IN THE SUPREME COURT OF FLORIDA
SECOND DISTRICT
LAKELAND, FLORIDA

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

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

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

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INTRODUCTION

This Initial Brief on jurisdiction is respectfully submitted by Petitioner, St. Joseph's Hospital, Inc. ("St. Joseph's"). St. Joseph's seeks discretionary review of the decision in Florida Patient's Compensation Fund v. Coxon, 12 FLW 654 (Fla. 2nd DCA Feb. 27, 1987). Time for rehearing has expired. The decision involves consolidated appeals in that Court, and review is sought becuase of a conflict of decisions pursuant to Article V, §3(b)(3). Fla.R.App.P. 9.030(a)(2)(A)(iv). A copy of the decision sought to be reviewed in appended to this Brief (A. 1-3). 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. The consolidated appeals presented the same question of law determined by the Second District Court of Appeal's decision. (A. 1-3).

STATEMENT OF THE CASE AND OF THE FACTS

The facts which control this Court's jurisdiction to review District Court decisions which expressly and directly conflict with prior decisions of this Court or other District Courts of Appeal on the same question of law are those expressed in the decision sought to be reviewed. (A. 1-3).[1/]

1/ 1980 Committee Note, Fla.R.App.P.9.030, 32 Fla. Stat. Ann. 308; England, Hunter & Williams, Constitutional Jurisdiction Of The Supreme Court Of Florida: 1980 Reform, 32 U.Fla.L.Rev. 147, 180-181, 189 (1980); Jenkins v. State, 385 So.2d 1356 (Fla.1980); Nielsen v. City of Sarasota, 117 So.2d. 731, 732 (Fla. 1960).

In the District Court both The Fund and St. Joseph's appealed the Trial Court's final judgment requiring each to pay a pro rata share of attorneys' fees awarded to Coxon pursuant to §768.56, Florida Statutes (1981). (A. 2).

The Fund argued that Chapter 768, Florida Statutes (1981) did not contemplate that The Fund would be liable for attorneys' fees as part of a "claim" which The Fund was obligated to pay under that Chapter. St. Joseph's contended that their statutory limit of liability on a claim ($100,000.00) was the full extent of its obligation, which they had satisfied, and that they were not liable for additional payments in the form of attorneys' fees. (A. 2).

On the basis of its previous decision in Florida Patient's Compensation Fund v. Maurer, 493 So.2d 510 (Fla. 2nd DCA 1986), the Second District held that St. Joseph's, as the health care provider, was responsible for attorney's fees in addition to its $100,000.00 claim limit, and that The Fund was not obligated to pay statutory attorney's fees. In so holding, the Second District recognized a direct conflict with Bouchoc v. Peterson, 490 So.2d 132 (Fla. 3rd DCA 1986). (A. 3).

Maurer and Bouchoc are pending on petition for review in this Court, and are scheduled for argument on May 8, 1987.

JURISDICTIONAL ISSUE PRESENTED

DOES THE DECISION SOUGHT TO BE REVIEWED EXPRESSLY AND DIRECTLY CONFLICT WITH BOUCHOC V. PETERSON, 490 SO.2D 132 (FLA. 3RD DCA

1986), FLORIDA PATIENT'S COMPENSATION FUND V. MILLER, 436 SO.2D 392 (FLA. 3RD DCA 1983), AND/OR FLORIDA PATIENT'S COMPENSATION FUND V. ROWE, 472 SO.2D 1145 (FLA. 1985).

STATEMENT OF ARGUMENT

The issue is whether or not the Florida Patient's Compensation Fund is liable to a plaintiff for attorney's fees under §768.54 and 768.56, Florida Statutes (1981), where the health care provider fund member has paid its $100,000.00 limitation of liability pursuant to §768.54.

In the decision sought to be reviewed the Second District Court of Appeal has held that the Fund is not liable for attorney's fees, and that a fund member is liable, even after it has paid its statutory $100,000.00 limit of liability under §768.54, Florida Statutes (1981). The Second District Court of Appeal has openly stated that it is in conflict with Bouchoc v. Peterson, 490 So.2d 132 (Fla. 3rd DCA 1986). (A. 3).

In holding that the Fund is liable for attorney's fees, the Court in Bouchoc relied upon Florida Patient's Compensation Fund v. Miller, 436 So.2d 932 (Fla. 3rd DCA 1983) and Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), and there is direct and express conflict between those decisions and the decision sought to be reviewed.

In Miller the Fund's liability for attorney's fees as part of a claim contemplated by the statutes was a necessary preamble to the hospital's recovery against the Fund on indemnity principles.

In Rowe, the sole issue was the Fund's liability for payment of attorney's fees after a health care member had paid its maximum liability of $100,000.00. The Fund's standing to challenge the constitutionality of §768.56 was predicated upon its attorney's fee liability.

ARGUMENT

THE DECISION SOUGHT TO BE REVIEWED EXPRESSLY AND DIRECTLY CONFLICTS WITH BOUCHOC V. PETERSON, 490 SO.2D 1932 (FLA. 3RD DCA 1986), FLORIDA PATIENT'S COMPENSATION FUND V. MILLER, 436 SO.2D 932 (FLA. 3RD DCA 1983) AND FLORIDA PATIENT'S COMPENSATION FUND V. ROWE, 472 SO.2D 1145 (FLA. 1985) ON THE LEGAL ISSUE OF WHETHER THE FLORIDA PATIENT'S COMPENSATION FUND IS LIABLE FOR ATTORNEYS' FEES UNDER §§768.454 and 768.56, FLORIDA STATUTES (1981), WHERE THE HEALTH CARE PROVIDER HAS PAID ITS $100,000.00 STATUTORY LIMIT OF LIABILITY.

A. Principles Of Conflict Jurisdiction.

The present controversy meets the requirement of "express and direct" conflict of decisions of Article V, §3(b)(3), Florida Constitution. Under that mandate, this Court has returned to the principles enunciated in Nielsen v. City of Sarasota, 117 So.2d 731 (Fla. 1960), Ansin v. Thurston, 101 So.2d 808 (Fla. 1958), and Kyle v. Kyle, 139 So.2d 885 (Fla. 1962). The present case annunciates a rule of law which conflicts with other District Court or Supreme Court expressions of law.

B. Express And Direct Conflict Exists.

In the decision sought to be reviewed the Second District Court of Appeal has recognized the express and direct conflict created by the decision sought to be reviewed:

> By our holding herein, we are again in conflict with Bouchoc v. Peterson, 490 So.2d 132 (Fla. 3rd DCA 1986). (A. 3).

Under the relevant provisions of §764.54(2)(a)(b) and (3)(e)(2), (3), Florida Statutes (1981), a health care provider, such as St. Joseph's, who pays its yearly fee and assessment is not liable for an amount in excess of $100,000.00 per claim. On approved settlements or judgments in excess of the $100,000.00 limit the injured plaintiff may file a claim with The Fund to recover the amount in excess of $100,000.00, including court costs and attorneys' fees, which are to be paid in one lump sum within 90 days after the settlement or judgment is rendered:

> (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)(e).
>
> * * *

(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 Than $100,000 per person per year 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.

* * *

Section 768.56(1), Florida Statutes (1981) provides for the allowance of attorney's fees to the prevailing party in medical malpractice actions:

> 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 poverty-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 an action, the court shall allocate its award of attorney's 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 amount in attorney's 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 attorney's 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 amount of attorney's 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.

Even without the Second District Court of Appeal's recognition of conflict, the Bouchoc decision, compared with the decision sought to be reviewed, reveals that conflict, as well as conflict with Florida Patient's Compensation Fund v. Miller, 436 So.2d 932 (Fla. 3rd DCA 1983) and Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985). In Bouchoc,[2/] based upon Miller and Rowe, the Third District held that The Fund was liable for attorney's fees as part of a claim where, as in the instant case, the health care provider has paid the $100,000.00 limit of liability provided by §768.54, supra:

2/ The minor differences between the 1981 and 1983 statute (§768.54) do not affect the issue presented.

> We affirm the judgment on the authority of Florida Patient's Compensation Fund v. Miller, 436 So.2d 932 (Fla. 3d DCA 1983) where, although in a different factual setting, we held that the Fund is liable for the attorney's fees, as well as damages arising from a plaintiff's injuries caused by the health care provider, after the provider has paid $100,000. Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) is also supportive. In that case the Fund was heard on a challenge to the fee statute on constitutional grounds. The Fund's standing to challenge the statute rested on the unaddressed premise that the Fund could be liable to pay attorney's fees where it was a nonprevailing party.
>
> [490 So.2d 132].

In Miller there was a different procedural/factual setting. However, the Fund's liability for attorney's fees to the plaintiff, where the health care provider had paid the $100,000.00 statutory limit of liability per claim, was expressly and directly recognized. In Miller the hospital fund member was held vicariously liable for the act of its employee/doctor, who was held jointly liable to the plaintiff and the hospital. Each defendant paid the plaintiff $100,000.00 on the judgment, and the hospital sued Dr. Miller and the Fund to recover its payment plus attorneys' fees and costs incurred in defending the original action. The Trial Court awarded judgment in that amount holding:

> 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].

In affirming the judgment, the Third District held that the Fund was liable to the hospital for the $100,000.00 it had paid under common law indemnity principles, as well as attorneys' fees and costs:

> We approve the rationale of the trial court. Had the Legislature wished to preclude the application of indemnity principles to cases of this nature, it could have done so when it enacted the statute. It did not, and we, accordingly, affirm. (Emphasis added).
>
> [436 So.2d at 933].

Conflict exists because the Fund's liability for attorneys' fees as part of a claim was a necessary preamble to the hospital's recovery against the Fund on indemnity principles.

In Rowe the constitutionality of §768.56, Florida Statutes (1981) was decided by this Court. As noted by the Court in Buochoc, quoted supra, p. 8, Rowe necessarily involved a determination that The Fund was responsible for all claim amounts, 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 payment of the attorney's fees after the health care member had paid its maximum liability of $100,000.00. The Fund's standing to challenge the constitutionality of §768.56 was predicated upon its attorney's fee liability. As recognized in Buochoc, the statutory $100,000.00 limitation is clear and unambiguous, and 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.
>
> [472 So.2d at 1146].

CONCLUSION

Express and direct conflict of decisions is present on a persistent and continuing issue. For that reason, this Court should accept jurisdiction and resolve the conflict and quash the decision of the Second District Court of Appeal in the present case and approve the decision of the Third District Court of Appeal in Bouchoc.

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 regular U.S. 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 24th day of March, 1987.

ATTORNEY