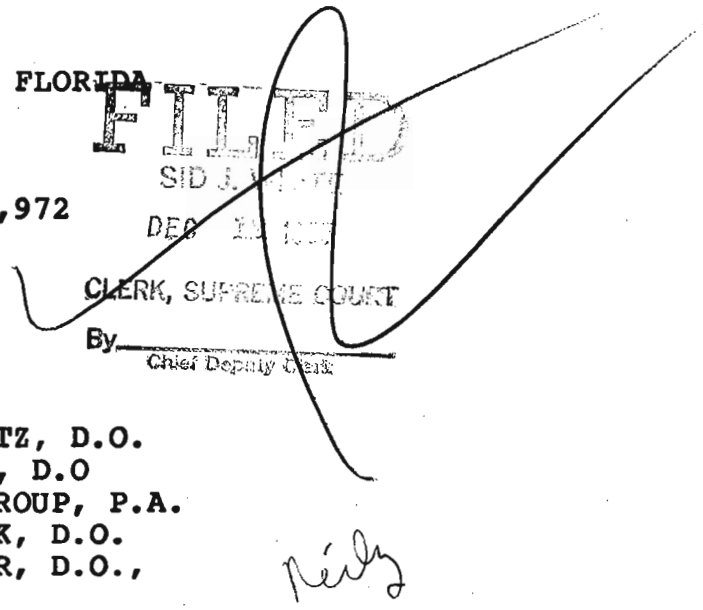
SUPREME COURT OF FLORIDA



CASE NO. 66,972

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

PETITIONER'S REPLY BRIEF ON THE MERITS

Submitted by:

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STATEMENT OF THE ISSUES

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

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

ARGUMENT

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

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.

The respondent argues that application of Fla. Stat. §768.56 does not impair the physician/patient contract in this case. The respondent suggests that the statute "does not affect the doctor's duty to render medical services, or the patient's duty to pay for the medical services." (See Respondent's Brief at 12). The respondent is in error.

There can be no doubt that the rising costs of medical and treatment is due in part to the enormous attorneys' fees awarded to litigants as a result of the enactment of Fla. Stat. §768.56. To suggest that application of Fla. Stat. §768.56 did not impair the agreement between the plaintiff and the defendant doctors in this case is tantamount to ignoring reality. The statute is not merely a consequence of the outcome of litigation, it is an impairment of the agreement between the patient and the defendant doctors for the agreement did not account for the potential liability for attorneys' fees because no such liability existed when the agreement was entered into, was performed, or terminated. Impairment of contract obligations is prohibited

by the Florida Constitution. The statute must not be applied to acts of alleged negligence, which predated the effective date of the statute.

The respondent further suggests that the preamble to Fla. Stat. §768.56 sets forth an important state objective. The respondent is correct. However, this objective does not negate the effect on the contractual obligations of the parties. This Court has previously ruled that Fla. Stat. §768.56 is constitutional. Thus, the state's objective has been found not only to be legitimate, but to outweigh the ill effects of the statute. However, this Court's holding does not suggest that the statute should be applied unconstitutionally to acts of alleged negligence, which predated the statute's effective date.

Respondent's attempt to distinguish the applicable cases involving impairment of contracts must fail. Each of the cases has consistently condemned the application of legislation which impairs rights protected under the constitution. This court held that Fla. Stat. §768.56 cannot be applied retroactively to causes of action accruing prior to July 1, 1980. Young v. Altenhaus, 472 So. 2d 1152 (Fla. 1985). 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.

Respondent's argument concerning the violation of due process is in contradiction with this Court's decision in Young v. Altenhouse. The respondent argues that the weighing process involved in a due process evaluation, results in a finding that no due process violation has occurred in this case. The respondent is in error.

In Young v. Altenhouse, this Court reiterated its concern over retroactive application of statutes that affect substantive rights. In so doing, this Court held that Fla. Stat. §768.56 could not be retroactively applied. Despite the permissible legislative concerns, this Court held that the statute cannot be given retroactive effect. Therefore, the respondent's argument fails.

The respondent spends a good deal of its brief attempting to re-argue the issue laid to rest by this Court in Young. They set forth a balancing test for determining a concern over the legitimacy of the state's objectives and the power of the state to regulate certain areas. While these issues are pertinent to the statute's facial constitutionality, they are irrelevant to the limited issue before this Court. This Court has already weighed the relevant factors, it has reviewed the legitimacy of the state's objectives and approved of the state's power to legislate in this area. And after undertaking these tasks, this Court has determined that Fla. Stat. §768.56 is constitutional,

but that it cannot be applied retroactively. Florida Patients Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985); Young v. Altenhaus.

This case will now serve as the conduit through which this Court may re-articulate the relevant date for determining retroactivity. As this Court has previously held, the relevant date is the date on which the alleged negligence occurred. In this case, those dates all fell prior to the effective date of Fla. Stat. §768.56. Thus, Fla. Stat. §768.56 cannot be applied to the cause of action before this Court.

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. Van Bibber v. Hartford Accident & Indemnity Insurance Co., 439 So. 2d 880 (Fla. 1983). 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.

As anticipated, the respondent has taken the position that the "accrual of the cause of action" occurred in October, 1980. This issue was contested at trial, but the respondent correctly states that the jury returned a verdict against two of the defendant doctors through a special interrogatory given to the jury concerning a statute of limitations defense. The interrogatory stated:

> Did the plaintiffs, Myrtle and Matthias Propst, by filing their complaint on August 11, 1981, commence their action against John Neily, D.O., more than two (2) years from the time the incidents were discovered or should have been discovered with the exercise of due diligence?

The jury answered the question "no." A similar question was asked concerning Stanley H. Frankowitz when the complaint was amended to include a claim against him on December 8, 1982. The jury returned a similar response. The jury simply found that the plaintiffs had filed their complaint within the two year statutory period.

The respondents now argue that the jury's finding with regard to the statute of limitations precludes the petitioners' argument setting the relevant date for evaluating retroactive application of the statute as the date on which the allegedly negligent acts occurred. Once again, the respondent is in error. The respondent cites a legion of cases which hold that a cause

of action does not accrue until it is discovered. (See Respondent's Brief at 6). The respondent is correct to the extent these cases discuss the statute of limitations. They are inapplicable, however, to whether the application of a statute is retroactive.

Not one of the cases cited by the respondents specifically holds that for determining retroactive application, the date of discovery of the negligence is the relevant factor. In fact, in the one case quoted by the respondent, Creviston v. General Motors Corp., 225 So. 2d 331 (Fla. 1969), the court specifically limited its holding. "Our holding is limited solely to the matter of the commencement of the running of the three year statute of limitations in the factual posture of this case and is not otherwise extended." Id. at 334.

In Lund v. Cook, 354 So. 2d 940 (1st DCA 1978), cert. denied, 360 So. 2d 1247 (Fla. 1978), the court simply stated a well-known legal maxim that the aggrieved party's discovery or duty to discover determines the accrual of the cause of action for purposes of the statute of limitations. In Meehan v. Celotex Corp., 466 So. 2d 110 (Fla. 3d DCA 1985), the same maxim was reiterated. In Senfeld v. Bank of Nova Scotia, 450 So. 2d 1157 (Fla. 3d DCA 1984), the court held that the statute in question was remedial in nature and therefore was not concerned with retroactive application. In Phelan v. Hanft, 471 So. 2d 648 (Fla. 3d DCA 1985) and Steiner v. Ciba-Giegy Corp., 364 So. 2d 47 (3d DCA 1978), cert. denied, 373 So. 2d 461 (Fla. 1979), the courts again discussed the discovery date as the relevant date for

determining the accrual of a cause of action for medical malpractice for statute of limitations purposes.

The petitioners do not quarrel with the principal articulated in these cases, but dispute the respondent's reliance upon these cases to support its position. This is not a case in which the statute of limitations is an issue before this court. The issue in this case is whether a statute, which became effective on July 1, 1980, can be applied to acts of negligence which occurred prior to that date. As this Court has stated on at least two prior occasions, a substantive statute "has no application to a cause of action predicated on events which occurred prior to the effective date of the statute." Van Bibber v. Hartford Accident Indemnity Co., 439 So. 2d 880, 881 (Fla. 1983). See also, Department of Transportation v. Knowles, 402 So. 2d 1155 (Fla. 1981). Petitioner's argument in this case is not contrary to the court's own decisions, as suggested by the respondents on page 8 of its brief. Rather, to allow Fla. Stat. §768.56 to be applied to the alleged negligent acts, which transpired before July 1, 1980, would permit an unconstitutional application of the statute in this case.

This Court has recognized the substantive nature of Fla. Stat. §768.56. This Court has held that the statute cannot be applied retroactively to a cause of action which accrued prior to the effective date of the statute. Petitioners respectfully request this Court to now articulate that the relevant date

for determining retroactivity is the date of the alleged negligence -- not the date the plaintiff discovered that negligence.

The petitioner respectfully requests this Court to reverse the Fourth District Court of Appeal's decision in this case, which unconstitutionally applied Fla. Stat. §768.56 to the present cause of action. The respondent requests this Court to remand the case to the Fourth District Court of Appeal for a determination of the estoppel argument should the petitioners prevail. The respondent did not request the Fourth District Court of Appeal by way of petition for rehearing to evaluate this argument and she has therefore waived her right to assert the estoppel issue at this late date.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. mail this 11th day of December, 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.

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