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.

ON PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. SECTION 768.56 FAILS THE RATIONAL BASIS TEST

A. Section 768.56 Is An Invalid Exercise Of The Police Power

Section 768.56 is an invalid exercise of the police power because the means chosen by the Legislature are irrational in light of the statute's goals and premises. The preamble to section 768.56 states that its purpose is to discourage the filing of nonmeritorious claims and to encourage prompt settlement of meritorious claims. The

preamble also expressly recognizes that liability is the "primary" issue to be resolved in medical malpractice litigation. Section 768.56 is unconstitutional because it is irrational to encourage settlement or discourage the bringing of suits by penalizing litigants for being unable to resolve the liability question, which the Legislature found was most difficult to resolve.

The Respondents do not meet this argument in their Answer Brief. Instead, they parrot boilerplate language from cases upholding statutes under the rational basis test. The Respondents cite Lasky v. State Farm Ins. Co., 296 So.2d 9, 15 (Fla. 1974) for a statement of the rational basis test: "whether the statute bears a reasonable relation to a permissible legislative objective." This is correct as far as it goes. But the language omitted by the Respondents from Lasky mirrors the deficiency in their response to the Petitioners' challenges: "It is necessary to examine the objectives of the legislature in enacting this statute in order to determine whether the provisions of the act bear a reasonable relation to them." 296 So.2d at 15. The Respondents fail to undertake the necessary examination.

The Respondents present three reasons why section 768.56 passes the rational basis test. First, the courts have upheld some statutes which differentiate among the categories of tortfeasors and victims. Respondent's Brief at 4-5. Second, the courts have upheld other provisions of the

Medical Malpractice Reform Act. Id. at 5-6. Third, the courts have upheld other attorney's fees statutes. Id. at 8.

That other tort-related legislation is valid has no particular bearing on the validity of this statute. Indeed, some statutes drawing distinctions within the tort area have been declared invalid. See, e.g., Lasky, 296 So.2d at 20. The court must focus on the means chosen by this statute to effectuate the particular legislative objective stated in the legislative preamble.

The Respondents simply do not address the manifold inconsistencies between the means chosen by the legislature and the premises and purposes stated in the preamble to section 768.56. Instead, they argue that the rationality of this statute "has been conclusively resolved by the Florida Supreme Court," citing the decisions which have upheld other provisions of the Medical Malpractice Reform Act. Respondent's Brief at 5, citing, inter alia, Pinillos v. Cedars of Lebanon Hospital Corp., 403 So.2d 365 (Fla. 1981).

The Respondents essentially adopt the approach of the Fourth District Court of Appeal in Florida Medical Center, Inc. v. Von Stetina, 438 So. 2d 1030 (Fla. 4th DCA 1983), relied upon by the court below, which also referred without analysis to cases upholding different provisions of the Medical Malpractice Reform Act. The Respondents conclude, simply:

> 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.
>
> Respondents' Brief at 6.

In our Initial Brief, we detailed the inadequacy of the comparison between these other provisions and section 768.56. Section 768.56 is a unique provision, enacted with its own distinct preamble, which seeks to achieve the overall goal of reducing malpractice insurance premiums by questionable means -- inhibiting the use of the courts regardless of the reasonableness of a claim or defense. Further, the means employed to accomplish these objectives are totally inconsistent with the legislative findings underlying the enactment. See Petitioners' Initial Brief at 9-11.

The Respondents do not address any of the Petitioners' arguments regarding the inconsistencies between the statute and its preamble. While conceding that the preamble to section 768.56 differentiates it from the provisions upheld in Pinillos and other medical malpractice cases, they merely repeat rational basis test language and conclude:

> 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.
>
> Respondents' Brief at 7.

This response is patently unsatisfactory in light of the commands of cases decided by this Court under the police power doctrine. Simmons v. Division of Pari-Mutuel Wagering, 412 So.2d 357 (Fla. 1982), aff'd, 407 So.2d 269 (Fla. 3d DCA 1981); Horsemen's Benevolent and Protective Assoc. v. Division of Pari-Mutuel Wagering, 397 So.2d 692 (Fla. 1981); State v. Walker, 9 FLW 368 (2d DCA Case No. 83-1047 Feb. 8, 1984). See also State v. Lee, 356 So.2d 276 (Fla. 1976). These Supreme Court decisions require that statutes enacted under the police power be measured against the legislative objectives and findings contained in the preamble. As the Petitioners' Initial Brief demonstrates, section 768.56 fails this test because the means chosen by the legislature are totally irrational in light of the preamble to ch. 80-67, Laws of Florida.

The leading Supreme Court decision in the area of attorney's fees, Hunter v. Flowers, 43 So. 2d 435 (Fla. 1949), is cited by the Petitioners, the Respondents, as well as the Fourth DCA in Von Stetina. The Court in Hunter held "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 . . . ." Id. at 436. The clear import of Hunter is that the means chosen (under the police power) or the classification drawn (for equal protection purposes) by the legislature must be based on a difference bearing a "reasonable and just relation" to the purpose of the law. Id. at 438. As stated by this court in Horseman's, the means chosen must be "reasonably appropriate to accomplish the purposes of the act." 397 So.2d at 694.*/

The Respondents state conclusorily that section 768.56 is reasonably designed to discourage "frivolous"

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*/ In Sasso v. Ram Property Management, 431 So.2d 204 (Fla. 1st DCA 1983), the court held that for equal protection purposes, a classification involving a non-suspect class need only bear "some reasonable basis" to a valid legislative objective. Under the "some reasonable basis" standard, the court will uphold a statute if it can hypothesize some rational basis for the legislation. Such deference is not warranted in this case.

Sasso distinguished that test from the "substantial relationship" test applied by this Court on several occasions. 431 So.2d at 216. The "substantial relationship" test requires a more concrete connection between the means chosen and the objective of a statute. Without getting bogged down in the analysis performed by the First District, which is now before this Court, it suffices that Sasso equated the "just and reasonable relation" standard used in Hunter v. Flowers with the stricter "substantial relationship" test. 431 So. 2d at 214, and cases cited therein. Similarly, the court in Simmons looked for a "fair and substantial relationship to the objectives sought, 407 So.2d at 272, and the court in Lee required a "just and reasonable relation" between the means and the legislative purpose, 356 So.2d at 279.

claims and encourage settlement of "meritorious" claims, with a view toward reducing malpractice litigation, and thus reducing insurance premiums. Respondents' Brief at 9. The extent of the analysis offered in support of this claim is the following: "The similarity of the subject statute to the various other attorney's fee statutes which have withstood constitutional attacks in the past is apparent." Id. In light of the detailed distinctions between section 768.56 and other attorney's fee statutes, see Petitioner's Initial Brief at 15-28, the Respondents' cursory conclusion is neither justified nor persuasive.

The Respondents cite three decisions upholding other attorney's fee statutes as support for the validity of section 768.56. They are Empire State Ins. Co. v. Chafetz, 302 F. 2d 828 (5th Cir. 1962); Sarasota County v. Barg, 302 So.2d 737 (Fla. 1974), and Sharpe v. Herman A. Thomas, Inc., 250 So.2d 330 (Fla. 3d DCA) cert. denied 257 So.2d 257 (Fla. 1971). These citations offer no insight into the case before this Court. Certainly, the Petitioners are not arguing that no attorney's fee statute is valid. In fact, the three decisions the Respondents cite fall within the class of cases recognized in our Initial Brief that uphold attorney's fees statutes which are necessary to regulatory schemes advancing independent public policy objectives. Empire State is an insurance case; Sarasota County involves a state

conservation law; and Sharpe is a mechanic's lien case. The statutes upheld in those cases are distinguishable from the one under review here because section 768.56 is solely designed to discourage the use of the courts of Florida for the sake of reducing litigation. No court has held that inhibiting good faith litigation, as an end in itself, is a permissible legislative goal. See Petitioners' Initial Brief at 17-18.

B. Section 768.56 Is Unconstitutionally Underinclusive Because It Affects All Defendants And Almost No Plaintiffs

The Respondents take comfort in the purported "even-handedness" of section 768.56 because several cases uphold statutes which provide attorney's fees for prevailing claimants only. The implication of this argument is that if claimant-only statutes are valid, a statute purporting to apply to plaintiffs as well as defendants is some sort of constitutional bonus. But the test of the validity of any statute is the rationality of the means chosen to effectuate the overall legislative objective. Clearly, in the case of section 768.56, the overall objective is that the attorney's fee sanction deter plaintiffs, as a class, from filing "nonmeritorious" lawsuits, and encourage defendants, as a class, to settle "meritorious" cases.

As indicated in our Initial Brief, section 768.56 is ineffectual with respect to nearly the entire class of

malpractice plaintiffs. The poverty and insolvency exceptions, obviously designed to except plaintiffs, eliminate any pretense that this statute is facially neutral.*/ In addition, the practical reality that most plaintiffs are judgment-proof further erodes the effectiveness of the sanction with respect to plaintiffs.

The Respondents suggest that the even-handedness of the statute "is exemplified by appeals by a losing Plaintiff (Mathews) and losing Defendants (Karlin, Davis, Florida Medical Center, and Young)." Respondent's Brief at 9. Actually, the make-up of the appellate cases involving section 768.56 starkly highlights the one-sided effect of the statute.

Defendants prevail in approximately eighty percent of all medical malpractice cases. Yet eighty percent of the cases before the appellate courts are cases in which the plaintiff prevailed. This incredible reversal of proportion vividly illustrates that the statute affects defendants with full force and plaintiffs virtually not at all. The dearth of appeals from nonprevailing plaintiffs reflects that despite the overwhelming frequency with which plaintiffs as a group do not prevail, they are not saddled with section

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*/ On this basis alone, the statute is unconstitutionally underinclusive. Plaintiffs who can afford to risk an attorney's fee judgment will not be deterred from filing suits, even frivolous ones. See Lindsey v. Normet, 405 U.S. 56 (1972).

768.56 judgments. Being unaffected by the statute's sanction, plaintiffs are undeterred from the course of conduct the statute is meant to discourage -- filing "unmeritorious," meaning unsuccessful, malpractice suits.

Therefore, even if the statute were an otherwise valid means of minimizing litigation, it denies equal protection of the law. In order to accomplish its stated purpose, it would have to be effective as to both plaintiffs and defendants. Instead, the law is decidedly one-sided. Defendants are coerced into settling good-faith defenses because of the risk of liability for the plaintiffs' attorney's fee, with no concomitant reduction in the filing of serious or frivolous malpractice claims. Section 768.56 is unconstitutionally underinclusive because it cannot rationally advance the statute's overall purpose when it excludes in operation nearly all of one class and none of the other.

II. SECTION 768.56 VIOLATES THE ACCESS TO COURTS PROVISION OF THE FLORIDA CONSTITUTION

In response to the Petitioners' Access to Courts argument, the Respondents cite Sasso v. Ram Property Management, 431 So.2d 204, 209-11 (Fla. 1st DCA 1983). The court in Sasso held that the worker's compensation law limiting a claimant's entitlement to wage-loss benefits did not violate the access to courts provision of the Florida Constitution because it does not "completely abolish" a

claimant's right to those benefits. Id. at 210. This case is now before the Supreme Court for review, Case No. 63,708. Nonetheless, this Court has never expressly adopted the "total abolition" standard. Moreover, it held quite recently that avoiding a chilling effect on access to courts is a sufficiently important public policy consideration to preclude the application of an otherwise valid statute. See Stokes v. Bell, 441 So.2d 146 (Fla. 1983). In light of the "outer boundaries" defined in Carter v. Sparkman, section 768.56 constitutes an intolerable restraint on access to courts.

III. SECTION 768.56 FAILS THE HEIGHTENED SCRUTINY REQUIRED UNDER THE EQUAL PROTECTION CLAUSE

In response to the Petitioners' argument that there are several less restrictive alternatives to section 768.56 which more rationally advance the stated legislative objectives of the statute, the Respondents argue that the "Petitioners are not a substitute superior legislature." Respondent's Brief at 8. The Respondents completely ignore our argument that the chilling effect section 768.56 has on litigants' fundamental right of access to courts triggers heightened scrutiny under the Florida Equal Protection Clause. See In re Estate of Greenberg, 390 So.2d 40 (Fla. 1980). The several less restrictive alternatives identified by the Petitioners thus stand unchallenged in this appeal.

Should this Court agree that section 768.56 impinges on the right of malpractice litigants' access to courts then the less restrictive alternative identified at pages 39-46 of the Petitioners' Initial Brief require invalidation of section 768.56.

IV. THE RESPONDENTS' MISCELLANEOUS ARGUMENTS ARE WITHOUT MERIT

A. The Validity Of A Statute Is A Matter Of Legal Analysis, Not Factual Proof.

The Respondents argue that all of the Petitioners' major points are "unsubstantiated" and not supported by evidence in the record. Respondents' Brief at 10-11. They literally list sixteen points of our argument regarding the validity of the statute and state: "These conclusions are not sustained by either the record or reasoned analysis." Id. at 11.

With respect to the need for "record" evidence, the Respondents seriously misapprehend the nature of constitutional analysis. Our challenge does not require or contain factual support. It presents purely legal questions, and calls for a type of analysis regularly employed by Florida appellate courts. See Horsemen's Benevolent and Protective Assoc. v. Division of Pari-Mutuel Wagering, 397 So.2d 692 (Fla. 1981); Simmons v. Division of

Pari-Mutuel Wagering, 407 So.2d 269 (Fla. 3d DCA 1981), aff'd 412 So.2d 357 (Fla. 1982); and State v. Lee, 356 So.2d 276 (Fla. 1978). See also State v. Walker, 9 FLW 368 (2d DCA No. 83-1047 Feb. 8, 1984).

Further, to the extent we rely on the legislative purpose as stated in the statute's preamble, that preamble is subject to judicial notice under Section 90.201, Florida Statutes (1983). More importantly, legislative preambles are regularly consulted by the courts as a primary source of legislative intent for purposes of testing the validity of a statute. See Simmons and Walker.

As to whether our argument is supported by reasoned analysis, we leave this question to the Court's judgment. We note, however, that the Respondents have failed completely to confront our arguments in Points I (police power) and III (strict scrutiny under equal protection), and have only weakly addressed our argument in Point II (access to courts).

B. The Public Policy Identified By the Legislature Is Not Served By the Statute.

The Respondents finally argue that section 768.56 should be upheld because it represents the public policy of the State that prevailing medical malpractice litigants be

made whole by recovering their attorney's fees. Respondents' Brief at 12. While it may be pleasant to hypothesize this motive on the part of the Legislature, the hypothesis is unfounded. The preamble to this statute says nothing about such an imagined purpose. The clearly stated purpose of this law is the deterrence of medical malpractice litigation, both reasonable and unreasonable, by the imposition of a penalty upon the nonprevailing party. The preamble states:

> "[I]ndividuals required to pay attorney's fees to the prevailing party will seriously evaluate the merits of a potential medical malpractice claim."
>
> See Appendix to Petitioners' Initial Brief, A. 2.

As we demonstrated in our Initial Brief, section 768.56 does not rationally advance this legislative purpose. Where the legislature has so clearly spoken with regard to its intent, it is not the Court's role to substitute an alternative purpose not supported by the pertinent legislative record. See Schweiker v. Wilson, 450 U.S. 221, 244-45 (1981) (dissenting opinion).

CONCLUSION

The petitioners respectfully urge this Court to reverse the decision of the Fourth District and hold that

the Medical Malpractice Attorney's Fee Statute, section 768.56, Florida Statutes (1981), is unconstitutional and void.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petitioners' Brief and accompanying Appendix and Request for Oral Argument was served by mail this 16th day of April, 1984 to Joe N. Unger, Esq., 606 Concord Building, 66 West Flagler Street, Miami, Florida 33130; Milton Kelner, Esq., Kelner and Kelner, 2215 AmeriFirst Building, One S.E. Third Avenue, Miami, Florida 33131; David E. Stone, Esq., 1401 West Flagler Street, Suite 201, Miami, Florida 33131; and to John S. Neely, Jr., Esq., P.O. Box 7028, Fort Lauderdale, Florida 33304.

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