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.

DISCRETIONARY REVIEW OF A DECISION OF THE FOURTH DISTRICT COURT OF APPEAL

MAIN BRIEF OF PETITIONERS, ENRIQUE MORALES, M.D., AND WHITE, KUMP AND MORALES, M.D., P.A.

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INTRODUCTION

This main brief on the merits 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

The jury by its verdict determined that Morales was negligent in his treatment of Scherer. The alleged negligence of Morales occurred in June, 1979. The complaint was filed on September 20, 1982. The jury also determined that Scherer did not discover or with due diligence should have discovered her cause of action against Morales more than two years prior to filing her claim, i.e., before September 20, 1980. The jury assessed damages at $240,000 and the trial court subsequently awarded attorney's

fees in the sum of $120,000 pursuant to Section 768.56, Florida Statutes (1981).

Post-trial, Morales moved for a limitation of liability under Section 768.54, Florida Statutes (1981). This section provides that a health care provider shall not be liable for an amount in excess of $100,000 provided that he is a member of the Fund and pays the initial $100,000 of any settlement or judgment against him. As correctly reported in the District Court opinion, "Scherer acknowledges that Morales is a Fund member in good standing and that Morales paid his $100,000 primary policy limits." (DCA opinion at 4).

Scherer successfully contended that Morales' motion for limitation of liability under Section 768.54 was untimely. The district court held:

> A motion limiting liability under section 768.54 must be made within the time frame of Florida Rule of Civil Procedure 1.530(b). See Mercy Hospital, Inc. v. Menendez, 371 So.2d 1077 (Fla. 3d DCA 1979), appeal dismissed and cert. denied, 383 So.2d 1198 (Fla. 1980). In this case, Morales failed to move to limit his liability within the time frame of Rule 1.530(b). Therefore, we affirm the trial court's denial of Morales' motion to limit liability under section 768.54. [DCA opinion at 4].

SUMMARY OF ARGUMENT

A cause of action accrues at the time of the injury and the statute of limitations generally begins to run at the same time. This rule has been tempered with the judicial development

of a "discovery rule" and a legislative recognition of a "discovery rule" for certain causes of action. A cause of action still accrues, however, when the last element constituting the cause of action occurs. Subjective awareness of the cause of action is not an element of the action itself. 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. Here, the cause of action was complete prior to the enactment of the attorney's fee statute. Therefore, the plaintiff is not entitled to fees under the statute.

In holding that a motion to limit liability must be made within the time frame of Florida Rule of Civil Procedure 1.530(b), the district court misapprehended the conditions precedent to the limitation of liability under Section 768.54, as amended and as applicable to the facts of this case. The amended statute applicable to this case made actual payment of the underlying coverage a prerequisite to the limitation of liability. Here, the $100,000 was paid on behalf of Dr. Morales, but it was necessarily paid some time after entry of judgment. The motion to limit judgment was filed thereafter. The trial court's jurisdiction was properly invoked under Rule 1.540 (b)(5) which provides a party with relief from a final judgment if, "the judgment or decree has been satisfied, released or discharged ... or it is no longer equitable that the judgment or decree should have prospective application." Section 768.54 provides the health care provider with a limitation

of liability when the specified conditions are met. Morales met the specified conditions and was entitled to the statutory limitation of liability upon post-judgment compliance with the statute.

ARGUMENT

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.

Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985), governs when a plaintiff is entitled to recover attorney's fees under Section 768.56 (1981). Rights vest when the cause of action accrues and, when the cause of action accrues prior to July 1, 1980, a successful plaintiff is not entitled to an award of attorney's fees under Section 768.56.

Here, the alleged incident of malpractice occurred in 1979. Scherer was free to bring suit against Morales any time thereafter. But as the jury determined by its verdict, Scherer did not "discover" her cause of action against Morales until some time later.

A cause of action accrues at the time of the injury and the statute of limitation begins to run at the same time. Christiani v. City of Sarasota, 65 So.2d 878, 879 (Fla. 1953). In Christiani, this Court held that the running of the statute is not postponed even though the injury may not materialize or be discovered until later. This rule has since been tempered with the

judicial development of a "discovery rule." This "discovery rule" has also been codified and capped for medical malpractice actions in Section 95.11(4)(b), Florida Statutes (1981). A cause of action still accrues, however, "when the last element constituting the cause of action occurs." Section 95.031(1), Florida Statutes (1981). Subjective awareness of the cause of action is not an element of the action itself.

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 616, 617 (Fla. 1988). Here, the trial court and 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., 466 So.2d 1096 (Fla. 5th DCA 1985), approved, 481 So.2d 484 (Fla. 1986), 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 under-

> lying cause of action accrues. [466 So.2d at 1098].

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 1098].

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' 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 thereafter when Scherer discovered or with due diligence should have discovered the incident giving rise to her cause of action.

II.

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

Section 768.54, Florida Statutes (1981) provides that a health care provider such as Morales shall not be liable for an amount in excess of $100,000 if he is a member of the Florida Patient's Compensation Fund and pays the initial $100,000 of any settlement or judgment against him. Here, Dr. Morales was a member in good standing of the Florida Patient's Compensation Fund and he has paid to the plaintiff his $100,000 primary policy limits. Under these circumstances, the trial court and the district court of appeal erred in failing to give effect to the statutory limitation of liability.

This court in Florida Patient's Compensation Fund v. Tillman, 487 So.2d 1032, 1035 (Fla. 1986) and in Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783, 788-9 (Fla. 1985), has twice held the statutory limitation of liability constitutional. Where, as here, the statutory prerequisites to the limitation of liability have been met, the doctor is entitled to his limitation of liability. Tillman; Von Stetina; Mercy Hospital, Inc. v. Menendez, 371 So.2d 1077 (Fla. 3d DCA 1979), cert. den., 383 So.2d 1198 (Fla. 1980); Neilinger v. Baptist Hospital of Miami, Inc., 460 So.2d 564 (Fla. 3d DCA 1984); Bouchoc v. Peterson, 490 So.2d 132 (Fla. 3d DCA 1986), aff'd. sub nom., Florida Patient's Compensation Fund v. Bouchoc, 514 So.2d 52 (Fla. 1987).

In holding that a motion to limit liability must be made within the time frame of Florida Rule of Civil Procedure 1.530(b), the district court of appeal overlooked or failed to consider the subsequent amendment to Section 768.54 not considered in Mercy Hospital, Inc. v. Menendez, 371 So.2d 1077 (Fla. 3d DCA 1979), cert. den., 383 So.2d 1198 (Fla. 1980). "The provision in the statute is one of limitation of judgment upon the performance of conditions specified." 371 So.2d at 1079. The conditions specified in the 1977 statute construed in Menendez were all conditions which preceded the litigation. To obtain the limitation of liability under the 1977 statute, the health care provider had to have paid the fees required by the Fund and had to maintain primary insurance coverage.

In 1978, the statute underwent significant revision. Under Section 768.54(2)(b), Florida Statutes (1979), the health care provider must first pay the initial $100,000 before being entitled to a limitation of liability. With the 1978 amendment, a health care provider is no longer entitled to a limitation of liability upon the mere demonstration of the existence of primary coverage. Section 768.54(2)(b), Florida Statutes (1979) provides:

> A health care provider shall not be liable for an amount in excess of $100,000 ... if the health care provider ... pays at least the initial $100,000 ... of any settlement or judgment against the health care provider. ... [e.s.].

The amended statute applicable to this case makes actual payment of the underlying coverage a prerequisite to the limitation of liability. Morales was not entitled to a limitation of liability unless and until the $100,000 was paid on his behalf. The $100,000 was paid on behalf of Morales, but it was necessarily paid some time after entry of judgment. The motion to limit judgment was filed thereafter and was decided at a time when the trial court had continuing Rule 1.530 post-judgment jurisdiction over the other pending motions.

The trial court also had jurisdiction under Rule 1.540-(b)(5) to consider and rule upon the motion. Subsection (5) provides that a party may be relieved from a final judgment if, "the judgment or decree has been satisfied, released or discharged ... or it is no longer equitable that the judgment or decree should nave prospective application." Section 768.54(2)(b) provides a health care provider with a limitation of liability when the specified conditions are met. Here it is conceded that the specified conditions were met and Morales was thus entitled to the statutory limitation of liability upon his demonstrating post-judgment compliance.

CONCLUSION

The attorney's fee award should be reversed. The denial of Morales' motion to limit liability to $100,000 in accordance with Section 768.54 should also be reversed.

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By 
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CERTIFICATE OF SERVICE

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

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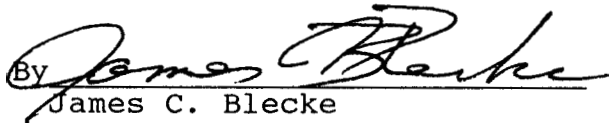
By 
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Morales v. Scherer
17th Jud. Cir. Court Case No. 82-19511 CZ
4th DCA Case No. 86-1959
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