IN THE SUPREME COURT OF FLORIDA

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Reily v. Propst

CASE NO. 66,972

DCA NOS. 84-402, 84-505 and 84-554

STANLEY FRANKOWITZ, D.O.,
JOHN THESING, D.O.,
SUNRISE MEDICAL GROUP, P.A.,
JAMES J. YEZBICK, D.O.,
and DAVID MILLER, D.O.,

Petitioners

v.

MYRTLE PROPST and
MATTHIAS PROPST,

Respondents

PETITIONERS' BRIEF ON JURISDICTION

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STATEMENT OF THE CASE & FACTS

Section 768.56 of the Florida Statutes sets the stage for this appeal. The trial court granted the plaintiffs' motion for attorneys' fees after a verdict rendered in favor of the plaintiff, Myrtle Eileen Propst. (R. 117). The court specifically held that Florida Statute 768.56 was constitutional and that the statute applied to any action filed after July 1, 1980, even if the negligence which gave rise to the cause of action occurred prior to that date. In addition, the trial court ruled that the defendants, Stanley, Frankowitz, D.O., John Thesing, D.O., Sunrise Medical Group, P.A., James J. Yezbick, D.O., and David Miller, D.O., were estopped from raising the unconstitutionality of the statute because the defendants had asked for attorneys' fees in their answer to the plaintiffs' complaint.

The one matter not in dispute was the dates of care and treatment rendered to the plaintiff. The plaintiff alleged that treatment rendered by Drs. Yezbick and Miller occurred on or about January, 1979. (R. 2). The complaint further alleged that Dr. John Thesing had rendered negligent treatment to the plaintiff on or about March, 1979. Id. The plaintiff alleged that treatment rendered by Dr. Stanley Frankowitz occurred between January, 1979, and June, 1980. Id. All of these dates precede the effective date of Fla. Stat. §768.56. Because the action had been filed subsequent to July 1, 1980, however, the trial

court ruled that the statute applied and was not retroactive in effect.

On January 9, 1985, the Fourth District Court of Appeal rendered its decision. (See Appendix at 1). The court held that the trial court had properly applied the statute based upon a previous decision of the Fourth District, which held that the language in the statute evidenced the legislature's intent for the statute to apply to parties sued on or after July 1, 1980. "Accordingly, we hold that Section 768.56, Florida Statutes (1983), 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." (See slip op. at 4; Appendix at 4). The court further upheld the constitutionality of the statute.

On January 23, 1985, the defendants, Stanley, Frankowitz, D.O., John Thesing, D.O., Sunrise Medical Group, P.A., James J. Yezbick, D.O., and David Miller, D.O., filed a motion for rehearing. In the motion, the defendants called the court's attention to a recent decision from the First District Court of Appeal, Parrish v. Mullis, 458 So. 2d 401 (Fla. 1st DCA 1984). The appellants requested the court to rehear the appeal or to certify the case to be in direct conflict with the decision of the First District Court of Appeal. The appellants supplied the court with an additional case, Tindall v. Miller, 10 Fla. L. Weekly 258 (Fla. 2d DCA Jan. 23, 1985), as supplemental authority on March 20, 1985. In fact, the Tindall court acknowledged

the conflict with the original opinion in Frankowitz v. Propst. "We recognize that this holding conflicts with Frankowitz v. Propst, Nos. 84-402, 84-505 and 84-554, (Fla. 4th DCA Jan. 9, 1985)." Id. at 550.

On April 3, 1985, the Fourth District Court of Appeal rendered a per curiam decision denying the motion for rehearing and/or certification. However, Judge Anstead dissented and made the following statement:

> I write only to note my concurrence with the decisions of the First and Second Districts which are in direct conflict with our holding herein that the attorneys' fees statute in question can constitutionally be applied to actions based upon tortious conduct that took place before the statute was enacted. See Parrish v. Mullis, 9 F.L.W. 2268 (Fla. 1st DCA Nov. 1, 1984) and Tindall v. Miller, 10 F.L.W. 258 (Fla. 2d DCA Jan. 23, 1985).

On April 30, 1985, the defendants filed their Notice to Invoke the Discretionary Jurisdiction of the Supreme Court and now file this brief on jurisdiction.

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SUMMARY OF THE ARGUMENT

In its original opinion, the Fourth District Court of Appeal held that Fla. Stat. §768.56 could be applied to actions based on negligence which had occurred prior to the effective date of the statute, July 1, 1980. Judge Anstead dissented in the original opinion. On the Motion for Rehearing, Judge Anstead dissented with opinion and expressed his view that the Fourth District Court of Appeal's decision in the present case conflicted with other decisions from the First and Second District Courts of Appeal.

In addition, the Second District Court of Appeal in Tindall v. Miller, 10 Fla. L. Weekly 258 (Fla. 2d DCA Jan. 23, 1985) acknowledged the conflict between its decision and the original opinion in the present case.

> We agree with the holding of the First District in Parrish v. Mullis, No. AY-104 (Fla. 1st DCA Nov. 1, 1984) that Section 768.56 is inapplicable where the cause of action accrued prior to the effective date of the statute, July 1, 1980. As the First District observed, constitutional considerations of due process preclude the retroactive application of Section 768.56. For that reason we hold, as did the First District, that Section 768.56 may not be retroactively applied to a cause of action which accrued prior to its effective date.

There is, therefore, express and direct conflict between the district courts of appeal within this state.

In addition, the Fourth District Court of Appeal held that Fla. Stat. §768.56 is constitutional despite the attacks on its constitutionality. This provides a further basis for this court to accept jurisdiction under Article V, Section 3(b)(3).

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ARGUMENT

I. THE FOURTH DISTRICT COURT OF APPEAL'S DECISION IN THIS CASE "EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF OTHER DISTRICT COURTS OF APPEAL ... ON THE SAME QUESTION OF LAW."

Article V, Section 3(b)(3) of the Florida Constitution provides discretionary jurisdiction of the Supreme Court when a decision of a District Court of Appeal "expressly and directly conflict(s) with a decision of another District Court of Appeal or of the Supreme Court on the same question of law." The Fourth District Court of Appeal's decision in this case expressly and directly conflicts with decisions of the First and Second District Courts of Appeal. The petitioners, Stanley, Frankowitz, D.O., John Thesing, D.O., Sunrise Medical Group, P.A., James J. Yezbick, D.O., and David Miller, D.O., respectfully request this court to accept jurisdiction of this case.

"It is not necessary that a district court explicitly identify conflicting district court or Supreme Court decisions in its opinion in order to create an 'express conflict' under Section 3(b)(3)." Ford Motor Co. v. Kikas, 401 So. 2d 1341 (Fla. 1981). See also, Dodi Publishing Co. v. Editorial America, 385 So. 2d 1369 (Fla. 1980). To determine whether a case is in conflict, it is necessary to look at the resulting decision and not just the wording of the opinion. Niemann v. Niemann, 312 So. 2d 733, 734 (Fla. 1975)(emphasis supplied). In Niemann, the petitioner attempted to demonstrate a conflict between decisions

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of the Third and Fourth District Courts of Appeal. In determining whether an actual conflict existed, the court stated that the actual decision of the court is to be considered rather than the language contained in the opinion. The decision in this case establishes the requisite conflict.

In the present case, the Fourth District Court held that Fla. Stat. §768.56 may be applied to acts of negligence which occurred prior to the effective date of the statute as long as the case was filed subsequent to July 1, 1980. Two other decisions have specifically held that Fla. Stat. §768.56 cannot be applied to a cause of action which accrues prior to the effective date of the statute. Parrish v. Mullis, 458 So. 2d 401 (Fla. 1st DCA 1984) and Tindall v. Miller, 10 Fla. L. Weekly 550 (Fla. 2d DCA 1985).

In Parrish v. Mullis, the First District held that application of Fla. Stat. §768.56 to a cause of action which accrued prior to the effective date of the statute, July 1, 1980, violated due process considerations.

> When appellants' cause of action accrued, she was not burdened with the potential responsibility to pay the successful parties' attorneys' fees and costs, and appellee was not entitled to that right. The right and responsibility were later created by the legislature in order that malpractice plaintiffs, faced with this burden, "will seriously evaluate the merits of a potential medical malpractice claim." In the instant case, it would be manifestly unfair to argue that plaintiff could have filed her lawsuit earlier to avoid operation of the statute, when, in February of 1980, she was totally unaware of the statute; it did not exist. Therefore, we hold that Section 768.56 may

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> not be retroactively applied to a cause of action which accrued prior to its effective date.

Id. at 402 (citations omitted).

Subsequently, the Second District Court of Appeal reached the same decision.

> We agree with the holding of the First District in *Parrish v. Mullis*, No. AY-104 (Fla. 1st DCA Nov. 1, 1984) that Section 768.56 is inapplicable where the cause of action accrued prior to the effective date of the statute, July 1, 1980. As the First District observed, constitutional considerations of due process preclude the retroactive application of Section 768.56. For that reason we hold, as did the First District, that Section 768.56 may not be retroactively applied to a cause of action which accrued prior to its effective date.

Id. at 550 (citations omitted).

The conflict is apparent. In fact, the Second District Court of Appeal has articulated that its decision conflicts with *Frankowitz v. Propst*. And, at least one of the panel members in the present case has now articulated his belief that the decision in the present case is in direct conflict with the decisions of the First and Second District Courts of Appeal. (See Dissent of Anstead, J.; Appendix at 5). Under these circumstances, this court is not faced with a situation in which it must compare the cases to determine if there is conflict; but rather, two courts have articulated the existence of direct conflict.

II. THE FOURTH DISTRICT COURT OF APPEAL'S DECISION EXPRESSLY DECLARED FLA. STAT. §768.56 CONSTITUTIONAL AND THEREFORE PROVIDES JURISDICTION IN THIS COURT.

The underlying opinion in this case expressly declared valid Fla. Stat. §768.56 despite the constitutional attacks made by the appellants. (See slip op. at 3-4; Appendix at 3-4). In the opinion, the court stated "we find nothing in this section to offend due process. Appellants' other constitutional arguments are without merit .... We further hold that the statute does not violate due process of law." (Id. at 4; Appendix at 4). Thus, jurisdiction in this court is further founded on the Fourth District Court of Appeal's decision in this case.

Article V, Section 3(b)(3) provides that the Supreme Court of Florida "[m]ay review any decision of a district court of appeal that expressly declares valid a state statute ...." Fla. Const., Art. V, Section 3(b)(3). The Fourth District Court of Appeal expressly declared valid Fla. Stat. §768.56 in its opinion of January 9, 1985. As Florida Medical Center v. Von Stetina, Case No. 64,237 is still pending before this court, the petitioner reserves the constitutional attacks on the statute made before the Fourth District Court of Appeal in this instance. Jurisdiction may therefore vest in this court either through the conflict expressed in Argument I of this brief or through the court's declaration that Fla. Stat. §768.56 is constitutionally valid.

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CONCLUSION

For the foregoing reasons, the petitioner respectfully requests this court to accept jurisdiction of this case, pursuant to Fla. Const. Art. V, Section 3(b)(3).

Respectfully submitted,

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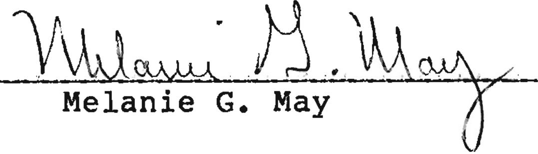
By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. mail this 9th day of May, 1985, to: Mercedes C. Busto, Esquire, BAILEY & DAWES, 1390 Brickell Avenue, 5th Floor, Miami, Florida 33131-3313; David L. Kahn, Esquire, DAVID L. KAHN, P.A., 514 S.E. 7th Street, Fort Lauderdale, Florida 33302; Bruce F. Simberg, Esquire, CONROY & SIMBERG, P.A., 2206 Hollywood Boulevard, Hollywood, Florida 33020; Morton J. Morris, Esquire, LAW OFFICES OF MORTON J. MORRIS, P.A., 2500 Hollywood Boulevard, #212, Hollywood, Florida 33020.

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