DA 4-1-88 017

IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO: **71,338**

THIRD DISTRICT CASE NO. **86-3040**

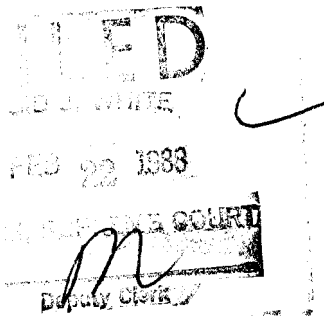
FIRTH S. SPIEGEL, M.D.; RICHARD K. EBKEN, M.D.; and SPIEGEL AND EBKEN, M.D., P.A.,

Petitioners/Defendants

VS.

BUD PRATT WILLIAMS,

Respondent/Plaintiff.
_____/



PETITIONERS' REPLY BRIEF ON THE MERITS

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ARGUMENT

The obligation of the instant insurance policy to pay "all cost of defending a suit" clearly and unambiguously obligates the carrier to pay only defense costs. The plain wording of the insurance contract does not include an obligation to pay a prevailing plaintiff's statutory attorney's fees.

Spiegel's position is not at odds with either the governing statute or the Bouchoc case. Both F.S. §768.54(2)(b) and the decision in Florida Patients Compensation Fund v. Bouchoc, 514 So.2d 521 (Fla. 1987), decision provide that the Fund is liable for a plaintiff's statutory attorney's fees unless the health care provider's underlying insurance policy assumes such responsibility. As the trial court correctly determined, there is no such assumption of the Fund's obligation by Spiegel's underlying insuror.

As this court has again acknowledged in its recent decision in the case of St. Joseph's Hospital, Inc. v. Coxon, ——— So.2d ——— 12 F.L.W. 514 (Fla. 10/8/87), the Fund becomes obligated to pay a prevailing plaintiff's attorney's fees once the defendant's primary insurance carrier has paid its entry level limits.

Contrary to Williams' suggestion, Spiegel's stance is not at odds with the fact his insurance carrier has paid Williams' customary taxable trial costs. Under the American rule, an indeed under the Florida Rules of Civil Procedure, such costs are

routinely taxes against all losing parties. These charges are a known and accepted cost of either an unsuccessful defense or prosecution of a case. Recognizing an obligation to pay this normal and anticipated cost is wholly consistent with Spiegel's position that his carrier's obligation to pay "all costs of defense" does not include a plaintiff's statutory attorney's fees. This is particularly true here because the parties to the insurance contract were at all times aware of the Fund's presence and the Fund's statutory directive to pay all attorney's fees which are in excess of the health care provider's primary limits.

Williams' reliance on the Finkelstein v. North Broward Hospital District, 485 So.2d 1241 (Fla. 1986) case is misplaced. That case actually supports Spiegel's contention that Williams' statutory attorney's fees cannot be considered a cost of defense under the terms of the instant insurance policy. In Finkelstein, the court held that a post judgment motion for attorney's fees in a medical malpractice case is a "collateral and independent claim" id. at 1243 (emphasis added). There is no suggestion in that decision that such fees were recoverable as a defense cost under the terms of the primary insurance policy.

The case of Highway Casualty Company v. Johnston, 104 So.2d 734 (Fla. 1958) is also of no help to Williams. That case involved a different provision of a different insurance policy. In the Johnston case, the insurance company's policy included an obligation to pay all interest and therefore the carrier had a duty to pay post judgment interest even on the portions of the judgment which exceeded its policy limits. If the St. Paul policy

in question agreed simply to pay "all costs", the Johnston case would perhaps give some guidance to determining the issue now before the court. Unfortunately for Williams, the policy in question clearly states that St. Paul will pay only "all costs of defense", thus negating any applicability of the Johnston case.

The common accepted definition of "all cost of defense" does not, as the trial court recognized, include an opposing party's statutory attorney's fees. For this reason, Williams' citation to the Stuyvesant Ins. Co. v. Butler, 314 So.2d 567 (Fla. 1975) decision is not on point.

In both the Liberty National Ins. Co. v. Eberhart, 398 P.2d 997 (Alaska 1975) and Weckman v. Houger, 464 P.2d 528 (Alaska 1974) cases, the Alaska courts were faced with entirely different insurance provisions than the one now before this court. The Liberty National policy required the insurance carrier to pay "all costs taxed against the insured"; the Weckman carrier agreed to pay "all costs" levied against its insured. Because of these provisions, the Alaska court held that the insurance carriers had to pay all taxable costs, even those beyond the liability limits of the policy. Those decisions are readily distinguishable from the instant case where the policy promises only to pay "all costs of defense" and not all taxable costs. The sixty year old Mississippi case of National Box Co. v. New Amsterdam Casualty Co., 105 So 539 (Miss. 1925) is inapplicable for similar reasons.

The common thread for establishing the insurance carrier's liability under the cases Williams has cited is well expressed in The National Box Co., supra, case: Absent limiting language in

the policy, the carrier will be liable for costs that would otherwise be borne by its insured. That rationale is precisely the reason none of those cases apply here, and explains why the District Court erred in holding Spiegel's primary carrier had an obligation to pay Williams' attorney's fees. First, Spiegel's policy contains no broad obligation to pay "all costs"; the policy agrees only to pay "all costs of defense". Secondly, Spiegel has no personal liability for the payment of his opponent's attorney's fees. That responsibility belongs exclusively to either his primary insurance carrier (if the policy includes such coverage) or to the Fund. The Lower Florida Keys Hospital District v. Littlejohn, _____ So 2d _____, 13 F.L.W. 273 (Fla. 3rd DCA 1/26/88). Because this liability for an opponent's attorney's fees is not a cost of defense as to Spiegel, it cannot fall within "cost of defense" coverage under the policy.

The Life and Casualty Insurance Co. v. McCray, 291 U.S. 566 (1934) case has no precedential value here. That case stemmed from a life insurance carrier's failure to timely pay benefits. At issue in that case was the constitutionality of an Arkansas statute requiring assessment of attorney's fees and interest against carriers who wrongfully refused to pay. Again, the facts of that case have no bearing on the issue and policy provision now before the court.

Williams has failed to distinguish any of the cases cited by Spiegel and, indeed, has not suggested that those decisions are factually dissimilar. Spiegel again reiterates that the cases

cited in his main brief are controlling. Because all cases cited by Williams are factually distinguishable, they do not provide any precedent for reaching a decision in this case.

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 MAILING

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 19th day of February, 1988 to Larry Stewart, Esquire snd Gary D. Fox, Esquire, Stewart, Tilghman, Fox & Bianchi, 1900 Sourthouse 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, Richard A. Sherman, P.A., Suite 102 North, Justice Building, 524 S. Andrews Avenue, Ft. Lauderdale, FL 33301, and Joe N. Unger, Esquire, 606 concord Building, 66 West Flagler Street, Miami, FL 33130.

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