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IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,230

CLERK

By _____

THE FLORIDA PATIENT'S COMPENSATION FUND, INC.

pl

Petitioner,

vs.

GEORGE BOUCHOC, ST. FRANCIS HOSPITAL
and EDNA PETERSON,

Respondents.

On Petition to Invoke Discretionary Jurisdiction
to Review Decision of the District Court of
Appeal of Florida, Third District

BRIEF OF PETITIONER
ON JURISDICTION

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THE FLORIDA PATIENT'S :
COMPENSATION FUND, :
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Petitioner, :
 :
vs. :
 :
GEORGE BOUCHOC, ST. :
FRANCIS HOSPITAL and :
EDNA PETERSON, :
 :
Respondents. :
_____ :

PETITIONER'S BRIEF
ON JURISDICTION

I.

JURISDICTION

These proceedings are filed to review a decision of the District Court of Appeal of Florida, Third District, in Bouchoc v. Peterson, 490 So.2d 132 (Fla. 3d DCA 1986). (A. 1-4).¹ Jurisdiction vests in this court pursuant to Article V, Section 3(b)(3), Florida Constitution, because the District Court decision conflicts with a decision of this Court and a decision of another District Court of Appeal.

¹ The abbreviation "A" stands for Appendix to Brief of Petitioner.

II.

STATEMENT OF THE CASE AND FACTS

As set forth in the decision below, appeal was taken to that court from a final judgment for attorneys' fees based on Section 768.56, Florida Statutes (1983), since repealed, against defendants in the trial court including health care providers and the Florida Patient's Compensation Fund. By cross-appeal, the plaintiff in the trial court challenged the Amended Final Judgment on Liability and Damages to the extent that it limited the health care providers' liability to the statutory \$100,000 without conditioning this limitation on the Fund's ability to satisfy that portion of the judgment which exceeds \$100,000. The practical effect of the amended final judgment is to require the Fund to pay the attorney's fee award.²

The holding of the majority decision is clearly restated in the dissenting opinion:

"In the present case, the majority, relying on Miller, concludes that fulfilling the same statutory requirements insulates the member-doctor from liability for a plaintiff's attorney's fees, the payment of which, it is again decided, is to be the Fund's sole responsibility."

The majority decision of the District Court of Appeal directly and expressly conflicts with the decision of this

² The final judgment for plaintiffs was in the amount of \$750,000.00.

court in Citizens of the State of Florida v. Public Service Commission, 435 So.2d 784 (Fla. 1983) (A.5-10) and that of the District Court of Appeal of Florida, Second District, in Florida Patient's Compensation Fund v. Maurer, 11 FLW 1852 (Fla. 2d DCA August 22, 1986). (A.11).

III.

SUMMARY OF ARGUMENT

Attorney's fees awarded to the plaintiff prevailing in a medical malpractice action against health care providers arise out of but, by statutory definition, are not part of the successful claim. The Fund, by statute, is responsible for payment of a claim. Thus, to make the Fund responsible for the payment of attorney's fees ignores the expressed intent of the governing statute. This conflicts with the cited decision of this Court as well as the cited decision of the District Court of Appeal.

IV.

POINT INVOLVED ON APPEAL

WHETHER THE DETERMINATION BY THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, THAT THE FLORIDA PATIENT'S COMPENSATION FUND RATHER THAN A FUND MEMBER IS RESPONSIBLE FOR THE PAYMENT OF ATTORNEY'S FEES AWARDED UNDER SECTION 768.56 IN A MEDICAL MALPRACTICE ACTION DIRECTLY AND EXPRESSLY CONFLICTS WITH THE DECISION OF THIS COURT IN CITIZENS OF THE-STATE OF FLORIDA V. PUBLIC SERVICE COMMISSION AND THAT OF THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT, IN FLORIDA PATIENT'S COMPENSATION FUND V. MAURER.

V.

ARGUMENT

1. Direct and Express Conflict with Florida Patient's Compensation Fund v. Maurer

On August 22, 1986, the District Court of Appeal of Florida, Second District, issued its opinion in Florida Patient's Compensation Fund v. Maurer. Before the court was a challenge to an order in which the trial court determined the Florida Patient's Compensation Fund to be solely responsible for the payment of costs and attorney's fees taxed against the unsuccessful health care providers in a medical malpractice action. The opinion points out that the litigation was initiated against the health care providers and the Florida Patient's Compensation Fund in 1982 and a final judgment was entered upon a jury verdict awarding the plaintiff \$400,000 which was reduced to \$385,000 based upon settlement reached with a co-defendant.

Thereafter, the trial court awarded the prevailing plaintiffs costs of approximately \$15,000.00 and attorney's fees in the amount of \$133,333.33. Both costs and fees were taxed against the health care providers and the Fund jointly and severally. Thereafter, the health care providers sought to restrict their respective liabilities to the \$100,000 prescribed in Section 768.54, Florida Statutes (1981). The trial court granted this motion and entered an order finding that the Fund was liable for the balance of the final

judgment including costs and attorney's fees.³ On appeal, the Fund attacked, among other things, the determination that it alone was liable for the payment of the attorney's fees.

This particular issue is stated as follows in the opinion of the court:

"FPCF's final contention is that the limitation of liability enjoyed by a health care provider pursuant to section 768.54(2)(b) is not intended to foreclose imposing a prevailing plaintiff's attorney's fees upon the health care provider."

The opinion then specifically recognizes that the Third District Court of Appeal rejected this construction of Section 768.56 and has held the Fund solely liable for the payment of fees, citing this case. Notwithstanding the decision in the instant case, ". . .we disagree and note conflict with the majority in Bouchoc v. Peterson. . . ."

The Second District adopts the reasoning of the dissent in Bouchoc, particularly that portion which notes that to place vicarious responsibility upon the Fund for a tortious health care provider's liability to pay a successful plaintiff's attorney's fee is inconsistent with the purpose of Section 768.54.

The opinion goes on to concur with the conclusion that plaintiff's attorney's fees arise out of but by

³ The order limiting liability of the health care providers in the instant case to \$100,000.00 has the same effect.

definition are not part of a successful claim and that excess portion of a claim which the Fund is responsible to pay cannot include attorneys' fees.

The determination of the trial court granting the motion to limit liability of the health care providers to an initial \$100,000 was reversed and the cause remanded for the entry of an order consistent with the opinion of the court.

No further elaboration is necessary to establish that this decision directly and expressly conflicts with the instant decision and requires resolution of this conflict by this Court.

2. Direct and Express Conflict with
Citizens of the State of Florida
v. Public Service Commission

While the facts and issues of the cited decision of this court are not similar to those of the instant case, the cited decision does re-announce the well accepted principle of law that where words of a statute are clear and unambiguous, judicial interpretation is not appropriate to displace the expressed intent. The only way in which the District Court of Appeal in the instant case could have reached the result which it did in the majority opinion is by violating this principle and thus conflicting with the case which announces it.

Section 768.54, Florida Statutes (1985), governs creation, operation, and liability of the Florida Patient's Compensation Fund. Members of the Fund are permitted to limit their liability for "any claim arising out of the

rendering of or failure to render medical care or services" which results in injury to a patient. Section 768.54(3)(a), Florida Statutes (1985). Since attorney's fees awarded to a plaintiff in a medical malpractice action arise out of but by definition are not a part of a successful claim, the excess portion of a claim which the Fund is responsible to pay cannot include attorneys' fees under the clear words of the statute. ⁴

The District Court of Appeal in the instant case has taken the clear words of the statute and attributed to them an interpretation which displaces the expressed intent. This is a conflict of decisions.

3. Reasons for Granting the Writ

Section 768.56 of the Florida Statutes was repealed by Ch. 85-175, Section 43, Laws of Florida (1985). Section 48 of the repealer act provides that it would apply prospectively and not apply to actions filed on or before the effective date of October 1, 1985.

There are untold numbers of medical malpractice actions still pending which were filed before October 1, 1985 and to which the provisions of Section 768.56 apply. The substantive issue here involved was not made academic by repeal of the statute.

⁴ A claim is defined as "...arising out of an occurrence." Section 768.54(1)(f). An occurrence is "...an accident or incident. . .which results in patient injuries not intended from the standpoint of the insured." Section 768.54(1)(f).

The decisions of the District Court of Appeal here and the Second District Court of Appeal involve a question of grave importance to plaintiffs in a medical malpractice action, health care providers, and the Florida Patient's Compensation Fund. The merits of determining which of these latter-named entities should be required to pay attorneys' fees to a successful plaintiff in a medical malpractice action is a question upon which there are two exactly opposite views by different district courts of appeal. This conflict should be resolved by this Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail upon Julian Clarkson, Esquire, and Richard Nichols, Esquire, Holland & Knight, P.O. Box 015441, Miami, Florida 33101; H. Lawrence Hardy, Esquire, 299 Alhambra Circle, Coral Gables, Florida 33134; and Betsy E. Gallagher, Attorney at Law, Talbut, Kubicki, Bradley & a Draper, 701 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130, this 2nd day of September, 1986.

Respectfully submitted,

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