0.A 5-827

IN THE SUPREME COURT OF FLORIDA

WINTER HAVEN HOSPITAL, INC. Petitioner, vs. FLORIDA PATIENT'S COMPENSATION FUND, Respondent.	:	CASE NO.: 69,493 2nd District No.: 85-493
ELMER MAURER, M.D., Petitioner, vs. FLORIDA PATIENT'S COMPENSATION FUND, Respondent.	:	CASE NO.: 69,421 2nd District No.: 85-2734

RESPONDENT'S BRIEF ON MERITS

MARGUERITE H. DAVIS
SWANN & HADDOCK, P.A.
315 South Calhoun St.
Suite 800
Tallahassee, Florida 32301
(904) 224-9634

Attorneys for Florida
Patient's Compensation Fund

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

OTHER AUTHORITIES

cont.

STATEMENT OF THE CASE AND FACTS

A medical malpractice action was filed against Dr. Maurer, Winter Haven Hospital, Dr. Brooks, and the Florida Patient's Compensation Fund (FPCF) for the doctors' and Winter Haven Hospital Inc.'s, (Hospital) negligent treatment of a patient for a drug overdose. This action resulted in final judgment for the Plaintiff.

After trial, the jury entered a verdict in the amount of $400,000 with a finding of 80% liability on the part of Dr. Maurer and 20% on the part of Winter Haven Hospital. R. 209-210. Pursuant to the verdict the trial court entered final judgment for the Plaintiff against Defendants Dr. Maurer, Winter Haven Hospital, Inc. and the FPCF in the amount of $400,000. R. 212. Dr. Brooks had settled for $15,000. Pursuant to a motion by Defendant for a set-off, an Order was later entered amending the judgment and ordering the settlement sum of $15,000 received from Dr. Brooks to be credited against the $400,000 jury verdict.

Thereafter, the Court entered an Order taxing costs against Dr. Maurer, Winter Haven Hospital, Inc. and the FPCF jointly and severally in the amount of $148,688.63. R. 236-238. This amount included an attorney's fee award of $133,333.33 pursuant to Section 768.56, as well as $15,355.30 of other taxable costs. Dr. Maurer and Winter Haven Hospital, Inc. each moved to limit their respective liabilities to $100,000. R. 228-229, 268-269.

They maintained that the $100,000 limitation of liability included any attorney's fees and costs awarded and that those sums should be paid by the Florida Patient's Compensation Fund rather than Dr. Maurer or Winter Haven Hospital, Inc. R. 229, 269. FPCF objected to these motions. R. 243-247.

The underlying coverage agreements maintained by Dr. Maurer with Physicians Protective Trust Fund and Winter Haven Hospital, Inc. with Florida Hospital Trust Fund contained Supplementary Payment provisions which expressly provide that the Hospital's insurer and the physician's insurer will pay costs assessed against the insured in addition to payment of the $100,000 liability limits. R. 244-247, 262, A. Ex. A and B.

After a hearing, the trial court entered an Order granting the motions to limit liability. R. 291-92. It ordered that Defendant Elmer Maurer is liable to pay $100,000 plus any post-judgment interest accrued on the $100,000; that the FPCF is liable to pay $333,688.33, plus any post-judgment interest accrued on that amount.

The FPCF appealed the Order of the trial court determining that the FPCF was solely responsible for the payment of the costs and attorney's fees taxed against Dr. Maurer and Winter Haven Hospital, the unsuccessful defendants in the medical malpractice action. R. 296.

The Second District reversed the trial court and held that

Dr. Maurer and Winter Haven Hospital were liable for costs under the terms of the supplementary payments provisions of their underlying liability policies and that Dr. Maurer and the Hospital were liable for attorney's fees awarded the prevailing party plaintiff pursuant to Section 768.56. (This statute was repealed last year, Chapter 85-175, §43, Laws of Florida (1985)). At the bar of the Second District, Counsel for Dr. Maurer conceded liability of the underlying insurer for payment of costs pursuant to the supplementary payments provisions of the underlying liability policies.

The Second District reversed the trial court, vacated the "Order Granting Motions to Limit Liability," and held that the Hospital and Dr. Maurer's limitation of liability as members of the Fund did not include a limitation of liability from payment of costs in the amount of $15,355.30 where the underlying coverage specifically provided that in addition to payment of $100,000, costs taxed will be paid by the underlying insurer. This ruling of the Second District is not at issue before this court. Although the Second District rejected the FPCF's contention that prevailing party attorney's fees awarded pursuant to statute (Section 768.56) were not costs within the contemplation of the Supplementary Payment provisions of the underlying liability coverage, it agreed with the FPCF that Section 768.54(2)(b) is not intended to foreclose imposing a

prevailing Plaintiff's attorney's fees upon the health care provider and held that the limitation of liability provided for by Section 768.54 did not encompass a limitation of liability from payment of Section 768.56 prevailing party attorney's fees.

Dr. Maurer and Winter Haven Hospital, Inc. seek review of that portion of the Second District's decision regarding liability for prevailing party attorney's fees on the basis of conflict with the Third District's decision in Bouchoc v. Peterson, 490 So. 2d 132 (Fla. 3d DCA 1986). This Court has accepted jurisdiction in Bouchoc and has consolidated Bouchoc with the present case for the purpose of oral argument.

SUMMARY OF THE ARGUMENT

The limitation of liability created by the legislature in Section 768.54 and specifically defined by Section 768.54 does not include a limitation of liability from the payment of Section 768.56 prevailing party attorney's fees. Section 768.54 which creates the Fund also establishes the conditions and provisions governing the relationship between the Fund and its members. The Fund's liability is enforced only in the manner directed by the Florida Legislature in Section 768.54. This statute creating the Fund does not contain any provision that permits the Fund to pay attorney's fees, and it specifically requires that the health care provider members of the Fund provide an adequate defense for the FPCF. The Fund is not liable for the cost of defense. The limitation of liability provision refers expressly to the limitation of a Fund member's liability for a claim for bodily injury or property damage to the person or property of a patient or claims arising out of the rendering or failure to render medical care or services such as medical and hospitalization bills, wage loss, and pain and suffering.

Section 768.56 which provides that attorney's fees shall be paid by the prevailing party in a medical malpractice suit is not incorporated into Section 768.54 as an additional contractual obligation to be imposed on the Fund or as an additional aspect

of the specifically defined limitation of liability created by the enactment of Section 768.54(2)(b).

Further, as appears from the purpose for the enactment of Section 768.56, the legislature intended to instill in prospective plaintiffs and defendants a cautionary attitude in instigating litigation or defending on non-meritorious grounds. This purpose would not be achieved if the health care provider member were absolved of liability for Section 768.56 Attorney's fees, where the health care provider member is responsible by statute for providing a defense for FPCF.

The Second District could have additionally reversed on the basis that the Section 768.56 prevailing party attorney's fees were costs within the contemplation of the supplementary payment provisions of the underlying liability policies of Winter Haven Hospital and Dr. Maurer.

The Second District correctly reversed the trial court, and its decision should be affirmed.

ARGUMENT

THE FLORIDA PATIENT'S COMPENSATION FUND IS NOT RESPONSIBLE FOR THE PAYMENT OF PREVAILING PARTY ATTORNEY'S FEES AWARDED PLAINTIFF PURSUANT TO SECTION 768.56 AND THE SECOND DISTRICT CORRECTLY REVERSED THE TRIAL COURT AND CORRECTLY VACATED THE ORDER GRANTING MOTIONS TO LIMIT LIABILITY.

The Second District Court's decision is entirely consistent with the law and legislative intent as evidenced by the specific language of the relevant statutes discussed herein and relied upon by the Second District. It was not within the province of the Second District to judge the wisdom of this legislation. The decision of the Second District should be affirmed

At the outset the FPCF would point out that the Second District, composed of an entirely different panel of judges, was asked to recede from Maurer on the basis of arguments similar to those presently asserted by Petitioners. In Florida Patient's Compensation Fund v. Coxon, Case Nos. 86-814, 86-815, (Fla. 2d DCA February 27, 1987), reaffirming its holding in Florida Patient's Compensation Fund v. Maurer, 493 So.2d 510 (Fla. 2d DCA 1986), the Second District held that the FPCF was not liable for attorney's fees imposed pursuant to Section 768.56 and that the defendant health care provider was liable for these fees. Appendix, Exhibit C.

Although Winter Haven Hospital argues that the Second District erred in reversing the order of the trial court limiting liability, it must be recognized that the grounds for the district court's reversal were twofold. It reversed because the trial court had improperly limited liability for payment of costs in the amount of $15,355.30 where Dr. Maurer's and Winter Haven Hospital's underlying liability policies specifically provided for the payment of costs levied against them above the $100,000 limit. The Court also reversed because the trial court had improperly found the FPCF responsible for payment of prevailing party attorney's fees in the amount of $133,333.33, when in fact, the statutory limitation of liability for health care provider members of the Fund, did not include a limitation of liability for defendant health care providers from the payment of prevailing party attorney's fees awarded pursuant to Section 768.56, Florida Statutes (1981).

Neither Dr. Maurer nor Winter Haven Hospital question the application of the Supplementary Payments provision and the holding of the Second District that "Maurer and the Hospital, not the FPCF, are liable for the costs pursuant to Section 768.54(2)(b), Florida Statutes (1981) which provides that a health care provider shall not be liable for an amount in excess of $100,000 . . . or the maximum limit of the underlying coverage maintained by the health care provider. . . whichever is

greater." In fact, Dr. Maurer conceded at the bar of the Second District that in light of the supplementary payments provision of the underlying liability policy, its limitation of liability provided by Section 768.54 would not include costs. For these costs, Dr. Maurer conceded liability. Winter Haven Hospital although arguing that the trial court's order limiting liability should not have been set aside does not now dispute the propriety of the Second District's ruling regarding the lack of limitation of liability for payment of these costs by Dr. Maurer and Winter Haven Hospital.

Contrary to the contention of Winter Haven Hospital, the Second District correctly determined that the issues raised by the FPCF on appeal to the Second District were properly preserved for appeal in the trial court and were clearly within the scope of the District Court's review. The FPCF raised as an affirmative defense that any judgment is subject to the limitations of Section 768.54. (R.159-160). It also adopted any affirmative defense that may be asserted by Winter Haven Hospital and Dr. Maurer. The Fund did not concede that the liability of Winter Haven Hospital was limited to $100,000. It merely admitted that Winter Haven Hospital and Dr. Maurer were members of the FPCF and that the FPCF was created by statute to provide limitation of liability to its member health care providers insofar as this limitation is defined by statute. The FPCF,

before the trial court and on appeal to the District Court, asserted the limitations of Section 768.54 which establishes the contract between the FPCF and its member health care providers. The FPCF then timely objected to Dr. Maurer's and Winter Haven Hospital's Motion to Limit Liability pursuant to the limitations of Section 768.54 which govern the FPCF. This motion was made after the court had entered an order assessing $148,688.63 against Dr. Maurer, Winter Haven Hospital, Inc. and the FPCF.

The District Court properly reversed the trial court's order limiting liability and correctly held that the limitation of liability enjoyed by a health care provider member of the FPCF is not intended to foreclose imposing Section 768.56 prevailing plaintiff's attorney's fees upon the health care provider. The Second District correctly held that Section 768.56 prevailing party attorney's fees are by definition not a part of a successful claim which the FPCF is responsible to pay and cannot, therefore, include attorney's fees. The Second District agreed with Judge Pearson's well reasoned dissent in Bouchoc v. Peterson, 490 So.2d 132 (Fla. 3d DCA 1986). The statute creating the Fund does not authorize such payment and specifically limits the FPCF's liability to payment of judgments which include the rendering or failure to render medical care or services.

The FPCF, a unique entity, was created by the Florida Legislature as a non-profit entity in 1975 to assist in

alleviating a medical malpractice crisis in this state, by providing medical malpractice protection to the physicians and hospitals who join as well as to provide a method of payment to medical malpractice plaintiffs. Chapter 75-9, Laws of Florida (1975). The legislature, in the preamble to this enactment explained the need for the FPCF Chapter 76-260, Laws of Florida (1976). Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783 (Fla. 1985). The FPCF was created for the sole purpose of paying portions of claims arising out of the "rendering or failure to render medical care or services." Section 768.54(3)(a). Its primary purpose is to create a fund designed to compensate medical malpractice plaintiffs, not to set up an insurance fund with obligations to a health care provider. Mercy Hospital, Inc. v. Menendez, 371 So.2d 1077 (Fla. 3d DCA 1979), cert. den. 383 So.2d 1198 (Fla. 1980). It was created as a limitation of liability device where liability otherwise fully exists rather than as an insurance company. Taddiken v. Florida Patient's Compensation Fund, 449 So.2d 956 (Fla. 3d DCA 1984), approved 478 So.2d 1058 (Fla. 1985). It is not an insurer of each health care provider that becomes a member of it. Owens v. Florida Patient's Compensation Fund, 428 So.2d 708, (Fla. 1st DCA 1983), rev. denied 436 So.2d 100 (Fla. 1983).

The FPCF's concept was upheld against constitutional challenge in Department of Insurance v. Southeast Volusia

Hospital District, 438 So.2d 815 (Fla. 1983), appeal dismissed 104 S.Ct. 1673 (1984). In Von Stetina, the Supreme Court reaffirmed the validity of this concept and the Fund's assessment mechanism and further held that the statutory scheme does not deny plaintiff's recovery of judgments, but in fact is designed to ensure that sufficient funds exist to pay substantial judgments.

The conditions and provisions governing the relationship between the FPCF and its members are specifically and solely established by the Florida Legislature in Section 768.54. Florida Patient's Compensation Fund v. Von Stetina. Section 768.54, establishes the terms of the FPCF's contract with its members. Department of Insurance v. Southeast Volusia Hospital District. The FPCF's liability is enforced only in the manner directed by the Florida Legislature. The limitation of liability provisions fix and declare the primary rights of the parties to the contract by establishing the rights and liabilities of FPCF, the health care provider and the malpractice plaintiffs. The FPCF is strictly bound by the provisions of Section 768.54 and is required by statute to operate on an actuarially sound basis. Section 768.54(3)(e). To comply with this requirement the statutory provisions directing the operation of the Fund must be strictly followed. The statute creating the FPCF permits the Fund only to pay money for claims as defined in Section 768.54(3)

which are claims for bodily injury or property damage. Section 768.54(3).

In the present case we are concerned with the construction of two separate and distinct responses to Florida's Medical Malpractice Crisis. Section 768.54 establishes the contract between the Florida Patient's Compensation Fund and its health care provider members. Section 768.54(2)(b), Florida Statutes (1981), provides:

> (b) 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 had paid the fees required pursuant to subsection (3) for the year in which the incident occurred for which the claim is filed, and an adequate defense for the fund is provided, and pays at least the initial $100,000 or the maximum limit of the underlying coverage maintained by the health care provider on the date when the incident occurred for which the claim is filed, whichever is greater, of any settlement or judgment against the health care provider for the claim in accordance with paragraph (3)(e).

Emphasis Supplied.

Pursuant to Section 768.54(2)(b), the health care provider is responsible for providing the defense for the FPCF. Section 768.54(2)(b) further provides for limitation of liability only for "claims covered under subsection (3)" of Section 768.54. The claim referred to in subsection (2)(b) is any claim arising out of the rendering or failure to render medical care or services or

any claim for bodily injury or property damage to the person or property of any patient and which is in excess of the limits set forth in subsection (2)(b). Section 768.54(3). Subsection (3) does not include claims for Section 768.56 prevailing party attorney's fees awarded to the prevailing parties pursuant to Section 768.56. The limitation of liability provided for by Section 768.54(2)(b) is applicable only to damages arising out of and flowing from the rendering or failure to render services which would include medical and hospitalization bills, wage loss, and pain and suffering.

Section 768.56[1] was a separate and distinct response to a later recognized malpractice crisis in this state. It was enacted at the insistence of the health care industry. Its legislatively announced purpose was to discourage medical malpractice actions by imposing economic sanctions against losing

---

[1] Section 768.56 provides in pertinent part:

> (1) Except as otherwise provided by law, the court shall award a reasonable attorney's fee to the prevailing party in any civil action which involves a claim for damages by reason of injury, death, or monetary loss on account of alleged malpractice . . . When there is more than one party on one or both sides of an action, the court shall allocate its award of attorney's fees amount prevailing parties and tax such fees among prevailing parties and tax such fees against nonprevailing parties <u>in accordance with the principles of equity</u> . . .

medical malpractice plaintiffs. Chapter 80-67, Laws of Florida (1980). By its enactment, the Legislature intended to instill in prospective plaintiffs and defendants a cautious attitude toward initiating questionable claims or advancing non-meritorious defenses. Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985). It expressly requires the court to tax attorney's fees against the nonprevailing parties in accordance with principles of equity.

Section 768.56 requiring the award of a reasonable attorney's fee to the prevailing party in a medical malpractice action was not in effect when Section 768.54(3) was enacted in 1976, establishing the claims for which liability would be limited under Section 768.54(2)(b). Chapter 76-168, Laws of Florida (1976).

The enactment of Section 768.54 and the much later enactment of Section 768.56 do not demonstrate any legislative intent that Section 768.56 be included as a part of the contract created by Section 768.54 between the FPCF and a Fund member, and therefore its enactment did not affect the Fund member's limitation from liability by expanding it to include a limitation from payment of prevailing party attorney's fees awarded pursuant to Section 768.56.

The polestar by which courts are guided in statutory construction is legislative intent. Parker v. State , 406 So.2d

1089 (Fla. 1981). To determine legislative intent the court must consider the enactment as a whole at the time of its enactment. State v. Webb, 398 So.2d 820 (Fla. 1981). The general rule of statutory construction is that the words of a statute should ordinarily be taken in the sense in which they were understood at the time the statute was enacted. Thayer v. State, 335 So.2d 815 (Fla. 1976); State v. City of Jacksonville, 50 So.2d 532 (Fla. 1951). The statutory attorney's fee provision of Section 768.56 was not enacted until five years after creation of the Florida Patient's Compensation Fund. It was never incorporated by express language, by reference, or otherwise into the contractual provisions of Section 768.54 setting forth the exclusive rights between the health care provider member and the FPCF. The legislature clearly did not intend that the limitation for "claims covered under subsection (3)" encompass an award of attorney's fees to the prevailing plaintiff made pursuant to Section 768.56.

There is nothing in the legislative history of Section 768.54 or Section 768.56(1) that evidences a legislative intent that the language of Section 768.54(3)(e)(3), Florida Statutes (1981), should be construed as enhancing the limitation of liability provisions of Section 768.54(2)(b) so as to include a limitation of liability on behalf of St. Joseph's Hospital from the payment in part or in whole of attorney's fees awarded

Plaintiff pursuant to Section 768.56. Moreover, the intended salutary effect for enactment of Section 768.56 to instill in health care provider defendants, who are required to provide a defense for the FPCF, a cautionary attitude toward advancing non-meritorious defenses would be thwarted by interpretation of these statutes in the manner now being proposed by the Petitioners in the present case.

Decisional authority supports that Section 768.54(2)(b), does not limit all liability of the health care provider to $100,000 (or the amounts specified in Section 768.54(2)(f)) but only liability for claims identified in subsection (3).

In Florida Patient's Compensation Fund v. Mercy Hospital, Inc., 419 So.2d 348 (Fla. 3d DCA 1982), the Third District construed this limitation of liability provision of Section 768.54(2)(b) in the context of the issue of whether the FPCF or the health care provider would be liable for punitive damages in the amount of $750,000 that were awarded against the health care provider. Plaintiff who was a patient at Mercy Hospital had undergone a diagnostic procedure to determine whether he suffered from a blocked artery. The tip of the catheter broke as it was pushed toward his heart. He sued and recovered compensatory damages from the doctor, the hospital and the FPCF and $750,000 in punitive damages against the hospital. The trial court held that the FPCF must pay the punitive damages. The FPCF appealed

and the district court reversed and held that the assessment of punitive damages against the FPCF would force innocent FPCF members to share the punishment for the wrongful acts of a health care provider. The court acknowledged that the Florida Legislature had subsequently amended the FPCF Statute to expressly provide that the FPCF could not be responsible to pay punitive damages but that the health care provider would be liable to pay this amount. It concluded that the amendment provided persuasive authority of the legislative intent applicable to the original statute.

The attorney's fees provision would lose its intended purpose were it held to be incorporated within the limitation of liability provisions of Section 768.54, contrary to the Second District's holding in the present case. The Second District's holdings in the present case and in Florida Patient's Compensation Fund v. Coxon comport with the clear language of the statutes and legislative intent.

In 1985, the Florida Legislature again expressly acknowledged the medical malpractice crisis in this state and the "dire threat posed by the continuous dramatic increase in medical malpractice insurance premiums to the continuing availability of health care in our state...." and, as part of its reform legislation repealed Section 768.56, effective October 1, 1985. Chapter 85-175, Section 43. Because Section 768.56 had no impact

on the limitation of liability provisions of Section 768.54(2)(b), and (3), the Florida Legislature did not amend these provisions. This provides persuasive evidence that Section 768.56 was not a part of the limitation of liability provisions of Section 768.54(2)(b).

The Supreme Court in its recent decisions of Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), and Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985), addressed the issues of the constitutionality of Section 768.56 and its retroactive application. In Rowe, the FPCF did not raise and the Court did not address the issue now presented of whether the nonprevailing Fund member health care provider is limited in liability in part or in whole from payment of attorney's fees to the prevailing party awarded pursuant to Section 768.56.

The only decisions addressing the issue now before this Court other than the present decision under review and the recent Second District's decision in Florida Patient's Compensation v. Coxon are the Third District's decisions in Bouchoc v. Peterson, 490 So.2d 132 (Fla. 3d DCA 1986), presently before this court for review, and Florida Patient's Compensation Fund v. Miller, 436 So.2d 932 (Fla. 3d DCA 1983).

The Third District Court in Bouchoc v. The Florida Patient's Compensation Fund, in a brief opinion relying upon its earlier decision of Florida Patient's Compensation Fund v. Miller,

affirmed the trial court's final judgment for attorney's fees awarded the prevailing party pursuant to Section 768.56 against defendants, health care providers and the Florida Patient's Compensation Fund.

Judge Pearson dissented and wrote a well reasoned and correct dissent with which the Second District in the present case agreed. Among other reasons, Judge Pearson explained that Section 768.56 attorney's fees were by definition not a part of a successful claim for which liability is limited by Section 768.54; that when the statute creating the Fund and its responsibilities and those of its members was enacted, there was no statutory basis for recovery of attorney's fees against the non-prevailing party in medical malpractice actions; and that holding the FPCF responsible for plaintiff's attorney's fees is inconsistent with the statute's purpose. Judge Pearson reasoned that if the FPCF were held responsible to pay all attorney's fees in excess of the underlying $100,000 responsibility of a health care provider, it could be to the benefit of the health care provider not to settle a claim or offer the limits of its liability, knowing that if this gamble is lost it can only be liable for the maximum amount of the applicable Fund entry level and not for any additional amount, including attorney's fees. Rather than alleviating the medical malpractice "crisis," this could have a chilling effect on pretrial settlements.

In Miller, the Third District affirmed the trial court's holding that Mt. Sinai Hospital of Greater Miami, Inc. had established its right of common law indemnity against Dr. Saul Miller and that the FPCF, as the physician's insurer, was obligated to pay on behalf of Dr. Miller all damage awards including the hospital's attorney's fees rendered against Dr. Miller in excess of $100,000, the statutory limit which had been paid by Dr. Miller. Subsequent to the decision of the Third District in Miller which was effectually based on that court's finding that the FPCF was the liability insurer of the doctor, the Florida Supreme Court in Taddiken v. Florida Patient's Compensation Fund, 449 So.2d 956 (Fla. 3d DCA 1984), approved 478 So.2d 1058 (Fla. 1985), has recently held that the FPCF is not an insurer of its health care provider members. Rather, the Supreme Court held, the FPCF is a unique entity created by statute as a limitation of liability device and is not an insurance company. See also: Burr v. Florida Patient's Compensation Fund, 447 So.2d 349 (Fla. 2d DCA 1984); Owens v. Florida Patient's Compensation Fund, 428 So.2d 708 (Fla. 1st DCA 1983); Fabal v. Florida Keys Memorial Hospital, 452 So.2d 946 (Fla. 3d DCA 1984), approved 478 So.2d 1058 (Fla. 1985). The Supreme Court expressly held that the legislature treats the FPCF differently from private insurance companies in most important respects. Thus, the underlying rationale of Miller, that the Florida Patient's

Compensation Fund is obligated to pay costs and attorney's fees of the hospital being indemnified because it is the liability insurer of the health care provider physician, is erroneous in light of the Supreme Court's very recent decision in Taddiken v. Florida Patient's Compensation Fund.

Judge Pearson also wrote a well-reasoned dissent in Miller for similar reasons to those he expressed in Bouchoc. He explained that by clear statutory language, it is the health care provider who is responsible to provide an adequate defense for the Fund, not the other way around, and that by requiring the FPCF to pay prevailing party attorney's fees contravenes this Section 768.54.

Section 768.54(2)(b) limits liability to claims covered by subsection (3). Subsection (3) does not include award of Section 768.56 prevailing party. Section 768.54 establishes the contract between the FPCF and Dr. Maurer and between the FPCF and Winter Haven Hospital. These terms of these contracts do not include a provision that the FPCF pay the attorney's fee award to the prevailing party in whole or in part once the liability judgment reaches the statutory threshold for limitation of liability set out in Section 768.54. Therefore, the nonprevailing health care provider remains liable for the full award of attorney's fees awarded to the prevailing party pursuant to Section 768.56.

Winter Haven Hospital's reliance on Berek v. Metropolitan Dade County, 422 So.2d 838 (Fla. 1982) and other sovereign immunity cases is misplaced. Berek and the other decisions cited by Winter Haven Hospital relating to waiver of sovereign immunity are inapposite to the present case. Article X, Section 13 of the Florida Constitution provides that provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating. In accordance with this provision, the legislature adopted Section 768.28 waiving sovereign immunity for liability for torts by the state, its agencies, or subdivisions only to the extent specified in that act. The statute sets out the parameters for waiver of sovereign immunity up to $100,000 per person or $200,000 per incident. In Berek, the Supreme Court of Florida held that the waiver of sovereign immunity must be strictly construed and that the maximum amount of liability available to any one claimant arising out of any incident was $50,000 (the statutory amount in effect at the time of the incident in Berek). Absent the waiver of sovereign immunity statute, the state would not be liable in tort and, therefore the statutory maximum amount has been held to be the absolute limit of liability for the state.

Section 768.28 is an entirely different statute than Section 768.54 in nature and language. Section 768.28 permits recovery up to a maximum amount where no right of recovery would exist

absent the statute. Section 768.54, on the other hand limits the liability of the health care provider that, but for the statute, would otherwise exist fully. Rather than allowing liability where none previously existed as is the case with the sovereign immunity statute, a health care provider's liability for medical malpractice which previously existed is merely limited by operation of law as specifically provided for in Section 768.54(2)(b) by the health care provider's membership in the FPCF. The limitation of liability exists only by virtue of the statute and only to the extent defined by the Statute. Section 768.54 establishes the conditions that must be met as a prerequisite to entitlement to limitation of liability and expressly establishes the nature of the limitation of liability. Section 768.54(2)(b) describes the parameters of the liability limitation to cover any claim arising out of the rendering or failure to render medical care or services or any claim for bodily injury.

Contrary to Dr. Maurer's contention, the district court in this case is not imposing upon a primary carrier a responsibility for attorney's fees in excess of primary policy limits. The district court is holding that the limitation of liability provisions created by the legislature through the enactment of Section 768.54 does not include prevailing party attorney's fees awarded pursuant to Section 768.56. It holds that the FPCF is

not liable for Section 768.56 prevailing party attorney's fees. Highway Casualty Co. v. Johnston, 104 So.2d 734 (Fla. 1958), cited by Petitioner Dr. Maurer is inapplicable to the present case. Therein the Supreme Court held that a casualty company was liable for interest where it did not specifically limit its liability to the face amount of the policies.

The Second District Court correctly held that the limitation of liability provision of Section 768.54 specifically does not include Section 768.56 prevailing party attorney's fees. It could correctly additionally have determined that these statutory attorney's fees were costs within the contemplation of the supplementary payments provisions of the underlying policies and, for that reason, the health care providers would not be eligible for limitation of liability pursuant to Section 768.54(2)(b) because to be eligible, the health care provider member must pay the maximum of its underlying coverage maintained on the date when the incident occurred.

Statutory attorney's fees are considered costs within the contemplation of the supplementary payments provisions of the underlying liability coverage policies of Winter Haven Hospital and Dr. Maurer. The Supplementary Payment provisions of these agreements expressly provide:

> The Trust Fund will pay in addition to the applicable limit of liability:

> (a) all expenses incurred by the Trust Fund, all costs taxed against the insured in any suit defended by the Trust Fund and all interest on the entire amount of any judgment therein which accrues after entry of the judgment and before the Trust Fund has paid or tendered or deposited in the court that part of the judgment which does not exceed the limit of the Trust Fund's liability thereon.

Emphasis supplied.

"Costs" are generally defined as "A pecuniary allowance made to the successful party, (and recoverable from the losing party) for his expenses in prosecuting or defending a suit or a distinct proceeding within a suit." Black's Law Dictionary 415 (rev. 4th ed. 1968). Attorney's fees are taxed as costs where they are provided for by statute. Codomo v. Emanuel, 91 So.2d 653 (Fla. 1956); Shavers v. Duval County, 73 So.2d 684 (Fla. 1954).

In River Road Construction Company v. Ring Power Corporation, 454 So.2d 38 (Fla. 1st DCA 1984), the First District distinguished between attorney's fees awardable by statute, and attorney's fee claims based upon contract. The Court held that the former are costs in that they are statutory allowances recoverable by a successful party while the latter are treated as elements of damages which are an integral part of Plaintiff's cause of action. The statutory attorney's fees award in the present case is part of the costs assessed against Dr. Maurer and Winter Haven Hospital contemplated by the Supplementary Payments Provisions of their underlying coverage policies.

This Court in its recent decision upholding the constitutional validity of Section 768.56, characterized attorney's fees awarded pursuant to Section 768.56 as costs. Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985). In addressing the validity of the statute, particularly against due process and equal protection claims, the Supreme Court quoted as authority the following excerpt from Justice Cardozo's decision in Life and Casualty Insurance Co. v. McCray, 291 U.S. 566 (1934):

> We assume in accordance with the assumption of the court below that payment was resisted in good faith and upon reasonable grounds. Even so, the unsuccessful defendant must pay the adversary's costs, and costs in the discretion of the lawmakers may include the fees of an attorney.

472 So.2d at 1148-49. (Emphasis added.)

The court then stated that "the assessment of attorney's fees against an unsuccessful litigant imposes no more of a penalty than other costs of proceedings which are more commonly assessed." Id. at 1149. In support of its holding that the statute was valid, the court explained that in certain causes of action, attorney's fees historically have been considered part of the litigation costs. That is so in the present case where the health care provider member is required by its contract with the FPCF, the terms of which are established in Section 768.54, to provide an adequate defense for the FPCF. Section 768.54(2)(b).

In the present case, costs were taxed against Dr. Maurer, Winter Haven and Florida Patient's Compensation Fund in the amount of $148,688.33. Dr. Maurer's and Winter Haven Hospital's policy coverage provides for the payment of these costs. Section 768.54, permitting health care providers limited liability, is subject to the condition that the health care provider pay the maximum amount of the underlying coverage if it exceeds $100,000. Neither Winter Haven Hospital nor Dr. Maurer can take advantage of the limit on liability until they pay the maximum amount of coverage.

Therefore, not only did the Second District properly reverse the trial court and vacate the "Order Granting Motions to Limit Liability" for the reasons stated in its decision, it could also be determined that the trial court erred on the basis that the statutory attorney's fees awarded pursuant to Section 768.56 were costs within the supplementary payments provision of the underlying policies and that before liability could be limited the maximum underlying coverage must have been paid.

The Second District court's decision correctly holds that the FPCF is not responsible for the payment of Section 768.56 prevailing party attorney's fees awarded plaintiff against Dr. Maurer and Winter Haven Hospital and its decision should be affirmed.

CONCLUSION

The Decision of the District Court of Appeal, Second District, in the present case should be affirmed.

Respectfully submitted,

MARGUERITE H. DAVIS
SWANN & HADDOCK, P.A.
315 South Calhoun St.
Suite 800
Tallahassee, Florida 32301
(904) 224-9634

Attorneys for Respondent

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing Respondent's Brief on the Merits was furnished by United States Mail to: JULIAN CLARKSON, P. O. Drawer 810, Tallahassee, Florida 32302, JEFFREY C. FULFORD, 1417 East 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 2nd day of March, 1987.

Marguerite H. Davis

MARGUERITE H. DAVIS