IN THE SUPREME COURT

OF FLORIDA

CASE NO. 66,784

HOWARD FOLTA, et ux,

Petitioners,

vs.

JOSEPH BOLTON, et al.,

Respondents.

PETITIONERS' BRIEF ON CERTIFIED QUESTION

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QUESTIONS RAISED

1. When a plaintiff in a medical malpractice suit recovers a judgment against a defendant based on but one of five separate and distinct claims brought against that defendant, which of the two parties is considered the "prevailing party" for purposes of awarding attorney's fees pursuant to § 768.56?

2. Does a trial court have jurisdiction to award attorney's fees pursuant to § 768.56 when the final judgment entered in the case fails to expressly reserve jurisdiction to make such an award?

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STATEMENT OF THE CASE AND FACTS

On March 27, 1985, the United States Court of Appeals, Eleventh Circuit, certified two questions to this Court pursuant to Rule 9.150, Florida Rules of Appellate Procedure.

Appellants, Howard Folta and Joanne Folta, will provide a full statement of the facts because the statement contained in the Eleventh Circuit's opinion is somewhat incomplete and it is inaccurate in two respects. As noted in footnote 6 of the Eleventh Circuit's decision, the Foltas are not restricted in their arguments to matters contained on the face of the opinion:

> We repeat what we have often said in the past: [T]he particular phrasing used in the certified question is not to restrict the Supreme Court's consideration of the problems involved and the issues as the Supreme Court perceives them to be in its analysis of the record certified in this case. This latitude extends to the Supreme Court's restatement of the issue or issues and the manner in which the answers are to be given, whether as a comprehensive whole or in subordinate or even contingent parts.

A. The Malpractice

This appeal involves a refusal of the trial court to award the Foltas attorney's fees pursuant to Florida Statute §768.56, which requires the award of such fees to the prevailing party in a medical malpractice action.

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Mr. Folta was seriously injured in a motorcycle accident and he was taken to Tarpon Springs General Hospital for treatment. (T.116). This action involves the failure of the Hospital staff and certain physicians to properly diagnose and treat his injuries. The cast of characters relevant to the resolution of the issues on this appeal are as follows:

(a) Tarpon Springs General Hospital (hereafter Hospital) was sued for the alleged negligence of nurses, a radiologist (Dr. Berje), a physical therapist, and the emergency room physician (Dr. Rutledge). (R. 1-10).

(b) Hugh Rutledge, M.D., the emergency room physician, was ultimately dismissed from this case pursuant to a stipulation entered into with the plaintiffs. (R.391, 393, 400).

(c) Joseph Bolton, M.D., is a general surgeon and one of Mr. Folta's attending physicians. Dr. Bolton was sued for failure to properly diagnose and treat Mr. Folta's injuries. (R. 1-10).

(b) William Atkinson, M.D. is a general surgeon and Mr. Folta's other attending physician. Dr. Atkinson was sued for failure to properly diagnose and treat Mr. Folta's injuries. (R. 1-10).

(e) Albert Berje, M.D. is a radiologist at the Hospital and he was sued for failure to request appropriate x-rays and for failure to properly interpret Mr. Folta's x-rays. (T. 187, 340; R. 1-10).

It is significant to note that Drs. Atkinson and Bolton did not file a brief in the Eleventh Circuit.

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After the accident, Mr. Folta was examined in the emergency room by Dr. Rutledge, who assigned the case to Dr. Bolton. (T.116-117). He called Dr. Bolton, rather than an orthopedist, because the patient had multiple traumas and he felt that a general surgeon should coordinate the diagnosis and treatment of the various injuries. (T.117).

Dr. Rutledge ordered a hip x-ray but he did not specify the particular views of the hip which he desired. (T.120). In the normal course of events, a lateral view of the hip is taken when x-rays are requested. (T.126). No such x-ray was taken in this case. (T. 127).

Dr. Berje received the x-rays and diagnosed a fracture of the hip, which required surgery. (T. 340). Dr. Bolton testified that Dr. Berje misdiagnosed the injury because ultimately it was discovered that there was no fracture. (T. 340). Had an x-ray with a lateral view been done, a proper diagnosis could have been made. (T. 438). This malpractice resulted in damage to the sciatic nerve. (T. 419). The jury ultimately found that Dr. Berje was 100% responsible for this injury. (R. 519-520).

During his treatment at the Hospital, Mr. Folta also had a dislocation of the neck which went undiagnosed and untreated. Despite evidence of repeated complaints of pain by Mr. Folta to the physical therapist, Dr. Atkinson and others, no x-ray was ever taken of his neck. (T. 342, 346). This resulted in an improper fusion of the spine.

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Mr. Folta's expert testified that Dr. Bolton and Dr. Atkinson were negligent in numerous respects including the failure to diagnose the cervical spine fracture (T. 400) and the failure to diagnose the dislocated hip. (T. 399-404).

There was also evidence presented at the trial that the Hospital's physical therapist was negligent in failing to tell Dr. Bolton about Mr. Folta's neck pains. (T. 342). Mr. Folta's expert also testified that the Hospital's nurses were negligent in allowing an ulcer to develop on Mr. Folta's heel. (T. 409).

The trial court ultimately granted a directed verdict in favor of Dr. Berje as to the neck injury. T. 387-390, 420).

B. The Charge Conference, Verdict and Hearing on Fees

At the charge conference, counsel for the Hospital requested that there be a verdict form separating the three injuries. (T. 893). In addition, even though there was no claim for contribution pending, the defendants wanted the jury to allocate the percentages of liability between defendants so that each could pay the plaintiff his proportionate share of any judgment and obviate the need for a contribution suit. (R. 729, 774-777). This procedure was not based upon any issue raised in the pleadings or any issue outlined in the pretrial stipulation. The pleadings made no differentiation between the defendants in terms of damages. (R. 1-10, 373-380, 647). The Court adopted this procedure and the following verdict was returned by the jury:

SPECIAL VERDICT

We, the jury return the following verdict:

I. NECK INJURY

1. Was the defendant, Joseph Bolton, M.D., negligent which was a legal cause of damage to plaintiff's neck injury?

YES

2. Was the defendant, William Atkinson, M.D., negligent which was a legal cause of damage to plaintiff's neck injury?

YES

3. Was the emergency room physician, Hugh Rutledge, M.D., negligent which was a legal cause of damage to plaintiff's neck injury?

NO

4. Was the physical therapist negligent which was a legal cause of damage to plaintiff's neck injury?

YES

5. State the percentage of any negligence that you charge to:

JOSEPH BOLTON, M.D.	42.5%
WILLIAM ATKINSON, M.D.	42.5%
HUGH RUTLEDGE, M.D.	-0-
Physical Therapist	15%
TOTAL MUST BE	100%

II. HIP INJURY

6. Was the defendant, Joseph Bolton, M.D., negligent which was a legal cause of damage to plaintiff's hip injury?

NO

7. Was the defendant, William Atkinson, M.D., negligent which was a legal cause of damage to plaintiff's hip injury?

NO

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8. Was the defendant, Albert Berje, M.D., negligent which was a legal cause of damage to plaintiff's hip injury?

YES

9. Were the x-ray technologists negligent which was a legal cause of damage to plaintiff's hip injury?

NO

10. State the percentage of any negligence that you charge to:

JOSEPH BOLTON, M.D.	-0-
WILLIAM ATKINSON, M.D.,	-0-
ALBERT BERJE, M.D.	100%
X-ray Technologists	-0-
TOTAL MUST BE	100%

II DECUBITUS ULCER

11 Were the nurses or Tarpon Springs General Hospital negligent which was a legal cause of damage to plaintiff's decubitus ulcer?

NO

IV. MISC. ISSUES NO ANSWER REQUIRED? Ref: Note from JUDGE CARR.

12 Was Hugh Rutledge, M.D., an agent or employee of Tarpon Springs General Hospital?

(no answer)

13. Was Albert Berje, M.D. an agent or employee of Tarpon Springs General Hospital.

YES

14. Was the physical therapist an agent or employee of Tarpon Springs General Hospital?

YES

V. DAMAGES

15. What is the total amount of any damages (100%) sustained by the plaintiffs and caused by the negligence in question,

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HOWARD FOLTA:	damage related to neck	$41,250
	damage related to hip	$37,125
	damage related to ulcer on heel	$ -0-
JOANNE FOLTA		12,500

SO SAY WE ALL

Dated this 19th day of October, 1982.

ADDENDUM TO SPECIAL VERDICT

QUESTION: What is the total amount of damages (100%) of any future loss of earnings of the plaintiff, Howard Folta, if any?

$37,050.

SO SAY WE ALL.

Dated this 19th day of October, 1982.

After the court reduced the award of lost future earnings to present money value, a final judgment was entered in accordance with the percentages allocated between the defendants. (R.649). Although the verdict found that Dr. Berje was an employee of the Hospital in committing malpractice, the judgment entered thereon inadvertently did not require the Hospital to be liable for Dr. Berje's negligence. (R.649, 895, 933). In its briefs and arguments before the Eleventh Circuit, the Hospital did not deny that the final judgment inadvertently failed to recite its liability for Dr. Berje. This judgment was fully satisfied by the defendants. (R. 793).

On January 4, 1984, a hearing was held on plaintiff's motion for attorney's fees and motion to tax costs. As to costs, the court held that:

> The full amount should be awarded and should be awarded against the defendants Bolton, Atkinson, and Berje. (Tr. 1/4/84, p.9).

As to attorney's fees, the defendants argued that while plaintiffs proved malpractice against them, they did not prove every claim of malpractice asserted. Consequently, the defendants argued that they should be considered prevailing parties and entitled to fees for the portion of the damages Mr. Folta was unable to prove against a particular defendant. (Tr. 1/4/84, pp. 15-22). The Court ruled as follows:

> THE COURT: I can't find any cases really in Florida that are directly on point on this, that the facts of this case really fit into. I'm inclined to think that the defendants' view is the correct view under the statute. So the motion to award attorney's fees to the plaintiffs is denied, and each party shall bear their own attorney's fees. See Trial Transcript 1/4/84, p. 23.

None of the defendants objected to the proceedings on the ground that the final judgment did not reserve jurisdiction to decide the issue of attorney's fees. The issue was tried by the consent of the parties.

Subsequently, on February 28, 1984, the court entered an order denying plaintiffs' motion for attorney's fees. (R. 800).

C. The Eleventh Circuit's Opinion

On page 3129 of the Eleventh Circuit's opinion, the Court states as follows:

> Upon the conclusion of the presentation of the evidence, appellants elected to present five different distinct and several claims against the Hospital to the jury. These

> claims were in addition to those brought against the individual staff members. Each of these claims involved different persons, allegedly the agent or servant of the Hospital, different times of occurrence, different acts or conduct allegedly described as malpractice, with resulting different injuries. Each of these distinct claims form the basis of a lawsuit in and of itself.
>
> Of the five different and distinct claims brought against the Hospital, the jury sided with the plaintiffs on only one. Specifically, the jury determined that the Hospital's physical therapist was 15% negligent in regard to additional damage to plaintiff's neck injury. Consequently, we can conclude that the Hospital prevailed on at least three, and possibly four, of the five charges brought against it but the plaintiff prevailed in the sense of obtaining a judgment against the Hospital.

Footnote 5 states as follows:

> "the percentage of negligence attributed by the jury to Dr. Albert Berje, the Hospital's radiologist, for the consequential injury to Mr. Folta's hip was 100%. Although the verdict found that Berje was an employee of the Hospital in committing malpractice, the judgment entered thereon apparently did not require the Hospital to be liable for Dr. Berje's negligence.

The first problem with the Eleventh Circuit's analysis is that after the presentation of the evidence, appellants did not elect to present five distinct and severable claims against the Hospital to the jury.

The record is uncontroverted that the Hospital requested that the verdict form separate the three injuries and that the jury allocate the percentages of negligence between defendants in order to obviate the necessity of a claim for contribution. (T. 893, 729, 774-777). This was done as an

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accommodation to the defendants. It was not based upon any issue raised in the pleadings. The pleadings made no differentiation between the defendants in terms of damages. (R. 1-10, 373-380, 647).

We also take exception to the Eleventh Circuit's characterization of the claims against the Hospital as being different, distinct and severable. Since we have devoted a subpoint in the argument portion of our brief to this statement, we will not repeat the discussion of it here.

We also strongly disagree with the Eleventh Circuit's conclusion that the Foltas lost four out of five claims because Dr. Berje was not included in the final judgment. As previously noted, the jury found Dr. Berje 100% negligent and also found that he was an employee of the Hospital at the time of the incident. Omitting the Hospital from the final judgment was simply a mistake. Nothing was done about it because the defendants paid their proportionate share of the judgment. There is simply no question that the Foltas won this issue.

ARGUMENT

QUESTION I

> First, when a plaintiff in a medical malpractice suit recovers a judgment against a defendant based on but one of five separate and distinct claims brought against that defendant, which of the two parties is considered the "prevailing party" for purposes of awarding attorney's fees pursuant to § 768.56?

We will demonstrate below that even as phrased the correct answer to the question is that the plaintiff is the prevailing party. However, the Foltas contend that the question asked by the Eleventh Circuit is inherently inaccurate and requires correction.

A. The Foltas are the Prevailing Parties under Florida Law.

The trial court denied the Foltas' claim for attorney's fees, even though they proved liability and damages for malpractice as to each defendant, because the defendants were not held liable for 100% of the damages asserted against each of them. This was clearly erroneous under Florida law.

Florida Statute § 768.56 (1983) provides, in pertinent part, as follows:

> . . . the court shall award a reasonable attorney's fee to the prevailing party in any civil action which involves a claim for damages by reason of injury, death, or monetary loss on account of alleged malpractice by any medical or osteopathic physician, podiatrist, hospital, or health maintenance organization . . . . When there is more than one party on one or both sides of an action, the court shall allocate its award of attorney's fees among prevailing parties and tax such fees against nonprevailing parties in accordance with the principles of equity. (Emphasis added).

The District Court of Appeal, Third District, has held that an award of attorney's fees under this statute is mandatory. Young v. Altenhaus, 448 So.2d 1039 (Fla. 3d DCA 1983), portions quashed on other grounds, Young v. Altenhaus, _So.2d 10_, FLW 252 (Fla. May 2, 1985). We respectfully submit that the correct

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interpretation of this statute is that attorney's fees must be awarded to the prevailing party in a malpractice action and that a prevailing party is one who has an affirmative judgment in his favor at the conclusion of the case. In other words, the award is to be made to a party prevailing in the over all action and not on the individual damage claims comprising it. As applied to this case, establishing malpractice is the basis upon which fees should be awarded and it is irrelevant whether such malpractice is found not to have caused all of the damages claimed.

The present case simply involves a complaint for malpractice and the defendants' answers to the complaint denying any malpractice. (R. 1-10). The jury rendered a verdict against each defendant and awarded money damages to the Foltas.[1] Under these circumstances, the Foltas were unquestionably the "prevailing parties" under Florida Statute § 768.56 and entitled to fees.

To begin with, a very recent decision by the Second District (October 24, 1984) decided this issue in our favor under § 768.56. Florida Patient's Compensation Fund v. Black, _So.2d_ 9 FLW 2247, 11/2/84 (Fla. 2d DCA. 1984).

Appendix "A").

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[1] Even where a counterclaim is filed and both parties are successful on their affirmative claims, the "prevailing party" is deemed to be the net winner when the dust settles. Sharpe v. Ceco Corp. 242 So.2d 464 (Fla. 3d DCA 1970); Kendall East Estates Inc., v. Banks, 386 So.2d 1245 (Fla. 3d DCA 1980); Kirou v. Oceanside Plaza Condominium Association, Inc., 425 So.2d 650 (Fla. 3d DCA 1983).

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In Black, supra, the Fund appealed the trial court's order denying its attorneys fees in a case where the plaintiff recovered a judgment for $27,000 against a physician in a medical malpractice action. The Fund contended that the amount sought by plaintiffs and the amount actually recovered was far below the $100,000 threshold which activates the Fund's liability. Thus, the Fund asserted that it was the prevailing party on the plaintiff's claim against it. The Second District rejected this argument and affirmed the trial court's order. In reaching this result, the court stated:

> Although the fund tellingly argues that from its standpoint the Fund prevailed, for present purposes the appropriate way to view the outcome of a suit like this is from the standpoint of the plaintiff. Failure to win on all aspects of a lawsuit does not mean that plaintiff did not prevail. See Hendy Tractor Co. v. Fernandez, 432 So.2d 1315 (Fla. 1983) (a plaintiff prevails when he wins a personal injury suit on one theory even though he may lose on another); Raffel v. Margarian, 165 So.2d 249 (Fla. 3d DCA 1964) (a plaintiff is entitled to costs when he obtains a judgment in his favor on liability even though no damages are awarded). See also Upson v. Hazelrig, 444 So.2d 1127 (Fla. 3d DCA 1984). We do not believe it was the legislature's intent to penalize a plaintiff in these circumstances for adding the Fund to a suit like this. There is no contention that the including of the Fund in the suit was improper. The fact that in closing argument, after all the evidence was in, plaintiff's attorney asked for damages in an amount less than $100,000 ($74,266.68) does not mean that inclusion of the Fund in the suit was improper.

Reasoning from the foregoing, it is clear that ". . . the appropriate way to view the outcome of a suit like this is from the standpoint of the plaintiff" and the "[f]ailure to win on all aspects of a lawsuit does not mean that plaintiff did not prevail." In the present case, viewing the outcome from the Foltas' perspective, they prevailed against the Hospital for Mr. Folta's neck and hip injuries, i.e., two out of the three injuries claimed against the Hospital. The fact that other agents of the Hospital were not found liable for these injuries does not change the fact that the Foltas prevailed on their claims for medical malpractice. When an employee of a Corporation commits a tort, the law considers that act the act of the Corporation. Thus, since the Hospital is deemed to have caused two out of the three injuries suffered by Mr. Folta, it is responsible to him for attorney's fees.

By analogy, the cases interpreting other similar statutory and contractual attorney's fees provisions require that fees be awarded in this case. Florida's Mechanic's Lien Statute, Section 713.29 (1975), provides that the "prevailing party shall be entitled to recover a reasonable fee for the services of his attorney. . . ." In Sharpe v. Ceco Corp.. 242 So.2d 464 (Fla. 3d DCA 1970), a subcontractor sought to foreclose a mechanic's lien in the amount of $60,000. The trial court held that the owner had a valid claim for $18,000 and entered a net judgment on the lien for $28,869.45. Attorneys fees were awarded in favor of the subcontractor and the owner appealed.

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On appeal, the Third District affirmed and reasoned as follows:

> Appellants argue that Ceco [subcontractor] was not the prevailing party because its recovery was not the amount claimed, but a lesser sum. We view that argument as unsound. The prevailing party is regarded as that party who has affirmative judgment rendered in his favor at the conclusion of the entire case. 242 So.2d at 465.

Similarly, in Peter Marich & Associates, Inc. v. Powell, 365 So.2d 754 (Fla. 2d DCA 1978), an architectural firm sought to enforce a mechanic's lien in the amount of $70,000. The trial court awarded less than the claim of lien and denied attorney's fees. The Second District reversed and held:

> [1] Section 713.29, Fla.Stat. (1975) provides that a prevailing party in a mechanic's lien foreclosure "shall be entitled to recover a reasonable fee for the services of his attorney . . . which shall be taxed as part of his costs." This court has held this language to be mandatory, i.e., if the prevailing party seeks an attorney's fee the court is obligated to grant it. Peacock Construction Co. v. Gould, 351 So.2d 394 (Fla.2d DCA 1977); Emery v. International Glass & Mfg., Inc., 249 So.2d 496 (Fla. 2d DCA 1971). The trial court recognized this statutory mandate, but concluded that appellant was not a "prevailing party" because it had failed to prove its entire claim. In so concluding we thing the court erred.
>
> [2-4] A prevailing party is one in whose favor an affirmative judgment is rendered. This is true despite the fact that the judgment is for less than initially sought in the complaint. R.F. Driggers Construction Co. v. Bagli, 313 So.2d 450 (Fla. 2d DCA 1975); Foxbilt Electric, Inc. v. Belefant, 280 So.2d 28 (Fla. 4th DCA 1973); Sharpe v. Ceco Corp., 242 So.2d 464 (Fla. 3d DCA 1970). Therefore, appellant was entitled to a reasonable attorney's fee even though it did

> not recover the entire amount sought in its complaint. (emphasis in original, footnote omitted).

See also, American Insulation of Fort Walton Beach, Inc. v. O.H. Pruitt, 378 So.2d 839 (Fla. 1st DCA 1979), which held that a recovery of $185.00 in a mechanic's lien suit where $303.54 was claimed, entitled the claimant to attorney's fees as the "prevailing party." Flagler Corporation v. Hamm, 302 So.2d 195 (Fla. 1st DCA 1974). See Quapaw Co. v. Varnell, 566 P.2d 164 (Okla. 1977), where it was held that the plaintiff was the prevailing party under an attorney's fee statute because he prevailed on two out of four counts alleging breach of four separate oral contracts.

A case involving a contractual provision awarding attorney's fees to the "prevailing party" is Kirou v. Oceanside Plaza Condominium Association, Inc., 425 So.2d 650 (Fla. 3d DCA 1983). There, a condominium association sought to cancel a "Pet Agreement" and remove dogs from the premises. The owner, Kirou, filed a counterclaim for a declaration that the rules of the association did not apply to him. The trial court ruled against the owner on the counterclaim but ruled that the association could not evict the dogs. The trial court awarded both parties attorney's fees because each won part of the case. The Third District reversed the fee awarded to the association and held:

> It is clear to us that only Kirou was entitled to recover under the attorneys' fees provision in question. The "proceeding" below was one in which the association sought to get the dogs out, and Kirou tried to keep them in. When the dust -- or whatever -- had cleared, they were still there. Thus,

> notwithstanding the intermediate battle, or rather skirmish, over the counterclaim, which had no effect on the ultimate result, Kirou plainly won, and the association plainly lost the war. It was therefore not the or even a "prevailing party" in the proceeding and thus should not have been awarded fees. Kendall East Estates, Inc. v. Banks, 386 So.2d 1245 (Fla. 3d DCA 1980), and cases cited . . . ." (footnote omitted). 425 So.2d at 651.

The Third District further noted that had the counterclaim been denominated an affirmative defense ". . . it would not have been even arguable that the association was entitled to fees." See also, Kendall East Estates, Inc. v. Banks, 386 So.2d 1245 (Fla. 3d DCA 1980); P & C Thompson Brothers Construction Co. v. Rowe, 433 So.2d 1388 (Fla. 5th DCA 1983).

Another relevant line of cases are those interpreting Florida's Cost Statute, Section 57.041, which allows the "party recovering judgment" to recover costs. This has been interpreted to mean the "prevailing party." Fernandez v. Hendry Tractor Co., 406 So.2d 1213 (Fla. 3d DCA 1981), approved 432 So.2d 1315 (Fla. 1983).

In Fernandez, supra, the plaintiff was injured in a construction accident and sued under the theories of negligence and breach of warranty. The plaintiff recovered $101,600 under the negligence count but lost as to breach of implied warranty. The trial court awarded costs to both parties and the plaintiff appealed. The Third District reversed and held that ". . . only a prevailing party is entitled to recover costs . . ." and that the plaintiff "clearly prevailed."

In approving the Third District's decision, the Supreme Court of Florida stated in Fernandez:

> The fact that their recovery could have been more lucrative than it actually was does not, by any stretch of the imagination, render their ultimate monetary judgment of $101,602.00 a losing proposition. 432 So.2d at 1316-1317. (emphasis in original).

Florida courts have also held that where a defendant proves comparative negligence, the plaintiff should, nevertheless, recover all of his costs. Florida East Coast Railway Co. v. Hunt, 322 So.2d 68 (Fla. 3d DCA 1975); Spicuglia v. Green, 302 So.2d 772 (Fla. 2d DCA 1974); Blaw-Knox Food & Chemical Equipment Corp. v. Holmes, 348 So.2d 604 (Fla. 4th DCA 1977).

It was even held that where the jury found negligence but awarded no damages for the claimed injuries, the plaintiff was the sole party entitled to recover costs. Upson v. Hazelrig, 444 So.2d 1127 (Fla. 3d DCA 1984). See 20 Am.Jur.2d § 15 Costs, wherein it states ". . . in the absence of some statutory authorization the court is without power to make an apportionment of costs based upon the fact that the prevailing party has failed in a part of his claims . . . ."

Reasoning from the foregoing authorities and from the express language of Florida Statute § 768.56, it unquestionably follows that the Foltas were the "prevailing parties" entitled to attorney's fees. The Foltas sued each of the defendants for medical malpractice and recovered a money judgment against all of

them. The fact that each defendant was not held liable for all of the Foltas' claims does not change their status as "prevailing parties."

In reaching his decision, the trial judge was influenced by the portion of the statute which states:

> When there is more than one party on one or both sides of an action, the court shall allocate its award of attorney's fees among prevailing parties and tax such fees against nonprevailing parties in accordance with the principles of equity.

It is apparent that this statute allows equitable principles to come into play solely where an allocation of fees must be made between multiple plaintiffs inter se or between multiple defendants inter se. However, the statute does not authorize equitable apportionment of fees between plaintiffs and defendants. Thus, where the plaintiff is the prevailing party and there are four defendants, the court can invoke equitable principles in determining what percentage of all of the plaintiff's fees will be assessed against each defendant. Equity cannot be invoked, however, to prevent the plaintiff from recovering 100% of his reasonable fees.

Any other interpretation is contrary to present Florida law and it would lead to several absurd results. For example, parties to any lawsuit may plead in the alternative under the Florida Rules of Civil Procedure (Rule 1.110). The trial court's interpretation of the statute would mean that a prevailing party plaintiff should be denied fees where he has pleaded in the

alternative because he did not prevail on one of the alternative claims. This is not only illogical but it also conflicts with the intent of Rule 1.110.

Such an interpretation would also require a plaintiff to verify each element of damage claimed prior to filing suit even where a physician admits malpractice or run the risk of paying fees to the guilty physician. In addition, the attorney's fees owed to the physician might be more than the judgment entered against him on the liability claim. This is particularly true where there are multiple defendants.

Even if the Eleventh Circuit is correct that this case involves distinct and unrelated incidents, such would not preclude the Hospital's liability for attorneys fees.

This is fully supported by the cases which hold that where a counterclaim is filed and both parties are successful on their affirmative claims, the "prevailing party" is deemed to be the net winner when the dust settles. Sharpe v. Ceco Corp., 242 So.2d 464 (Fla. 3d DCA 1970); Kendall East Estates, Inc. v. Banks, 386 So.2d 1245 (Fla. 3d DCA 1980); Kirou v. Oceanside Plaza Condominium Association, Inc., 425 So.2d 650 (Fla 3d DCA 1983). See also Fernandez v. Hendry Tractor Co., 406 So.2d 1213 (Fla. 3d DCA 1981).

Clearly, the purpose of the statute is to discourage nonmeritorious medical malpractice actions and not simply to compensate parties who prevail on portions of their case for their attorneys fees. The only logical way to carry out this purpose is to hold that if a plaintiff proves malpractice, he is

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entitled to all of his fees and the defendant gets no fees even though plaintiff was not successful on all claims. Medical malpractice as well as the issue of who is responsible for a particular portion of the malpractice is extremely difficult to prove, particularly where many professionals were involved in the care and treatment of a patient. A patient should be allowed to join all guilty parties and sort out the extent of their guilt without fear of having to pay attorneys fees.

B. The Hospital Did Not Prevail on Four Severable Distinct Claims.

As noted under subsection A, we believe that we were the prevailing party against the Hospital under Florida law and that the number of claims which it prevailed on is irrelevant because the jury found it guilty of malpractice and awarded the plaintiffs an affirmative money judgment. However, if this Court deems numbers to be important, then we submit that the Eleventh Circuit has erroneously calculated the numbers.

Mr. Folta was injured over several parts of his body in a motorcycle accident and he was taken to the Hospital for treatment of all of his injuries. The malpractice occurred within the course and scope of his overall treatment arising out of the accident, i.e., it arose out of the same series of connected transactions.

As evidenced by the verdict form, Mr. Folta suffered three injuries at the Hospital - an injury to his hip, to his neck and to his foot. The jury determined that a Hospital employee, Dr. Berje, caused the hip injury and that another

Hospital employee, a physical therapist, was a legal cause of the neck injury. Thus, it is clear that the Hospital caused two out of the three injuries suffered by Mr. Folta. The fact that the Hospital did not appear on the judgment as being liable for Dr. Berje is essentially irrelevant because the jury properly found the Hospital guilty on the verdict. The sums awarded were promptly paid and this obviated the necessity of having to correct the judgment.

We believe that the Eleventh Circuit should not have considered this case from the standpoint of how many corporate employees were sued and how many of them were found not negligent. Under Florida law, the act of an agent or employee is deemed the act of the Corporation. Atlantic Cylinder Corp. v. Hetner, 438 So.2d 922 (Fla. 1st DCA 1983). Thus, since the Corporation was found guilty of causing two out of Mr. Folta's three injuries, it cannot under any logical analysis be deemed a prevailing party.

We also contend that the Eleventh Circuit's characterization of the claims as separate and able to form the basis of five different lawsuits is incorrect.

Under Florida law, if a person sues a corporation for a particular injury allegedly caused by an employee and loses, he cannot sue the corporation a second time by asserting that another employer or department might have also contributed to that same injury. The doctrines of res judicata collateral estoppel and prohibiting splitting causes of action require that all causes of action arising out of the same transaction or

occurrence be brought in one action. Cf. Variety Childrens Hospital v. Mt. Sinai Hospital of Greater Miami, Inc., 448 So.2d 546 (Fla. 3rd DCA 1984). Thus, for example, a corporation cannot be sued by a particular plaintiff for a particular injury on the theory of negligent manufacture in one suit and then on the theory of negligent design in another suit.

As noted in the Restatement of Judgments, 2d, §24 comment d:

> Successive acts or events as transaction or connected series; considerations of business practice. When a defendant is accused of successive but nearly simultaneous acts, or acts which though occurring over a period of time were substantially of the same sort and similarly motivated, fairness to the defendant as well as the public convenience may require that they be dealt with in the same action.

The illustration provided by the Restatement is also instructive in this connection:

> Illustrations:. . . .
> 5. A brings an action against B Co., a street railway company, alleging that the motorman was negligent in starting the car while A was alighting and that as a result A broke his arm. After a verdict and judgment for A, A brings a new action against B Co. alleging that after alighting from the car he fell into a trench negligently left by B Co., beside the road and broke his leg. The action is precluded.

It is clear from the illustration that where two employees cause different injuries involving successive acts, the corporation must be sued by the plaintiff for both in one suit or be forever precluded from suing.

In the present case the verdict form is divided into the three injuries suffered as a result of one course of treatment. Under the section involving the neck, two hospital employees are listed. One was found guilty and one not guilty. Clearly, the plaintiff received an affirmative judgment against the Hospital and was the prevailing party as to the neck injury. Two separate suits against the Hospital simply could not have been filed.

The same analysis applies to the hip injury. One hospital employee was exonerated and one was found 100% negligent. Again, separate suits could not have been filed.

In addition, since the hip, neck and foot injuries resulted from one course of treatment, involving successive and connected transactions all had to be brought in one suit. Thus, each claim was not so separate and distinct as to justify its own independent claim for attorneys fees. In any event, even if some of the claims could have been filed in separate actions (which we deny), the fact is that all were tried in one action and the plaintiffs prevailed when the dust settled.

QUESTION 2

> Second, does a trial court have jurisdiction to award attorney's fees pursuant to § 768.56 when the final judgment entered in the case fails to expressly reserve jurisdiction to make such an award?

While we believe that the answer to the question should be "yes", under Florida law the Foltas may still prevail even if the court is inclined to answer the question differently. As we

will discuss in detail below, if the issue is deemed procedural under Florida law (as opposed to substantive) the federal courts are bound to follow federal procedural rules on this issue. Under the federal procedure, jurisdiction need not be reserved in the judgment.

In addition, the issue was tried by consent and none of the defendants objected on this ground. Accordingly, it is our position that the issue was waived.

A. Jurisdiction Need Not Be Reserved Under Florida Statute § 768.56.

An analysis of the cases in Florida dealing with the reservation of jurisdiction to award attorneys fees appears at first blush to lead to a variety of inconsistent results. We believe that this issue is purely procedural and that this Court should adopt a rule similar to that adopted by the Supreme Court of the United States which held that in all cases where attorneys fees are authorized by statute, an express reservation of jurisdiction is not required. See White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982); Knighton v. Watkins, 616 F.2d 795 (5th Cir. 1980); Rothenberg v. Security Management Co., Inc., 677 F.2d 64 (11th Cir. 1982).

In White, supra, the plaintiff filed a motion for attorney's fees pursuant to 42 U.S.C. § 1988 four and one-half months after the entry of a final consent judgment. Section 1988 provides for awards of attorney's fees to a "prevailing party." The district court awarded fees and the First Circuit reversed on the ground that a motion for attorney's fees is a motion to alter

or amend the judgment and pursuant to Rule 59(e), Fed.R.Civ.P., such motion must be filed within 10 days after the entry of the judgment. The Supreme Court reversed the First Circuit and held that the motion for attorney's fees was properly before the district court. In its opinion, the Supreme Court approved the Fifth Circuit's decision in Knighton v. Watkins, 616 F.2d 795, 797 (5th Cir. 1980):

> "[A] motion for attorney's fees is unlike a motion to alter or amend a judgment. It does not imply a change in the judgment, but merely seeks what is due because of the judgment. [citation omitted].

(455 U.S. at 452).

The Supreme Court emphasized that while there is no jurisdictional time limit for filing the motion, a district court has discretion to deny a motion which is dilatory if prejudice exists to the opposing party.

In Rothenberg, supra, this Court applied White in reversing the district court's denial of a motion for attorney's fees sought pursuant to a Georgia statute. The motion for attorney's fees had been filed after the notice of appeal.

This same analysis can be justified under Florida's rules governing post trial motions.

In the event this Court declines to adopt a comprehensive rule of procedure, then there is another rational way to approach the problem. It is our position that where a statute

is mandatory -as opposed to discretionary - in awarding attorneys fees and where the statute does not expressly require the reservation of jurisdiction or the inclusion of the award in the judgment, then attorney's fees - like contribution - can be handled after final judgment without an express reservation of jurisdiction.This rationale was adopted by the Third District in Young v. Altenhaus, 448 So.2d 1039 (Fla. 3rd DCA 1983) portions quashed on other grounds, Young v. Altenhaus, _So.2d_ 10 FLW 252 (Fla. May 2, 1985). In Young, the Third District held that under Florida's Medical Malpractice Statute §768.56 - which is silent as to reservation of jurisdiction - there need not be a reservation of jurisdiction. The first reason given, which is applicable here, was that:

> "...the language of section 768.56(1) is mandatory: ". . . the court shall award a reasonable fee to the prevailing party. . . .'"

The Court also noted that ". . .the purpose of the statute [is] remedial and . . .it should be construed liberally to effectuate that purpose."

In Hartford Accident and Indemnity Co. v. Smith, 366 So.2d 456 (Fla. 4th DCA 1979), the Fourth District reversed an award of attorney's fees entered after judgment where jurisdiction was not reserved in the judgment to award such fees.

> "Since the statute which provides attorney's fees in cases such as this requires the award of attorney's fees to be included in the judgment the Court had to make the fees a part of the judgment

> or at least reserve jurisdiction to award the fees upon motion and proof. § 627.428. . ." (emphasis supplied).

A similar analysis was made in Arceneaux v. Merrill Lynch, Pierce, Fenner & Smith,, 595 F. Supp. 171 (MD. Fla). There, the defendants argued that attorney's fees were improperly awarded under the Florida Securities Act § 517.211(6) because the motion was filed after the Final Judgment was entered.

The court stated that the clearest rationale for the rule requiring a reservation of jurisdiction was enunciated in Hartford, supra i.e., that the statute required fees to be included in the judgment or that jurisdiction be reserved for that purpose. The court rejected the argument that jurisdiction had to be reserved pursuant to the statute before it because,

> "the statute involved in the instant case, however, makes no such provision."

See also Golub v. Golub, 336 So.2d 693 (Fla. 2nd DCA 1976) wherein the court held that "[I]t was not necessary to reserve jurisdiction over costs in order to enter a subsequent order taxing costs in favor of the successful party."

Without ever citing its decision in Hartford, supra and without addressing the issue of the mandatory nature of the Medical Malpractice Statute § 768.56, and that it does not require a reservation of jurisdiction, the Fourth District in North Broward Hospital District v. Finkelstein 456 So.2d 498 (Fla. 4th DCA 1984) simply held that the Final Judgment must reserve jurisdiction for that purpose.

An examination of the Court's opinion reveals that the three decisions it relied upon were domestic relations cases, where an award of fees is discretionary by statute.

Based upon the foregoing, we respectfully urge the Court to adopt a procedural rule applying to all cases involving a statutory award of attorney's fees which would not require a reservation of jurisdiction. In the alternative, this Court should hold that where the statute is silent on the issue and where the grant of fees is mandatory, a reservation of jurisdiction is not required.

B. The Issue is Procedural Rather Than Substantive.

In the unlikely event that this court determines that the correct answer to the second question is "no", then it is of critical importance to this case to define whether the rule in Florida is substantive or procedural.

In Lumbermens Mutual Casualty Company v. Renuart-Bailey-Cheely Lumber & Supply Co., 392 F2d 556 (5th Cir. 1968), the Fifth Circuit held that Florida Statute § 627.0127, which authorizes fees in successful suits by an insured against his insurer, should be enforced in federal court. However, the Fifth Circuit also held that:

> "We do not consider this court bound by the procedural direction of the Florida Statute, that the appellate court shall adjudge the fee on appeal."

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In the present case, Florida Statute § 768.56 is silent as to whether jurisdiction must be reserved. Any such rule adopted by this Court would clearly be procedural and applicable only to the state courts of Florida. The issue simply involves how a claim may be preserved in a Florida court which is under the jurisdiction of this Court. There is no compelling reason to attempt to govern how federal courts reserve or divest themselves of jurisdiction in a case. In fact, if such a rule is deemed substantive it would change the present federal rule in diversity cases.

C. The Issue was Waived.

It is uncontroverted that none of the defendants ever objected to the hearing on fees or to consideration of the issue of fees by the district judge on the ground that jurisdiction was not reserved in the judgment. The issue of attorney's fees was tried by consent. Thus, if the reservation of jurisdiction is not deemed a matter of subject matter jurisdiction under Florida law, then it was waived. We do not believe that a reservation of jurisdiction for attorney's fees necessarily has to be grounded in the trial court's subject matter jurisdiction.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that both questions be answered as urged by the Foltas.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 8th day of May, 1985 to: Alan W. Cohn, Esq., 3705 Biscayne Boulevard, Miami, Florida 33131, Thomas Saieva, Esq., P.O. Box 1601, Tampa, Florida 33601, Jeffrey Fulford, Esq., 333 North Ferncreek Avenue, Orlando, Florida 32803, and Michael L. Kinney, Esq., Sun Bank Building, 315 Madison, Suite 711, Tampa, Florida 33602.

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