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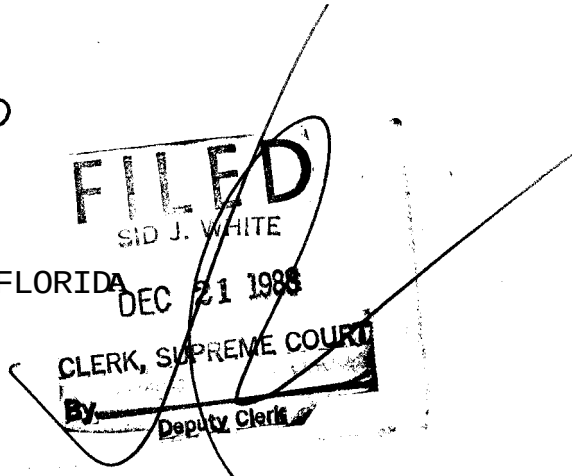

IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

VS.

HARRIET R. SITOMER, and
THE FLORIDA PATIENT'S
COMPENSATION FUND,

Respondents.

CASE NO.: 72,610

4th **DCA** CASE NOS.:
4-86-0844
4-86-0967

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

RESPONDENT FLORIDA PATIENT'S COMPENSATION FUND'S BRIEF ON THE MERITS

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Florida Statutes:

STATEMENT OF THE CASE AND THE FACTS

This case is before this Court on review of the decision of the District Court of Appeal, Fourth District in Florida, Patient's Compensation Fund v. Sitomer; Smith v. Sitomer, 524 So.2d 671 (Fla. 4th DCA 1988).

The facts relevant to the issues before this Court which relate to the amount of attorney's fees awarded pursuant to Section 768.56, Florida Statutes, (now repealed) and the liability for those attorney's fees can be briefly stated. This statement of the facts is warranted because the statement of the facts and case contained in Petitioners' brief are argumentative as relates to the issue in controversy between Petitioner and Respondent as to the liability for the attorney's fee award.

Background

Harriet Sitomer filed a malpractice complaint against Petitioners, Dr. Smith and his professional association (hereinafter referred to collectively as "Dr. Smith"), for damages arising from injuries she sustained as a result of breast surgery performed by Dr. Smith in June, 1981, and as a result of immediate post-surgery care. Over one and one-half years after filing this complaint, Mrs. Sitomer filed an amended complaint in December 1984, joining the Florida Patient's Compensation Fund (hereinafter the "Fund"). (R. 672-76). The Trial Court entered Final Judgment on December 17, 1985, for Mrs. Sitomer against Dr. Smith

and the Florida Patient's Compensation Fund in the amount of **$1,250,000**, with the court reserving jurisdiction to tax attorney's fees in favor of Mrs. Sitomer against Dr. Smith and the Fund upon appropriate motion. (R. **719**).

Liability for Section 768.56 Prevailing Party's Attorney's Fees

Contrary to Dr. Smith's assertion in his Statement of the Case and Facts, the Trial Court, in entering Final Judgment in this case, did not limit the liability of Dr. Smith for payment of prevailing party's, statutory, attorney's fees. Rather, the Trial Court only limited to $100,000 Dr. Smith's liability for the damages of **$1,250,000** awarded Plaintiff. This is apparent in the Final Judgment entered by the Trial Court on December **17, 1985. (R. 719).** The Trial Court, in entering judgment against Dr. Smith for $100,000 of the damages and against the Fund for **$1,150,000,** expressly reserved jurisdiction to tax Section **768.56** prevailing party's attorney's fees and other costs in favor of Plaintiff and against Dr. Smith and the Florida Patient's Compensation Fund. (R. **719**).

At the hearings on Plaintiff's motion for attorney's fees, the Fund maintained that it was not responsible and should not be taxed any portion of the prevailing party's attorney's fees that may be awarded Plaintiff Sitomer pursuant to Section **768.56,** Florida Statutes, or other taxable costs because the Supplementary Payments provision of Dr. Smith's underlying insurance

policy provided for payment of these statutory attorney's fees as taxable costs. (R. 1010-15, 1025). Dr. Smith, on the other hand, argued that his liability was limited to $100,000, and, that, despite the Supplementary Payments provision of his underlying coverage, he should not be required to pay prevailing party attorney's fees taxed against him. (R. 1001).

In support of its position, the Fund introduced into evidence Dr. Smith's underlying insurance coverage agreement. (R. 1009-10, 829-41). The Fund referred the Trial Court to Section VI of that policy, which provides:

> VI. SUPPLEMENTARY PAYMENTS.
>
> 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 therein which accrues after entry of the judgment and before the Staff Fund had paid or tendered or deposited in the court that part of the judgment which does not exceed the limit of the Staff Fund's liability thereon:
>
> (b) premiums on appeal bonds required in any such suit, premiums on bonds to release attachments in any such suit for any amount not in excess of the applicable limit of the liability of this Agreement.

(R. 834). (Emphasis supplied). In light of the specific provisions of this insurance contract, read in conjunction with

Section 768.54(2)(b) which states that the Fund member must first pay the maximum limits of its underlying coverage, the Florida Patient's Compensation Fund contended that all of the costs taxed against the non-prevailing party for unsuccessfully defending in these proceedings were the responsibility of the underlying primary insurer of its health care provider member, Dr. Smith, and could not be taxed against the Fund.

After hearing, the Trial Court entered judgment for Section 768.56, prevailing party's attorney's fees in the amount of $425,317.50 against both Dr. Smith and the Fund. (P. 842, 855). (This amount, however, reflected a mathematical miscalculation, and without dispute by Plaintiff, was reduced to $398,317.50 by the Fourth District. 524 So.2d 671.)

Amount of Fees

The Fund adopts the portions of the Statement of The Case and Facts entitled "Testimony" and "Order" beginning at page 2 of Petitioner's Brief and continuing through page 6 which statement relates solely to the issue of the excessiveness of the attorney's fees taxed in favor of Plaintiff.

Decision of the District Court of Appeal, Fourth District

The Fund and Dr. Smith filed separate appeals from the Final Judgment on attorney's fees.

The Fourth District agreed with the position of the Fund and, among other cases, relied on this Court's decisions 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). It held that the language of the underlying insurance policy in this case is sufficient to include the payment of attorney's fees by Dr. Smith's insurance carrier. The District Court further cited to the Third District decision in Williams v. Spiegel, 512 So.2d 1080 (Fla. 3d DCA 1987) in which the identical issue of liability for Section 768.56 attorney's fees was raised where the policies issued by the defendant's primary insurance carrier contained an analogous supplementary payments provision as does the primary insurance policy of Dr. Smith.

The Fourth District explained:

> [I]n order to resolve the conflict between Smith and the Fund regarding the payment of the attorney's fees, we need to look to the language of Smith's underlying coverage. That policy provides:
>
> > 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... .
>
> It appears to us that that language is sufficient to include the payment of attorney's fees by Smith's carrier, which would preclude liability therefor by the Fund. In construing a somewhat similar policy in Third District Court of Appeal in Williams v. Spiegel, 512 So.2d 1080, 1081-1082 (Fla. 3d DCA 1987), said:

> 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 costs,' 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. [footnote omitted].

The District Court, therefore, held that since the Plaintiff's prevailing party attorney's fees are payable under the provisions of the health care provider's liability insurance coverage, these fees should be paid by Dr. Smith's insurance carrier. (See Appendix for decision of the Fourth District.)

Petitioner then sought review to this Court on the basis that the District Court's decision conflicted with Florida Patient's Compensation Fund v. Bouchoc, **514** So.2d **52** (Fla. **1987)** and alternatively on the basis that this Court presently has pending before it for review the Third District Court's decision in Williams v. Spiegel, 512 So.2d 1080 (Fla. 3d DCA **1987).**

Apparently, because this Court was addressing the identical issue in the Spiegel case, it chose to accept jurisdiction in the present case.

SUMMARY OF ARGUMENT

The issue before the Trial Court regarding liability for attorney's fees was solely one of interpretation of a supplementary payments provision of the insurance contract provided by the primary insurer to the health care provider Fund member. The insurance policy provided that in addition to liability limits the underlying insurer shall pay all costs taxed against the negligent health care provider insured in his unsuccessful defense of a claim of malpractice.

The District Court correctly determined that the attorney's fees were payable under the provisions of Petitioner's liability insurance coverage, and that, therefore, the Fund was not responsible because Section 768.54(2)(b) provides that the Fund shall pay only the excess over $100,000 or the maximum limit of the underlying coverage, whichever is greater.

Pursuant to Section 768.54(2)(b), in order to limit his liability, the Fund member must pay the maximum limit of his underlying coverage and must provide an adequate defense for the Florida Patient's Compensation Fund. Petitioner's underlying policy contains a supplementary payments provision obligating his underlying insurer to pay, in addition to the $100,000 liability limit, prevailing party's attorney's fees taxed against the non-prevailing party pursuant to Section 768.56 in favor of Plaintiff.

The Trial Court correctly determined that Dr. Smith's limitation of liability provided for in Section 768.54(2)(b) did not include a limitation from the payment of these attorney's fees and other taxable costs. The Trial Court, however, had erred in holding the Florida Patient's Compensation Fund responsible for any part of the prevailing party attorney's fees, and the District Court of Appeal, Fourth District, correctly reversed this ruling.

Even if the Trial Court had ruled prior to Final Judgment (as Petitioner suggests, but Respondent contests) that liability for damages as well as attorney's fees were limited to $100,000, it continued to retain jurisdiction of this case and had the authority to change its decision prior to losing jurisdiction of the case. In the Final Judgment awarding damages, the Trial Court reserved jurisdiction to award attorney's fees against both Dr. Smith and the Fund and subsequently so ordered.

The District Court, although correctly ruling that Dr. Smith's insurer, not the Fund, was obligated to pay the Section 768.56 fees taxed against Dr. Smith and in favor of Plaintiff, it erred in not holding that the Trial Court had abused its discretion in awarding excessive and unreasonable attorney's fees which do not comport with the guidelines announced by the Florida Supreme Court in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) and its progeny. The amount of the attor-

ney's fees award was unreasonably excessive and should have been reduced. The remainder of the Fourth District Court's decision relating to liability for these fees should be affirmed.

ARGUMENT

I. THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, CORRECTLY DECIDED THAT THE OBLIGATION TO PAY THE STATUTORY PREVAILING PARTY ATTORNEY'S FEES AWARDED PURSUANT TO SECTION **768.56** WAS PROPERLY THAT OF THE HEALTH CARE PROVIDER MEMBER'S INSURER WHICH SPECIFICALLY CONTRACTED TO PAY ALL COSTS OF DEFENDING THIS MALPRACTICE ACTION.

A. Section **768.54** Only Limits Liability if the Health Care Provider Member Pays the Maximum Limit of the Underlying Coverage which in this Case Includes the Payment of Section **768.56** Attorney's Fees Taxed Against Dr. Smith.

Section 768.54(2)(b), Florida Statutes (1981), provides:

> (b) A health care provider shall not be liable for an amount in excess of $100,000 per claim or $500,000 per occurrence for claims covered under subsection (3) if the health care provider has paid the fees required pursuant to subsection (3) for the year in which the incident occurred for which the claim is filed, and an adequate defense for the fund is provided, and pays 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, of any settlement or judgment against the health care provider for the claim in accordance with paragraph (3)(e). (Emphasis supplied).

The Fund is liable only for the amounts above $100,000 or the maximum underlying coverage provided by the health care provider, whichever is greater.

Dr. Smith, through his underlying insurer in the present case must pay at least the initial $100,000 or the maximum limit of the underlying coverage maintained by him on the date when the incident occurred for which the claim is filed, which-

ever is greater.' The maximum limit of his underlying coverage includes the additional supplementary coverage for all costs taxed in his insurer's defending of the medical malpractice action filed against him and the Fund, which include statutory attorney's fees taxed against the non-prevailing health care provider member in favor of the prevailing plaintiff pursuant to Section 768.56, Florida Statutes.

The Fund is not liable for the award of the prevailing party's attorney's fees taxed pursuant to Section 768.56 in the present case because, among other reasons, the underlying coverage agreement maintained by Dr. Smith exceeded the $100,000 liability limitation by expressly providing in its supplementary payment provision that the underlying insurer, in addition to the applicable limits of liability, would pay all costs taxed in this suit defended by the underlying insurer.

Dr. Smith maintains his underlying coverage with North Broward Hospital District Active Medical Staff Self Insurance Trust Fund (hereinafter, Staff Fund). This coverage agreement provides for $100,000 liability coverage plus a supplementary

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1 The legislature in 1982 amended Section 768.54 by increasing in the future the applicable amounts for which the Fund member remains liable, but it did not amend the requirement that the health care provider pay the amount of the claim up to the applicable statutory amount or the maximum limit of the underlying coverage maintained by the health care provider on the date of the incident or whichever is greater.

payments provision. The supplementary payments provision of this agreement expressly provides:

> 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. . . .
>
> (b) premiums on appeal bonds required in any such suit, premiums on bonds to release attachments in any such suit for any amount not in excess of the applicable limit of the liability of this Agreement.

Emphasis supplied.

Through this supplementary payments provision, the underlying insurer contracted to pay all costs taxed in the defense of this lawsuit which include statutory prevailing party attorney's fees required by statute to be taxed against the non-prevailing party, in this case, Dr. Smith. All costs in the context of this insurance policy means the total sum of the attorney's fees expressly required by statute to be taxed against the non-prevailing negligent health care provider.

In Florida Patient's Compensation Fund v. Bouchoc, 514 So.2d 52 (Fla. 1987), this Court held that generally the Fund, not the health care provider member, is liable for Section 768.56 prevailing party's attorney's fees in a medical malpractice action. It limited this general statement, however, in a concluding paragraph of its decision when it said:

> 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 the underlying coverage, whichever is greater.

514 So.2d 52 (Fla. 1987). (Emphasis supplied).

If a health care provider has insurance coverage which includes the payment of attorney's fees, then Section 768.54(2)(b), as interpreted by this Court in Bouchoc, requires payment by the insurer of that provider, not the Fund.

Contrary to Dr. Smith's assertions, the Fund is now merely arguing that, reading Section 768.54(2)(b) in conjunction with the specific supplementary payments provision of Dr. Smith's liability insurance policy and this Court's decisions in Rowe and Bouchoc, the District Court correctly held that under the particular circumstances of the present case, Dr. Smith's carrier is liable for the statutory prevailing party's attorney's fees taxed in favor of Plaintiff and against Dr. Smith in an action defended by his insurer.

In Williams v. Spiegel, 512 So.2d 1080 (Fla. 3d DCA), a case analogous to the present case, the Third District, in addressing whether the underlying primary insurer was liable to

pay the statutory prevailing party attorney's fees taxed in favor of the prevailing plaintiff, construed "costs" in the supplementary payments provision of the primary insurance policy of the underlying health care provider member to encompass prevailing party's attorney's fees. The Third District's analysis is correct and is consistent with this Court's pronouncements in Bouchoc and Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145, 1148-49 (Fla. 1985). In Spiegel, the Third District reasoned:

> 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 costs,' 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.

512 So.2d at 1080 (Fla. 3d DCA 1987).

~~See also~~: The Lower Keys Hospital District v. Littlejohn, 520 So.2d 56 (Fla. 3d DCA), rev. denied 631 So.2d 1352 (Fla. 1988), wherein the Court held that where there is insurance providing for payment of all costs of defense, which include statutory attorney's fees required by Section 768.56 to be taxed in favor of the prevailing party, the health care provider and his insurer are liable for the attorney's fee award,

but the award is payable solely by the insurer, not the Florida Patient's Compensation Fund.

Just as in Spiegel, had the insurer chosen to do so, the words "all costs" could have been defined to exclude attorney's fees. Section 768.56 requires that attorney's fees be taxed against the non-prevailing party and these in fact become a cost of defending the malpractice lawsuit. Section 768.56 speaks of "taxing" fees against the non-prevailing parties.

This case involves simply an issue of interpretation of the insurance policy which provides that the primary insurer will pay the costs of defending a suit -- those costs that are taxed against the non-prevailing party. Prevailing party attorney's fees are costs of defending and by specific statutory language are "taxed" against the non-prevailing party who, in this case, is the negligent health care provider. By statute, the health care provider is required to defend the Florida Patient's Compensation Fund. Section 768.54(2)(b).

At the time Dr. Smith purchased his liability insurance, a cost which an unsuccessful party was required by Section 768.56 to have taxed against it in favor of the prevailing party were prevailing party attorney's fees. The insurance contract in this case expressly provides that the health care provider's insurer shall pay all costs taxed in the suit defended by it. This malpractice lawsuit against Dr. Smith was defended by its

insurer (North Broward Hospital District Staff Fund Self Insurance Trust Fund). The statutory prevailing party's attorney's fees were a part of the costs taxed against Dr. Smith in the suit defended by his insurer. There was no limitation of these costs that would be taxed in defending the lawsuit by Dr. Smith's insurer.

The Fourth District in the present case, as did the Third District in Spiegel, merely correctly interpreted the insurance contract provision of all costs to mean just what it said "all costs" in any suit defended by Dr. Smith's underlying insurer. In holding as it did, the Fourth District did not create conflict with any decision of any other appellate court in this state. The District Court correctly held that all costs taxed for defending include the costs of proceedings and the cost of litigation.

Dr. Smith cites Wiggins v. Wiggins, **446 So.2d 1078** (Fla. 1984), a dissolution action, which is not at all applicable to the present case. The present case is one of construction of an insurance contract. In the present case, the attorney's fees to be taxed against the non-prevailing party in the unsuccessful defense of a malpractice lawsuit are mandatorily required to be taxed by Section **768.56**. To the contrary, Section **61.16** is discretionary.

In Wiggins, a husband filed a dissolution of marriage action against his wife. After the husband voluntarily dismissed the action, the wife moved for attorney's fees pursuant to Section 61.16, Florida Statutes, which gives the Trial Court discretion from time to time to award attorney's fees to either party depending on their financial resources. The question addressed was whether the voluntary dismissal divested the Trial Court of jurisdiction to award attorney's fees. The Court held that the trial court was authorized to order one party to pay the other's attorney's fees "from time to time" after considering the financial resources of both parties and held that when a dissolution of marriage action is terminated upon the filing of a voluntary dismissal by the petitioner, the court has the authority to enter an order assessing a reasonable attorney's fee. Id. at 1079.

The other decisions cited by Petitioner, likewise, do not deal with the interpretation of a contract similar to the insurance policy presently at issue.

Even were the issue here, as Dr. Smith suggests, purely a question of whether plaintiff's statutory attorney's fees required to be taxed by Section 768.56 were an element of costs, this Court has already ruled on this issue contrary to the present position espoused by Dr. Smith.

This Court in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), has expressly held that attor-

ney's fees taxed in accordance with Section 768.56 are a part of the costs of the malpractice proceedings. In addressing the validity of the statute, particularly against due process and equal protection claims, the Supreme Court quoted as authority the following excerpt from Justice Cardozo's decision in Life and Casualty Insurance Co. v. McCray, 291 U.S. 566 (1934):

> We assume in accordance with the assumption of the court below that payment was resisted in good faith and upon reasonable grounds. Even so, the unsuccessful defendant must pay the adversary's costs, and costs in the discretion of the lawmakers may include the fees of an attorney.

472 So.2d at 1148-49. (Emphasis added).

This Court then stated that "the assessment of attorney's fees against an unsuccessful litigant imposes no more of a penalty than other costs of proceedings which are more commonly assessed." Id. at 1149. In support of its holding that the statute was valid, this Court went on to explain that in certain causes of action, attorney's fees historically have been considered part of the litigation costs.

The decision of the Florida Supreme Court in Highway Casualty Company v. Johnston, 104 So.2d 734 (Fla. 1958), is analogous to the present case, is instructive, and buttresses the present decision of the Fourth District. In that case, Highway Casualty had issued an insurance policy with a $10,000 limit of liability. This policy, however, also contained a supplementary

benefit in the form of a promise to pay "all interest accruing after entry of the judgment until the company has paid, tendered, or deposited in Court such part of such judgment as does not exceed the limit of the company's liability thereon." Id. at 736. A $40,000 judgment was entered against the insured.

This was $30,000 over the company's liability limit. The insurer was required to pay interest on the full $40,000 rather than the $10,000 limit of liability, and the Florida Supreme Court affirmed. Highway Casualty had contended that it would do violence to common sense and logic to insist that it pay interest on the remaining $30,000 for the payment of which plaintiff can look solely to the defendant and that it was less than logical to insist that it pay interest on this $30,000 which it had not superseded, which it cannot be called upon by the plaintiff to pay, and over which it had absolutely no control, nor any obligation to pay. Id. at 735.

In affirming, the Supreme Court ruled that Highway Casualty, by its own contract, obligated itself to pay "all interest accruing after entry of judgment . . ." Id. at 736, and concluded: "This language does not appear to us to be ambiguous. However, if it were ambiguous, it should be construed against the insurer." Id. at 736.

It has often times been reiterated that when the contract is one for insurance, since it is the insurer that draws

the contract, the general rule is that the 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); Rigel v. National Casualty Company, 76 So.2d 285 (Fla. 1954).

The decision of the Fourth District in the present case should likewise be affirmed. The contract was made by the insurer and obligated it to pay. This language is not ambiguous and, even if it were, any ambiguity must be construed against Dr. Smith's insurer.

The issue to be addressed is simply a matter of contract. As suggested by the Supreme Court in Highway Casualty Company v. Johnston, the insurer could have limited its liability for certain supplemental benefits, had it so desired, as it did on other supplemental benefits. This it did not do. Id. at 735. As in Highway Casualty, "Had appellant entertained any doubt with reference to its obligation upon the subject under discussion, it could have revised the verbiage of its contract before the issuance thereof." Id. at 736. "The dilemma in which the [Dr. Smith's] carrier finds itself appears to us to be of its own making." Id. at 736.

The case of the Alaska Supreme Court in Weckman v. Houger, 464 P.2d 528, 529 n.2 (Alaska, 1970) is also instructive. The policy there obligated the insurer, as in the present case,

> [t]o pay in addition to the applicable limits of liability (a) all expenses incurred by the company, all costs taxed against the insurer in any such suit . . .

An Alaskan rule of civil procedure provided for an award of attorney's fees to the prevailing party, and the issue was whether the insurer with a policy liability limit of $10,000 was required to pay an attorney's fee award of **$30,850** based upon **a** judgment of $300,000. The court held the carrier responsible for the full fee award under the "all costs taxed" policy provision. The Alaska Supreme Court relied upon its earlier decision in Liberty Nat'l. Ins. Co. v. Eberhart, **398** P.2d **997** (Alaska, **1965),** where a carrier was again held responsible for the full award of attorney's fees and costs under an all costs provision in its policy. It held:

> The words "all costs" mean just that. They do not admit of the interpretation urged by the appellant. If appellant had wished to contract to pay only proportionate share of the costs based upon the applicable limit of liability in the policy, it easily could have used appropriate language to achieve that result. [**398** P.2d at **10001.**

In the present case, the District Court of Appeal, Fourth District, correctly held that the obligation in the present case to pay the statutory prevailing party attorney's fees awarded pursuant to Section **768.56** was properly that of Dr. Smith's insurer which specifically contracted to pay all of the costs of defending this malpractice action.

B. The Sovereign Immunity Decisions Cited by Dr. Smith are Inapplicable to the Present Case.

Dr. Smith attempts to analogize the present case to several sovereign immunity cases including Gerard v. Department of Transportation, 472 So.2d 1170 (Fla. 1985); City of Lake Worth v. Nicolas, 434 So.2d 315 (Fla. 1983); Berek v. Metropolitan Dade County, 422 So.2d 838 (Fla. 1982); City of Hallandale v. Arose, 435 So.2d 985 (Fla. 4th DCA 1983). These cases, however, are not analogous and are inapplicable to the present case. As previously explained, this is a case involving construction of contractual terms requiring payment. Also, in response to this argument, this Court should consider the Highway Casualty decision of this Court explained above.

Moreover, the waiver of sovereign immunity statute, Section 768.28, is entirely different from the provisions of Section 768.54. These statutes proceed from entirely different premises.

Article X, Section 13 of the Florida Constitution provides that provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating. In accordance with this provision, the legislature adopted Section 768.28 waiving sovereign immunity for liability for torts by the state, its agencies, or subdivisions only to the extent specified in that act. The statute sets out the parameters for waiver of sovereign immunity up to $100,000 per person

or $200,000 per incident. In Berek, the Supreme Court of Florida held that the waiver of sovereign immunity must be strictly construed and that the maximum amount of liability available to any one claimant arising out of any incident was $50,000 (the statutory amount in effect at the time of the incident in Berek).

Importantly, absent waiver of the sovereign immunity statute, the State would not be liable in tort and, therefore, the statutory maximum amount has been held to be the absolute limit of liability for the state.

Section 768.28 is an entirely different statute than Section 768.54 in nature and in language. Section 768.28 permits recovery up to a maximum amount where no right of recovery would otherwise exist absent this statute. Section 768.28 eliminates the absolute immunity which prevented recovery for existing common law torts committed by the government. Trianon Park Condominium Association, Inc. v. City of Hialeah, 468 So.2d 912 (Fla. 1985).

Section 768.54, on the other hand, limits the liability of the health care provider for damages in medical malpractice actions that, but for the statute, would otherwise exist to the full extent of all damages awarded in favor of the Plaintiffs. Rather than allowing liability where none previously existed, as is the case with the sovereign immunity statute, a health care provider's liability for medical malpractice which previously

existed is merely limited by operation of law as provided for in Section 768.54(2)(b), when a Fund member meets prerequisites to entitlement to limitation of liability set forth in Section 768.54 and discussed above.

In response to Dr. Smith's statement on page 15 of his brief that, when the Trial Court subsequently assessed attorney's fees, it entered an Order inconsistent with its own prior ruling, the Fund would point out that in its Final Judgment awarding damages to Plaintiff, the Court expressly reserved jurisdiction to assess prevailing party's attorney's fees and other taxable costs against Dr. Smith. The limitation of liability Order entered prior to Final Judgment in favor of Plaintiffs related only to damages. If, in fact, however, this Order had also included a limitation as to attorney's fees, the Trial Court retained jurisdiction to change its decision prior to the entry of Final Judgment. Strazzulla v. Hendrick, 177 So.2d 1 (Fla. 1965); Beverly Beach Properties, Inc. v. Nelson, 68 So.2d 604 (Fla. 1953), cert. denied 348 U.S. 816 (1954); State v. LoChiatto, 381 So.2d 245 (Fla. 4th DCA 1979).

C. Florida Case Law Does Not Support a Holding Contrary to the Present Decision of the Fourth District Court.

For the reasons outlined above, Florida case law does not compel the result urged by the Dr. Smith. The decision of Florida Patient's Compensation Fund v. Miller, 436 So.2d 932 (Fla. 3d DCA 1983) is factually distinguishable and not appli-

cable. That case did not involve the interpretation of a supplementary provision of an insurance policy which contractually binds the insurance company to pay Section 768.56 prevailing party attorney's fees taxed against its insured in the defense of a malpractice action.

II. SECTION 768.56 DOES NOT MANDATE THAT THE PREVAILING PARTY ATTORNEY'S FEES TAXED IN FAVOR OF PLAINTIFF AND AGAINST DR. SMITH FOR HIS INSURER'S UNSUCCESSFUL DEFENSE OF HIM AND THE FLORIDA PATIENT'S COMPENSATION FUND IN A MEDICAL MALPRACTICE ACTION BE ALLOCATED EQUITABLY BETWEEN DR. SMITH'S PRIMARY INSURER AND THE FUND.

The statutory language is clear and needs no interpretation. If the policy of insurance issued to a health care provider requires payment of attorney's fees (as is clearly indicated in the instant case), neither public policy nor statutory language would require the Florida Patient's Compensation Fund to be responsible for the payment of attorney's fees. This conclusion is supported by the language of Section 768.56 (now repealed) which speaks of taxing fees against multiple non-prevailing parties " . . . in accordance with the principles of equity."

Traditionally, principles of equity would require the expense to be distributed among the non-prevailing parties based upon the degree of fault or negligence of each of the non-prevailing parties. Lincenberg v. Issen, 318 So.2d 386 (Fla. 1975). Here there is a unique relationship between the Fund and

Dr. Smith. A defendant other than the Fund was found negligent. The Fund did nothing wrong. "Principles of equity" dictate that if any doubt exists under policy language, the health care provider's insurance carrier should pay attorney's fees. Therefore, should Section 768.56 apply, the application of general principles of equity would impose the entire cost of the prevailing party's attorney's fees on Dr. Smith, or at the very least, would require that a greater portion of this award be borne by Dr. Smith.

III. AN AWARD OF $567.85 PER HOUR FOR ATTORNEY'S FEES IS GROSSLY EXCESSIVE AND CONSTITUTES AN ABUSE OF DISCRETION.

Respondent agrees completely with Petitioner's argument on this issue. The Trial Court abused its discretion in awarding grossly excessive attorney's fees.

CONCLUSION

For the reasons and pursuant to the authority set forth herein, the decision of the District Court of Appeal should be approved or affirmed with regard to its determination that the payment of attorney's fees taxed in favor of Plaintiff's attorneys pursuant to Section 768.56 are to be paid by Dr. Smith's insurer, not the Florida Patient's Compensation Fund.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Breif on the Merits has been forwarded by U.S. Mail this 21st day of December, 1988 to: Melanie G. May, Esq., Bunnell and Woulfe, P.A., 1080 S.E. 3rd Avenue, Ft. Lauderdale, Florida 33316; Ed Perse, Esq., Horton, Perse & Ginsburg, 410 Concord Building, 66 W. Flagler Street, Miami, Florida 33130; and K.P. Jones, Esq., Jones, Zaifert & Steinberg, 633 S. Andrews Avenue, #201, Ft. Lauderdale, Florida 33301.

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