IN THE SUPREME COURT OF FLORIDA

CASE No. 64,459

FLORIDA PATIENT'S COMPENSATION FUND,

Defendant/Appellant,

vs.

LENA ROWE, as Personal Representative of the Estate of DARLENE MURPH and LENA ROWE, individually and as Trustee for MACK CHURCH,

Plaintiff/Appellee.

ON APPEAL FROM A DECISION OF THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT FOR LEE COUNTY, FLORIDA AS CERTIFIED BY THE SECOND DISTRICT COURT OF APPEAL

BRIEF OF APPELLEE

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I.

INTRODUCTION

The appellee, LENA ROWE, as Personal Representative of the Estate of DARLENE MURPH and LENA ROWE, individually and as Trustee for MACK CHURCH, was the plaintiff in the trial court and the appellant, FLORIDA PATIENT'S COMPENSATION FUND, was one of several defendants. In this Brief of Appellee the parties will be referred to as the plaintiff and the defendant and, alternatively, as "ROWE" and as "FUND." The symbols "R" and "A" will refer to the record on appeal and the appendix which accompanied the appellant's brief. All emphasis has been supplied by counsel unless indicated to the contrary.

II.

STATEMENT OF THE CASE AND ISSUES

The plaintiff accepts the defendant's "Statement of the Case and The Issues" as being substantially correct.

III.

STATEMENT OF THE FACTS

The plaintiff accepts the defendant's "Statement of the Facts" as representing a substantially correct version of what transpired below. The plaintiff also accepts the statements advanced therein as reflecting a correct assessment of what the defendant urges. The plaintiff does not agree with the "conclusions" that the defendant reaches. The plaintiff takes issue with all assertions made by the defendant concerning this case

and the case of FLORIDA PATIENT'S COMPENSATION FUND, ET AL. vs. VON STETINA, Florida Supreme Court Case No. 64,237.

This Court's order accepting jurisdiction dispenses with oral argument and establishes a briefing schedule (See: this Court's order dated November 28, 1983). Whether or not the instant cause is similar to, distinguishable from, consistent with, or dependent on FLORIDA PATIENT'S COMPENSATION FUND vs. VON STETINA, supra, this Court's order did not consolidate this case with VON STETINA for briefing or for any other purpose. Plaintiff herein is not a party to FLORIDA PATIENT'S COMPENSATION FUND vs. VON STETINA, supra. Hence, plaintiff believes it appropriate to respond only to those assertions found in the defendant's brief which relate to this case. Simply stated, aside for the defendant's gratuitous inclusion into its appendix of the brief which it filed in FLORIDA PATIENT'S COMPENSATION FUND v. VON STETINA, supra, this plaintiff has no knowledge of the facts, circumstances, issues, etc. involved therein. In point of fact, the plaintiff believes it appropriate to respond only to the argument presented in the defendant's brief which:

> ". . .is limited to the question of the facial constitutionality of the statute."

The plaintiff reserves the right to argue the significance of the above observations in the argument portion of this brief.

IV.

POINT INVOLVED ON APPEAL

WHETHER THE TRIAL COURT WAS CORRECT IN DETERMINING THAT §768.56, FLORIDA STATUTES (1981) WHICH AUTHORIZES THE IMPOSITION OF ATTORNEY'S FEES IN MEDICAL MALPRACTICE CASES, IS CONSTITUTIONAL.

V.

ARGUMENT

THE TRIAL COURT WAS CORRECT IN HOLDING CONSTITUTIONAL §768.56, FLORIDA STATUTES (1981) WHICH AUTHORIZES THE IMPOSITION OF ATTORNEY'S FEES IN MEDICAL MALPRACTICE CASES.

The plaintiff would suggest to this Court the trial court was correct in granting the plaintiff's motion for costs and attorney's fees and in holding that §768.56, Florida Statutes (1981) is constitutional. The plaintiff suggests to this Court the order appealed should be affirmed in all respects.

At the outset, the plaintiff must once again reiterate that she is neither a party to nor in privity with the litigants in, and the case of, FLORIDA PATIENT'S COMPENSATION FUND v. VON STETINA, supra. It would appear painfully obvious that the Florida Patient's Compensation Fund is involved in both. Yet, the Fund has, in this case, taken the opportunity to argue matters not of record by its repeated reference to the "arguments advanced", positions taken, issues framed, etc., in VON STETINA, supra. The Fund has placed in its appendix the brief it filed in VON STETINA for purposes which this plaintiff is at a loss to discern. Plaintiff suggests that the brief filed by the Florida

Patient's Compensation Fund in this case be stricken or, at the very least, all reference to matters founded upon VON STETINA be stricken. If Lena Rowe is to be bound by the decision in VON STETINA, respectfully, so be it! However, if the argument advanced by the Fund in this case does not for some reason apply to VON STETINA, then the plaintiff respectfully suggests that the defendant's argument be made without constant cross-reference to the circumstances found and arguments made in VON STETINA, supra. Simply stated, this plaintiff is not cognizant of the facts and circumstances founded therein and neither the Fund's gratuitous inclusion into its appendix of the brief it previously filed nor the Fund's statements concerning what is involved in VON STETINA, supra, provide plaintiff with either the ability to properly respond or the authority and obligation to go outside the subject record. With no other alternative the plaintiff would therefore respectfully adopt herein all arguments advanced in VON STETINA, supra, which could apply in opposition to the arguments made by the subject defendant.

In addition to the above the following is submitted. In this case the defendant's argument is basically fourfold.

First, the defendant argues that §768.56 is unconstitutional because "notwithstanding the language contained within the preamble, there is no requirement for a finding by the Court prior to awarding such fees that the claim or defense was spurious, improper or otherwise unfounded."

Second, the defendant argues that while the Legislature has

set forth presumably valid objectives in the preamble to the statute, "the regrettable conclusion must be that the language used to implement these objectives is, sadly, unconstitutional."

Third, the defendant argues that the "automatic imposition of attorney's fees on non-prevailing litigants in medical malpractice actions is inconsistent with the premise that liability is a difficult issue to resolve."

Lastly, the defendant argues there exist several "less restrictable alternatives which are more compatible with the Legislature's findings and purposes."

The defendant couches the arguments advanced in support of each of the above in traditional constitutional terms: that the statute violates "equal protection of the law"; that the statute deprives one of "due process of law"; and, that the statute involved is arbitrary, irrational, etc. The plaintiff suggests to this Court the subject statute is constitutional and this Court should so hold.

At the outset it should be noted that the subject statute operates in a uniform fashion. It provides for an award of attorney's fees against losing plaintiffs as well as defendants. Except for this factor the statute is no different than a plethora of other relevant Florida statutes which provide for attorney's fees in other circumstances. This Court's opinion in HUNTER v. FLOWERS, 43 So. 2d 435 (Fla. 1949), would support plaintiff's assertion in this regard.

The subject statute is reasonably designed to discourage frivolous medical malpractice claims and to encourage prompt settlement of meritorious claims. The legal justification is that the statute advances a permissible legislative interest: the reduction of medical malpractice insurance premiums and health care costs. Hence the statute meets constitutional muster.

The defendant also asserts that the means selected by the Legislature (to accomplish the statute's permissible objective) is not reasonably related to that objective. The argument advanced in support is that an attorney's fee statute is inconsistent with the premise that the issue of liability is a primary issue to be resolved in medical malpractice litigation because (according to the defendant) it deters litigants from resorting to the forum best designed to resolve that issue. However, that is precisely what the statute was designed in part to do. The statute was designed to coerce defendants into compromising and settling claims in which liability is both established and fairly debat-able. The purpose: to avoid the cost of expensive litigation and exposure to large judgments. Its intended effect would reduce the collective costs of insurance coverage for the health care industry. The general means to effect that (admitted general) goal is therefore perfectly rational even if the operation of the statute might occasionally result in settlement of a case which might have been successfully defended. It should be remembered that

the general classification of §768.56 (which admittedly singles out medical malpractice victims and health care providers for special treatment not imposed upon other tort victims/tort feasors), does bear a reasonable relationship to the permissible legislative objective of alleviating the so-called "medical malpractice insurance crisis." Indeed, that is the stated purpose of the statute, a purpose recognized by this Court. See: CARTER v. SPARKMAN, 335 So. 2d 801 (Fla. 1976) and PINILLOS v. CEDARS OF LEBANON HOSPITAL CORP., 403 So. 2d 365 (Fla. 1981).

The cases cited by the defendant in the argument portion of its brief are factually distinguishable from the instant cause. To the extent that the cases cited stand for general principles of law the plaintiff will not argue. As the defendant recognized, the issue herein is the facial constitutionality of the subject statute. In light of this Court's prior holdings in CARTER v. SPARKMAN, supra, and PINILLOS vs. CEDARS OF LEBANON, supra, the legislative objectives seem to be well established.

At page 22 of its brief the defendant argues that §768.56 is "unconstitutionally vague." In supporting the assertion the defendant argues that nowhere within the statute are the terms "insolvent" or "poverty stricken" defined. The defendant further argues that there are no guidelines given to the court for the purpose of making a determination as to who is and who is not "insolvent" or "poverty stricken". From these assertions defendant then concludes the subject statute must be constitutionally

infirm. The plaintiff would respectfully disagree.

The law in this state is well settled. As a basic rule of statutory construction words are to be given their plain meaning. See: TATZEL v. STATE, 356 So. 2d 787 (Fla. 1978); GAULDEN v. KIRK, 47 So. 2d 567 (Fla. 1950); and CITY OF WINTER PARK v. JONES, 392 So. 2d 568 (Fla.App.5th 1981). If the Legislature uses a word without defining it, then its common or ordinary meaning applies. STATE v. LITTLE, 400 So. 2d 197 (Fla.App.5th 1981). The words found in statutes should be given the meaning accorded to them in common usage unless a different connotation is expressed in, or necessarily implied from, the context of the statute. See: CITY OF WINTER PARK v. JONES, supra, and GAULDEN v. KIRK, supra. If the body of case law referenced above is lawfully correct, then it would appear a statute is not, ipso facto, "unconstitutional" simply because all of the terms utilized in the statute are not defined. When that circumstance occurs, the words utilized are given their normal and customary meaning. Hence, the argument advanced at pages 22, 23 and 24 of defendant's brief should be rejected. The Legislature intended that the statute not apply to a party who is "insolvent or poverty stricken." That the Legislature provided no "definition" of those terms does not make the statute constitutionally infirm. The defendant argues:

> "Absent a definition or guideline to the court, a party would be left to guess at the probable application of §768.56 and the awarding of fees. . ."

The above statement is probably true. Absent a definition or

guidelines to the court, a party would probably be left to guess at the probable application of §768.56 and the awarding of fees. What the defendant overlooks is simply the fact that the absence of a definition from within the four corners of the statute does not render the statute constitutionally defective. Hence, there exists a definition for each of the subject terms and that definition is found in the meaning accorded to the words from their common usage. These general principles are strengthened even further when one recognizes that the Legislature did not express (or necessarily imply from the context of the statute) any "different connotation." See: GAULDEN v. KIRK, supra. Since the defendant has stated at page 5 of its brief that the issue before this Court "is limited to the question of the facial constitutionality of the statute", the plaintiff does not believe any further discussion need be made concerning this aspect of the statute.

At pages 16-22 of its brief, the defendant asks this Court to rewrite the statute. The defendant is not even subtle about it. The argument advanced is totally inconsistent with the assertions that the issue before this Court relates to the "facial constitutionality of the statute." For example, at page 16 of its brief the defendant suggests that this Court "save the statute" by making the award of attorney's fees "discretionary with the trial court based upon the reasonableness of the claims or defenses maintained." The suggestion would lead to a rewriting of the statute. The language found in the statute is clear.

The defendant admits that the Legislature "considered and rejected a proposal which would have made the attorney's fee award discretionary depending on the trial judge's assessment of the reasonableness of the position taken by the non-prevailing party." In truth and in fact, the argument advanced by the defendant appears to be an argument more "fitting" to what has been argued (or perhaps should have been argued) by the Fund in VON STETINA, supra. If "facial constitutionality" is the issue before this Court, then the plaintiff suspects the arguments advanced herein are being made by the defendant with the knowledge that the parties in VON STETINA, supra, will not be accorded an opportunity to "respond."

Lastly, defendants "tracing" of the legislative history concerning the subject statute establishes only what the Legislature rejected and does not deal directly with legislative intent concerning what was enacted. Hence, discussions concerning "less restrictive alternatives" are inappropriate in this appeal. At page 21 of its brief the defendant suggests:

> ". . .A further less restrictive alternative would be to require bifurcation of medical malpractice trials. This device is frequently and effectively used in product liability cases under Federal Rule of Civil Procedure 42 and its state equivalents. If the court conducts separate trials on the issues of liability and damages, the optimum results would be achieved. If liability is found to exist, the defendant might be more willing to settle the question of damages rather than incur the further expense of a trial. If he does not settle, the attorney's fee penalty (with its offer of judgment provision) could apply, more consistently with the statute's purpose. If no liability is found, there would be no need for a further trial. Such a

> system would reduce the cost of malpractice litigation yet be consistent with the legislative finding that liability is difficult to resolve. . . ."

The plaintiff finds it somewhat difficult to restrain herself. In truth and in fact, the medical profession "got what it wanted." The medical profession does not like what it got! The arguments advanced by the defendant concerning "bifurcation", etc., are ludicrous. The purpose of the statute was to foster settlement. Now the defendant suggests "bifurcation" and justifies same by stating:

> ". . .If liability is found to exist, the defendant might be more willing to settle the question of damages rather than incur the further expense of a trial. . . "

With all due respect to the defendant, the purpose of the statute was to foster a settlement before the need for a trial on liability would occur. If liability is found not to exist, what protection would the plaintiff then have? Indeed, the defendant does not even state that "if liability is found to exist" the defendant would settle. Once more the defendant "hedges" and proffers that it might be "more" willing to settle the question of damages if, and only if, it is found "liable." The defendant's argument is untenable and should be rejected in its entirety by this Court.

The plaintiff respectfully urges this Honorable Court to affirm, in all respects, the order appealed, and to hold §768.56, Florida Statutes (1981) constitutional.

V.

CONCLUSION

Based upon the foregoing reasons and citations of authority the plaintiff respectfully urges this Honorable Court to affirm, in all respects, the order appealed.

Respectfully submitted,

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VI.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Appellees was served, by U.S. mail, this 16th day of December, 1983 on:

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