

IN THE SUPREME COURT OF FLORIDA

LEONARD CANTOR, M.D., :

Petitioner, :

vs. :

ESTINE DAVIS, :

Respondent. :

JOHN H. KATHE, M.D., :

Petitioner, :

vs. :

ESTINE DAVIS, :

Respondent. :

Case No. 64,663

FILED
SUPREME COURT

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CLERK, SUPREME COURT

By *[Signature]*
Chief Deputy Clerk

Case No. 64,664

BRIEF OF PETITIONER, LEONARD CANTOR, M.D.

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INTRODUCTION

This cause is currently pending before this Court on review of the decision of the District Court of Appeal, Third District, in **DAVIS V. NORTH SHORE HOSPITAL**, 452 So.2d 937 (Fla. 3d DCA 1983) (A 1-2). In that decision, the District Court of Appeal determined that Section 768.56, Fla.Stat., the Medical Malpractice Attorney's Fee Statute, "meets constitutional muster."

The Petitioner, **LEONARD CANTOR**, was the Defendant in a medical malpractice action in Dade County Circuit Court. The Co-Petitioner, **JOHN H. KATHE** (Case No. 64,664) was a Defendant in the same action. In that action, the trial court struck the claim for attorney's fees of Respondent, **ESTINE DAVIS**, based upon a decision that Section 768.56 was unconstitutional. **DAVIS** appealed to the District Court of Appeal, Third District, which reversed and held the statute to be constitutional.

CANTOR and **KATHE** filed notices seeking to invoke the discretionary jurisdiction of this Court to review the Third District's decision. This Court has now accepted jurisdiction.

Counsel for **CANTOR** has conferred with counsel for **KATHE** in the companion case and has concluded that **KATHE'S** brief should be adopted by reference herein in order to avoid un-

necessary expense and foster judicial economy. Therefore, the Petitioner, CANTOR, adopts by reference the brief submitted by the Petitioner, KATHE, in companion case 64,664, said brief having been served on the date hereof.

This limited brief is being filed on behalf of CANTOR and will attempt to avoid any duplication of the arguments or statements raised by KATHE. Based upon the reasons and authorities contained in this brief, as well as that filed by KATHE, it is respectfully submitted that the decision of the District Court should be quashed. Pursuant to this Court's decision in **YOUNG V. ALTENHAUS**, 472 So.2d 1152 (Fla. 1985), Section 768.56 cannot be constitutionally applied to the instant pre-July 1, 1980, cause of action.

STATEMENT OF CASE AND FACTS

Respondent, ESTINE DAVIS, was allegedly injured as a result of medical malpractice on or about January 2, 1980. (A 3-8). She sought damages from both Petitioners in Dade County Circuit Court. Her complaint also sought a reasonable attorney's fee pursuant to Section 768.56, Fla.Stat.

As KATHE'S brief demonstrates, the trial court's decision that Section 768.56 was unconstitutional, was reversed by the Third District in DAVIS V. NORTH SHORE HOSPITAL, supra. (A 1-2). At the same time, the Third District awarded counsel for Respondent the sum of \$5,000.00 pursuant to the same statute. (A 9).

Petitioners seek review of the Third District's decision, as well as the award by the Third District of an attorney's fee on appeal.

SUMMARY OF ARGUMENT

Respondent, ESTINE DAVIS, allegedly sustained an injury as a result of medical malpractice committed in January, 1980. She sought and recovered damages from Petitioners, CANTOR and KATHE, and also sought an award of attorney's fees pursuant to Section 768.56.

In **YOUNG V. ALTENHAUS**, *supra*, this Court specifically held that Section 768.56 could not be constitutionally applied to causes of action accruing prior to July 1, 1980, the effective date of the statute. Thus, the Third District has incorrectly determined that the attorney's fee statute passes constitutional muster vis-a-vis the instant claim and has further erred in awarding an attorney's fee to counsel for Respondent for prosecution of her appeal. In accord with **YOUNG V. ALTENHAUS** this Court must quash the Third District's decision as applied to the instant case and must quash the order awarding attorney's fees in the amount of \$5,000.00.

ARGUMENT

SECTION 768.56 CANNOT BE CONSTITUTIONALLY APPLIED TO RESPONDENT'S CAUSE OF ACTION WHICH ACCRUED IN SEPTEMBER, 1980, PRIOR TO THE EFFECTIVE DATE OF THAT SECTION.

As previously indicated, this Petitioner, CANTOR, adopts by reference the arguments made by the Petitioner, KATHE. Therefore, CANTOR will make only two short observations at this point.

Respondent has acknowledged that this Court's decision in **YOUNG V. ALTENHAUS**, *supra*, would preclude application of Section 768.56 to her cause of action. Nonetheless, she is apparently taking the position that review should be denied "because of the Petitioner's failure below to raise the issue presently before the Court." (Respondent's Notice of Supplemental Authority, September 30, 1985). In that regard, CANTOR would note that the First District has recently and very specifically addressed this question in **CATO V. WEST FLORIDA HOSPITAL, INC.**, 10 F.L.W. 1490 (Fla. 1st DCA, June 14, 1985).

Relying on **YOUNG V. ALTENHAUS**, *supra*, and the facts and arguments related thereto as known to the First District (the matter had been considered by that Court), the First District determined that this Court's decision allows a constitutional challenge based on retroactivity notwithstanding

the absence of a particular objection in the trial court. **CATO** was certified to this Court and unless this Court disagrees with the First District's conclusion, any claim raised by Respondent to the effect that no "retroactivity" argument was raised in the trial court must be rejected.

There is yet another reason why the **CATO** result would be both fair and just in the instant case. The Petitioners mounted a broad constitutional attack on Section 768.56 in the trial court, and later in the Third District. Because the trial court agreed with Petitioners that Section 768.56 violated "the equal protection of the laws as guaranteed by the Florida Constitution and the Constitution of the United States, and is unconstitutionally vague," (A 10), it was not necessarily incumbent upon Petitioners to raise all possible arguments and objections. Having prevailed in the trial court, additionally, it was not necessary for Petitioners to file a cross-appeal in order to preserve undecided issues. See, **STATE V. DYE**, 346 So.2d 538 (Fla. 1977) n.3.

CANTOR'S other observation involves the award of \$5,000.00 in attorney's fees to counsel for Respondent by the Third District. If Section 768.56 cannot be constitutionally applied to this pre-July 1, 1980 cause of action in the trial court, it cannot be applied in the appellate courts. Thus, the Third District improperly awarded fees

pursuant to that section and this Court must quash the award of fees as well as the decision of the Third District.

CONCLUSION

Based upon the foregoing reasons and authorities, as well as those contained in the KATHE brief, and adopted by reference, Petitioner respectfully requests this Honorable Court to quash the decision of the Third District as well as the award by that court of attorney's fees to Respondent's counsel.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 30th day of October, 1985 to ROBERT KLEIN, Esquire, One Biscayne Tower, Suite 2400, Miami, Florida, JOEL D. EATON, Esquire, 1201 City National Bank Building, 25 W. Flagler Street, Miami, Florida 33130, JOHN G. WOOD, JR., Esquire, 424 E. Call Street, Tallahassee, Florida, and PAMELA LUTTON, Esquire, Assistant Attorney General, Suite 1502, The Capitol, Tallahassee, Florida 32301.

By



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