OA- 5-8-87

IN THE SUPREME COURT OF FLORIDA

WINTER HAVEN HOSPITAL, INC.

Petitioner,

vs.

CASE NO. 69,493

FLORIDA PATIENT'S COMPENSATION FUND,

Respondent.

_____/

On Review of Decision of

the Second District Court of Appeal

PETITIONER WINTER HAVEN HOSPITAL, INC.'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The instant action is a medical malpractice case brought by the Estate of Stacy Short against Defendants, DR. ELMER MAURER, WINTER HAVEN HOSPITAL, INC., DR. BEACH BROOKS, and the FLORIDA PATIENT'S COMPENSATION FUND. This action revolves around an incident where Stacy Short, a 16 year old girl, took an overdose of 47 pills containing Theophylline and was admitted to the emergency room of Petitioner, WINTER HAVEN HOSPITAL, INC., at 11:00 p.m. on March 3, 1982. (R. 156-180-186). Ms. Short was treated for the drug overdose but nonetheless died on March 5, 1982. (R. 156-180-186). William Short, as father and personal representative of her estate, filed the Complaint in the instant action which alleged that the Defendants failed to use reasonable skill in caring and treating Stacy Short and that this failure caused proper treatment of her to be delayed. (R. 156-158).

After the filing of the initial Complaint, Plaintiffs subsequently filed their Second Amended Complaint on September 15, 1983, and said Complaint was the pleading under which the instant case proceeded to trial. (R. 154). Petitioner, WINTER HAVEN HOSPITAL, INC., answered the Second Amended Complaint on October 31, incorporating prior Answer to the Amended Complaint of January 13. (R. 161). Additionally, Respondent, FLORIDA PATIENT'S COMPENSATION FUND, answered the Second Amended Complaint on October 26, 1983. (R. 154). In its Answer to the Second Amended Complaint, this Petitioner admitted that it was a member of

the Florida Patient's Compenstion Fund and further raised as an Affirmative Defense its entitlement to a limitation of liability of $100,000.00 or in the amount of the verdict, whichever was less. (R. 154-58, 22). Further, Respondent, FLORIDA PATIENT'S COMPENSATION FUND, answered the Second Amended Complaint by admitting that this Petitioner and co-Petitioner, ELMER MAUER, M.D., were entitled to the limitation of liability of $100,000.00 as alleged by the Plaintiff (R. 159-160).

Trial of the instant medical malpractice claim was had and resulted in a verdict in favor of the Plaintiffs and against the health care providers, ELMER MAUER, M.D. and WINTER HAVEN HOSPITAL, INC.. Final Judgment was entered in the sum of $400,000.00 which was thereafter amended in response to a Motion for Setoff filed by both Petitioners (R. 212). The Order Amending Judgment reflected that the Plaintiff was entitled to a Judgment of $385,000.00 against the Petitioners (R.235).

The Trial Court thereafter entered its Order taxing costs and attorneys' fees in the sum of $15,355.30 as costs, and $133,333.33 as attorneys' fees (R. 236-38). Petitioner, WINTER HAVEN HOSPITAL, INC., filed a Motion to Limit Liability and its Brief in Support of that Motion to Limit Liability (R. 268-69, 261-67). Further, this Petitioner tendered its limit of $100,000.00 to the Plaintiff which was accepted and to which a partial Satisfaction of Judgment was filed on October 4, 1985 (R. 252-53). After hearing argument

of various counsel, reviewing all the Briefs and Memorandum of Law on the Motions to Limit Liability, the Trial Court thereafter granted Petitioners' Motions to Limit Liability to the sum of $100,000.00 each in accordance with the Florida Statutes. (R. 291-92).

Respondent, Florida Patient's Compensation Fund, thereafter filed its Notice of Appeal in the Second District Court of Appeal contesting the Trial Court's Order Limiting Liability of Petitioners to $100,000.00. On August 22, 1986, the Second District Court of Appeal issued its opinion in the instant case reversing the lower Court's Order granting the Motions to Limit Liability. Subsequently, this Petitioner filed its Brief on Jurisdiction noting that the decision in the instant case expressly and directly conflicts with the Third District Court of Appeal's decision in the Bouchoc v. Peterson case, 490 So.2d 132 (Fla. 3d DCA 1986). This Court accepted jurisdiction over the instant case on January 12, 1987.

ISSUE ON APPEAL

I. WHETHER THE TRIAL COURT ERRED IN GRANTING PETITIONERS, WINTER HAVEN HOSPITAL, INC.'S AND ELMER MAUER, M.D.'S MOTION TO LIMIT LIABILITY

SUMMARY OF ARGUMENT

This Petitioner, WINTER HAVEN HOSPITAL, INC., would submit that the Trial Court acted appropriately granting the Petitioner's Motion to Limit its Liability to $100,000.00 in accordance with Florida Statute, Section 768.54. It is undisputed that this Petitioner met the three conditions precedent to being entitled to the limitation of liability in that this Petitioner was a member of the Florida Patient's Compensation Fund at all times material to this action, this Petitioner provided an adequate defense for the Fund, and finally, this Petitioner did pay its $100,000.00 in accordance with the statute. Further, Respondent, the FLORIDA PATIENT'S COMPENSATION FUND, admitted in their Answer to the Second Amended Complaint that this Appellee was entitled to a limitation of liability in the amount of $100,000.00 and therefore, this Petitioner would assert that Respondent is now precluded from asserting any other position in the instant appeal because of this Answer.

Additionally, this Petitioner would assert that contrary to the opinion rendered by the Second District Court of Appeal in the instant case, that attorneys' fees are considered part of a successful claim pursuant to Florida Statute, Section 768.54 and do fall within the coverage that would be provided by FLORIDA PATIENT'S COMPENSATION FUND to Petitioner, WINTER HAVEN HOSPITAL, INC. Further, this Petitioner would submit that the award of attorneys' fees does not fall within any alleged extension

of the coverage that would be provided by the FLORIDA HOSPITAL TRUST FUND to Petitioner, WINTER HAVEN HOSPITAL, INC. Instead, Petitioner would assert that it would be unreasonable and outside the intent of the statute to require payment of attorneys' fees in excess of the limitation of liability provided by the statute particularly since Florida Patient's Compensation Fund controlled settlement ability. Thus, the Fund controls not only whether or not opposing counsel incur attorneys' fees but also control the amount of fees that the opposing party will be able to accumulate in a case. It would be unreasonable and beyond the intent of the statute to allow the Fund to be in control of the existence and amount of attorneys' fees incurred by an opponent and, on the other hand, to require the Fund member to share the responsibility for payment of these same fees. Additionally, this Petitioner would submit that the intent of the statute is clearly seen by its own conditions regarding the time within which attorneys' fees must be paid. This statute creates a duty on the part of the Florida Patient's Compensation Fund to pay the Plaintiffs their attorneys' fees and further sets out a time within which this must occur.

In light of all of the foregoing, this Petitioner would submit that the Trial Court acted appropriately, and did not err in granting its Motion to Limit Liability.

ARGUMENT

WHETHER THE TRIAL COURT ERRED IN GRANTING PETITIONER'S MOTION TO LIMIT LIABILITY.

The issues involved in the instant appeal center around the creation and existence of a Florida Patient's Compensation Fund. The Fund was created in 1975 in response to a medical malpractice crisis which caused many insurers to cease writing malpractice coverage for Florida physicians and hospitals. Basically, the Fund provides excess insurance over $100,000.00 to health care providers who are members and who have paid a fee for such coverage. Unlike a traditional excess insurer, however, the Fund's obligation to pay that portion of the Judgment in excess of $100,000.00 flows directly to the patient and not merely to indemnify the member. Owens v. Florida Patient's Compensation Fund, 428 So.2d 708 (Fla. 1st DCA 1983), pet. for review denied, 436 So.2d 100 (Fla. 1983). Indeed, this Court has ruled that statute which creates the Florida Patient's Compensation Fund is itself a "contract" between the Fund and its member. Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815 (Fla. 1983). As a further condition of this unique relationship between the Fund and its member, and as a portion of the "contract" between these two parties, the Legislature has provided that a member of the Fund who has complied with the provisions of the involved statute is entitled to a "limitation of liability." Fla. Stat. Sec. 768.54(2)(b)(1981). Thus, the Legislature has

specifically provided that a complying member of the Fund is not liable for monetary damages awarded in excess of $100,000.00.

During the course of the Briefs submitted to the Second District Court of Appeal, as well as in the Briefs submitted by the Florida Patient's Compensation Fund in the companion case, Florida Patient's Compensation Fund v. Bouchoc, the Fund has repeatedly cited different versions of Florida Statute Section 768.54 and noted some of the changes that have occurred in this statute throughout its legislative history. It is clear, however, that the statute or "contract" which is applicable to the instant case is Florida Statute, Section 768.54(1981) due to the date of the incident involved in the instant litigation. See Garcia v. Cedars of Lebanon Hospital, Corp., 444 So.2d 538 (Fla. 3d DCA 1984). Pertinent portions of the above-noted statute provide:

> (2) LIMITATION OF LIABILITY...
> (b) A health care provider shall not be liable for an amount in excess of $100,000.00 per claim or $500,000.00 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 $100,000.00 or the maximum limit of the underlying coverage maintained by the health care provider on the date when the incident occurred for which the claiem is filed, whichever is greater, of any settlement or judgment against the health care provider for the claim in accordance with paragraph (3)(e)....
>
> (3) PATIENT'S COMPENSATION FUND....
> (e) Claims procedure....
> 3. A person who has recovered a final judgment

> or a settlement approved by the fund against a health care provider who is covered by the fund may file a claim with the fund to recover that portion of such judgment or settlement which is in excess of $100,000.00 or the amount of the health care provider's basic coverage, if greater as set forth in paragraph (2)(b). In the event an account for a given year incurs liability exceeding $100,000.00 to all persons under a single occurrence, the persons recovering shall be paid from the account at a rate not more than $100,000.00 per person per yer until the claim has been paid in full, except that Court costs and reasonable attorney's fees shall be paid in one lump sum within 90 days after the settlement or judgment is rendered. Such fees shall not reduce the amount of the annual award. Id.

Based on the statutes and pleadings, this Appellee would submit it is entitled to a limitation of liability of $100,000.00 for the involved claim. The lower tribunal was therefore correct in its Order of November 6, 1985. (R. 294).

This Petitioner would also argue that Respondent's appeal in this matter was outside the scope of review of the Second District Court of Appeal and consequently is outside of the scope of the review of this Court. More particularly, the pleadings below upon which this action were tried were the Second Amended Complaint, Petitioner WINTER HAVEN HOSPITAL'S Answer, and Respondent FLORIDA PATIENT'S COMPENSATION FUND'S Answer. (R. 154, 161, 154; A. 20, 6-8, 9). Plaintiff below alleged that this Petitioner was a member of the FLORIDA PATIENT'S COMPENSATION FUND at the time of the incident and indeed stated as follows:

> 7. Pursunt to Sec. 768.54, Florida Statutes, the Defendant, FLORIDA PATIENT'S COMPENSATION FUND, shall pay all or a portion of any judgment

in excess of $100,000.00 against the Defendants and is a necessary party. (R-154; A-2)

The Petitioner, WINTER HAVEN HOSPITAL, INC., filed its Answer as follows:

7. This Defendant was at all times material a member of the FLORIDA PATIENT'S CCOMPENSATION FUND, and its liability, if any, is limited to $100,000.00 or the amount of the verdict rendered against it, whichever is smaller, pursuant to Florida Statutes, Chapter 768.54.

The important admission made by FLORIDA PATIENT'S COMPENSATION FUND in their Answer to the Second Amended Complaint which was served on October 26, 1983, precludes them from now asserting, in this appeal, that this Respondent is not entitled to a limitation of liability of $100,000.00. (R. 154; A.9). Thus, Respondent's admission that this Petitioner was a member of the FLORIDA PATIENT'S COMPENSATION FUND and was entitled to a $100,000.00 limitation of liability precludes them from raising the same issue on appeal. Indeed, Respondents have waived any and all rights to dispute this Petitioner's limitation of liability by their own admission contained within their response to the Second Amended Complaint.

Despite Respondent's admissions in regard to the limitation of liability, this Petitioner would also show the Court that it is entitled to the limitation of liability as ordered by the lower Court based solely on the facts of this cause of action and on the laws of the State of Florida. More particularly, this action deals with Florida Statutes,

Section 768.54, which has recently been upheld by this Court as being constitutional. Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783 (Fla. 1985). Further, this Court upheld the validity of Section (2)(b) which limited the liability against a health care provider who was a participant of the FLORIDA PATIENT'S COMPENSATION FUND at the time of the involved incident. Id. In so doing, this Court stated that it is important to consider the purpose and reasons for the creation of the Fund and more particularly stated:

> "Initially, however, the reason for the creation of the Fund must be fully understood. In 1975, the Florida Legislature instituted the Fund as a non-profit entity to provide medical malpractice protection to the physicians and hospitals who join it, as well as a method of payment of medical malpractice plaintiffs....The Fund provides a statutory scheme of pooling the risk of losses and placing major losses in the entity that can best spread the risk of loss as well as control the conduct of those at fault. Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815 (Fla. 1983), appeal dismissed, 104 S. Ct. 1673 (1984). In its preamble to the 1976 amendment, the legislature summarized its public policy findings with respect to the need for the enactment. It reads, in part, as follows:
>
> 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 exorbitant 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 crises proportions of this compelling social problem demand immediate and dramatic legislative action..."
>
> We find nothing in the transfer of liability provision or the periodic pay-out provision as applied to this case that constitutionally invalidates the statutory scheme. We specifically uphold the constitutionality of sections 768.54(2)(b), 768.54(3)(e) and 768.51, Florida Statutes (1981)." Id.

In reversing the Trial Court's Order in the instant case, the Second District Court of Appeal adopted the reasoning of Judge Pearson's dissent from the Bouchoc v. Peterson case. Thus, the Court indicated that it was holding that FLORIDA PATIENT'S COMPENSATION FUND was not responsible for attorneys' fees in the instant matter because a plaintiff's attorneys' fees was not by definition considered part of a "successful claim" for which the Fund may be held responsible. Id. This Petitioner womuld submit that the Second District Court of Appeal's ruling was in error and that, instead, this Court should adopt the reasoning espoused by the Third District Court of Appeal in the majority opinion in Bouchoc v. Peterson, 490 So.2d 132 (Fla. 3d DCA). The majority in the Bouchoc decision considered and rejected the arguments that attorneys' fees are not part of the "claim" for purposes of the involved statute and thereby held that the $100,000.00 limitation of liability extended to health care providers does preclude them from paying any

attorneys' fees.

In addition to the foregoing, this Petitioner would submit that the clear language of Florida Statute, Section 768.54, indicates and demonstrates that attorneys' fees are a portion of the claim out of which the involved occurrence arose. As noted above, the FLORIDA PATIENT'S COMPENSATION FUND is designed to protect and spread the risk for health care providers. It thus deals with, and indeed was created to serve, health care providers in claims for medical malpractice. Part and parcel of a claim for medical malpractice in the year of this incident, 1982, was a claim for attorneys' fees since the medical malpractice provisions of the Florida Statutes specifically allowed attorneys' fees to the prevailing party in a medical malpractice action. Fla. Stat., Section 768.56 (1981). Indeed, the Complaint involved in the instant case specifically makes a demand for attorneys' fees in this case. Consequently, it is clear that the attorneys' fees involved in this case were part of the "claim" in this matter.

This Petitioner would further submit that the words "arising out of" that are used in the pertinent portion of the statute do have a very specific legal meaning as has been interpreted by the Courts of this and other states. More particularly, this phrase has a very specific meaning when involved in insurance and insurance-related contracts. Thus, it is then held repeatedly that claims "arising out of" a specific event, deal with claims which "originate

from, are incident to, or have some connection with" the item insured. Red Ball Motor Freight v. Employers Mutual Liability Insurance Company, 189 F.2d 374 (5th Cir. 1951). See also Goverment Employees Insurance Co. v. Novak, 453 So.2d 1116 (Fla. 1984); Padron v. Long Island Insurance Company, 356 So.2d 1337 (Fla. 3d DCA 1978). Thus, in the instant case, the phrase "arising out of" would involve all claims which would originate from, be incident to, or have some connection with the claim of medical malpractice brought against this Petitioner by Stacy Short. Clearly, under the Florida law, the award of attorneys' fees to a prevailing plaintiff in a medical malpractice case does originate from insured or protected activities taken by the health care providers. It is consequently very clear that the attorneys' fees that are at issue in the instant case arose out of the activities that were intended to be covered by the FLORIDA PATIENT'S COMPENSATION FUND under Florida Statute, Section 768.54.

In addition to the foregoing, this Petitioner would submit that pursuant to the plain terms and language of the involved statute, it is entitled to a limitation of liability of $100,000.00. WINTER HAVEN HOSPITAL was a member of a self insurance trust fund, the Florida Hospital Trust Fund. As is clearly set forth in the declaration sheet of WINTER HAVEN HOSPITAL with the Florida Hospital Trust Fund, this hospital was limited to $100,000.00 of liability per claim. (A. 27). It did not have a greater coverage amount,

as will be addressed below, and pursuant to the terms of Florida Statutes, Section 768.54, et. seq., then this Defendant is entitled to a limitation of liability to $100,000.00.

Further, it is clear from the plain reading of the statute that the members of the Fund which have paid their fees for the year of the incident, and which have provided an adequate defense, have an absolute $100,000.00 per claim limit of liability. Indeed, the first sentence of Section (2)(b) of this statute establishes that the health care provider has a $100,000.00 limitation of liability. No where does the statute go on to put any qualifications on this limitation of liability. Thus, the statute does not state that the health care provider has $100,000.00 limitation of liability except for payment of costs and attorneys' fees, but instead, this limitation of liability is absolute and unqualified. It is clear, additionally, that Section (3)(e) 3. specifically provides for payment of costs and attorneys' fees by the Fund in situations where the $100,000.00 limitation of liability has been exceeded by the Judgment or settlement. It is interesting to note that the latter portion of this statute differentiates between when attorneys' fees and costs should be paid by the Fund and when the remainder of the Judgment or settlement should be made. In light of the foregoing language, it is clear that the legislature did in fact consider when and how attorneys' fees should be paid in situations where a Judgment exceeded

the $100,000.00 limitation of liability. It is further clear that the Legislature not only intended that the Fund make such a payment, but specifically provided that they must do so in one lump sum within 90 days after the Judgment was rendered.

Additionally, the Courts in this state have also held that the limitation of liability provided to Fund members by Florida Statutes, Section 768.54, prevents such Fund members from being responsible for any costs or attorneys' fees awarded in excess of the $100,000.00 limitation of liability. Bouchoc v. Peterson, 490 So.2d 132 (Fla. 3d DCA 1986); Florida Patient's Compensation Fund v. Miller, 436 So.2d 932 (Fla. 3d DCA 1983); Florida Medical Center, Inc. v. Von Stetina, 436 So.2d 1022 (Fla. 4th DCA 1983), reversed on other grounds, 474 So.2d 783 (Fla. 1985); Mercy Hospital v. Mendez, 371 So.2d 1077 (Fla. 3d DCA 1979), cert. denied, 383 So.2d 1189 (Fla. 1980). The above-noted cases are directly on point with the issue on appeal before this Court although Respondents will undoubtedly attempt to distinguish them in some manner. Indeed, the decisions by the Third and Fourth District Court of Appeals have specifically held that a Fund member may not be compelled to pay attorneys' fees in addition to its $100,000.00 limitation of liability. Bouchoc v. Peterson, supra; Florida Patient's Compensation Fund v. Miller, supra; Florida Medical Center, Inc. v. Von Stetina, supra; Mercy Hospital, Inc. v. Mendez, supra.

In the Miller case, for example, the Court held that

the attorneys' fees portion of Florida Statutes, Section 768.54, creates a relationship which is comparable to the relationship sustained by an indemnitee for which the indemnitor is responsible. Florida Patient's Compensation Fund v. Miller, supra. In other words, the Court held that since the Fund member had met their statutory obligation of paying $100,000.00, the Florida Patient's Compensation Fund is then liable for any costs or attorneys' fees which exceed that $100,000.00 limitation of liability. Id. at 933. Similarly, the Mercy Hospital case specifically held that the statutory provisions which provide that limitation of liability to health care providers who are Fund members is valid and enforceable. Further, this Court in Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783 (Fla. 1985), recognized that the legislative scheme which created the Fund and the $100,000.00 limitation of liability was not a violation of the Plaintiff's constitutional rights. In doing so, the Court noted that, "the scheme that makes the Fund party to a medical malpractice action and responsible for portions of awards in excess of $100,000.00 does not substantially violate or change any of the Plaintiff's vested rights." Id. at 788. In light of the foregoing case law, it is interesting to note that the only case which has been cited to date by any party that supports Respondent's position is the opinion rendered by the Second District Court of Appeal in the instant case. It is thus evident that prior to the lower Court decision in the

instant case, that both the case law and the statutory law pursuant to Florida Statute, Section 768.54, clearly established that the Florida Patient's Compensation Fund is, and should be, responsible for any attorneys' fees awarded in situations where the Fund member has already paid $100,000.00 in settlements or judgments.

In the instant case, Petitioner, WINTER HAVEN HOSPITAL, INC., has complied with the three criteria required to invoke the protections provided by Florida Statutes, Section 768.54(2)(b)(1981). It is undisputed that WINTER HAVEN HOSPITAL did pay a statutory fee to the Florida Patient's Compensation Fund for its limitation of liability, that it provided an adequate defense for the Fund in the instant lawsuit, and that this Petitioner has paid $100,000.00 to the Plaintiff in the instant litigation, receiving a partial Satisfaction of Judgment for said payment. (R. 2521; A-52). In light of the clear wording of the statute, as well as the preceding case law, it is clear that any liability for costs and attorneys' fees over the $100,000.00 already paid by WINTER HAVEN HOSPITAL rests solely and completely with the Florida Patient's Compensation Fund.

In the lower Courts, Respondent has argued that the Petitioner's liability is greater than $100,000.00 and includes costs and attorneys' fees. The Respondent stated that the basis of this argument is the portion of Florida Statute 768.54 which requires the Fund member to pay the initial $100,000.00 or "the maximum limit of the underlying

coverage maintained by the health care provider." Fla. Stat. Sec. 768.54(2)(b)(1981). Respondent further has argued that pursuant to the mutual covenants between WINTER HAVEN HOSPITAL and the Florida Hospital Trust Fund, this Petitioner has greater coverage with the Florida Hospital Trust Fund than $100,000.00. The Respondent's argument totally ignores the stated coverage amount set forth in WINTER HAVEN HOSPITAL'S declaration sheet with the Florida Hospital Trust Fund and the stated amounts of coverage as set forth in the mutual covenants between WINTER HAVEN HOSPITAL and the Florida Hospital Trust Fund. (A. 27,37). Both the insuring agreement in the mutual covenants, on page 37 of this Appendix, and the declaration sheet, reflect the amount of coverage to be $100,000.00 per claim.

Florida Patient's Compensation Fund, when accepting premiums from its members, charges said members fees or premiums based upon actuarial studies for $100,000.00 limitation of exposure of the underlying party. It is undisputed that the premiums paid by this Petitioner to Respondent to its membership within the Florida Patient's Compensation Fund was based on an underlying coverage of $100,000.00 and not some greater amount. Had this Petitioner had a greater amount of underlying coverage, for example $250,000.00 or $500,000.00 in coverage, then it would have been entitled to a reduced membership fee with the Florida Patient's Compensation Fund. However, based upon the lowest underlying limits of $100,000.00, it was required to pay the

maximum amount of Fund membership premiums as set by the actuaries hired by the Florida Patient's Compensation Fund. While the above-stated point is not critical to this Petitioner's position, however, it certainly is additional evidence of the legislative intent of the limitation of liability of $100,000.00 as applicable to this Petitioner. The factual evidence to support this Petitioner's position would have been borne out in additional discovery and evidence presented to the Court in accordance with this Petitioner's Motion to Open Discovery. (R. 248; A-49). This motion was rendered moot by the Trial Court's Order which limited the liability as to this Petitioner. Nonetheless, WINTER HAVEN HOSPITAL would submit that further discovery would have brought forth additional evidence reflecting that the Florida Patient's Compensation Fund has had prior dealings and operates in the normal course of its practice by the payment of sums in excess of $100,000.00 to settle claims and judgments for health care providers maintaining similar insurance contracts as to those in this case. Since the interpretation and construction of the statute and mutual covenants of the parties hereto is an issue, then the prior business dealings are relevant to reflect the parties' intent and prior conduct related to these similar insurance contracts. This Petitioner would thus show that while additional evidence as set forth herein is not the strongest point supporting its position, it is nonetheless important additional evidence. Further, it supports this Petitioner's

position and the Trial Court's Order limiting liability as to this Petitioner.

Since the obvious purpose of the creation of the Florida Patient's Compensation Fund is to pool the risk of losses, then it is entirely logical and reasonable that all of the sums in excess of the $100,000.00 limitation of liability should be paid by the Florida Patient's Compensation Fund and spread throughout the membership of the Florida Patient's Compensation Fund. See, Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815 (Fla. 1983), appeal dismissed, 104 S. Ct. 1673 (1984); Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783 (Fla. 1985). The adoption of Respondent's argument would place an additional and unreasonable burden on health care providers who have previously joined the Florida Patient's Compensation Fund for purposes of insuring liability greater than $100,000.00. For example, the Legislature certainly did not intend to require a physician to pay an attorneys' fee award in the amount of several hundred thousand dollars, or more, after he or she had been granted membership in the Florida Patient's Compensation Fund and complied with the requirements of the said statute. The adoption of Respondent's arguments would have that effect. Further, it appears to be much more reasonable to take the same attorneys' fees and costs award which exceeds $100,000.00 and require the Florida Patient's Compensation Fund to make the said payments and thereafter spread the

loss among the members by additional assessments. That is the stated purpose and intent of the creation of the Florida Patient's Compensation Fund, and it would certainly be a more logical and reasonable approach for this Court to follow in this particular case.

The Respondent has in the past equated the award of attorneys' fees with an award of punitive damages. Respondent would assert that since it cannot be held responsible for punitive damages under Florida Patient's Compensation Fund v. Mercy Hospital, Inc., 419 So.2d 348 (Fla. 3d DCA 1982), then it should not be held responsible for attorneys' fees in the instant case. This argument is totally without merit since punitive damages cannot in any way be equated to an award of attorneys' fees. As punishment, exemplary damages have been required to be paid by wrongdoers and not by insurance companies or similar entities. An award of attorneys' fees, however, clearly stands in a different posture and acts as compensation to the prevailing party for attorneys' fees actually incurred in the prosecution or defense of a matter. Clearly, Florida Statutes, Section 768.56 which entitled Plaintiffs to recover attorneys' fees, was not in any way intended to act as a punishment to defendants who do not prevail. Indeed, this statute has nothing whatsoever to do with punitive measures or exemplary damages. Instead, the purpose of the attorneys' fees statute in medical malpractice cases is to encourage settlement in meritorious cases and to discourage

the filing of non-meritorious cases. Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985). Obviously, this has nothing to do with any punitive measures and is therefore not analagous at all to the case law dealing with the award of punitive damages.

Since the purpose of the attorneys' fees statute is to encourage settlement in a meritorious case, then the obvious party to bear those attorneys' fees should rest with the person who has the ability to control the settlement. In cases such as the instant case, where the health care provider's underlying coverage is limited to $100,000.00, and the Plaintiffs' demands for settlement and eventual Final Judgment greatly exceed the underlying limits of coverage, the ability to and responsibility of settlement are placed with the Florida Patient's Compensation Fund. A decision not to settle a meritorious case results in a great deal of effort to finalize discovery, prepare for trial, and actually try the case, as well as any appeals that may result from the trial. It is totally inequitable and illogical to require the underlying health care provider, who has a limitation of liability, to satisfy the additional attorneys' fees and costs required in cases where the Florida Patient's Compensation Fund is unwilling to settle obviously meritorious cases. By requiring the underlying health care provider to pay the attorneys' fees, the Second District Court of Appeal is in essence requiring these health care providers to pay for the Florida Patient's

Compensation Fund's failure to settle meritorious cases. It is thus, in essence, requiring these health care providers to pay a punitive damage award for the Florida Patient's Compensation Fund's unreasonableness in settlement. It is not, and should not, be the law of this state to require one party to pay for another one's lack of diligence in settling meritorious cases. Consequently, the responsibility for the payment of attorneys' fees and costs in excess of the limitation of liability of $100,000.00 should be placed with the party that controls the ability to settle the claim. In this case, that party is the Florida Patient's Compensation Fund and is not this Petitioner.

The adoption of the Second District Court of Appeal's position by this Court would lead to situations where the Fund could unreasonably refuse to settle a meritorious claim, even though requested to do so by the underlying health care provider. This could, in turn, cause an award of attorneys' fees that could exceed several hundred thousand dollars, all or most of which could be entirely attributable to the Fund's unreasonableness in settlement. Yet, under the Second District Court of Appeal's ruling, the Fund would escape responsibility for payment of these fees, and instead, the underlying health care provider would be forced to pay this award even though it had requested settlement by the Fund. Consequently, this Petitioner would submit that the Florida Patient's Compensation Fund should, and does under the law, bear the responsibility of paying any

attorneys' fees awarded in excess of the underlying members $100,000.00 limitation of liability.

Indeed, this Petitioner would vigorously assert that by payment of its membership fee in the Florida Patient's Compensation Fund, it is entitled to its limitation of liability of $100,000.00 since that is the actuarial basis for its membership fee. The Respondents totally ignore the declaration sheet and stated coverage amount as referred to above. Even should this Court adopt Respondents' position tnat the health care provider is not entitled to a $100,000.00 limitation of liability, it is still the position of this Petitioner that attorneys' fees are certainly not included in any extended coverage. The supplementary payment provision within Winter Haven Hospital, Inc.'s mutual covenants with the Florida Hospital Trust Fund specifically does not include attorneys' fees. For there to be coverage of attorneys' fees in addition to a limitation of liability, the said provision would have to specifically state that such coverage exists. The medical malpractice attorneys' fees statute, Florida Statutes, Section 768.56, does not state that the attorneys' fee award, under this statute, are equivalent to or part of "costs." Respondent has submitted in the past that any attorneys' fees awarded by the statute are automatically deemed "costs." This is simply not true and is not supported by the laws of Florida as was recognized by even the Second District Court of Appeal in its decision in this case.

Indeed, there is a long line of cases in Florida which specifically provide that attorneys' fees are not to be considered "costs" unless the legislature has specifically provided that attorneys' fees are part of costs. Wiggins v. Wiggins, 466 So.2d 1078 (Fla. 1984); Simmons v. Schimmel, 476 So.2d 1342 (Fla. 3d DCA 1985); Bankers Multiple Line Insurance Co. v. Blanton, 352 So.2d 81 (Fla. 4th DCA 1977). A comparison of the wording of Florida Statutes, Section 768.56 and Section 327.01, clearly demonstrates that the former statute, the Medical Malpractice Attorneys' Fee Statute, was not intended by the legislature to make attorneys' fees a part of the costs of litigation. Specifically, the Fourth District Court of Appeal, in addition to the Second District's decision in the instant case, has held that attorneys' fees awarded pursuant to Florida Statutes, Section 768.56, are not costs of the litigation. Simmons v. Schimmel, supra.; Florida Patient's Compensation Fund v. Mauer, 493 So.2d 570 (Fla. 2d DCA 1986). In fact, Respondents have never cited any case which supports their position that attorneys' fees awarded under Florida Statutes Section 768.56, fall within the category of taxable costs. Instead, this Petitioner would submit that all of the case law on this issue clearly demonstrates that such attorneys' fees are not costs. This Petitioner would also point out an analagous line of cases involving a limitation of liability of governmental entities pursuant to Florida Statutes, Section 768.28. In Berek v. Metropolitan

Dade County, 422 So.2d 838, (Fla. 1982), this Court held that the government's limitation of liability of $50,000.00 does not include payment for costs, post judgment interest, or attorneys' fees once the entity has satisfied the $50,000.00 limitation of liability as set forth by the statute. Thus, once the statutory limitation of liability has been satisfied by the governmental entity involved, then there is no additional obligation to pay costs, attorneys' fees or interest over that limitation of liability. Id. See also, City of Lake Worth v. Nicolas, 434 So.2d 315 (Fla. 1983); Godoy v. Dade County, 428 So.2d 662 (Fla. 1983).

This Court's reasoning in the above-cited cases is clearly applicable in the case at bar since both Florida Statutes, Section 768.28 and Florida Statutes, Section 768.54 provide for a limitation of liability on the part of certain defendants in court actions. Indeed, Florida Statutes, Section 768.54 creates a statutory scheme to limit the liability of health care providers and transfers any excess liability to a statutorily created fund that can more equitably pool and share the excess losses of its members. A statutory limitation of liability as set forth in this provision is just that, a limitation on the liability on those parties in compliance with the statute. By adoption of Respondents' arguments herein, the requirement that this Petitioner pay additional costs and attorneys' fees which have exceeded one million dollars in cases within the State of Florida, effectively eliminates the limitation of

liability of the participant which was contemplated by the legislature. It is obvious that it was the intent of the legislature to transfer the excess liability over $100,000.00 to the participants in the Florida Patient's Compensation Fund and thereby spread the risk of loss. Since this Court has previously upheld the assessment mechanism involved in pooling and sharing the risk in this transfer of liability provision involving the Florida Patient's Compensation Fund, then a reasonable interpretation of the declaration sheet, mutual covenants, and the statute itself would mandate a holding that any and all sums in excess of $100,000.00 should be the responsibility of the Respondent Fund.

The Respondents' whole argument in the instant case is premised on the issue of whether the Florida Patient's Compensation Fund is responsible for attorneys' fees. A simple reading of the statute reflects Florida Patient's Compensation Fund does have such responsibility. Additionally, a reading of the cases cited lend to this same conclusion. Consequently, this Petitioner would submit that this Court should reverse the decision rendered by the Second District Court of Appeal and should affirm the Trial Court's decision limiting Petitioner, WINTER HAVEN HOSPITAL'S, liability in the instant matter to $100,000.00.

CONCLUSION

The Petitioner, WINTER HAVEN HOSPITAL, INC., would respectfully urge this Honorable Court to affirm the Trial Court's Order of November 6 granting its Motion to Limit Liability to $100,000.00 and reverse the Second District Court of Appeal's decision in the instant case. Petitioners would further submit that Respondents could not appropriately raise the issues in this appeal to the Second District Court of Appeal. Instead, Respondents waived any rights to litigate this issue by their prior admissions in the pleadings in the Trial Court. Additionally, this Petitioner would respectfully submit that it is entitled to a limitation of liabiity based on the clear wording of the statute itself, as well as based on the case law that exists in this state. Finally, this Petitioner would submit that the very purpose of the Florida Patient's Compensation Fund, to pool the risk of loss among members, supports the limitation of liability espoused by this Petitioner and thereby supports its position. Consequently, and in light of all of the foregoing, Petitioner, WINTER HAVEN HOSPITAL, INC., would respectfully submit that this Honorable Court should reverse the decision rendered by the Second District Court of Appeal and should affirm the Order of the Trial Court granting this Petitioner's Motion to Limit Liability to $100,000.00.

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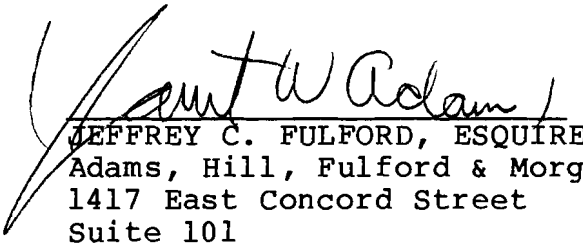
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing Petitioner's Brief on the Merits have been furnished by mail to MARGUERITE H. DAVIS, ESQ., 315 South Calhoun Street, Suite 800, Tallahassee, Florida, 32301; J. RON SMITH, ESQ., Post Office Box 1606, Lakeland, Florida, 33802; JAMES F. PAGE, JR., ESQ., Post Office Box 3068, Orlando, Florida, 32802; and to JULIAN CLARKSON, ESQ., Post Office Drawer 810, Tallahassee, Florida, 32302, this 6th day of February, 1987.



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