OA 5.8.87

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
MAR 23 1987
CLERK, SUPREME COURT
By ______ Deputy Clerk

WINTER HAVEN HOSPITAL, INC.,

Petitioner,

vs. CASE NO. 69,493

FLORIDA PATIENT'S
COMPENSATION FUND,

Respondent.
_______________________________/

PETITIONER, WINTER HAVEN HOSPITAL, INC.'S, REPLY BRIEF

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ARGUMENT

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

Petitioner, WINTER HAVEN HOSPITAL, INC., would submit that the Trial Court acted appropriately and correctly in granting its Motion to Limit Liability and consequently would submit that the Second District Court of Appeal erred by reversing the Trial Court's Order in this matter. Further, Petitioners contend that the decision rendered by the Third District Court of Appeal in the Bouchoc v. Peterson case, 490 So.2d 132 (Fla. 3rd DCA 1986), is a better reasoned opinion and should be adopted by this Court in the instant matter.

In their Answer Brief, Respondents initially begin their argument by attempting to claim that there is no issue regarding the Trial Court's limitation of liability in respect to the cost award of $15,355.30. In so doing, Respondents claim that this Petitioner does not question whether it should be responsible for such costs. This Petitioner wishes to make clear at this point that it does contend that the $100,000.00 limitation of liability that applies to it is precisely that, a statutory exemption preventing this Petitioner from paying any amount over $100,000.00, including any cost Judgment. Despite any statements made in Respondents' Brief, this Petitioner has always contended, in both the Trial and

Appellate Courts, that the $100,000.00 limitation of liability granted pursuant to Florida Statute §768.54 requires that the Florida Patients Compensation Fund, and not this Petitioner, pay any Judgment in excess of any $100,000.00, regardless of whether it be for damages, costs, or attorneys' fees. This Petitioner has consistently argued that the $100,000.00 limitation of liability extended to health care providers in Florida Statute §768.54 is just that, a limitation of liability of $100,000.00, and does indeed require the Florida Patients Compensation Fund to pay any Judgment, regardless of character, which is assessed against this Petitioner in excess of $100,000.00.

In addition to the foregoing, Respondents' attempt to argue in their Answer Brief that any attorneys' fees that may be taxed pursuant to Florida Statute §768.56 is not part of a successful "claim" for which the Florida Patients Compensation Fund is responsible pursuant to Florida Statute §768.54. This Petitioner would again point out to the Court that Florida Statute §768.54 clearly evidences the intention to include attorneys' fees as part of any "claim." This statute was clearly designed to protect health care providers and to spread the risk of medical malpractice claims for

such health care providers. Part and parcel of a medical malpractice claim in the year of this incident, 1982, was a potential claim for attorneys' fees to be awarded to the prevailing party. See, Florida Statute §768.56 (1981). Further, the words "arising out of" have been repeatedly interpreted to include claims which originate from, are incident to, or have some connection with the item insured. See, Red Ball Motor Freight v. Employers Mutual Liability Insurance Company, 189 F.2d 374 (5th Cir. 1951); Government Employees Insurance Co. v. Novak, 453 So.2d 1116 (Fla. 1984); Padrone v. Long Island Insurance Company, 356 So.2d 1337 (Fla. 3d DCA 1978). The case law, thus, makes it clear that in the instant case, the phrase "arising out of" would involve all of the claims which originate from, are incident to, or have some connection with the claim of medical malpractice brought by Stacy Short against this Petitioner. It is, consequently, very clear that the attorneys' fees that are at issue in this case arose out of the activities that were intended to be covered by the Florida Patients Compensation Fund under Florida Statute §768.54.

In response to this argument, and throughout their brief, Respondents have repeatedly pointed out that the Florida Patients Compensation Fund is not an insurer but is a state-created entity which shares risk among potential malpractice defendants. This Petitioner does not take

issue with this fact or with this Court's previous holdings that the Florida Patients Compensation Fund is not an insurance company. Nonetheless, this Court has ruled that the statute creating the Florida Patients Compensation Fund does create a "contract" between the Fund and its members. Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815 (Fla. 1983). A plain reading of the involved statute indicates that one of the very cornerstones behind the contract created by Florida Statute §768.54 is that the underlying health care provider should have a limitation of liability of $100,000.00. Indeed, the Florida Patients Compensation Fund offered varying levels of protection for its members depending upon the amount of the statutory fee paid by the member. It is undisputed in the instant case that this Petitioner did pay a statutory fee which would entitle it to the $100,000.00 limitation of liability as noted in Florida Statute §768.54. Consequently, this Petitioner would submit that that limitation is absolute and does not require it to pay any portion of any Judgment rendered against WINTER HAVEN HOSPITAL, INC., including attorneys' fees or costs, in excess of $100,000.00.

In their Answer Brief, Respondents spend a good deal of time discussing the Legislative history of Florida Statute §768.54 and then attempts to argue that that statute somehow shows that the Legislature did not intend for attorneys' fees to be paid by the Florida Patients Compensation

Fund. In response, this Petitioner would point out that Respondents have totally ignored the wording of Florida Statute §768.56 which entitles Petitioner to the award of attorneys' fees. That statute specifically states that attorneys' fees shall be awarded to the prevailing party in medical malpractice actions. In that light, it is very telling that the Florida Patients Compensation Fund, unlike any insurance carrier, would be named as a party in a medical malpractice claim that arose in 1982, at the time of this incident. Indeed, not only was it possible for a plaintiff to make the Florida Patients Compensation Fund a party in medical malpractice litigation, but additionally, it was a requirement for recovery that a plaintiff have actually named the Florida Patients Compensation Fund as a party. Thus, unlike any insurance carrier involved in medical malpractice claims in 1982, the Florida Patients Compensation Fund in the instant litigation was a named party. Clearly, the Fund is liable for attorneys' fees under Florida Statute §768.56, and it is consequently difficult to understand how, at this juncture, the Respondents can now claim that the Legislature did not intend that the Fund be responsible for such attorneys' fees.

In addition to the foregoing, Respondents, in their brief, attempt to distinguish the cases cited by this

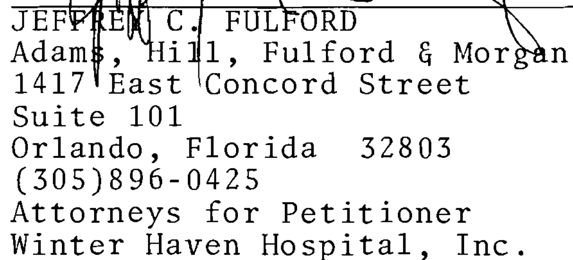
Petitioner in its Initial Brief regarding sovereign immunity. As this Petitioner initially pointed out, the sovereign immunity cases discuss situations where a statutory limitation on liability has been dealt with by the Courts of this state. In an attempt to distinguish these cases, the Respondents argue that the sovereign immunity cases are not similar to the instant case since the sovereign immunity statute sets out a limitation or parameters on the liability that may be imposed on a governmental entity. Quite frankly, this Petitioner is at a loss to understand how this is not exactly the situation created by Florida Statute §768.54 since that statute does very specifically set out a limitation or parameters on liability for this Petitioner. Thus, this Petitioner would submit that the cases indicating that in situations where a governmental limitation of liability is involved, that the governmental entity is not responsible for any attorneys' fees over the amount of that limitation of liability are applicable and analagous in the instant case. See, Berek v. Metropolitan Dade County, 422 So.2d 838 (Fla. 1982); City of Lake Worth v. Nicolas, 434 So.2d 313 (Fla. 1983); Godoy v. Dade County, 428 So.2d 662 (Fla. 1983). Consequently, this Petitioner would submit that this Court should adopt the reasoning and the results reached by it in the above-noted cases dealing with a governmental

entity's responsibility for attorneys' fees over and above its statutory limitation of liability.

Finally, in their brief, Respondents attempt to again argue that the attorneys' fees involved in this case are "costs" and that this Petitioner should be liable for costs. As noted at the beginning of this brief, this Petitioner does not agree that it is responsible for any costs incurred by the Plaintiff in this matter. Further, Petitioner would point out that no Court, not even the Second District Court of Appeal, has held that attorneys' fees in a medical malpractice action are "costs." Indeed, Respondent has no basis for this argument in case or statutory law. Consequently, Petitioner would submit that attorneys' fees awarded pursuant to Florida Statute §768.56 are not costs and that, further, that Petitioner is not responsible for any cost Judgments awarded in excess of its $100,000.00 limitation of liability. In light of all of the foregoing, this Petitioner would respectfully submit that the Trial Court acted appropriately in granting this Petitioner's Motion to Limit Liability to $100,000.00 and that, therefore, this Court should reverse the decision rendered by the Second District Court of Appeal in the instant matter.

CONCLUSION

Petitioner, WINTER HAVEN HOSPITAL, INC., would respectfully urge this Court to affirm the Trial Court's Order of November 6, 1985, granting its Motion to Limit Liability to $100,000.00 and to reverse the decision rendered by the Second District Court of Appeal in the instant matter. This Petitioner would submit that it is entitled to a limitation of liability pursuant to Florida Statute §768.54 based not only on the clear wording of that statute, but also on the case law that exists in this state. Further, this Petitioner would submit that the Third District Court of Appeal's decision in Bouchoc v. Peterson, 490 So.2d 132 (Fla. 3d DCA 1986) is a correct decision on this issue and should be adopted by this Court. Consequently, this Petitioner would respectfully request that this Court reverse the decision rendered by the Second District Court of Appeal and therefore affirm the Order of the Trial Court granting this Petitioner's Motion to Limit Liability to $100,000.00.



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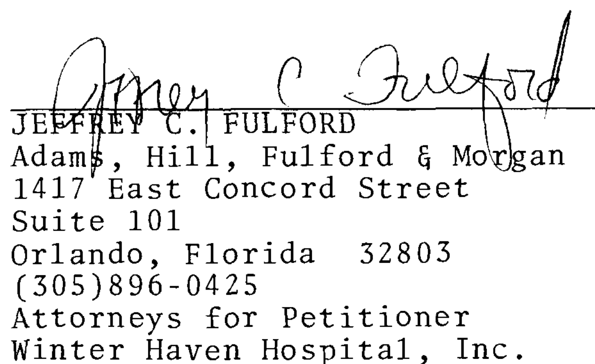
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing 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 JULIAN CLARKSON, ESQ., Post Office Drawer 810, Tallahassee, Florida, 32302, this 30th day of March, 1987.



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