IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,459

SECOND DISTRICT COURT OF APPEAL

CASE NO. 83-2065

FLORIDA PATIENT'S COMPENSATION FUND,

Defendant/Appellant,

v.

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

APPELLANT'S INITIAL BRIEF

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EXPLANATION OF REFERENCES

The parties to this appeal are the Florida Patient's Compensation Fund and Lena Rowe. The Florida Patient's Compensation Fund, the Appellant herein and Defendant before the lower tribunal, will be referred to as "Fund." The Appellee, Lena Rowe, was the Plaintiff below and will be referred to in this proceeding as "Rowe."

The following references will be used throughout this brief:

R. _____ refers to pages in the record on appeal.

A. _____ refers to pages in the Appendix filed with Appellant's Brief.

TABLE OF CITATIONS

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STATEMENT OF THE CASE AND THE ISSUES

This case originates from the Circuit Court of the Twentieth Judicial Circuit for Lee County, Florida, where Rowe brought a medical malpractice claim against the Hospital Board of Directors of Lee County d/b/a Lee Memorial Hospital as a result of the death of Darlene Murph. The Fund was made a party to the action because Lee Memorial Hospital was a member of the Fund on the date of the incident giving rise to the claim.

As a result of the trial of this cause, verdict was returned in favor of Rowe. The jury's deliberation resulted in a net award of $360,000.00 for Lena Rowe, after consideration of ten percent comparative negligence found against her. Mack Church was awarded $135,000.00. The estate was awarded $990.00. The foregoing amounts total $495,990.00. (R. p.258-259)

By way of post trial motion, Lee Memorial Hospital filed a Motion for New Trial or in the alternative for Remittitur. R.263-264. The Circuit Court, on August 26, 1983, entered an Order granting the Hospital's Motion for New Trial or Remittitur. R.295-299. The award to Lena Rowe was reduced to $125,000.00 and Mack Church's claim was reduced to $30,000.00.

The Court's Order on Post-Trial Motions, contrary to the Fund's challenge (R. 276.291) found Florida Statutes §768.56 to be constitutional and obligated the Fund for

Plaintiff's costs and attorneys' fees after the Hospital's $100,000.00 primary coverage level was exhausted. A. 4.

From the Order on Post-Trial Motions, the Fund filed its timely Notice of Appeal to the Second District of Appeal. R.305-306. The Fund also filed a timely Motion for Immediate Certification to the Florida Supreme Court as an Issue of Great Public Importance. On October 31, 1983, the District Court of Appeal granted the Fund's Motion for Immediate Certification.

Pursuant to Article V, Section 3(b)(5) of the Constitution of Florida, this Court, on November 28, 1983, has accepted jurisdiction.

The question certified to this Court by the District Court of Appeal, Second District, for resolution is the constitutionality of Florida Statutes §768.56, which provides for an award of attorney's fees to the prevailing party in medical malpractice actions.*

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*/ This very point among others is presently on review by this Court in the case of Florida Patient's Compensation Fund, et al. v. Von Stetina, Case No. 64,237.

STATEMENT OF THE FACTS

This appeal is the direct result of an Order on Post-Trial Motions that was entered by the trial court on August 26, 1983. R.295, A. 1. Although several issues were addressed in the Order, the only part being reviewed by this proceeding is that portion which specifically declares Florida Statutes §768.56 constitutional and determines the Fund to be liable for a yet to be ascertained amount of Plaintiffs' attorneys' fees.

The underlying facts which resulted in the malpractice action being brought against Lee Memorial Hospital and the Fund are, by and large, unimportant for the resolution of the question certified. Where significant, these underlying facts will be highlighted.

This case is a wrongful death action. The suit was brought in the name of Lena Rowe as personal representative of the estate of Darlene Murph. Rowe is the mother of the minor decedent. The only other individual claimant in the suit was Mack Church, the decedent's father.

At the conclusion of the trial, the jury returned a combined, net award, to the claimants in the amount of $495,990.00. As previously noted, the trial court granted the Hospital's Post-Trial Motion and ordered a remittitur to the amount of $155,990.00. The Plaintiffs accepted this reduced award. The trial court ordered that the statute

being scrutinized herein was constitutional and reserved ruling after further hearing to set the amount of attorneys' fees for Plaintiffs' lawyers.

By way of its Response to Motion for Attorneys' Fees (R.276), the Fund mounted an assault against the constitutionality of Florida Statutes §768.56. The arguments raised by the Fund can be summarized as follows:

A. Section 768.56 is an invalid exercise of the police powers because the means chosen to effect its stated purposes are irrational.

B. Section 768.56 denies medical malpractice litigants the equal protection of the law.

1. Under a rational basis test, §768.56 denies equal protection because the classifications do not bear a reasonable or rational basis to the legislative goal.

2. Section 768.56 is subject to "strict scrutiny" because it infringes fundamental rights of the Fund and its members.

a. Free access to the courts, guaranteed under Article I, Section 21, Florida Constitution, is denied under §768.56.

b. Section 768.56 denies equal protection because its purposes could be achieved by less restrictive alternatives.

In addition to the foregoing grounds, the Fund asserted below that §768.56 is unconstitutionally vague.

The statute being reviewed, Florida Statutes §768.56, is entitled "Attorney's fees in medical malpractice actions." The law mandates that ". . . the court shall award a reasonable attorney's fee to the prevailing party in any civil action which involves a claim for damages . . . on account of alleged malpractice . . ." by a doctor or hospital. The statute provides that its sanctions shall not be applied against a party ". . . who is insolvent or poverty-stricken." According to its terms, the law applies to all medical malpractice actions filed after July 1, 1980. The full text of the statute is contained in the appendix to this brief, A. 135.

The stated purpose of this statute was to prevent the filing of non-meritorious medical malpractice lawsuits and, thus, reduce the cost of professional liability insurance for health care providers.

Presently before this Court is the Fund's appeal in Florida Patient's Compensation Fund, et al. v. Von Stetina, Case No. 64,237. The constitutionality of Florida Statute §768.56 is challenged in the Von Stetina proceeding. To some extent the question certified in this case is the same as the issue framed in Von Stetina. This case, however, is limited to the question of the facial constitutionality of the statute. Von Stetina goes further by presenting issues relative to the application of Florida Statutes §768.56, as well as other unrelated issues.

To the extent that the issues in these two cases are the same, and considering that Von Stetina has already been briefed, the Fund will rely on its earlier arguments to avoid repetition. All arguments in Von Stetina which are relevant to the issues in this case are at least mentioned and summarized in this brief. Reference from time to time will be made directly to the briefs in Von Stetina to avoid duplication.

ARGUMENT

I

SECTION 768.56 PROVIDING FOR AN AWARD OF ATTORNEYS' FEES IN MEDICAL MALPRACTICE ACTIONS IS UNCONSTITUTIONAL

A. The statute providing for an award of attorneys' fees to the prevailing party in a medical malpractice action is violative of applicable due process, equal protection and police power provisions.

This Court has consistently held that an act of the Legislature is valid if there is a reasonable or rational relationship between the objective of the Statute and the method chosen by the Legislature to accomplish this objective. Horsemen's Benevolent Asso. v. Division of Pari-Mutual, 397 So.2d 692 (Fla. 1981); State v. Lee, 356 So.2d 276,280 (Fla. 1978). When §768.56 was enacted in 1980, the Legislature expressly stated in the preamble that the "issue of liability is a primary issue to be resolved in medical malpractice litigation while the issue of damages is generally the primary issue in other areas of tort litigation . . ." Laws of Florida, Chapter 80-67. The Legislature also stated in the preamble that "individuals required to pay attorneys' fees to the prevailing party will seriously evaluate the merits of a potential medical malpractice claim . . ." Id.

The clear implication from these two sections of the preamble is that the Legislature intended to screen out

non-meritorious malpractice claims by placing the burden on potential litigants to work out their disputes and settle meritorious claims. The penalty for failing to settle a medical malpractice claim and taking it to trial is that the prevailing party is, by statute, entitled to an award of attorneys' fees. 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. The Court is required to award the fees. Further discussion and elaboration on this point is contained in the brief of appellants in Florida Patient's Compensation Fund and Florida Medical Center v. Von Stetina, Case No. 64,237, A. 60. Non-prevailing litigants are thus penalized, without a showing of bad faith or vexatiousness, for asking the Court to resolve the often complex legal issues that arise in medical malpractice cases.

It is clear that the means chosen by the Legislature in §768.56 for discouraging baseless and non-meritorious medical malpractice claims is not consistent with the lofty objectives set out in the preamble to this legislative enactment. Because the language of the statute is arbitrary and irrational in light of its stated purpose, it is an invalid exercise of the police power under the Florida Constitution, and denies those subject to its reach due process and equal protection as secured by the Florida and United States

Constitutions. Patch Enterprises, Inc. v. McCall, 447 F. Supp. 1075, 1078, 1081 (M.D., Fla. 1978)

Two cases recently decided by this Court applied the rational basis test to two statutes and found them constitutionally infirm. In Horseman's Benevolent and Protective Asso. v. Division of Pari-Mutual Wagering, 397 So.2d 692 (Fla. 1981), this Court considered a statute that required racehorse licensees to pay one percent of every purse to a "horseman's association." While the legislative objectives of the statute, such as encouraging year-round stalling of horses in Florida, were recognized as valid, there were no restrictions within the language of the statute that required the money be used for year-round stalling or any other stated objectives. This Court found that there was "no reasonable relationship between the stated objective of the statute and the form of the statute chosen by the Legislature to advance this purpose." 397 So.2d at 695. This lack of a reasonable relationship between the goals and the form of the statute was a violation of the police power and the statute was struck down.

Likewise, in the case of Simmons v. Division of Pari-Mutual Wagering, 412 So.2d 357 (Fla. 1982), aff'g 407 So.2d 269 (Fla. 3d DCA 1981), this Court affirmed a finding by the Third District Court of Appeal that struck down a portion of a statute prohibiting dogs and horses from racing "with any substance foreign to the natural horse or dog."

The District Court of Appeal concluded that while the purposes of the law, "to preserve the integrity of the sport of racing from corruption, to keep the wagering public from being misled, to reduce the risk of injury, and to protect the animals from cruel and inhumane treatment," were valid, the language chosen to accomplish those purposes was too broad. 407 So.2d at 271 and n.5. The Simmons Court struck down that portion of the statute that prohibited helpful and harmful substances, and went on to find that the section of the statute "banning any foreign substance cannot be said to bear a fair and substantial relationship to the objectives sought." 407 So.2d at 271-272. The reasoning of the Third District Court was adopted by this Court. 412 So.2d at 359.

While the Legislature has set forth presumably valid objectives in the preamble §768.56, the regrettable conclusion must be that the language used to implement these objectives is, sadly, unconstitutional. Just as in the two cases cited above, the specific legislative objectives found in the preamble to §768.56 and the language used to carry out those objectives bear no reasonable or rational relationship. The statute is therefore unconstitutional.

B. Automatic imposition of attorneys' fees on non-prevailing litigants in medical malpractice actions is inconsistent with the premise that liability is a difficult issue to resolve.

As stated earlier, the preamble to §768.56 and the language itself that appears in the statute present a picture of strong contrasts. While on the one hand the introductory language of the statute states that the determination of liability is the "primary issue to be resolved in medical malpractice litigation," potential litigants are strongly discouraged from taking cases to court because of the potential attorneys' fees sanction that could be imposed if they lose.

Thus, these persons must choose between a potential attorneys fee sanction being imposed or resolving a complex legal issue without the aid of the court system. Although the ostensible purpose of the statute is to discourage baseless and unfounded claims, nowhere does the Legislature provide for any determination as to the merits of the case. It is apparently presumed that the non-prevailing litigant was pursuing a baseless claim or defense, and that attorneys' fees should be assessed. The attorneys' fee sanction is applied without a finding by the Court relating to the merits of the case or defense. Litigants who guess wrong are forced to pay twice -- once for the judgment and again for the attorneys' fees. It is totally unreasonable to penalize persons for utilizing the court system to resolve disputes when this is the very reason why it exists. The Legislature found that the issue of liability was at the same time the most important and the most difficult to resolve. Absent

a specific determination by the Court of vexatiousness, it is totally inconsistent with these legislative findings to penalize the litigant that seeks court assistance in the resolution of such complex matters.

The situation now before the Court resembles a situation where this Court held that a law which restricts the exercise of an occupation, recognized by the Legislature to be legitimate, violates due process. Larson v. Lesser, 106 So.2d 188 (Fla. 1958). In Larson, the Court struck down a statute prohibiting public insurance adjustors from soliciting business. The Court presumed the act was constitutional, and applied the rational basis test, as the law was an economic regulation and did not infringe a fundamental right. 106 So.2d at 191. But the occupation of "public adjustor" had been "recognized as a valid and legitimate occupation by legislative definition." 106 So.2d at 192. The Court found no reasonable basis in the public health, welfare, or safety which "justifies the imposition of a restriction which . . . would have the practical effect of prohibiting (the public adjustor) from actually engaging in the business which the Legislature itself recognizes as being perfectly legitimate." Id.

Section 768.56 presents this Court with a problem that is very much like the issues addressed in Larson. However, the irrationality of §768.56 is apparent from even a cursory examination of the statute. The language adopted in the body

of the statute bears no reasonable or rational relationship to the stated objectives, and the statute is therefore unconstitutional.

The attorney's fees statute runs afoul of the Fund's statute, Florida Statutes §768.54, and the avowed purposes of both, i.e., it causes the ultimate cost of medical malpractice coverage to increase. When membership fees were established for Fund years prior to July 1, 1980 (any action filed after this date is subject to this sanction, even though the incident giving rise to the claim may have occurred in an earlier Fund year) the additional liability exposure caused by the attorney's fee statute was not considered. This most assuredly will cause an increase in assessments needed by the Fund. Hospital Fund members who already claim to be overburdened by the cost of Fund assessments are certain to bear more expense. See, Dept. of Insurance v. Southeast Volusia Hosp. Dist., 438 So.2d 815 (Fla. 1983). The statute again misses the mark by driving higher the cost of medical malpractice insurance when the goal of the Legislature was to lessen this exorbitant expense.

II

UNDER A STRICT SCRUTINY ANALYSIS, SECTION 768.56 IS UNCONSTITUTIONAL BECAUSE IT DEPRIVES THE FUND AND ITS MEMBERS OF FUNDAMENTAL RIGHTS AND LESS RESTRICTIVE ALTERNATIVES EXIST

A. Section 768.56 denies equal protection because it is not substantially related to its asserted purpose.

Under a strict scrutiny analysis, a statute must necessarily serve a compelling state purpose and admit of no less restrictive alternatives. Assuming the purpose of the statute is valid, the enactment is not precisely drawn. Notwithstanding the frail logical foundation for the legislation outlined earlier in this brief, the statute utterly fails to effectuate even those purposes articulated by the Legislature. Consequently, it deprives that group which is subject to its reach of the equal protection of the law. State v. Lee, 356 So.2d 276, 279 (Fla. 1978).

1. Under §768.56, the Fund and its members are deprived of a fundamental right, and the statute is therefore subject to "strict scrutiny."

While it is generally true that legislative enactments affecting social and economic interests are accorded great difference by the courts, In re Estate of Greenberg, 390 So.2d 40 (Fla. 1980), if a statute infringes upon a fundamental right, then it must pass a higher standard of review. Section 768.56, because of its effect on the

the judicial system in this state, is subject to this higher standard of review.

In Article I, Section 21, Florida Constitution it states:

> Access to Courts. The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

When this section of the Florida Constitution is placed alongside §768.56, there is an immediate and obvious conflict. Persons who chose to exercise their rights guaranteed under the constitution are confronted with the possibility that they might be punished for that choice in the form of attorneys' fees. Because this right guaranteed under the Constitution has been impinged upon, before the statute can be allowed to stand this Court must make a determination that the state's interest in adopting the statute is "substantial and compelling", and that the means used to achieve the legislative goal "are necessarily and precisely drawn." 390 So.2d at 42. Under this standard of review, §768.56 must fall.

Admittedly the state has an interest in screening out those medical malpractice claims that are frivolous and unfounded. This Court has recognized that there are some restrictions on entry into the court system that are permissible. Carter v. Sparkman, 335 So.2d 802 (Fla. 1976). However, the statute now before the Court cannot be considered a reasonable restriction on entry into the court system in

light of its punitive and totally irrational effect on the administration of justice within the state.

To permit the prevailing party in a medical malpractice action to automatically be entitled to an award of attorneys' fees, without a showing of vexatiousness or bad faith as a method of screening out non-meritorious and spurious claims fails the test set out in Greenberg that the language be "necessarily and precisely" drawn. While the legislative goal is proper and perhaps compelling, the means chosen to effect that goal do not pass constitutional muster. A discussion of this issue was presented to the Court below and is found at A. 126.

2. There are several less restrictive alternatives which are more compatible with the Legislature's findings and purposes.

Under a greater-than-rational-basis analysis, a statute is invalid if the Court can find "less restrictive alternatives" to the means chosen by the Legislature. See, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969). In light of the legislative finding that "liability is a primary issue to be resolved in medical malpractice litigation," more effective and far less restrictive alternatives are available to accomplish these objectives.

One obvious alternative would be to make the award of attorneys' fees discretionary with the trial court based upon the reasonableness of the claims or defenses

maintained. Such a procedure would require an unsuccessful litigant to pay the prevailing party's attorneys' fees only if his position was, based on affirmative findings of a judge, unreasonable.

Indeed, the Legislature considered and rejected a proposal which would have made the attorneys' fee award discretionary depending on the trial judge's assessment of the reasonableness of the position taken by the non-prevailing party.

> Mr. Moffitt: I'm very serious on this amendment, Members of the Committee and Mr. Chairman. The Court should have the discretion -- we allow the Court he discretion in many other instances where we provide for the prevailing party to have attorney's fees . . . I'm saying, and I believe, that there are instances where there may be close questions of law that ought to be litigated before the courts and where it might be a case of first impression . . . It's a very close question of fact; it's a very close question of law. The Court ought to be able to have the discretion to decide whether or not to award attorney's fees in instances like that -- to leave the word "shall" in there and not put the word "may" ties the hands of the Court and I think it's unfair to the litigants. There may be that classification of cases filed that deserves to have the issue heard without the threat of the attorney's fees provision hanging over their head. I think it's totally reasonable to leave the discretion in the Court under these circumstances as to whether or not to allow the prevailing party attorney's fees.

See Proceedings Before the House of Representatives Insurance Committee, May 15, 1980, Florida State Archives.

Instead of this less restrictive alternative, the Committee adopted the irrational position reflected in the law as it currently stands. Notwithstanding findings that the question of liability in medical malpractice cases is exceedingly difficult to determine, and notwithstanding that the function of the courts is to resolve seriously disputed claims, the law finally enacted penalized malpractice litigants for seeking judicial resolution of difficult issues in order to encourage settlement of "meritorious" claims. If "meritorious" means "ultimately found successful by a jury" and "nonmeritorious" means "ultimately found unsuccessful by a jury," the law decries the function of the judiciary in our society. It makes much more sense, and would be much less offensive, to permit the trial judge to decide whether the suit should have been brought or whether it should have been settled, and to have the judge award (or not award) attorney's fees accordingly.

The Legislature rejected a second more effective and less restrictive alternative. That alternative would have permitted a defendant to avoid liability for attorney's fees if he admitted liability (the "primary issue") at the outset of the litigation, leaving only the question of damages to be litigated. The House Insurance Committee expressly deleted a provision which would have enabled "[a] party who admits liability or" makes an offer of judgment to avoid liability for his opponent's attorney's fees. That

provision was in addition to the "offer of judgment" provision which, expressly incorporating the rule of civil procedure on point, was sensibly retained in order to permit a defendant to minimize his attorney's fees by making a damages offer which proves reasonable in light of the jury's ultimate finding.

The "admits liability or" provision would have met the principal stated purpose of the statute far more effectively than the final version which became law. That alternative would have enabled defendants, in effect, to settle the "primary" issue (liability) and litigate only damages. The Legislature's underlying premise, that liability is the "primary" issue, implies that liability requires the most extensive and expensive litigation. Given the law's purpose, to encourage settlement, a version of this bill which gives defendants the right to admit liability would reduce litigation on the primary issue, and would apply the sanction in only those situations where the Legislature's findings suggest it would be most appropriate: where the defendant fails to concede nearly certain liability.*

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*/ Another way to serve the legislative goals more effectively in light of the underlying premise would be to permit an admission of liability at a specified early stage of the proceedings. That would reduce even further litigation of the liability issue.

This additional less restrictive alternative was also rejected by the House Insurance Committee with minimal debate:

> Mr. Woodruff: Let me ask you this. If a physician, under your bill, at the beginning of the lawsuit realizes that he in fact was negligent, and in order to cut his losses and the insurance company's losses on the attorney's fees right off the bat says, we are going to admit liability, I did it, but I simply don't think that this half a million dollar lawsuit is worth half a million dollars, so I'm only going to argue about damages . . . According to your bill, if I read it correctly, if that doctor or insurance company had been smart enough to admit liability in the very first day of the controversy, even though it might take three or four years in litigation, attorney's fees couldn't be taxed.
>
> Mr. French: In the hypothetical situation you're right, Mr. Woodruff. Let me tell you, in malpractice cases it is very very rare for the issue to be the issue of damages. It is very rare for liability to be admitted. Liability is the issue in malpractice cases the vast quantity of times. In that one set of circumstances you're correct . . . I think that given the point that you make I don't think you are going to find any overwhelming objection. [F]rom our perspective, if you wanted to strike the "admits or" and just let it ride with the offer of judgment language which is existing law, I don't think you'd find us posing any serious objection.

Proceeding Before the House of Representatives Insurance Committee, May 15, 1980, Florida State Archives. Section 768.56 is impermissibly overbroad because it punished a larger class of defendants than it was intended to affect --

defendants who are willing to admit liability but who wish only to litigate damages.

This deficiency in §768.56 was recently recognized by the Florida Medical Malpractice Insurance Advisory Council. The Council is appointed by the Florida Insurance Commissioner to review problems in the medical malpractice insurance field. Its membership broadly represents several parties and interests.

In its January, 1983 Report, the Council recommended an alternative similar to the one the Legislature rejected. It proposed a system whereby physicians would be permitted to admit liability and then negotiate, or if necessary litigate the issue of damages. The Council concluded that such a system would substantially reduce the costs of medical malpractice litigation. The Council's full proposal is contained in the Appendix at A. 93.

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 attorneys' 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 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.

A final and obvious alternative is the present statute requiring the court to award attorneys' fees when a non-prevailing party fails to raise a justiciable issue of law or fact. Section 57.105, Florida Statutes (1981). If section 768.56 is really intended to deter frivolous or bad faith claims or defenses, it is grossly over inclusive in light of the existing statutory remedy. Without §768.56, §57.105 offers the major benefits to be derived from the medical-malpractice-only attorneys' fee statute, without punishing litigants for submitting the very difficult issue of liability for impartial decision.

3. In its present form, §768.56 is unconstitutionally vague.

Section 768.56 presents this Court with a statute that is remarkably vague. For example, the statute provides that

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*/ The Medical Malpractice Insurance Advisory Council also recommended that bifurcation of malpractice trials be available on the demand of either party in large cases. The Council's recommendation was that the system be available "in the more serious cases with questionable liability when the jury might be unduly influenced by sympathy." The proposal would permit a claimant to be present when either or both phases are tried. (A. 97-98.

its provisions shall not apply to a party that is "insolvent or poverty stricken." Nowhere in the statute is there a definition of "insolvent" or "poverty stricken" nor are there any guidelines given to the Court for the purpose of making such a determination. Absent a definition or guidelines to the Court, a party would be left to guess at the probable application of §768.56 and the awarding of fees.

Another example of the vagueness of the statute is that language which purports to provide for the allocation of attorneys fees when there are two or more parties on one or both sides of an action. The statute provides that "the Court shall allocate its award of attorney's fees among prevailing parties, tax such fees against non-prevailing parties in accordance with the principles of equity." As was noted to the Court below, A. 132 , the statute does not take into account the possibility that some of the parties may have settled, or that the plaintiff may be successful against some but not all of the defendants. While on the one hand this statute gives the Court no discretion in determining whether or not an award of attorneys' fees are justified in a particular case, it gives the Court a tremendous amount of latitude in deciding who will pay the fees and in what amounts.

The United States Supreme Court, in Orr v. Orr, 440 U.S. 268, 99 S.Ct. 1102, 592 Ed.2d 306 (1979), struck down an Alabama Statute on equal protection grounds that are

closely analogous to those presented to this Court. The Orr Court, in considering the statute that required husbands, but not wives, to pay alimony, used a mid-tier analysis (important governmental interest/substantial relationship) in its evaluation.

Two key points made in the Orr opinion have direct application to this case. First, the Orr Court noted that only a financially secure wife whose husband was in need derived an advantage from the statute. As pointed out above, only financially solvent litigants are affected by §768.56. Those litigants that are insolvent or poverty stricken are exempt from its application. Also in Orr, the Court noted that there was an appropriate time (routine hearings) at which a determination could be made as to the particular circumstances in a divorce. In essence, the need for the statute was not found. Likewise, in medical malpractice cases, the judge would be in a position to determine whether attorneys' fees in a particular case are warranted. A determination could then be made at the conclusion of the trial, and there is no need for the vague language of the statute.

CONCLUSION

For the above stated reasons, the Florida Patient's Compensation Fund respectfully requests that this Court find §768.56 to be unconstitutional.

Respectfully,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Appellant's Initial Brief and Appendix has been furnished by U. S. Mail to STEVEN KELLOUGH, Suite 310, Concord Building, 66 West Flagler Street, Miami, Florida 33130; JERRY L. NEWMAN, Post Office Box 2378, Tampa, Florida 33601; JAMES A. FRANKLIN, JR., Post Office Box 280, Fort Myers, Florida 33902; JOHN F. STEWART, 2225 Main Street, Fort Myers, Florida 33901; GLEN Z. GOLDBERG, Suite 803, Brickell Centre, 799 Brickell Plaza, Miami, Florida 33131; and ARNOLD R. GINSBERG, 410 Concord Building, 66 West Flagler Street, Miami, Florida 33130 on this 8th day of December, 1983.

RICHARD B. COLLINS