IN THE SUPREME COURT OF FLORIDA
SECOND DISTRICT
LAKELAND, FLORIDA

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| 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

# REPLY BRIEF ON MERITS OF PETITIONER, ST. JOSEPH'S HOSPITAL, INC.

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## INTRODUCTION

This Reply Brief is respectfully submitted by Petitioner, St. Joseph's Hospital, Inc. The same symbols, abbreviations and designations utilized in the Initial Brief will be employed in this Reply Brief.

The Fund is the only Respondent to file an Answer Brief, Respondent, Elaine M. Coxon, has filed a notice of adopting The Fund's Brief.

## RESPONSE TO ANSWER BRIEF'S STATEMENT OF FACTS

The only contention in the Statement of the Case and Facts of The Fund's Answer Brief requiring a reply is the assertion that St. Joseph's conceded that it must bear its pro rata share of the taxable costs, citing (R. FPCF 125-126, 128 (Answer Brief, pp. 2-3, 9). Reference to the record does not support that statement. In the Trial Court, Counsel for St. Joseph's was arguing only that he could not find a case which directly held that a member of The Fund did not have to bear its share of costs, stating, additionally:

> In the absence of any case to that effect, and since that is normally not a part of a claim, I am not contending that we would not be liable for some percentage of taxable costs, because I don't have a case that says that. (R. 124).

St. Joseph's counsel had previously cited this Court's opinion in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), which is predicated upon The Fund's

assumed liability for fees, but did not mention costs specifically. (R. FPCF 103-105). It has always been St. Joseph's contention that the statutory limitation of liability under §768.54, Florida Statutes (1981) is absolute, and precludes entry of any judgment in excess of the $100,000.00 limit, including all elements of a judgment. (R. FPCF 102-107, 121-124).

## ARGUMENT

THIS COURT'S RECENT DECISION IN FLORIDA PATIENT'S COMPENSATION FUND V. BOUCHOC, 12 FLW 392 (FLA. JULY 16, 1987) HAS DECIDED THE ISSUES IN THIS CASE AND MANDATES REVERSAL OF THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL WHICH ERRONEOUSLY HELD THAT A MEMBER OF THE FLORIDA PATIENT'S COMPENSATION FUND IS LIABLE FOR COSTS AND ATTORNEYS' FEES IN EXCESS OF THE $100,000.00 LIMITATION OF LIABILITY UNDER §768.54, FLORIDA STATUTES (1981).

To a great extent, St. Joseph's Initial Brief on the merits anticipated many arguments raised by The Fund in its Answer Brief. More importantly, this Court has recently decided the conflicting cases underlying the grant of review in this case. In Florida Patient's Compensation Fund v. Bouchoc, 12 FLW 392 (Fla. July 16, 1987),[1/] this Court approved Bouchoc v. Peterson, 490 So.2d 132 (Fla. 3rd DCA 1986) and disapproved Florida Patient's Compensation Fund v. Maurer, 493 So.2d 510 (Fla. 2nd DCA 1986), relied upon by the Second District in its decision in the present case.

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1/ Reference will be to the pagination of the Court's Slip Opinion and not to that of the Florida Law Weekly.

The Fund's Answer Brief in this case is used primarily as a vehicle for an expanded argument on rehearing of this Court's decision in Florida Patient's Compensation Fund v. Bouchoc. This Court has already rejected the primary arguments of The Fund in holding:

> ...when the purpose for which the Fund was created is considered, we think the statutory language is properly construed to require the Fund to pay the attorney's fees.
>
> * * *
>
> It is unreasonable to believe that the Legislature would have intended that the health care providers be held responsible for the amount of attorney's fees over and above the $100,000 when the statute contemplated that the Fund would pay all judgments in excess of $100,000. (Emphasis added.)
>
> [Slip Opinion, pp. 3-4].

This Court correctly rejected The Fund's various arguments which were predicated upon the fact that §768.54, Florida Statutes (1975) which created The Fund was enacted several years before the passage of §768.56, Florida Statutes (1980) providing for the payment of attorney's fees. Slip Opinion, pp. 4-5. The Fund is hoisted on the petard of its own argument in attempting to limit the underscored reference to attorney's fees in §768.54(3)(e)(3) (Slip Opinion, p. 4) to fees paid by way of agreed settlements. As this Court points out,

> ...had the Legislature not intended for the Fund to be liable for attorney's fees, it would have so provided when it enacted section 768.56 as part of its program of continuing malpractice reform.
>
> [Slip Opinion, p. 4].

The Fund's argument raises the rhetorical question: In using the term "judgment", by what rationale was the Legislature differentiating between statutory attorney's fees and attorney's fees voluntarily paid without the statutory mandate as a part of an agreed settlement?

The fact that §57.105, Florida Statutes (1981) was originally enacted in 1978 does not detract from this Court's reasoning. The Fund overlooks this Court's opinion in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145, 1148 (Fla. 1985) in which this Court stated:

> This state has recognized a limited exception to this general American Rule in situations involving inequitable conduct. See Wahl, Attorney's Fees Taxed Against a Party Because of his Inequitable Conduct, 26 Fla.L.J. 281 (1985); Wahl, Attorneys' Fees Taxed Against Opposing Party, 37 Fla.B.J. 220 (1963).

Thus, even without the limited provision of §57.105 there preexisted in this State authority for the award of attorney's fees in civil cases in prevailing party situations. Accordingly, this Court was manifestly correct in rejecting The Fund's argument that the statutory language regarding payment of attorney's fees refers to the Plaintiff's obligation to his own attorney. (Slip Opinion, p. 5).

The Fund's attempt to distinguish the sovereign immunity cases interpreting the limitation of liability in §768.28(5), Florida Statutes (e.g., Berek v. Metropolitan Dade County, 422 So.2d 838 (Fla. 1982)) is totally without merit. Both §768.28 (5) and §768.54(2)(b) involve a limitation of liability. However that liability arises, or whether it was preexisting, is immaterial to the issue of legislative intent in interpreting statutory language effectuating a limitation of the liability which does exist. This Court's interpretation of §768.28(5) is clearly analogous to its treatment of §768.54(2)(b) in Bouchoc.

Both with respect to the issue of costs and attorney's fees. The Fund, in several instances in its Brief, relies upon the provision of §768.54(2)(b) which requires that the health care provider member provide an "adequate defense for the Fund." This provision has nothing whatsoever to do with the extent of the statutory limitation of liability. It is simply a recognition that the Fund member must conscientiously defend The Fund as well as itself. To the extent that the compensatory damages are less than $100,000.00 the Fund member must, of course, also pay the attorney's fees and costs up to that limit and any balance would be The Fund's responsibility.

The rationale of much of The Fund's arguments is predicated on the improper assumption that all medical malpractice judgments exceed $100,000.00. Furthermore, The Fund

simply refuses to recognize that attorney's fees and costs arise out of and are part of the judgment rendered in favor of the injured party. See Government Employee's Insurance Company v. Novak, 453 So.2d 1116 (Fla. 1984); Florida Patient's Compensation Fund v. Bouchoc, Slip Opinion, p. 3. The statute is a limitation on all liability encompassed by a judgment against a Fund member, not just compensatory damages. Rowe at 11; Florida Patient's Compensation Fund v. Bouchoc, Slip Opinion at 4.

With respect to St. Joseph's liability for costs, the Second District did not decide that St. Joseph's Hospital had waived its right to contest the assessment of costs. The decision is silent in that respect. Florida Patient's Compensation Fund v. Coxon, 502 So.2d 1369 (Fla. 2nd DCA 1987). At no time did St. Joseph's concede that it would be liable for any amount in excess of $100,000.00. It is of interest that St. Joseph's appealed from both the judgment for attorney's fees and the amended judgment taxing costs. (R. SJHI 20). The Fund appealed only the March 3, 1986 attorney's fees judgment and did not contest its liability for costs. (R. FPCF 94). Because of the Second District's erroneous conclusion that a "claim" encompassed only compensatory damages, it was not necessary for it to address both attorney's fees and costs. As with the limitation of liability applicable in sovereign immunity cases, the limitation of liability applicable to a Fund member must include costs as well as attorney's

fees. Berek, supra. (Initial Brief, pp. 15-16).

At page 22 of its Answer Brief The Fund attempts to ressurect Judge Pearson's dissent in Bouchoc v. Peterson, supra. Judge Pearson's fears concerning health care provider's "gambling" are unfounded. Given the fact that the health care provider must protect The Fund by providing it with an "adequate defense", The Fund would clearly have a basis for imposing the entire judgment upon the health care provider in a case of "bad faith". Additionally, as stated by this Court in Rowe, at 1149:

> The statute may encourage an initiating party to consider carefully the likelihood of success before bringing an action, and similarly encourage a defendant to evaluate the same factor in determing how to proceed once an action is filed.

The Fund certainly has the ability to determine whether or not it has been afforded an adequate defense in a case by ahealth care provider, and if not, it can avoid imposition of any liability upon itself.

In the present case it is not contended by The Fund that any of the conditions precedent to the statutory limitation of liability were not fulfilled. The statute must be construed to mean what it says, i.e., that St. Joseph's liability is limited to $100,000.00 and, having paid that amount to Ms. Coxon on her claim St. Joseph's obligation is discharged, and any excess liability must be assumed by The Fund.

This Court's decision in Florida Patient's Compensation Fund v. Bouchoc, is entirely consistent with its previous recognition that under the legislative scheme as a whole The Fund's liability was intended to be open-ended and that of the health care provider's relatively small. Taddiken v. Florida Patient's Compensation Fund, 478 So.2d 1058, 1061 (Fla. 1985).

## CONCLUSION

In light of this Court's opinion in Florida Patient's Compensation Fund v. Bouchoc, 12 FLW 392 (Fla. July 16, 1987), the decision of the Second District Court of Appeal in this case must be quashed and the case remanded with instructions to enter judgment in favor of Ms. Coxon against The Fund for the full amount of attorney's fees and costs.

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 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 5th day of August, 1987.

Ted K Mannige

ATTORNEY