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IN THE SUPREME COURT OF FLORIDA

CASE NO: 74,407
4TH DCA CASE NO: 87-1820 and 87-2555

FLORIDA PATIENT'S COMPENSATION FUND and MAX W. WILSON, M.D., and WILSON, MEIGS, MASTROLE and SUTHERLAND, M.D., P.A.,

Petitioners,

vs.

DORIS WASSER, as Personal Representative of the Estate of JACOB WASSER,

Respondent,

PETITIONER (FPCF'S) INITIAL BRIEF ON THE MERITS

Submitted by:

Melanie G. May, Esquire
BUNNELL and WOULFE, P.A.
1080 S.E. 3rd Avenue
Fort Lauderdale, Florida 33316
(305) 761-8600

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BUNNELL AND WOULFE, P.A., P. O. DRAWER 22988, FORT LAUDERDALE, FLORIDA 33335 • (305) 761-8600

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STATEMENT OF THE CASE & FACTS

Section 768.56's application to the Florida Patient's Compensation Fund [FPCF] and yet another variation of a familiar theme provide the variety of issues for this Court's review. The plaintiff, Doris Wasser, successfully prosecuted a claim against Max W. Wilson, M.D., and Wilson, Meigs, Mastrole and Sutherland, M.D., P.A. While the FPCF was a named defendant, the verdict did not exceed the limits of Dr. Wilson's coverage. Nevertheless, the trial court entered a judgment against the FPCF. The trial court awarded attorney's fees against the defendants jointly. The petitioners, FPCF, Dr. Wilson and his P.A., seek review of the attorney's fees award. (R. at 1068-70).

The complaint alleged that Dr. Wilson had been negligent in his care and treatment of the plaintiff's decedent, Jacob B. Wasser, from March 22, 1978, through the end of February, 1985. (R. at 1068-70). The plaintiff alleged that as a result of the negligence, Jacob Wasser died on June 28, 1985. The health care provider and his P.A. denied the allegations of negligence. (R. at 1071-72).

The FPCF admitted that Dr. Wilson and his P.A. were members of the FPCF at "sometime, however such membership [was] limited by the terms and conditions of the applicable Florida Statutes and the contract,'' and further asserted as a defense "all such conditions, limitations, limitations of liability, effective dates of coverage and exclusions." (R. at 1078-79). The parties entered into a joint pre-trial stipulation in March,

1987. Under section 111, "Statement of Disputed Issues of Law and Facts," the parties set forth the issue of causation. Trial commenced on April 13, 1987. The jury returned a verdict in the amount of four thousand, three hundred sixty-seven dollars and five cents ($4,736.05), for Mr. Wasser's estate and ninety thousand dollars ($90,000) for Doris Wasser. (R. at 995).

Subsequently, Wilson and his P.A. filed various post-trial motions. (R. at 1093-97). The FPCF filed a motion for a new trial and a motion to vacate the final judgment. (R. at 1098-99). The plaintiff filed a motion to tax attorney's fees and costs. (R. at 1105-07).

At the hearing on the post-trial motions, the FPCF argued that the underlying judgment did not exceed the health care provider's insurance coverage of one hundred thousand dollars ($100,000). Therefore, the underlying judgment should not be entered against the FPCF. (R. at 1049). With regard to the attorney's fees judgment, the FPCF argued that the plaintiff was not a "prevailing party" as to the FPCF and that the health care provider's underlying insurance policy provided coverage for attorney's fees through its supplementary payments provision.

At the hearing on the motion for attorney's fees, the plaintiff called Richard R. Kirsch, Esquire, as an expert witness. He believed that two hundred and sixty-six (226) hours were reasonably spent in preparation and trial of the case and that two-hundred and fifty dollars ($250) an hour was a reasonable rate. (R. at 1009).

By multiplying 226 hours by $250 per hour, he arrived at a figure of fifty-six thousand, five hundred dollars ($56,500). (R. at 1010). He opined that a contingency risk multiplier of 2.5 should be applied. By multiplying the 2.5 contingency risk factor by $56,500 he arrived at a reasonable attorney's fee of one hundred forty-one thousand, two hundred and fifty dollars ($141,250). (R. at 1013).

The trial court denied **FPCF'S** motions for new trial and to vacate the final judgment. (R. at 1114). On the same day, the trial court entered an amended final judgment, which imposed liability for the underlying judgment, costs, and attorney's fees jointly against Dr. Wilson, his **P.A.,** and the **FPCF.** The court awarded attorney's fees in the amount of one hundred and one thousand, seven hundred dollars ($101,700). This figure was achieved by multiplying 226 hours by $200/hour to obtain a lodestar of forty-five thousand, two hundred dollars ($45,200) and then multiplying it again by a contingency risk multiplier of *2.25.* The judgment also contained a cost award of seven thousand, seven hundred fifty-three dollars and eighty cents ($7,753.80).[1]

The **FPCF** filed a motion to alter or amend the amended judgment requesting the court to vacate the underlying judgment and the award of attorney's fees and costs against the **FPCF. (R.**

[1] Dr. Wilson and his **P.A.** have paid the underlying judgment, costs, and interest and a partial satisfaction of judgment has been executed. The **FPCF** did not participate in this settlement.

at **1119-20).** The trial court denied the motion. (R. at **1133-34** and **1138-39).**

During the trial, the FPCF had attempted to participate in a limited capacity. The legal issue of coverage had been raised in its answer. The factual issue of causation had been raised in the pre-trial stipulation. Counsel for the FPCF requested the court to allow its participation on the factual causation issue so that the court could then rule on the legal issue of coverage.

At the beginning of the trial, the FPCF advised the court of its position.

> Mr. Woulfe: I represent the Florida Patient's Compensation Fund. I have a request to make to the court, so we may end up with a total of six strikes on each side, depending on how you rule. I represent the Fund. The Fund covered through the end of June **'83.**
>
> The allegations in the complaint alleged negligence on the part of Dr. Wilson, I believe, **1978, '79,** right on through until **1984,** and **'85.** The patient died in **1985.** There has been expert testimony from the Plaintiff that has indicated that, if the diagnosis had been made and treatment started before the end of the year **1983,** that the man would not have died when he died. My coverage ended June **30, 1983.**
>
> I have got a verdict form here that has a question that I would like to have the jury answer [T]he question is, "within a reasonable degree of medical

> probability, when do you find that the last time that the man could have been diagnosed and treated, and the result would have been different."
>
> If the court allows that question to go to the jury, then I am going to stay in the case and participate. If the court does not, then I have got a much more difficult question, because I am not sure actually what I need to do in order to preserve that issue.
>
> But if the court is not going to instruct the jury, to give that question, then I am going to have limited or no participation at all.

(See Trial Transcript; R. at 5-6).

Both the plaintiffs' and the defendants' attorneys objected to the FPCF'S participation. They both argued that the issue had not been properly raised.

> Now, I am not representing to the Court that Mr. Woulfe did not ever tell me during the course of this litigation, that they may be claiming that at some point.
>
> What I am telling you is that it is not an issue that we had stipulated to, nor discussed was going to be tried at this particular time . . . .

(R. at 11). The trial court denied the FPCF'S request to participate in the trial. (R. at 30).

Throughout the trial, the FPCF proffered testimony, which revealed that if Mr. Wasser had been diagnosed and treated in 1983, he would have had a better than 50% chance of survival. (R. at 291). However, if his condition was not treated or

diagnosed until **1984,** he would **not** have had a better than 50% chance of survival. Id. The FPCF elicited similar testimony from Dr. Henry, the plaintiffs' expert. (R. at **385).** On cross-examination of Dr. Struhl, the FPCF elicited his opinion **that it** was more probable than not that if the cancer had been treated by surgery anytime in **1981, 1982,** or **1983,** Mr. Wasser would not have died in June, **1985.** Id. at **483.**

At the conclusion of the testimony, the FPCF advised the trial court that if allowed, it would have presented additional testimony.

> It would come from the representative of the Florida Patient's Compensation Fund, and I am not going to do it in question and answer form. I am just going to give a statement of what it would be, and the statement would be this.
>
> That Dr. Wilson and his P.A. had, and were members of the Patient's Compensation Fund up until the end of . . . June **30, 1982,** that Dr. Wilson himself had his membership continued on to June **30, 1983,** and that is it; and I think also the statute very clearly points out that after June **30, 1983,** that the Fund discontinued writing any coverage, has not written any coverage since June 30th of **1983.**

(R. at **910).** The FPCF then moved for a directed verdict based on causation. "But for" the negligence that occurred after June **30, 1983,** after the FPCF coverage lapsed, Mr. Wasser died. Any negligence that occurred prior to that time had no causal connection to Mr. Wasser's death. Therefore, the legal cause of his death occurred after June **30, 1983,** when the FPCF did not provide coverage. (R. at **913).**

The court denied the motion. (R. at 913-14). The special interrogatory requested by the FPCF was not submitted to the jury. The FPCF was not permitted to receive a jury finding on the issue of causation or obtain a legal ruling on the coverage issue.

From the various post-trial orders and the amended judgment, the FPCF appealed. The Fourth District Court of Appeal identified the "main issue" as "whether the Fund or Wilson's primary carrier is responsible for Wasser's attorney's fees." Relying upon Florida Patient's Compensation Fund v. Sitomer, 524 So.2d 671 (Fla. 4th DCA 1988), the Fourth District held "that the language of the health care provider's underlying coverage was 'sufficient to include the payment of attorney's fees . . . .'" [2] The Fourth District held the health care provider's underlying carrier responsible for the attorney's fees award.

The Fourth District affirmed the trial court's finding that the "fee agreement" provided for an award of a reasonable attorney's fee and was not limited by the percentage agreement. The Fourth District did not address the FPCF'S inability to participate at trial. The Fourth District granted rehearing to correct a mis-statement in the original opinion, but did not change the substantive outcome of the case.

From this decision, the underlying health care provider and his P.A. filed a notice to invoke the discretionary

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[2] The Sitomer decision is currently pending review in this Court.

jurisdiction of this court. The Florida Patient's Compensation Fund joined in the notice to invoke. [3]

[3] If the Fourth District's decision is affirmed in all respects, the FPCF has no interest in the issues. However, because of cases pending in this Court at the time the Notice to Invoke was due concerning the responsibility for the attorney's fees award, the FPCF joined in the notice. Should this Court reverse the Fourth District on the issue of responsibility, then the FPCF'S interest in the remaining issues is renewed.

SUMMARY OF THE ARGUMENT

Several errors, which occurred post-trial, mandate a reversal of the Fourth District Court of Appeal's decision and the trial court's orders of June 9, 1987, and August 27, 1987. Because the verdict in the case did not exceed the limits of the health care provider's underlying coverage, no underlying judgment should have been entered against the FPCF. The trial court erred when it did so and the Fourth District compounded the error by affirming.

Without an underlying judgment against the FPCF, the plaintiff is not a "prevailing party," pursuant to Fla. Stat. 5768.56. Because the plaintiff is not a "prevailing party" against the FPCF, she is not entitled to attorney's fees. Quijano v. Florida Patient's Compensation Fund, 520 So.2d 656 (Fla. 3rd DCA 1988). Indeed, the FPCF should be entitled fees against the plaintiff. The trial court erred when it entered the attorney's fees judgment against the FPCF. The Fourth District erred when it affirmed the judgment.

Regardless of the "prevailing party" issue, the judgment for attorney's fees must be vacated for an additional reason. The health care provider's underlying policy contains a supplementary payments provision. The supplementary payments provision provides for the payment of "all costs taxed." Therefore, the attorney's fees "are payable under the provision of the health care provider's liability insurance coverage...." Florida Patient's Compensation Fund v. Bouchoc, 514 So.2d 52, 54

(Fla. 1987). The Fourth District Court of Appeals' decision should be affirmed on this issue.

The decision should be reversed, however, on the "amount" of fees issue. The award should be reduced to the percentage called for under the plaintiff's fee agreement.

The trial court improperly prohibited the FPCF from presenting evidence and argument on its coverage issue. The factual issue of causation was raised in the pre-trial stipulation. The legal issue of coverage had been raised in the FPCF's answer. The FPCF should have been permitted to present its case at trial. The trial court's error requires a new trial limited to the coverage issue if the FPCF is held liable for attorney's fees.

ARGUMENT

I. THE TRIAL COURT ERRED BY ENTERING A FINAL JUDGMENT AGAINST THE FPCF WHEN THE VERDICT FAILED TO EXCEED THE LIMITS OF THE HEALTH CARE PROVIDER'S UNDERLYING INSURANCE POLICY.

Section 768.54 provides in pertinent part:

> (b) Whenever a claim covered under sub-section (3) results in a settlement or judgment against a health care provider, the Fund shall pay to the extent of its coverage if the health care provider has paid the fees and any assessments required pursuant to sub-section (3) for the year in which the incident occurred for which the claim is filed, provides an adequate defense for the Fund, and pays the initial amount of the claim up to the applicable amount set forth in paragraph (f) 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.

Fla. Stat. §768.54(b)(1983). Because the judgment in this case did not exceed the maximum limit of underlying coverage, no judgment should have been entered against the FPCF.

In this case, the health care provider maintained underlying coverage of one hundred thousand dollars ($100,000), plus a supplementary payments provision. (**See** copy of policy attached to notice of filing, dated March 25, 1988). Under 5768.54, the FPCF did not become a responsible party until the underlying coverage was exhausted. The judgment of ninety-four thousand, three hundred sixty-seven dollars and five cents ($94,367.05) did not exhaust the underlying coverage. The trial

court erred, therefore, in entering a judgment against the FPCF. The trial court's orders of June 9, 1987, and August 27, 1987, as well as the Fourth District Court's opinion should be reversed in this regard.

11. THE TRIAL COURT ERRED BY ASSESSING ATTORNEY'S FEES AGAINST THE FPCF WHEN THE PLAINTIFF WAS NOT A "PREVAILING PARTY" AGAINST THE FPCF.

Section 768.56 of the Florida Statutes provides:

> Except as otherwise provided by law, the court shall award a reasonable attorney's fee to the prevailing party in any civil action, which involves a claim for damages by reason of injury, death, or monetary loss on account of alleged malpractice by any medical or osteopathic physician, podiatrist, hospital or health maintenance organization; however, attorney's fees shall not be awarded against a party who is insolvent or poverty-stricken.

Fla. Stat. S768.56 (1986) (emphasis added). The statute requires the existence of a "prevailing party" before a fee may be awarded. Because the plaintiff was not a "prevailing.party" against the FPCF, the trial court erred in entering an attorney's fees judgment against it. Quijano v. Florida Patient's Compensation Fund, 520 So.2d 656 (Fla. 3rd DCA 1988).

In Quijano, the Third District acknowledged that the FPCF may be a "prevailing party" regardless of the merits of the negligence action against the health care provider. In that case, the FPCF prevailed because none of the health care providers were members of the Fund. The FPCF prevailed in the present case because the verdict failed to exhaust the limits of

the health care provider's underlying coverage. The plaintiff simply did not satisfy the statutory prerequisite of being a "prevailing party."

The FPCF is a statutory creature. The **1983** version of the statute specifically provided that the FPCF is responsible for paying to the extent of its coverage **only** after the health care provider has paid the fees and assessments for the year, provided an adequate defense, and paid the initial amount of the claim up to the "maximum limit of the underlying coverage. . . ." Fla. Stat. **§768.54(b) (1983).**

In this case, the underlying coverage was one hundred thousand dollars **($100,000)** plus items covered by the supplementary payments provision. Because the verdict did not exceed the applicable amount of one hundred thousand dollars **($100,000)** "plus", the FPCF'S coverage never took effect. The plaintiff was, therefore, never a "prevailing party" with regard to the FPCF. For this reason, the trial court erred when it entered an attorney's fees judgment against the FPCF. The orders denying the FPCF'S motion to vacate should be reversed as well as the Fourth District Court of Appeal's decision, which affirmed these orders.

III. THE HEALTH CARE PROVIDER'S UNDERLYING INSURANCE CARRIER IS RESPONSIBLE FOR THE ATTORNEY'S FEES AWARD.

A. Section 768.54 Mandates That Dr. Wilson Is Responsible For The Attorney's Fees Taxed In This Case.

Section 768.54 (2)(b) provides for a limitation of liability to the health care provider if certain prerequisites are met. Those prerequisites include the payment of a required fee by the health care provider, an adequate defense for the FPCF, and the payment of at least one hundred thousand dollars ($100,000) "or the maximum limit of the underlying coverage maintained by the health care provider. . . whichever is greater. . . ." The limitation on liability exists only after the health care provider exhausts its underlying coverage. The FPCF is only liable for amounts that exceed one hundred thousand dollars ($100,000), whichever is sreater. In this case, the maximum coverage exceeded one hundred thousand dollars ($100,000) and included coverage for attorney's fees awarded in this case.

The policy in this case provides supplementary coverage for "all costs taxed" in defending a medical malpractice action. These costs include statutory attorney's fees "taxed against the non-prevailing health care provider member." The FPCF is not liable for the prevailing party's attorney's fees because the underlying coverage agreement expressly provided that in addition to the applicable limits of liability, the carrier would pay "all costs taxed."

The health care provider's underlying coverage was maintained with the North Broward Hospital District Active Medical Staff Self-Insurance Trust Fund [underlying carrier]. The coverage agreement provided for one hundred thousand dollars ($100,000) in liability coverage plus "supplementary payments.'' The supplementary payments provision provided:

> 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 has 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. . . .

The supplementary payments provision provided for the underlying carrier to pay "all costs taxed" against the health care provider. "Costs" in the context of this policy includes attorney's fees statutorily required to be "taxed" against the health care provider.

In Florida Patient's Compensation Fund v. Bouchoc, 514 So.2d 52 (Fla. 1987), this Court found that the FPCF, not the health care provider, is generally liable for attorney's fees in a medical malpractice action. However, when the health care provider's underlying insurance policy provides for the payment of attorney's fees, the general rule does not apply. As this Court noted:

> 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 attorney's 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 at 52 (emphasis supplied). If a health care provider has insurance coverage for the payment of attorney's fees, then section 768.54(2)(b) requires payment by the insurer of that provider.

This Court's recent decision in Spiegel v. Williams, 545 So.2d 1360 (Fla. 1989) is analogous to, but not dispositive of, the present case. In Spiegel, this Court held that the following language did not provide for the payment of attorney's fees.

> We'll pay all costs of defending a suit, including interest on that part of any judgment that doesn't exceed the limit of your coverage.

The language in the present policy is significantly different. The policy at issue provides for the underlying carrier to pay "all costs taxed" against the named insured. The attorney's fees award in this instance was "taxed." Therefore, Dr, Wilson, not the FPCF, is responsible for the payment of the attorney's fees award.

The FPCF is cognizant of this Court's reasoning in Spiegel. And, while section 768.56 may not speak in terms of

costs, it does require the Court to "tax" attorney's fees against the non-prevailing party.

As the dissent noted in Spiegel, the policy did not restrict itself to the payment of defense costs, it included the payment of interest, bond premiums, and the like. Just as judgment interest is not strictly a "cost" incurred in the defense, but is covered by the policy, so too is an award of prevailing party attorney's fees when "taxed." It is a cost "taxed" as a result of an unsuccessful defense. The policy in this case provides coverage for the attorney's fees award.

B. The Underlying Carrier's Policy Provides For Payment Of "All Costs Taxed," Including Attorney's Fees.

When Dr. Wilson purchased his liability insurance, section **768.56** required the taxation of attorney's fees in favor of the prevailing party. The insurance contract expressly provided that the health care provider's insured shall pay "all costs **taxed."** The statutory attorney's fees were a part of the "costs taxed" in the suit defended by Dr. Wilson's underlying carrier.

Because the underlying carrier selected the defense attorney and controlled the defense, it is only logical to require the entity which controlled the defense to be responsible for fees generated by its controlled defense. The FPCF did not control the defense. In fact, the FPCF was not permitted to participate in the trial. It should not now be responsible for attorney's fees over which it had no control.

The prevailing party's attorney's fees are costs of defending and by specific statutory language are "taxed" against the non-prevailing party. By statute, the health care provider is required to defend the FPCF. Fla. Stat. §768.54(2)(b). It is, therefore, responsible for the attorney's fees "taxed."

It is axiomatic that ambiguous policy language will be construed against the drafter. Ambiguous policy terms are read broadly to provide coverage whenever feasible. Stuyvesant Insurance Co. v. Butler, 314 So.2d 567 (Fla. 1975); Riegel v. National Casualty Co., 76 So.2d 285 (Fla. 1954). The ambiguous, undefined term "all costs taxed" should be read broadly to include attorney's fees and be construed against the underlying carrier.

Section 768.56 requires that attorney's fees be taxed against the non-prevailing party. Section 768.56 uses the term "taxed" in discussing fees assessed against non-prevailing parties. In fact, the statute uses the term "tax" once and "taxed" twice: "tax such fees", "taxed against such non-prevailing party" and "shall not be taxed." The policy uses the term "all costs taxed." Under a broad construction of the undefined term "costs taxed," the attorney's fees in this case fall within the coverage of the underlying carrier's policy.

There was no limitation in the policy concerning the costs that would be taxed in defending the lawsuit. Had the insurer chosen to do so, the words "all costs taxed" could have been defined to exclude attorney's fees. But, the underlying

carrier failed to do so. It is now responsible for the attorney's fees.

As the Third District previously 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,' . . . there is very good reason why we should accord the term its more inclusive meaning.

Williams v. Spiegel, 512 So.2d 1080 (Fla. 3rd DCA 1987), Quashed, 545 So.2d 1360 (Fla. 1989). See also: The Lower Keys Hospital District v. Littlejohn, 520 So.2d 56 (Fla. 3rd DCA), review denied, 531 So.2d 1352 (1988) (where insurance policy provides for the payment of all costs of defense, the health care provider and its insurer are liable for the attorney's fees award).

This Court in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), expressly stated that attorney's fees "taxed" in accordance with section 768.56 are a part of the costs of the malpractice proceedings. In addressing the validity of this statute, this Court quoted an excerpt from Justice Cardozo's opinion 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 cost 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. Attorney's fees historically have been considered part of the litigation costs. The fees in this case are "costs taxed" as part of the litigation. The underlying carrier is responsible for them.

The decision of this Court in Highway Casualty Co. v Johnston, 104 So.2d 734 (Fla. 1958) supports the underlying carrier's responsibility for payment of attorney's fees. In Highway Casualty, the carrier issued an insurance policy with a $10,000 liability limit. The policy contained a supplementary benefit provision for payment of "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.

The carrier insisted that it was limited to pay interest on only $10,000 of the judgment and that the interest on the remaining $30,000 was not its responsibility. This Court ruled that the carrier, by its own conduct, obligated itself to pay "all interest accruing after entry of judgment . . . ." Id. at 736.

The same contract law should be applied in this case. As suggested by this Court in Highway Casualty, the insurer could have limited its liability for certain supplemental benefits, but it failed to do so. Id. at 735. "The dilemma in which [Dr. Wilson's] carrier finds itself appears to us to be one of its own making." Id. at 736.

In Weckman v. Houger, 464 P.2d 528, 529 n.2 (Alaska 1970), the Alaska Supreme Court encountered a similar issue. The policy in Weckman obligated the insured "[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 . . . . " Id. An Alaska rule of civil procedure provided for an award of attorney's fees to the prevailing party as costs.

The issue was whether the policy's liability limit of $10,000 precluded the carrier from paying 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 under the "all costs taxed" policy provision.

In deciding the issue, the Alaska Supreme Court relied upon an earlier decision. Liberty National Insurance Co. v. Eberhart, 398 P.2d 997 (Alaska 1965). In Eberhart, a carrier was held responsible for attorney's fees and costs under an all costs provision in its policy.

> The words "all costs" mean just that. They do not admit of the interpretation urged by the appellant. If the appellant had wished to contract to pay only a 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 1000.

The Fourth District correctly held that the obligation to pay the attorney's fees awarded, pursuant to section 768.56, was properly that of Dr. Wilson's underlying carrier. This holding should be affirmed.

IV. THE TRIAL COURT ERRED WHEN IT FAILED TO LIMIT THE ATTORNEY'S FEES AWARD TO THE PERCENTAGE FEE AGREEMENT BETWEEN THE PLAINTIFF AND HER ATTORNEYS.

In August, 1985, this Court rendered its decision in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985). This Court articulated the method by which to compute a reasonable attorney's fee. This Court recognized the "impact of attorney's fees on the credibility of the court system and the legal profession . . . . "

> There is but little analogy between the elements that control the determination of a lawyer's fee and those which determine the compensation of skilled craftsmen in other fields. Lawyers are officers of the Court. The Court is an instrument of society for the administration of justice. Justice should be administered economically, efficiently; and expeditiously. The attorney's fee is, therefore, a very important factor in the administration of justice, and if it is not determined with proper relation to that fact it results in a species of social malpractice that undermines the confidence of the public and the bench and bar. It does more than that. It brings the Court into dispute and destroys its power to perform adequately the function of its creation.

Id. at **1149-50** (citing Baruch v. Giblin, **122** Fla. **59, 63, 165 So. 831, 833 (1985).**

The trial court partially followed this Court's instructions in determining a reasonable attorney's fee in this case. The Court determined the number of hours expended **(226)** and multiplied them by an hourly rate **($200).** The Court then multiplied the "lodestar" by a contingency risk factor **(2.25).** The Court erred, however, when it failed to recognize the limitation or "cap" placed upon an attorney's fee by this Court in Rowe.

> [B]ecause the party paying the fee has not participated in the fee arrangement between the prevailing party and that party's attorney, the arrangement must not control the fee award. "Were the rule otherwise, Courts would find themselves as instruments of enforcement, as against third parties, of excessive fee contracts." **Further, and in no case should the Court-awarded fee exceed the fee agreement reached by the attorney and its client.**

Id. at **1151** (emphasis added).

This Court provided not only the method of determining a reasonable attorney's fee, but also provided a limitation on all fee awards. In no event should an attorney's fee award exceed the amount specified in the contingency fee agreement between the attorney and his client. The trial court erred as did the Fourth District when it failed to adhere to this "cap."

The agreement in this case specifically provided for an award of thirty percent (30%) "[i]n the event suit or demand for arbitration is filed." The trial resulted in a judgment for the

plaintiff in the amount of $94,367.05. The plaintiff's attorneys should only have been able to recover 30% of that amount or $28,310.12. The trial court erred when it entered an award of attorney's fees over three times in excess of .that amount -- $101,700. The judgment should be reduced to $28,310.12.

The FPCF is cognizant that a number of recent District Court of Appeal's decisions have failed to restrict the amount of a contingency percentage fee agreement when the agreement calls for an alternative reasonable fee. (See, e.g., Tallahassee Memorial Regional Medical Center, Inc. v. Poole, 547 So.2d 1258 (Fla. 1st DCA 1989); Florida Patient's Compensation Fund v. Moxley, 545 So.2d 922 (Fla. 4th DCA 1989); and Kaufman v. MacDonald, 545 So.2d 913 (Fla. 4th DCA 1989). However, this Court should not permit a windfall to the plaintiffs' attorney.

If the plaintiffs' attorneys wish to rely on the benefit bestowed by Rowe, the contingency risk multiplier, then they must also accept the corresponding limitation. When the trial court improperly awarded an amount in excess of the percentage fee agreement and the Fourth District Court of Appeal affirmed, reversible error was committed. The final order on attorney's fees should be reversed.

In Miami Children's Hospital, Inc., v. Tamayo, 529 So.2d 667 (Fla. 1988), this Court had the occasion to revisit the meaning of Rowe. In its decision, this Court again articulated its concern that a fee award be limited to the agreement between the plaintiff and its attorney. This Court held that the

contingency risk multiplier could not be used "without the requirement contained in Rowe that an attorney's fee not exceed the fee set by the contingency agreement. . . ."

An attorney should not be permitted to guarantee a percentage of the judgment for a fee and then opt for more if he can convince a court to apply a contingency risk multiplier. While the protection of a reasonable fee may be available to a defendant, the plaintiff's lawyer gets the best of both worlds. If the plaintiff's lawyer truly wants to gamble on the contingency, then his fee agreement should strictly provide for a payment of a "reasonable fee." However, if the plaintiff's lawyer seeks to guarantee his fee by inserting a percentage in his agreement, then he must be bound by it.

If the court were to have awarded a fee smaller than the percentage called for in the agreement, there can be no doubt that plaintiff's counsel would still take up to the 30% of the judgment as a fee guaranteed by the agreement. It is only now that the fee exceeds the amount of the underlying judgment that the plaintiffs' counsel seeks to abandon the guaranteed percentage. If the percentage is a hedge against an unreasonably low award, it should also be a hedge against an award that exceeds the percentage called for in the fee agreement.

V. THE TRIAL COURT ERRED IN DENYING THE FPCF'S RIGHT TO A FAIR OPPORTUNITY TO BE HEARD.

Should this Court agree with the FPCF's position on attorney's fees in this case, this last issue is moot. However,

in the event this Court does not agree with the FPCF'S position, then the Court should consider the trial court's error in failing to allow it to present relevant testimony to the jury and argue its coverage issue.

It is axiomatic that the pleadings frame the issues to be litigated. Provident National Bank v. Thunderbird Assoc., 364 So.2d 790 (Fla. 1st DCA 1978). In fact, the Florida Rules of Civil Procedure, and case law interpreting those rules, support the amendment of pleadings to conform to evidence introduced at trial. Id.; Fla. R. Civ. P. 1.190. Because the FPCF'S answer sufficiently articulated the legal issue on coverage, no amendment to the pleadings was necessary.

The FPCF alleged in its answer that Dr. Wilson and his P.A. had a limited membership. (R. at 1071-72). Their "membership [was] limited by the terms and conditions of the applicable Florida Statutes and the contract." Id. In addition, the FPCF relied on "all such conditions, limitations, limitations of liability, effective dates of coverage and exclusions" set forth in its Answer. (R. at 1078-79). The pre-trial stipulation contained the factual issue of causation, which would then allow the trial court to rule on coverage as a matter of law.

Had the FPCF been permitted a jury determination on a specific causation question, it would have made the following legal argument. Section 768.54(2)(b) provides for coverage by the FPCF "[w]henever a claim covered under sub-section (3)

results in a . . . judgment." Fla. Stat. §768.54(2)(b). Subsection (3) established the FPCF

> for the purpose of paying the 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 provider or any claim for bodily injury or property damage to the person or property of any patient, including all patient injuries and deaths. . . .

Fla. Stat. §768.54(3)(a) (1983).

Subsection (2)(b) further provided that coverage for a claim shall be provided on an occurrence basis. . . ." Fla. Stat. 5768.54(2)(b). An "occurrence" is statutorily defined as "an accident or incident, including continuous or repeated exposure to conditions which result in patient injuries . . . ." Fla. Stat. §768.54(1)(f) (1983) (emphasis added). Thus, only when an incident "results" in an injury or death, and the minimum criteria of section 768.54(b) are met, does the FPCF provide coverage.

In this case, testimony revealed that if Mr. Wasser had been diagnosed and treated as late as December, 1983, he had better than a 50% chance of survival. (R. at 291, 395, and 483). Because Mr. Wasser could have been diagnosed and treated as late as December, 1983, the negligence committed from 1978 to 1983 did not "result" in his death. Dr. Wilson and his P.A. were not members of the FPCF after June, 1983. Thus, under a plain interpretation of Fla. Stat. S768.54, the FPCF did not provide coverage at a time when the negligence "resulted" in Mr. Wasser's death.

The Fourth District Court of Appeal addressed a somewhat similar issue in Frazier v. Effman, 501 So.2d 114 (Fla. 4th DCA 1987). In Frazier, the court crystallized causation in a time frame. Until such time as the negligence cannot be remedied, the plaintiff remains undamaged, "causation has not occurred," and no cause of action has accrued. Id.

In Frazier, the plaintiff sued two attorneys for legal malpractice, contending that each of them had been retained to represent her and had failed to name the Florida Patient's Compensation Fund as a defendant in a medical malpractice action. She had retained Mr. Effman initially and subsequently substituted Mr. Rotella as her counsel. The substitution occurred at a time when the Florida Patient's Compensation Fund could have been added within the statute of limitations period, and the original negligence could have been remedied. In the legal malpractice case, Effman filed a motion to dismiss, contending that the retention of Rotella, and his failure to add the FPCF before the statute of limitations ran, broke the causal connection between the allegations of negligence against Effman and the alleged injury. The trial court granted the motion. The Fourth District affirmed.

> Under the circumstances of this case, where the complaint shows that the defendant lawyer was discharged and a new counsel retained long before the claim became barred, a claim of negligence cannot be maintained.

Id. at 115.

In this case, it was the negligence committed in **1984,** which caused Mr. Wasser's death -- negligence which did not occur during a time in which the FPCF provided coverage for Dr. Wilson and his P.A. (R. at **291; 385;** and **483).** Any negligence which occurred prior to **1984** could have been remedied. Had the FPCF been permitted to participate at trial, it would have introduced testimony regarding the dates of coverage. (R. at 910). The certificates of FPCF membership for Dr. Wilson and his P.A. further supported the limited time period of FPCF coverage. In addition, the FPCF stopped providing coverage in June, **1983.**

The FPCF proffered the requisite expert testimony on causation and submitted a special interrogatory on the causation issue. The trial court erred when it deprived the FPCF of its day in Court. The ultimate issue -- coverage -- was a matter for the Court to decide based upon statutory and case law. However, without allowing the jury to decide the factual issue, the Court could not decide the legal coverage issue.

For these reasons, if this Court does not vacate the attorney's fees judgment against the FPCF, the case should be remanded for a trial limited to the factual causation issue and the legal issue of coverage.

CONCLUSION

For the foregoing reasons, the petitioner, the FLORIDA PATIENT'S COMPENSATION FUND, respectfully requests this Court to affirm the Fourth District Court of Appeal's decision on the issue of Dr. Wilson and his P.A.'s liability for the attorney's fees award. In the alternative, the case should be remanded for a reduction of the attorney's fees awarded in this case.

In the event the Court does not vacate or remand the attorney's fees judgment against the FPCF, the petitioner respectfully requests this Court to remand the case for a new trial on the coverage issue.

Respectfully submitted,

for **Melanie G. May**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U. S. mail this 23rd day of October, 1989, to: STEVE K. DEUTSCH, Deutsch & Blumberg, P.A., New World Tower, Suite 2802, 100 North Biscayne Boulevard, Miami, Florida 33132; STEVE BILLING, ESQ., Billing, Cochran & Heath, P.A., Legal Center Building, 888 S.E. Third Avenue, Suite 301, Fort Lauderdale, Florida 33316; NANCY LITTLE HOFFMA", ESQ., 2929 East Commercial Blvd., Barnett Bank Tower, Suite 502, Fort Lauderdale, Florida 33308; and JAMES C. BLECKE, ESQ., Biscayne Building, Suite 705, 19 West Flagler Street, Miami, Florida 33130.

BUNNELL and WOULFE, P.A.
Attorneys for F.P.C.F
1080 S.E. 3rd Avenue
Fort Lauderdale, Florida 33316
(305) 761-8600

By: Melanie G. May
Melanie G. May
Fla. Bar No. 333621