04-02-97

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IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,230

THE FLORIDA PATIENT'S COMPENSATION FUND,

Petitioner,

vs.

GEORGE BOUCHOC, ST. FRANCIS HOSPITAL and EDNA PETERSON,

Respondents.

BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

By order dated December 5, 1986, this Court has accepted jurisdiction and ordered a brief on the merits. Petitioner, Florida Patient's Compensation Fund, was one defendant in a medical malpractice action. The Fund appealed the Final Judgment for Attorney's Fees awarding fees to plaintiff's counsel pursuant to Section 768.56, Florida Statutes (1983). The amount of the fee was agreed to and was not an issue in the appeal to the District Court of Appeal, Third District.

The parties to the appeals[1] proceeded under a stipulation in lieu of record on appeal since the only issue was whether the Fund or other defendants in the medical malpractice action were responsible for payment of the attorney's fees where the plaintiff's judgment was in excess of that amount which the other defendants had to pay pursuant to Section 768.54, Florida Statutes, 1985.[2]

The stipulation in lieu of record set forth all pertinent facts necessary to a determination of the issue in the District Court of Appeal. (R.2-3) Plaintiff, Peterson, sued the hospital, its employee, Bouchoc, and Dr. Grondin for malpractice. The jury returned a $750,000 verdict in

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[1] One other defendant took an appeal from the order awarding fees. A cross-appeal was filed by the plaintiff. All matters were consolidated.

[2] Record references are to the Index filed in this Court by the District Court of Appeal.

favor of the plaintiff against all defendants. The hospital and Grondin, members of the Fund, each paid plaintiff $100,000 and then looked to the Fund to pay the amount of the judgment in excess of $200,000, plus the $225,000 attorney's fee awarded by order of the court. The trial court had awarded fees against all defendants jointly and severally. (R.4-5)

The decision of the District Court of Appeal states that appeal was taken to that court from a final judgment for attorney's fees awarded pursuant to Section 768.56, Florida Statutes (1983), since repealed, against health care providers and the Fund. The decision requires the Fund alone to pay the attorney's fee award.

The majority decision is explained 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." Bouchoc v. Peterson, 490 So.2d 132, 134 (Fla. 3d DCA 1986).

Jurisdiction was sought in this Court based on direct and express conflict with the decision of the District Court of Appeal of Florida, Second District in Florida Patient's Compensation Fund v. Maurer, 493 So.2d 510 (Fla. 2d DCA 1986). The Maurer decision expressly rejects the interpretation of Section 768.56 given by the Third District

in this case and adopts the reasoning of the Bouchoc dissent: Placing 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 statute which creates the Fund. Maurer concurs with the following statement in the Bouchoc dissent: "Plaintiff's attorney's fees arise out of, but are by definition not a part of, a successful claim, and that excess portion of a claim which the Fund is responsible to pay cannot, therefore, include attorney's fees."[3] Florida Patient's Compensation Fund v. Maurer, supra at page 511.

SUMMARY OF ARGUMENT

The payment of attorney's fees awarded to the prevailing party in a medical malpractice action under the provisions of Section 768.56, now repealed, should not be the responsibility of the Florida Patient's Compensation Fund regardless of the amount of the plaintiff's judgment. The statute creating the Fund does not authorize such payment, limiting the liability of the Fund to judgments which involve the rendering or failure to render medical care or services. There is no language in the statute which justifies a contrary conclusion.

Section 768.54 which creates the Fund establishes the contract between the Fund and its members. This statute

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[3] Author's emphasis.

limits the liability of the Fund to judgments involving rendering or failure to render medical care or services. The award of attorney's fees does not fall within this category and is thus outside the contract between the Fund and the Fund members.

There is no other language in Section 768.54 which justifies a contrary conclusion. On the contrary, the express language of the statute creating the Fund is clear that the legislature did not intend that the Fund be liable for attorneys' fees awarded under Section 768.56.

POINT INVOLVED ON APPEAL

THE TRIAL COURT ERRED IN ENTERING FINAL JUDGMENT FOR ATTORNEY'S FEES AGAINST THE FUND RATHER THAN FUND MEMBER IN A MEDICAL MALPRACTICE ACTION.

ARGUMENT

The Florida Patient's Compensation Fund is a statutory entity created by legislation enacted in 1975 in response to the "crisis" then existing because private insurance companies were refusing to write medical malpractice insurance in Florida or those who were writing such insurance were charging exorbitant premiums. Chapter 75-9, Laws of Florida.

The import of the statute was summarized by this Court in Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783, 789 (Fla. 1985): "The legislature has designated a source to pay medical malpractice judgments and

has created a system of paying future damages." (Emphasis supplied.)

The statute creating the Fund first appeared as Section 627.353. It was then transferred to Section 768.54. The enactment has been amended numerous times during its eleven year history. None of these amendments alter the argument made by the Fund here that it is not responsible for the payment of attorney's fees awarded to plaintiff's counsel in a medical malpractice action.

To resolve the issue of whether the Fund is liable for attorney's fees requires review of the relevant provisions of Section 768.54. Section 768.54(2)(b), Florida Statutes (1979) provided, "A health care provider shall not be liable for an amount in excess of $100,000 per claim or $500,000 per occurrence for claims covered under subsection (3). . . ." if the health care provider has paid the required fee to belong to the Fund, has provided an adequate defense for the Fund and pays at least the initial $100,000 or the maximum limit of the underlying coverage.

A claim is defined as ". . .arising out of an occurrence." Section768.54(1)(g). An occurrence is ". . . an accident or incident, including continuous repeated exposure to conditions, which results in patient injuries not intended from the standpoint of the insured." Section 768.54(1)(f).

Only a claim covered under subsection (3) of the statute can result in a settlement or judgment for which the

Fund is obligated to pay the extent of its coverage in excess of the Fund entry level selected by the health care provider. Section 768.54(3)(a) provides: "There is created a 'Florida Patient's Compensation Fund' for the purpose of paying that portion of any claim arising out of the rendering of or failure to render medical care or services. . . . ."

Under these provisions of the enacting statute, Section 768.54 is intended as a limitation of liability to health care providers who are members of the Fund for accidents or incidents arising out of the rendering of or failure to render medical care or services resulting in patient injury. The enumerated provisions limit the Fund's financial obligation to common law damages which arise out and flow from the rendering or failure to render medical care or services. This would include medical and hospitalization bills, wage loss, pain and suffering, etc. This would not include attorney's fees to be awarded the plaintiff's attorney under the provisions of now repealed Section 768.56.

These fees are an extraordinary remedy provided for by separate statute, now repealed. These fees are not logically a part of the claim arising out of the rendering of or failure to render medical care. Requiring the Fund to pay attorney's fees to the plaintiff's attorney violates the statutory scheme which makes it the responsibility of the Fund member to provide the defense for any claim which

potentially affects the Fund. Section 768.54(3)(e)(2).

When the statute creating the Fund and describing its responsibilities and those of the member health care providers was enacted in 1976, there was no statutory basis for the recovery of attorney's fees against the non-prevailing party in a medical malpractice action. Statutory provision for attorney's fees in medical malpractice actions did not come into existence until the enactment of Section 768.56 (1980), four years after creation of the Fund. Thus, the 1976 legislature could not have considered the payment of attorney's fees awarded to plaintiff's counsel under a statute which did not exist.

Neither the enactment of Section 768.54 or the later enactment of Section 768.56 demonstrate legislative intent that the latter section was to be included as a part of the contract created by Section 768.54 between the Fund and a Fund member. The legislature in 1976 could not have considered the payment of attorney's fees under Section 768.56 when it imposed on the Fund the responsibility for paying claims resulting in judgments against members in excess of $100,000. Section 768.54 does not incorporate either expressly or otherwise the provisions of Section 768.56. The wording of Section 768.54 must be interpreted in the light of what it meant when it was enacted in 1976.

The 1976 statute creating the Fund was designed to alleviate a situation in which medical malpractice insurance

was available, if at all, only for exorbitant rates, thus creating a threat to the continuing availability of health care. As this Court in Von Stetina stated, the statute was designed to insure that sufficient funds existed to pay the substantial judgments rendered in medical malpractice actions and to pay future damages. Nowhere in the Von Stetina analysis is there an indication that the Fund should be required to pay attorney's fees in addition to that portion of the liability judgment above the entry level of the Fund member.

Since its inception, there has been a provision in 768.54 concerning the amount to be paid per person per year until a claim has been paid.[4] This provision requires that court costs and reasonable attorney's fees be paid in one lump sum within ninety days after the settlement or judgment is rendered. This statutory phrase has been argued as recognition of the fund's obligation to pay those attorney's fees awarded to the plaintiff's attorney under Section 768.56. This argument has no merit.

The attorney's fees mentioned in Section 768.54(3)(f)3 govern the payment of fees to the plaintiff's attorney under the contract of employment between the plaintiff and the attorney. Fees owed by the plaintiff to his attorney are excluded from the periodic payments specified for certain

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[4] Previously Section 768.54(3)(e)3, now Section 768.54(3)(f)3.

types of damages. This 1976 provision could not apply to fees paid to the prevailing party under a 1980 statute.

In this case, the District Court of Appeal held that the Fund is liable for attorney's fees as well as damages arising from a plaintiff's injuries caused by a health care provider after the provider has paid $100,000. There is an extensive dissent by Judge Pearson expressing the view that even though a Fund member's liability for the damages arising from its negligent conduct may be limited to $100,000, the Fund member may nevertheless be held responsible to pay other expenses of litigation such as attorney's fees notwithstanding the member's insurer may ultimately pay out more than $100,000.

One month after rehearing was denied in this case, the Second District Court of Appeal decided Florida Patient's Compensation v. Maurer, 493 So.2d 510 (Fla. 2d DCA 1986).[5] There the Fund contended that the limitation of liability of a health care provider pursuant to Section 768.54(2)(b) was not intended to foreclose imposing a prevailing plaintiff's attorney's fees upon the health care provider. The decision recognizes that the Third District rejected this construction of the statute. The Second District nevertheless disagreed, and adopted the reasoning of the dissent:

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[5] The fund filed certiorari proceedings in this Court asserting conflict between Bouchoc and Maurer. The Court has not ruled on jurisdiction. (Case No. 69,230). Maurer is pending on jurisdictional briefs.

> Thus, as Judge Pearson noted, to place a vicarious responsibility upon the FPCP for a tortious healthcare provider's liability to pay a successful plaintiff's attorney 's fee is inconsistent with the purpose of section 768.54. We concur in the conclusion that: 'Plaintiff's attorney's fees arise out of, but are by definition not a part of, a successful claim, and that excess portion of a claim which the Fund is responsible to pay cannot, therefore, include attorney's fees.'" Florida Patient's Compensation Fund v. Maurer, supra.

In creating the Fund, the legislature designated a source to pay medical malpractice judgments. The legislature did not designate a source to pay statutory attorney's fees to be awarded under the provisions of a later-enacted statute. No evil intended to be corrected by the statute creating the Fund is addressed by making the Fund pay attorney's fees awarded to the plaintiff's attorney in a medical malpractice action.

This analysis is recognized in the Bouchoc dissent and Maurer decision. It should be adopted by this court. The importance of what the Fund seeks here is not diminished by the repeal of of Section 768.56.[6] The repeal does not apply to the numerous actions filed on or before October 1, 1985, which will involve payment of fees.[7]

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[6] See, Chapter 85-175, Section 43, Laws of Florida (1985).

[7] The same question is presently before this court in Florida Patient's Compensation Fund v. Smith, and Smith v. Sitomer, Case Nos. 4-86-0844 and 4-86-0967; and Morales v. Scherer, Case No. 4-86-1959, pending in the Fourth District Court of Appeal.

CONCLUSION

For the reasons and under the authorities set forth above, the majority decision of the District Court of Appeal should be quashed and the dissenting opinion made the law of Florida.

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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 & Draper, 701 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130, this 23rd day of December, 1986.

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