

IN THE SUPREME COURT OF FLORIDA

Case No. 72,610

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

Petitioners,

v.

HARRIET R. SITOMER,

Respondent,

and

FLORIDA PATIENT'S COMPENSATION
FUND,

Respondent.

FILED

SID J. WHITE

JUL 14 1988

CLERK, SUPREME COURT

By

Deputy Clerk

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

JURISDICTIONAL BRIEF OF RESPONDENT
FLORIDA PATIENT'S COMPENSATION FUND

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INTRODUCTION

This jurisdictional brief is filed on behalf of the Florida Patient's Compensation Fund to demonstrate the absence of any jurisdictional basis for review by this Court. Petitioners will be referred to as Petitioners. The Florida Patient's Compensation Fund will be referred to as the Fund.

STATEMENT OF THE CASE AND THE FACTS

The statement of the case and facts must be limited to those set forth in the decision of the District Court of Appeal, Fourth District in Florida Patient's Compensation Fund v. Sitomer, 13 F.L.W. 391 (Fla. 4th DCA 1988). The facts can be briefly stated. A judgment was entered in favor of Harriet Sitomer in a medical malpractice case. Pursuant to section 768.56, Florida Statutes, the trial court awarded Plaintiff Sitomer statutory prevailing party attorney's fees.

The sole issue upon which Petitioners purport to allege conflict relates to whether Petitioners' underlying insurance carrier or whether the Fund is liable to pay these prevailing party attorney's fees.

The only portion of the Fourth District's decision which addresses this issue is contained on page 9 and 10 of that decision. As appears in that decision, the underlying insurance coverage which was required to be provided by Petitioners as a

condition precedent to its eligibility for any limitation of liability, provided by section 768.54, Florida Statutes, contained the specific supplementary payments provision that "The Staff Fund will pay, in addition to the applicable limits of liability: (a) all expenses incurred by the Staff Fund, all costs taxed against the Member in any suit defended by the Staff Fund and all interest on the entire amount of any judgment...."

Section 768.54(2)(b), Florida Statutes (1981) provides that in order for the health care provider member, in this case Dr. Smith, to be eligible for the limitation of its liability to \$100,000, it must provide the Fund an adequate defense and pay at least the initial \$100,000, or the maximum limit of the underlying coverage maintained by the health care provider on the date when the incident occurred for which the claim is filed, whichever is greater.

The Fourth District Court in the present case relied on this Court's recent decision in Florida Patient's Compensation Fund v. Bouchoc, 514 So.2d 52 (Fla. 1987) and held that the language of the insurance policy in this case is sufficient to include the payment of attorney's fees by Petitioners' insurance carrier. The Court noted that the Third District had similarly held in Williams v. Spiegel, 512 So.2d 1080, but the Fourth District did not base its decision on the authority of Spiegel.

The Fourth District concluded that the statutory attorney's fees assessed should be paid by Petitioners' insurance carrier on the basis of this Court's recent pronouncements in Bouchoc.

SUMMARY OF THE ARGUMENT

The decision of the District Court of Appeal in Florida Patient's Compensation Fund v. Sitomer, 13 F.L.W. 391 (Fla. 4th DCA 1988) does not expressly and directly conflict with any decision of this Court or any decision of any other District Court of Appeal in this State. The District Court's holding that, in light of the language of the Supplementary Payments Provision of the underlying insurance policy of the Petitioners, the statutory prevailing party attorney's fees awarded the Plaintiff should be paid by Petitioners' insurance carrier is entirely consistent with this Court's decision in Florida Patient's Compensation Fund v. Bouchoc, 514 So. 2d 52 (Fla. 1987) and Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985). Moreover, Jollie v. State, 405 So.2d 418 (Fla. 1981) does not provide any basis for this Court's jurisdiction in this case.

ISSUES AND ARGUMENT

I. THERE IS NO EXPRESS AND DIRECT CONFLICT WITH FLORIDA PATIENT'S COMPENSATION FUND V. BOUCHOC, 514 SO.2D 52 (FLA. 1987).

In order for this Court to exercise its discretion to accept review, conflict must be apparent within the four corners of the decision sought by Petitioners to be reviewed by this Court. This 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 decision of the Fourth District Court of Appeal in the present case does not expressly and directly conflict with Florida Patient's Compensation Fund v. Bouchoc, 514 So.2d 52 (Fla. 1987), **as** contended by Petitioners in their brief on jurisdiction, and is, in fact, entirely consistent with the holding of that decision as well as the earlier decision of this Court in Florida Patient's Compensation v. Rowe, 472 So.2d 1145 (Fla. 1985).

Petitioners' attempt to confuse this Court's concise decision of Bouchoc by resurrecting the decisions of the Second and Third District Courts of Appeal which brought Bouchoc v. Peterson, 490 So.2d 132 (Fla. 3rd DCA 1986) and Florida Patient's Compensation Fund v. Maurer, 493 So.2d 510 (Fla. 2d DCA 1986), to the Florida Supreme Court on the basis of conflict.

The Bouchoc decision of the Third District did not address the issue of any supplementary payments provision in the insurance policy as we have in the present case.

The Florida Supreme Court in Florida Patient's Compensation Fund v. Bouchoc specifically held, consistent with the Fourth District's decision presently before this Court in this case:

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 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 underlying coverage, whichever is greater.

514 So.2d at 54.

Rather than merely arguing the purported basis of this Court's jurisdiction, Petitioners are primarily and inappropriately attempting to argue the merits of their case.

The Fourth District's decision is also in accord with this Court's decision in Rowe wherein this Court held among other things that attorney's fees awarded pursuant to section 768.54 are like any "other costs of proceedings" and are a "part of litigation costs", 472 So.2d 1145, 1149 (Fla. 1985).

Moreover, the decision of the Fourth District does not expressly nor directly conflict with any other decision of any other District Court of Appeal in this State. In fact the Fourth

District's decision is entirely consistent with the recent decision of the District Court of Appeal, Third District, in Williams v. Spiegel, 512 So.2d 1080, 1081-82, (Fla. 3d DCA 1987) wherein the Third District held:

The policies issued by the defendants' primary insurance carrier provide for benefits 'in addition to the limits of [the insured's] coverage,' one of which is the carrier's undertaking to 'pay all costs of defending a suit.' Although 'costs' may be specifically defined to exclude attorney's fees, that was not done in these 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 cost,' Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145, 1149 (Fla. 1985), there is very good reason why we should accord the term its more inclusive meaning.

The Third District in Spiegel found the Supreme Court's decision in Bouchoc to be controlling.

11. THE DISTRICT COURT OF APPEAL OPINION WHICH CITES A DECISION OF ANOTHER DISTRICT COURT OF APPEAL THAT IS PENDING REVIEW IN THE FLORIDA SUPREME COURT DOES NOT CONSTITUTE A BASIS FOR EXPRESS CONFLICT AND DOES NOT CONSTITUTE AN APPROPRIATE BASIS UPON WHICH THIS COURT CAN EXERCISE ITS JURISDICTION.

Petitioners cite Jollie v. State, 405 So.2d 418 (Fla. 1981) and three additional cases which follow Jollie¹ as an additional

¹ Harrison v. Hyster Co., 515 So.2d 1279 (Fla. 1987); Mathis v. Foote Steel Corp., 515 So.2d 983 (Fla. 1987) and State v.

basis for jurisdiction. Jollie, however, does not provide any basis for this Court's conflict jurisdiction. Jollie was a criminal case in which the District Court of Appeal, Fifth District, had per curiam affirmed without opinion the conviction of Jollie. The Court had cited as authority for its per curiam affirmance the decision of Murray v. State. There was much conflict in the several district courts of appeal on the issue involved in Murray and in Jollie which was whether failure to give a particular jury instruction could be harmless error. Several decisions which had been PCAed on the same issue were pending in the Supreme Court prior to the effective date of the limitation to this Court's jurisdiction brought about by the 1980 amendments to Article V, Florida Constitution, but Jollie was placed in a different position because of the intervention of the 1980 amendment. The Court accepted jurisdiction of Jollie's case because, as this Court explained, Jollie became the victim of happenstance, delayed processing through the district court resulting in his case reaching the Court after the effective date of the 1980 constitutional amendment limiting Supreme Court Jurisdiction.

The question addressed by Jollie was in what posture should the Court place a citation PCA where the cited case is either

Mullett, 439 So.2d 924 (Fla. 2nd DCA 1983).

pending review in this Court or has been previously reversed by this Court. The Court concluded that a district court PCA opinion which cites as controlling a case that is pending review in the Supreme Court may give the Court a basis for jurisdiction.

This is not the case presently before this Court. The Fourth District Court in its Sitomer decision did not cite Williams v. Spiegel as controlling authority. Rather, it is merely cited as a decision of another district court which had reached a similar result.

Petitioners' analysis of Jollie is contrary to this Court's intent when it wrote that decision. Jollie should not be extended beyond the parameters for which this Court intended that it be used.

Moreover, Williams v. Spiegel was one of no less than thirteen cases cited by the Fourth District in its opinion, five of which appear in the portion of that Court's decision addressing attorney's fees.

The controlling case cited by the Fourth District is this Court's decision in Bouchoc. The Fourth District in the present case applied Bouchoc and found that the language of the policy of the underlying insurance carrier of Petitioners included the payment of statutory prevailing party attorney's fees to be paid by the insurance carrier for Petitioners.

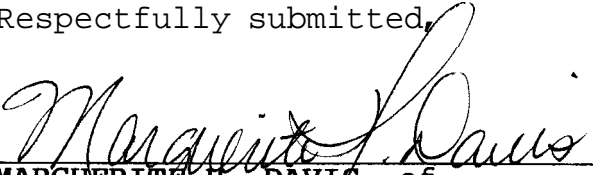
There is no express and direct conflict with any decision

cited by Petitioners, and Jollie gives no further basis for jurisdiction here where there is no express and direct conflict with any decision of another District Court of Appeal or the Florida Supreme Court.

CONCLUSION

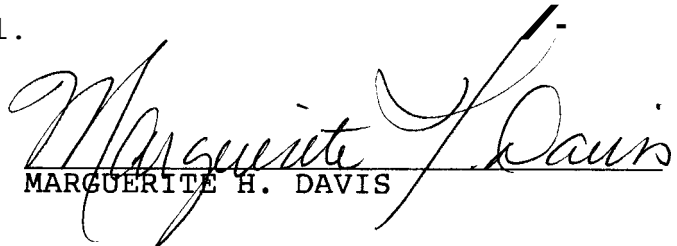
There is no express and direct conflict with any decision of this Court or any other District Court of Appeal, and Jollie v. State provides no basis for this Court's conflict jurisdiction. Therefore, the Petition for Review should be denied.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a copy of the foregoing Respondent's Jurisdictional Brief has been furnished by U.S. Mail this 13th day of July, 1988, to: MELANIE G. MAY, ESQ., Bunnell and Woulfe, P.A., 1080 S.E. Third Avenue, Fort Lauderdale, Florida 33316; 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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