OIa 4-7-89

IN THE SUPREME COURT OF FLORIDA

CASE NO: 72,878

FLORIDA PATIENT'S COMPENSATION FUND;
ENRIQUE MORALES, M.D., AND
WHITE, KUMP, AND MORALES, M.D., P.A.,

PETITIONERS,

VS.

CLARA M. SCHERER, ET AL.,

RESPONDENTS.

AMICUS CURIAE
FLORIDA PHYSICIANS INSURANCE COMPANY'S BRIEF

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INTRODUCTION

This brief on the merits is filed on behalf of the Florida Physicians Insurance Company which has been granted amicus curiae status by this Court.

STATEMENT OF THE CASE AND FACTS

Amicus curiae Florida Physician Insurance Company herein adopts the statement of the case and facts set forth by Petitioners Florida Patients Compensation Fund, Enrique Morales, M.D., and White, Kump & Morales, M.D., P.A..

SUMMARY OF ARGUMENT

The trial court erred in entering a judgment for attorney's fees pursuant to Section **768.56,** as the negligent act upon which Respondent's action is based occurred prior to the effective date of the attorney's fees statute, Section **768.56.** In YOUNG v. ALTENHAUS, **472** So.2d **1152** (Fla. **1985),** this Court determined that the statute did not apply retroactively, and would apply only to causes of actions which accrued subsequent to the statute's effective date.

In the instant case, the trial court has improperly imposed Section **768.56** upon a cause of action which accrued prior to the statute's effective date, apparently because Respondent confused the accrual date of a cause of action with the date on which the statute of limitations commences to run. While the two dates are often the same, in medical malpractice actions the statute of limitations may sometimes not commence to run until years after the cause of action actually accrues.

The application of Section 768.56 to acts of malpractice occurring prior to its enactment date would constitute a violation of state and federal constitutional prohibition against ex post facto laws. The damages and penalties, including an award of attorney's fees, for which a physician may be held liable, cannot be constitutionally enlarged after the date of the alleged malpractice.

ARGUMENT

POINT I

THE COURT ERRED IN ENTERING JUDGMENT FOR ATTORNEY'S FEES UNDER SECTION 768.56 WHEN THE ALLEGED NEGLIGENT ACT OCCURRED PRIOR TO JULY 1, 1980.

The trial court in this matter entered a judgment for attorney's fees against Dr. Morales pursuant to the authority of Section 768.56, Florida Statutes (1981). That statute, which provides that the prevailing party in a medical malpractice action is entitled to a reasonable attorney's fee, was enacted by the 1979 Florida Legislature. Section (2) of the statute provides that it does "... not apply to any action filed before July 1, 1980."

While the statute did provide that it would not apply to any action filed before its effective date, the issue of whether the statute would apply to causes of action which accrued prior to the statute's effective date but were not filed until after July 1st, 1980 remained an open question for several years. That question was finally resolved by this Court in YOUNG V. ALTENHAUS, 472 So.2d 1152 (Fla. 1985). The YOUNG Court determined that the statute did not apply retroactively, and that it would only apply to causes of action which accrued subsequent to the effective date of the statute.

In the instant case, the alleged incident of malpractice occurred in 1979, prior to the effective date of Section 768.56. However, Scherer arguably did not "discover" her cause of action against Morales (or file suit thereon) until after

July lst, 1980. Thus, Scherer maintained that although the incident of malpractice occurred prior to the effective date of the attorney's fees statute, she was nonetheless entitled to an award of attorney's fees, as her cause of action was not discovered -- and therefore did not accrue -- until after the effective date of the statute. The Fourth District Court of Appeal agreed with the trial court, holding that Ms. Scherer was in fact entitled to an award of attorney's fees.

It appears that Respondent has confused the date of accrual of her cause of action with the date when the statute of limitations began to run. While the two dates are often the same, that is not always the case. A cause of action accrues "when the last element constituting the cause of action occurs." Section 95.031(1), Florida Statutes (1981). Conversely, where the cause of action is for medical malpractice, the statute of limitations does not commence to run until "... the incident is discovered, or should have been discovered with the exercise of due diligence...." Thus, the statute of limitations may not commence to run on a medical malpractice action until several years after the cause of action actually accrued.

As this Court noted in YOUNG, it is the accrual date of the plaintiff's cause of action which determines whether the prevailing party is entitled to attorney's fees. The YOUNG case does not state that the entitlement to attorney's fees depends upon whether the statute of limitations commenced to

run subsequent to the effective date of the statute. Therefore, it would appear that the Fourth District's decision in this matter misapplied the Court's holding in YOUNG.

The ruling in YOUNG was based upon the Court's determination that a statutory requirement for the payment of attorney's fees by a non-prevailing party constitutes a substantive law. In Florida, absent an explicit legislative expression to the contrary, a substantive law is to be construed as having prospective effect only.

A statute which does provide for retroactive application may be found unconstitutional.

> A retrospective provision of a legislative act is not necessarily invalid. It is so only in those cases wherein vested rights are adversely affected or destroyed or when a new obligation or duty is created or imposed, or an additional disability is established, in connection with transactions or considerations previously had or expiated. McCORD v. SMITH, **43** So.2d **704, 708-709** (Fla. **1949).** (emphasis added)

As Section **768.56** contains no provisions for retroactive application, and as it imposes a new obligation upon litigants, it necessarily applies only to actions which accrue subsequent to the effective date of the statute. Had the Legislature attempted to have this statute apply retroactively, it would have been unconstitutional under the principles which were related in McCORD, as it would impose a new obligation in connection with prior transactions.

As Judge Anstead noted in his dissent to the Fourth District's decision in this case, application of Section

768.56 to acts of malpractice which occurred prior to its enactment constitutes a violation of state and federal constitutional prohibitions against ex post facto laws. The damages and penalties, for which a physician may be held liable, including an award of attorney's fees cannot be constitutionally enlarged after the date of the alleged malpractice.

Judge Anstead's dissent is in accordance with the Supreme Court's pronouncement in McCORD V. SMITH, supra, i.e., that a retroactive application of a legislative provision is invalid where it would impose a new duty or obligation in connection with transactions which have already been completed.

In this case, the transaction in question was the treatment of Scherer in 1979. In 1979, if Dr. Morales committed malpractice he was obligated to pay compensatory damages (or punitive damages if the negligence was sufficiently egregious). At that time, Dr. Morales would have no obligation to pay attorney's fees to a patient who prevailed in a malpractice action against him.[1] The obligation to pay attorney's fees is a new obligation, which cannot constitutionally be applied to transactions or treatment which took place prior to the enactment of this statute.

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[1] Similarly, the obligation undertaken by medical malpractice insurance carriers in 1979 was to indemnify their insureds for any awards of compensatory damages that might be assessed against them. The carriers did not contemplate (and the premiums which they charged did not reflect) an undertaking to pay an award of attorney's fees pursuant to a subsequently enacted statute.

In MORALES, the majority found that the date of accrual of the cause of action for purposes of determining entitlement to attorney's fees, was synonymous with the date of accrual of the cause of action for statute of limitations purposes. We do not take issue with this general principle. To the contrary, we simply do believe that the Court was thereafter incorrect in asserting that the cause of action does not accrue until the plaintiff discovers the cause of action.

The accrual of a cause of action was discussed in detail by the First District Court of Appeal in GLASS v. CAMERA, 369 So.2d 625 (Fla. 1st DCA 1979).

> We concede the difficulty of rationalizing our classification of this case with decisions associating accrual of a cause of action with plaintiff's knowledge of it, instead of with those that require a reply of waiver or tolling to avoid a limitation statute running upon accrual of the cause in a strict sense. Section 95.11(10), Florida Statute (1973), which formerly governed the limitations period for medical malpractice actions, leaped the doctrinal chasm by declaring that "the cause of action in such case [is] not to be deemed to have accrued until the plaintiff discovers, or through the use of reasonable care should have discovered, the injury." Under such a statute, it was not difficult to consider that the pleader of the affirmative defense, having the burden of showing when the cause of action "accrued," must carry the day on the issue of plaintiff's knowledge. The malpractice limitations statute in its present form, supra n.1, does not attempt the miracle of associating accrual with notice; but our construction of the statute, though perhaps untidy, serves the same purpose of requiring the defendant to prove the staleness of plaintiff's claim by reference to the time when plaintiff reasonably should have been expected to sue, given plaintiff's knowledge or means of acquiring knowledge. 369 So.2d at 629.

The 1973 version of the medical malpractice statute of limitations specifically provided that, "the cause of action in such cases [is] not to be deemed to have accrued until the plaintiff discovers, or through use of reasonable care should have discovered, the injury."

The current statute of limitations for medical malpractice actions does not speak in terms of accrual. Rather, the statute addresses precisely when a statute of limitations commences to run. When discussing fraud, the statute does not provide that the cause of action does not accrue until the cause of action is discovered; rather, the period of limitations is simply extended for two years "from the time the injury is discovered or should have been discovered with the exercise of due diligence, but in no event to exceed seven years from the date the incident giving rise to the injury occurred." Thus, there is nothing in the current statute to suggest that the cause of action does not accrue at the time the negligence and resulting injury, notwithstanding a plaintiff's ignorance of the cause of action. In other words the plaintiff's discovery of the cause of action starts the clock on the statute of limitations; it does not signal "accrual" of the cause of action.

An interpretation which equates the accrual of a cause of action for the purpose of determining a party's entitlement to attorney's fees with the occurrence of the negligence which resulted in injury would normally not run afoul of the

constitutional prohibition against ex post facto laws. If an attorney's fees statute was in effect at the time that the negligent medical treatment was performed, then the prevailing party in a subsequent medical malpractice action should be entitled to attorney's fees, regardless of whether the attorney's fee statute was in effect at the time that the cause of action was discovered or the complaint filed. Both parties would be certain of their potential obligations at the time that the transaction was undertaken; neither would be subjected to the uncertainties which are inherent in determining when a plaintiff "Knew or should have known" of the cause of action, or the subjective findings which must be examined in order to render that determination. Similarly, neither party would be deprived of rights which existed at the time of the transaction; nor would either party be forced to bear obligations which were never contemplated by either party at the time of the transaction.

POINT II

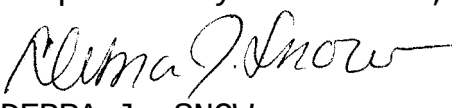
THE COURT ERRED IN FAILING TO LIMIT JUDGMENT AGAINST MORALES IN ACCORDANCE WITH SECTION 768.54, FLORIDA STATUTES.

Amicus Curiae Florida Physicians Insurance Company will not address the merits of Point 11.

CONCLUSION

For the aforementioned reasons, Amicus Curiae, Florida Physicians Insurance Company respectfully requests that this Court reverse the judgment of attorney's fees entered in this case, and that this Court determine that Section 768.56 does not apply where the negligent act occurred prior to July 1st, 1980.

Respectfully submitted,



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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 16th day of January, 1989 to all counsel of service on attached service list.

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