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IN THE SUPREME COURT OF FLORIDA

CASE NOS: 84-402, 84-505, 84-554

SUPREME COURT CASE NO: 66,972

JOHN A. NEILY,

Petitioner,

vs.

MYRTLE PROPST and MATTHAIS PROPST,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW OF
THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

INITIAL BRIEF OF PETITIONER

JOHN A. NEILY, ON JURISDICTION

BRUCE F. SIMBERG
STEVEN J. CHACKMAN
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2206 Hollywood Boulevard
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INTRODUCTION

Petitioner, John A. Neily, was Appellant in the Fourth District Court of Appeal and a defendant in the trial Court. Respondent, Myrtle Propst, was Appellee in the Fourth District Court of Appeal and a Plaintiff in the trial Court. The parties will be referred to as they stand before this Court.

All emphasis is supplied by this writer unless otherwise indicated.

STATEMENT OF THE FACTS AND THE CASE

The original Plaintiffs, Myrtle Propst and Matthais Propst, sued Stanley Frankowitz, D.O., John Thesing, D.O., Sunrise Medical Group, James J. Yezbick, D.O., David Miller, D.O. and John A. Neily, for alleged medical malpractice. The Complaint was filed in August of 1981 and complained of negligent acts at various times between 1977 and June of 1980.

A jury found negligence on the part of the doctors and awarded damages to Mrs. Myrtle Propst. The Trial Court granted the Respondents motion for attorneys fees against the doctors and an appeal was taken to the Fourth District Court of Appeal.

The Fourth District Court of Appeal held that Section 768.56, Florida Statutes, applies to all medical malpractice actions filed on or after July 1, 1980, even though the act of medical negligence may have taken place before that date. The Court affirmed the judgment of the Trial Court and further held that the statute did not violate due process of law.

POINT ON APPEAL

Whether a conflict exists between the decision sub judice and the decisions in Parrish vs. Mullis, 9 F.L.W. 2268 (Fla. 1st DCA, Nov. 1, 1984) and Tindall vs. Miller, 10 F.L.W. 258 (Fla. 2nd DCA, Jan. 23, 1985)?

ARGUMENT

A CONFLICT DOES EXIST BETWEEN THE DECISION SUB JUDICE AND THE DECISION IN PARRISH V. MULLIS, 9 F.L.W. 2268 (Fla. 1st DCA, Nov. 1, 1984) AND TINDALL V. MILLER, 10 F.L.W. 258 (Fla. 2nd DCA, Jan. 23, 1985)

Petitioner, John A. Neily, respectfully requests that this Court take jurisdiction over this appeal pursuant to Section 3(b)(3), Article V of the Florida Constitution and Rule 9.030 (a)(2)(A)(iv), Florida Rules of Appellate Procedure, The Florida Constitution and the Florida Rules of Appellate Procedure indicate that the Supreme Court may take jurisdiction over any decision of a district Court of Appeal that expressly and directly conflicts with a decision of another district Court of Appeal or of the Supreme Court on the same question of law. This brief will demonstrate that there is a conflict between the decisions and that therefore, this Court should accept jurisdiction.

In Parrish v. Mullis, 9 F.L.W. 2268 (Fla. 1st DCA, Nov. 1, 1984), appellant was an unsuccessful plaintiff in a medical malpractice action and the physician appellee moved for attorneys fees pursuant to Section 768.56(1), Florida Statutes. The Trial Court granted the motion and the First District Court of Appeal reversed.

In Parrish, the Court determined that since the cause of action had occurred on February 16, 1980, prior to the statute's effective date of July 1, 1980, that constitutional considerations of due

process prevented retroactive application of the statute. The Court stated that the right to attorneys fees is a substantive right which had not arisen when the appellant's cause of action accrued. The First District Court of Appeal concluded that section 768.56, Florida Statutes may not be retroactively applied to a cause of action which accrued prior to that sections' effective date.

In Tindall v. Miller, 10 F.L.W. 258 (Fla. 2nd DCA, Jan. 23, 1985), unsuccessful Plaintiffsin a medical malpractice action appealed the Trial Courts order granting attorneys fees to the defendant physicians under section 768.56, Florida Statutes.

The Court stated that Tindall's knee surgery was performed on March 4, 1980 and that the Plaintiff was aware of the alleged malpractice by the end of April of 1980 and that, therefore, her cause of action accrued prior to July 1, 1980. Citing Salvaggio v. Austin, 336 So. 2d 1282 (Fla. 2nd DCA 1976).

The Second District Court of Appeal expressly recognized that their holding conflicted with the Fourth District Court of Appeals decision in the case sub judice, but held that "constitutional considerations of due process preclude the retroactive application of section 768.56." The Court reversed and stated that this section may not be retroactively applied to a cause of action which accrued prior to the statutes' effective date.

In the decision sub judice, the Fourth District Court of Appeal held that section 768.56, Florida Statutes, applied to all medical malpractice actions filed on or after July 1, 1980,

even though the acts of medical negligence may have taken place before that date. The Court further determined that the statute did not violate due process and affirmed the Trial Courts judgment granting attorneys fees.

In this case, the Fourth District Court of Appeal denied the petitions for rehearing and for rehearing and/or certification. Judge C.J. Anstead dissented, noting his concurrence with the decisions of Parrish v. Mullis, supra and Tinsdall v. Miller, supra which in his opinion, directly conflict with the Courts holding in the case sub judice.

Based upon the above, it is clear that the Fourth District Court of Appeals' instant decision expressly and directly conflicts with other decisions of the state and that the Court should accept jurisdiction over this cause.

CONCLUSION

Based upon the above argument and authorities, Petitioner, John A. Neily, respectfully submits that this Court does have jurisdiction to hear this appeal based upon conflict and respectfully requests that this Honorable Court grant Petitioner's Petition for Discretionary Review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this 3rd day of May, 1985 to: MERCEDES C. BUSTO, ESQUIRE, 1390 Brickell Avenue, 5th Floor, Miami, Florida 33131-3313; MORTON J. MORRIS, ESQUIRE, 2450 Hollywood Boulevard, #300, Hollywood, Florida 33020; K.P. JONES, ESQUIRE, 1000 South Federal Highway, Suite 106, Ft. Lauderdale, Florida 33316; DAVID L. KAHN, ESQUIRE, 514

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