IN THE SUPREME COURT OF THE STATE OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO: **72,878**

FLORIDA PATIENT'S COMPENSATION FUND,

Petitioner,

vs.

CLARA M. SCHERER, et al.,

Respondent.

_____/

BRIEF OF RESPONDENT SCHERER ON JURISDICTION
(Addressing the Brief of Florida Patient's Compensation Fund)

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INDEX

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STATEMENT OF THE CASE AND FACTS

In September, 1982, Plaintiff sued Dr. Morales, his P.A., and the Patient's Compensation Fund for medical malpractice that had occurred between November, 1978 and April, 1980. Defendants raised the statute of limitations as a defense. The jury found in favor of the Plaintiff on that defense, finding that the Plaintiff's cause of action had not occurred until sometime after September, 1980, and therefore, her lawsuit had been filed within the two year statute of limitations (A4). Plaintiff recovered a judgment for $240,000. Defendants appealed the judgment, but subsequently voluntarily dismissed that appeal.

Thereafter, Defendants appealed certain post-judgment orders, including an award of attorney's fees to Plaintiff under S768.56. The Fourth District affirmed the attorney's fee award ruling that S768.56 was applicable since Plaintiff's cause of action had not accrued until after the effective date of the statute (A3-4):

> Morales and the Fund maintain that a cause of action for an award of attorney's fees under section 768.56, Florida Statutes, accrues at the time of malpractice. They argue that the cause does not accrue at the time plaintiff discovers or should have discovered the malpractice, which is the time a malpractice action accrues for the purpose of the statute of limitations, section 95.11(4), Florida Statutes. However, case law fails to suggest that the time of accrual of a cause of action for awarding attorney's fees under section 768.56 should be any different than under section 95.11(4) dealing with the statute of limitations. We conclude that the jury's determination that the cause of action accrued after September 20, 1980, should control. Therefore, we affirm the award of

attorney's fees and costs to Scherer under section 768.56.

Judge Anstead dissented stating that, in his opinion, $768.56 could not be applied to acts of malpractice occurring prior to its enactment, even if the Plaintiff's cause of action had not accrued until after the statute's enactment (A6).

Defendants' Motion for Rehearing was denied, with Judge Anstead once again dissenting, stating that the majority's opinion appeared to conflict with BROWN v. NORTH BROWARD HOSPITAL DISTRICT, 521 So.2d 143 (Fla. 4th DCA 1988) and DEPARTMENT OF TRANSPORTATION v. SOLDOVERE, 519 So.2d 616 (Fla. 1988).

Defendants seek review before this Court claiming a direct and express conflict with other Florida appellate decisions.

JURISDICTIONAL ISSUE

THE FOURTH DISTRICT'S DECISION DOES NOT DIRECTLY AND EXPRESSLY CONFLICT WITH YOUNG v. ALTENHAUS, 472 So.2d 1152 (Fla. 1985) OR DEPARTMENT OF TRANSPORATION v. SOLDOVERE, 519 So.2d 616 (Fla. 1988).

SUMMARY OF *ARGUMENT*

There is no direct conflict between the Fourth District's decision in this case and YOUNG v. ALTENHAUS or DOT v. SOLDOVERE. Rather, the Fourth District's decision is in accord with Florida cases which hold that a party's right to recover attorney's fees under $768.56 becomes vested on the date the cause of action for medical malpractice accrues, which does not occur until the

injured party discovers or had a duty to discover the invasion of his legal rights.

ARGUMENT

This Court should not accept jurisdiction of this case because, with al due respect to the dissenting judge, there is no direct and express conflict. The attorney's fee statute in question, §768.56, provided that it did not apply to any action filed before its effective date of July 1, 1980. And this Court ruled in YOUNG v. ALTENHAUS, 472 So.2d 1152 (Fla. 1985), that the statute could also not constitutionally be applied to any cause of action that accrued prior to July 1, 1980, even if the action was filed after that date:

> In the instant cases, Altenhaus' and Mathews' rights to enforce their causes of actions for malpractice against the defendants below vested prior to the effective date of (s768.56. When these causes of action accrued, neither party was statutorily responsible for the opposing party's attorney's fee nor entitled to such an award. We agree with the First District Court of Appeal's recent decision in PARRISH v. MULLIS, 458 So2d. 401 (Fla. 1st DCA 1984), in which that court stated:
>
> > When appellant's cause of action accrued, she was not burdened with the potential responsibility to pay the successful party's attorney's fees and costs, and appellee was not entitled to that right. The right and responsibility were later created by the legislature...[W]e hold that §768.56 may not be retroactively applied to a cause of action which accrued prior to its effective date.

Defendants do not dispute the fact that in this case the jury determined that Plaintiff's cause of action did not accrue

until after July 1, 1980. Applying YOUNG v. ALTENHAUS, supra, $768.56 would be applicable here and, therefore, there can be no direct and express conflict between YOUNG v. ALTENHAUS and the present decision.

Defendants also do not dispute the fact that YOUNG v. ALTENHAUS, supra, delineated the pivotal time as "when the plaintiff's cause of action accrues", not when the incident of malpractice occurs. Defendants simply argue that this Court obviously "meant to refer" to the malpractice incident, rather than the accrual of the cause of action. But very simply, that is not what this Court said in YOUNG. Defendants are claiming an express conflict with an alleged holding in YOUNG that does not in fact exist.

Defendants also argue that the accrual of a cause of action for limitations purposes is not the same as accrual of a cause of action for medical negligence. That argument must fall in light of S95.031 F.S. which equates the running of the statute of limitations with the accrual of the cause of action.

As in YOUNG v. ALTENHAUS, this Court has repeatedly held that the date on which the cause of action for medical negligence accrues determines the applicability of S768.56. FOLTA v. BOLTON, 493 So.2d 440 (Fla. 1986); CANTOR v. DAVIS, 489 So.2d 18 (Fla. 1986). In other words, under Florida law a party's right to recover attorney's fees under S768.56 becomes "vested" on the date the cause of action for malpractice accrues, YOUNG v. ALTENHAUS, supra, PARRISH v. MULLIS, 458 So.2d 401 (Fla. 1st DCA 1984); TINDALL v. MILLER, 463 So.2d 1262 (Fla. 2d DCA 1985);

LOWER FLORIDA KEYS HOSP. DIST. v. LITTLEJOHN, 493 So.2d 467 (Fla. 3d DCA 1986); NEVIASER v. STONE, 510 So.2d 636 (Fla. 3d DCA 1987); LIEBELER v. ZIMMERMAN, 513 So.2d 1310 (Fla. 2d DCA 1987); WINTER PARK MEMORIAL HOSP. ASSOC. v. JEMISON, 514 So.2d 1134 (Fla. 5th DCA 1987)[1].

The cause of action accrues in a medical negligence case when the plaintiff is first put on notice that he has sustained an injury, or has reason to believe that his right of action has accrued. CITY OF MIAMI v. BROOKS, 70 So.2d 306 (Fla. 1954). This "discovery rule" recognizes the fundamental principle that accrual of the cause of action coincides with the injured party's discovery, or duty to discover, the invasion of his legal rights. HAWKINS v. WASHINGTON SHORES SAVINGS, 509 So.2d 1314 (Fla. 5th DCA 1987). Stated another way, a cause of action accrues when the last element constituting the cause of action occurs. CARR v. BROWARD COUNTY, 505 So.2d 568 (Fla. 4th DCA 1987). This occurs when the plaintiff has knowledge or notice of the invasion of a legal right, BUCK v. MOURADIAN, 100 So.2d 790 (Fla. 1958). In the present case, the jury explicitly found that Plaintiff's cause of action had accrued after September, 1980, and consequently within the period covered by S768.56.

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[1]/Once vested, the entitlement to attorney's fees cannot be divested, even though S768.56 was subsequently repealed. UMBEL v. UPADHYAYA, 508 So.2d 32 (Fla. 2d DCA 1987); NEVIASER v. STONE, LIEBELER v. ZIMMERMAN, WINTER PARK MEMORIAL HOSP. v. JEMISON, supra.

Several cases have addressed a similar issue where a defendant's malpractice occurred prior to the effective date of an amendment to the statute of limitations, but was not discovered by the plaintiff until afterwards. All of the cases have held that the statute of limitations in effect when the plaintiff discovered the malpractice, rather than when the negligent act occurred, controlled. FOLEY v. MORRIS, 339 So.2d 215 (Fla. 1976); HILL v. VIRGIN, 359 So.2d 918 (Fla. 3d DCA 1978); SALVAGGIO v. AUSTIN, 336 So.2d 1282 (Fla. 2d DCA 1976); JOHNSON v. SZYMANSKI, 368 So.2d 370 (Fla. 2d DCA 1979). The same rationale applies here. Section 768.56 applies to this case because it was in effect when Plaintiff's cause of action for malpractice accrued. When the negligent act occurred is irrelevant.

Although Defendants cite to BROWN v. NORTH BROWARD, supra, they admit it cannot give rise to "conflict" since it is a decision of the same district court of appeal. Even so, there is no conflict. In BROWN, unlike here, there was no issue regarding discovery. Accordingly, the incident of malpractice and the plaintiff's cause of action occurred at the same time. The Court merely held that since "the cause of action herein accrued prior to the effective date of the statute", S768.56 was inapplicable. The Fourth District's decision in BROWN is completely in accord with its decision in this case. The results differ only because here the Plaintiff's cause of action for malpractice accrued after, not before, the effective date of S768.56.

The final case cited by Plaintiffs for conflict is DEPARTMENT OF TRANSPORTATION v. SOLDOVERE, **519** So.2d **616** (Fla. **1988).** The issue in SOLDOVERE was whether a plaintiff's cause of action against the DOT accrued when he was injured or whether the accrual date was extended until after the plaintiff complied with certain statutory conditions precedent to maintaining suit under the sovereign immunity statute. This Court held that the plaintiff's cause of action accrued when the injury was inflicted. That general statement is true where there is no discovery issue, which did not exist in SOLDOVERE, but does exist here. This distinguishing fact eliminates any conflict between the present decision and SOLDOVERE.

In fact, the Fourth District decided LUMBERMAN'S MUTUAL CASUALTY v. AUGUST, **509** So.2d **352** (Fla. 4th DCA **1987)** in accord with SOLDOVERE. That case held that a cause of action for uninsured motorist benefits accrued on the date of the accident and not on the date of compliance with conditions precedent in the insurance policy. Neither SOLDOVERE nor AUGUST concern the issue presented here.

None of the decisions cited by Petitioner directly and expressly conflict with the Fourth District's decision in this case. Rather, that decision is in accord with the many Florida cases holding that a party's right to recover attorney's fees under §**768.56** becomes vested on the date the cause of action for malpractice accrues, which is when the plaintiff discovers, or should have discovered, the malpractice. Here, the jury found that Plaintiff's cause of action for malpractice accrued while

the attorney's fee statute was in effect, and so an award of attorney's fees was entirely proper.

CONCLUSION

There is no direct and express conflict between the Fourth District's decision and YOUNG v. ALTENHAUS or DOT v. SOLDOVERE, supra. Accordingly, this Court does not have jurisdiction to entertain the merits of this Petition.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished by mail this 3rd day of OCTOBER, 1988, to: JOE N. UNGER, ESQ., 606 Concord Building, 66 West Flagler Street, Miami, FL 33130; KEVIN P. O'CONNOR, ESQ., 3300 Ponce de Leon Boulevard, Coral Gables, Fl 33133; JAMES C. BLECKE, ESQ., Bicayne Bulding, Suite 705, 19 West Flagler Street, Miami, FL 33130; CONRAD, SCHERER & JAMES, P. O. Box 14723, Ft. Lauderdale, FL 33302.

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