agreed with Williams' contention and reversed the trial court's decision (A. 9-11). In support of its decision, the Third District relied upon the cases of Florida Patient's Compensation Fund vs. Rowe, 472 So. 2d 1145 (Fla. 1985) and Florida Patient's Compensation Fund vs. Bouchoc, _____ So. 2d _____, 12 F.L.W. 392 (Fla. Case No. 69-230, 7/16/87). Spiegel asserts that the Third District's decision has created conflict by accepting decisions of this Court as controlling precedent but attributing to those decisions an erroneous principle of law.

SUMMARY OF ARGUMENT

Florida has always acknowledged the distinction between litigation costs and cost of defense. The Third District Court of Appeal's decision breaks with this precedent and improperly holds that an insurance company's contractual obligation to pay its insured's defense costs also requires the carrier to pay the opposing party's attorney's fees.

This court has twice decided that attorney's fees which are recoverable by statute in a medical malpractice case are a litigation cost; this court has never held that payment of a plaintiff's attorney's fees should be viewed as a cost of defense. Florida Patient's Compensation Fund vs. Rowe, 472 So. 2d 1145 (Fla. 1985) and Florida Patient's Compensation Funds v. Bouchoc, _____ So. 2d _____, 12 F.L.W. 392 (Fla. Case No. 69-230, 7/16/87). This court's holdings are in accord with the provisions of Florida Statute §768.54(2)(b). The instant decision of the Third District Court of Appeal conflicts with both the clear wording of the Medical Malpractice Act and the settled law of this case.

ISSUE

WHETHER THE DECISION OF THE DISTRICT COURT HAS CREATED A CONFLICT BY ACCEPTING DECISIONS OF THE FLORIDA SUPREME COURT AS CONTROLLING PRECEDENT BUT ATTRIBUTING TO THOSE DECISIONS AN ERRONEOUS PRINCIPLE OF LAW

ARGUMENT

THE DECISION OF THE DISTRICT COURT HAS CREATED A CONFLICT BY ACCEPTING DECISIONS OF THE FLORIDA SUPREME COURT AS CONTROLLING PRECEDENT BUT ATTRIBUTING TO THOSE DECISIONS AN ERRONEOUS PRINCIPLE OF LAW

The Third District Court of Appeal has held that a combined reading of Florida Statute §768.54 (2)(b) and Spiegel's insurance policy (which provides for payment of "all costs of defending a suit") requires Spiegel's insurance carrier to pay Williams' attorney's fees. This holding is in conflict with two decisions of this court.

Spiegel submits that the Third District's reliance upon the case of Florida Patient's Compensation Fund vs. Rowe, 472 So. 2d 1145 (Fla. 1985) as precedent for its opinion results in a misapplication of the principles of law presented in Rowe and creates a conflict between these two decisions. This court has frequently held that certiorari jurisdiction is present where such a conflict occurs. Wale vs. Bornes, 278 So. 2d 601 (Fla. 1973);

Gibson vs. Avis Rent-a-Car Systems, Inc., 386 So. 2d 520 (Fla. 1980); Pinkerton-Hayes Lumber Co. vs. Pope, 127 So. 2d 441 (Fla. 1961); Spivey vs. Battaglia, 258 So. 2d 815 (Fla. 1972).

The district court relied upon the Rowe decision to support its opinion that Spiegel's insurance company was obligated to pay Williams' attorney's fees (a statutory litigation cost) because its policy agreed to pay "all costs of defense". For several reasons this reliance is misplaced. In both the Rowe decision and the case of Florida Patient's Compensation Fund vs. Bouchoc, _____ So. 2d _____, 12 F.L.W. 392 (Fla. 7/16/87), this court has acknowledged an important distinction between the costs of defending a suit and the litigation costs which an unsuccessful party must bear. Spiegel's attorney's fees are a litigation cost, and while they arise out of the successful prosecution of his medical malpractice claim, by their very nature they are not a defense cost. As this court stated in the Rowe case:

In certain causes of action attorney's fees historically have been considered part of litigation costs and the award of these costs is intended not only to discourage meritless claims, but also to make the prevailing plaintiff or defendant whole. Id. at 1149.

Although the Rowe decision acknowledges that, by statute, attorney's fees are taxable as litigation costs in more than seventy situations, nothing in that decision suggests such a statute transforms a cost of litigation into a cost of defense.

It is asserted that the Third District's decision was premised on an erroneous reading of Rowe and therefore improperly determined that a statutory litigation cost is the equivalent of a defense cost.

Spiegel also asserts that further conflict is created by the instant opinion of the Third District Court of Appeal because of a misapplication of the holding and reasoning contained in the Bouchoc decision. As this court stated in Bouchoc:

It is unreasonable to believe that the legislature would have intended that the health care providers be held responsible for the amount of attorney's fees over and above the \$100,000 when the statute contemplated that the Fund would pay all judgments in excess of \$100,000. Id. at 393.

A conflict is created because the Third District has held that even though an insured and insurer enter into an insurance coverage agreement which contemplates that the Florida Patient's compensation Fund will cover all claims beyond \$100,000, **that** an insuring agreement for payment of "defense costs" by the primary carrier includes payment of a plaintiff's attorney's fee. Under the Bouchoc decision, plaintiff's attorney's fees are properly the obligation of the Fund. There is nothing in the Spiegel's insurance policy, or any other part of the record, to suggest that St. Paul's contractual insuring agreement to pay Spiegel's defense costs was intended to assume the Fund's obligation to pay litigation costs such as a plaintiff's attorney's fees.

Spiegel submits that the decision of the Third District has resulted in a misapplication of the Florida Supreme Court's decisions in Rowe and Bouchoc and that this type of decisional conflict requires resolution by this court. Spivey, Gibson, supra. Permitting the Third Districts' decision to stand as legal precedent will surely cause confusion in the body of the law of this state. N & L Auto Parts Co. vs. Doman, 117 So. 2d 410 (Fla. 1960). Because of the conflict which is presented between the decision of the Third District and the decisions of this court, this court has jurisdiction to review the instant case and resolve this conflict.

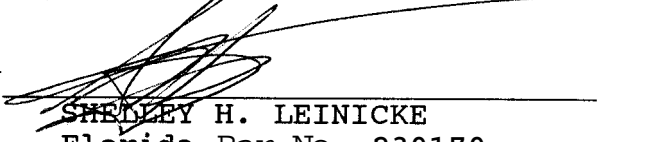
CONCLUSION

The Third District's reliance upon the cases of Rowe and Bouchoc has resulted in a misapplication of law vesting conflict jurisdiction in this court. This court is urged to accept jurisdiction and review this case on its merits to resolve the conflicts presented herein.

Respectfully Submitted.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was
nailed this 15th day of October, 1987 to all counsel of record
on the attached mailing list.

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