IN THE SUPREME COURT OF FLORIDA

CASE NO.: 64,381

Fourth District Case Nos.

82-1984
82-2085

NEIL J. KARLIN, M.D., and
FLORIDA PATIENT'S COMPENSATION FUND,

Petitioners,

vs.

DONNA DENSON and JOSEPH DENSON,

Respondents.

RESPONDENTS' ANSWER BRIEF

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INTRODUCTION

The issue of the constitutionality of Florida Statute §768.56 is before this Court in the Florida Medical Center, Inc. case, Supreme Court, Case No.: 64,251 and in Mathews v. Pohlman, Supreme Court Case No.: 64,589. Since the human mind, like a cup, "runneth over", the arguments in said cases are incorporated by reference without repetition. Further, five panels of three District Courts have held this statute constitutional. (Karlin v. Denson, _____So.2d_____ (8 F.L.W. 2212) (Fla. 4th DCA 1983); Davis v. North Shore Hospital, _____ So.2d_____ (8 F.L.W. 2488) (Fla. 3rd DCA 1983); Young v. Altenhaus, _____So.2d_____ (8 F.L.W. 2489) (Fla. 3rd DCA 1983); Florida Medical Center, Inc.

v. Von Stetina, 436 So.2d 1022 (Fla. 4th DCA 1983); Pohlman v. Mathews, 440 So.2d 681 (Fla. 1st DCA 1983).

The Fourth District Court in Florida Medical Center, Inc, supra., at page 1030, opted to employ the rational basis test and rejected the strict scrutiny test, noting that the Supreme Court had already so decided in Pinillos v. Cedars of Lebanon Hospital, 403 So.2d 365 (Fla. 1981), and applied the rational basis test in the instant case.

The First District Court in Pohlman, and the Third District Court in Davis and Young followed the Fourth District Court in Florida Medical Center, Inc., and applied the rational basis test.

Federal law also follows the rational basis test. Woods v. Holy Cross Hospital, 591 F. 2d 1164 (5th Cir., 1979).

ARGUMENT

FLORIDA STATUTE §768.56 IS CONSTITUTIONAL.

A. RATIONAL BASIS TEST

The "test" to be applied to the statute in measuring its constitutionality against both the equal protection clauses and the due process clauses are essentially the same, namely, the "rational basis test". Both clauses will be discussed together for the sake of economy.

In State of Florida v. C. H., 421 So.2d 62 (Fla. 4th DCA 1982), the Court stated:

> "We begin our analysis by noting two fundamental principles of statutory construction. First, "this Court has the duty if reasonably possible, consistent with protection of

constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutionality, and if reasonably possible a statute should be construed so as not to conflict with the constitution" Powell v. State, 345 So.2d 724, 725 (Fla. 1977).

...

The United States Supreme Court set forth the basic principles of equal protection analysis in Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79, 31 S.Ct. 337, 340, 55 L.Ed. 369 (1910):

> 1. The equal-protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary.
>
> 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality.
>
> 3. When the classification in such a law is called in question, if any state of facts reasonable can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.
>
> (4-7) Given this scope of review, a court cannot object to a statutory classification merely because a more precise line could be drawn to effectuate the act's underlying policy. Hamilton v. State, 366 So.2d 8 (Fla. 1979)." (at pages 64, 65).

Whether a statute complies with the due process clause is determined as follows:

> The test to be used in determining whether an act is violative of the due process clause is whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary, or oppressive." Lasky v. State Farm Insurance Co., 296 So.2d 9, 15 (Fla. 1974). Accord, Chapman v. Dillon, 415 So.2d 12 (Fla. 1982). See generally, 10 Fla. Jur. 2d, Constitutional Law, §§362-67 (and decisions cited therein).

Similarly, whether a statute complies with the equal protection clause is determined as follows:

> "In order to comply with the requirements of the Equal Protection clause, statutory classifications must be reasonable and non-arbitrary, and all persons in the same class must be treated alike...when the difference between those included in a class and those excluded from it bears a substantial relationship to the legislative purpose, the classification does not deny equal protection." Lasky v. State Farm Insurance Co., supra. at page 18. Accord, Chapman v. Dillon, supra. See generally , 10 Fla.Jur. 2d, Constitutional Law, §§339-44 (and decisions cited therein).

There is no constitutional prohibition against classifying and treating one type of tort victim/tortfeasor differently than other types of tort victims/tortfeasors--so long as the classification is reasonable, the classification treats all persons in the same class alike, and the classification bears a reasonable relationship to a permissible legislative objective. As a result, there are numerous decisions rejecting equal protection and due process challenges to discriminatory legislation very much like the statute involved here. See e.g., Lasky v.

State Farm Insurance Co., supra. (singling out private passenger automobile accident victims from other accident victims was held reasonable, and reasonably related to permissible legislative objective of reducing automobile insurance rates); Chapman v. Dillon, supra., (singling out permanently injured private passenger automobile accident victims from other accident victims was held reasonable, and reasonably related to permissible legislative objective of reducing automobile insurance rates); Lumbermans Mutual Casualty Co. v. Castagna, 368 So.2d 348 (Fla. 1979)(following Lasky); Purdy v. Gulf Breeze Enterprises, Inc., 403 So.2d 1325 (Fla. 1981) (singling out automobile accident victims from other accident victims for purposes of abolishing "collateral source rule" was held reasonable, and reasonably related to permissible legislative objective of reducing suits among automobile insurance carriers); McKee v. City of Jacksonville,, 395 So.2d 222 (Fla. 1st DCA 1981) review denied, 407 So.2d 1104 (Fla. 1981) (collateral source payments).

The question presented to this Court is therefore simply whether §768.56 creates a "reasonable classification", which has a "rational basis" and a "reasonable relationship to a permissible legislative objective." This question has been conclusively resolved by the Florida Supreme Court in favor of upholding the statute at issue here. In Carter v. Sparkman, 335 So.2d 802 (Fla. 1976), for example, the Supreme Court held that a statute requiring medical malpractice victims to submit their claims to "mediation" as a condition precedent to bringing a tort

action against a health care provider did not violate the due process or equal protection clauses of the state and federal constitutions.[1] Accord, Woods v. Holy Cross Hospital, 591 F.2d 1164 (5th Cir., 1979). See McCarthy v. Mensch, 412 So.2d 343 (Fla. 1982). More recently, in Pinillos v. Cedars of Lebanon Hospital Corp., 403 So.2d 365 (Fla. 1981), the Supreme Court rejected equal protection and due process challenges to a statute requiring payments received from collateral sources to be deducted from a medical malpractice victim's recovery in a tort suit. See Lower Florida Keys Hospital District v. Skelton, 404 So.2d 832 (Fla. 3rd DCA 1981) (following Pinillos).

All of these decisions hold, in effect, that special legislation designed to alleviate the perceived "medical malpractice insurance crisis" is a reasonable exercise of legislative power in support of a permissible state interest, and that a rational basis exists for singling out medical malpractice victims and health care providers for special burdens and special privileges not imposed upon or granted to other tortfeasors and tort victims.

[1]This statute was subsequently declared unconstitutional, but only because it has "proven intrinsically unfair and arbitrary and capricious in (its) application". Aldana v. Holub, 381 So.2d 231, 236 (Fla. 1980). This conclusion did not purport to overrule the Court's initial conclusions concerning the facial permissibility of the statute, and it has no bearing on the issue presented in this case--since it is impossible that the Petitioners can demonstrate here that §768.56 has proven intrinically unfair and capricious in its application in the short time that it has been on the books.

Section §768.56 has its own preamble and, as correctly argued by Petitioners (Petitioners' Brief 14-16, hereinafter PB), is not verbatim, or identical with the other cited preambles, but an analysis of the said preambles shows that in substance they state the same reasons for enactment, namely the "medical malpractice crisis". According to the "Whereas" clauses preceding §768.56, the statute at issue here, was enacted for precisely the same purposes as the statutes at issue in Carter, Woods, and Pinillos. The classification created by §768.56 "bears a reasonable relationship to the legitimate state interest of protecting the public health by ensuring the availability of adequate medical care for the citizens of this state". Pinillos, supra. at 368.

> "In the area of economics and social welfare, a State does not violate the Equal Protection clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis", it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." Woods v. Holy Cross Hospital, supra. at 1174, quoting Danridge v. Williams, 397 U.S. 471, 485, 90 S.Ct. 1153, 1161, 25 L.Ed.2d 491 (1970).

The fact that the statute deals with attorney's fee awards rather than some other method for solving the perceived "medical malpractice insurance crisis" gives the Petitioners no additional legitimate reason to question its constitutionality.

The Petitioners argue that "There Are Less Restrictive Alternatives Which Are More Compatible" (PB 38) and fault the

legislature for not adopting other possible alternatives which they suggest (PB 39, 40, 41, 42). The Petitioners are not a substitute superior legislature and the other suggested alternatives do not make the instant statute unconstitutional. Hamilton v. State, 366 So.2d 8 (Fla. 1979).

In Hunter v. Flowers, 43 So.2d 435, (Fla. 1949), 14 ALR 2d 447, the Supreme Court upheld a statute authorizing the recovery of attorney's fees by successful claimants in summary proceedings to enforce laborers' liens, with the following observation:

> "The validity of statutes awarding attorneys' fees to successful litigants has been upheld in various types of cases in recent years. The rule gleaned from the decided cases seems to be that, so long as the classification is based upon some difference bearing a reasonable and just relation to the act in respect to which the classification is attempted, there is no violation of the "due process" and "equal protection" clauses of the Fourteenth Amendment of the Constitution of the United States." (at page 436).

See also, Empire State Insurance Co. v. Chafetz, 302 F.2d 828 (5th Cir., 1962) (statute providing for award of attorney's fees in action brought against insurance company constitutional); Sarasota County v. Barg, 302 So.2d 737 (Fla. 1974) (statute providing for award of attorney's fees in litigation arising under Manasota Key Conservation District Act constitutional); Sharpe v. Herman A. Thomas, Inc., 250 So.2d 257 (Fla. 3rd DCA 1971), cert. denied. 257 So.2d 257 (Fla. 1971), (statute allowing reasonable attorney's fee to successful mechanic's lien claimant constitutional). See generally, Annotation,

Attorneys Fees to Successful Claimant, 73 ALR 3d 515 (1976).

The statute at issue here is reasonably designed to discourage frivolous medical malpractice claims and encourage prompt settlement of meritorious claims, with a view toward advancing a permissible legislative interest, namely, the reduction of medical malpractice insurance premiums and health care costs. The similarity of the subject statute to the various other attorney's fee statutes which have withstood constitutional attack in the past is apparent. In fact, the statute at issue does not suffer from the deficiency inherent in most other attorney's fee statutes--the lack of a provision allowing recovery of attorney's fees by a successful defendant. See Annotation, supra. The statute at issue is even-handed; it allows all prevailing parties, whether plaintiff or defendant, to recover attorney's fees; and its rational relationship to a permissible legislative objective renders it impervious to constitutional attack. The even-handedness of Section 768.56 is exemplified by appeals by a losing Plaintiff (Mathews) and losing Defendants (Karlin, Davis, Florida Medical Center, Inc. and Young). The constitutionality of this statute does not depend upon whose ox is gored.

Respondents' attorneys, relying on the statutorily promised fee, baked the four and twenty blackbirds in the pie. The Petitioners now ask this Court to give Respondents' attorneys the proverbial bird instead of the promised piece of pie.

Petitioners equate (PB 36, 37, 45) Section 768.56 with

the frivolous lawsuit statute, Section 57.105. Section 768.56 forces a potential party to consider the reasonable probability of winning by imposing on the losing party, plaintiff or defendant, the burden of incurring the costs of litigation for attorneys' fees and costs. Full compensation becomes the preventive spur to unnecessary litigation but does not destroy the cause of action nor close the courthouse door. See Sasso v. Ram Property Management, 431 So.2d 204, 209-211 (Fla. 1st DCA 1983) on the issue of whether a statute denies a claimant the right to access to the Courts.

> "As discussed in Kluger and borne out in later discussions, no substitute remedy need be supplied by legislation which does not destroy a cause of action." Sasso, supra at pg. 210.

B. PETITIONERS' CONCLUSIONS ARE UNSUBSTANTIATED

Petitioners in their brief present incantations and conclusions never raised in the trial court and for which there is no evidence. They state:

(1) "The means chosen by the legislature are totally inconsistent with its stated premises and objectives" (PB 8);

(2) "is arbitrary and irrational" (PB 8);

(3) "is an invalid exercise of the police power" (PB 9);

(4) "denies..due process and equal protection" (PB 9);

(5) "Is irrational" (PB 9);

(6) "reveals serious irreconcilable internal contradictions" (PB 9);

(7) "does not encourage settlement" (PB 11);

(8) "is manifestly unrelated to the accomplishment of its goals" (PB 13);

(9) "is not reasonably related to the legislative findings or objectives" (PB 13);

(10) "does not rationally advance these objectives" (PB 26);

(11) "does not serve a compelling governmental interest" (PB 33);

(12) "not a sufficient public purpose" (PB 33);

(13) "was intended to and operates to curtail severely medical malpractice litigants' right of access to the courts" (PB 34);

(14) "fails to meet the compelling state purpose" (PB 35);

(15) "Is not Substantially Related To Its Asserted Purpose" (PB 35);

(16) "The purported purpose of Section 768.56 is to inhibit non-meritorious claims" (PB 36);

These conclusions are not sustained by either the record or reasoned analysis.

The Petitioners present (PB 11, 12) a dog and pony show of statutes unrelated to attorneys' fees. Horsemen's Benevolent and Protective Assoc. v. Division of Pari-Mutual Wagering, 397 So.2d 692 (Fla. 1981), (payment of percent of purse pool to horseman's association); and Simmons v. Division of Pari-Mutual Wagering, 407 So.2d 269 (Fla. 3rd DCA 1981; aff'd 412 So. 357

(Fla. 1982) (drug use on racing animals). Section 768.56 dealing with attorneys' fees is a horse of another color and the cited statutes and cases are not analagous.

C. PUBLIC POLICY

Rising above the brambles and thickets of legal argument is the public policy of the State of Florida.

The legislature in enacting, Florida Statute §768.56, set the public policy of the State of Florida and provided that the wrongly injured party was to be made whole; Plaintiff, for his personal injury damages as determined by a jury and a reasonable fee for Plaintiff's attorney; the successful Defendant to be made whole by being awarded his attorney's reasonable fee from the losing Plaintiff. If the Plaintiff's attorney's fees must be paid from his jury award, his net return will make him less than whole. This invasion of the Plaintiff's jury award creates less than full justice.

Petitioners urge this Court to reverse the public policy as set by the legislature and Florida Statute §768.56 and revert to the hypocritical falsehood that a jury award without inclusion or consideration of his attorney's fees, constitutes full justice. Anything less than full justice is an injustice. If not full justice now, when?

D. PETITIONERS HAVE FAILED TO CARRY BURDEN OF PROOF

The constitutionality of a validly enacted statute is presumed. The party challenging the constitutionality of a statute shoulders a heavy burden. Where the issue is close, the

presumption of constitutionality must be indulged. The Petitioners have presented no evidence and have not shouldered their heavy burden, and for all of the foregoing reasons, it is respectfully submitted that the District Court was correct in holding the statute constitutional.

CONCLUSIONS

1. The trial court and the District Court did not err in holding Florida Statute §768.56 constitutional.

2. Florida Statute §768.56 does not violate the equal protection or the due process clauses of the state or federal constitution.

3. Florida Statute §768.56 is reasonably related to the accomplishment of the goals delineated in its preamble and meets the rational basis test.

That the holding of the District Court should be affirmed, it is

Respectfully submitted,

BY: _____
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BY: _____
JOHN D. KELNER, ESQ.

CERTIFICATE OF SERVICE**

WE HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENTS' ANSWER BRIEF was furnished by U.S. mail to: SAMUEL J. DUBBIN, ESQUIRE, TALBOT D'ALEMBERTE, ESQUIRE, STEEL, HECTOR & DAVIS, 1400 Southeast Bank Building, Miami, Florida 33131, this 20th day of March, 1984.

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