IN THE SUPREME COURT OF FLORIDA

ST. JOSEPH'S HOSPITAL, INC.,	:	
Petitioner,	:	
vs.	:	
	:	Case No. 70,237
ELAINE M. COXON, as Personal Representative of the Estate of ADAM CHRISTOPHER COXON, deceased, and FLORIDA PATIENT'S COMPENSATION FUND,	:	
Respondents.	:	

ON PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT

INITIAL BRIEF ON THE MERITS OF PETITIONER, ST. JOSEPH'S HOSPITAL, INC.

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INTRODUCTION

This Initial Brief is respectfully submitted by Petitoner, St. Joseph's Hospital, Inc. ("St. Joseph's"). This Court has accepted jurisdiction to review the decision of the Second District Court of Appeal of Florida in Florida Patient's Compensation Fund v. Coxon, 502 So.2d 1369 (Fla. 2nd DCA 1987) (A. 1). The decision to be reviewed involves consolidated appeals in the District Court and jurisdiction in this Court was sought because of a conflict of decisions pursuant to Article V, §3(b)(3), Florida Constitution.

In the District Court, Florida Patient's Compensation Fund ("The Fund") was Appellant and Elaine M. Coxon ("Coxon"), and St. Joseph's were Appellees in Case No. 80-814. In Case No. 80-815, St. Joseph's was Appellant and Coxon and The Fund were Appellees.

Because two records have been prepared on the consolidated appeal, references to the record in Second District Case No. 80-814 will be designated (R. FPCF ___) and the record in Case No. 80-815 will be designated (R. SJHI ___). References to the appendix will be designated by the symbol (A. ___).

STATEMENT OF THE CASE AND OF THE FACTS

Elaine M. Coxon, as Personal Representative of the Estate of Adam Christopher Coxon, deceased, brought an action based upon allegations of malpractice against St. Joseph's, with

respect to care provided to the premature infant born to Ms. Coxon and her husband, from his birth on January 15, 1982 to his death on January 19, 1982. (R. FPCF 1-4).

At trial on the malpractice action the jury found negligence on the part of St. Joseph's which was the legal cause of Adam Christopher Coxon's death. The jury awarded Ms. Coxon and her husband $125,000.00 each as compensation for mental pain and suffering. (R. SJHI 1-2).

In accordance with §768.54(2)(b), Florida Statutes (1981), in effect at the time of the occurrence of the alleged malpractice, St. Joseph's filed a Verified Motion for Entry of Final Judgment in the amount of $100,000.00 under the limits of liability of that statute. (R. SJHI 3-5; A. 26-29). The facts set forth in the Motion were not disputed. St. Joseph's is a "hospital" and a "health care provider" within the meaning of §768.541 Florida Statutes (1981), and was a member of The Fund from July 1, 1976 to July 1, 1982. (R. SJHI 3). St. Joseph's paid all yearly fees and assessments due and payable to The Fund during this period, and provided an adequate defense of the action for The Fund until The Fund was made a party to the cause. St. Joseph's thereafter cooperated with The Fund to provide further adequate defense at the trial of the action after The Fund, pursuant to the order of the Circuit Court, was excused from participation in the trial. (R. SJHI 3-4).

No underlying insurance coverage existed within the

meaning of §768.54(2)(b), Florida Statutes (1981) in favor of St. Joseph's throughout its period of membership in The Fund. St. Joseph's was a self-insurer for any recovery against it for medical malpractice up to the limit of $100,000.00 per claim under the provisions of §768.54(2)(b) and (3)(e)(3). (R. SJHI 4). St. Joseph's alleged that it was ready, willing and able to make payment of the $100,000.00 limit of its liability under the statute and that it was entitled to limitation of liability in that amount.

The Motion for Entry of Final Judgment was served November 19, 1985. The Circuit Court entered Final Judgment against St. Joseph's in the sum of $100,000.00 on November 13, 1986. (R. SJHI 7; A. 30). Because Ms. Coxon and The Fund were unwilling to concede that this amount was the limit of St. Joseph's liability, the Court reserved jurisdiction to hear and determine motions for assessment of costs and attorney's fees on any motion that might be filed by Ms. Coxon against either St. Joseph's or The Fund. (R. SJHI 7; A. 30). Thereafter, St. Joseph's paid and satisfied the Plaintiff's judgment in the amount of $100,000.00. (R. SJHI 59; A. 34-35).

Ms. Coxon moved to tax costs accompanied by an affidavit of her trial counsel. (R. SJHI 8-12). On November 26, 1985 Ms. Coxon filed a motion for award of attorney's fees, also supported by affidavit of trial counsel. (R. SJHI 13-15). These motions were heard on February 11, 1986. (R. SJHI 22-53).

At the hearing on the motions to tax attorney's fees and costs it was announced that The Fund had settled its liability under the Final Judgment of November 12, 1985, which liability was in the amount of $150,000.00, by the payment of $120,000.00 to Ms. Coxon. (R. SJHI 41).

Both The Fund and St. Joseph's contended at the hearing that they were not liable to the Ms. Coxon for any attorney's fees and costs, each relying upon the provisions of §768.54, Florida Statutes (1981). (R. SJHI 22-53).

The Circuit Court held that both The Fund and St. Joseph's were liable to Ms. Coxon for attorneys' fees and costs in the same proportion as they had paid the damages. The Circuit Court allowed attorney's fees in the sum of $57,750.00 and entered judgment on March 3, 1986 against The Fund for 55% of that amount ($31,762.50), and against St. Joseph's for 45% of that amount ($25,987.50). (R. SJHI 16; A. 31).

The Court taxed costs in the total amount of $2,512.77 and on March 31, 1986 an amendment to judgment was entered against The Fund for 55% of that amount ($1,382.02) and against St. Joseph's for 45% of that amount ($1,130.75). (R. SJHI 18-19; A. 32-33).

St. Joseph's timely appealed from the judgment of March 3, 1986, as amended by Amendment to Judgment of March 31, 1986. (R. SJHI 20). The Fund appealed only the March 3, 1986 attorney's fees judgment. (R. FPCF 94).

Accordingly, The Fund challenged only the award of attorney's fees while St. Joseph's challenged both the award of attorney's fees and costs which exceeded its $100,000.00 statutory limit of liability.

The Second District Court of Appeal's decision (A. 1), Florida Patient's Compensation Fund v. Coxon, 502 So.2d 1369 (Fla. 2nd DCA 1987) directly addressed only the attorney's fees issue. The Second District's per curiam decision relied upon its previous decision in Florida Patient's Compensation Fund v. Maurer, 493 So.2d 510 (Fla. 2nd DCA 1986) (A. 5) in holding that The Fund was not liable for attorney's fees imposed under §768.56 and that a health care provider was liable for such fees even in excess of its $100,000.00 statutory limit of liability. In reversing the pro rata imposition of liability for attorney's fees the Second District Court of Appeal enunciated its conflict with Bouchoc v. Peterson, 490 So.2d 132 (Fla. 3rd DCA 1986). (A. 2)

Oral argument has not been granted by this Court, and this Court has previously granted petitions to review in both Bouchoc and Maurer, and has heard oral argument in those cases.

ISSUE PRESENTED

IS A MEMBER OF THE FLORIDA PATIENT'S COMPENSATION FUND LIABLE FOR COSTS OR ATTORNEY'S FEES IN EXCESS OF THE $100,000.00 LIMITATION OF §768.54, FLORIDA STATUTES (1981) WHICH WAS IN EFFECT AT THE TIME THE CAUSE OF ACTION AROSE?

SUMMARY OF ARGUMENT

This Court should reject the Second District Court of Appeal's rulings in this case (A. 1) and in Florida Patient's Compensation Fund v. Maurer, 493 So.2d 510 (Fla. 2nd DCA 1986) (A. 5), and follow the decision of the Third District Court of Appeal in Bouchoc v. Peterson, 490 So.2d 132 (Fla. 3rd DCA 1986) (A. 2), and hold that under the provisions of §768.54(2)(a) and (b), Florida Statutes (1981) a fund member hospital or health care provider is not liable for attorney's fees or costs or any amounts over the $100,000.00 per claim limit of liability of that statute.

Under the clear and unambiguous language of §768.54(2)(a) and (b) (A. 21-22), a fund member in good standing who provides a defense for The Fund until it is named as a party in the action is entitled to a limitation of liability in the amount of $100,000.00 per claim, without exception.

This strict limitation is further supported by the provisions of §768.54(3)(e) 2 and 3 (A. 24) which prohibit a member from settling any claim in an amount in excess of $100,000.00 without The Fund's consent, and which provide that a plaintiff who has recovered a final judgment in excess of that amount must file a claim with The Fund to recover such excess.

The statutory language is all inclusive as to the liability limitation and does not include language which

restricts the limitation to compensatory damages as distinguished from attorney's fees, costs or other elements of recovery available because of liability.

The Third District Court of Appeal's decision in Bouchoc v. Peterson, supra is clearly the better reasoned authority. In this Court's previous decision in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) (A. 7), the issue was The Fund's liability for payment of attorneys' fees after a fund member had paid its maximum liability of $100,000.00. The Fund's standing to challenge the constitutionality of §768.56 Florida Statutes (A. 25) was predicated upon its recognition of its attorney's fee liability. Similarly, in Florida Patient's Compensation Fund v. Miller, 436 So.2d 932 (Fla. 3rd DCA 1983) (A. 15), the Fund's liability for attorney's fees as part of a claim contemplated by the statute was a necessary preamble to the hospital's recovery against The Fund on indemnity principles.

Both attorney's fees and costs are part of a successful plaintiff's recovery on his claim under any rational meaning of the pertinent language of §768.54, and §768.56, Florida Statutes (1981), allowing attorney's fees to the prevailing party in medical malpractice actions.

The present case is analogous to the limit of liability found in §768.28(5), Florida Statutes (1979), addressed by this Court in Berek v. Metropolitan Dade County, 422 So.2d 838 (Fla. 1982) (A. 18) which held that the statutory limit of liability in sovereign immunity cases was applicable to all

elements of recovery, including costs and post-judgment interest.

The Second District's decision in Maurer can be distinguished. Its result was right for the wrong reason. In Maurer there was underlying insurance providing for the payment of costs. Under Rowe, supra, §768.56 attorney's fees should be treated as costs to be taxed against a member's insurance carrier where there exists underlying insurance providing for payment of costs in addition to damages.

ARGUMENT

A MEMBER OF THE FLORIDA PATIENT'S COMPENSATION FUND IS NOT LIABLE FOR ANY ELEMENT OF RECOVERY, WHETHER COMPENSATORY DAMAGE, COSTS OR ATTORNEY'S FEES, IN EXCESS OF $100,000.00 ON ANY ONE CLAIM. THE FUND IS LIABLE FOR COSTS AND FEES IN EXCESS OF THE MEMBER'S STATUTORY LIABILITY.

The relevant provisions of §768.54, Florida Statutes (1981) (A. 21-22, 24) are as follows:

> 768.54
>
> (2) LIMITATION OF LIABILITY -
>
> (a) All hospitals, unless exempted under this paragraph or paragraph (c), shall, and all health care providers other than hospitals may, pay the yearly fee and assessment or, in cases in which such hospital or health care provider joined the fund after the fiscal year had begun, a prorated assessment into the fund pursuant to subsection (3).
>
> * * *
>
> (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)(c).

* * *

(e) Claims procedures -

* * *

2. It shall be the responsibility of the insurer or self-insurer providing insurance or self-insurance for a health care provider who is also covered by the fund to provide an adequate defense on any claim filed which potentially affects the fund, with respect to such insurance contract or self-insurance contract. The insurer or self-insurer shall act in a fiduciary relationship toward the fund with respect to any claim affecting the fund. No settlement exceeding $100,000, or any other amount which could require payment by the fund, shall be agreed to unless approved by the fund.

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 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 to all persons under a single occurrence, the persons recovering shall be paid from the

> account at a rate not more than $100,000 per person per year until the claim has been paid in full, except that court costs and reasonable attorneys' 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.
>
> * * *
>
> [Emphasis added].

Attorney's fees are provided for under §768.56(1), Florida Statutes (1981) (A. 25):

> 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 by any medical or osteopathic physician, podiatrist, hospital, or health, maintenance organization; however, attorneys' fees shall not be awarded against a party who is insolvent or proverty-stricken. Before initiating such a civil action on behalf of a client, it shall be the duty of the attorney to inform his client, in writing, of the provisions of this section. When there is more than one party on one or both sides of any action, the court shall allocate its award of attorneys' fees among prevailing parties and tax such fees against nonprevailing parties in accordance with the principles of equity. In no event shall a nonprevailing party be required to pay to any or all prevailing parties any among in attorneys' fees in excess of that which is taxed against such nonprevailing party. A party who makes an offer to allow judgment to be taken against him shall not be taxed for the prevailing party's attorneys' fees which accrue subsequent to such offer of judgment if the final judgment is not more favorable to the prevailing party than the offer. The court shall reduce the among of attorneys' fees awarded to a prevailing party in proportion to the degree to which

> such party is determined by the trier of fact to have contributed to his own loss or injury.

The clear and unambiguous language of the relevant provisions of §764.54, a hospital or health care provider, such as St. Joseph's, who pays his yearly fees and assessments is not liable for an amount in excess of $100,000.00 per claim, including attorney's fees and costs. Indeed, the provisions of §764.54(3)(e) 2 and 3 are inherently inconsistent with any claim that The Fund is not liable for attorney's fees. No settlement whatsoever in excess of $100,000.00 can be made without Fund approval. On approved settlements or judgments in excess of $100,000.00 the plaintiff may file a claim with The Fund to recover all amounts in excess of $100,000.00, including court costs and attorney's fees, which are to be paid in one lump sum within 90 days after settlement of judgment is rendered.

Prior to the decisions in Bouchoc v. Peterson, 490 So.2d 132 (Fla. 3rd DCA 1986) (A. 2), Florida Patient's Compensation Fund v. Maurer, 493 So.2d 510 (Fla. 2nd DCA 1986) (A. 5), and the present case (A. 1), no appellate decisions directly addressed liability for attorney's fees and costs after payment of the $100,000.00 statutory limit by a fund member. The present case presents a classic case of conflict with Bouchoc which must be resolved by this Court. The starting and ending points of resolution of this conflict are the words of the statute itself.

If the legislative intent is clearly manifest by the language used by the Legislature, rules of construction are unnecessary and inapplicable. The statutory language must simply be followed. E.g., Vocelle v. Knight Brothers Paper Co., 118 So. 2d 664 (Fla. 1st DCA 1960). Words of common usage, when employed in a statute, must be construed in their plain and ordinary sense. Southeastern Fisheries Association, Inc. v. Department of Natural Resources, 453 So.2d 1351 (Fla. 1984); Tatzel v. State, 356 So.2d 787 (Fla. 1978).

In the present case the Legislature has not left any room for speculation and there is no need for "rules of construction" to discern the legislative intent. The language: "A health care provider shall not be liable for an amount in excess of $100,000 per claim..." leaves no room for doubt. Nowhere does the statute say "excluding attorney's fees and costs" in relation to the elements of recovery in a malpractice action which are subject to the $100,000.00 limitation. As stated in Mercy Hospital, Inc. v. Menendez, 371 So. 2d 1077, 1079, (Fla. 2d DCA 1979) cert. denied, 383 So. 2d 1198 (Fla. 1980) the

> ... provision in the statute is one of limitation of judgment upon the performance of conditions precedent. (Emphasis added.)

"Judgment" in a malpractice action encorporates all elements of recovery, costs, attorney's fees and compensatory damages.

The majority opinion in Bouchoc has reached the correct

result as to the $100,000.00 limit of liability and The Fund's liability for attorney's fees in excess of that limit based upon Florida Patient's Compensation Fund v. Miller, 436 So.2d 932 (Fla. 3rd DCA 1983) (A. 15) and this Court's decision in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985). (A. 7).

As the Court in Bouchoc mentions, Miller arose under a different factual and procedural setting. Nevertheless, The Fund's liability for attorney's fees, vel non, to the plaintiff where the health care provider had paid the $100,000.00 statutory limits of liability per claim was expressly recognized. In that case the member hospital was held vicariously liable for the act of its employee/doctor who was also jointly liable to the plaintiff and the hospital. Each defendant paid $100,000.00 to the plaintiff following the judgment and the hospital sued Dr. Miller and The Fund to recover its payment plus attorney's fees and costs incurred in defending the original action. The trial court held:

> It is the opinion of the court that under the provisions of Chapter 768.54, Fla. Stat., the FLORIDA PATIENTS COMPENSATION FUND is obligated to pay on behalf of SAUL MILLER, M.D. all damage awards rendered against SAUL MILLER, M.D. in excess of $100,000 that arise out of the rendering of medical care or services by SAUL MILLER, M.D. In this case, the claim of MT. SANAI HOSPITAL OF GREATER MIAMI, INC. against SAUL MILLER, M.D. for common law indemnity has arisen out of the rendition of medical care and service by SAUL MILLER, M.D.
>
> [436 So.2d at 933; A. 16].

The Third District affirmed holding that The Fund was liable to the hospital for the $100,000.00 it had paid under common law indemnity principles, as well as attorney's fees and costs. (A. 16).

In Rowe the constitutionality of §768.56, Florida Statutes, (1981) was decided by this Court. As noted by the Court in Bouchoc, Rowe necessarily involved a determination that The Fund was responsible for all elements of recovery, including attorney's fees, in excess of the $100,000.00 statutory limit of liability applicable to a fund member. The sole issue in Rowe was The Fund's liability for payments of attorney's fees after the health care member had paid its maximum liability of $100,000.00. Indeed The Fund's standing to challenge the constitutionality of §768.56 was predicated upon its recognition of its attorney's fees liability as part of the judgment. As stated in Rowe, The Fund:

> ...is responsible for payment of the portion of the judgment against the hospital that exceeds the $100,000 primary coverage. (Emphasis added).
>
> [472 So.2d at 11; A. 8].

Both The Fund, and the Second District Court of Appeal overlook the fact that under §768.56, supra, attorney's fees are to be awarded to the prevailing party, and that under the statutory scheme The Fund is an indispensable party. See, Taddiken v. Florida Patient's Compensation Fund, 478 So.2d 1058 (Fla. 1985).

The present case is analogous to the extent of the limitation of liability in §768.28(5), Florida Statutes addressed in Berek v Metropolitan Dade County, 422 So.2d 838 (Fla. 1982) (A. 18), City of Lake Worth v. Nicolas, 434 So.2d 315 (Fla. 1983), and Godoy v. Dade County, 428 So.2d 662 (Fla. 1983). As decided in the lead case of Berek, the issue of whether the statutory limit of liability is fixed by the way of sovereign immunity included costs and post-judgment interest. §768.28(5), as construed in Berek, means:

> Neither the State nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of $50,000 or any claim or judgment or portions thereof which then totalled with all other claims or judgments paid by the State or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of $100,000. (Emphasis added.)

This languge compares quite favorably with §768.54(2)(b) which provides:

> A health care provider shall not be liable for an amount in excess of $100,000 per claim... for claims covered under subsection (3)... (Emphasis added.)

In Berek this Court held that the $50,000.00 statutory limitation of §768.28(5) included costs and post-judgment interest:

> The maximum amount of the State's liability to any one claim and arising out of any one incident or occurrence, therefore, is $50,000, including damages, costs and postjudgment interest. If damages alone are less than $50,000, then costs and post-judgment interest are recoverable,

> but only up to the maximum liability of $50,000.
>
> [422 So.2d at 840; A. 19].

As authority for its holding in this case and in Maurer, contrary to that of the majority in Bouchoc, the Second District Court of Appeal adopted Judge Pearson's dissent in Bouchoc in erroneously rationalizing that attorney's fees are not part of a "claim" which The Fund in obligated to pay. As stated by Judge Pearson:

> Under the clear provisions of Section 768.54, Florida Statutes, health care providers who are members of the Fund are permitted to limit their liability for 'any claim arising out of the rendering or failure to render medical care or services' resulting in pain and injury. §768.54(3)(a), Fla. Stat. (1981). Plaintiff's attorneys' fees arise out of, but are by definition not a part of, a successful claim, and that excess portion of a claim which the Fund is responsible to pay cannot, therefore, include attorneys' fees.
>
> [490 So.2d at 134, Pearson, J., dissenting; A. 3].

The fallacy of this reasoning is apparent. The statute is a limitation on all liability encompassed by a judgment against a fund member, not just compensatory damages. Rowe, supra; Menendez, supra. Under §768.54 and its "arising out of" language, by virtue of §768.56, attorney's fees do "arise out of" the malpractice claim. The words "arising out of" of necessity encompass attorney's fees and involve all elements

of recovery which inhere in a judgment in a medical malpractice case. See, Government Employees Insurance Company v. Novak, 453 So.2d 1116 (Fla. 1984).

Neither can the Second District's characterization of the attorney's fees imposition upon The Fund as "vicarious" stand examination under the provisions of §768.56. As previously stated, The Fund is clearly a necessary and indispensible party to the lawsuit and its liability for attorney's fees is not "vicarious" in light of the purposes of the Act and the contract which the statute creates. See Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815 (Fla. 1983); Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783, 788-789 (Fla. 1985).

Judge Pearson's attempt to equate attorney's fees with punitive damages was succinctly and correctly dealt with by the majority in Bouchoc at 133, n.3:

> Of course we disagree with the dissent's suggestion that the same public policy which precludes shifting of punitive damages to an insurer should also preclude insurer liability for a nonprevailing party's attorneys' fees. It is doubtful that the Legislature intended the statute as a punitive measure against a party who unsuccessfully advances an otherwise tenable defense. (A. 2).

In passing, it must be pointed out that the facts in Maurer vary from the facts in the present case because in Maurer there was "underlying coverage" specifically providing for payment of costs. To the extent that the underlying coverage existed, the Second District would be correct in

holding the liability carrier for Winter Haven Hospital, Inc. and not The Fund, liable for the plaintiff's costs and fees under its policy and the provision of §768.54(2)(b) wich states:

> A health care provider shall not be liable for an amount in excess of $100,000... or the maximum limit of the underlying coverage maintained by the health care provider... whichever is greater.

The Second District in Maurer held that attorney's fees under §768.56 were not to be treated as costs, relying upon Grasland v. Taylor Woodrow Homes Ltd., 460 So.2d 940 (Fla. 2nd DCA 1984), pet. denied, 471 So. 2d 43 (Fla. 1985). Grasland involved §57.105, Florida Statutes (1983) and a determination that there was no justiciable issue of law or fact. (A. 6). Grasland held that the appeal was untimely because not filed within 30 days of the entry of the final judgment dismissing the action, following the decision of Allen v. Estate of Dutton, 384 So.2d 171 (Fla. 5th DCA 1980), pet. denied, 392 So.2d 1373 (Fla. 1980), holding that attorney's fees awarded under the provisions of §57.105 are to be treated as costs.

§57.105, originally enacted in 1978, is almost identical to §768.56 with respect to the provision regarding the award of attorney's fees. Both sections read:

> The court shall award a reasonable attorney's fee to the prevailing party in any civil action...

Section 57.105, continues:

> ...in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party.

Section 768.56,continues:

> Which involves a claim for damages by reason of injury, death or monetary loss on account of alleged malpractice.

The conclusion that attorney's fees under §768.56 should properly be treated as costs, and therefore taxable under an insurance policy providing for payment of costs in addition to or in excess of compensatory damages, is even more strongly supported by this Court's decision in Rowe at 1147-1149. (A. 9-11) Attorney's fees under §768.56 clearly fall within the "English Rule" as discussed therein. As noted by this Court, the "prevailing party" category of attorney's fees adopts the English Rule:

> The second category adopts the English Rule, authorizing the prevailing party, whether plaintiff or defendant, to recover attorney fees from the opposing party.
>
> [472 So. 2d at 1148; A. 10].

Under the English Rule attorney's fees are part of the costs to be assessed by the Court. Rowe at 1148. (A. 10).

Thus, it was not necessary for the Second District to reach the finding expressed in the penultimate paragraph of its opinion in Maurer rejecting the proper interpretation of §768.54 by the Third District in Bouchoc.

CONCLUSION

Petitioner, St. Joseph's Hospital, Inc., respectfully urges this Court to reverse the decision of the Second District Court of Appeal, and to approve the decision of the Third District Court of Appeal in Bouchoc v. Peterson, 490 So.2d 132 (Fla. 3rd

DCA 1986) as the correct decision recognizing that a health care provider's limitation of liability includes liability for costs and attorney's fees and to the extent that a health care provider pays its limit of liability, additional sums, including attorney's fees and costs are the responsibility of the Florida Patient's Compensation Fund.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Initial Brief and Appensix has been furnished by regular United States mail to LARRY I. GRAMOVOT, ESQUIRE, de La Parte, Gilbert and Gramovot, 705 East Kennedy Boulevard, Tampa, Florida 33602; and MARGUERITE H. DAVIS, Swann & Haddock, P.A., 315 South Calhoun Street, Suite 800, Tallahassee, Florida 32301, this 1st day of July, 1987.

ATTORNEY