

OA 4-1-88

017

IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,338

Florida Bar No: 184170

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

Petitioners, )

7s. )

3UD PRATT WILLIAMS, )

Respondent. )

FILED

SID J. WHITE

JAN 18 1988

CLERK, SUPREME COURT

By: *[Signature]*  
Deputy Clerk

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

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(With Appendix)

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POINT ON APPEAL

- I. 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.

-v-

STATEMENT OF THE CASE AND FACTS

By Order dated November 12, 1987, this Court granted the Motion of the Florida Medical Malpractice Joint Underwriters Association (FMMJUA) to appear in this cause as amicus curiae. The FMMJUA was created by Florida Statute Section 627.351 to provide coverage for claims arising out of the rendering of medical care and services by health care providers and health care facilities. The purpose of the FMMJUA is to provide medical malpractice insurance in the statutorily required amount of \$100,000.

The FMMJUA adopts and incorporates by reference the Statement of the Case and Facts contained in the Petitioners' Brief. Amicus would only add for emphasis the following policy provisions which are the subject of this appeal. The St. Paul Fire & Marine policy issued to the Petitioners/Health Care Providers contains the following provision:

Additional Benefits. All of the following are in addition to the limits of your coverage: ... will pay all costs of defending a suit, including interest on that part of any judgment that doesn't exceed the limit of your coverage (R 510-572).

The FMMJUA, which also provides primary insurance coverage for health care providers, has the following provision in its supplementary payments clause:

III. Supplementary Payments

The company will pay, in addition to the applicable limit of liability:

- a) all expenses incurred by the company, all costs taxed against the

named insured in any suit defended by  
the company and all interest on the  
entire amount of any judgment therein  
which accrues after entry of the  
judgment and before the company has  
paid or tendered or deposited in  
court that part of the judgment which  
does not exceed the limit of the  
company's liability thereon.

It is respectfully submitted that the trial court's Order limiting judgment to the amount of primary insurance available was legally correct, conforms with public policy and the intent of the legislature, and the Third District's Opinion must be reversed and the trial court Order reinstated.



SUMMARY OF ARGUMENT

St. Paul Fire and Marine Insurance Company provided coverage to the health care providers below with policy language similar to that which appears in the FMMJUA standard insurance policy; which unambiguous language the Third District has improperly construed to include millions of dollars in attorneys' fees.

It is respectfully submitted that the Third District's Opinion is legally incorrect in its interpretation of the unambiguous term "costs" to include attorneys' fees, but it also violates the legislative intent and public policy behind the Medical Malpractice Reform Act. The plain language of the statute states that there is no liability in excess of \$100,000. Florida Statute Section 768.54(2)(b)(1981). This Court in Bouchoc, infra, has held that the Patient Compensation Fund is liable for attorneys' fees only to the extent that they are not provided for under the contract with the health care provider's primary liability insurer.

The Third District has construed the term "costs of defending a suit" to mean that the primary carrier intended to pay the attorneys' fees of the opposing party; as opposed to the normal construction of the term "costs", which merely refers to the expenses of litigation. Not only is this construction of the term "costs" contrary to the rules of construction, contract law and the intent of the parties, but it is also contrary to the legislative intent behind the award of fees and the Malpractice Act.

The legislative design of Section 768.56 was to award fees

to the prevailing party to prevent the unnecessary and frivolous litigation of medical malpractice claims. However, it is important to remember that the primary carriers, whether St. Paul or the FMMJUA, cannot settle beyond their \$100,000 policy limit and only the Patients' Compensation Fund or an excess carrier can settle above this amount. The clear legislative intent behind the statute, especially taken in connection with the limitation of liability of \$100,000, was that the Patient Compensation Fund or excess carrier should pay any statutorily awarded fees. Under the Act, the primary carrier with the initial coverage of \$100,000 must defend the entire case and it cannot enter into a settlement, which would require excess payments by the Fund. Since the express purpose of the fee statute is to discourage unnecessary and frivolous litigation, it is clearly the intent of the legislature for the Fund to pay the fees, since the Fund is the only entity which could settle a case for more than \$100,000. This legislative intent was recognized by this Court in Bouchoc, infra, at 54.

The issue left open by this Court's decision in Bouchoc, is under what circumstances the primary insurance carrier will be held responsible to pay attorneys' fees. In order to hold St. Paul responsible in the case below for more than \$200,000 in fees, the Third District construed the term "costs" to include attorneys' fees. Williams, infra. This interpretation of the term "costs" is legally incorrect, as a wealth of Florida case law has held that costs do not include attorneys' fees, but it also violates the legislative intent and public policy behind

the Medical Malpractice Reform Act. The plain language of the statute states that there is no liability in excess of \$100,000. The purpose of the statute is to encourage settlement and prevent meritless claims. The primary carrier is unable to settle beyond the \$100,000 dollar limit, as the statute provides that only the Fund may do this. The word "costs" used in the statute is not ordinarily understood to include attorneys' fees. This is nothing in the Record below to show that the parties intended for the term "costs", to mean anything other than its ordinary usage; which refers to the expenses of litigation only and not attorneys' fees. To uphold the Third District's construction of the term "costs" in the St. Paul policy, results in a potential liability of millions of dollars in attorneys' fees to St. Paul, the only remaining private medical malpractice insurer in Florida, and to the FMMJUA, the statutory provider of primary malpractice insurance coverage.

It is respectfully submitted that neither the statute nor the insurance contracts contemplated the payment of fees as costs under the insurance policies and the Opinion below must be reversed.

The question of the construction of a contract of insurance can arise only when the language of the contract is in need of construction. If the language of the contract is clear and unambiguous there is no occasion for construction and the language will be accorded its natural meaning. The Third District found the standard term "costs" undefined in the policy, so it applied its own definition, expanding the coverage

afforded to the insured to include over \$200,000 in attorneys' fees. There is no question that this is contrary to the law of Florida, as the Third District did not find the term "costs" ambiguous, but simply expanded the coverage for costs to include fees.

It is well established, not only in Florida but other jurisdictions, that the term "costs" does not include the payment of fees. The Third District has failed to follow the rule that the terms of an insurance policy must be construed to promote a reasonable, practicable and sensible interpretation consistent with the intent of the parties. The Third District misapplied this Court's decision in Rowe, infra, to substantiate its expansion of the term "costs" to include attorneys' fees. In Rowe, this Court upheld the Fund's obligation to pay fees under the statute. There is nothing in Rowe that indicates that the standard use of the term "costs" in the primary insurance carriers' policies should be expanded to include statutorily awarded attorneys' fees. It is only when the parties expressly contract for the payment of fees, that a carrier can be held liable to provide that coverage.

The policies in the following case provided \$100,000 in primary insurance coverage and the premium was based on that coverage alone. This is consistent with the Medical Malpractice Reform Act, which requires primary coverage of \$100,000 and also requires that the attorneys' fees be paid by the Patient Compensation Fund, which is the entity that is able to enter into a settlement above the primary limits.

The impact of the Decision below renders the primary insurance carriers liable for millions of dollars in attorneys' fees, which was clearly not contemplated by the statute, nor by the contracting parties. The Third District's opinion in Williams is contrary to the law of Florida and the public policy and legislative intent behind the statute, and the Opinion below must be reversed.

I. 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.

St. Paul Fire & Marine Insurance Company provided coverage to the Petitioners/Health Care Providers in this case under policy language similar to that which appears in the FMMJUA standard insurance policy (A1-4); which language the Third District has construed to include millions of dollars in attorneys' fees. Williams v. Spiegel, 12 F.L.W. 2255 (Fla. 3d DCA Sept. 25, 1987)(A5).

It is respectfully submitted that the Third District's Opinion is not only legally incorrect in its interpretation of the term "costs", but also violates the legislative intent and public policy behind the Medical Malpractice Reform Act. The plain language of the statute states that there is no liability in excess of \$100,000. Florida Statute Section 768.54(2)(b)

(1981):

A health care provider shall not be liable  
for an amount in excess of \$100,000 per  
claim.

The Third District erred in reversing the trial court's determination which limited the Judgment below to that amount; \$100,000 per insured.

The holding below is that the primary carrier must pay the statutory attorneys' fees awarded in this case, in addition to the \$100,000 primary limit. The Third District's Opinion could cost millions of dollars to the FMMJUA and other primary medical insurers.

- a -

LEGISLATIVE INTENT REQUIRES ATTORNEYS' FEES  
TO BE PAID BY THE EXCESS CARRIER.

It is clear that the legislative design was for the Patient's Compensation Fund, to pay statutory attorneys' fees. The preamble to the statute, F.S.A. Section 768.56 (repealed) specifically stated that the purpose of the attorneys' 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 cannot settle beyond its \$100,000 limit, and only the Patients' Compensation Fund or excess carrier can settle, the clear legislative purpose is that the Patients' Compensation Fund or excess carrier pay the statutory attorneys' fees.

Additionally, the statute which created the Patients' Compensation Fund initially did not provide that attorneys' fees could be paid from the Patients' Compensation Fund, and the statute was amended to specifically state that the Patients' Compensation Fund would pay attorneys' fees. F.S.A. Section 769.54(3)(f)(3).

Furthermore, the same statute states that the primary carrier or the FMMJUA, with primary coverage of \$100,000, must defend the entire case, and it cannot enter into a settlement, which would require excess payments by the Patients' Compensation Fund. Since the express purpose of the attorneys' fee statute is to discourage unnecessary and frivolous litigation, it is clear the legislative design was for the Patients' Compensation Fund to pay the statutory attorneys' fees, since

the Patients' Compensation Fund is the only entity which could settle the case for more than the \$100,000. The statute specifically states that the primary carrier or FMMJUA cannot settle for more and obligate the Patients' Compensation Fund.

In this case, the Third District acknowledged that health care providers are not obligated to pay the attorney fee award under the Statute, Section 768.56 (repealed). Williams, 2255; Florida Patients' 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 providers 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".

The Petitioners/Defendants below sought to limit their liability under Section 768.54(2)(b) to \$100,000 each. While the Third District recognized that the Fund has been held responsible for attorneys' fees by this Court in Bouchoc, the Opinion below states that the Defendants' insurer still should be liable to pay the attorneys' fees awarded to the Plaintiff under Section 768.56. Williams, 2255. The appellate court arrived at this conclusion by defining the term "costs" contained in the St. Paul policy to include attorneys' fees. Williams, 2255.

It is respectfully submitted that the Third District's Opinion below is not only legally incorrect in its interpretation of the term "costs", but also violates the legislative intent and public policy behind the Medical



Malpractice Reform Act. The plain language of the Statute states that there is no liability in excess of \$100,000. 768.54(2)(b) (1981).

The purpose behind the attorneys' fees statute was to encourage settlement. Either the private insurer or the FMMJUA could tender and pay its limits of \$100,000 and under the statute could do no more, toward settlement, but would need to continue to defend. Any failure to settle a case is solely on the part of the Fund, which by statute has the ability to negotiate a settlement. In addition, Section 768.54(3)(f) (3) (1981) specifically states that the Patients' Compensation Fund will pay attorneys' fees. In discussing this provision, this Court has stated that the statute logically suggests that the Fund is liable for the payment of the prevailing parties attorneys' fees, which is part of the Plaintiff's claims against a health care provider in excess of \$100,000. Bouchoc, 53.

A. Legislative Purpose Behind 768.56 Defeated  
by the Decision in Williams.

It is respectfully submitted that the Third District in construing the provision to pay "costs" in the St. Paul policy below, to include the attorneys' fees of the prevailing party, violates the very purpose behind the attorney fee statute. Fla. Stat. Section 768.56(1) (repealed). The nature of the award and the purpose of the fee Statute is to encourage settlement and prevent meritless claims. This type of legislative intent has been the basis of numerous statutory fee award provisions in

Florida law. Whitten v. Progressive Casualty Ins. Co., 410 So.2d 501 (Fla. 1982) (The purpose of 57.105 is to discourage baseless claims, stonewall defenses and sham appeals in civil litigation by placing a price tag through attorneys' fee awards, on losing parties who engage in these activities. Such frivolous litigation constitutes a reckless waste of judicial resources as well as time and money of prevailing litigants.). In addition to the purpose of avoiding meritless claims, Section 756.56 shows the legislative intent to not only screen out frivolous malpractice suits, but to encourage settlement of valid claims.

The preamble to this law tracks the background of the statute. It notes that the Florida Supreme Court found the Medical Malpractice Act unconstitutional in Aldana v. Holub, 381 So.2d 231 (Fla. 1980). Therefore, it was necessary to provide another mechanism for preventing non-meritorious claims, to stop further increase in the malpractice crisis. It was also desirable to enhance the prompt settlement of valid malpractice claims. The preamble read:

WHEREAS, an alternative to the mediation panels is needed which will similarly screen out claims lacking in merit and which will enhance the prompt settlement of meritorious claims, and . . . .

WHEREAS, individuals required to pay attorneys' fees to the prevailing party will seriously evaluate the merits of a potential medical malpractice claim, NOW, THEREFORE,  
. . . .

Preamble-Laws 1980 Ch. 80-67.

The legislative intent is clear. The purpose of awarding fees is to encourage settlement and prevent the filing of frivolous malpractice claims. Florida Patients' Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985). In Rowe, this Court said that 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 factors in determining how to proceed once an action is filed. Rowe, 1149. However, it is important to remember that only the Fund has the ability to negotiate a settlement, over the primary limits. The statute expressly allows the court to tax attorneys' fees according to the principles of equity if there is more than one party. Fla.Stat. Section 768.56 (repealed). The principles of equity call for the taxing of attorneys' fees against the non-prevailing party which fails to meet the legislative purpose. That party can only be the Patients' Compensation Fund, which has the ability to negotiate a settlement with the plaintiff. To tax attorneys' fees against the primary insurance carrier, that pays its full policy limits, violates not only the rules of fairness, but would punish a party that clearly acted to fulfill the legislative intent of the statute.

The health care providers and their primary insurance carriers are restricted by statute from settling. They can only offer the statutory limit of \$100,000 and any amount beyond that must be negotiated by the Fund. Therefore, to hold these parties liable under Section 768.56 for a failure to settle, when they had no power to settle, is clearly contrary to the

legislative intent.

The Williams decision, which extends liability for attorneys' fees beyond the common ordinary usage of the term "costs", as it appears in the primary carrier's policy, results in a potential liability of millions of dollars in attorneys' fees to St. Paul and the FMMJUA. This extension of liability, which is contrary to the legislative intent behind the attorneys' fees Statute and the intentions of the contracting parties, will have a grave and immediate impact upon health care providers, as well as the public in general.

B. Term "Costs" Does Not Include Fees.

In Bouchoc, this Court said that to the extent that the Plaintiff's attorneys' fees are payable under the provision of the health care provider's liability insurance coverage, the Fund will not be responsible to pay. Bouchoc, 54.

The Williams Decision below provides an opportunity for this Court to address the question left open in Bouchoc. That question is whether an insurance policy which provides in standard language that it will "pay the costs of defending the suit" can be construed to mean that the insurer has obligated itself to pay all attorneys' fees also? However, defining the term "costs" to include attorneys' fees is contrary to the law and the legislative purpose behind the attorney fee statute.

The terms "fees" and "costs" are sometimes used interchangeably, but accurately speaking the term "fees" is applicable to the items chargeable by law, between the officer

or witness and the party whom he serves; while "costs" have reference to the expenses of litigation between the parties. 20 Am.Jur.2d, Costs, Section 1 (and cases cited therein). The term "costs" or "expenses" as used in a statute is not understood ordinarily to include attorneys' fees. 20 Am.Jur.2d, Costs, Section 72. Several foreign jurisdictions have defined the term "costs" and the definition does not include attorneys' fees.

In its common usage and according to its unusual and ordinary meaning in this jurisdiction, the word "Costs" does not include counsel fees of the successful litigant. See 10 Del. C.Ch. 51 "Costs"; Peyton v. William C. Peyton Corporation, 23 Del.Ch. 365, 8 A.2d 89; Mehleman & Keyhoe, Inc. v. Brown, 4 Terry 481, 50 A.2d 92; J.J. White, Inc., v. Metropolitan Merchandise Mart, Del. Super., 107 A.2d 892.

In re Dougherty's Will, 114 A.2d 661, 663 (Del. 1955). The Delaware court states that, since by common usage and ordinary meaning the word "costs" does not include counsel fees of a successful litigant, and since there was no acceptable reason for according to the word any meaning broader than that ordinarily given to it, the court held that the word "costs" as used in a Delaware statute could not be construed to include the counsel fees of the prevailing party. See also, Woolf v. Mutual Benefit Health and Accident Association, 188 Kan. 694, 366 P.2d 219 (1961).

Similarly, the Supreme Court of Washington has also held that the term "costs" does not include attorneys' fees:

We have repeatedly held that "costs" do not include attorneys' fees (other than statutory) or accountants' fees. In Fiorito v. Goerig,

27 Wn. (2d) 615, 179 P.2d 316, we said:  
The term "costs" is synonymous with the term "expenses". Costs are allowances to a party for the expense incurred in prosecuting or defending a suit, and the word, "costs", in the absence of statute or agreement, does not include counsel fees; in other words, counsel fees are not costs or recoverable expenses incurred in prosecuting or defending a suit, either in suits in equity or actions at law.

Rocky Mountain Fire & Casualty Co. v. Ross, 385 P.2d 45 (Wash. 1963), quoting Chapin v. Collard, 29 Wash.2d 788, 795, 189 P.2d 642, 646 (1948); see also, Porter v. Citizens Fidelity Bank & Trust Company, 554 S.W.2d 397 (App. 1977).

In construing a contract to hold that the term "costs" did not include attorneys' fees the Supreme Court of Montana stated that **it** was not open to argument that in normal contract actions attorneys' fees are not to be included in the damages awarded. Kinter v. Harr, 408 P.2d 487 (Montana 1965). The court goes on to say that **it** is well settled that attorneys' fees are not allowed as costs under statutory provisions for costs in ordinary litigation and that "they are not in any proper sense a part of the costs in a case". Kinter, 498, and cases cited therein. The court held that in this contract action the lease provisions did not imply an obligation to make good reasonable attorneys' fees and counsel fees and under their law they are not part of costs. Kinter, 498. The court then goes on to note that the evidence in that case did not show that the parties intended the fees to be a part of costs and that a rule of the court did not or could not have made them so. Kinter, 498.

More than 60 years ago this Court held that attorneys' fees recoverable by statute are to be regarded as "costs" only when made so by statute. Otherwise they are to be treated as an element of damages. State ex rel. Royal Insurance Company v. Barrs, 87 Fla. 168, 99 So. 668 (1924). Therefore in Prudential Insurance Company of America v. Lamm, 218 So.2d 219 (Fla. 3d DCA 1969), the appellate court held that since the statute permitting an award of attorneys' fees against an insurer did not specifically provide that attorneys' fees would be regarded as costs, award of such fees would be an element of the plaintiff's damages.

The Third District itself noted the difference between "costs" and "fees" in Dade County v. Strauss, 246 So.2d 137 (Fla. 3d DCA 1971) where the court stated that:

In American jurisprudence, there is a well settled distinction between "costs" (expenses) and "attorneys fees" (compensation for services rendered). . . . "Costs and fees" are altogether different in their nature generally. The one is in allowance to a party of expenses incurred in a successful transaction or defense of a suit. The other (fees) is compensation to an officer for services rendered in the process of the cause. See, Crawford v. Bradford, 23 Fla. 404, 2 So. 782, 783 (Fla. 1887)

Strauss, 141.

Florida, as well as other jurisdictions, in construing the term "costs" has held the term to its general meaning and has not judicially expanded the definition to include attorneys' fees. Harris v. Richard N. Groves Realty Inc., 315 So.2d 5218 (Fla. 4th DCA 1975); Baker's Multiple Line Insurance Co. v.

Blanton, 352 So.2d 81 (Fla. 4th DCA 1977); Sisk v. Sanditen Investments 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).

It is established that jurisdictions which construed the term "costs" have not expanded the definition to include attorneys' fees. Ordinarily parties to a contract do not intend for the term "costs" to include attorneys' fees. To uphold the Third District's construction of the term "costs", in the St. Paul policy, results in a potential liability of millions of dollars in attorneys' fees to St. Paul, the only remaining private medical malpractice insurer in Florida and potentially to the FMMJUA, the statutory provider of primary malpractice insurance coverage. It is respectfully submitted that neither the statute nor the insurance contracts contemplated the payment of attorneys' fees as "costs" under the insurance policies and the Opinion below must be reversed.

This Court recently quashed the decision in Florida Patients' Comp. Fund v. Maurer, 493 So.2d 510 (Fla. 2d DCA 1986); Bouchoc, supra. The Opinion below is based on the same exact allegations raised in Maurer, which allegations have been expressly rejected by this Court which now results in direct conflict between Williams and Bouchoc. In Maurer, the court taxed attorneys' fees and costs against the doctor, hospital and



Fund, jointly and severally. The doctor and hospital then sought to limit the judgment to the \$100,000 limit prescribed in Section 768.54. The trial court entered an order granting the motions to limit liability, finding the Fund liable for the balance of the judgment, including costs and attorneys' fees. The Fund attacked that order claiming that the doctor's and hospital's liability policy provided for the payment of "costs" levied against them. The Second District agreed with the Fund and held the doctor and hospital liable for costs under 768.54(2)(b), Florida Statutes (1981). This is the very same argument made below by the Plaintiff against the doctors and the insurer. Williams, 2255. The Second District however rejected the Fund's argument that the doctor and hospital should also pay attorneys' fees based on the premise that fees are to be treated as costs.

This Court has quashed the decision in Maurer, reinstating the order granting the insureds' Motion to Limit Liability to \$100,000. This Court now has the opportunity to resolve the current conflict existing between Williams and Bouchoc. It 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".

#### C. Attorneys' Fees as Damages.

The common sense definition of the term "costs" is based not only on the normal usage of the word, but also upon well

established caselaw which holds that attorneys' fees awarded under statutory provisions are elements of damages. Florida Patients' Compensation Fund v. Miller, 436 So.2d 932 (Fla. 3d DCA 1983).

The trial court's conclusion that an indemnitee is entitled to recover reasonable attorneys' fees as a part of its damages is buttressed by a substantial body of Florida law. American Home Assurance Company v. City of Opa Locka, 368 So.2d 416 (Fla. 3d DCA 1979); Brown v. Financial Indemnity Company, 366 So.2d 1274 (Fla. 4th DCA 1979) Insurance Company of North American v. King, 340 So.2d 1175 (Fla. 4th DCA 1976); Canadian Universal Insurance Company v. Employers Surplus Lines Insurance Company, 325 So.2d 29 (Fla. 3d DCA 1976); Mims Crane Service Inc. v. Insley Manufacturing Corp., 226 So.2d 836 (Fla. 2d DCA 1969); Morse Auto Rental Inc. v. Dunes Enterprises, Inc., 198 So.2d 652 (Fla. 3d DCA 1967); Fountainbleu Hotel Corporation v. Postol, 142 So.2d 299 (Fla. 3d DCA 1962).

Miller, at 933.

Further authority for this theory is found in those cases construing similar statutes. Prudential Insurance Company v. Lamm, supra. The Lamm court, in deciding whether the jurisdictional amount had been exceeded by an award of fees, under 627.0127, found fees to be an element of damages. The Third District, relied on a prior decision of this Court and noted that fees would only be regarded as costs if this was stated in the statute. "In State ex rel. Insurance Company v. Barrs, 87 Fla. 167, 99 So. 668 (1924), our Supreme Court held that attorneys' fees recoverable by statute are regarded as "costs" only when made so by statute". Lamm, 220. Likewise Florida Statute Section 768.56 does not provide that the fees

are costs and therefore they must be regarded as damages. See also, First National Insurance Company of America v. Devine, 211 So.2d 587 (Fla. 2d DCA 1968) (fees under Section 627.1027 are damages); Preuss v. United States Fire Insurance Company, 414 So.2d 249 (Fla. 4th DCA 1982) (attorneys' fees were an element of damages where insurance company wrongfully failed to defend); Marshall v. W.L. Enterprises Corp., 360 So.2d 1147 (Fla. 1st DCA 1978) (finding fees under the "Little FTC Act" were damages).

It is well established in Florida caselaw that fees are an element of damages and not costs. Therefore not only is the Third District's construction of the term "costs", in the insurance policy below, contrary to the common ordinary usage of the word, it is also contrary to Florida caselaw.

D. Coverage May Not be Expanded Under Unambiguous Policy Provision.

The terms of an insurance policy are not to be construed in favor of the insured unless they cannot be clearly ascertained by ordinary rules of construction. Beasley v. Wolf, 151 So.2d 679 (Fla. 3d DCA 1963). It is axiomatic that if the contract is clear and unambiguous, there is no need for construction and language will be given its natural meaning. 30 Fla.Jur.2d, Insurance, Section 400. It is also well settled that terms in an insurance policy should be given their every day meaning as understood by the "man on the street". Sanz v. Reserve Insurance Company of Chicago, Illinois, 172 So.2d 912 (Fla.3d DCA 1965); Fountainbleu Hotel Corporation v. United Filigree Corpor-

ation, 298 So.2d 455 (Fla. 3d DCA 1974); Security Insurance Company of Hartford v. Commercial Equipment Corp., 399 So.2d 31 (Fla. 3d DCA 1981).

The question of the construction of a contract of insurance can arise only when the language of the contract is in need of construction. If the language of the contract is clear and unambiguous, there is no occasion for construction and the language will be accorded its natural meaning. Valdes v. Prudential Mutual Casualty Company, 207 So.2d 312 (Fla. 3d DCA 1968). In other words, terms of an unambiguous insurance policy cannot be enlarged or diminished by judicial construction, since the court cannot make a new contract for the parties, where they themselves have employed express and unambiguous words. Prudential Insurance Company v. Winn, 398 So.2d 508 (Fla. 3d DCA 1981); Oceanus Mutual Underwriting Assoc., v. Fuentes, 456 So.2d 1230 (Fla. 3d DCA 1984) (it is a well settled rule that a court should not rewrite a contract of insurance extending the coverage afforded beyond that plainly set forth in the insurance contract); Hess v. Liberty Mutual Insurance Company, 458 So.2d 71 (Fla. 3d DCA 1984) (added meaning cannot be read into an insurance policy by the courts); Graves v. Iowa Mutual Insurance Co., 132 So.2d 393 (Fla. 1961).

In the present case, the Third District found the term "costs" undefined in the policy so it applied its own definition; expanding the coverage afforded to the insured to include over \$200,000 dollars in attorneys' fees. There is no question that this is contrary to the law of Florida, where the

Third District did not find the term "costs" ambiguous, but simply expanded the coverage for costs to include attorneys' fees. Contracts of insurance should receive a construction that is practical and reasonable, as well as just. Fernandez v. USF&G, 308 So.2d 49 (Fla. 3d DCA 1975) (terms that are clear and unambiguous are taken and understood in their plain, ordinary and popular sense); Aetna Casualty & Surety Company v. Cartmel, 87 Fla. 495, 100 So. 802 (1924).

As previously discussed, it is well established, not only in Florida, but other jurisdictions, that the term "costs" does not include payment of attorneys' fees. Furthermore, there is no indication in the contract that the intention of the parties was for the insurer to pay fee amounts in excess of the \$100,000 statutory limit. The Third District has failed to follow the rule that terms of the insurance policy must be construed to promote a reasonable, practical and sensible interpretation consistent with the intent of the parties. United States Fire Insurance Company v. Pruess, 394 So.2d 468 (Fla. 4th DCA 1981). Rather, the court has chosen to expand the coverage available under the primary insurance policy in spite of the unambiguous use of the term "costs". This judicial interpretation of "costs" is contrary to insurance law, contrary to the statute, contrary to the intent of the parties to the contract, contrary to the public policy behind the statute, and contrary to the holding in Bouchoc.

The term "costs" as used in standard insurance policies has never been expanded to include attorneys' fees. Furthermore,

the Third District's reliance on Florida Patients' Compensation Fund v. Rowe, 472 So.2d 1145, 1149 (Fla. 1985) is misplaced. The Third District completely takes out of context the dicta in Rowe and construes it as a holding that fees are included in the term "cost". This section of Rowe relied on in Williams is a discussion of the Funds' argument that the payment of attorneys' fees under the statute is a penalty. In rejecting this penalty argument this Court states:

We reject the Fund's contention that requiring an unsuccessful litigant to pay the prevailing party's attorney fees constitutes a "penalty" offensive to our system of justice. The assessment of attorney fees against an unsuccessful litigant imposes no more of a penalty than other costs of proceedings which are more commonly assessed. In certain causes of action, attorney fees historically have been considered part of litigation costs and the award of these costs is intended not only to discourage meritless claims, but also to make the prevailing plaintiff or defendant whole.

Rowe, 1149.

It is clear that in reading the entire section, this Court's opinion in Rowe simply substantiates the argument made in this Brief, that the purpose of awarding attorneys' fees is to discourage meritless claims and to encourage settlement.

The Third District also notes that attorneys' fees were routinely made part of costs under the English Rule, however, it ignores the express language of this Court that the fees under 768.56 are awarded in accordance with the American Rule.

We find that an award of attorney fees to the prevailing party is "a matter of substantive law properly under the aegis of

the legislature," in accordance with the long-standing American Rule adopted by this Court. See, Whitten v. Progressive Casualty Insurance Co., 410 So.2d 501, 504 (Fla. 1982). See also, Campbell v. Maze, 339 So.2d 202 (Fla. 1976); Codomo v. Emanuel, 91 So.2d 653 (Fla. 1956).

Rowe, 1149.

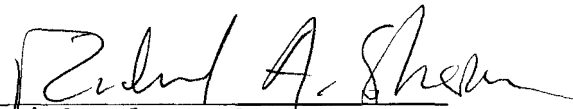
The Third District has ignored well established rules of construction that apply to insurance policies and has misapplied this Court's holding in Rowe, in order to expand coverage under the clear and unambiguous term "costs". The impact of the Decision below is to render the primary insurance carriers, providing medical malpractice insurance coverage pursuant to the 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, providing medical malpractice insurance coverage, 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 of Florida and 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 limit of liability and the Opinion must be reversed.

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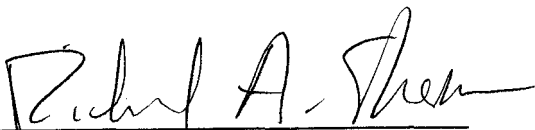
I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 11th day of January, 1988 to:

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