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 JURISDICTIONAL BRIEF

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INTRODUCTION

This jurisdictional brief is filed on behalf of the respondent plaintiff, Bud Pratt Williams ("Williams"), to demonstrate the absence of any jurisdictional predicate for review by this Court. The petitioners will be referred to collectively as "Spiegel." For the limited purpose of this jurisdictional brief, Williams will accept Spiegel's statement of the case and facts.

SUMMARY OF ARGUMENT

Spiegel summarizes his argument by saying: "Florida has always acknowledged the distinction between litigation costs and cost of defense. The Third District Court of Appeal's decision breaks with this precedent... ." What precedent? Spiegel cites no case which has "acknowledged the distinction between litigation costs and cost of defense." Depending upon the context in

which the terms are used, there may be a distinction or there may not. The Third District simply determined the breadth of the phrase "all costs of defending a suit" found in the supplemental benefit provision of an insurance policy.

Spiegel's jurisdictional argument is based upon case law antiquated with the 1980 amendment to Article V of the Florida Constitution. Review is limited to a decision of a district court of appeal "that expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law." The Third District decision did not address the same questions of law decided in either Florida Patient's Compensation Fund v. Bouchoc, 12 F.L.W. 392 (Fla. July 16, 1987) or Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985). Here, the court interpreted a supplemental benefit provision in an insurance contract.

Spiegel asserts in his summary: "this court has never held that payment of a plaintiff's attorneys' fees should be viewed as a cost of defense." This statement ignores Rowe which clearly labels statutorily awarded attorneys' fees as "costs of proceedings" and "litigation costs." More to the point, this Court has never held that payment of a plaintiff's attorneys' fees pursuant to legislative mandate should not be viewed as a cost of an unsuccessful defense of a medical malpractice action. If this Court has not held contrary to the Third District, conflict is patently lacking.

JURISDICTIONAL ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL IS NOT IN EXPRESS AND DIRECT CONFLICT WITH ROWE OR BOUCHOC ON THE SAME QUESTION OF LAW.

Traditionally, this Court's jurisdiction to review decisions upon alleged conflict is activated by **(1)** the announcement of a rule of law which conflicts with a rule previously announced by this Court or another district court or **(2)** the application of a rule of law to produce a different result in a case which involved substantially the same facts as a prior case. Mancini v. State, **312** So.2d **732, 733** (Fla. **1975).** With the **1980** amendment to Article V, the conflict has to be apparent within the four corners of the decision. The conflict must be express, direct, and upon the same question of law presented in the decision alleged to be in conflict. Jenkins v. State, **385** So.2d **1356** (Fla. **1980).**

The issue before the Third District was interpretation of an insurance policy provision. As the district court found, the policies issued by Spiegel's insurance carrier provide for benefits in addition to the limits of coverage, one of which is the carrier's undertaking to "pay all costs of defending a suit." Since the term "costs" was nowhere defined in the policy, the district court saw no reason to ascribe to the term anything other than its generic meaning. Noting the recent holding of this Court in Rowe, the district court concluded, "there is every good reason why we should accord the term its more inclusive meaning." This conclusion is in harmony with the time honored

rule that any ambiguity in a written agreement should be construed against the party which drew the contract. When the contract is one for insurance, since it is the insurer that draws the contract, the general rule is that ambiguities or equivocalities are read against the insurer and in favor of affording coverage. Stuyvesant Insurance Company v. Butler, 314 So.2d 567 (Fla. 1975).

There is no express or direct conflict with Florida Patient's Compensation Fund v. Rowe because, as conceded by Spiegel, Rowe recognized taxation of attorneys' fees under section 768.56 to be like any "other costs of proceedings" and a "part of litigation costs." Nor is there express or direct conflict with Florida Patient's Compensation Fund v. Bouchoc. There, this Court was interpreting the Fund's responsibility for attorneys' fees under section 768.54 after primary coverage has been exhausted. This Court specifically held:

> 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 the plaintiff's attorney's 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. [12 F.L.W. at 393].

The qualifying language of Bouchoc was intended to apply to a case precisely like this one. Here, attorneys' fees are payable under the provisions of the health care provider's liability insurance coverage. No conflict can be legitimately asserted.

In rejecting Spiegel's argument that "all costs of defending a suit" do not include "costs of proceedings" or "litigation costs," the district court was undoubtedly impressed by the fact that Spiegel's carrier paid Williams' "taxable costs" without complaint as "costs of defending a suit" under the supplemental benefit provision of the insurance policy. Spiegel admits at page one of his brief that, "Spiegel's insurance policy paid Williams $300,000 ($100,000 on behalf of each of the three petitioners) plus taxable costs and accrued interest on the final judgment." (e.s.). Under Rowe and section 768.54, taxable costs like taxable fees are "costs of proceedings" or "costs of litigation" and are payable as "costs of [unsuccessfully] defending a suit." Spiegel's argument on behalf of his insurance carrier rings as hollow here as it did below.

CONCLUSION

The petition should be denied, and attorneys' fees should be awarded to Williams under section 768.56 Florida Statutes (1983) and sections 57.105 and 59.33 Florida Statutes (1985).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Jurisdictional 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 6th day of November 1987.

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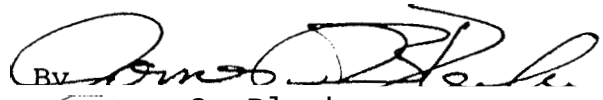
By 
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