

OA 4-1-88

1

IN THE SUPREME COURT OF FLORIDA
CASE NO. 71,338
Florida Bar No: 184170

FIRTH S. SPIEGEL, M.D.,
RICHARD K. EBKEN, M.D. and
SPIEGEL & EBKEN, M.D., P.A.

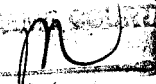
Petitioners,

vs .

BUD PRATT WILLIAMS,

Respondent.

FILED
MAR 7 1988

Clerk, Supreme Court
By 
Deputy Clerk

REPLY BRIEF OF AMICUS CURIAE ON THE MERITS
FLORIDA MEDICAL MALPRACTICE JOINT UNDERWRITERS ASSOCIATION
a non-profit association

Law Offices of
Richard A. Sherman, P.A.
Richard A. Sherman, Esquire
Rosemary B. Wilder, Esquire
Suite 102 N Justice Building
524 South Andrews Avenue
Fort Lauderdale, FL 33301
(305) 525-5885 - Broward
(305) 940-7557 - Dade

TABLE OF CONTENTS

	<u>Page</u>
Table of Citations.....	ii,iii
Points on Appeal.....	iv
Reply Argument:	
UNDER WELL ESTABLISHED FLORIDA LAW, PUBLIC POLICY AND LEGISLATIVE INTENT "COSTS" IN THE SUBJECT POLICIES DO NOT INCLUDE ATTORNEYS' FEES IN EXCESS OF THE STATUTORY LIMIT OF LIABILITY.....	1-11
Conclusion	12
Certificate of Service.....	13

TABLE OF CITATIONS

	<u>Page</u>
<u>Allstate Insurance Company v. Warren</u> , 125 So.2d 886 (Fla. 3d DCA 1961)	4
<u>Bakers Multiple Line Insurance Company v. Blanton</u> , 352 So.2d 81 (Fla. 4th DCA 1977).	10
<u>Dade County v. Strauss</u> , 246 So.2d 137 (Fla. 3d DCA 1971)	2,10
<u>Finkelstein v. North Broward Hospital District</u> , 44 So.2d 1241 (Fla. 1986)	2
<u>Florida Patient's Compensation Fund v. Bouchoc</u> , 514 So.2d 52, 54 (1987).	9,10
<u>Florida Patient's Compensation Fund v. Maurer</u> , 493 So.2d 510 (Fla. 2d DCA 1986)	10
<u>Florida Patient's Compensation Fund v. Rowe</u> , 472 So.2d 1145 (Fla. 1985)	11
<u>Harris v. Richard N. Groves Realty, Inc.</u> , 315 So.2d 528 (Fla. 4th DCA 1975)	10
<u>Highway Casualty Company v. Johnston</u> , 104 So.2d 734 (Fla. 1958)	3,4,5,6,9
<u>Liberty National Insurance Company v. Eberhart</u> , 398 P.2d 997 (Alaska, 1965)	6
<u>National Box Company v. New Amsterdam Casualty Company</u> , 140 Miss. 257, 150 So. 539 (1925)	6,7
<u>Perez v. Otero</u> , 415 So.2d 101 (Fla. 3d DCA 1982)	4
<u>Prudential Insurance Company of America v. Lamm</u> , 218 So.2d 219 (Fla. 3d DCA 1969)	6
<u>State ex. rel. Royal Insurance Company v. Barrs</u> , 87 Fla. 168, 99 So. 668 (1926).	5,6
<u>Sisk v. Sanditen Investment Limited</u> , 662 P.2d 317 (Okla. App. 1983).	10
<u>Weckman v. Houger</u> , 464 P.2d 528 (Alaska, 1970)	6

TABLE OF CONTENTS Continued

	<u>Page</u>
<u>REFERENCES</u>	
Florida Statutes, Section 768.54 (2)(b) (1978).	5
Florida Statutes, Section 768.54 (3)(e)(3)	5
Florida Statutes, Section 768.56.	8
Alaska Rules of Civil Procedure 82(a)(1).	6

REPLY ARGUMENT

UNDER WELL ESTABLISHED FLORIDA LAW, PUBLIC POLICY
AND LEGISLATIVE INTENT "COSTS" IN THE SUBJECT
POLICIES DO NOT INCLUDE ATTORNEYS' FEES IN EXCESS
OF THE STATUTORY LIMIT OF LIABILITY.

It is respectfully submitted that nowhere in Florida law has any court interpreted the clear unambiguous phrase "all costs of defending a suit" to include the payment of attorneys' fees. The ordinary construction of the term "all costs of defending suit", or simply "costs", has always been held to refer to the expenses of litigation. Numerous jurisdictions have expressly rejected the expansion of the term "costs" to include attorneys' fees, therefore the Decision below, by the Third District, expanding the definition of "costs" is legally incorrect and must be reversed. Not only does the expansion of the term "costs" to include attorneys' fees violate the ordinary use of the term, **it** also violates the legislative intent and public policy behind the Medical Malpractice Reform Act. Conspicuously absent from the Respondent's Brief is any mention of the legislative intent behind passing the attorneys' fees statute and the public policy behind the law, which was to avoid meritless claims and to encourage settlement of valid malpractice suits. Furthermore there was absolutely no need for the insurer to define or limit the term "costs" when **it** contracted with the health care providers; when **it** had always been construed to mean the expenses of litigation, especially where the law in existence held the Fund liable for attorneys' fees.

The Third District inconsistently stated that the term

"costs" was unambiguous and then expanded the definition of the term to include payment for the prevailing parties attorneys' fees. None of the authority cited by the Respondent supports his position that the payment of all costs of defending a suit includes the payment of statutory fees. In fact the Respondent has not cited a single case in Florida or any other jurisdiction that has held that the term "all costs of defending the suit" includes statutorily awarded attorneys' fees. The reason for this of course is that jurisdictions which have addressed the definition of the term "costs", as opposed to "fees", have consistently held that costs do not include an award of fees, and even the Third District Court of Appeal prior to the Williams Decision recognized this distinction. Dade County v. Strauss, 246 So.2d 137 (Fla. 3d DCA 1971).

Finkelstein v. North Broward Hospital District, 44 So.2d 1241 (Fla. 1986) fails to provide any support for the Respondent's position. The Supreme Court held that the trial court did not lack jurisdiction, to award attorneys' fees in a malpractice case, notwithstanding the fact that the final judgment did not expressly retain jurisdiction over the attorney fee claim or that the motion was filed three days after the judgment had become final. The final judgment in that case simply stated that "costs will be taxed at a later date upon appropriate motion".

Recognizing that attorneys' fees were not part of the costs, the Supreme Court noted that the motion for attorneys' fees raised a collateral and independent claim. Finkelstein, 123. Implicit in the Supreme Court's decision that the court had jurisdiction to

award fees in that case, was a finding that fees did not form a part of the costs. Therefore the Supreme Court statement that the statutory fees were a collateral and independent claim adds further support to the well established Florida law which has held that attorneys' fees are not part of costs.

Equally unpersuasive is the list of Florida and foreign cases relied on by the Respondent, which address the issue of which party should pay "all interest accruing on the judgment", the insured or the insurer. Highway Casualty Company v. Johnston, 104 So.2d 734 (Fla. 1958) was the first in a series of cases which interpreted the "standard interest clause", which obligated the insurer to pay all interest accruing after the entry of the judgment against the insured until the insurance company has paid, tendered or deposited in the courts such part of the judgment that is not excess of the policy limits and to pay all costs taxed against the insureds. It was generally held up to that point that any insurer which agreed to indemnify the insured against liability up to the stated amount and against interest and costs, was liable for the interest and costs within the specified limits of the policy only. The question then arose whether a liability insurer was liable for interest and costs on that part of the judgment recovered against the insured by a third party, which was in excess of the amount to which the policy was limited. The courts were divided in the meaning of the phrase "all interest accruing after the entry of the judgment", however this Court joined the majority of jurisdictions that supported the view that the liability of the insurer under

the standard interest clause extended to interest on the entire amount of the judgment, where there was no excess carrier.

Highway Casualty v. Johnston, supra; Allstate Insurance Company v. Warren, 125 So.2d 886 (Fla. 3d DCA 1961); Perez v. Otero, 415 So.2d 101 (Fla. 3d DCA 1982).

In other words the question was where there was no excess coverage, which would have to pay interest and costs above the policy limits, the insured or the insurer. In Highway Casualty the Supreme Court held that an automobile liability insurer was liable under the policy which contained the standard interest clause, to the insured's judgment creditor for interest on the full amount of the judgment rendered against the insurer, because the insurer had not paid, tendered or deposited into the court that part of the judgment against the insured which did not exceed the liability limits of the policy. The Court found that the standard interest clause was not ambiguous and held the insurer liable for all interest accruing after the judgment since it did not end its liability by paying the money to the court. Highway Casualty, 736. It is important to note that the Supreme Court in holding the insurer liable for the interest above the amount of the policy limits did not expand the definition of interest to include any other elements other than interest.*

* Currently pending before the Third District Court of Appeal and the Fourth District Court of Appeal is the issue of whether, where there is excess coverage available, the primary or excess carrier has the duty to pay all interests accruing on the judgment. Insurance Company of the State of Pennsylvania v. Puritan Insurance Company, Case No. 87-2183; Commercial Union Insurance Company v. Industrial Indemnity Insurance Company, Case No. 87-2951.

The Respondent asserts that St. Paul could have rewritten its policy after the attorneys' fees statute was passed in 1980. This overlooks the fact that: (1) costs have never been construed to include attorneys' fees and therefore the clear and unambiguous definition of costs never included fees; and (2) the law in existence at the time the policy was written limited the health care providers liability to \$100,000. Florida Statutes, Section 768.54(2) (b) (1978). Furthermore the statute which created the Patient's Compensation Fund initially did not provide that attorneys' fees could be paid from the Patient's Compensation Fund and the statute was amended to specifically state that the Patient's Compensation Fund would pay attorneys' fees. Florida Statutes, Section 768.54 (3) (e) (3).

In other words, the primary insurers contracted with the health care providers to provide the \$100,000 statutorily required coverage and the law in effect at the time of the contract limited recovery against the insured to that amount. The insurers were not in any doubt with reference to their obligations under the term "costs", as costs in Florida had never been construed to include the payment of statutorily awarded attorneys' fees. Therefore unlike the situation in Highway Casualty v. Johnston, supra, there was no need for the insurers to define or limit the term costs, especially in light of the fact that the statute specifically provided that the Fund would pay attorneys' fees. In addition there is a wealth of caselaw that holds that fees are a part of costs only when expressly provided for by statute or contract. State ex. rel. Royal

Insurance Company v. Barrs, 87 Fla. 168, 99 So. 668 (1926);
Prudential Insurance Company of America v. Lamm, 218 So.2d 219
(Fla. 3d DCA 1969).

The foreign cases relied on by the Respondent are not on point and simply follow the line of the Highway Casualty v. Johnston cases. The two Alaskan cases and the ancient Mississippi case simply deal with the same exact issue addressed by this Court in Highway Casualty, where the question was whether interest, costs, fees, etc. in excess of the policy limits were to be paid by the insurer or the insured. Weckman v. Houger, 464 P.2d 528 (Alaska, 1970); Liberty National Insurance Company v. Eberhart, 398 P.2d 997 (Alaska, 1965); National Box Company v. New Amsterdam Casualty Company, 140 Miss. 257, 150 So. 539 (1925).

The Respondent fails to point out that the two Alaskan cases dealt with a statute that expressly provided that costs included attorneys' fees. Both decisions were based on Rule of Civil Procedure 82(a)(1) which stated:

Unless the court, in its discretion, otherwise directs, the following schedule of attorney's fees will be adhered to in fixing such fees for the party recovering any money judgment therein, as part of the costs of the action allowed by law....

Should no recovery be had, attorney's fees **for** the prevailing party may be fixed by the court as a part of the costs of the action, in its discretion, in a reasonable amount.

Weckman, 529; Liberty Mutual, 999.

The issue was not whether fees were included in the term costs as this was already decided by the statute. Rather the

issue was whether the insurer had to pay all costs or just a prorated amount based on the policy limits. The Alaskan cases are in full accord with Florida law, which hold that costs ~~do not~~ include fees, unless expressly provided for in the statute or contract. There is no such provision in the present case and the Williams opinion is legally incorrect.

National Box is an ancient case which simply holds that an insurer must pay the expense of litigating an appeal, where it exercises its rights to appeal, in lieu of paying the judgment and then it loses the appeal. National Box, 540-541.

None of these cases involve the presence of excess coverage, such as exists in the present lawsuit and none of those case involved a situation where the primary carrier's liability was limited by statute and the same statute provided that the Patient's Compensation Fund would pay attorney's fees. Therefore the Respondent is clearly incorrect when he states that at the time St. Paul sold the policy to the doctors, that the unsuccessful litigant was required to bear the cost of paying statutorily awarded attorneys' fees. Rather it was the Fund that was required to pay attorneys' fees, in addition to the excess amount of liability over the primary \$100,000, as provided for by the statute.

Similarly the Respondent is legally incorrect when he states that the Third District's Opinion simply interpreted the term "all costs" to mean all costs; because the term "costs" in Florida have never been construed to include attorneys' fees. This error is substantiated by the fact that the Respondent has

failed to cite a single case that stands for the proposition that all cost of defending the suit includes the payment of statutorily awarded fees. Rather the caselaw as cited by the Petitioner, the Amicus and the Respondent clearly establishes that costs do not include statutorily awarded fees. The Respondent has not addressed a single one of the cases cited by St. Paul, which are controlling in the present lawsuit and require reversal.

More importantly the Respondent totally ignores the legislative intent and public policy behind the statutory scheme which provides for the payment of attorneys' fees. It is undisputed that the legislative design was for the Patient's Compensation Fund to pay statutory attorneys' fees. The preamble to the Statute, Section 768.56, specifically stated that the purpose of the attorney fee statute was to prevent the unnecessary and frivolous litigation of medical malpractice claims. Since the primary carrier St. Paul, or the FMMJUA, in these cases can not settle beyond its \$100,000 limit, and only the Patients' Compensation Fund or the excess carrier can settle, the clear legislative purpose was that the Fund or excess carrier pay the statutory fees.

Furthermore the same statute states that the primary carrier or the FMMJUA must defend the entire case and cannot enter into a settlement which would require excess payments by the Patient's Compensation Fund. Since the express purpose of the attorneys' fees statute is to discourage unnecessary and frivolous litigation, it is clear that the legislative intent was for the

Fund to pay the statutorily awarded fees, since the Fund is the only entity which can settle the case for more than the primary \$100,000. The statute specifically states the primary carrier or the FMMJUA cannot settle for more and obligate the Patient's Compensation Fund.

It is also important to remember that at the time the contract was entered into it was clearly the intent of the legislature that the health care providers liability be limited to \$100,000. Florida Patient's Compensation Fund v. Bouchoc, 514 So.2d 52, 54 (1987): "It is unreasonable to believe that the legislature would have intended that the health care provider be held responsible for the amount of attorneys' fees over and above the \$100,000 when the statute contemplated that the Fund would pay all judgments in excess of \$100,000". Therefore it is clear that the Highway Casualty line of cases do not apply to this situation, as the Supreme Court has interpreted the statute to say that the health care providers should not be responsible for fees over and above the \$100,000.

The exception in Bouchoc is simply that where the health care provider and insurer agree that the insurer will provide coverage for attorneys' fees, then the health care provider's insurance will pay such fees. If there is no such agreement, as below, then the Fund must pay the attorneys' fees. Bouchoc, 54.

There was no need to provide an exclusionary provision or to limit the definition of the term "costs" since, at the time the policy was entered into, the clear law in Florida was that the

Fund was to pay the attorneys' fees. In addition the law in Florida is that costs do not include statutorily awarded fees. Dade County v. Strauss, supra. Florida, in construing the term costs, has held the term to its general meaning and has not judicially expanded the definition, to include fees. Harris v. Richard N. Groves Realty, Inc., 315 So.2d 528 (Fla. 4th DCA 1975); Bakers Multiple Line Insurance Company v. Blanton, 352 So.2d 81 (Fla. 4th DCA 1977). See also, Sisk v. Sanditen Investment Limited, 662 P.2d 317 (Okla. App. 1983) (the plain usage of the word "costs" in a statute providing the award thereof is not ordinarily understood to include attorneys' fees: plain words of the statute do not provide for the inclusion of attorneys' fees as ordinary costs, and we are not free to expand their meaning by construction to include attorneys' fees).

The Respondent has also ignored the decision in Florida Patient Compensation Fund v. Maurer, 493 So.2d 510 (Fla. 2d DCA 1986), where the Second District specifically stated: "we reject, however, FPCF's further assertion that Maurer and the hospital should pay the attorneys' fees based on the premise that such attorneys' fees are to be treated as costs". Maurer, 511. In spite of that legal ruling the Second District went on to hold the health care provider and the hospital liable for attorneys' fees, which decision was quashed by this Court in Bouchoc. There is no question that the Williams decision is in direct and express conflict with Bouchoc. This Court can now resolve the conflict and can expressly address the issue left open in Bouchoc, of whether the term "costs" used in the primary

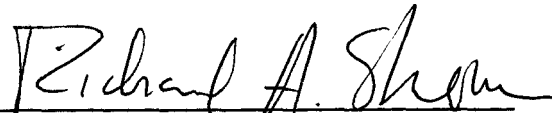
insurance carrier's policy should be construed to include attorneys' fees, contrary to the ordinary usage of the term "costs", requiring the payment of the fees by the primary insurance carrier.

The Third District ignored well established rules of construction that apply to insurance policies and has misapplied this Court's holding in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), in order to expand coverage under the clear and unambiguous term "costs". The Respondent has provided no case law or any other authority to support the Third District's decision. The reason of course is that the law in Florida and other jurisdictions which have addressed the term "costs" have held that the term does not include statutorily awarded attorneys' fees. The impact of the Decision is to render the primary insurance carriers, providing medical malpractice insurance coverage pursuant to this statute, liable for millions of dollars in attorneys' fees, which was clearly not contemplated by the statute, nor by the contracting parties. The extension of liability under the malpractice statute and the insurance policies, will have a grave and severe impact on health care providers, insurers and the public in general. As the Third District's opinion in Williams is contrary to the law in Florida, to the legislative intent and to the public policy behind the statute, the Opinion below must be reversed.

CONCLUSION

The Third District has erred as a matter of law in expanding the definition of the clear and unambiguous term "costs" to include attorneys' fees in excess of the statutory limits of liability and the Opinion must be reversed.

Law Offices of
RICHARD A. SHERMAN, P.A.
Richard A. Sherman, Esquire
Rosemary B. Wilder, Esquire
Suite 102 N Justice Building
524 South Andrews Avenue
Fort Lauderdale, FL 33301
(305) 525-5885 - Broward
(305) 940-7557 - Dade

By: 
Richard A. Sherman

CERTIFICATE OF SERVICE

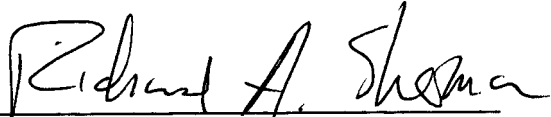
I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 4th day of March, 1988 to:

Larry S. Stewart, Esquire
Stewart, Tighman, Fox, et al.
44 West Flagler Street
Suite 1900
Miami, FL 33130

Shelley H. Leinicke, Esquire
Wicker, Smith, et al.
Post Office Drawer 14460
Fort Lauderdale, FL 33302

Victor H. Womack, Esquire
Suite 305
7700 N. Kendall Drive
Miami, FL 33156

Law Offices of
RICHARD A. SHERMAN, P.A.
Richard A. Sherman, Esquire
Rosemary B. Wilder, Esquire
Suite 102 N Justice Building
524 South Andrews Avenue
Fort Lauderdale, FL 33301
(305) 525-5885 - Broward
(305) 940-7557 - Dade

By: 
Richard A. Sherman