

012 5-8-87

IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,230

✓

*[Handwritten initials]*

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

BRIEF ON THE MERITS OF RESPONDENTS,  
GEORGE BOUCHOC and ST. FRANCIS HOSPITAL  
to brief of EDNA PETERSON

KUBICKI, BRADLEY, DRAPER,  
GALLAGHER & McGRANE  
Attorneys for Respondents,  
BOUCHOC and ST. FRANCIS  
701 City National Bank Bldg.  
25 West Flagler Street  
Miami, Florida 33130  
Telephone: 305/374-1212

I N D E X

	<u>PAGE NO.</u>
TABLE OF CITATIONS AND AUTHORITIES	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3-4
CONCLUSION	5
CERTIFICATE OF SERVICE	6

TABLE OF CITATIONS AND AUTHORITIES

	<u>PAGE NO.</u>
<u>Cantor v. Davis,</u> 489 So.2d 18 (Fla. 1986)	3 n.1
<u>Florida Patient's Compensation Fund</u> <u>v. Von Stetina,</u> 474 So.2d 783, 788-789 (Fla. 1985)	4
<u>Friddle v. Seaboard Coast Line R.R. Co.,</u> 306 So.2d 97 (Fla. 1974)	3 n.1
<u>Kennedy v. Kennedy,</u> 303 So.2d 629 (Fla. 1974)	3 n.1
<u>Mercy Hosp., Inc. v. Menendez,</u> 371 So.2d 1077 (Fla. 3d DCA 1979) <u>cet. denied,</u> 383 So.2d 1198 (Fla. 1980)	3
<u>Negron v. State,</u> 306 So.2d 104 (Fla. 1974)	3 n.1
<u>North Shore Hospital, Inc. v. Barber,</u> 143 So.2d 849, 854 (Fla. 1962)	4

### STATEMENT OF THE CASE AND FACTS

In this brief, respondents GEORGE BOUCHOC and ST. FRANCIS HOSPITAL respond to Point II of the Brief of Respondent, EDNA PETERSON. Respondent, EDNA PETERSON did not join in petitioner's notice to invoke the jurisdiction of this Court, but nonetheless raises an additional issue in Point II directed to this respondent which was not raised by petitioner, THE FLORIDA PATIENT'S COMPENSATION FUND. In Point II, the plaintiff asserts that the trial court committed error in limiting the liability of the health care provider without qualification.

As to Point II, there was no evidence presented to the trial court and none in this record which shows that the FUND will be unable to pay the attorney's fee award.

SUMMARY OF THE ARGUMENT

The trial court did not err in limiting the liability of the health care providers without qualification. There is no evidence in the record that the trial court was ever requested to qualify the limitation of liability. There is no evidence in the record that the FUND will be unable to pay the attorney's fee judgment. The statute did not intend the health care provider's liability to be open-ended, and plaintiff makes no constitutional challenge to the statute.

## A R G U M E N T

THE TRIAL COURT DID NOT ERR IN LIMITING THE  
LIABILITY OF THE HEALTH CARE PROVIDERS WITHOUT  
QUALIFICATION.

PETERSON contends that the trial court erred in entering an order limiting the liability of ST. FRANCIS and BOUCHOC, M.D. without qualification.<sup>1</sup>

First, there is no evidence in the record that the FUND will be unable to pay the attorney's fee judgment. Second, the Third District did not err in limiting the liability of the health care provider without qualification when there is no evidence in the record that the trial court was ever requested to qualify the limitation of liability. The issue was raised for the first time before the Third District, and plaintiff waived her right to raise the issue.

Third, the statute clearly limits the liability of the health care provider and did not intend the health care provider's liability to be open-ended. In Mercy Hosp., Inc. v. Menendez, 371 So.2d 1077 (Fla. 3d DCA 1979), cert. denied, 383

---

<sup>1</sup>/ Parenthetically, these respondents point out that respondent PETERSON did not join in the Notice to Invoke this Court's jurisdiction, and has asserted an issue not raised by the petitioner. This Court may not have jurisdiction to entertain respondent's additional issue. These respondents are aware of the existing case law which gives this Court jurisdiction to dispose of all contested issues once it accepts jurisdiction. See, Cantor v. Davis, 489 So.2d 18 (Fla. 1986); Negron v. State, 306 So.2d 104 (Fla. 1974); Friddle v. Seaboard Coast Line R.R. Co., 306 So.2d 97 (Fla. 1974); Kennedy v. Kennedy, 303 So.2d 629 (Fla. 1974). However, those cases do not involve a party which seeks affirmative relief without filing or joining in a Notice to Invoke Jurisdiction to review the lower court's decision.

So.2d 1198 (Fla. 1980), the district court of appeal stated that when the FUND is not named as a party in an action where recovery is sought against a health care provider in excess of \$100,000 that the trial court may enter an order for the limitation of liability against a health care provider. There is nothing in the statute which conditions a health care provider's limitation of liability on the ability of the FUND to pay. Plaintiff can always satisfy her contractual obligation for attorney fees to her counsel from the proceeds of the final judgment as other plaintiffs do who are not awarded attorney fees under Section 768.56.

Finally, plaintiff relies on the language in the decision of this Court in Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783, 788-789 (Fla. 1985). In that case, this Court specifically noted that it was not addressing "the constitutional right of a plaintiff to levy against a health care provider when the Fund is fiscally incapable of or otherwise prohibited from paying validly entered judgments within a reasonable time because of inadequate rates or assessments." Here, plaintiff/respondent has not attacked the statute on constitutional grounds. This Court should not address an issue not presented to it. See North Shore Hosp., Inc. v. Barber, 143 So.2d 849, 854 (Fla. 1962).

C O N C L U S I O N

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 9th day of February, 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., 2121 Ponce de Leon Boulevard, Coral Gables, Florida 33134.

KUBICKI, BRADLEY, DRAPER,  
GALLAGHER & McGRANE  
Attorneys for Respondents,  
BOUCHOC and ST. FRANCIS  
701 City National Bank Bldg.  
25 West Flagler Street  
Miami, Florida 33130  
(305) 374-1212

BY: Betsy E. Gallagher  
BETSY E. GALLAGHER