O/a 4-1-88

IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,338

FIRTH S. SPIEGEL, M.D., et al.,

Petitioners,

FILED
FEB 1988
CLERK, SUPREME COURT
By Deputy Clerk

vs.

BUD PRATT WILLIAMS,

Respondent.

BRIEF OF AMICUS CURIAE,
FLORIDA PATIENT'S COMPENSATION FUND

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INTRODUCTION

This brief is submitted on behalf of Amicus Curiae, Florida Patient's Compensation Fund, on behalf of the respondent, Bud Pratt Williams, as permitted by order of this Court dated January 28, 1988. In this brief, the Fund will limit argument to those matters involving interpretation of Section 768.54 of the Florida Statutes, that section which delineates the respective rights and obligations of the Fund and member health care providers.

The Fund adopts the argument of Respondent, Bud Pratt Williams, that Spiegel's insurance policy with St. Paul requires the insurer to the attorney's fees awarded to Williams under Section 768.56, Florida Statutes (1981).

STATEMENT OF THE CASE AND FACTS

Amicus Curiae, the Florida Patient's Compensation Fund, accepts the Statement of the Case and Facts set forth in the Brief of Petitioners insofar as it sets forth the procedural chronology of this case. The statement that the St. Paul insurance policy ". . .did not include any coverage or obligation an adversary's attorney's fees" set forth on page 2 is a conclusion not a statement of fact.

In the decision of the District Court of Appeal here reviewed, that Court found that the policy provision requiring payment of "all costs of defending a suit" in

addition to the limits of coverage obligated the insurer to pay the attorney's fees awarded to plaintiff's counsel in the medical malpractice action. The Court notes that although costs may be specifically defined to exclude attorney's fees, that was not done in the policy under consideration. The District Court decision goes on to recognize that this Court has expressly held attorney's fees awarded under Section 768.56 equatable to the cost of the proceedings and a part of the litigation cost in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985).

SUMMARY OF ARGUMENT

The explicit wording of the statute governing operation of the Florida Patient's Compensation Fund contemplates the Fund's obligation to be for those sums which exceed the underlying insurance coverage. Where, as here, the policy of the health care provider apparently includes coverage for the payment of attorney's fees, the award of fees to the plaintiff's attorney under Section 768.56 is the obligation of the insurer, not the Fund.

POINTS ON APPEAL

WHETHER THE DISTRICT COURT OF APPEAL CORRECTLY DECIDED THAT THE OBLIGATION TO PAY FEES UNDER SECTION 768.56 WAS PROPERLY THAT OF THE HEALTH CARE

PROVIDER'S INSURER WHICH CONTRACTED TO PAY ALL COSTS OF DEFENDING THE SUIT.

ARGUMENT

THE DISTRICT COURT OF APPEAL CORRECTLY DECIDED THAT THE OBLIGATION TO PAY FEES UNDER SECTION 768.56 WAS PROPERLY THAT OF THE HEALTH CARE PROVIDER'S INSURER WHICH CONTRACTED TO PAY ALL COSTS OF DEFENDING THE SUIT.

The starting point for the analysis of the issue here involved is the decision of this Court in Florida Patient's Compensation Fund v. Bouchoc, 514 So.2d 52 (Fla. 1987). One determination of this decision is that the Fund rather than the health care provider is liable for attorney's fees awarded to the prevailing plaintiff in a medical malpractice action. At the conclusion of the decision, this Court specifically limits this determination by stating that the holding shall not be interpreted to preclude the payment of fees by a health care provider in every instance: "To the extent that the plaintiff's attorneys' fees are payable under the provisions of the health care provider's liability insurance coverage, the Fund will not be responsible because section 768.54(2)(b) provides that the Fund shall only pay the excess over $100,000 or the maximum limit of the underlying coverage,

whichever is greater." Florida Patient's Fund v. Bouchoc, supra at page 54.

This statutory provision that the Fund shall pay only the excess over $100,000 or the maximum of the underlying coverage, whichever is greater, receives scant attention in either the Brief of Petitioners or the Brief of Amicus Curiae, Florida Medical Malpractice Joint Underwriters Association.

Petitioners' brief contains no discussion at all of the statutory language of section 768.54(2)(b) which requires the Fund to pay only the excess over $100,000 or the maximum of underlying coverage, whichever is greater.

On page 8 of the Brief of Amicus Curiae, Florida Medical Malpractice Joint Underwriters Association, there is set forth argument that the "plain language of the statute states there is no liability in excess of $100,000." In support of this argument is a reference to section 768.54(2)(b) (1981) and the statement that, "A health care provider shall not be liable for an amount in excess of $100,000 per claim." (Author's emphasis.) The material provisions which follow are omitted.

In the 1981 version of Section 768.54(2)(b) the subsection begins with the language, "A health care provider shall not be liable for an amount in excess of

$100,000 per claim. . . ." But this is not the end of the first sentence of this subsection. It goes on to provide that the health care provider should not be liable for an amount in excess of $100,000 per claim or $500,000 per occurrence if the health care provider had paid the fees required for the year in which the incident occurred, provided an adequate defense for the Fund and ". . .pays at least the initial $100,000 or the maximum limit of the underlying coverage maintained by the health care provider on the dates when the incident occurred for which the claim is filed, whichever is greater. . . ." (Emphasis supplied.) This language was changed in 1982 to its present form which, in all material particulars, is identical to the prior language. The statute now reads:

> "Whenever a claim covered under subsection (3) results in a settlement or judgment against a health care provider, the Fund shall pay for the extent of its coverage if the health care provider has paid the fees and any assessments required pursuant to subsection (3) for the year in which the incident occurred for which the claim is filed, provides an adequate defense for the Fund, and pays the initial amount of the claim up to the applicable amount set forth in paragraph (f) 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." Section 768.54(2)(b), Florida Statutes (1987)[1]

The concluding language of the quoted portion of the statute which requires the Fund to pay the extent of its coverage only after the health care provider has paid the initial amount of the claim up to the applicable limit set forth in the statute or the maximum limit of the underlying coverage whichever is greater was recognized by this Court in Florida Patient's Compensation Fund v. Bouchoc, supra, and the decision of the District Court of Appeal. Bud Pratt Williams v. Spiegel, 512 So.2d 1080 (Fla. 3d DCA 1987). The obligation of the Fund is not, as indicated by Petitioners and Amicus Curiae, in all cases all sums in excess of $100,000.

To argue otherwise totally ignores the statutory language which says the Fund is liable only for amounts above the initial amount paid by the health care provider or the maximum underlying coverage provided by the health care provider whichever is greater.

These few words, clearly stated and easily understood, express the intent of the Legislature in regard to the respective obligations of the Fund and member health care

1. The present language of the statute first appeared in 1983 The 1982 version contained minor differences not relevant here.

provider. If a health care provider has insurance coverage which includes the payment of attorney's fees, the statute as interpreted by this Court in Bouchoc requires payment of fees by the carrier, not the Fund. Thus, the question here involved is whether the policy of insurance of the health care provider includes the payment of fees, not whether the payment of fees would be violative of the public policy underlying Section 768.54.

If the insurer here had chosen to do *so*, the word "cost" could be specifically defined to exclude attorney's fees. This, in fact, has been accomplished by other insurers.

This Court has referred to the assessment of attorney's fees against an unsuccessful litigant as imposing ". . .no more of a penalty than other costs of proceedings which are more commonly assessed." Florida Patient's Compensation Fund v. Rowe. 472 So.2d 1145, 1149 (Fla. 1985). It seems to be legal hairsplitting to distinguish "costs of defense", ''costs of litigation", and "costs of defending a suit."

A cost is a cost, and if the contracting parties to the insurance policy issued to the health care provider agree that the insurer should pay "all costs of defending a suit," no logic dictates these costs should not include

attorney's fees. Petitioner argues in support of the "legislative intent" the Fund pay attorney's awarded under Section 768.56 that the statute which created the Fund specifically provides that the Fund will pay attorney's fees, citing Section 768.54(3)(f)(3).

When the statute creating the Fund and describing its responsibilities and those of the member health care providers was enacted in 1976, there was no statutory basis for the recovery of attorney's fees against a non-prevailing party in a medical malpractice action. Statutory provision for attorney's fees in medical malpractice actions did not come into existence until the enactment of Section 768.56 (1980), four years after creation of the Fund. Thus, the 1976 Legislature could not have considered the payment of attorney's fees awarded to plaintiff's counsel under a statute which did not exist.[2]

After many years and many court decisions, it has once and for all been determined that the Florida Patient's Compensation Fund can be liable for the payment of attorney's fees under Section 768.56. This determination

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2. But see, Florida Patient's Compensation Fund v. Bouchoc, supra, where this Court found it "equally persuasive" that the Legislature could have excluded the Fund from payment of fees under 768.56. Respectfully this does not change what the Legislature intended in 1976.

contains an explicit exception where the payment of attorney's fees is provided for in the policy of insurance issued to the health care provider. This eventuality is based, in turn, upon specific language in the Fund statute which makes the Fund liable for the payment of medical malpractice judgments to the extent of the Fund's coverage only after the health care provider pays the initial amount of the claim up to the applicable limits set forth in the statute or the maximum limit of the underlying insurance maintained by the health care provider whichever is greater.

The statutory language is clear and needs no interpretation. If the policy of insurance issued to a health care provider requires payment of attorney's fees (as is clearly indicated in the instant case) neither public policy nor statutory language would require the Fund to be responsible for the payment of attorney's fees. This conclusion is supported by the language of Section 768.56 (now repealed) which speaks of taxing fees against multiple nonprevailing parties ". . .in accordance with the principles of equity." The defendants other than the Fund were found negligent. The Fund did nothing wrong. "Principles of equity" dictate that if any doubt exists

under policy language, the health care provider's insurance carrier should pay attorney's fees.

CONCLUSION

For the reasons and under the authority set forth herein and in the brief of Respondent, it is respectfully submitted that the decision of the District Court of Appeal should be affirmed insofar as it determines that the payment of attorney's fees assessed in favor of plaintiff's attorney's are to be paid by the insurer of the health care provider, and not the Fund.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail upon Shelley H. Leinicke, Esquire, Wicker, Smith, Blomqvist, Tutan, O'Hara, McCoy, Graham & Lane, P.O. Drawer 14460, Fort Lauderdale, Florida 33302; Victor H. Womack, Esquire, Suite 305, 7700 North Kendall Drive, Miami, Florida 33156; Larry S. Stewart,

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