

IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,878

FLORIDA PATIENT'S COMPENSATION FUND,

Petitioner,

vs.

CLARA M. SCHERER, et al.,

Respondent.

On Petition to Invoke Discretionary Jurisdiction
to Review Decision in the District Court of Appeal
of Florida, Fourth District

FILED
SUPREME COURT

AUG 25 1988

CLERK OF SUPREME COURT

By: _____
Deputy Clerk

BRIEF OF PETITIONER ON JURISDICTION

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JURISDICTION

Jurisdiction is sought pursuant to Article V, Section 3(b)(3), Florida Constitution, in that petitioner asserts the decision of the District Court of Appeal of Florida, Fourth District, conflicts with a decision of this Court and with decisions of other district courts of appeal on the same question of law.¹

STATEMENT OF THE CASE AND FACTS

This case began as a medical malpractice action by plaintiff Clara Scherer against various health care providers and the Florida Patient's Compensation Fund. On appeal and cross-appeal from the final judgment and various post-judgment orders, the District Court of Appeal determined, relevant to these proceedings, that a cause of action for the award of attorney's fees under Section 768.56, Florida Statutes (now repealed) existed even though the particular acts of malpractice which formed the basis of the litigation occurred prior to the effective date of the statute. The majority opinion concluded that the jury's finding the cause of action, for statute of limitations purposes, accrued after September 20, 1980 (when the plaintiff discovered or should have discovered the malpractice) was determinative as to when the cause of

1. The decision of the District Court of Appeal is Morales v. Scherer, 13 FLW 416 (4th DCA February 19, 1988), Appendix 1 to this brief).

action accrued for purposes of entitlement to attorney's fees.

One judge dissented from that part of the decision concerning the award of attorney's fees. The dissenting judge pointed out that the alleged malpractice took place well before the effective date of Section 768.56 and this Court in Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985) invalidated the retrospective application of the fee statute. The dissent points out:

"I believe the application of section 768.56 to acts of malpractice occurring prior to its enactment constitutes a violation of the state and federal constitutional prohibitions against ex post facto laws. The damages and penalties, if any, 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."

The dissenting judge took the unusual step of filing a dissent to the denial of rehearing (Appendix 2), noting that the majority opinion on the issue of attorney's fees appears to conflict with two recent decisions, one from the Florida Supreme Court and one from the District Court of Appeal, Fourth District.

SUMMARY OF ARGUMENT

The decision of the District Court of Appeal as it pertained to the payment of attorney's fees under Section 768.56 of the Florida Statutes, where the incident of malpractice occurred before the effective date of the

statute, directly and expressly conflicts with the decision of this Court in Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985). In Young, this Court refused to apply the fee statute in two causes of action that accrued prior to the statute's effective date. The accrual of the cause of action to which this Court referred was the malpractice incident, not the date of its discovery by an injured plaintiff. The decision of the District Court of Appeal also directly and expressly conflicts with the decision of this Court in Department of Transportation v. Soldovere, 519 So.2d 616 (Fla. 1988) which holds that a cause of action for the negligence of another accrues at the time the injury is first inflicted.

ISSUE INVOLVED

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL THAT THE MEDICAL MALPRACTICE FEE STATUTE WOULD APPLY TO A CASE WHERE THE INCIDENT OF MALPRACTICE OCCURRED PRIOR TO THE EFFECTIVE DATE OF THE STATUTE DIRECTLY AND EXPRESSLY CONFLICTS WITH THE DECISIONS OF THIS COURT IN YOUNG V. ALTENHAUS, SUPRA AND DEPARTMENT OF TRANSPORTATION V. SOLDOVERE, SUPRA.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL THAT THE MEDICAL MALPRACTICE FEE STATUTE WOULD APPLY TO A CASE WHERE THE INCIDENT OF MALPRACTICE OCCURRED PRIOR TO THE EFFECTIVE DATE OF THE STATUTE DIRECTLY AND EXPRESSLY CONFLICTS WITH THE DECISIONS OF THIS COURT IN YOUNG V. ALTENHAUS. SUPRA AND DEPARTMENT OF TRANSPORTATION V. SOLDOVERE, SUPRA.

The 1979 Florida Legislature enacted Section 768.56

which provided that the prevailing party in a medical malpractice action would be entitled to a reasonable attorney's fee. Section (2) provided that it would ". . .not apply to any action filed before July 1, 1980."²

While the applicability section of the statute states that it would apply to any action filed before July 1, 1980, a series of district court decisions culminated in the decision of this Court in Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985) in which it was determined that the statute would not apply retroactively and would not apply to causes of action that accrued prior to the statute's effective date.

In discussing the relevant facts of the several cases which formed the basis of asserted conflict jurisdiction in Young v. Altenhaus, the Court notes that in one of these cases the malpractice incident occurred in 1979 prior to the effective date of Section 768.56. The decision goes on to state that the record revealed that the causes of action in the cases under review accrued prior to the effective date of the statute, obviously referring to the fact that the malpractice incidents occurred prior to July 1, 1980. "In each case, the plaintiff's cause of action was filed after July 1, 1980 but the cause of action actually accrued before that date.'" Young v. Altenhaus, supra at page 1154:

2. The statute was repealed in 1985.

"In the instant cases, Altenhaus' and Matthews' rights to enforce their causes of action for malpractice against the defendant below vested prior to the effective date of Section 768.56." Young v. Altenhaus, supra at page 1154.

Accordingly, this Court invalidated the retrospective application of the statute and quoted with approval from its earlier decision in McCord v. Smith, 43 So.2d 704, 709 (Fla. 1949):

"A retrospective provision of a legislative act is not necessarily invalid. It is so only in those cases wherein. . .a new obligation or duty is created or imposed. . . .in connection with transactions or considerations previously had or expiated." Young v. Altenhaus, supra, at page 1154.

While not a basis for conflict jurisdiction since the decision arises in the same district court of appeal, it is interesting to note, as did the dissenting judge in the order denying rehearing, that in Brown v. North Broward Hospital District, 13 FLW 247 (Fla. 4th DCA January 20, 1988), a different panel of the same court (citing Young v. Altenhaus) determined that Section 768.56 was inapplicable to causes of action accruing prior to July 1, 1980. Since the incident of malpractice occurred on June 3, 1980, the cause of action accrued prior to the effective date of the statute and the statute was inapplicable.

The determination of the District Court of Appeal in the instant case that the time of accrual of a cause of action for purposes of the entitlement to an award of

attorney's fees under Section 768.56 should be the same as the accrual of a cause of action under the statute of limitations, Section 95.11(4), Florida Statutes (1987)³ also directly and expressly conflicts with the unequivocal determination of this Court in Department of Transportation v. Soldovere, supra, that a cause of action for the negligence of another accrues at the time the injury is first inflicted. This unequivocal statement cannot be obviated by the special provisions of the statute of limitations governing actions for medical malpractice which require commencement within two years from the date the incident giving rise to the action occurs ~~or~~ within two years from the time the incident is discovered or should have been discovered with the exercise of due diligence. The addition of a period of repose for medical malpractice actions until discovery of the incident causing injury does not change the rule of law that a cause of action for the negligence of another accrues at the time the injury is first inflicted. Thus, the instant decision also conflicts with the Soldovere case.

CONCLUSION

Without arguing the merits of retroactive statutory

3. "An action for medical malpractice should be commenced within 2 years from the time of the incident giving rise to the action occurred or within 2 years from the time the incident is discovered, or should have been discovered with the exercise of due diligence; . . ."

the District Court of Appeal that the plaintiff's cause of action accrued for purposes of of the award of attorney's fees at the time she discovered the alleged act of malpractice (which was after the effective date of the fee statute) rather than at the time the act of medical malpractice was committed (which was prior to the effective date of the statute), directly and expressly conflicts not only with the Soldovere decision but with the specific holding of this Court in Young v. Altenhaus. This court held that attorney's fees may be awarded to the prevailing parties in medical malpractice actions pursuant to section 768.56 only where the incident of malpractice occurred before the effective date of the statute. The decision of the District Court of Appeal to the contrary is improper and causes confusion in the applicable law. For this reason, it is respectfully requested that this Court accept jurisdiction of this matter so that it may proceed on the merits.

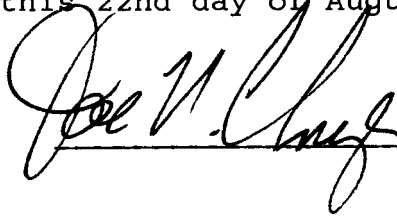
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail upon all counsel on the attached Service List this 22nd day of August, 1988.



Florida Patient's Compensation Fund v. Scherer
Supreme Court of Florida
Case No. 72,878

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