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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.

On appeal from the District Court of Appeal of Florida Third District

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BRIEF ON THE MERITS OF RESPONDENTS, GEORGE BOUCHOC and ST. FRANCIS HOSPITAL

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I N D E X

TABLE OF CITATIONS AND AUTHORITIES

TABLE OF CITATIONS AND AUTHORITIES (continued)

OTHER AUTHORITIES:

STATEMENT OF THE CASE AND FACTS

Respondents, GEORGE BOUCHOC and ST. FRANCIS HOSPITAL have respectfully added a jurisdictional issue in Point I of the brief. Brief of Respondents, pages 4-6. Respondents address petitioner's argument on the merits in Point II of this brief. Brief of Respondents, pages 7-14.

Respondents, GEORGE BOUCHOC and ST. FRANCIS HOSPITAL, agree with the statement of the case and facts of petitioner, FLORIDA PATIENT'S COMPENSATION FUND. Respondents add that the record shows that before trial Mr. BOUCHOC and ST. FRANCIS HOSPITAL each tendered to the FUND $100,000--the maximum amount of underlying coverage (R. 2-3). The action arose from events occurring on February 23, 1982.

POINTS INVOLVED ON APPEAL

POINT I

WHETHER THIS COURT HAS JURISDICTION TO REVIEW THE CASE ON THE MERITS; WHETHER THERE IS AN EXPRESS AND DIRECT CONFLICT.

POINT II

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

SUMMARY OF THE ARGUMENT

In Point I, this Court is asked to revisit the jurisdictional issue. There is no conflict between the present Third District decision and Florida Patient's Compensation Fund v. Maurer, 493 So.2d 570 (Fla. 2d DCA 1986). The majority opinion of the Third District decision does not expressly state the holding on which the FUND relies to create a conflict with the Maurer decision.

There also is no conflict between the instant Third District decision and Citizens of the State of Florida v. Public Service Commission, 435 So.2d 784 (Fla. 1983). The instant decision, involving facts substantially different from the Citizens of the State of Florida decision, does not announce a rule of law which conflicts with any statement of law in this case.

Point II of the brief addresses the merits and urges this Court to approve the instant Third District decision. The FUND rather than its members should be responsible for the payment of plaintiff's attorney's fee award under the language of the medical malpractice act, and policy considerations support this determination. The clear language of Section 768.54(2)(b) must be read with section 768.56 and limits the liability of the health care providers to $100,000 per claim.

A R G U M E N T

POINT I

THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW THE CASE ON THE MERITS; THERE IS NO DIRECT AND EXPRESS CONFLICT.

Although this Court entered its order accepting jurisdiction on December 5, 1986, respondents request this Court to revisit the jurisdictional issue. This Court has, on occasion, determined that review was improvidently granted and found that there was no "express and direct conflict" after accepting jurisdiction. See, e.g., Department of Health and Rehabilitative Serv. v. National Adoption Counseling Serv., Inc., __ So.2d __ (Fla. November 26, 1986 Case No. 68,191), [11 FLW 617]; Reaves v. State, 485 So.2d 829 (Fla. 1986).

The FUND sought to invoke this Court's jurisdiction on the basis of an alleged "direct and express" conflict between the instant Third District decision and Florida Patient's Compensation Fund v. Maurer, 493 So.2d 510 (Fla. 2d DCA 1986). A careful reading of the majority opinion of the Third District decision shows that the majority opinion does not expressly state the holding on which the FUND relies to create a conflict between the instant Third District decision and Maurer.

This Court has recently noted: "Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision." Reaves v. State, 485 So.2d at 830. This Court does not allow an "inherent" or "implied"

conflict to form the basis of conflict jurisdiction. Department of Health and Rehabilitative Serv. v. National Adoption Counseling Serv., Inc., supra.

No where in the majority opinion does the Third District announce a holding that the FUND must pay any judgment for attorney's fees entered for a plaintiff once the FUND member has satisfied the conditions precedent of Section 768.54(2)(b), Florida Statutes (1981)--the payment of the membership fee and underlying maximum monetary limit and providing an adequate defense. Indeed, in its brief on jurisdiction and its brief on the merits, the FUND essentially concedes that language from the dissenting opinion is necessary to show the question of law addressed by the majority. Brief of Petitioner on Jurisdiction, page 2; Brief of Petitioner on the Merits, page 2. There is no express and direct conflict between the instant Third District decision and the decision of the Second District Court of Appeal in Maurer.

There also is no express and direct conflict between the instant Third District decision and Citizens of the State of Florida v. Public Service Commission, 435 So.2d 784 (Fla. 1983). Petitioner argued that the Third District decision conflicts with the following rule of law announced in this Court's decision: "Where the words of a statute are clear and unambiguous, judicial interpretation is not appropriate to displace the expressed intent." [cites omitted] Id. at 786. The instant decision, involving facts substantially different from the Citizens of the State of Florida decision, does not announce a rule

of law which conflicts with this Court's decision. The instant decision announced no principle relating at all to judicial interpretation of a statute. This Court does not have jurisdiction to review a decision based on an "implied" or "inherent" conflict. Department of Health and Rehabilitative Serv. v. National Adoption Counseling Serv., Inc., supra.

This Court should not exercise its discretionary jurisdiction.

POINT II

THE TRIAL COURT DID NOT ERR IN ENTERING A FINAL JUDGMENT FOR ATTORNEY'S FEES AGAINST THE FUND RATHER THAN THE FUND MEMBER IN A MEDICAL MALPRACTICE ACTION.

The Florida Patient's Compensation Fund was established to mitigate the spiraling cost of medical malpractice insurance. Chapter 75-9, Laws of Fla.[1] See also Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783, 788 (Fla. 1985); Florida Patient's Compensation Fund v. Mercy Hosp., Inc., 419 So.2d 348, 349 (Fla. 1982).

The purpose of the creation of the FUND was not only to protect patients but also "to provide medical malpractice protection to the physicians and hospitals who join it ..." Florida

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[1]/ The preamble to the 1975 Act creating the FUND states:

> WHEREAS, despite the responsive and responsible actions of the 1975 session of the legislature, professional liability insurance premiums for Florida physicians have continued to rise and ... such insurance, even at exhorbitant rates, is becoming virtually unavailable in the voluntary private sector, and ... this insurance crisis threatens the quality of health care services in Florida ... and ... this crisis also poses a dire threat to the continuing availability of health care in our state ... and ... our present tort law/liability insurance system for medical malpractice will eventually break down ... [and] fundamental reforms of said tort law/liability insurance system must be undertaken, and ... the continuing crisis proportions of this compelling social problem demand immediate and dramatic legislative action....

Ch. 76-260, Laws of Fla. See also ch. 75-9, Laws of Fla.

Patient's Compensation Fund v. Von Stetina, supra at 785. The plain language of Section 768.54(2)(b), Florida Statutes (1981) as well as strong public policy considerations mandate a determination that the FUND is responsible for the payment of attorney's fees where the amount of plaintiff's judgment is in excess of the maximum amount of liability of a FUND member, and the FUND member has already paid the maximum amount of its liability.

Section 768.54(2)(b) provides that "a health care provider shall not be liable for an amount in excess of $100,000 per claim ... for claims covered under subsection (3)" if the conditions precedent for applying the limitation of liability have been met. (emphasis added). Section 768.54(3) states that the FUND was created "for the purpose of paying that portion of any claim arising out of the rendering of a failure to render medical care or services ..." (emphasis added). Section 768.54(1)(g) defines "per claim" as "all claims per patient arising out of an occurrence." "Occurrence" is defined in Section 768.54(1)(f) as "an accident or incident, including continuous or repeated exposure to conditions, which results in patient injuries not intended from the standpoint of the insured." Plaintiff's claim for attorney's fees is clearly one of the "claims" "arising out of" the occurrence which was the basis of the medical malpractice action. The clear and unambiguous limitation of liability in the statute applies to all claims for attorney's fees. The FUND argues, and dissenting opinion posited, that attorney's fees "are

not logically a part of the claim arising out of the rendering of or failure to render medical care." Brief of Petitioner, page 6; 490 So.2d at 134. (emphasis added). The petitioner's use of the words "a part of the claim" is contrary to the language of the statute. The petitioner, and dissenting opinion below, imply that each plaintiff may only assert one claim as a result of an occurrence. However, the statute defines "per claim" as "all claims per person arising out of an occurrence" and certainly contemplates a multiplicity of claims arising out of each occurrence.

The words "arising out of" have not been judicially construed for the purposes of the medical malpractice act. However, the words "arising out of" have been construed widely by Florida and federal courts for the purposes of automobile liability policies and automobile insurance statutes. See, e.g., Red Ball Motor Freight v. Employers Mut. Liab. Ins. Co., 189 F.2d 374 (5th Cir. 1951); Government Employees Ins. Co. v. Novak, 453 So.2d 1116 (Fla. 1984); Padron v. Long Island Ins. Co., 356 So.2d 1337 (Fla. 3d DCA 1978). In both Red Ball Motor Freight and Padron v. Long Island Insurance Co, supra at 1338, the courts of appeal construed insurance policies which provided coverage for an insured for injuries sustained from an accident "arising out of the ownership, maintenance or use of a motor vehicle" as meaning those accidental injuries "which originate from, are incident to, or have some connection with" the use of the insured motor vehicle. Hence, the two courts determined that the words "arising

out of" must be construed as "originat[ing] from, [bring] incident to, or hav[ing] some connection with." As those courts recognize, the words "arising out of" are words of broad significance and not words of limitation contrary to petitioner's argument in this case.

The courts' broad construction of the words "arising out of" in the cited cases, is not based on the rule of statutory construction that any ambiguity in an insurance contract must be construed against an insurer. But even if the courts had applied that rule of construction to their interpretation of "arising out of," it is clear the same interpretation should apply here. Although the FUND "is a unique entity created by statute," it clearly has many similarities to an insurance company. Taddiken v. Florida Patient's Compensation Fund, 478 So.2d 1058 (Fla. 1985). One purpose of the FUND is to protect the health care provider, and it pays claims like an insurer from a pool of money collected from FUND members. The legislature also established a comprehensive risk management program to put responsibility on the FUND to minimize adverse incidents. Since the legislature sought to effectuate liability protection for the health care provider by the creation of the FUND, the statute should be construed to require the FUND to pay attorney's fees once the member pays its maximum amount of liability.

The construction of the words "arising out of" urged by the respondents (fund members) is consistent with this Court's Taddiken decision which noted: "Under the legislative plan the liability exposure of the FUND is open ended and potentially very

great, whereas that of the health care providers is relatively small." 478 So.2d at 1061. The FUND overlooks the fact that not all medical malpractice liability policies provide coverage for attorney fees. The effect of a decision by this Court against the FUND members may put the FUND members in the position of paying exhorbitant amounts for medical malpractice insurance and FUND membership and still have to reach deeply into their pocket to pay attorney's fee judgments which may be in the hundreds of thousands of dollars[2] or even millions of dollars.

The dissenting opinion below reasons that since Section 768.56 was not enacted until 1980 and the provisions of the statute creating the FUND, Section 768.54, were enacted earlier, that the two statutes should not be read together. 490 So.2d at 134. Respondents respectfully point out that this reasoning is contrary to basic rules of statutory construction.

It is a well established principle of statutory construction that statutes which relate to the same or to closely related subjects are regarded as in pari materia. Ferguson v. State, 377 So.2d 709, 710 (Fla. 1979); Mann v. Goodyear Tire & Rubber Co., 300 So.2d 666, 668 (Fla. 1974); Garner v. Ward, 251 So.2d 252, 255 (Fla. 1971). This principle applies even where the statutes were not enacted at the same time. Mann; Garner. This Court's

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[2]/ The amount of attorney fees awarded by the trial court in this caes is $225,000.

decision in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145, 1147 (Fla. 1985) which upheld the constitutionality of Section 768.56 points out that the attorney's fee statute "was adopted" as part of the Medical Malpractice Reform Act and became effective July 1, 1980."[3]

The dissenting opinion, below, quoting the Brief of Petitioner, also bases its decision on an argument that a ruling in favor of FUND members could have a "chilling effect on pre-trial settlements." 490 So.2d at 135. However, this argument applies equally to both sides! A decision finding the members solely responsible for attorney's fees would allow the FUND to procrastinate in contributing a fair amount of its funds into a settlement thereby increasing the member's exposure for attorney's fees. Indeed, in this case the health care provider tendered its statutory obligation well before trial, and the FUND gambled by trying the case.

The dissenting opinion also bases its opinion on an argument that the FUND should not be required to pay attorney fees since it is the member's negligence and not the FUND's which results in the assessment of fees. 490 So.2d at 135. This reasoning is faulty for three reasons. First, very often the liability of a

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[3]/ This Court's decision in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) also supports respondents' position. In Rowe, the FUND was ordered by the trial court to pay attorney's fees and costs after the FUND member had paid its $100,000 in primary coverage. The FUND appealed, and this Court ultimately found Section 768.56, Florida Statutes constitutional, and the FUND was required to pay the attorney's fees.

health care provider, as with the FUND, is vicarious only. Second, all liability of the FUND is vicarious, and there is no reason to treat the payment of attorney's fees any differently than the payments of the personal injury or damage claim. Finally, the court's reasoning ignores the fact that the legislature imposed on the FUND substantial risk management responsibilities "to minimize adverse incidents." §768.54(3)(f), Fla. Stat. (Supp. 1982); Taddiken v. Florida Patient's Compensation Fund at 1061.[4]

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[4]/ This Court listed several components of the required risk management program of the FUND in its Taddiken decision:

> 1. The investigation and analysis of the frequency and causes of general categories and specific types of adverse incidents causing injury to patients;
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> 2. The development of appropriate measures to minimize the risk of injuries and adverse incidents to patients;
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> 3. The analysis of patient grievances which relate to patient care and the quality of medical services;
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> 4. The development and implementation of an incident reporting system based upon the affirmative duty of all health care providers and all agents and employees of health care providers and health care facilities to report injuries and incidents; and
>
> 5. Auditing or participating health care providers to assure compliance with the provisions of the risk management program.
>
> [citing §768.54(3)(f), Fla. Stat. (Supp. 1982)].

The FUND, rather than its fund members, should be responsible for payment of plaintiff's attorney's fee claim in this medical malpractice action. The clear language of Florida Statute §768.54(2)(b) and policy considerations support the decision of the Third District Court of Appeal.

CONCLUSION

This Court is respectfully requested to revisit its jurisdiction. Respondents submit that the majority decision sought to be reviewed does not expressly and directly conflict with the two cases relied on by petitioner to create conflict.

Alternatively, this Court is respectfully requested to approve of the Third District Court of Appeal decision.

Respectfully submitted,

BY: Betsy E. Gallagher
BETSY E. GALLAGHER

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the above and foregoing Brief of Respondents on the Merits was mailed this 20th day of January, 1987 to: JOE N. UNGER, ESQ., 606 Concord Building, 66 West Flagler Street, Miami, Florida 33130; JULIAN CLARKSON, ESQ., P.O. Box 015441, Miami, Florida 33101; and to H. LAWRENCE HARDY, ESQ., 299 Alhambra Circle, Coral Gables, Florida 33134.

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