O/a 4-7-89

IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,878

FLORIDA PATIENT'S COMPENSATION FUND, et al.

Petitioners,

vs.

CLARA M. SCHERER,

Respondent.

BRIEF OF PETITIONER, FLORIDA PATIENT'S COMPENSATION FUND, ON THE MERITS

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APPENDIX TO PETITIONER'S BRIEF ON THE MERITS

Decision in Morales v. Scherer dated February 10, 1988

INTRODUCTION

This brief is submitted on behalf of petitioner, Florida Patient's Compensation Fund, and deals with the propriety of awarding attorney's fees to the plaintiff pursuant to Section 768.56 of the Florida Statutes (since repealed). The Fund herewith adopts those portions of the brief to be filed by Enrique Morales, M.D. and White, Kump and Morales, M.D., P.A. arguing other issues raised in these proceedings.

STATEMENT OF THE CASE AND FACTS

This is a medical malpractice action brought by Clara Scherer against Drs. Morales and Schultz and the Holy Cross Hospital, as well as the Florida Patient's Compensation Fund for treatment rendered between November 22, 1978 and April 4, 1980. (R.61-65, 79-80)[1]

The plaintiff's complaint was filed on September 20, 1982. An issue was made in defendant's pleadings that the statute of limitations had run on the plaintiff's claim. This was raised as an affirmative defense and in a motion for summary judgment filed by Morales. (R.97-99) Summary judgment was granted for Morales. (R.108) On appeal, it was determined that the record conclusively established that Dr. Morales had performed a medical procedure and that Mrs.

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1. The treatment rendered to Mrs. Scherer by Dr. Morales which would form the basis of her complaint occurred in June, 1979. (Transcript of June 30, 1986, mistakenly labeled August 30, 1986, at page 29).

Scherer knew that he had performed a procedure more than two years before suit was filed. Dr. Morales, however, failed to conclusively demonstrate the absence of an issue with respect to whether Mrs. Scherer either knew or should have known of the alleged malpractice more than two years before she commenced suit. Accordingly, the record was inadequate to sustain a summary judgment on the statute of limitations question and the cause was reversed and remanded for further proceedings. Scherer v. Schultz, 468 So.2d 539 (Fla. 4th DCA 1985).

At trial, the statute of limitations question as to whether the plaintiff knew or should have known of the alleged malpractice committed by Dr. Morales was presented to the jury and resulted in a special interrogatory verdict finding in the plaintiff's favor.

Pursuant to the verdict, a judgment was entered in plaintiff's favor and against Dr. Morales, his professional association and the Florida Patient's Compensation Fund in the sum of $240,000. (R.183) Various post-trial motions were filed, including a Motion to Limit Final Judgment, stating the defendants were entitled to reduction of the $240,000 by a $100,000 pre-trial settlement entered into in accordance with an agreement contained in an exhibit to the motion. It was also asserted that pursuant to Section 768.50 of the Florida Statutes, the defendants were entitled to a set-off of collateral sources of indemnity

approximating **$120,000** constituting Medicare payments, Social Security and other public programs providing remuneration. **(R.178-180)**

Subsequently, the trial court entered an Order on Motion to Limit Final Judgment granting defendants' motion granting a set-off of $100,000 and deferring ruling on the set-off of collateral sources. **(R.204-205)**

During this post-trial period, the plaintiff filed a motion to tax attorney's fees in accordance with the provisions of Section **768.56** of the Florida Statutes. **(R.213)** After denial of defendants' motions for new trial, remittitur, and judgment notwithstanding the verdict, but prior to resolution of the other then pending post-trial motions, the defendants filed a notice of appeal from the final judgment. **(R.223-224)** This appeal was voluntarily dismissed. **(R.256)**

On July **25, 1986**, the two orders concerning fees and set-off were entered by the trial court. In the first, titled Final Order on Motion to Limit Final Judgment **(R.257),** the trial court again ruled that Morales and the Fund were entitled to a set-off of the $100,000 paid to the plaintiff pursuant to the settlement agreement, but were not entitled to any reduction for collateral source benefits. Accordingly, the **$240,000** judgment previously entered was reduced by $100,000 to **$140,000** plus costs and attorney's fees.

In the Order and Final Judgment Granting Motion for Attorney's Fees and Costs, the trial court reviewed the evidence presented concerning the amount of time spent by plaintiff's counsel and the appropriate risk multiplier, determining that a reasonable fee was $152,800. Plaintiff was awarded a fee of $120,000 since this was the amount in the fee agreement reached between plaintiff and counsel. (R.258-259)

An appeal from these orders was taken by Morales and joined in by the Fund. (R.260-261, 268, 287-288) A majority of the reviewing court affirmed the award of fees based on a determination that the plaintiff's cause of action accrued after the effective date of Section 768.56, Florida Statutes (now repealed). One judge dissented. Morales v. Scherer, 528 So.2d 1 (Fla. 4th DCA 1988), copy appended. These proceedings followed.

ISSUE ON REVIEW

WHETHER THE DISTRICT COURT ERRED IN AFFIRMING A JUDGMENT FOR ATTORNEY'S FEES UNDER SECTION 768.56 AGAINST DR. MORALES AND THE FUND WHERE THE ALLEGED NEGLIGENT ACT OCCURRED PRIOR TO THE EFFECTIVE DATE OF THE STATUTE.

SUMMARY OF ARGUMENT

The decision in Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985) governs the timing of when a plaintiff is entitled to recover attorney's fees under Section 768.56 (now repealed). This statute entitled the prevailing party

in a medical malpractice action to an award of attorney's fees. Under Young v. Altenhaus and other cases which preceded and followed, where tortious conduct which is the basis of a plaintiff's complaint took place before July 1, 1980, the effective date of the statute, there is no entitlement to attorney's fees. Here, the medical malpractice incident involving Dr. Morales alleged to have caused the plaintiff's injuries occurred sometime in 1979. Whether or not the plaintiff discovered commission of a negligent act after July 1, 1980, is not relevant to the entitlement to statutory attorney's fees. The plaintiff was not entitled to recover attorney's fees under Section 768.56.

ARGUMENT

THE DISTRICT COURT ERRED IN AFFIRMING A JUDGMENT FOR ATTORNEY'S FEES UNDER SECTION 768.56 AGAINST DR. MORALES AND THE FUND WHERE THE ALLEGED NEGLIGENT ACT OCCURRED PRIOR TO THE EFFECTIVE DATE OF THE STATUTE.

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."

While this section was repealed in 1985, there are many cases still pending in which the question of attorney's fees to the prevailing party in a medical malpractice action

still applies. The question here is whether the facts of this case give rise to entitlement to fees by the plaintiff.

The applicability section of the statute states in deceptively simply terms that it would not apply to any action filed before July 1, 1980. Through a series of district court litigation culminating in the decision of this Court in Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985), it was determined that the statute did not apply retroactively and would not apply to causes of action that accrued prior to the statute's effective date. It is the position of the Florida Patient's Compensation Fund that the phrase "causes of action that accrued prior to the statute's effective date" specifically refers to those actions in which the "malpractice incident" or tortious conduct took place before the statute was enacted. If this interpretation is correct, there would be no entitlement by Mrs. Scherer to attorney's fees as the prevailing party in a medical malpractice action against Dr. Morales since the tortious conduct of Dr. Morales occurred sometime in 1979, well before the July 1, 1980 effective date of the statute.

Attorneys for Scherer argued in the hearing on attorney's fees that since the jury determined for purposes of the statute of limitations that Mrs. Scherer's cause of action accrued after September of 1980, this determination carries with it an implicit determination that for purposes of the medical malpractice fee statute, the cause of action

accrued after July 1, 1980. This argument combines apples and oranges to come to a conclusion which is not justified by the decision of this Court in Young v. Altenhaus, nor in the cases which have followed it.

Young v. Altenhaus was a combined decision of two cases before the court. These were Young v. Altenhaus, 448 So.2d 1039 (Fla. 3d DC 1983) and Pohlman v. Mathews, 440 So.2d 681 (Fla. 1st DCA 1983). In each case, the district court had upheld the validity of Section 768.56 and in a decision released simultaneously with the decision in Young, this Court upheld the constitutionality of the section. Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985).

The two case before this Court presented the question of whether the statute applied ". . .to causes of action that accrued prior to that statute's effective date." Young v. Altenhaus, supra at page 1153. In discussing the relevant facts in each of the cases, it is specified that in Young v. Altenhaus the "malpractice incident" occurred in 1979, prior to the effective of Section 768.56. In Pohlman v. Mathews, it is simply stated that Mathews' cause of action accrued in 1978 and 1979.

This Court goes on to state that the record revealed the causes of action accrued prior to the effective date of the statute, obviously referring in the Young v. Altenhaus situation to the fact that the "malpractice incident"

occurred in 1979. "In each case, the plaintiff's action was filed after July 1, 1980, but the cause of action actually accrued before that date." Young v. Altenhaus, supra at page 1154.

As to when the cause of action accrued for purposes of entitlement to attorney's fees in medical malpractice actins, this Court determined:

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

Accordingly, the portions of the district court decisions holding that attorney's fees could be awarded to the prevailing parties pursuant to Section 768.56 were quashed.

It must be carefully noted that when this Court spoke in Young v. Altenhaus about accrual of a cause of action for purposes of entitlement to attorney's fees, it clearly meant when the malpractice incident occurred and not when the cause of action accrued for purposes of the statute of limitations set forth in Section 95.11(4).

Under the specific terms of the limitations statute, a cause of action does not accrue for purposes of that statute until a party either knows or should have known that a tortious act has occurred. While this is clearly the case where application of the statue of limitations is

concerned,[2] it is not the case where the question involved is the payment of attorney's fees in a medical malpractice action. Notwithstanding the clear distinction readily apparent in the case law regarding application of the statute of limitations and the fee statutes, the district court in the instant case incorrectly determined ". . .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." Morales v. Scherer, 528 So.2d 1, 2 (Fla. 4th DCA 1988). Respectfully, case law does suggest differing effects to the time of accrual of a cause of action.

Young v. Altenhaus, cites with approval first the decision in Parrish v. Mullis, 458 So.2d 401 (Fla. 1st DCA 1984) which held generally that Section 768.56 could not be retroactively applied to a cause of action which accrued prior to its effective. The Parrish decision does not specify whether the "accrual" of which it speaks is the commission of the tortious conduct or notice of that tortious conduct.

The second case cited is Tindall v. Miller, 463 So.2d 1262 (Fla. 2d DCA 1985) which appears to equate knowledge of tortious conduct with accrual of a cause of action for

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2. See, Salvaggio v. Austin, 336 So.2d 1282 (Fla. 2d DCA 1976).

purposes of Section 768.56. Examination of the Tindall decision, however, indicates that the medical malpractice would have occurred on March 4, 1980 and plaintiff was aware of the alleged malpractice at least by the end of April, 1980. Under any view of the evidence, the cause of action would have accrued prior to July 1, 1980, for purposes of the award of attorney's fees.

Just prior to the decision in Young v. Altenhaus, the Fourth District decided Frankowitz v. Propst, 464 So.2d 1225 (Fla. 4th DCA 1985). The defendants in a medical malpractice action challenged the constitutionality of Section 768.56. While plaintiff's complaint was filed in August, 1981, after enactment of the statute, it was defendants' contention that because the acts of negligence alleged by the plaintiffs all occurred before July, 1980, the award of attorney's fees constituted an impermissible retroactive application of the statute. The majority decision holds that Section 768.56 applied to all medical malpractice actions filed on or after July 1, 1980 in accordance with the wording of the statute ". . .even though the act of medical negligence may have taken place before that date." Frankowitz v. Propst, supra at page 1227.

The majority decision in Frankowitz was quashed by this Court based upon Young v. Altenhaus, supra. Neily v. Propst, 489 So.2d 10 (Fla. 1986). The quashal invalidated not only the determination that Section 768.56 applied to

all medical malpractice actions filed on or after July, 1980, but also the finding that the fee statute applied even though the act of medical negligence had taken place before that date. The Frankowitz dissent in the district court is to the majority determination that the attorney's fee statute can constitutionally be applied to actions based on tortious conduct that took place before the statute was enacted. This dissenting view presaged Young v. Altenhaus, which speaks in terms of a "malpractice incident" and not knowledge of tortious conduct, which is the basis for application or non-application of the statute of limitations.

As the dissenting district court judge pointed out in this case, the invalidation of retrospective application of section 768.56 by this Court in Young v. Altenhaus, supra, quotes with approval the 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 son only in those case where. . .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.

It was based on this determination that the dissenting judge correctly concluded that application of section 768.56 to acts of malpractice occurring prior to its enactment (as the majority decision has done) violates state and federal

constitutional prohibitions against ex post facto laws by enlarging the financial obligation of a physician after the date of alleged malpractice. This conclusion is not only suggested but required by Young v. Altenhaus.

It is also important to note that the majority determination of the Fourth District in this case conflicts with a unanimous decision of a different panel of the same court which held in another case that since the incident of malpractice occurred on June 3, 1980, the cause of action accrued prior to enactment of the fee statute and the statute was inapplicable. Brown v. North Broward Hospital District, 521 So.2d 143 (Fla. 4th DCA 1988). See also Department of Transportation v. Soldovere, 519 So.2d 616 (Fla. 1988)(Cause of action accrues at the time of injury).

CONCLUSION

For the reasons and under the authorities set forth above, that portion of the decision rendered below which affirms the award of attorney's fees to Scherer under section 768.56 should be quashed with directions to the trial court to rule accordingly.

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 13th day of January, 1989

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