OA 4-1-88

IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO: 71,338

THIRD DISTRICT CASE NO. 86-3040

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.

PETITIONERS BRIEF ON THE MERITS

SHELLEY H. LEINICKE, ESQUIRE
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STATEMENT OF THE CASE AND FACTS

Williams, the prevailing party in a medical malpractice case, was awarded **$950,000** by the jury. (R. **441)** Following set off of the $100,000 proceeds of a settlement with certain defendants and **$102,762** in collateral source benefits, an amended final judgment was entered in the amount of **$747,238.** (R. **467-468)** Post-trial, Williams filed a motion for attorney's fees pursuant to **§768.56,** Florida Statutes **(1981)** and was awarded **$206,000.** (R. **515)** Costs totalling **$5,116.50** were also awarded. (R. **461)**

The final judgment was well in excess of Spiegel's primary insurance limits of **$300,000** ($100,000 limits for each of the three petitioners). Spiegel's insurance carrier, St. Paul Fire and Marine Insurance Company ("St. Paul") paid Williams $300,000 plus taxable costs and accrued interest on the final judgment. Following this payment, the trial court entered an order limiting judgment against Spiegel to the amounts paid pursuant to the

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Plaintiff/Respondent Bud Pratt Williams will be referred to as "Wi11iams"
Defendants/Petitioners Firth S. Spiegel, M.D., Richard K. Ebken, M.D. and Spiegel and Ebken, M.D., P.A. will be referred to as "Spiege1"
The Symbol "R" refers to the Record on Appeal
The Symbol **"A"** refers to Petitioners' Appendix
All emphasis is added unless noted to be in the original

provisions of §768.54(2)(b), Florida Statutes (1981). (R. 445-446, 470-472) It should also be noted that Spiegel was a member of the Florida Patient's Compensation Fund and had coverage through the Fund for amounts in excess of his primary insurance Limit. [1]

In addition to liability insurance coverage, Spiegel's insurance policy with St. Paul provided for payment of Spiegel's defense costs. The policy did not include any coverage or obligation to pay an adversary's attorney's fees. The policy clearly stated:

> Additional Benefits. All of the following are in addition to the limits of your coverage: . . . We'll pay all costs of defending a suit, including interest on that part of any judgment that doesn't exceed the limits of your coverage (A.7)

Williams objected to the limitation of the judgment and asserted that the insurance company's obligation under this policy to pay "all costs of defending a suit" required Spiegel's carrier to pay Williams' statutory attorney's fees as a further prerequisite to the limiting of the judgment.

On appeal, the Third District Court of Appeal agreed with Williams' contention and reversed the trial court's decision. (A.9) This petition followed. In the interim, pursuant to the mandate of the Third District Court of Appeal, the trial court entered a third amended final judgment (amending the final

[1] The Florida Patient's Compensation Fund initially received a summary judgment grounded on the Statute of Limitations. (R. 467) This was reversed on appeal in the consolidated companion case No. 86-1579, and the claim against is now set for trial.

judgment to include Williams' trial attorney's fees of $206,000) and also entered a judgment for attorney's fees awarding Williams $58,600 in appellate attorney's fees.

SUMMARY OF ARGUMENT

Florida has always acknowledged the distinction between Litigation costs and costs of defense. The Third District's decision breaks with this precedent and improperly holds that an insurance company's contractual obligation to pay its insured's defense costs also requires the carrier to pay the opposing party's attorney's fees.

This court has twice decided that attorney's fee which are recoverable by statute in a medical malpractice case are a Litigation cost; this court has never held that payment of a plaintiffs attorney's fees should be viewed as a cost of defense. Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985); Florida Patient's Compensation Fund v. Bouchoc, 514 So.2d 52 (Fla. 1987). This court's holdings are in accordance with the provisions of Florida Statute 8768.54 (2)(b).

It is well settled that where language of a contract is clear and unambiguous, the terms will be accorded their natural meaning. Interpretation is required only where an ambiguity appears in the policy provisions. Under both settled law and common usage, "defense costs" does not include a plaintiff's attorney's fees. The Third District failed to follow the governing law when it decided to expand the coverage afforded under Spiegel's insurance policy to include payment of an opponent's attorney's fees.

The Third District's decision to require Spiegel's primary insurance carrier to pay an opponent's attorney's fees totally ignores the fact that Spiegel was fully covered by the Florida Patient's Compensation Fund for amounts in excess of his $100,000 primary limits. The governing statutes clearly provide that where there is coverage by the Patient's Compensation Fund or an excess insurance company, the obligation to pay the prevailing plaintiff's statutory attorney's fees must be borne by the Patient's Compensation Fund or the excess carrier.

ISSUE

I. WHETHER, UNDER SETTLED LAW, PUBLIC POLICY, AND THE GOVERNING LEGISLATION, A PRIMARY INSURANCE CARRIER'S OBLIGATION TO PAY "COSTS OF DEFENSE" EXCLUDES PAYMENT OF AN OPPOSING PARTY'S STATUTORILY IMPOSED ATTORNEY'S FEES

ARGUMENT

I. UNDER SETTLED LAW, PUBLIC POLICY, AND THE GOVERNING LEGISLATION, A PRIMARY INSUR NCE CARRIER'S OBLIGATION TO PAY "COSTS OF DEFENSE" EXCLUDES PAYMENT OF AN OPPOSING PARTY'S STATUTORILY IMPOSED ATTORNEY'S FEES

A. Settled law acknowledges a distinction between defense costs and litigation expenses

The Florida courts have long acknowledged the important distinction between the costs of defending a suit and the litigation costs which an unsuccessful party must bear. More than sixty years ago, this court held that attorney's fees recoverable by statute are costs only if so defined by the statutes. In the absence of such a statutory definition, attorney's fees are considered an element of damages. State ex rel. Royal Insurance Co. v. Barrs, 87 Fla. 168, 99 So. 668 (Fla. 1924).

Spiegel readily acknowledges that, in addition to paying its primary insurance limits of $300,000, his carrier has also paid Williams' taxable trial costs. This payment neither affects Spiegel's position nor forms any support for Williams' assertion that Spiegel's carrier should also pay Williams' attorney's fees. Taxable costs are expenses of litigation that, under the American rule, have long been charged to a losing defendant as a part of cost of unsuccessfully defending a suit. Williams' statutorily awarded attorney's fees do not fall into this category - and are readily distinguishable - because they are not defined as costs in the statute and/or they are an element of his damages.

While the terms "fees" and "costs" are sometimes (albeit erroneously) used interchangeably, they are not synonymous. When used precisely, the term "fees" applies to the items chargeable by law between the officer or witness and the party whom he serves, "costs" refer to one's expenditures during litigation. 20 Am.Jur. 2d "Costs" §1. The terms "costs" or "expenses" as used in a statute are not generally considered to include attorney's fees. 20 Am.Jr. 2d "Costs" §72.

"Costs" have been defined by several foreign jurisdictions to include payment of an opposing party's attorney's fees. The Delaware courts have stated repeatedly that because common usage and the ordinary meaning of the word "costs" does not include counsel fees of a successful litigant, the term "costs" as used in a Delaware statute could not be construed to include the prevailing party's attorney's fees. In re Dougherty's Will, 114 A. 2d 661, 663 (Del. 1955). See also: J.J. White, Inc. v. Metropolitan Merchandise Mart, Del. Super 107 A.2d 892.

The Supreme Court of Montana has also stated that attorney's fees cannot be included under statutory provisions for costs in ordinary litigation because "they are not in any proper sense a part of the costs of a case". Kinter V. Harr, 408 P.2d 487 (Mont.1965).

The Third District itself has recognized the difference between "costs" and "fees". In the case of Dade Countv v. Strauss, 246 So.2d 137 (Fla. 3rd DCA 1971), the court stated:

> In American Jurisprudence, there is a well settled distinction between "costs" (expenses) and "attorney's 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 the successful transaction or defense of a suit. The other [fees] is compensation to an officer for services rendered in the process of the cause. Dade County v. Strauss, supra at 141.

Other Florida decisions have reiterated the difference and distinctions between "costs" and attorney's fees. See: Harris v. Richard N. Groves Realty, Inc., 315 So.2d 528 (Fla. 4th DCA 1975); Bakers Multiple Line Insurance Co. v. Blanton, 352 So.2d 81 (Fla. 4th DCA 1977) ("Costs" cannot be expanded to include attorney's fees).

Other jurisdictions facing this same issue have construed the term "costs" in accordance with its general meaning and have not judicially expanded its definition to include attorney's fees. See, for example, Sisk v. Sanditen Investments Ltd., 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 attorney's fees: plain words of the statute do not provide for the inclusion of attorney's fees as ordinary costs, and we are not free to expand their meaning by construction to include attorney's fees).

The case should be controlled by this court's recent decision in Florida Patient's Compensation Fund v. Bouchoc, 514 So.2d 52 (Fla. 1987) which quashed the Second District's decision of Florida Patient's Compensation Fund v. Maurer, 493 So.2d 510 (Fla. 2nd DCA 1986). The Third District's decision in the instant case

is based upon the same assertions raised in Maurer which were expressly rejected by this court. In Maurer, the trial court taxed attorney's fees jointly and severally against the doctor, hospital and the Patient's Compensation Fund. The Second District affirmed this imposition of attorney's fees against the doctors and hospital but specifically rejected the plaintiff's assertion that such fees should be treated as costs. This Court held that the doctor and the hospital were not liable for payment of the plaintiff's attorney's fees because the Patient's Compensation Fund had a statutory mandate to satisfy this obligation pursuant to the provisions of §768.54(2)(b), Florida Statute (1981).

Spiegel's attorney's fees are a litigation cost, and while they arise out of the successful prosecution of his medical malpractice claim, by their very nature they are not a defense cost. As this court stated in the Rowe case:

> In certain causes of action, attorney's 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. Id. at 1149.

Although the Rowe decision acknowledges that, by statute, attorney's fees are taxable as litigation costs in more than seventy situations, nothing in that decision suggests such a statute transforms a cost of litigation into a cost of defense.

This court has clarified and reiterated its decision in Rowe in the case of Florida Patient's Compensation Fund v. Bouchoc, 514 So.2d 52 (Fla. 1987). As this court stated in Bouchoc:

> It is unreasonable to believe that the legislature would have intended that the health care providers be held responsible for the amount of attorney's fees over and above the $100,000 when the statute contemplates that the Fund would pay all judgments in excess of $100,000. Id. at 393

Contrary to the settled law, the Third District has held that even though an insured and insurer enter into an insurance coverage agreement which contemplates that the Florida Patient's Compensation Fund will cover all claims beyond $100,000, that an insuring agreement for payment of "defense costs" by the primary carrier includes the payment of a plaintiff's attorney's fees. Under the Bouchoc decision, plaintiff's attorney's fees are properly the obligation of the Fund. There is nothing in the Spiegel's insurance policy, or any other part of the record, to suggest that St. Paul's contractual insuring agreement to pay Spiegel's defense cost was intended to assume the Fund's obligation to pay litigation costs such as a plaintiff's attorney's fees.

B. Statutory attorney's fees are considered an element of the plaintiff's damages.

In addition to the cases acknowledging that an award of attorney's fees is a statutory litigation cost rather than a cost of defense, a number of decisions have held that where attorney's fees are recoverable by statute, they are to be considered an

element of the plaintiff's damages. Florida Patient's Compensation Fund v. Miller, 436 So.2d 932, 933 (Fla. 3rd DCA 1983) ("The trial court's conclusion that an indemnitee is entitled to recover reasonable attorney's fees as a part of its damages is buttressed by a substantial body of Florida law")

In the case of Prudential Insurance Co. v. Lamm, 218 So. 2d 219 (Fla. 3rd DCA 1969), the court determined that attorney's fees awarded pursuant to 5627.0127 were an element of the plaintiff's damages. In reaching this conclusion, the Third District relied upon a prior decision of this court and noted that fees would be regarded as costs only if this was specified in the governing statute: "Our Supreme Court held that attorney's fees recoverable by statute are regarded as "costs" only when made so by statute", supra, at 220. Similarly, 5768.56, Florida Statutes, does not provide that fees are to be considered as costs; therefore any attorney's fee award must be regarded as damages. See also: First National Insurance Co. of America V. Devine, 211 So.2d 587 (Fla. 2nd DCA 1968) (5627.1027 Fees are an element of Damages); Preuss v. U.S. Fire Insurance Co., 414 So.2d 249 (Fla. 4th DCA 1982) (Where insurance carrier wrongfully failed to defend, attorney's fees were an element of damages);

C. The terms of this unambiguous insurance policy must be given their plain meaning.

It is Hornbook law that language of a clear and unambiguous contract will be given its natural meaning. 30 Fla. Jur. 2d "Insurance" 5400. It is also well settled that terms of an

insurance policy should be given their common, everyday meaning as understood by the average man. Sanz v. Reserve Insurance Co. of Chicago, Illinois, 172 So. 2d 912 (Fla. 3rd DCA 1965); Security Insurance Co. of Hartford v. Commercial Equipment Corp. 399 So.2d 31 (Fla. 3rd DCA 1981); Fontainebleau Hotel Corp. v. United Filigree Corp., 298 So. 2d 455 (Fla. 3rd DCA 1974). The terms of an insurance policy cannot be construed in favor of the insured unless those terms cannot be clearly ascertained by ordinary rules of construction. Beasley v. Wolf, 151 So.2d 679 (Fla. 3rd DCA 1963); Valdes v. Prudential Mutual Casualty Co., 207 So.2d 312 (Fla. 3rd DCA 1968).

Terms of an unambiguous insurance policy cannot be expanded or reduced by judicial construction because the court cannot make a new contract for the parties. Prudential Insurance Co. v. Wynn, 398 So. 2d 502 (Fla. 3rd DCA 1981); Oceanus Mutual Underwriting Association v. Fuentes, 456 So.2d 1230 (Fla. 3rd DCA 1984). The courts may not rewrite a contract of insurance nor give an added meaning to a plainly written policy. The fact that analysis is necessary to fully understand the policy provisions does not mean the contract is ambiguous. Hess v. Liberty Mutual Insurance Co., 458 So.2d 71 (Fla. 3rd DCA 1984).

In the instant case, the Third District has created a new definition of the word "costs" which expand Spiegel's policy to include coverage for over a quarter million dollars in plaintiff's attorney's fees. The District Court's action is contrary to the clear terms of the insurance policy and the settled law because

these attorney's fees should be viewed as either a statutory litigation expense or an item of the plaintiff's damages; these fees should not be viewed as a defense cost. The District Court did not find the term "costs" to be ambiguous; rather the court judicially expanded the unambiguous coverage for "costs of defense" to include the plaintiff's attorney's fees.

Insurance contracts should receive a construction which is practical, and reasonable, and just. The Third District has failed to follow the case law which holds that terms of an insurance policy must be construed to promote a reasonable, practical, and sensible interpretation consistent with the parties' intent. Peerless Ins. Co. v. Sun Line Helicopters, Inc., 180 So.2d 364 (Fla. 3rd DCA 1965); U.S. Fire Insurance Co. v. Pruess, 394 So. 2d 468 (Fla. 4th DCA 1981). Instead, the Third District has chosen to expand the coverage available under the primary insurance policy (even in the face of coverage through the Patient's Compensation Fund) in spite of the unambiguous use of the term "costs of defense". This decision is unsupportable by the case law because the use of the word "costs" in standard insurance policies has never been expanded to include attorney's fees.

D. The legislative intent of the governing statute requires attorney's fees to be paid by the Patient's Compensation Fund and/or an excess insurance carrier.

When the Patient's Compensation Fund was created, the legislature clearly intended for the Fund to pay statutory attorney's fees. The preamble to 5768.56, Florida Statutes, specifically stated that the purpose of the attorney's fee statute was to prevent the unnecessary and frivolous litigation of medical malpractice claims. The statute which created the Patient's Compensation Fund specifically provides that the Fund will pay attorney's fees. §768.54(3)(f)(3). Further, that same statute states that while a primary carrier with coverage limits of $100,000 must defend the entire case, that carrier cannot negotiate a settlement which would require excess payments by the Patient's Cornpensation Fund. This is further evidence that the legislature intended for the Patient's Compensation Fund to be responsible for payment of statutory attorney's fees in a claim in excess of $100,000 because only the Fund can settle a claim for more than $100,000.

CONCLUSION

It is respectfully submitted that the trial court correctly determined that Spiegel was entitled to a limitation of the instant judgment upon the payment of the $300,000 primary insurance limits. It is submitted that the District Court erred in stating that Spiegel's insurance policy provided coverage for an opposing party's attorney's statutorily awarded attorney's fees and that such sums must be paid as a condition to limiting Spiegel's liability. It is respectfully requested that the decision of the District Court be quashed, that the Third Amended Final Judgment and the Judgment for Attorney Fees be vacated and the Second Amended Final Judgment be reinstated.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was furnished this 8th day of January, 1988 to Larry Stewart, Esquire and Gary D. Fox, Esquire, Stewart, Tilghman, Fox & Bianchi, 1900 Courthouse Tower, 44 West Flagler St., Miami, FL 33130, James C. Blecke, Esquire, Biscayne Building, Suite 705, 19 West Flagler St., Miami, FL 33130, Brett D. Anderson, Esquire, 1 N.E. 2nd Ave., Suite 202, Miami, FL 33132, Victor H. Womack, Esquire and Judith A. Bass, Esquire, 305 Dadeland Square, 7700 North Kendall Dr., Miami, FL 33156 and Richard A. Sherman, P.A., Suite 102 N. Justice Building, 524 South Andrews Avenue, Ft. Lauderdale, Fl 33301.

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