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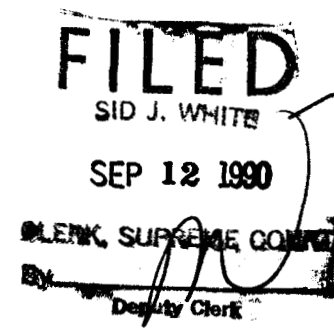
IN THE FLORIDA SUPREME COURT



DR. JAMES T. MCGIBONY, DR. JOSEPH VON THRON, DR. MARK D. ZIFFER and DR. WILLIAM BARFIELD, on behalf of themselves and all others similarly situated,

Petitioners,

CASE NO. 76,565

vs.

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PLAN, FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION, TOM GALLAGHER, in his official capacity as the head of THE FLORIDA DEPARTMENT OF INSURANCE and LAURENCE GONZALEZ, in his official capacity as the head of THE FLORIDA DEPARTMENT OF PROFESSIONAL REGULATION,

Respondents.

PETITIONERS' JURISDICTIONAL BRIEF

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JURISDICTIONAL BASIS

The basis for the petitioners' invocation of this Court's discretionary jurisdiction is the First District Court of Appeal's opinion expressly declaring valid section 73 of Chapter 88-1, Laws of Florida, as amended by sections 39 and 44 of Chapter 88-277, Laws of Florida, and as further amended by section 6 of Chapter 89-186, Laws of Florida, all codified at section 766.314, Florida Statutes (1989).

STATEMENT OF THE CASE

On June 25, 1990, the First District Court of Appeal affirmed[1] the trial court's finding[2] that the financing mechanism of the Florida Birth-Related Neurological Injury Compensation Plan created by the Florida Legislature by Chapters 88-1 and 88-277, Laws of Florida, did not violate the petitioners' rights under the due process and equal protection guarantees of the United States and Florida Constitutions. In addition, the First District Court of Appeal affirmed the trial court's finding that the financing mechanism did not constitute an unlawful delegation of the legislative power to tax.

Subsequently, the petitioners moved for rehearing which was denied by the First District Court of Appeal on July 31, 1990. On August 30, 1990, petitioners filed their notice to invoke the discretionary jurisdiction of this Court.

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[1] A copy of the First District Court of Appeal's opinion is contained in the Appendix to this brief.

[2] A copy of the trial court's opinion is contained in the Appendix to this brief.

STATEMENT OF THE FACTS

Petitioners are Florida licensed physicians representing a class who are not eligible to be "participating" physicians in the Florida Birth-Related Neurological Injury Compensation Plan (the "Plan"), enacted by the Legislature in 1988. §§ 766.301-766.316, Fla. Stat. (1989). The Plan is administered by the Florida Neurological Injury Compensation Association (the "Association"). § 766.314(2), Fla. Stat. (1989). In essence, the Plan provides for a no-fault compensation system for certain neurologically injured infants born after January 1, 1989. § 766.303(1), Fla. Stat. (1989). The protections, including immunity from malpractice based on negligence, afforded by the Plan are available only to "participating" physicians. Id. at 766.303(2). Physicians who practice obstetrics either full time or part time can participate in the Plan by paying an initial and annual assessment of $5,000. §766.314(4)(c), Fla. Stat. (1989). Physicians, such as the petitioners, who do not practice obstetrics and cannot participate, are required to pay an initial annual assessment of $250. Id. at 766.314(4)(b). Petitioners, as a class, pay four times more into the Plan than the amount paid by the participating obstetricians. (R. at 305) The petitioners, as non-participating physicians, are not afforded any of the protections of the Plan.

The First District Court of Appeal summarily disposed of the petitioners' argument that they received no greater benefit from the Plan than other members of the public. The appellate court also quickly dispatched the petitioners' argument that there was

no rational basis for singling out their class of non-participating physicians for contribution to the Plan. After quoting the applicable standard from Eastern Airlines, Inc. v. Department of Revenue, 455 So.2d 311, 314 (Fla. 1984), appeal dismissed, 474 U.S. 892 (1985), the appellate court found as follows:

> Recognizing the standard of judicial review explicated in Eastern Airlines, Inc. v. Department of Revenue, the [trial] court looked at legislative history and other evidence presented at trial to determine whether there was a rational basis for the Legislature to have called upon physicians not practicing obstetrics to contribute to the Plan. In doing so, the trial court found that Chapters 88-1 and 88-277, Laws of Florida, were enacted in response to a medical malpractice crisis which engulfed our state, severely disrupted the delivery of health care services, and adversely affected all Florida physicians. Further, evidence was presented that health care services are delivered by a team of providers, all of whom interact and depend upon one another, and that a breakdown in one area of service impacts other areas. The trial court found and held as follows:
>
> > Since one of the goals of the Plan is to help alleviate the crisis and permit the efficient delivery of health care services by all members of the team, plaintiffs are undeniably related to at least one of the goals of the Plan and stand to benefit from its realization . . . Thus, the Legislature's decision to require plaintiffs to contribute to the Plan was not wholly unreasonable, arbitrary or capricious.
>
> We find that there was ample factual basis for the trial court's holding on this issue. Consequently, we reject the appellants' due process and equal protection arguments.

The First District Court of Appeal never set forth the "ample factual basis for the trial court's holding on this issue." At trial, there was no dispute over the existence of a medical malpractice crisis. The issue presented was whether the

petitioners could be singled out to pay the $250 annual assessment, which the trial court found to be a tax, when the Plan specifically prohibited the petitioners from participating in or receiving any benefits from the Plan.

At trial, the only evidence submitted on the relationship between the petitioners and obstetrics was the testimony of the defendants' purported expert, Mr. Weinstein, who was not a physician and had not been involved in a hospital that delivered babies for the past nine years. (R. at 247-48) This purported expert testified extensively on the "team" approach to health care delivery and obstetrics, despite the fact that he also testified that all of his hospitals had gotten along perfectly fine during the past nine years without delivering babies. (R. at 254-59, 262-67) This purported expert had absolutely no expertise in the area of obstetrics and its relationship to the health care profession. (R. at 249) Nevertheless, the trial court allowed him to testify over the objection of the petitioners and made numerous factual findings based on his testimony. (R. at 249, 487-88)

Despite the fact that the admissibility of the testimony of the expert was the primary issue raised on appeal by the petitioners relating to their due process and equal protection constitutional claims, the First District Court of Appeal chose not to address that issue. Instead, it summarily found "ample factual basis for the trial court's findings."

The First District Court of Appeal also did not address the petitioners' second argument. Petitioners' second argument was

that section 766.314 of the Florida Statutes improperly constituted an unlawful delegation of the taxing authority to the Association. Instead of setting forth the issue presented, the First District Court of Appeal set forth the issue of whether the Department of Insurance's authority to proportionally increase assessments to maintain the Plan was an unlawful delegation of the legislative taxing power. The appellate court found that the actuarialy sound standard was sufficient under this Court's decision of Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815 (Fla. 1983), appealed dismissed, 466 U.S. 901 (1984).

Section 6 of Chapter 89-186 of the Laws of Florida specifically provided that the Association, and not the Department of Insurance, had the authority to assess, collect and enforce the tax assessments against the petitioners by filing suit in Leon County. Also, the Association is empowered to direct the Florida Department of Professional Regulation to not renew the petitioners' license to practice medicine if they do not pay the assessments.

The Association is not a state agency. The Legislature chose to define the Association as an entity which "is not a state agency, board or commission." § 766.315(1)(a), Fla. Stat. (1989). The trial court described the Association as a "non-state entity" in an attempt to distinguish it from a private entity. (R. at 481-82)

The issue presented was whether the Association could be delegated the power to tax under section 1 of article VII of the Florida Constitution. The First District Court of Appeal, rather

than addressing the issue as presented, addressed the issue of whether the Department of Insurance, not the Association, could properly be delegated the power to proportionally increase assessments. The appellate court never addressed the issue of whether it was an unlawful delegation of the taxing power for the Association, a non-state entity, to have the power to assess and collect the tax and bring suit to enforce its collection.

SUMMARY OF ARGUMENT

This Court should accept jurisdiction in this case for two reasons. First, the imposition of the tax on the petitioners lacks a rational basis. The statute is based upon the premise that all physicians are the same when it comes to being taxed but are unequal when it comes to being eligible to participate in the benefits derived from the tax. If the petitioners must pay monies to benefit obstetricians and any injured infants, they should also be eligible receive some of the benefits flowing from that program. They should not be excluded. Second, the Association, a non-state entity, cannot assess, collect and enforce a tax. The taxing power resides exclusively with the Legislature and the delegation of the taxing authority is prohibited by the Florida Constitution.

REASONS FOR ACCEPTING JURISDICTION

A. Absence of a Rational Basis for Imposition of the Tax on the Petitioners.

The Legislature has the power to attempt to find solutions to various aspects of the medical malpractice crisis. However, the financing mechanism chosen by the Legislature for those solutions must comport with due process and equal protection. In the United

States and the State of Florida, there is no more important principle of law than the prohibition against the government from singling out individuals to contribute monies for the benefit of others, while expressly excluding those individuals from participation in the benefits.

The Legislature's taxation of the petitioners is based upon the premise that all physicians are the same when it comes to being taxed but are unequal when it comes to being eligible to participate in the benefits derived from the tax. If the petitioners must pay monies to benefit obstetricians and any injured infants, they should be also eligible to receive some of the benefits flowing from that program. They should not be excluded. On the other hand, because the Legislature chose to exclude the petitioners from the Plan, then they cannot be deprived of their property in order to finance the Plan.

The Legislature chose not to tax the entire populous of the State of Florida in order to finance the Plan. The Legislature was also careful to tax hospitals only to the extent that they delivered babies by imposing a head tax of $50 per baby delivered. § 766.314(4)(a), Fla. Stat. (1989). (Thus, the hospitals where the purported expert, Mr. Weinstein, has been employed during the past nine years have not and will not pay a single dollar into the Plan because they do not deliver babies.)

Even if the First District Court of Appeal had addressed the issue of the purported experts' testimony on the "team" approach to medical care, the issue of whether a proper rational basis for

imposition of the tax upon the petitioner would still remain. Assuming medical services are delivered by a "team" approach, does such a "team" approach provide a rational basis for taxing physicians to subsidize or eliminate the malpractice premiums of a particular specialty, while at the same time excluding those physicians from the benefits provided by the Plan? No explanation of how all members of the "team" "stand to benefit" was ever given by either the trial or appellate court.

To set the issue in a context more familiar to the Court, can judges, law clerks, personal injury attorneys, legal service attorneys, public defenders, prosecutors be taxed by the Legislature to provide a no-fault compensation mechanism for securities lawyers who specialize in leveraged buyouts that took place after January 1, 1989? No one can dispute that there may be a malpractice crisis relating to attorneys who were involved in leveraged buyout deals which have gone sour and resulted in the bankruptcy of the entities involved. Does the fact that legal services in general may be provided as a result of a "team" approach justify taxing all other lawyers to subsidize securities lawyers specializing in leveraged buyouts, while at the same time excluding the taxed lawyers from any of the protections afforded by the legislation? The "team" approach analysis says nothing about a rational basis for imposition of the tax upon the petitioners.

B. A Non-State Entity Cannot Assess, Collect and Enforce a Tax.

The issue of whether a non-state entity can be delegated the power to assess, collect and enforce a tax also justifies the Court accepting jurisdiction in this matter. Numerous cases have held that the taxing power resides exclusively in the Legislature and the delegation of the taxing authority is prohibited by the Florida Constitution. See Connor v. Joe Hatton, Inc., 203 So.2d 154, 155 (Fla. 1967); Stuart v. Daytona and New Smyrna Inlet District, 114 So. 545, 547 (Fla. 1927). This Court has also recognized that the power to tax can be exercised only pursuant to a valid statute and is an attribute of sovereignty. See State ex rel Arthur Coodner, Inc. v. Lee, 7 So.2d 110, 114 (Fla. 1942).

Despite this clear authority, the appellate court chose not to address the issue. Instead, the court framed the issue as whether there was an unlawful delegation to the Department of Insurance to proportionally increase assessments. Even here, however, the appellate court misapplied the holding of this Court in Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815 (Fla. 1983), appeal dismissed, 466 U.S. 901 (1984). The only issue in Southeast Volusia was a delegation argument based upon appropriate standards. The issue in this case involves a tax, not a voluntary assessment. The assessment in Southeast Volusia was voluntary for all physicians and health care providers, except for those hospitals who could not demonstrate financial responsibility. Id. at 817-18. The issue becomes of even more constitutional importance when the tax is being assessed, collected

and enforced by the Association, a non-state entity, where the procedural protections of the Florida Administrative Procedure Act are not available.

Conclusion

This Court should invoke its discretionary jurisdiction to accept the appeal by the petitioners.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the following by U.S. Mail this 11th day of September, 1990:

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