IN THE SUPREME COURT OF FLORIDA

Case No. 72,610

ROBERT B. SMITH, M.D., and
ROBERT B. SMITH, M.D., P.A.,

Petitioners,
Defendants,

V.

HARRIET R. SITOMER,

Respondent,
Plaintiff,

and

FLORIDA PATIENT'S COMPENSATION FUND,

Respondent,
Defendant.

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

PETITIONERS' JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

Attorneys fees and who should pay them provides the setting for this petition. Section 768.56, Florida Statutes (1983)[1] provided for recovery of attorney fees by a prevailing party in a medical negligence lawsuit. Petitioners and the Florida Patient's Compensation Fund (FPCF) were unsuccessful defendants in such an action. The verdict exceeded petitioner's $100,000 primary insurance coverage, and under §768.54, Florida Statutes, the FPCF became liable for payment of the judgment in excess of this coverage.[2]

Subsequent to the judgment, the trial court awarded attorneys fees to the plaintiff and entered a judgment against Dr. Smith, his P. A., and the Florida Patient's Compensation Fund in the amount of $425,317.50. The Fourth District Court of Appeal affirmed the underlying judgment, reduced the fee because of a calculation error, and directed that the fee be paid solely by Dr. Smith, his P. A., and his insurance carrier.

Petitioners seek discretionary review of the decision of the Fourth District Court of Appeal, Florida Patient's Compensation Fund v. Sitomer, 13 F.L.W. 391 (Fla. 4th DCA 1988), which directed payment by the health care provider of $398,317 as plaintiff's attorneys fees. (See Appendix). Though the FPCF was a co-defendant, the District Court ruled it was not liable for

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[1] Repealed 1985 Fla. Laws 85-175, S43

[2] The underlying judgment and cost judgment were recently settled. The attorney's fees judgment remains at issue.

any portion of these fees. The Fourth District Court of Appeal relied upon the policy provisions of the health care provider's underlying policy in rendering its decision.

The applicable policy provision provided that the primary carrier would pay "in addition to the applicable limits of liability: (a) all expenses incurred by the Staff Fund (and) all costs taxed against the member in any suit defended by the Staff Fund...." However, Fla. Stat. §768.54(3)(a) declares:

> There is created a "Florida Patient's Compensation Fund" for the purpose of paying that portion of any claim arising out of the rendering of or failure to render medical care or services, or arising out of activities of committees, for health care providers or any claim for bodily injury or property damage to the person or property of any patient, including all patient injuries and deaths, arising out of the members' activities for those health care providers set forth in subparagraphs (1)(b) 1., 5., 6., and 7. which is in excess of the fund entry level selected and less than the limit selected under paragraph (2)(b). The fund shall be responsible only for payment of claims against health care providers who are in compliance with the provisions of paragraph (2)(b), of reasonable and necessary expenses incurred in the payment of claims, and of fund administrative expenses.

Fla. Stat. §768.54(3)(f)(3) provides:

> The amount of liability of the fund under a judgment, including court costs, reasonable attorney fees, and interest, shall be paid in a lump sum....

(Emphasis added.)

The petitioners moved for a rehearing, which was denied. From the Fourth District Court of Appeal's decision, the petitioners filed a Notice to Invoke the discretionary

jurisdiction of the Court. This brief is filed in support of jurisdiction.

SUMMARY OF ARGUMENT

Art. V, Section (, of the Florida (tit i ides this Court ı :r i ur of this l I Fourth I stri Cou of Apr l i hel that l alth care provider d his carrier were responsible :or the ı en of an ı s award based upon l in the c polic which provided for the me of defense :(. s · a · ı . e in t ent s Compensation Fund v. choc 5 So.2d (Fa. 1987), that the i tient · : Fund s responsible for at fe un the nde y ng alth care provider s i ur p i pr vi s for the payment of such fees The policy in this case does not provide for the payment of attorney's fees. Therefore, the Fourth District's decision is in conflict with this Court's decision in Bouchoc.

In addition, the Fourth District relied, in part, on Williams v. Spiegel, 512 So.2d 1080 (Fla. 3rd DCA 1987). This court has previously entertained oral argument in Williams v. Spiegel, which addressed the identical issue. This Court's decision in Williams will be dispositive of the issue in this case. However, if this court does not entertain jurisdiction of this case during the pendency of Williams, then the present decision has the potential of being wrongly decided. As this court noted in Jollie v. State, 405 So.2d 418 (Fla. 1981):

> [A] District Court of Appeal per curiam opinion, which cites as controlling authority a decision that is either pending review in or has been reversed by this court continues to constitute prima facie express conflict and allows this court to exersise its jurisdiction.

Id. at 420.

For these reasons, the petitioners respectfully request this court to exercise its discretionary jurisdiction over this case.

ARGUMENT

I. THE DECISION OF THE DISTRICT COURT OF APPEAL IS IN DIRECT AND EXPRESS CONFLICT WITH A DECISION OF THIS COURT ON THE SAME QUESTION OF LAW.

Article V, Section 3(b)3, Florida Constitution, bestows discretionary jurisdiction on the Supreme Court to consider decisions of district courts of appeal that are in direct and express conflict with a decision of the Supreme Court on the same question of law. The Fourth District Court of Appeal's ruling in this matter conflicts with prior decisions of this Court. For this reason, the Court may accept jurisdiction of this case.

An analysis of the applicable rules of law must begin with Bouchoc v. Peterson, 490 So. 2d 132 (Fla. 3rd DCA 1986). (Bouchoc I). There, the Third District Court of Appeal held the Florida Patient's Compensation Fund chargeable with all attorney's fees and damages beyond the defendant physician's $100,000 judgment obligation.

A few months after Bouchoc I was decided, the Second District Court of Appeal addressed the same issue in Florida

Patient's Compensation Fund v. Maurer, 493 So. 2d 510 (Fla. 2d DCA 1986). In doing so, the Maurer court rejected Bouchoc I and accepted the FPCF's claim that the defendant doctor and hospital were liable for plaintiff's attorney's fees because their primary liability insurance policy provided for payment of costs taxed against them. This is particularly important because 1) the FPCF has pressed the same point in the matter under consideration here; and 2) this court exercised its discretionary jurisdiction to resolve the Bouchoc I/Maurer conflict and expressly rejected Maurer, in Florida Patient's Compensation Fund v. Bouchoc, 514 So. 2d 52 (Fla. 1987). (Bouchoc II).

There, following its review of the relevant, above-noted statutory provisions, this Court held: "[W]hen the purpose for which the Fund was created is considered, we think that the statutory language is properly construed to require the Fund to pay the attorneys' fees." Id. at 53. Maurer was reversed "to the extent that it requires the health care providers rather than the Fund to pay the plaintiff's attorney fee." Id. at 54. Faced with the knowledge that Maurer's policy provided for payment of costs taxed against him, as does the policy involved here, this Court has ruled that the FPCF is liable for statutorily imposed attorney's fees. Thus, the instant decision is in conflict with Bouchoc 11.

Note, too, that the relevant Florida Statute also expressly imposes such liability. Under Fla. Stat. §768.54(3)(f)(3) the FPCF is responsible for the balance of any

judgment in excess of the health care provider's underlying coverage (here, $100,000). The provision explicitly includes reasonable attorney's fees as part of the judgment:

> The amount of liability of the fund under a judgment, including court costs, reasonable attorney's fees, and interest, shall be paid in a lump sum... Fla. Stat. §768.54(3)(f)(3) (1983).

In this case, the Fourth District Court of Appeal has held petitioners liable for these fees contrary to the express language of the statute, and contrary to the rule announced in Bouchoc II. Such a conflict bestows discretionary jurisdiction on this Court. The petitioners respectfully request this Court to accept jurisdiction.

II. A DISTRICT COURT OF APPEAL OPINION WHICH CITES AS AUTHORITY A DECISION THAT IS PENDING REVIEW IN THE FLORIDA SUPREME COURT CONSTITUTES PRIMA FACIE EXPRESS CONFLICT AND ALLOWS THIS COURT TO EXERCISE ITS JURISDICTION.

In ruling that attorneys' fees were to be paid by petitioners and their underlying carrier, the Fourth District relied in part on Williams v. Spiegel, 512 So. 2d 1080 (Fla. 3rd DCA 1987). That case is presently before this Court on the very issue involved here and jurisdiction is premised upon a conflict between Williams on the one hand and Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (1985) and Florida Patient's Compensation Fund v. Bouchoc, on the other. Bouchoc II was also cited as authority for the District Court of Appeal's controverted ruling in the present matter. Petitioner submits

Bouchoc II is controlling but, as in Williams, was erroneously applied. This, standing alone, forms the "direct and express conflict" acknowledged in Jollie v. State, 405 So. 2d 418 (Fla. 1981). See also, Harrison v. Hyster Co., 515 So.2d 1279 (Fla. 1987); Mathis v. Foote Steel Corp.; 515 So.2d 983 (Fla. 1987); and State v. Mullett, 439 So.2d 924 (Fla. 2nd DCA 1983).

In Jollie, the Supreme Court considered whether a district court of appeal's per curiam affirmance, which relied on a decision then on review before the Court, constituted a direct and express conflict. It held:

> We thus conclude that a district court of appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by this court continues to constitute prima facie express conflict and allows this court to exercise its jurisdiction.

Id. at 420.

Though Jollie only involved a per curiam ruling, its principles have no less import. Recall that here the district court of appeal decided the present matter partly on the basis of language contained in Williams. Certainly, a detailed analysis of, and spoken reliance on a case that is presently before this Court on review, provides the requisite express and direct conflict. This itself permits discretionary review.

Policy considerations also dictate that such jurisdiction be assumed. Judicial economy will not be thwarted if the Fourth District Court of Appeal's ruling is withheld pending this Court's decision in Williams. However, if this Court does not

accept jurisdiction, then the petitioners will be required to pay a judgment, which will be rendered invalid if the identical legal issue is resolved favorably to the petitioners in the Williams case. Inconsistent decisions may result if this Court does not accept jurisdiction, and this case in particular may become an anomaly of Florida law. Finally, acceptance of the jurisdiction would provide the petitioners with the due process to which they are entitled.

The Fourth District Court of Appeal has held the petitioners and their primary insurer liable for the respondent, Sitomer's, attorney's fees. In reaching its decision, it relied on case law presently on review before this Court. An automatic direct and express conflict is thereby created. Jollie v. State, 405 So.2d 418 (Fla. 1981). The appeals court ruling is also in express conflict with this Court's decision in Bouchoc II, and Fla. Stat. §768.54. Petitioners request this court to exercise its jurisdiction over the present matter.

CONCLUSION

For the foregoing reasons, petitioners, Robert B. Smith, M.D., and Robert B. Smith, M.D., P.A., respectfully this Court to assume jurisdiction of the present matter.

Respectfully submitted,

Melanie G. May

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Jurisdictional Brief has been furnished by U.S. mail this 27th day of July, **1988,** to: MARGUERITE H. DAVIS, ESQ., Katz, Kutter, Haigler, Alderman, Eaton, & Davis, P.A., **315** S. Calhoun Sttreet, **#800,** Tallahasse, Florida **32301;** ED PERSE, ESQ., Horton, Perse, & Ginsburg, 410 Concord Building, **66** W. Flagler Street, Miami, Florida **33130;** THOMAS E. BACKMEYER, ESQ., Hoppe, Backmeyer & Wilson, Second Floor, Concord Building, **66** West Flagler Street, Miami, Florida **33130** and K. P. JONES, ESQ., Jones, Zaifert & Steinberg, **633** S. Andrews Avenue, **#201,** Fort Lauderdale, Florida **33301.**

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