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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., :
Respondent. :

INTRODUCTION

This jurisdictional brief is filed on behalf of Enrique Morales, M.D. and White, Kump and Morales, M.D., P.A., ("Morales"), the defendants appellants below. They join the defendant appellant, Florida Patient's Compensation Fund, as petitioners under Rule 9.360(a).

STATEMENT OF THE CASE AND FACTS

Morales adopts the statement of the case and facts presented by the Florida Patient's Compensation Fund.

SUMMARY OF ARGUMENT

Morales adopts the summary of argument and argument of the Florida Patient's Compensation Fund. Morales further asserts jurisdictionally significant conflict with L. Ross, Inc. v. R.W. Roberts Construction Company, Inc., 466 So.2d 1096 (Fla. 5th DCA

1985), approved, 481 So.2d 484 (Fla. 1986). The incident giving rise to Scherer's claim against Dr. Morales occurred prior to the enactment of section 768.56, Florida Statutes (Supp. 1980) and the decision of the Fourth District is therefore in conflict with Ross, which held, "the legislature cannot constitutionally increase an existing obligation, burden or penalty as to a set of facts after those facts have occurred." 466 So.2d at 1098.

JURISDICTIONAL ARGUMENT

I.

THE DECISION OF THE DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT IN YOUNG v. ALTENHAUS, 472 So.2d 1152 (Fla. 1985) AND DEPARTMENT OF TRANSPORTATION v. SOLDVERE, 519 So.2d 616 (Fla. 1988).

Dr. Morales adopts the argument of the Florida Patient's Compensation Fund on this jurisdictional issue.

II.

THE DECISION OF THE DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION IN L. ROSS, INC. v. R.W. ROBERTS CONSTRUCTION COMPANY, INC., 466 So.2d 1096 (Fla. 5th DCA 1985), APPROVED, 481 So.2d 484 (Fla. 1986).

It is well-settled that a cause of action for the negligence of another accrues at the time the injury is first inflicted. Department of Transportation v. Soldovere, 519 So.2d

at 617. Here, the district court of appeal confused the date upon which the statute of limitation began to run with the date of the incident giving rise to the cause of action.

In L. Ross, Inc. v. R.W. Roberts Construction Company, Inc., the Fifth District considered the substantive nature of a change in entitlement to attorney's fees under section 627.756, Florida Statutes (1983). Effective October 1, 1982, a statutory limitation on the amount of recoverable attorney's fees was repealed. Recognizing an award of attorney's fees to be ancillary to, and an incident of, the accrual of the underlying cause of action, the court went on to hold:

Therefore the right to recover attorney's fees ancillary to another particular underlying cause of action always accrues at the time the other underlying cause of action accrues. This means substantive rights and obligations as to attorney's fees in particular types of litigation vest and accrue as of the time the underlying cause of action accrues. [466 So.2d at 10981.

Under L. Ross, Inc. v. R.W. Roberts Construction Company, Inc., substantive rights vest at the time of the underlying incident complained of. Accrual of the cause of action is the occurrence for purposes of determining when rights vest:

It is a facet of constitutional due process that, after they vest, substantive rights cannot be adversely affected by the enactment of legislation. Likewise, but conversely, it is fundamentally unfair and unjust for the legislature to impose, ex post facto, a new or increased obligation, burden, or penalty as to a set of facts after those facts have occurred. For the same reason, regardless of the intent of the legislature, the legislature

cannot constitutionally increase an existing obligation, burden or penalty as to a set of facts after those facts have occurred. [e.s., 466 So.2d at 10981.

Morales treated Scherer at a time when he was under no obligation to pay attorney's fees for the unsuccessful defense of a malpractice action against him - and Scherer was under no obligation to pay Morales's attorney's fees in an unsuccessful claim of medical malpractice against him. The rights and responsibilities of physician to patient and vice versa were sealed on the date of the incident complained of, not at some indeterminate time in the future when Scherer discovered or with due diligence should have discovered the incident giving rise to her cause of action.

CONCLUSION

This court should accept jurisdiction and review on the merits the decision of the district court of appeal.

James C. Blecke
Counsel for Morales and P.A.
Biscayne Building, Suite 705
19 West Flagler Street
Miami, Florida 33130
(305) 358-5999

By 
James C. Blecke

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to: JOE N. UNGER, ESQUIRE, Law Offices of Joe N. Unger, P.A., 606 Concord Building, 66 West Flagler Street, Miami, Florida 33130; KEVIN P. O'CONNOR, ESQUIRE, Lanza & O'Connor, 3300 Ponce de Leon Boulevard, Coral Gables, Florida 33134; WILLIAM DEFOREST THOMPSON, ESQUIRE, Thompson & O'Brien, 888 Southeast Third Avenue - Suite 300, Fort Lauderdale, Florida 33302; EDNA L. CARUSO, ESQUIRE, Edna L. Caruso, P.A., Suite 4B - Barristers Building, 1615 Forum Place, West Palm Beach, Florida 33401; and REX CONRAD, ESQUIRE, Conrad, Scherer & James, Post Office Box 11022, Fort Lauderdale, Florida 33339, this 23rd day of August, 1988.

James C. Blecke
Counsel for Morales and P.A.
Biscayne Building, Suite 705
19 West Flagler Street
Miami, Florida 33130
(305) 358-5999

By 
James C. Blecke