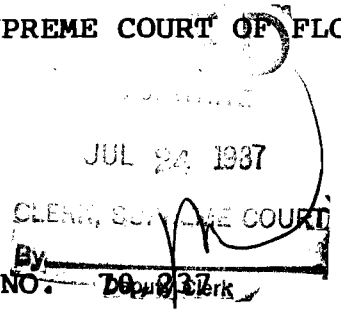
IN THE SUPREME COURT OF FLORIDA



ST. JOSEPH'S HOSPITAL, INC.	:	
Petitioner,	:	
vs.	:	CASE NO. 70,827
ELAINE M. COXON, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ADAM CHRISTOPHER COXON, DECEASED, AND FLORIDA PATIENT'S COMPENSATION FUND	:	
Respondents.	:	

BRIEF OF RESPONDENT FLORIDA PATIENT'S COMPENSATION FUND ON THE MERITS

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ATTORNEYS FOR RESPONDENT
FLORIDA PATIENT'S COMPENSATION
FUND

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PREFACE

Elaine Coxon, as personal representative of the Estate of Adam Christopher Coxon, will be referred to as "Plaintiff". St. Joseph's Hospital, Inc., which will be referred to as "St. Joseph's Hospital", also a defendant in the lower court's case, is the petitioner in this appeal. The Florida Patient's Compensation Fund, a defendant in the lower court, and respondent in this Court will be referred to as "FPCF". References to the Record will be to the record in Case No. 86-814, below, and will be referred to as (FPCF R. p.#).

Respondent, FPCF, notes that this court has presently pending before it the cases of Maurer and Winter Haven Hospital v. FPCF, Sup. Ct. Case No. 69,493, (O.A. May, 1987), and Bouchoc v. FPCF, Case No. 69,230, (O.A. May, 1987), which involve the same issue raised in the present case.

STATEMENT OF THE CASE AND THE FACTS

In a medical malpractice suit filed by Elaine Coxon, as personal representative of her deceased son's estate, against St. Joseph's Hospital and the FPCF, the jury returned a verdict finding St. Joseph's Hospital's negligence to be the legal cause of Adam's death. (FPCF R.66-67). The jury awarded damages of $250,000. Final judgment was entered against St. Joseph's Hospital for $100,000, with the Court reserving jurisdiction to hear and determine any motion for assessment of costs and attorney's fees against St. Joseph's Hospital and the FPCF. (FPCF R.76).

Plaintiff Coxon, as the prevailing party, moved for reasonable attorney's fees, as well as other costs. (R.89). At the hearing on these motions, counsel for St. Joseph's Hospital, contended that the Section 768.54(2)(b) $100,000 limitation of liability included attorney's fees awarded the prevailing party. (R.102). But St. Joseph's Hospital, did not argue that the $100,000 limitation included costs, and, in fact, expressly conceded that it must bear its pro rata share of taxable costs. (FPCF R.125-26). Counsel for St. Joseph's Hospital expressly said: "I do not, however, claim that the hospital does not have to bear its pro rata share of taxable costs, because the Act says that among the things that the hospital must do is to provide a

defense. It seems to me that this might very well include costs, and I can't find any case that says that a member of the Fund doesn't have to bear its share of costs." (FPCF R.125-26).

The FPCF, on the other hand, contended, pursuant to Section 768.54, Florida Statutes, establishing the terms of the Fund's contract with its members, that the $100,000 limitation of liability set forth in Section 768.54(2)(b) does not include prevailing party attorney's fees and that the Fund member is required to pay these attorney's fees. (R.103, 119-20). At the hearing on Plaintiff's motion for attorney's fees, the Fund posited that pursuant to Section 768.54, the limitation of a Fund member's liability is a limitation for damages -- personal injury or property -- above the statutory limits and that pursuant to the provision of the statutory contract between the Fund and its members, the limitation of liability does not encompass attorney's fees. (FPCF R.119).

The Court entered final judgment for attorney's fees to the prevailing party and ordered that Plaintiff recover $31,762.50 from the FPCF and $25,987.50 from St. Joseph's Hospital. (FPCF R.92). It further entered an order taxing other costs against both the Fund and St. Joseph's Hospital, in the amount of $2,512.77. Fifty-five percent of these costs was ordered to be paid by the Fund and forty-five percent was ordered to be paid by St. Joseph's Hospital.

The FPCF and St. Joseph's Hospital appealed the trial court's final judgment which required each of them to pay a pro rata share of section 768.56 prevailing party attorney's fees awarded to Plaintiff.

The FPCF argued to the Second District that the legislative scheme creating the FPCF and encompassed within section 768.54 does not contemplate that the FPCF is liable for section 768.56 prevailing party attorney's fees as a part of the "claim" which the FPCF may be obligated to pay. The Second District agreed with the FPCF's position, held that the FPCF is not liable for these attorney's fees and that Defendant St. Joseph's Hospital is liable for such fees, vacated the final judgment of the trial court, and remanded to the trial court for entry of a final judgment consistent with its decision. The Second District, in Florida Patient's Compensation Fund v. Maurer, 493 So.2d 510 (Fla. 2d DCA 1986), reaffirmed and followed its previous decision in Maurer which is presently pending review in this Court. The Second District acknowledged conflict with the Third District's decision in Bouchoc v. Peterson, 490 So.2d 132 (Fla. 3d DCA 1986).

St. Joseph's Hospital seeks review of the decision of the Second District on the basis of conflict between the Second District's holding on the issue of liability for attorney's fees and the Third District's holdings on a similar issue in Bouchoc

v. Peterson, 490 So.2d 132 (Fla. 3d DCA 1986) and Florida Patient's Compensation Fund v. Miller, 436 So.2d 932 (Fla. 3d DCA 1983). Review was sought to this Court in both Bouchoc and Maurer.

SUMMARY OF ARGUMENT

This Court should approve the ruling of the Second District in the present case and should revisit its non-final decision in Florida Patient's Compensation Fund v. Bouchoc and Maurer v. Florida Patient's Compensation Fund, case nos. 69230, 69,421, and 69,493 (Fla. July 16, 1987) which is premised on erroneous statements of the law.

St. Joseph's Hospital was precluded from raising on appeal the issue of whether the trial court erred in ordering it to pay a percentage of the taxable costs, which portion amounted to $1,130.75, where, in the trial court, it conceded its responsibility to pay a portion of the taxable costs and where it made no objection to the assessment of a portion of the taxable costs against it on the basis that the limitation of liability provided in Section 768.54 encompassed such costs. The Second District correctly did not address this issue regarding costs because St. Joseph's Hospital failed to preserve this issue for appeal.

The Second District Court of Appeal correctly held that the limitation of liability of St. Joseph's Hospital, as a Fund member, did not include a limitation of liability for payment of attorney's fees and correctly held that the FPCF was not liable for the prevailing party attorney's fees. Section 768.54,

creating FPCF, establishes the express 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. The limitation of liability provided in Section 768.54 does not encompass a limitation for Fund members from the payment of Section 768.56 prevailing party attorney's fees. The statute creating the Fund does not contain any provision that permits the Fund to pay these prevailing party attorney's fees pursuant to Section 768.56, Florida Statutes (which has now been repealed effective October, 1985). 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 768.54 expressly provides that the Fund member health care provider must provide an adequate defense for the Fund.

Section 768.56 which provides that attorney's fees shall be paid to 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. The limitation of liability provisions of Section 768.54(2)(b) do not encompass a limitation of liability for a Fund member from the payment of attorney's fees.

The decisions cited by Petitioner relating to waiver of the sovereign immunity are not applicable to the present case. The waiver of sovereign immunity statute are entirely different in nature and language from Section 768.54.

The District Court correctly decided that the Trial Court erred in requiring FPCF to pay a portion of the prevailing party attorney's fee award, and that the Trial Court did not err in not limiting the liability of St. Joseph's Hospital for the payment of Section 768.56 prevailing party attorney's fees. The District Court correctly held that the FPCF was not liable for prevailing party attorney's fees imposed pursuant to Section 768.56.

The decision of the District Court of Appeal, Second District, should be approved.

This Court in Bouchoc has premised its decision on several misapprehensions of the law. This Court states as a premise for rejecting an important aspect of the Fund's argument that Section 57.105 was in existence when the Fund was created. In fact, however, it was not and did not become effective until 1978. The Fund was created in 1975. Additionally, this Court has misstated several important elements of Section 768.54. This Court should recede the nonfinal decision in Bouchoc and Maurer from which the Fund intends to seek rehearing in this Court.

ARGUMENT

THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, CORRECTLY DECIDED THAT FPCF IS NOT LIABLE FOR PREVAILING PARTY ATTORNEY'S FEES AND THAT THE EXPRESS STATUTORY LIMITATION OF LIABILITY PROVIDED BY SECTION 768.54(2)(b) DOES NOT INCLUDE SECTION 768.56 PREVAILING PARTY ATTORNEY'S FEES.

Although St. Joseph's Hospital attempts again to raise the issue of liability for costs as well as for Section 768.56 prevailing party attorney's fees, the District Court correctly decided that St. Joseph's Hospital had waived its right to contest the assessment of a percentage of the costs against it at the hearing on the motion of Plaintiff for costs and attorney's fees. At the hearing, counsel for St. Joseph's Hospital expressly told the Trial Court that it was not claiming that the Hospital did not have to bear its pro rata share of taxable costs. (FPCF R.125-126, 128). It expressly conceded its liability for its pro rata share of the taxable costs. Taxable costs in this case (separate from the award of attorney's fees) were awarded in the amount of $2,512.77, fifty-five percent of which are to be paid by the FPCF and forty-five percent by St. Joseph's Hospital. Because St. Joseph's Hospital did not object to a percentage of the taxable costs being awarded against it on the basis of the Section 768.54(2)(b) limitation of liability,

and in fact conceded its responsibility for a portion of the taxable costs, other than prevailing party attorney's fees, it could not be heard by the Second District Court to complain as to the court's award against it of taxable costs in the amount of $1,130.75. St. Joseph's Hospital was precluded from raising the issue of its liability for these taxable costs on appeal to the District Court because it had not properly preserved it for appeal. Moreover, even had it preserved this point, the District Court would have affirmed the Trial Court because the FPCF member is expressly required by Section 768.54 to provide an adequate defense for the FPCF.

The Second District Court decision is entirely consistent with law and legislative intent as evidenced by the specific language of the relevant statutes discussed herein and relied upon by the District Court. It was not within the province of the Second District or this Court to judge the wisdom of this legislation. Tatzel v. State, 356 So.2d 787 (Fla. 1978). A Court cannot assume that the legislature meant something which does not appear on the face of the statute. Platt v. Lanier, 127 So.2d 912 (Fla. 2nd DCA, 1961).

When the legislature defined the limitation of liability upon creation of the FPCF, there was no statutory provision for award of attorney's fees to the prevailing party. If the plaintiff prevailed, he paid his own attorney's fees on a

percentage basis of the verdict. The limitation of liability of a member of the FPCF established by Section 768.54 does not include a limitation of liability on the part of a FPCF member for payment of attorney's fees or other taxable costs. In the present case, the Second District correctly held that the FPCF was not liable for prevailing party attorney's fees imposed by Section 768.56 and that the health care provider member, St. Joseph's Hospital was liable for such fees. 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 party 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 that, therefore, the limitation of liability for claims as defined by Section 768.54(3) does not include Section 768.56 prevailing party attorney's fees. It concluded that the statute creating the FPCF 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. Limitation of liability for judgments or verdicts in medical malpractice cases contemplated by the legislature in creation of the FPCF in no way could have

included these awards for attorney's fees anymore than such limitation could have included an award for punitive damages. Attorney's fees were not awardable by statute to a malpractice plaintiff because he had prevailed in the suit.

The FPCF, as a unique statutory entity created by the Florida Legislature in 1975, depends solely upon the express terms of its creating statute for its functions and obligations. The FPCF was created as a non-profit entity to provide a method of payment to medical malpractice plaintiffs of portions of claims arising out of the "rendering or failure to render medical care or services." Section 768.54(3)(a); Chapter 75-9, Laws of Florida (1975); Chapter 76-260, Laws of Florida (1976); Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783 (Fla. 1985).

The Legislature's purpose in creating the Fund was 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). Rather, the Fund was created as a carefully defined limitation of liability device not 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 conditions and provisions governing the contractual relationship between the Fund and its members are specifically and solely established by the Legislature in Section 768.54, and the FPCF's liability is enforced only in the manner directed by the Florida Legislature. Florida Patient's Compensation Fund v. Von Stetina. The specific statutory 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). 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).

Contrary to contention of St. Joseph's Hospital, the language of the pertinent statutes does not clearly and unambiguously limit the FPCF member's liability for attorney's fees and other taxable costs. Although St. Joseph's Hospital attempts to suggest otherwise, the issue presently presented was not raised and was not addressed in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985).

Here, we are concerned with the construction of the Legislature's two separate and distinct responses to Medical

Malpractice Crisis in Florida, which responses were not simultaneous but rather were several years apart and were never interrelated. Section 768.54, establishing the express contract between the Fund and its health care provider members, provides in pertinent part:

> (2)(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).

Section 768.54, emphasis supplied.

By clear statutatory language, the member, as one of the several prerequisites for eligibility for the statutorily defined limitation of liability, must provide an adequate defense for the FPCF.

Relative to what is a claim, Subsection (3) provides in pertinent part:

> (a) The fund.--There is created a "Florida Patient's Compensation Fund" for the purpose of paying that portion of any claim arising out of the rendering of or failure to render medical care or services, or arising out of activities of committees, for health care providers or any claim

> for bodily injury or property damage to the person or property of any patient, including all patient injuries and deaths, arising out of the insureds' activities for those health care providers set forth in subparagraphs (1)(b)1., 5., 6., and 7. which is in excess of the limits as set forth in paragraph (2)(b). The fund shall be liable only for payment of claims against health care providers who are in compliance with the provisions of paragraph (2)(b), of reasonable and necessary expenses incurred in the payment of claims, and of fund administrative expenses.

Emphasis supplied.

Pursuant to Section 768.54(2)(b), the health care provider is required to provide a 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 claims referred to in subsection (2)(b) are any claims 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 attorney's fees or taxable costs awarded to the prevailing parties pursuant to Section 768.56. This limitation of liability 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 earning loss, and pain and suffering.

As a separate and distinct response to the medical malpractice crisis existing in 1980, Section 768.56, Florida

Statutes,[1] requiring the award of attorney's fees to the prevailing party in medical malpractice cases, was enacted at the insistence of the health care industry to encourage medical malpractice defendants to make prompt and reasonable settlements of meritorious claims. Its legislatively announced purpose was to discourage medical malpractice actions by imposing economic sanctions against losing medical malpractice plaintiffs. Chapter 80-67, Laws of Florida (1980). Florida Patient's Compensation Fund v. Rowe.

Section 768.56 was not in effect when Section 768.54(3), establishing the claims for which liability would be limited under Section 768.54(2)(b), was enacted in 1976. Chapter 76-168, Laws of Florida (1976). When the Fund was created in 1975, and its responsibilities were expressly described, there was no statute allowing recovery of attorney's fees by a prevailing

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[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 in accordance with the principles of equity . . .

party in a medical malpractice action. Contrary to this Court's statement in Bouchoc that Section 57.105 existed when the FPCF was created in 1975, the FPCF points out that Section 57.105 was not enacted until 1978.

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. The Legislature in 1975, did not consider the payment of Section 768.56 prevailing party attorney's fees when it enacted the limitation of liability for certain claims in favor of Fund members and imposed on the Fund the responsibility of paying claims resulting in judgments against members in excess of $100,000. Nor did the legislature ever incorporate by reference either expressly or otherwise the provisions of Section 768.56 into Section 768.54. Therefore, the enactment of 768.56 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 with regard to Section 768.54, this Court must consider the enactment as a whole at the time of its enactment. State v. Webb, 398 So.2d 820 (Fla.

1981). The words of a statute must 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 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.

The conclusion that attorney's fees awarded pursuant to Section 768.56 are not a claim under subsection (3) and therefore that Section 768.54(2) provides no limitation of liability for such attorney's fees is not affected by the language contained in Section 768.54(3)(e)(3) providing that the amount of liability of the FPCF for reasonable attorney's fees shall be paid in lump sum. This language was added to Section 768.54 in 1976. At that time, Section 768.56 did not exist. The mention of attorney's fees in this subsection does not refer to the attorney's fee provision of Section 768.56 which was not enacted until four years later, nor could this section have referred to Section 57.105 which was not enacted until 1978. Rather, this reference refers to the payment of fees to a plaintiff's attorney under an agreed settlement.

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.

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 comports with the clear language of the statutes and legislative intent.

In 1985, the Florida Legislature, as a part of its medical malpractice reform 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 Legislature did not amend these provisions. This is persuasive evidence that Section 768.56 was not a part of the limitation of liability provisions of Section 768.54(2)(b).

Contrary to St. Joseph's Hospital's contention, the construction of Section 768.54 which it urges in the present case is not in any way implicit in the Florida Supreme Court decision of Florida Patient's Compensation Fund v. Rowe, Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783 (Fla. 1985), or Taddiken v. Florida Patient's Compensation Fund, 478 So.2d 1058 (Fla. 1985). In none of these decisions was the present issue raised or addressed. The Supreme Court in Florida Patient's Compensation Fund v. Rowe, and Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985), addressed the issues of the constitutionality of Section 768.56 and its retroactive application. The FPCF in Rowe, however, 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.

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 FPCF.

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. 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 FPCF is obligated to pay 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.

Furthermore, Mercy Hospital, Inc. v. Menendez, 371 So.2d 1077 (Fla. 3d DCA 1077), cert. denied 383 So.2d 1198 (Fla. 1980), relied upon by petitioner, is not controlling.

St. Joseph's Hospital's reliance on Berek v. Metropolitan Dade County, 422 So.2d 838 (Fla. 1982) and other sovereign immunity cases is misplaced. Berek, City of Lake Worth v. Nicholas, 434 So.2d 315 (Fla. 1983), and Gadoy v. Dade County, 428 So.2d 662 (Fla. 1983), relating to waiver of sovereign immunity are inapposite and inapplicable 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 waiving sovereign immunity 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 otherwise exist absent the statute.

Section 768.54, on the other hand limits the liability of the health care provider, only as specifically defined by statute, 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 several 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. The FPCF member must provide an adequate defense for the FPCF prerequisite to any entitlement to the statutorily defined limitation of liability.

Section 768.54(2)(b) limits liability to claims covered by subsection (3). This limitation, however, does not include an award of attorney's fees to the prevailing party pursuant to Section 768.56. Section 768.54 establishes the contract between the FPCF and St. Joseph's Hospital. This contract does not include a provision that the Fund pay the attorney's fee award or other taxable costs 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 and for other taxable costs. The District Court correctly held that St. Joseph's Hospital was liable for the award of attorney's fees to the prevailing Plaintiff in this case. Section 768.54(2)(b) does not provide a limitation of liability for St. Joseph's Hospital insofar as concerns the award of attorney's fees to the prevailing Plaintiff or other taxable costs assessed against it in favor of the prevailing Plaintiff.

DISCUSSION OF THIS COURT'S RECENT DECISION IN FLORIDA PATIENT'S COMPENSATION FUND V. BOUCHOC, and MAURER V. FLORIDA PATIENT'S COMPENSATION FUND Case Nos. 69,230, 69,421, and 69,493.

The language of Section 768.54 is clear and unambiguous. The legislature clearly did not include Section 768.56 within the limitation of liability previously enacted by the legislature when it created the Florida Patient's Compensation Fund. When the legislature enacted Section 768.56, it did not include or reference the language of this provision as a part of Section 768.54. The fact that Section 768.56 expressly provides [Section 768.56 Attorney's Fees] "that the Court will tax fees against the non-prevailing parties in accordance with principles of equity", clearly speaks against any legislative intent that the limitation of liability provided by 768.54 encompasses Section 768.56 prevailing party attorney's fees.

In its not-final decision of Florida Patient's Compensation Fund v. Bouchoc and Maurer v. Florida Patient's Compensation Fund, Case Nos. 69,230, 69,421 and 69,493 (Fla. July 16, 1987), wherein this Court, last week, held that the Florida Patient's Compensation Fund is liable for Section 768.56, attorney's fees, this Court has made several erroneous statements upon which erroneous statements it relies for its ultimate decision.

Therein this Court erroneously states that Section 57.105 was effective at the time that the Fund was created. The Court

premises its rejection of an important aspect of the Florida Patient's Compensation Fund's argument on this statement. Section 57.105, however, was not in effect when the Florida Patient's Compensation Fund was created. The Fund was created in 1975, but Section 57.105 did not come into effect until June 15, 1978. Chapter 78-275, Laws of Florida (1978).

In Bouchoc and Maurer, this Court also erroneously states that under the statutory scheme, by merely paying the requisite fee to the Florida Patient's Compensation Fund, the health care providers limit their exposure to $100,000. To be eligible for the specifically described limitation of liability, however, Section 768.54 imposes additional requirements to the payment of the required fee. Section 768.54, among other things, requires that the health care provider member provide an "adequate defense for the fund." Section 768.54(2)(b).

The Court further states that "the statute contemplated that the Fund would pay all judgments in excess of $100,000." This, however, is not what the Statute says. Section 768.54(2)(b) states that a health care provider shall not be liable for an amount in excess of $100,000 per claim "for claims covered under subsection (3)." What is meant by claims is carefully described by the legislature in Section 768.54(3). It does not include all judgments.

This Court states further that the Fund was established to permit health care providers to protect themselves from catastrophic verdicts in malpractice cases, but such verdicts did not include the requirement of Section 768.56 that the nonprevailing party pay the attorney's fee award to the prevailing party.

It is axiomatic that this Court cannot judge the wisdom of these statutes. This Court, however, has judged the wisdom of these statutes and has effectively rewritten Section 768.54 to include subsequently enacted Section 768.56. If the legislature had intended that the Florida Patient's Compensation Fund pay Section 768.56 attorney's fees, the legislature would have so stated. When the legislature did not specifically reference to Section 768.54 and include Section 768.56 as part of the legislatively created limitation of liability, the Court cannot rewrite the statute to do so. Claims in Section 768.54 refers solely to malpractice claims as specifically defined in Section 768.54.

This Court has oftentimes reiterated the general principle of statutory construction of expressio unius est exclusio alterius, which is to say the mention of one thing implies the exclusion of another. Thayer v. State, 335 So.2d 815 (Fla. 1976). Here Section 768.54 expressly stated what was included in the term "claims". This enumeration did not include attorney's fees awarded to the prevailing party nor did it include punitive damages awards against the health care provider.

This Court has made it very clear in previous decisions that specific provisions must be made for payment of attorney's fees and that statutes authorizing attorney's fees are in derogation of the law and are to be strictly construed. Whitten v. Progressive Casualty Insurance Co., 410 So.2d 501 (Fla. 1982); Kittel v. Kittel, 210 So.2d 1 (Fla. 1968).

Moreover, this Court has repeatedly held that amendment of a statute by implication is not favored. State v. JRM, 388 So.2d 1227 (Fla. 1980). See also, State ex rel. Quigley v. Quigley, 463 So.2d 224 (Fla. 1985). Unless it clearly appears that the legislature intended to amend Section 768.54 by including 768.56 in the definition of claims, this Court cannot, by implication, so amend Section 768.54. There is no conflict or repugnancy between Section 768.54 and Section 768.56, and Section 768.54 has never incorporated Section 768.56 by reference or otherwise.

Here, strict construction of the statute permitting prevailing party attorney's fees which statute has never been incorporated into Section 768.54 and the contract between the Fund and its members and a reading of the clear language of Section 768.54 regarding the requirements imposed upon the health care member and the parameters of the limitation of liability lead to the logical conclusion reached by the Second District in the present case.

The attorney's fees referred to in Section 768.54(3)(e)(3) were never contemplated by the legislature to include Section 768.56 attorney's fees because they did not exist when this Section 768.54(3)(e)(3) was enacted. The Court cannot legislate by incorporating by reference a provision into Section 768.54, when the legislature did not do so. Courts do not have the power to modify the plain intent of the legislature as expressed in the language of the statute, even if this change is designed to bring about what may be conceived in the minds of the judges to do a more practical or proper result. Vocelle v. Knight Brothers Paper Co., 118 So.2d 664 (Fla. 1st DCA 1960).

This Court has repeatedly held that Courts cannot amend or complete acts of the legislature intending to supply relief in instances where the legislature has not provided such relief. Dade County v. National Bulk Carriers, Inc., 450 So.2d 213 (Fla. 1984). This Court has also made clear that it is not within the Court's prerogative to modify or shade expressed legislative intent in order to uphold policy favored by the court.

In Bouchoc, this court has added to Section 768.54, the provisions of section 768.56 in order to make it cover a situation which is not within the meaning of this statute. Bouchoc is not final and should be revised on rehearing. The Fund will seek rehearing in Bouchoc. The Fund asks that this Court revisit its decision in Bouchoc and that this Court not attempt to rewrite

the legislation to reach a result the Court finds desirable. Rather, amendment of Section 768.54 to include by reference Section 768.56, if to be done, should be done by the legislature and not by this Court.

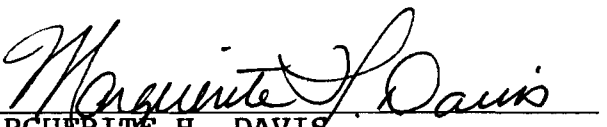
The Decision of the Second District should be approved.

CONCLUSION

Accordingly, St. Joseph's Hospital has waived its right to contest the judgment of taxable costs against it.

The decision of the District Court of Appeal, Second District holding that the FPCF is not liable for Section 768.56 attorney's fees should be approved.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by United States Mail to T. PAINE KELLY, JR., P.O. Box 1531, Tampa, Florida 33601, and LARRY I. GRAMOVOT, 705 East Kennedy Boulevard, Tampa, Florida 33602, this 23rd day of July, 1987.

Marguerite H. Davis

MARGUERITE H. DAVIS