IN THE SUPREME COURT OF FLORIDA

LEONARD CANTOR,

Petitioner,

vs. CASE NO. 64,663

ESTINE DAVIS,

Respondent.

_____/

JOHN H. KATHE, M.D.,

Petitioner,

vs. CASE NO. 64,664

ESTINE DAVIS,

Respondent.

_____/

RESPONDENT'S BRIEF ON JURISDICTION

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I.
ISSUE PRESENTED ON JURISDICTION

WHETHER THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW *DAVIS v. NORTH SHORE HOSPITAL*, 452 So.2d 937 (Fla. 3rd DCA 1983), WHERE THE ISSUE SOUGHT TO BE RAISED HERE WAS NOT RAISED IN THE TRIAL COURT, NOT RAISED IN THE DISTRICT COURT, AND NOT DISCUSSED IN THE DECISION SOUGHT TO BE REVIEWED.

II.
ARGUMENT

The petitioners are two physicians who were unsuccessful defendants in a medical malpractice action below, in which the plaintiff obtained a small judgment of $10,000.00. Following trial, the plaintiff sought an award of attorney's fees under §768.56, Fla. Stat. (1981). The defendants challenged the constitutionality of §768.56 on several grounds. Copies of their motions to strike the plaintiff's claim for attorney's fees are included in the appendix to this brief.[1/] Both motions conceded that "Florida Statute Section 768.56 entitled "Attorney's Fees in Medical Malpractice Actions" is applicable to this claim", and neither motion raised any challenge to the constitutionality of the statute as applied retroactively to causes of action accruing before July 1, 1980. The trial court declared the statute "unconstitutional because it is vague and because it denies to defendants equal protection of the laws as guaranteed by the Florida Constitution and the Constitution of the United States". *Davis v. North Shore Hospital*, 425 So.2d 937, 937 (Fla. 3rd DCA 1983). On appeal, the Third District rejected the two constitutional challenges raised by the defendants, held the statute to be constitutional to the extent that it had been challenged, and reversed the trial court's order. *Id.*

[1/] We would not ordinarily resort to the "record proper" in this fashion. However, the defendants' entire argument here is built upon the "record proper", rather than on the face of the decision sought to be reviewed--so we have no choice but to respond in kind so that this Court is not misled.

Subsequently, in *Florida Patient's Compensation Fund v. Rowe*, 10 FLW 249 (Fla. May 2, 1985), this Court also rejected the constitutional challenges asserted by the defendants below, declared the statute constitutional, and cited the Third District's decision in this case with approval. On the same date, this Court held that, notwithstanding its general constitutionality, the statute could not be constitutionally applied retroactively to cases in which the plaintiff's cause of action accrued before July 1, 1980. *Young v. Altenhaus*, 10 FLW 252 (Fla. May 2, 1982). Notwithstanding that the defendants never challenged the statute below on the ground that it could not be constitutionally applied retroactively, and notwithstanding that the District Court never ruled on that issue, the defendants now seek the benefit of *Young v. Altenhaus*--and the assistance of this Court in resurrecting the constitutional challenge they clearly waived below. They invoke both the discretionary "conflict" jurisdiction of this Court, and the discretionary jurisdiction of this Court to review decisions declaring a state statute valid.

The first basis upon which this Court's discretionary review jurisdiction is invoked clearly does not exist. Before this Court's "conflict" jurisdiction can be successfully invoked, it is apodictic that the decision sought to be reviewed must be in "express and direct conflict" with a decision of this Court or another District Court of Appeal--i.e., the decision must conflict *on its face* with such a decision. No such conflict appears on the face of the decision sought to be reviewed, because the date the plaintiff's cause of action accrued is not revealed on the face of the decision, and the face of the decision is expressly limited to a rejection of the defendants' "vagueness" and "equal protection" challenges. That is already clear to the Court, of course, else it would not have cited the decision with approval in *Rowe*.[2/]

[2/] Surely, the mere fact that the decision sought to be reviewed cites the Third District's decision in *Young v. Altenhaus*, subsequently quashed by this Court, cannot *ipso*

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Neither do we believe that this Court should exercise whatever discretionary jurisdiction it might have under the second branch of its jurisdiction invoked by the defendants. There is certainly no need to determine the constitutionality of §768.56, or to resolve any conflicting decisions of the district courts, because that has already been done in *Rowe* and *Young*. Neither is there any reason to correct the decision sought to be reviewed in this case, because it is harmonious on its face with both *Rowe* and *Young*. In fact, it is difficult to understand how the District Court's decision could be quashed by this Court, because it is perfectly correct on its face. Therefore, the *only* purpose which would be served by accepting jurisdiction of this case would be to relieve two individual litigants of their initial waiver of the constitutional challenge successfully asserted by two other litigants in other cases. We think this Court's limited resources should be devoted to more important things.

We also believe that it would be legally erroneous for this Court to accept the defendants' challenge to the constitutionality of §768.56 on the ground now raised for the first time here. It has long been settled by this Court that constitutional attacks upon attorney's fee statutes cannot be raised for the first time on appeal. *Sanford v. Rubin*, 237 So.2d 134 (Fla. 1970). That proposition would seem to apply in spades when a litigant seeks to raise a constitutional challenge for the first time in this Court, which, if successful, would result in the reversal of a district court for a ruling it never made. And nothing in this Court's decision in *Young* (on its face at least) purports to overrule that settled proposition of *Sanford v. Rubin*.

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facto give rise to express and direct conflict with this Court's subsequent decision in *Young v. Altenhaus*. Where, as here, the point for which a subsequently reviewed decision is cited is not disapproved by this Court, and this Court's subsequent quashal of the cited decision is on a ground not implicated by the decision sought to be reviewed, no "express and direct conflict" is created by the quashal of the cited decision on an unrelated ground.

It is also apparent that this Court did not intend to overrule *Sanford* in *Young*, because the principle of *Sanford* was repeated and reendorsed by this Court a month after *Young* was decided in *Tillman v. State*, 10 FLW 305, 305-06 (Fla. June 6, 1985):

> The foregoing argument is not the argument raised at trial or on appeal. In both the trial and appellate courts, petitioner argued that no judgment of conviction could be entered on the jury's verdict of attempted manslaughter because there was no such crime. *In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.* [Citations omitted]. It is true that the trial and appeal took place before our decision in *Taylor* was rendered. Thus it might well be argued that there was no opportunity for defense counsel to rely on the specific ground raised now . . . . But the *Taylor* decision was no fundamental departure in this area of the law; it was based upon reasoning derived from legal precedents. . . . We therefore find that the issue petitioner presents is not properly presented, not having been raised at trial by specific objection or motion.

(Emphasis supplied).

With respect to the issue presented in the instant case, this Court's decision in *Young* was clearly not a "fundamental departure in this area of the law". Its reasoning derived from a long line of judicial precedent concerning the constitutionality of retroactively applicable statutes. The decision certainly came as no surprise to anyone, since several of the district courts had reached conflicting conclusions on the question long before this Court resolved the conflict in *Young*. In short, if *Sanford* and *Tillman* are still the law here, this Court cannot legally relieve the defendants of their initial failure to raise the constitutional challenge now raised here for the first time, and there is therefore neither reason nor need for granting review of the perfectly proper decision rendered by the District Court below.

III.
CONCLUSION

For all of the foregoing reasons, we respectfully submit that review should be denied.

IV.
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 3rd day of July, 1985, to: Robert Klein, Esq., One Biscayne Tower, Suite 2400, Miami, Fla.; John G. Wood, Jr., Esq., 424 East Call Street, Tallahassee, Fla.; Joel R. Wolpe, Esq., 607 Biscayne Bldg., 19 W. Flagler Street, Miami, Fla. 33130; Pamela Lutton, Esq., Assistant Attorney General, Suite 1502, The Capitol, Tallahassee, Fla. 32301; and to Steven R. Berger, P. A., 8525 S.W. 92nd Street, Suite B-5, Miami, Fla. 33156.

Respectfully submitted,

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