IN THE SUPREME COURT OF FLORIDA

FLORIDA PATIENT'S COMPENSATION FUND,

PETITIONER,

V.

CASE NO. 74,431

DARRYL MOXLEY, ETC., ET AL.,

RESPONDENTS,

NEIL J. KARLIN, M.D., ET AL.,

PETITIONERS,

V.

CASE NO. ~~74,480~~ 74,480 this Case

DARRYL MOXLEY, ETC., ET AL.,

RESPONDENTS.

RESPONDENT'S (FPCF'S) BRIEF ON THE RERITS et al.
CASE NO. 74,480

Submitted by:

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE & FACTS

The Florida Patient's Compensation Fund accepts the petitioner's statement of the case and facts with the following addition.

The insurance policy for the underlying health care provider provided:

> The company will pay, in addition to the applicable limit of liability:
>
> (a) all expenses incurred by the company, all costs taxed against the named insured . . . .

(Emphasis added).

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal correctly held Dr. Karlin and his P.A. responsible for the attorney's fee taxed in this case. The Florida Patient's Compensation Fund should not be held liable for the attorney's fees. The supplementary payments provision of the underlying health care provider's insurance policy provides for the payment of "costs taxed." The attorney's fees were "taxed.". Therefore, the attorney's fees "are payable under the provisions 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 certified question should be answered in the affirmative.

ARGUMENT

I. THE FLORIDA PATIENT'S COMPENSATION FUND IS NOT RESPONSIBLE FOR THE ATTORNEY'S FEES AWARD.

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

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, or any settlement or judgment against the health care provider for the claim in accordance with paragraph (3)(e). (emphasis supplied).

The limitation on liability exists only after the health care provider exhausts his underlying coverage. The Florida Patient's Compensation Fund [Fund] is only liable for amounts that exceed $100,000 or the maximum underlying coverage provided by the health care provider, whichever is greater. In this case, the maximum coverage exceeds $100,000 and includes responsibility for attorney's fees.

The maximum limit of underlying coverage in this case includes supplementary coverage for all "costs taxed" in defending a medical malpractice action, which include statutory

attorney's fees "taxed" against the non-prevailing health care provider member. The Fund 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, **($100,000)** the carrier would pay all "costs taxed."

Dr. Karlin maintained his underlying coverage with the South Broward Hospital District Physicians Professional Liability Insurance Trust Fund [underlying carrier]. The coverage agreement provided **$100,000** in liability coverage plus supplementary payments. The supplementary payments provision expressly provided:

> The company will pay, in addition to the applicable limit of liability:
>
> (a) all expenses incurred by the company, all costs taxed against the named insured in any suit defended by the company. . . .

(Emphasis added).

The supplementary payments provision provided for the underlying carrier to pay all "costs taxed" in the defense of this lawsuit. "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 Fund, not the health care provider, is generally liable for attorney's fees in a medical malpractice action. However, when the underlying health care provider's 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 52 (Fla. 1987)(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, the health care provider, not the Fund, is responsible for the payment of the attorney's fees.

The Fund 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, covers the attorney's fees award.

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

When Dr. Karlin 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 insurer shall pay "all costs taxed." The statutory attorney's fees were a part of the "costs taxed" in the suit defended by Dr. Karlin'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 Fund did not

control the defense and should not, now be responsible for attorney's fees over which it had no control.

Prevailing party 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 Florida Patient's Compensation Fund. 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); Rigel v. National Casualty Co., 76 So.2d 285 (Fla. 1954). The ambiguous, undefined term "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 "taxed" twice and "tax" once: "tax such fees", "taxed against such non-prevailing party," and "shall not be taxed." The policy uses the term "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,' 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.

Williams v. Spiegel, 512 So.2d 1080 (Fla. 3d DCA 1987), quashed, 545 So.2d 1360 (Fla. 1989). See also: The Lower Keys Hospital District v. Littlejohn, 520 So.2d 56 (Fla. 3d DCA), review denied, 531 So.2d 1352 (Fla. 1988), (where insurance policy provides for the payment of all costs of defense, the health care provider and his 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 the 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 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. 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 paying interest only on $10,000 of the judgment and that the remaining $30,000 was not its responsibility. This Court ruled that the

carrier, by its own contract, 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. Karlin's] carrier finds itself appears to us to be 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 insurer "[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 Alaskan 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 award 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 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. Karlin's underlying carrier. Its holding should be affirmed.

11. THE TRIAL COURT ERRED WHEN IT FAILED TO LIMIT THE ATTORNEY'S FEES AWARD TO THE PERCENTAGE AGREEMENT BETWEEN THE PLAINTIFFS AND THEIR ATTORNEYS

The respondent adopts its argument from it's initial brief in Case No. 74,431 and Dr. Karlin's brief in this appeal.

CONCLUSION

For the foregoing reasons, the Respondent, the Florida Patient's Compensation Fund, respectfully requests this Court to affirm the decision of the Fourth District Court of Appeal in part and hold Dr. Karlin and his P.A. responsible for the attorney's fees award, but to answer the certified question on the quantum of the award in the affirmative and reduce the attorney's fees awarded in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U. S. mail this 19th day of September, 1989, to: MARTIN J. SPERRY, ESQ., 805 E. Broward Blvd., Suite 200, Fort Lauderdale, FL 33301; ALAN D. SACKRIN, ESQ., Klein & Tannen, P.A., 633 Northeast 167th Street, Suite 1111, North Miami Beach, Florida 33162; DAVID H. KRATHEN, ESQ., 524 South Andrews Avenue, Fort Lauderdale, Florida 33301 and GARY FARMER, ESQ. 888 South Andrews Avenue, Fort Lauderdale, Florida 33316.

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