IN THE SUPREME COURT OF FLORIDA

Case No. **71,338**

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

Petitioners,
Defendants,

vs.

BUD PRATT WILLIAMS,

Respondent,
Plaintiff.

DISCRETIONARY PROCEEDING TO REVIEW A DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

# RESPONDENT'S ANSWER BRIEF


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## DUCTION

This answer brief is filed on behalf of the respondent, Bud Pratt Williams, in support of the Third District interpretation of the St. Paul Fire & Marine Insurance Company professional liability policy issued to the petitioners, Firth S. Spiegel, M.D., Richard K. Ebken, M.D., and Spiegel and Ebken, M.D., P.A. As St. Paul is the real party in interest, petitioners will be referred to as "St. Paul" in this brief.

## STATEMENT OF THE CASE AND FACTS

St. Paul's statement of the case and facts is acceptable, except for its attempt to recast the terms of its insurance coverage - the pivotal fact in this case. St. Paul boldly states that its policy obligation to pay all costs of defending a suit "did not include any coverage or obligation to pay an adversary's attorney's fees." (St. Paul Brief, p. 2). And it proceeds to

underline the word "defending" and then manipulate that into only "defense costs." St. Paul's unjustified underlineation of this one word in its statement of the case and facts best demonstrates St. Paul's myopic view of its own policy. Its misunderstanding of the issue in the district court is the false predicate upon which it argues in this Court.

A proper statement of the facts is that the policy provided coverage for "all costs of defending a suit..." There is no limitation of any nature on the phrase "all costs of defending a suit." There is no limitation to just "defense costs," and there is specifically no exclusion of court awarded attorney fees.

St. Paul's phrasing of the issue on review is also argumentative and therefore misleading. In its issue presented for review, St. Paul quotes the words "costs of defense." This quoted phrase does not appear in the St. Paul policy or in the relevant statutes or case law. The determinative phrase is St. Paul's promise to "pay all costs of defending a suit."

Although this Court has accepted the case on the merits, the fundamental issue remains whether the district court decision is in express and direct conflict with two decisions of this Court. The underlying issue is whether the Third District correctly applied the rules of insurance contract interpretation when it concluded that the St. Paul promise to "pay all costs of defending a suit" included payment of statutory attorney's fees charged against its insureds.

## ISSUE

WHETHER THE THIRD DISTRICT CORRECTLY INTERPRETED THE ST. PAUL PROMISE TO "PAY ALL COSTS OF DEFENDING A SUIT" AS INCLUDING PAYMENT OF STATUTORY ATTORNEY'S FEES CHARGED AGAINST ITS INSUREDS.

## SUMMARY OF ARGUMENT

The issue before the Third District was one of interpretation of an insurance policy provision. As the district court found, the St. Paul policies provide for benefits in addition to payment of the limits of coverage, one of which is St. Paul's promise to "pay all costs of defending a suit." The term "costs" is nowhere defined in the policy. Nor is it in any way qualified or limited. The policy does, however, contain specific limitations or exclusions on other aspects of the coverage. For example, the policy specifies that (a) St. Paul won't defend the suit or pay any claim after the applicable limit of coverage has been used up, (b) St. Paul won't pay premiums for bonds valued in excess of the limit of coverage, and (c) St. Paul won't pay its insured's loss of earnings in excess of $200 a day.

The St. Paul policy contains no exclusion for statutory attorney's fees charged against its insured. The Third District correctly concluded:

> Although 'costs' may be specifically defined to exclude attorney's fees, that was not done in the policies. Therefore, we see no reason to ascribe to the term anything other than its generic meaning. Indeed, because our supreme court has expressly held attorney's fees under Section 768.56 to be like any 'other costs of proceedings' and a 'part of litigation costs,' Florida Patient's Compen-

sation Fund v. Rowe, 472 So.2d 1145, 1149 (Fla. 1985), there is every good reason why we should accord the term its more inclusive meaning. [512 So.2d at 1081-2].

The district court decision falls squarely within the circumstance predicted by this Court in Florida Patient's Compensation Fund v. Bouchoc, 514 So.2d 52, 54 (Fla. 1987):

> Our holding should not be interpreted to preclude the payment of a prevailing party's attorney's fee award by a health care provider in every instance. To the extent that a 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.

There is absolutely no conflict between the Third District decision and this Court's decisions in Rowe or Bouchoc.

## ARGUMENT

### THE THIRD DISTRICT CORRECTLY INTERPRETED THE ST. PAUL PROMISE TO "PAY ALL COSTS OF DEFENDING A SUIT" AS INCLUDING PAYMENT OF STATUTORY ATTORNEY'S FEES CHARGED AGAINST ITS INSUREDS.

In Bouchoc, this Court held that, as a general rule, the Florida Patient's Compensation Fund, rather than the health care provider, would be liable to the plaintiff for statutorily awarded attorney's fees. The Court expressly created an exception, however, for those cases in which the plaintiff's attorney's fees are payable under the health care provider's under-

lying liability insurance policy. 514 So.2d at 54. The Court was referring to precisely this type of case.

All the Third District did in this case was to apply basic principles of insurance contract interpretation to the insurance policy in effect. At the time St. Paul sold this policy to Doctors Spiegel and Ebken, one of the costs which an unsuccessful litigant was required to bear in a medical malpractice case was the cost of paying the other side a reasonable attorney's fee. St. Paul chose to sell this policy with an unqualified and unlimited[1] promise to pay "all costs of defending a suit." The policy did not say St. Paul would pay "only defense costs" or "only litigation costs" or "only taxable costs" - it said "all costs."

St. Paul accuses the Third District of creating a new definition of the word "costs" (St. Paul Brief, p. 13). Nothing could be further from the truth. In reality, it is St. Paul, not the Third District, that is trying to create a new definition of the phrase "all costs" and thus rewrite its policy.[2] The Third District's opinion simply says "all costs" means "all costs." In

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[1]While the promise to pay "all costs" was unlimited, St. Paul did specifically limit some of its other obligations under the policy. For example, St. Paul provided it had no obligation to defend once its coverage had been exhausted, St. Paul had no obligation to provide bonds in excess of its coverage limits and St. Paul's obligation to pay for its insured's loss of earnings was limited to $200 a day.

[2]Interestingly, St. Paul's effort to rewrite its policy to limit its obligation to just "defense costs" is inherently inconsistent with its concession and payment of other of plaintiff's "costs," i.e., plaintiff's taxable costs.

so holding, it created no conflict with any decision of this Court or any other appellate court of this state. The district court concluded there was no reason not to ascribe the general meaning to the term "all costs" and simply held, "all costs of defending a suit" include "costs of proceedings" and "litigation costs."

Highway Casualty Company v. Johnston, 104 So.2d 734 (Fla. 1958) illustrates by analogy the correctness of the district court opinion here. Highway Casualty Company issued a policy of liability insurance containing as a supplemental benefit the promise to pay "all interest accruing after entry of judgment until the Company has paid, tendered, or deposited in court such part of such judgment as does not exceed the limit of the Company's liability thereon." The insured suffered a $40,000 judgment which was $30,000 over the company's $10,000 limit of liability. The carrier was called upon to pay interest on the full $40,000 rather than the $10,000 limit of liability.

Highway Casualty contended that "it does violence to common sense and logic to insist this insurance company should pay interest on the remaining $30,000 of the judgment for the payment of which the plaintiff can look solely to the defendant" and that "it is less than logical to insist the insurance carrier should pay interest on this $30,000 which it has not superseded, which it cannot be called upon by the plaintiff to pay, and over which it has absolutely no control, nor any obligation to pay." 104 So.2d at 735. Highway Casualty complained of a bad bargain.

In affirming the judgment against Highway Casualty, this Court noted the consequence but preferred instead to rule upon the fact that the insurance carrier by its own contract obligated itself to pay "all interest accruing after entry of judgment...." (emphasis by this Court). 104 So.2d at 736. As this Court aptly concluded, "This language does not appear to us to be ambiguous. However, if it were ambiguous it should be construed against the insurer." 104 So.2d at 736.[3]

Here, the same result obtained in the district court and should remain undisturbed in this Court. St. Paul by its own contract obligated itself to "pay - costs of defending a suit." (e.s.). This language is not ambiguous and, even if it were, any ambiguity must be construed against St. Paul.

In Highway Casualtv Company v. Johnston, as here, "the question now under discussion is purely and simply a matter of contract." In Highway Casualty Company v. Johnston, as here, "The casualty company could, of course, have limited its liability [for certain supplemental benefits], had it so desired, as it did on [other supplemental benefits]. This it did not do." 104 So.2d at 736.

In Highway Casualty Company v. Johnston, as here, "Had appellant entertained any doubt with reference to its obligation upon the subject under discussion it could have revised the

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[3]When the contract is one for insurance, since it is the insurer that draws the contract, the general rule is that the ambiguities or equivocalities are read against the insurer and in favor of affording coverage. E.g. Stuyvesant Insurance Company v. Butler, 314 So.2d 567 (Fla. 1975).

verbiage of its contract before the issuance thereof." In Highway Casualty Company V. Johnston, as here, "The dilemma in which the carrier finds itself appears to us to be of its own making." 104 So.2d at 736. Section 768.56 was passed in 1980, effective July 1, 1980. St. Paul could have rewritten its policy thereafter had it wished to do so.

Cases from other jurisdictions construing insurance coverage for costs all point to the same result. In Weckman v. Houger, 464 P.2d 528 (Alaska 1970), the policy under consideration obligated the carrier:

> [t]o pay in addition to the applicable limits of liability (a) all expenses incurred by the company, all costs taxed against the insurer in any such suit.... [464 P.2d at 529 n. 2].

An Alaskan rule of civil procedure provided for an award of attorneys fees to the prevailing party, and the issue was whether the carrier, with a policy liability limit of $10,000, was required to pay an attorney's fee award of $30,850 based upon a judgment of $300,000. The court held the carrier responsible for the full fee award under the "all costs taxed" policy provision.

The court in Weckman relied upon its earlier decision in Liberty Nat'l. Ins. Co. v. Eberhart, 398 P.2d 997 (Alaska 1975), where a carrier was again held responsible for the full award of attorney's fees and costs under an all costs provision in its policy. In language reminiscent of this Court's decision

in Highway Casualty Co. v. Johnston, supra, the Alaskan court held:

> The words "all costs" mean just that. They do not admit of the interpretation urged by the appellant. If appellant had wished to contract to pay only proportionate share of the costs based upon the applicable limit of liability in the policy, it easily could have used appropriate language to achieve that result. [398 P.2d at 10001.

The policy in Eberhart, as here, did limit the post-judgment interest to that which accrued on so much of the judgment as did not exceed the policy limits. But the court held that this limitation had "no reference to and does not limit the company's obligation to pay costs." 398 P.2d at 1000.

That coverage for costs in defending an action truly extends to any kind of financial obligation imposed upon the insured is demonstrated by National Box Co. v. New Amsterdam Casualty Co., 140 Miss. 257, 105 So. 539 (1925). The policy at issue provided:

> The expense incurred by the company in defending such suit, including costs, if any, taxed against the assured, will be borne by the company whether the verdict is for or against the assured, irrespective of the limits of liability expressed in the policy. [105 So. at 540].

The plaintiff obtained a verdict for policy limits, the defendant appealed, and the judgment was affirmed. Under Mississippi law at the time, a five percent penalty was imposed if a judgment was affirmed on appeal, and an issue arose as to whether this penalty was covered by the policy. Noting that the

insurance company could have escaped the penalty by paying the judgment in the first place, the court found coverage for this expense because "when [the company] undertook to appeal, it necessarily undertook to assume such expenses as legally resulted from that fact." 105 So. at 541.

The Mississippi court's rationale and decision in National Box Co. speak directly to the issue here. When St. Paul chose to litigate rather than settle this case when it had the opportunity to do so, its contractual agreement to pay "all costs of defending [the] suit" necessarily extended to the costs or expenses that legally resulted from its decision. Bud Williams' award of attorney's fees as the prevailing party was, by any test, just such a cost or expense.

At pages eleven and twelve of its brief, St. Paul has the audacity to argue that section 768.56 attorney's fees are considered an element of the plaintiff's damages. In Finkelstein v. North Broward Hospital District, 484 So.2d 1241 (Fla. 1986), this Court held directly to the contrary. Section 768.56 attorney's fees are not part of the damages but are a "collateral and independent claim" taxable upon post-judgment motion as costs. No reservation of jurisdiction in the final judgment is necessary to award such costs. 484 So.2d at 1242-3. Section 768.56 attorney's fees are an incidental litigation cost or cost of proceedings recoverable by the prevailing party and covered by St. Paul's promise to pay all costs over and above the policy limit on damages.

St. Paul also cites numerous cases for the proposition that attorney's fees are usually not considered "taxable costs." The cases cited by St. Paul have no bearing on the issue before this Court. St. Paul did not agree to pay only "taxable" costs of defending, it agreed to pay "all costs." St. Paul's lengthy discussion of "taxable costs" is nothing more than an ill-disguised attempt to distract this Court from the policy language and the true issue involved.

In any event, even if the question was whether plaintiff's statutory fees were a proper element of "costs," that issue was previously decided by this Court contrary to St. Paul's position in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145, 1147-8 (Fla. 1985) wherein this Court determined that the payment of plaintiff's statutory attorney's fees was one of the costs of unsuccessfully defending a medical malpractice action.

Rowe was not breaking new ground in treating statutory attorney's fees as costs. As far back as 1934, the United States Supreme Court addressed this issue in Life and Casualty Insurance Co. v. McCray, 291 U.S. 566, 54 S.Ct. 482, 78 L.Ed. 987 (1934). In that case, the defendant challenged the constitutionality of a statute providing for payment of attorney's fees to the prevailing party. The Court found the statute to be constitutional and made the following observation:

> We assume in accordance with the assumption of the court below that payment was resisted in good faith and upon reasonable grounds. Even so, the unsuccessful defendant must pay the adversary's costs, and costs in the discretion of the lawmakers may include the

fees of an attorney. [291 U.S. at 569, 54 S.Ct. at 483; e.s.].

But attorney's fees under Section 768.56 need not be categorized as "taxable" costs to be recoverable from St. Paul under the supplemental benefit provision of its policy. As noted above, the payment of supplemental benefits is not limited to "taxable" costs, but to "all costs of defending a suit." "All costs" are inclusive of "taxable costs," not limited to "taxable costs." The issue correctly decided by the district court was whether "all costs of defending a suit" include "costs of proceedings" or "litigation costs," two terms used by this Court in Rowe to describe an award of attorney's fees to the prevailing party under Section 768.56.

St. Paul argues unpersuasively that a "cost of litigation" is not a "cost of defense," an argument newly conceived for this petition. No such distinction was argued below. Instead, St. Paul argued that section 768.56 attorney's fees were not a cost of litigation or a cost of proceedings, notwithstanding Rowe's clear holding to the contrary.

In the district court St. Paul also tried to argue that costs of defense are limited to monies spent in defense of its insured, as opposed to monies paid to the plaintiff. Such a limiting definition falls flat, however, given St. Paul's concession that the policy provision of "all costs of defending a suit includes payment of the plaintiff's taxable costs - a payment to plaintiff.

Attorney's fees under Section 768.56, like taxable costs and interest on the judgment, are recoverable by the plaintiff ancillary to his judgment on the merits of the claim. Florida Patient's Compensation Fund v. Bouchoc, 514 So.2d 52, 53 (Fla. 1987); Finkelstein v. North Broward Hospital District, 484 So.2d 1241 (Fla. 1986). Interest, fees, and costs are all costs to the unsuccessful defendant and are subsumed within St. Paul's promise to "pay all costs of defending a suit."

## CONCLUSION

The petition should be denied for lack of jurisdiction. In the alternative, the district court decision should be approved.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Answer Brief was mailed to: GARY D. FOX, ESQUIRE, Stewart, Tilghman, Fox & Bianchi, 1900 Courthouse Tower, 44 West Flagler Street, Miami, Florida 33130; BRETT D. ANDERSON, ESQUIRE, 202 White Building, One Northeast Second Avenue, Miami, Florida 33132; SHELLEY H. LEINICKE, ESQUIRE, Wicker, Smith,

Blomqvist, Tutan, O'Hara, McCoy, Graham and Lane, Post Office Drawer 14460, Fort Lauderdale, Florida 33302; and JUDITH A. BASS, ESQUIRE, Womack, Lombana & Bass, Dadeland Square, Suite 305, 7700 North Kendall Drive, Miami, Florida 33156, this 2nd day of February, 1988.

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