IN THE SUPREME COURT OF FLORIDA

LEONARD CANTOR,

Petitioner,

v.

ESTINE DAVIS,

Respondent.

CASE NO. 64,663

3rd DCA CASE NO. 82-1392

JOHN H. KATHE, M.D.,

Petitioner,

v.

ESTINE DAVIS,

Respondent.

CASE NO. 64,664

3rd DCA CASE NO. 82-1392

PETITIONER JOHN H. KATHE, M.D. INITIAL BRIEF ON THE MERITS

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INTRODUCTION

Petitioner JOHN H. KATHE, M.D. was a defendant in the trial court and Appellee before the District Court of Appeal of Florida, Third District. Respondent ESTINE DAVIS was the plaintiff in the trial court action and Appellant before the District Court of Appeal. In this brief, the parties will be referred to as Petitioner/Defendant and Respondent/Plaintiff, as well as by name.

The following symbols will be used for reference purposes:

"A" for references to the appendix which is attached to Petitioner's brief. All emphasis has been supplied by counsel, unless indicated to the contrary.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Petitioner seeks review of the decision of the Third District Court of Appeal in DAVIS v. NORTH SHORE HOSPITAL, 452 So.2d 937 (Fla. 3rd DCA 1983). The issue raised below is whether Section 768.56, Florida Statutes (1981), which provides for an award of reasonable attorney's fees to the prevailing party in a medical malpractice action is constitutional. The decision of the Third District Court of Appeal in DAVIS reversed the ruling of the trial court, and found that Section 768.56, Florida Statute, is constitutional.

Dr. KATHE initially sought review of the decision of the Third District Court of Appeal pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(ii). As this Court had agreed to review a decision from the Fourth District Court of Appeal, FLORIDA MEDICAL CENTER, ETC., et al. v. VON STETINA, 436 So.2d 1022 (Fla. 4th DCA 1983), which had also determined that Section 768.56 is constitutional, Petitioner sought to have this appeal consolidated with the VON STETINA appeal or, in the alternative, to stay the jurisdictional briefing schedule in this case pending a decision in VON STETINA. This Court stayed the subject case pending disposition of VON STETINA.

On May 8th, 1985, Respondent moved to vacate the stay of proceedings entered by this court and for summary denial of the review sought in the this appeal. The basis for Respondent's motion was the decision of this Court in FLORIDA PATIENTS COMPENSATION FUND v. ROWE, Supreme Court of Florida, 472 So.2d 1145 (Fla. 1985), which Respondent maintained approved the decision of the Third District in DAVIS v. NORTH SHORE HOSPITAL, 452 So.2d 937 (Fla. 3rd DCA 1983).

Dr. KATHE replied to Respondent's motion by agreeing that the stay should be vacated; nevertheless, Petitioner asked this Court not to summarily deny review. Petitioner maintained that review would be appropriate in this case because of this Court's decision in YOUNG v. ALTENHAUS, 472 So.2d 1152 (Fla. 1985), and the companion consolidated case of MATHEWS v. POHLMAN.

On May 31, 1985, this Court entered an order granting Respondent's motion to vacate the stay and denying Respondent's motion for summary denial of review. In compliance with the Court's order, both parties filed briefs on jurisdiction. Petitioner requested this Court to exercise its discretionary jurisidiction to review the decision of the Third District Court of Appeal in DAVIS v. NORTH SHORE HOSPITAL, pursuant to Rule 9.030(a)(2)(A)(ii), Florida Rules of Appellate Procedure and Art. 5, Section 3(B)(3), Florida Constitution, as the DAVIS decision expressly declared valid Section 768.56, Florida Statutes. Petitioner also requested that the Court exercise its conflict jurisdiction as the DAVIS decision conflicts with this Court's decision in YOUNG v. ALTENHAUS and MATHEWS v. POHLMAN.

Respondent replied that jurisdiction should not be exercised, as the issue being raised - the constitutionality of Section 768.56, Florida Statutes, as applied to causes of action accruing prior to its effective date - had not been raised in the trial court, was not raised in the district court, and was not discussed in the decision sought to be reviewed. On October 10, 1985, this Court granted jurisdiction.

SUMMARY OF ARGUMENT

The decision of the District Court of Appeal, Third District in DAVIS v. NORTH SHORE HOSPITAL, 452 So.2d 937 (Fla. 3rd DCA 1983) must be reversed in light of this Court's recent decision in YOUNG v. ALTENHAUS and MATHEWS v. POHLMAN, 472 So.2d 1145 (Fla. 1985).

The District Court of Appeal in DAVIS, supra, issued a blanket ruling affirming the constitutionality of Section 768.56, Florida Statutes (1981), without delineating between the constitutionality of the statute as applied to causes of action accruing subsequent to the statute's effective date, and those accruing prior to July 1, 1980. This Court's decision in YOUNG and MATHEWS that Section 768.56 cannot be constitutionally applied to causes of action accruing prior to July 1, 1980 requires a reversal of the DAVIS decision, as it is evident that Respondent DAVIS's cause of action accrued prior to July 1, 1980.

Additionally, the decision of the Third District Court of Appeal in DAVIS must be reversed as it is premised upon its previous decision in YOUNG v. ALTENHAUS, 448 So.2d 1039 (Fla. 3rd DCA 1983), which decision has since been quashed by this Court.

POINT ON APPEAL

WHETHER THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN THIS CASE SHOULD BE REVERSED WHERE THE THIRD DISTRICT COURT OF APPEAL IMPROPERLY APPLIED SECTION 768.56, FLORIDA STATUTES TO A CAUSE OF ACTION WHICH ACCRUED PRIOR TO JULY 1, 1980, AND WHERE THE THIRD DISTRICT'S DECISION AFFIRMING THE CONSTITUTIONAL VALIDITY OF SECTION 768.56 WAS IN PART BASED UPON THE THIRD DISTRICT'S PRIOR DECISION IN YOUNG v. ALTENHAUS, 448 So.2d 1039 (Fla. 3rd DCA 1983), A DECISION WHICH WAS RECENTLY QUASHED BY THIS COURT.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN THIS CASE SHOULD BE REVERSED WHERE THE THIRD DISTICT COURT OF APPEAL IMPROPERLY APPLIED SECTION 768.56, FLORIDA STATUTES TO A CAUSE OF ACTION WHICH ACCRUED PRIOR TO JULY 1, 1980, AND WHERE THE THIRD DISTICT'S DECISION AFFIRMING THE CONSTITUTIONAL VALIDITY OF SECTION 768.56 WAS IN PART BASED UPON THE THIRD DISTRICT'S PRIOR DECISION IN YOUNG V. ALTENHAUS, 448 So.2d 1039 (Fla. 3rd DCA 1983), A DECISION WHICH WAS RECENTLY QUASHED BY THIS COURT

The long contested issue of the constitutionality of Florida Statute 768.56 has finally been put to rest. In a series of recent decisions, this Court has clearly held that the medical malpractice attorney's fees statute is constitutional, but only when applied to causes of action accruing subsequent to the statute's effective date, July 1, 1980. FLORIDA PATIENTS COMPENSATION FUND v. ROWE, 472 So.2d 1145 (Fla. 1985); YOUNG v. ALTENHAUS and MATHEWS v. POLHMAN, 472 So.2d 1145 (Fla. 1985)

It is evident from the allegations of the Complaint (A-1) in the instant case that ESTINE DAVIS'S cause of action accrued in January of 1980, prior to the effective date of Section 768.56. Despite this fact, and despite Petitioner's challenge to the constitutionality of the statute, the Third District Court of Appeal held that Florida Statute §768.56 is both constitutional and applicable to the instant case. DAVIS v. NORTH SHORE HOSPITAL, 452 So.2d 937 (Fla. 3rd DCA 1983).

The DAVIS court did not distinguish between causes of action which accrued prior to the effective date of the statute and those which accrued subsequent to July 1, 1980, but rather issued a blanket ruling on the constitutionality of the statute. That decision directly conflicts with this Court's recent opinion

in YOUNG and MATHEWS. For that reason, the Third District's decision in DAVIS must be reversed.

Additional grounds for reversal exist. The decision of the Third District Court of Appeal in DAVIS was in part premised upon its prior decision in YOUNG v. ALTENHAUS, 448 So.2d 1039 (Fla. 3rd DCA 1983). The Third District's decision in YOUNG was recently quashed by this Court in its opinion in YOUNG and MATHEWS, supra. Thus, although the Third District's decision in DAVIS may have been correct at the time that it was rendered, based upon the then existing law, the decision is no longer valid. The case upon which the DAVIS decision was based has been specifically quashed by this Court and subsequent decisions have clearly demonstrated that the DAVIS holding was in error.

Since this Court's decision in YOUNG and MATHEWS, Florida appellate courts have routinely reversed cases where causes of action accrued before July 1, 1980. See, e.g., KOLLINGER v. HALIFAX HOSPITAL DISTRICT, 472 So.2d 879 (Fla. 5th DCA 1985). Similar decisions have been rendered regardless of whether the parties had specifically challenged the constitutionality of Section 768.56 as applied to causes of action accruing prior to July 1, 1980. Nor has this Court suggested that a party must specifically challenge the constitutionality of Section 768.56 as applied to causes of action arising before July 1, 1980 -- rather than level a general challenge to the constitutionality of the statute in its entirety -- before that party may be entitled to relief pursuant to the YOUNG and MATHEWS decision.

It does not appear from the district court opinions in either YOUNG v. ALTENHAUS, 448 So.2d 1039 (Fla. 3rd DCA 1983), or POHLMAN v. MATHEWS, 440 So.2d 681 (Fla. 1st DCA 1983), that either appellant raised a specific argument concerning the

constitutionality of Section 768.56 as applied to causes of action arising before the effective date of the statute. Further, this Court did not require that type of specific challenge to the constitutionality of the statute as a prerequisite to its consideration of that issue in YOUNG and MATHEWS. Thus, Petitioner's challenge to the constitutionality of Section 768.56, Florida Statutes (1981) before the trial court and district court is sufficient to allow this Court to consider its application in this case.

It is therefore not necessary for this Court to examine the record to determine whether Petitioner's challenge to the constitutionality of the Statute was general rather than specific. Implicit within Petitioner's challenge to the constitutionality of the statute was a challenge to the constitutionality of the Statute as applied, given the facts of this case. Likewise, implicit within the decision of the Third District Court of Appeal in this case is a holding to the effect that Section 768.56, Florida Statutes (1981) is constitutional as applied to the facts of this case. See SAX ENTERPRISES v. DAVID AND DASH, 107 So.2d 612 (Fla. 1958). The specific issue of the constitutionality of the medical malpractice attorney's fees statute as applied to the facts of this case is therefore properly before this Court for review.

Petitioner maintains that it is evident from the allegations of the Complaint that Respondent's cause of action accrued prior to July 1, 1980. (A-1) Respondent's lawsuit was based upon her contention that a surgical sponge had been left in her body during surgery which was performed on January 2, 1980. A second procedure was required on January 3, 1980 to remove the sponge. Nevertheless, if this Court determines that

the record is insufficient to establish the date of accrual of Respondent's cause of action, it may remand the case for a determination as to the date of accrual of the cause of action, pursuant to the authority of this Court's decision in FLORIDA PATIENTS COMPENSATION FUND v. ROWE.

Any uncertainty as to the date of accrual of Respondent's cause of action should not prevent the Court from reversing the Third District's decision in DAVIS, since the DAVIS opinion constitutes a blanket ruling to the effect that Florida Statute 768.56 is constitutional under all circumstances. Thus, this Court should reverse the decision of the Third District Court of Appeal in DAVIS, and remand the case to the trial court for further proceedings consistent with this Court's opinion in YOUNG and MATTHEWS.

CONCLUSION

Petitioner JOHN H. KATHE, M.D., repectfully request this Court to reverse the decision of the District Court of Appeal, Third District, in DAVIS v. NORTH SHORE HOSPITAL, 452 So.2d 937 (Fla. 3rd DCA 1983) and to enter a ruling that Section 768.56, Florida Statutes (1981) cannot constitutionally be applied to this case. Alternatively, Petitioner KATHE respectfully requests this Court to reverse the decision of the District Court of Appeal, Third District and to remand the case to the trial court for a determination of the date of accrual of Respondent's cause of action.

Respectfully Submitted,

Debra J. Snow

ROBERT M. KLEIN
DEBRA J. SNOW

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 29th day of October, 1985, to the attached list of addresses.

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DAVIS v. KATHE

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