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IN THE SUPREME COURT OF FLORIDA

CASE NO. : 74,407

FLORIDA PATIENT'S COMPENSATION)
FUND, MAX W. WILSON, M.D., and)
WILSON, MEIGS, MASTRIOLE &)
SUTHERLAND, M.D.s P.A., et al.,)

Petitioners,)

v.)

DORIS WASSER, as Personal)
Representative, etc., et al.,)

Respondents.)

FILED
OCT 22 1988
[Signature]

DISCRETIONARY PROCEEDING TO REVIEW A
DECISION OF THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA,
CASE NO.: 87-1820 and 87-2555

PETITIONERS' MAX W. WILSON, M.D.
AND WILSON, MEIGS, MASTRIOLE & SUTHERLAND, M.D.s, P.A.
BRIEF ON THE MERITS

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QUESTION PRESENTED

WHETHER THE FEE AWARDED TO PLAINTIFF'S ATTORNEY PURSUANT TO SECTION 768.56, FLORIDA STATUTES, IS THE RESPONSIBILITY OF THE FLORIDA PATIENT'S COMPENSATION FUND AND NOT THAT OF A MEMBER HEALTH CARE PROVIDER OR HIS UNDERLYING INSURER, WHERE THE UNDERLYING POLICY PROVIDES FOR THE PAYMENT OF COSTS BUT NOT ATTORNEY'S FEES.

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PREFACE

This brief is submitted on behalf of Petitioners, MAX W. WILSON, M.D. and WILSON, MEIGS, MASTRIOLE & SUTHERLAND, M.D.s, P.A., in support of their petition to review the decision of the Fourth District Court of Appeal dated June 14, 1989. In this brief, these Petitioners will be referred to by name (collectively as "Wilson"). Petitioner The Florida Patient's Compensation Fund will be referred to as "the Fund." Respondent, Doris Wasser, as Personal Representative of the Estate of Jacob Wasser, deceased, will be referred to as "the Plaintiff." Reference to the record on appeal will be by R.1-1159. Any emphasis appearing in quoted material is that of the writer unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Plaintiff Wasser brought a wrongful death action against Wilson and the Fund alleging medical malpractice. The jury returned a verdict awarding \$4,367.05 for Mr. Wasser's estate and \$90,000.00 for Doris Wasser (R.995). The court subsequently entered an amended final judgment, awarding attorney's fees jointly against Wilson and the Fund, in the amount of \$101,700.00, as well as costs in the amount of \$7,753.80 (R.1115-1116). The Fund then sought to have the court delete the Fund from the amended judgment, on the basis that Wilson's carrier was responsible for the payment of attorney's fees and costs (R.1121-1125). The court denied that motion (R.1138-1139). Wilson's carrier paid the underlying judgment, costs and

interest and received a partial satisfaction of judgment (R.1149). Both the Fund and Wilson appealed the attorney's fee judgment to the District Court of Appeal, Fourth District. In that appeal, the Fund argued that the trial court had erred in imposing joint and several liability upon the Fund and Wilson, and claimed that Wilson's carrier should be solely responsible for payment of the attorney's fee award. Wilson argued for affirmance of the trial court's decision on that issue. With regard to the amount of the attorney's fee award, the Fund argued that the award should have been limited to the contingency fee agreement between Plaintiff and her attorneys. Wilson joined in that aspect of the Fund's argument.

In its decision dated June 14, 1989 (copy appended hereto), the Fourth District Court of Appeal affirmed the amount of the attorney's fee award, but reversed the judgment entered against the Fund on the basis that Wilson's carrier should be solely responsible therefor. The Fourth District relied upon its earlier decision in Florida Patient's Compensation Fund v. Sitomer, 524 So.2d 671 (Fla. 4th DCA 1988), rev. pending sub. nom. Smith v. Sitomer, Case No.: 72,610.

Wilson has petitioned this Court to review that decision, since the Sitomer case is presently under review by this Court. The Fund has joined in these proceedings, on the basis that the Fourth District's affirmance of the amount of the attorney's fee award conflicts with this Court's decision in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985).

This Court accepted jurisdiction by virtue of its order of September 26, 1989.

SUMMARY OF ARGUMENT

This Court has held in Florida Patient's Compensation Fund v. Bouchoc, 514 So.2d 52 (Fla. 1987) that attorney's fees awarded to a medical malpractice plaintiff under Section 768.56, Florida Statutes, are the obligation of the Fund rather than the health care provider's carrier, unless that carrier's policy provided for the payment of attorney's fees. Wilson's policy does not so provide. The policy states only that the carrier (the "Staff Fund") will pay:

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. . . .

(Copy of policy attached to Notice of Filing in the District Court of Appeal, dated March 24, 1988).

More recently, this Court held in Spiegel v. Williams, 545 So.2d 1360 (Fla. 1989) that attorney's fees recoverable by statute are not regarded as "**costs**" unless the statute so specifies, and that fees awarded under Section 768.56, Fla.Stats., cannot be considered as "costs."

This Court's decisions in Bouchoc and Spiegel are controlling, and compel the conclusion that the Fund should be solely responsible for the Plaintiff's attorney's fee judgment. The decision of the District Court of Appeal, Fourth District, should be quashed accordingly.

Wilson adopts the Fund's argument with respect to the amount of the fee awarded by the trial court, and affirmed by the District Court of Appeal.

ARGUMENT

THE FEE AWARDED TO PLAINTIFF'S ATTORNEY PURSUANT TO SECTION 768.56, FLORIDA STATUTES, IS THE RESPONSIBILITY OF THE FLORIDA PATIENT'S COMPENSATION FUND AND NOT THAT OF A MEMBER HEALTH CARE PROVIDER OR HIS UNDERLYING INSURER, WHERE THE UNDERLYING POLICY PROVIDES FOR THE PAYMENT OF COSTS BUT NOT ATTORNEY'S FEES.

The Fourth District Court of Appeal held that the Fund should not be responsible for the attorney's fee award in the present case, relying upon its decision in Florida Patient's Compensation v. Sitomer, 524 So.2d 671 (Fla. 4th DCA 1988). This Court presently has that decision before it for review ~~sub. nom.~~ Smith v. Sitomer, Case No.: 72,610. The Fourth District's decision in Sitomer was based in turn upon a decision of the Third District Court of Appeal, Williams v. Spiegel, 512 So.2d 1080 (Fla. 3d DCA 1987), in which that court held that the term "costs" includes attorney's fees taxed pursuant to Section 768.56, Fla.Stats.

This Court has since quashed the Third District's holding on that point, Spiegel v. Williams, 545 So.2d 1360 (Fla. 1989), and has specifically held that since Section 768.56, Fla.Stats. did not specify that attorneys' fees could be taxed as costs, a policy provision obligating a carrier to pay "costs" cannot include a judgment for the plaintiff's attorneys' fees.

We respectfully submit that this Court's recent decision in Spiegel, supra, is directly controlling here, despite slight variances in language between this policy and the policy under consideration in Spiegel. This is so because the underlying basis for this Court's decision in Spiegel is the proposition

that pursuant to Section 768.56, Fla.Stats., a plaintiff's attorney's fees are not considered as a species of taxable costs.

Since the situation of the parties in the present case is legally indistinguishable from that of the parties in Spiegel v. Williams, supra, we respectfully urge this Court to set aside the decision of the District Court of Appeal, Fourth District, in the present case and order that the attorney's fee judgment be the sole responsibility of the Florida Patient's Compensation Fund.

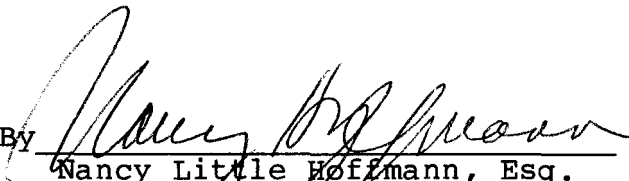
CONCLUSION

For the reasons set forth above, the decision of the District Court of Appeal, Fourth District, should be quashed with directions that the attorney's fee judgment be entered solely in the name of the Florida Patient's Compensation Fund, and that Wilson and his underlying carrier be relieved of any responsibility therefor.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served by mail this 23rd day of October, 1989, to: Steven Billing, Esquire, Billing, Cochran, Heath, Lyles & Mauro, P.A., 888 Southeast Third Avenue, Suite 301, Fort Lauderdale, Florida 33316; Steven K. Deutsch, Deutsch & Blumberg, P.A., New World Tower, Suite 2802, 100 North Biscayne Boulevard, Miami, Florida 33132; James C. Blecke, Esquire, James C. Blecke, P.A., Biscayne Building, Suite 705, 19 West Flagler Street, Miami, Florida 33130; and Melanie G. May, Esquire, Bunnell, Denman & Woulfe, P.A., Post Office Drawer 22988, Fort Lauderdale, Florida 33335.

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