o/a 11-5-85

IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,784

HOWARD FOLTA, et ux,

Petitioners,

vs.

JOSEPH BOLTON, et al.,

Respondents. /

REPLY BRIEF OF TARPON SPRINGS GENERAL HOSPITAL, CROSS-APPELLANTS

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ARGUMENT

TARPON SPRINGS GENERAL HOSPITAL, INC., as Appellee would join in with the issues and arguments on appeal as asserted by Appellee, Dr. Berje. Specifically, this Appellee would adopt by reference the argument and citations of authority regarding Dr. Berje's position that the Trial Court was without jurisdiction to order attorney's fees where such jurisdiction was not deserved in the Final Judgment.

In this reply brief of the Cross-Appellant, TARPON SPRINGS GENERAL HOSPITAL, INC., the hospital will not spend a great deal of time rearguing or reiterating the points previously made in its original brief. Instead, it will attempt to address or respond to the points raised in Appellee's reply brief. Specifically, the hospital wishes to rebut the argument made by Appellee in its reply brief that this Court is not bound by the facts as were cited by the Eleventh Circuit Court of Appeal. Appellee mistakenly relies on footnote six of the Eleventh Circuit Court opinion in the instant case as support for its claim that they are not bound by the facts as were cited in the Eleventh Circuit opinion. Footnote six does not state that this Court is not bound by the facts as determined by the Eleventh Circuit Court of Appeals but, instead states that this Court is not bound by the phrasing of the certified questions to this Court. Thus, the hospital submits that the facts which are at issue in this

case are recited by the Eleventh Circuit Court of Appeals in their certificate to this Court.

In its reply brief, Appellee seems to assert that the hospital prevailed as to only one of the claims brought against it. As is indicated in this cross-appellant's initial brief, this claim is totally unfounded in the record. Instead, the record clearly indicates that the hospital prevailed on at least three of the five separate and independent claims brought against it. The record clearly indicates that the Foltas chose to pursue the five separate and independent causes of action against the hospital and they cannot now be heard to claim that because some of these claims against the hospital were based on vicarious liability for the hospital's employees or agents, that these claims were not in fact against the hospital itself. Thus, the Foltas are now attempting to claim that had they prevailed against the employee or agent they could have recovered monetary damages from the hospital but that since they did not prevail against certain employees the hospital was not the prevailing party. Consequently, the hospital submits that the record clearly indicates that it prevailed on a minimum of three out of five separate and independent claims which were brought against it by the Appellee.

In regard to the second question certified by the Eleventh Circuit Court of Appeals, the hospital specifically adopts its prior argument. Additionally, the hospital would cite in support of those arguments the recently

decided decision in Compton vs. Gator Office Supply and Furniture, Inc., 10 F.L.W. 1574(Fla. 4th DCA, July 5, 1985). The aforementioned case reverses an award of attorney's fees based on the earlier decision of North Broward Hospital District vs. Finklestein, 456 So.2d 498(Fla. 4th DCA 1984). Thus, the Compton court has adopted the reasoning and rationale of the Finklestein court in holding that absent a specific reservation of jurisdiction to assess attorney's fees in a medical malpractice action the Trial Court lacks jursidiction to make such an award. Compton vs. Gator Office Supply and Furniture, Inc., supra: North Broward Hospital District vs. Finklestein, supra.

In addition to the foregoing, the hospital would address the arguments raised by the Appellee that the second issue raised by the Eleventh Circuit Court of Appeal is a procedural question and therefore should be dealt with by the Eleventh Circuit. In that regard the hospital submits that Appellees' argument is totally baseless and is not supported by the record in this case. Specifically, when discussing this latter issue the Eleventh Circuit Court stated in its opinion: "Again we recognize that the Supreme Court of Florida is the appropriate authority for resolution of this issue." Thus, the Eleventh Circuit has determined that this Court is the appropriate authority for resolution of the second certified question and Appellees' arguments to the contrary are totally without support.

Appellees remaining arguments have been answered fully in the hospital's initial brief.

CONCLUSION

Based on the foregoing arguments, the hospital respectfully submits, that this Court should answer the certified questions in favor of the hospital.

Respectfully submitted,

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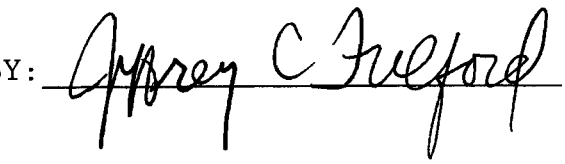
BY: 

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Tarpon Springs General Hospital, Cross-Appellants has been furnished by mail this _____ day of July, 1985 to: ALAN W. COHN, ESQUIRE, 3705 Biscayne Blvd., Miami, Florida 33131, THOMAS SAIEVA, ESQUIRE, P. O. Box 1601, Tampa, Florida 33601, MICHAEL L. KINNEY, ESQUIRE, Sun Bank Bldg., 315 Madison, Suite 711, Tampa, Florida 33602, and to MARK HICKS, ESQUIRE, 1414 duPont Bldg., 169 East Flagler Street, Miami, Florida 33131.

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