

IN THE SUPREME COURT OF FLORIDA

ELMER MAURER, M.D.,)
)
 Petitioner,)
)
 v.) CASE NO.
)
 FLORIDA PATIENT'S COMPENSATION)
 FUND,)
)
 Respondent.)
 _____)

On Review of Decision of
the Second District Court of Appeal

PETITIONER'S BRIEF ON JURISDICTION

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PETITIONER'S BRIEF ON JURISDICTION

Petitioner ELMER MAURER seeks review of a decision of the Second District Court of Appeal (A 1) that expressly and directly conflicts with a prior decision of the Third District Court of Appeal (A 5) in Bouchoc v. Peterson, 490 So.2d 132 (Fla. 3d DCA 1986). Ironically, although Bouchoc was decided before the Second District Court filed its decision in the present case, the losing party there has already invoked this Court's discretionary jurisdiction based on conflict with this later case. See Florida Patient's Compensation Fund v. Bouchoc, Case No. 69,230.

STATEMENT OF THE CASE AND FACTS

In this medical malpractice action, Plaintiff obtained a \$385,000 judgment against Dr. Maurer, Winter Haven Hospital and Florida Patient's Compensation Fund. The trial court awarded the prevailing plaintiff an attorney's fee pursuant to Section 768.56, Florida Statutes (1981). Subsequently, the trial court limited the liability of Dr. Maurer and the hospital to \$100,000 each under the provisions of the Medical Malpractice Reform Act, the effect of which was to require the Fund to pay the attorney's fee.

On appeal by the Fund, the Second District Court held that the Fund cannot be held liable for attorneys' fees and vacated the trial court's order.

SUMMARY OF THE ARGUMENT

The decision of the District Court of Appeal in this case expressly notes conflict with a prior decision of the Third District Court of Appeal in Bouchoc v. Peterson, 490 So.2d 132 (Fla. 3d DCA 1986). This Court should exercise jurisdiction to resolve the conflict.

Exercise of the Court's discretionary jurisdiction is further required here to overturn a disposition that is inconsistent with the relative responsibilities of health care providers and the Florida Patient's Compensation Fund under the Medical Malpractice Reform Act. The District Court's holding that the Fund can never be required to pay a prevailing plaintiff's attorney's fees violates the manifest intent and purpose of the Act.

ARGUMENT

The Second District Court opinion demonstrates the existence of jurisdictional conflict in language which is unmistakable:

FPCF's final contention is that the limitation of liability enjoyed by a health care provider . . . is not intended to foreclose imposing a prevailing plaintiff's attorney's fees upon the health care provider. Recognizing that the Third District has rejected this construction of section 768.56 and has held otherwise, we disagree and note conflict with the majority in Bouchoc v. Peterson, Nos. 85-973, 85-1009 (Fla. 3d DCA June 3, 1986) (11 F.L.W. 1253). We adopt the reasoning of the dissent in Bouchoc.

(Emphasis added.)

Because the two decisions reach opposite results concerning the identical legal issue, conflict is manifest. The Fund was adjudicated liable for attorneys' fees in Bouchoc and evaded responsibility for such fees in this case.

Reasons for Granting Review

The paramount reason for reviewing the Second District Court's decision here is to resolve the conflict between two district courts of appeal.

But there is another compelling reason to grant review in this case. Under the Second District holding, the Fund can never be held liable to pay a prevailing plaintiff's attorney's fee.

That result is patently unjust when one views the respective bargaining positions of the several defendants. The record in this case demonstrates that Dr. Maurer tendered his \$100,000 underlying coverage before trial of the case. Trial was required because of the Fund's attempt to minimize payment under its excess coverage -- an attempt that forced Maurer, under the Act, to provide the Fund with a defense in order to limit his liability to \$100,000. Having gambled and lost, the Fund should not be heard to argue, as it has successfully done in the Second District, that the health care providers rather than the Fund should pay the plaintiff's attorney's fees as well as the cost of defending the action.

CONCLUSION

This Court should grant review, approve the decision of the Third District Court in Bouchoc and quash the conflicting decision of the Second District Court in this case.

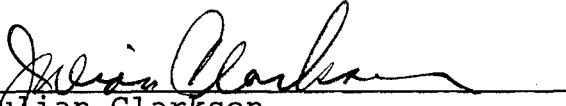


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Petitioner's Brief on Jurisdiction were served by U. S. Mail upon MARGUERITE H. DAVIS, 315 South Calhoun Street, Suite 800, Tallahassee, Florida 32301; JEFFREY C. FULFORD, 1417 E. Concord Street, Suite 101, Orlando, Florida 32803; J. RON SMITH, P. O. Box 1606, Lakeland, Florida 33802; and JAMES F. PAGE, JR., P. O. Box 3068, Orlando, Florida 33801, this 30th day of September, 1986.



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