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IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,459

SECOND DISTRICT COURT OF APPEAL

CASE NO. 83-2065

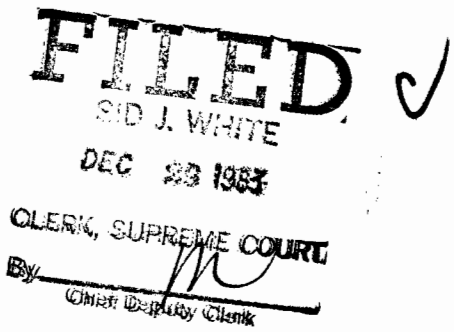
FLORIDA PATIENT'S COMPENSATION FUND,

Defendant/Appellant,

v.

LENA ROWE, as Personal Respresentative of the Estate of DARLENE MURPH and LENA ROWE, individually as 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 REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

INTRODUCTION

The issue on appeal to this Court is whether §768.56 is a valid and constitutional exercise of legislative authority. While opposing counsel has devoted much effort to criticizing the procedure used by the defendants to reduce the duplication of arguments before this Court, this brief will focus only on those legal arguments presented in Rowe's brief.

ARGUMENT

I

SECTION 768.56 IS UNCONSTITUTIONAL ON ITS FACE BECAUSE THERE IS NO RATIONAL RELATIONSHIP BETWEEN THE OBJECTIVE OF THE STATUTE AND THE MEANS CHOSEN TO ACCOMPLISH THIS OBJECTIVE.

When §768.56 was enacted in 1980, the clear intent of the Legislature was to discourage the filing of baseless and unfounded medical malpractice lawsuits and to encourage litigants to settle meritorious claims. While this objective of the Legislature is presumably valid, the means chosen to accomplish the objective fail to meet this Court's requirement that the means be rationally related to the permissable objective. Horsemen's Benevolent Asso. v. Division of Pari-Mutual Wagering, 397 So.2d 692 (Fla. 1981).

Non-prevailing medical malpractice litigants are singled out and forced to pay attorneys' fees as a way of advancing the legislative goal of discouraging baseless and non-meritorious claims. Nowhere is there a requirement or even a suggestion that a finding be made that a claimant's or defendant's position was spurious, which would be in keeping with the statutes avowed purpose.

Plaintiffs have taken the incredible position that while the statute will "coerce" some defendants into settling claims in which liability is questionable, this is an acceptable situation. Plaintiffs have raised the precise reason why this statute cannot pass constitutional muster. It is simply not rational or reasonable under any definition of those terms for a statute that is designed to prevent the filing of baseless and unfounded medical malpractice claims to penalize those litigants who have valid claims or defenses and who choose to exercise their constitutional right of free access to the courts.

The concession by plaintiffs that §768.56 could result in the settlement of actions that might have been successfully defended had they been fully litigated illustrates the defendants point: it is arbitrary, capricious and wholly irrational to impose a penalty for the ligitation of issues not easily resolvable outside a court. The Legislature recognized in the preamble to §768.56 that liability is the "primary" issue to be resolved in medical

malpractice actions. Yet, the statute fosters coerced settlement of cases in which liability is questionable. This is constitutionally unacceptable.

It is curious that plaintiffs, without any basis or authority whatsoever, state that this punitive attorneys' fee statute reduces the "costs of insurance coverage for the health care industry." It is difficult to see how a statute that forces defendants to settle cases in which liability is questionable reduces the costs of insurance coverage. A contrary argument that insurance costs increase when defensible cases are settled could just as easily be made. Furthermore, when initial rates were established, there was no way of knowing that this additional exposure was present and it was not thought to be a risk factor. If initial rates were inadequate, as hospitals' claim in Dept. of Ins. v. Southeast Volusia Hosp. District, 438 So.2d 815 (Fla. 1983), they will be even more inadequate with attorneys' fees included.

A more feeble argument made by plaintiffs in support of §768.56 is that the general classification of the attorneys' fee statute "does bear a reasonable relationship to the permissible legislative objective of alleviating the so-called 'medical malpractice insurance crisis'." Plaintiffs correctly state that this is one of the stated purposes of the statute. Unfortunately, this argument by plaintiffs misconstrues the true constitutional test that this Court

must apply. It is not enough that the statute's purpose is legitimate and that the classification to which it applies is valid in another context. The test is whether the means chosen by the Legislature is rationally related to the Legislature's stated purpose. See, e.g., Horseman's.

II

PLAINTIFFS HAVE FAILED TO REBUT DEFENDANT'S CONTENTION THAT §768.56 IS SUBJECT TO STRICT SCRUTINY

Plaintiffs have devoted little effort to rebutting defendants assertion that §768.56 impinges upon the fundamental rights of defendants. It is still maintained by the defendants that §768.56 violates Article I, Section 21, Florida Constitution in that it denies free access to the courts.

Plaintiffs, with regard to defendants' argument that §768.56 is unconstitutionally vague, would have this Court believe that the words "insolvent" and "poverty stricken" contained within the statute are sufficiently clear and unambiguous. Plaintiff cites a number of cases for the proposition of statutory construction that words are to be given their plain meaning unless otherwise indicated. With this statement the defendant will not argue. However, it is ludicrous to contend that the terms "proverty stricken" or "insolvent" have some plain, common or customary meaning.

Persons who would be subject to the reach of the attorneys' fee statute are without any guidelines as to its application to them. Since parties are not aware of this requirement with some reasonable degree of certainty in advance, the statute is unconstitutionally vague.

CONCLUSION

Before this Court is the question of the constitutionality of §768.56. This issue must be viewed in light of the purposes of the Legislature in enacting the statute, and the language ultimately adopted to effectuate those purposes. The defendant respectfully request that this Court strike down §768.56 as 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 Reply Brief 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 29th day of December, 1983.

RICHARD B. COLLINS