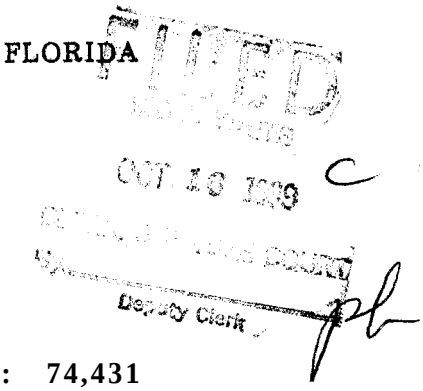
IN THE SUPREME COURT OF FLORIDA



FLORIDA PATIENT'S COMPENSATION, FUND,

Petitioner,

vs.

CASE NO: 74,431

DARRYL MOXLEY, ETC., ET AL.,

Respondent,

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

Petitioners,

vs.

CASE NO: 74,480

DARRYL MOXLEY, ETC., ET AL.,

Respondents.

PETITIONERS' (KARLIN M.D. AND KARLIN M.D., P.A.) REPLY BRIEF
CASE NO: 74,480

Submitted By:

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TABLE OF CITATIONS

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SUMMARY OF THE ARGUMENT

In its brief, the FUND attempts, in futility, to distiguish the case of Spiegel v. Williams, 545 So.2nd 1360 (Fla.1989). The Spiegel case squarely holds that a health care provider's insurer is not responsible for payment of prevailing party attorneys' fees awarded pursuant to 8768.56, Florida Statutes (now repealed) even where the insuring agreement provided that the insurer will pay, in addition to the liability limits, "all costs of defending a suit," or all "costs taxed" against the insured. Nothing in § 768.54, Florida Statutes, or in KARLIN's insurance policy, mandates a result different from the Spiegel case.

Insofar as the amount of the fee awarded is concerned, this Court should quash the decision of the District Court of Appeal by answering the certified question in the affirmative. In personal injury cases, courts should not award a prevailing party attorneys' fee in an amount greater than the prevailing party is required to pay his attorney under the terms of their fee arrangement,

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ARGUMENT I

THE FLORIDA PATIENT'S COMPENSATION FUND, NOT KARLIN OR HIS INSURER, IS RESPONSIBLE FOR THE PLAINTIFF'S PREVAILING PARTY ATTORNEYS FEES ASSESSED IN THIS CASE.

As noted by the District Court in its opinion, the FUND relied upon the decision in Williams v. Spiegel, 512 So.2d. 1080 (Fla. 3rd DCA 1987) to support its argument that DR. KARLIN's insurer, as opposed to the FUND, should be responsible for payment of the attorneys' fee award. Now that the Supreme Court has quashed the Williams decision in Spiegel v. Williams, 545 So.2d 1360 (Fla. 1989), the FUND, ironically, argues its inapplicability. A review of this Court's opinion, however, reveals that it controls the disposition of this appeal.

In Spiegel, the health care provider's malpractice policy provided that the carrier would 'pay all costs of defending a suit,. . . ," and in the case sub judice, the insurer agreed to pay, in addition to the applicable of limit of liability, all "costs taxed against the named insured in any suit defended by the company." The FUND contends that the difference in policy language requires a result at variance from that reached in the Spiegel case. However, in Spiegal, this Court concluded that prevailing party attorneys' fees could only be construed to be a cost of defending a suit if attorney's fees are a species of taxable costs. Id. at 1361-62. Citing to its earlier precedent, this Court continued to adhere to the rule that attorneys' fees recoverable by statute are regarded as "costs" only when spe-

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cified as such by the statute which authorizes their recovery. Since 1768.56, Florida Statutes (1981), did not specify that attorneys' fees could be taxed as costs, an insurer is not responsible for payment of the plaintiff's prevailing party attorneys' fees under either a "taxable cost" or "cost of defending a suit" payment provision. Id.

The FUND next argues that since 1768.56, Florida Statute, utilizes the word "tax" in reference to attorneys' fees, then attorneys' fees under that statutue are an item of taxable costs. This reasoning is convoluted and illogical. "Tax" within the context of 9768.56 simply means to assess or to judicially determine an amount. It does not follow that since 1768.56 requires a court to tax fees against the non-prevailing party that such fees are an item of taxable costs. The FUND recognizes in its brief that 1768.56 does not define attorneys' fee as a taxable cost. The FUND's brief on the merits, case no. 74,480 at p.6. In defining "costs," Black's Law Dictionary, 5th edition, notes that they "generally do not include attorneys' fees unless such fees are by a statute denominated costs or by statute allowed to be recovered as costs in the case." This is in accord with the Spiegel opinion and lends another blow the FUND's argument.

Finally, the FUND argues that the phrase "costs taxed" is ambiguous and should be read broadly to include attorneys' fees. However, this argument was also specifically rejected in Spiegel. Just as in Spiegel, the language of KARLIN's policy is clear when read in conjunction wtih Florida law which does not recognize attorneys'

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fees as an element of taxable costs unless the statute or rule authorizing in their recovery specifically denominates that the fees are an element of taxable costs.

The cases cited by the FUND in its answer brief do not provide this Court with persuasive authority for the FUND's position. In Weckman v. Houger, 464 P.2d 528 (Alaska 1970) and Liberty National Insurance Co. v. Eberhart, 398 P.2d 997 (Alaska 1965), attorneys' fees were assessed against insurers that agreed to pay all "costs taxed" against their insureds. However, an Alaskan Rule of Civil Procedure designated that attorneys' fees be awarded "as part of the costs of the action allowed by law . . . ." Weckman, 464 P.2d at 529 n.2. The FUND's brief appropriately notes that the Alaskan Rule of Civil Procedure denominated attorneys' fees as costs but nonetheless the FUND still cited these cases as authority in support of its argument. These cases actually fully support KARLIN's position and they are consistent with this Court's Spiegel opinion, since the rule or statute authorizing recovery of fees indentified fees as an element of taxable costs.

This Court's decision in Highway Casualty Co. vs. Johnston, 104 So.2d 734 (Fla. 1958), also cited by the FUND, is inapposite. That case simply held that where an insurer agrees to pay the interest on an entire judgment, it must pay interest on the full judgment, not just interest on that portion of the judgment equalling its underlying limits of liability coverage. The holding in Highway Casualty has absolutely no connexity to the question presented in

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this appeal.

The FUND has unsucessfully attempted to distinguish the case of Spiegel v. Williams, supra. Accordingly, the District Court's opinion should be quashed with instructions that the attorneys' fee award be paid by the FLORIDA PATIENT'S COMPENSATION FUND.

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ARGUMENT II

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

The answer brief filedby **MOXLEY** in case no. **74,480,** (this case) concerning this issue is substantially identical to the answer brief filed by **MOXLEY** on the same issue in consolidated case no. **74,431.** The FUND has filed its reply brief to **MOXLEY's** answer brief in case no. **74,431.** Rather than reiterating all of the FUND's reply arguments in that case, KARLIN adopts in its entirety the FUND's reply brief in case no. **74,431** as if fully set forth herein with the following additional comments.

It is beyond dispute that attorneys' fee agreements between lawyers and clients are guided by the ethical mandates of the profession. For years, contingent fee agreements have been under intense scrutiny by the Florida Bar as well as the public. If **MOXLEY** and his attorney had agreed, in the event of recovery, to authorize the trial court to determine an appropriate fee as between **MOXLEY** and his attorney, and there was no prevailing party attorneys' fee statute, then it is undeniable that the maximum ethical fee **MOXLEY's** attorneys could have been awarded by the Court would be **45%** or perhaps **50%** of the compensatory damage award. The mere existence of a prevailing party attorneys' fee statute should not authorize a trial court to award, as against the losing party, an attorneys' fee which exceeds the ethical boundaries placed upon an attorney when entering into a contigent fee agreement with a client. Therefore, even had **MOXLEY's** fee agreement

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stated that a fee was contigent upon recovery, and left the amount of the fee open for the court to determine, a court in assessing the fees to be paid by the non-prevailing party should still be governed by the ethical limitations placed upon attorneys in contingent fee cases. **MOXLEY** implicitly concedes that his attorneys could not have ethically collected a 97% contigent fee. The public's conscience would be shocked if it were ever disclosed that a lawyer commanded a **$150,000.00** contingent fee from a **$155,000.00** compensatory damage award in a personal injury case.

In order to maintain the integrity of the judicial system and to restore confidence in the system, rules of law and procedure must be developed that promote a degree of logic and fairness to all litigants. In this regard, a statutory fee award against a non-prevailing party should never exceed an amount which the prevailing party's lawyer could have ethically charged his client.

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CONCLUSION

For the reasons expressed in KARLIN's initial and reply briefs, the Petitioners respectfully request the Supreme Court to accept jurisdiction of this cause and to quash the decision of the Fourth District Court of Appeal on two distinct grounds, First, the decision should be quashed and remanded to require the FUND, as opposed to KARLIN, his P.A. or insurer, to pay the attorneys' fee award. Secondly, the certified question concerning the amount of the fee award should be answered the affirmative and the award should be reduced to reflect an amount equal to 50% of the compensatory damages awarded by jury.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 11th day of October, 1989 to: MARTIN J. SPERRY, Esq., Co-Counsel for Moxley, 805 E. Broward Blvd., Suite 200, Fort Lauderdale, FL 33301; MELANIE G. MAY, Esq., Counsel for Fund, P.O. Drawer 22988, Fort Lauderdale, FL 33335; DAVID H. KRATHEN, Esq., Counsel for Moxley, 524 South Andrews Avenue, Fort Lauderdale, FL 33301 and GARY FARMER, Esq., Co-Counsel for Moxley, 888 South Andrews Avenue, Fort Lauderdale, FL 33316

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