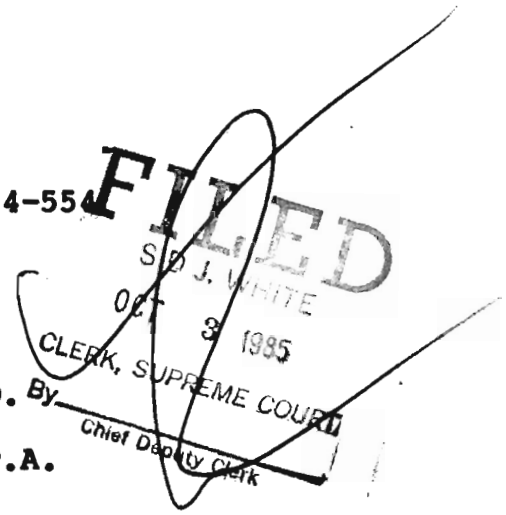
SUPREME COURT OF FLORIDA

CASE NO. 66,972

DCA NOS. 84-402, 84-505 & 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

Respondent

PETITIONERS' BRIEF ON THE MERITS

Melanie G. May, Esquire
BUNNELL, DENMAN & WOULFE, P.A.
P.O. Drawer 22988
Fort Lauderdale, Florida 33335
(305) 761-8600

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STATEMENT OF THE ISSUE

WHETHER APPLICATION OF FLA. STAT. §768.56 TO AN ACTION BASED ON NEGLIGENCE WHICH PRECEDED THE STATUTE'S EFFECTIVE DATE IS UNCONSTITUTIONAL?

STATEMENT OF THE CASE & FACTS

Section 768.56 of the Florida Statutes sets the stage for this appeal. The plaintiffs filed a complaint on August 7, 1981, alleging that Drs. Neily, Thesing, Yezbick, and Miller, and the Sunrise Medical Group had committed medical malpractice. (R. App. at 1-11). Subsequently, the plaintiffs amended their complaint to include an action for negligence against Dr. Frankowitz. (R. App. at 12-15).

The jury found in favor of Myrtle Propst and against the various defendants. (R. App. at 16-20). The jury verdict was, however, favorable to the defendants on the claim of Mr. Propst. Subsequent to the trial, the plaintiff filed a motion for attorney's fees, pursuant to Fla. Stat. §768.56. (R. App. at 21-22). The defendants filed a motion to strike and raised the inapplicability of the statute to acts of negligence which preceded the effective date of the statute. (R. App. at 23-25).

The trial court granted the motion to strike. (R. App. at 26-27). The plaintiffs moved for reconsideration. (R. App. at 28-37). After the submission of memoranda, the trial court reversed its decision, vacated its prior order, and entered an order granting the plaintiff's motion for attorneys' fees. (R. App. at 38-39). In its order granting the plaintiffs' motion for attorney's fees, the court specifically held that Fla. Stat. §768.56 was constitutional and applied to any action filed after July 1, 1980, even if the alleged 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 attorney's fees in their answer to the plaintiff's complaint.

The one matter not in dispute concerned the dates of care and treatment rendered to the plaintiff by the defendants. The plaintiff alleged that treatment rendered by Drs. Yezbick and Miller occurred on or about January, 1979. (R. App. at 2). The complaint alleged that Dr. John Thesing had rendered negligent treatment to the plaintiff on or about March, 1979. (Id. at 3). Plaintiff alleged that treatment rendered by Dr. Stanley Frankowitz occurred between January, 1979, and June, 1980. All of these dates preceded 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.

The defendants appealed the trial court's order granting the plaintiffs' motion for attorneys' fees. On January 9, 1985, the Fourth District Court of Appeal rendered its decision. (See Appendix at 40). The court held the trial court had properly applied the statute, relying 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 43). The court further upheld the constitutionality of the attorney's fees 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. (R. App. at 44). 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 in Parrish. The appellants also supplied the court with Tindall v. Miller, 463 So. 2d 1262 (Fla. 2nd DCA 1985), as supplemental authority on March 20, 1985. The Tindall court had acknowledged the conflict with the Fourth District's opinion in the present case. "We recognize that this holding conflicts with Frankowitz v. Propst."

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 this court and filed their Brief on Jurisdiction on May 9, 1985. On September 9, 1985, this court granted certiorari and ordered the petitioners to file their brief on the merits.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal held that the trial court had properly applied Fla. Stat. §768.56 against the defendants even though the plaintiffs' claims were based on alleged acts of negligence predating the effective date of the statute, July 1, 1980. On the motion for rehearing, Judge Anstead dissented and expressed his view that the Fourth District's decision in the present case conflicted with other decisions from the First and Second District Courts of Appeal.

The Fourth District Court of Appeal's decision is now in conflict with this court's decision in Young v. Altenhaus, 472 So. 2d 1152 (Fla. 1985). In fact, in Young, this court expressed its disapproval of the portions of the Fourth District's opinion, which had affirmed the retroactive application of the subject statute.

The acts of negligence alleged in the plaintiffs' complaint all occurred prior to July 1, 1980. Application of Fla. Stat. §768.56 to these acts of negligence represents an unconstitutional retroactive application of the statute. Such an application impairs vested contract rights and violates due process; it cannot be countenanced. The Fourth District Court of Appeal's decision in this case must be reversed.

ARGUMENT

I. APPLICATION OF FLA. STAT. §768.56 TO AN ACTION BASED ON NEGLIGENCE WHICH PRECEDED THE STATUTE'S EFFECTIVE DATE IS UNCONSTITUTIONAL.

This court has stood as a sentinel to protect the constitutional rights of our citizens. Foremost among those rights are the protection from impairment of contracts and the right to due process. Phillips v. City of West Palm Beach, 70 So. 2d 345 (Fla. 1953). In this case, the application of Fla. Stat. §768.56 not only impairs the contractual rights between the plaintiff and the defendants for the rendering of medical care and treatment, but also violates the defendants' due process rights. "Virtually no degree of contract impairment has been tolerated in this State." Yamaha Parts Distributors, Inc. v. Ehrman, 316 So. 2d 557, 559 (Fla. 1975). In addition, no vested right may be abrogated without the protection of due process. Van Bibber v. Hartford Accident and Indemnity Insurance Co., 439 So. 2d 880 (Fla. 1983). Neither should be countenanced in this case.

A. Fla. Stat. §768.56 Impairs the Contractual Rights Between the Plaintiffs and Defendants if Applied to Acts of Negligence Which Preceded the Effective Date of the Statute.

Article I, section 10, of the Florida Constitution provides:

> No bill of attainer, ex post facto law or law impairing the obligation of contracts shall be passed.

From this provision is derived the protection from impairment of contracts. To determine whether a statute "implicates the maxim that retroactive legislation may not impair vested rights," the court must evaluate whether a right had vested prior to the effective date of the statute. Department of Transportation v. Knowles, 402 So. 2d 1155, 1157 (Fla. 1981). The rights of the parties involved in this case vested at the time the alleged negligent acts occurred.

The complaint and amendment to it alleged that Myrtle Propst had been treated by Dr. John A. Neily in June and August, 1977 and 1978. (See paragraphs 8, 17, 18, 19 and 21 of the Plaintiffs' Complaint). The complaint alleged that Mrs. Propst's contact with Drs. James J. Yezbick and David O. Miller occurred on or about January, 1979. (See paragraphs 10 and 11 of Plaintiffs' Complaint.) The plaintiff alleged that her contact with Dr. John Thesing occurred on or about March, 1979. (See paragraph 16 of Plaintiff's Complaint). The amendment to the complaint alleged that Myrtle Propst had been seen by Dr. Stanley Frankowitz in March, 1979. (See paragraph 16(a) and (b) of Plaintiff's Amendment to Complaint). All of these dates preceded July 1, 1980, the effective date of Fla. Stat. §768.56.

There is no dispute that the alleged negligent acts occurred during the years 1977, 1978, 1979 and 1980 and terminated prior to July 1, 1980. During the term of the relationship between the plaintiff and the various defendants, there was no obligation to pay attorney's fees should an action for medical

malpractice be filed. The defendants, aware that no such statute existed, insured themselves for professional liability without a concern over an additional cost for attorney's fees. Applying Fla. Stat. §768.56, which did not become effective until the termination of the contractual relationship between the plaintiff and defendants, imposes an additional obligation under the contract between them. It materially changes the rights of the parties to that contractual relationship.

By June, 1980, all of the defendants had vested interests in the contracts for professional care and treatment, which had been performed and terminated prior to the effective date of the statute. Application of Fla. Stat. §768.56 to acts of negligence and contracts which preceded the effective date of the statute could only be retroactive. The Florida Constitution, however, prevents such retroactive application when it impairs vested rights. Fla. Const., art. I, sec. 10.

This court and the District Courts of Appeal of this state have consistently condemned the application of legislation which impairs rights protected under the constitution. Fleeman v. Case, 342 So. 2d 815 (Fla. 1976); Love v. Jacobson, 390 So. 2d 782 (Fla. 3rd DCA 1980); Hunter v. Richie's Economy Cars, 406 So. 2d 1285 (Fla. 1st DCA 1981). In Fleeman, this court reiterated that even if a legislature had intended retroactive application of a statute, it would be compelled to hold it invalid if it impaired the obligation of contract. 342 So. 2d at 818 (relying

on Yamaha Parts Distributors, Inc. v. Ehrman, 316 So. 2d 557 (Fla. 1975)).

In Love, the Third District Court of Appeal refused to apply Fla. Stat. §57.105, allowing for attorney's fees in frivolous actions, to an action predicated on substantive rights which had vested prior to the enactment of the new statute. Importantly, Love involved a medical negligence action, where the acts of negligent treatment had occurred prior to the effective date of the statute.

In Hunter, the First District Court of Appeal refused to apply 1979 amendments to the Workers Compensation Statute to accidents which had occurred prior to the effective date of the statute. The court specifically noted that the substantive rights of the parties had been fixed as of the accident date and therefore any attempt to "retroactively amend the statute" impaired the vested rights of the parties. Hunter v. Richie's Economy Cars, 406 So. 2d at 1285.

Perhaps most importantly, however, this court has reiterated its concern over retroactive application of the specific statute in question, Fla. Stat. §768.56, in its recent decision of Young v. Altenhaus, 472 So. 2d 1152 (Fla. 1985). In Young, this court held that Fla. Stat. §768.56 could not be constitutionally applied to causes of action which accrued prior to July 1, 1980. Id. at 1154. In fact, this court commented that it disapproved of the portions of the Fourth District Court of Appeal's opinion in the present case, which had affirmed the retroactive application

of the subject statute. In light of this court's comments in Young, and the clear impairment of contracts which occurs through the application of Fla. Stat. §768.56 to acts of negligence which predate the statute, the Fourth District Court of Appeal's decision in this case must be reversed.

B. Retroactive Application of Fla. Stat. §768.56 Violates Due Process.

Retroactive application of a statute has been approached from an additional constitutional concern - the guarantee of due process. Due process precludes the retroactive application of a statute which affects substantive rights. Section 768.56 affects substantive rights and therefore may not be applied retroactively.

Attorneys' fees statutes are substantive in nature. Whitten v. Progressive Casualty Insurance Co., 410 So. 2d 501 (Fla. 1982). This Court reiterated this ruling in Young v. Altenhaus. An attorneys' fees statute is substantive in nature because it creates a "new obligation or duty" not previously in existence. Id. at 1154 (citing McCord v. Smith, 43 So. 2d 704 (Fla. 1949)).

Because Fla. Stat. §768.56 is substantive in nature, it may not be applied retroactively without an explicit legislative expression to that effect. However, even a legislative expression cannot override the constitutional protections afforded under Article I, sec. 10, of the Florida Constitution. Fleeman v. Case, 342 So. 2d 815 (Fla. 1977). (See Argument "A"). This Court

agreed and ruled against retroactive application of Fla. Stat. §768.56 in Young v. Altenhaus.

This court recently encountered the retroactive application of another statute in Van Bibber v. Hartford Accident and Indemnity Insurance Co., 439 So. 2d 880 (Fla. 1983). In Van Bibber, this court held that the non-joinder statute had "no application to a cause of action predicated on events which occurred prior to the effective date of this statute." Id. at 881. The Court's holding in Van Bibber is particularly significant because the Court relied on the dates the alleged negligence occurred to determine whether retroactive application had occurred. Unfortunately, the trial court and the Fourth District have applied Fla. Stat. §768.56 to acts of alleged negligence which predated the statute.

There is no dispute in this case that all of the alleged acts of negligence occurred prior to, and in many instances years prior to, the effective date of the statute. The fact that the plaintiffs did not file their complaint until August, 1981, over a year after the effective date of the statute is of no import. Nor is the discovery of the alleged negligence significant to the determination of retroactivity. Application of this statute to acts of negligence which predated the statute's enactment is retroactive. Such retroactive application cannot be countenanced. The Fourth District Court of Appeal's decision should be reversed.

II. THE DATE OF THE ALLEGED NEGLIGENCE PROVIDES THE APPROPRIATE TIME FRAME FOR DETERMINING THE RETROACTIVE APPLICATION OF FLA. STAT. §768.56.

In Young v. Altenhaus, this Court stated the question to be answered as "whether Section 768.56 may properly apply where the cause of action accrued prior to July 1, 1980, the date the section became effective?" 472 So. 2d at 1154. It appears from the opinion that both the Young and Mathews cases involved malpractice incidents which had occurred prior to the effective date of the statute. It is unclear, however, whether an issue was raised as to what date the cause of action accrued.

In the trial court and the Fourth District Court of Appeal, the plaintiffs argued that because the acts of negligence were not discovered until after the effective date of the statute, application of the statute was not retroactive. Decisions from this court have made clear, however, that retroactivity concerns the date the acts of negligence occurred -- not the date of discovery.

In Van Bibber v. Hartford Accident Indemnity Co., this court addressed the relevant date for determining retroactive application of a statute. "We hold that the statute is constitutional, but that it has no application to a cause of action predicated on events which occurred prior to the effective date of the statute." 439 So. 2d at 881.

In Department of Transportation v. Knowles, 402 So. 2d 1155 (Fla. 1981), this court held that the sovereign immunity statute could not be applied to a plaintiff's judgment to reduce the amount of that judgment. This court analyzed the retroactive application argument under due process considerations. Knowles' vested right involved his right to sue the defendant, which emanated from the date of the alleged acts of negligence.

The Fourth District Court of Appeal made a similar ruling in Galbreath v. Shortle, 416 So. 2d 37 (Fla. 4th DCA 1982). In Galbreath, the Fourth District dealt with application of the sovereign immunity statute. The statute had been enacted after the date of the accident, but prior to the filing of the complaint. The Fourth District Court found that the acts constituting the alleged negligence served as the basis for determining whether a statute was being applied retroactively. "It is true this particular lawsuit had not yet been filed on the effective date of the amendment, and that does represent a factual distinction from the above cited Knowles case. However, we are of the opinion that the date of the accident controls." Id. at 37. Under these authorities, there can be no doubt but that the date of the alleged acts of negligence formed the time frame from which to determine whether the statute was being applied retroactively. In this case, there is also no doubt that the negligent acts occurred prior to the effective date of the statute. As noted in Galbreath, the fact that the complaint was filed after the

effective date of the statute is of no importance. The District Court of Appeal's decision in this case must be reversed.

III. SECTION (2) DOES NOT CLEARLY ARTICULATE A LEGISLATIVE INTENT TO APPLY THE STATUTE RETROACTIVELY.

Subsection (2) of the statute provides:

> This section shall not apply to any action filed before July 1, 1980.

As this court noted in Seddon v. Harpster, 403 So. 2d 409 (Fla. 1981), the legislature must expressly manifest its intention. The intent in Fla. Stat. §768.56 is not clear. If anything, it shows an intent to not apply the statute to actions filed before its effective date. This concern is consistent with an intent to prohibit retroactive application of the statute. In Young v. Altenhaus, this court held that Fla. Stat. §768.56 could not be applied retroactively. Although the opinion did not discuss subsection (2), it was in existence at the time of the opinion and did not affect this Court's disposition of the issue. This court has already ruled on the retroactive application of Fla. Stat. §768.56. The statute is substantive in nature and therefore precludes retroactive application to any cause of action which accrued prior to the effective date. The Fourth District Court of Appeal's decision in this case must be reversed.

IV. FLA. STAT. §768.56 IS UNCONSTITUTIONAL.

Cognizant of this court's decision in Florida Patients Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985), but out of concern that a petition for rehearing is pending, the defendants wish to preserve the issue of the constitutionality of the attorney's fees statute. This issue was raised and briefed in the Fourth District Court of Appeal. The petitioners incorporate their prior arguments, and request additional time to brief the constitutional issues should the Court desire additional argument.

CONCLUSION

For the foregoing reasons, the petitioners, Stanley Frankowitz, D.O., John Thesing, D.O., James J. Yezbick, D.O., David Miller, D.O. and Sunrise Medical Group, P.A., respectfully request this court to reverse the decision of the Fourth District Court of Appeal.

Respectfully submitted,

BUNNELL, DENMAN & WOULFE, P.A.
Attorneys for Petitioners
P. O. Drawer 22988
Fort Lauderdale, FL 33335
(305) 761-8600

By: Melanie G. May
Melanie G. May

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. mail this 30th day of September, 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., P.O. Box 14190, 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.

BUNNELL, DENMAN & WOULFE, P.A.
Attorneys for Petitioners
P.O. Drawer 22988
Fort Lauderdale, Florida 33335
(305) 761-8600

By: Melanie G. May
Melanie G. May