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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

PETITIONERS ROBERT B. SMITH, M.D., and ROBERT B. SMITH, M.D., P.A., REPLY BRIEF ON THE MERITS

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STATEMENT OF THE CASE & FACTS

The petitioners, Robert B. Smith, M.D., and Robert B. Smith, M.D., P.A., object to the facts contained on page 9 of the respondent Sitomer's Answer Brief. The petitioners further object to the attachment of letters concerning the settlement of the underlying judgment in the appendix. These letters are not part of the record and should not have been made a part of Sitomer's appendix. The appendix should be stricken and page 9 of Sitomer's brief ignored. However, if this Court considers page 9 of Sitomer's brief and her appendix, the petitioners suggest that Sitomer's argument must fail.

The beliefs of Sitomer's counsel are not relevant. If Sitomer's counsel "understood" that the quantum of the award would not be challenged, they are alone in that understanding. Neither the petitioners nor the FPCF had that understanding. It is an understanding unsupported by the letters found in Sitomer's appendix. In fact, a review of those letters indicates nothing more than a settlement of the underlying judgment. As set forth in the June 21, 1988, letter from the undersigned to Sitomer's counsel: "The issue of attorney's fees will remain at issue during the pendency of the proceedings in the Supreme Court of Florida." (See Sitomer's Appendix at 4.)

The petitioners also object to the suggestion that the Florida Patients Compensation Fund's [FPCF] voluntary dismissal of its petition indicates that the FPCF did not intend to raise the amount of attorney's fees awarded as an issue. Nothing could

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be further from the truth. The voluntary dismissal took place only because the FPCF agreed not to pursue other substantive issues involving the underlying judgment as part of the settlement of the underlying judgement. The FPCF never abandoned the quantum of fees issue.

Any decision made by Sitomer's counsel not to file a jurisdictional brief was unilateral. To suggest that Sitomer was misled into making such a decision is disingenuous. No one ever agreed to abandon the quantum issue.

The undersigned has been authorized by counsel for the FPCF to inform this Court that it joins in the petitioners' response in this regard.

SUMMARY OF THE ARGUMENT

The attorney's fees judgment against the petitioners should be reversed. The cases cited by the FPCF do not "hold" that attorney's fees are costs. Indeed, attorney's fees are not costs. Because of the distinction between the two terms, the carrier's provision for the payment of costs taxed against the insured should not be construed to provide for the payment of an attorney's fees award.

The underlying policy is not ambiguous. It simply does not expressly provide coverage for attorney's fees. Without such an express provision, the policy should not be construed beyond its intended purpose.

The trial court's award of fees in this case constitutes an abuse of discretion. Perhaps Sitomer's belief that this issue would not be addressed arises from her concern that the trial court's decision will not stand. It should not stand for the reasons set forth in the petitioner's initial brief.

ARGUMENT

I. THE FOURTH DISTRICT COURT OF APPEAL ERRED IN RULING THAT THE FINAL JUDGMENT FOR ATTORNEY'S FEES BE ENTERED AGAINST ROBERT B. SMITH, M.D., AND HIS P.A., IN EXCESS OF THEIR STATUTORY LIMITATION OF LIABILITY.[1]

The FPCF suggests that Dr. Smith's underlying coverage exceeded the limits of liability specified in the policy: $100,000. (See FPCF's Brief at 11). The petitioners disagree. The supplementary payments provision of the underlying policy provides for the payment of expenses and costs taxed against the insured, Dr. Smith. It does not increase Dr. Smith's coverage limits. The petitioners agree that the provision providing for the payment of costs taxed is "in addition" to the maximum limits of coverage provided. However, this does not mean that the coverage limits are increased.

The petitioners also agree with the FPCF's statement that "[i]f 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." (See FPCF's Brief at 14). When this principle is applied to the insurance policy in this case, however, there can be no doubt that the policy does not expressly provide for the payment of

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[1]Since Sitomer has not taken a position on this issue, the petitioners argument addresses solely the FPCF's arguments.

attorney's fees. Without such an expression of intent, the FPCF cannot read into the policy a provision that simply is not there.

The FPCF relies on the Third District Court of Appeal's decision in Williams v. Spiegel, 512 So.2d **1080** (Fla. 3rd DCA **1987).** Williams is presently under review by this Court. Nevertheless, unlike the policy in Williams, the present policy contains an additional term "taxed" which distinguishes it from the policy under review in Williams.

Williams also involved an appeal from an order limiting the health care provider's liability. There was no such appeal taken in this case. For these reasons, even if this Court decides Williams favorably for the FPCF, a different result would be mandated in this case.

The FPCF next cites Lower Keys Hospital District v. Littlejohn, 520 So.2d 56 (Fla. 3rd DCA), review denied, 531 So.2d 1352 (Fla. **1988).** In Littlejohn, the Third District Court of Appeal held that the defendant hospital was responsible for attorney's fees "because it, admittedly, has purchased liability insurance coverage for the attorney's fee award in issue. . . ." Id. at 57. The opinion does not include the policy language under review. Therefore, Littlejohn is of little value to this Court's determination of the issue in this case.

The issue in this case stripped to its "bottom-line" is whether attorney's fees are taxable "costs" as the term is used in a supplementary payments provision of an insurance policy. The petitioners respectfully suggest the answer to that question

is **NO.** No Florida court has yet "held" that attorney's fees are "costs". While courts have referred to attorney's fees as costs, there simply has been no "holding" in that regard. Indeed, there should be no holding equating the two terms. They simply are not the same.

The FPCF states that this Court "has expressly held that attorney's fees taxed in accordance with Section **768.56** are a part of the costs of the malpractice proceedings." (See FPCF's Brief at **18-19.)** Petitioners view this Court's statement differently. This Court may have made the statement, but the petitioners did not read it as a holding of this Court.

Similarly, the FPCF's reliance on Life and Casualty Insurance Co. v. McCray, **291** U.S. **566 (1934)** as involving a "holding" on this issue is misplaced. Rather, the United States Supreme Court's statement suggests that costs, in the discretion of the law-makers, may include attorney's fees. However, the Florida Legislature did not make such a decision in this instance. Thus, McCray does not provide the authority sought by the FPCF.

While this Court may have held that a supplementary benefit for the payment of interest allowed for the entry of a judgment against the carrier in excess of the stated limits of liability, it is significant to note that the policy expressly provided for the payment of interest. Highway Casualty Co. v. Johnston, **104** So.2d **734** (Fla. **1958).** In this case, the policy does not expressly provide for the payment of "attorney's fees".

It merely provides for the payment of costs taxed, which are simply not the same. The carrier in Johnston obligated itself to pay interest on the judgment by expressly providing for such a payment in its policy. Dr. Smith's carrier did not undertake a similar obligation. Without having done so, it cannot now be held liable.

The petitioners acknowledge the general principle that ambiguities are construed against the drafter of a document. (See, e.g., Stuwesant Insurance Co. v Butler, 314 So.2d 567 (Fla. 1975); Rigel v. National Casualty Co., 76 So.2d 285 (Fla. 1954), cited in FPCF's Brief at page 21.) However, there is no ambiguity in this case. There is only an allegation of ambiguity in an attempt to construe a policy beyond that which it intended.

When an insurance contract is clear and unambiguous, the court must give effect to the contract as it is written. State Farm Fire & Casualty Co. v. Oliveras, 441 So.2d 175 (4th DCA 1983), petition for review denied, 451 So.2d 849 (Fla. 1984).

> [J]ust because insurance contracts are complex instruments, the fact that analysis is required for one fully to comprehend them does not mean the contracts are ambiguous. The rule that ambiguities in insurance contracts are to be construed in favor of the insured, is not a license for our raiding of the deep pocket. That rule simply does not apply where the language used in the policy is clear and unambiguous.

Id. at 176 (citation omitted).

There is no ambiguity in this case. There is merely a suggestion that the provision is ambiguous.. Such a suggestion should not create coverage where it does not exist. Pursuant to

Fla. Stat. §768.54, the FPCF is responsible for attorney's fees in this case. It should be held accountable.[2]

The FPCF next cites Weckman v. Houger, 464 P.2d 528 (Alaska 1970). This case is not "instructive". In Weckman, the carrier's policy contained limits of $10,000. The court entered a judgment for $300,000 and an attorney's fees award of approximately $30,000. The issue before the court was whether the carrier was responsible for a pro rata portion of the fee award or the total amount. The court did not address the initial question of whether the carrier had any responsibility for attorney's fees. Perhaps that is due to the carrier's failure to raise the issue. Regardless, the court determined the carrier was responsible for the entire fee award, not just a pro rata portion. The opinion, however, provides no guidance on the initial issue of "who" is responsible. It is also important to note that there was no substitute for the FPCF in Weckman.

For the reasons set forth in the petitioners' initial brief on the merits, the judgment for attorney's fees against the petitioners should be vacated and the FPCF held responsible for the attorney's fees judgment.

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[2]If there is an ambiguity in the policy, then such a finding would have required testimony from the carrier regarding its intent in drafting the provision and allowed evidence concerning the assessment of premiums based upon the carrier's obligation for payment under the terms of the policy. There have been no evidentiary hearings on these issues since the carrier was not made a party to this action.

11. SECTION 768.56 MANDATES THAT THE ATTORNEY'S FEES AWARD BE ALLOCATED EQUITABLY.

The petitioners rely on their initial brief in response to the FPCF's argument.

111. AN AWARD OF $567.85 PER HOUR FOR ATTORNEY'S FEES IS GROSSLYEXCESSIVE AND CONSTITUTES AN ABUSE OF DISCRETION.

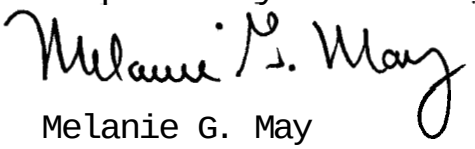
The petitioners acknowledge that the trial court's findings of fact bear a presumption of correctness. (See Oceanic International Corp. v. Lantana Boat Yard, 402 So.2d 507 (Fla. 4th DCA 1981), cited by Sitomer.) However, when the trial court abuses its discretion, its judgment must be vacated.[3]

[3]Since the FPCF is aligned with the petitioners position on this issue, this response is directed solely to Sitomer's brief.

CONCLUSION

For the foregoing reasons, the petitioners, Robert B. Smith, M.D. and Robert B. Smith, M.D., P.A., respectfully request this Court to quash the decision of the Fourth District Court of Appeal and hold that only the Florida Patient's Compensation Fund is responsible for the attorney's fees judgment in this case. In the alternative, the petitioners respectfully request this Court to remand this case for an allocation of the attorney's fees award between the Florida Patient's Compensation Fund and Robert B. Smith, M.D., and his P.A. In addition, the petitioners respectfully request this Court to reduce the award or remand the case to the trial court to reduce the award, pursuant to the guidelines in Rowe.

Respectfully submitted,



Melanie G. May

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. mail this 17th day of January, 1989, to: Marguerite H. Davis, Esquire, KATZ, KUTTER, HAIGLER, ALDERMAN, EATON & DAVIS, P.A., 315 S. Calhoun Street, #800, Tallahassee, Florida 32301; Ed Perse, Esquire, HORTON, PERSE & GINSBURG, 410 Concord Building, 66 W. Flagler Street, Miami, Florida 33130; K.P. Jones, Esquire, JONES, ZAIFERT & STEINBERG, 633 S. Andrews Avenue, #201, Fort Lauderdale, Florida 33301.

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