FILED
SID J. WHITE
SEP 28 1990
CLERK, SUPREME COURT
By _____ Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

JAMES F. COY, M.D.,
SIDNEY R. STEINBERG, M.D., and
CLAUDE A. BOYD, M.D.,
on behalf of themselves
and all others similarly
situated,

Appellants,

vs. CASE NO.: 76,565

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

Appellees.

JURISDICTIONAL BRIEF OF APPELLEE FLORIDA BIRTH-RELATED INJURY COMPENSATION ASSOCIATION

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS CONTINUED

FLORIDA RULES OF APPELLATE PROCEDURE

STATEMENT OF THE CASE AND FACTS

The Florida-Birth Related Neurological Injury Compensation Association (NICA), Appellee, adopts and incorporates herein by reference the appellants' statement of the case with the following modification. The named appellants are seeking review of the decision of the First District Court of Appeal, State of Florida, case no. 89-2593. The District Court's decision had consolidated for review the appeals of Drs. James F. Coy, et al. from a decision of the Leon County Circuit Court with the appeal of Dr. James T. McGibony, Dr. Joseph Von Thorn, Dr. Mark Ziffer, and Dr. William Barfield from the same Circuit Court decision.

Both groups of appellants sought review of the above-referenced District Court decision in this court. Appellants James F. Coy, et al. timely filed their notice of appeal but the Notice oa Appeal filed by Dr. James T. McGibony, et al. was untimely. By order dated September 13th, 1990, with a reference of case no. 76,601, this court dismissed appellants' Dr. James T. McGibony, et al. appeal as being untimely. Accordingly, appellee NICA will respond only to the jurisdictional brief of appellants James F. Coy, et al.

The Florida legislature, during its special session in February of 1988, enacted Chapter 88-1, Laws of Florida. A portion of Chapter 88-1 created the Florida Birth-Related Neurological Injury Compensation Plan and provided the means of funding same. (See §766.301-§766.316, Fla. Stat. (1988)).

Pursuant to §766.306-§766.316, Fla. Stat. (1988), the Florida Birth-Related Neurological Injury Compensation Plan (hereinafter the "Plan") was created and provided for a no fault compensation system for certain neurologically injured infants. In order to finance the Plan, the legislature developed a financing scheme, found in §73 of Chapter 88-1, Laws of Florida, now §766.314, Fla. Stat. (1988), which requires all physicians licensed in the State of Florida, all hospitals in the State of Florida, and all physicians who are qualified for and chose to participate in the Plan, to pay certain defined assessments for the purpose of funding the Plan. In addition, the legislature provided for an Insurance Commissioners Regulatory Trust Fund to ensure the financial soundness of the Plan. Under certain circumstances, casualty insurance carriers would also contribute to the Plan. (See §766.315(5), (6), (7), Fla. Stat. (1988)).

Beginning January 1, 1990, licensed physicians were to be assessed annually in accordance with the plan of operation, and those physicians not participating in the Plan would be assessed $250 annually, with those participating in the Plan being assessed $5,000 annually. (See §766.314(4), Fla. Stat.). Additional assessments could be imposed pursuant to the provisions of §766.314(7) Fla. Stat.

Likewise, pursuant to §766.314(5), (b), if the assessments collected pursuant to paragraph (4) of §766.314, Fla. Stat., and the appropriation of funds already provided by §76, of Chapter 88-1, Laws of Florida, were insufficient to maintain the Plan on an actuarily sound basis, the legislature provided for the

appropriation of an additional amount of up to $20,000,000 from the Commissioners Regulatory Trust Fund. Thereafter, pursuant to §766.314(5)(c), and after taking into account the assessments collected pursuant to paragraph (4) of §766.315, Fla. Stat., (the assessments made directly against physicians) and taking into consideration appropriations from the Insurance Commissioners Regulatory Trust Fund, if additional funds were still necessary to maintain the Plan on an actuarially sound basis, the Florida Department of Insurance was impowered to assess each entity licensed to issue casualty insurance in Florida an annual assessment in an amount determined by the Department pursuant to paragraph (7)(a) of §766.314, Fla. Stat. (1988).

Accordingly, beginning January 1, 1990, all physicians contributing to the Plan were required to annually make a payment equal to the initial assessment ($250 or $5,000) together with any additional assessments made and justified pursuant to §766.314(7)(b) (1988) after all the sources of funding had been exhausted. Section 766.314(7)(b) provides as follows:

> "(b) If the Department of Insurance finds that the plan cannot be maintained on an actuarially sound basis based on the assessments and appropriations listed in (4) and (5), the Department shall increase the assessment specified in (4) on a proportional basis as needed."

In effect, after an actuarial investigation and a determination that the Plan, after receipt of the $250 and $5,000 assessments and all funds appropriated from the Commissioners Regulatory Trust Fund, could not be maintained on an actuarially

sound basis, the Department of Insurance was authorized to increase the assessments above the initial assessment amount on a proportional basis as needed to maintain the Plan on an actuarially sound basis. It is the Department of Insurance's responsibility to make the actuarial investigation and to determine the soundness of the Plan and to determine the amount of needed additional assessments, if any.

The appellants filed a lawsuit attacking the constitutional validity of those portions of §766.314 (1988) providing for the assessment of non-participating physicians for the purpose of funding the Plan.

The Leon County Circuit Court considered all issues raised by appellants and confirmed the constitutional validity of the various assessment provisions of §766.314, Fla. Stat. The First District Court of Appeal by opinion dated June 25, 1990 affirmed the decision of the Leon County Circuit Court in all respects.

SUMMARY OF ARGUMENT

The appellants have sought to invoke the discretionary jurisdiction of the Florida Supreme Court under the provisions of Rule 9.030(a)(2)(A) and Rule 9.120, Florida Rules of Appellate Procedure (FRAP). The basis of the jurisdiction is predicated on the decision of the First District Court of Appeal expressly declaring valid a State statute.

Pursuant to Rule 9.120(d) the appellants' brief on jurisdiction must be limited solely to the issue of the Supreme Court's jurisdiction. It is not appropriate to argue the merits of the substantive issues involved in the case or to discuss any matters not relevant to the threshold jurisdictional issue. The appellants' brief on jurisdiction, however, discusses in detail the merits of the substantive issues involved in the case and does not discuss in any detail the matters relevant to the threshold jurisdictional issue and, therefore, should not be considered by this court for determination as to whether to exercise its discretionary jurisdiction.

The appellants have made general arguments that the assessments violate their due process and equal protection rights. None of these arguments have value as precedent. The appellants also maintain that the subject statute improperly delegated the power to tax to the Department of Insurance because the funds derived from the assessments are paid to a "private entity" and because the Department of Insurance has the authority to levy additional assessments if necessary to maintain the fund

on an actuarially sound basis. It is contended by the appellants that an actuarially sound standard is too vague of a standard to pass constitutional muster. However, the most pertinent issue in this case i.e. the constitutionality of an actuarially sound standard as a basis for determining any increase of assessments, has already been considered and affirmed by this court in Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815 (Fla. 1983), appeal dismissed, 466 U.S. 901, 104 S.Ct. 1673, 80 LEd. 2d. 149 (1984). Accordingly, there is no necessity nor justification for this court to accept jurisdiction in this cause as the case will have no value as precedent.

ARGUMENT

The appellants have sought to invoke the discretionary jurisdiction of this court on the basis that the District Court decision sought to be reviewed has expressly ruled that a State statute is constitutionally valid. Pursuant to Rule 9.120(d), FRAP, however, the appellant/petitioners' brief on jurisdiction must be limited solely to the issue of the Supreme Court's jurisdiction i.e. whether the District Court expressly ruled that a State statute was constitutionally valid. Rather than discuss this issue, the appellants' brief is totally devoted to argument of the merits of the substantive issues involved in the case and, in effect, discusses matters not relevant to the threshold jurisdictional issue. While it is proper for the appellant/petitioner to include a very short statement as to why the Supreme Court should exercise its discretion and entertain the case on the merits, appellants' brief goes way beyond the spirit and intent of Rule 9.120, FRAP and, therefore, should not be considered by the court in making its determination as to whether to invoke its discretionary jurisdiction in this cause.

Appellee, NICA would respectfully suggest to the court that this is not a case in which this court should invoke its discretionary jurisdiction. As can be seen from the decision of the First District Court of Appeal and the Final Order of the Leon County Circuit Court, which was attached to appellants' brief as an appendix, the appellants made general and broad arguments regarding violation of their constitutional rights under the due

process and equal protection clauses of the United States and Florida Constitutions i.e. the assessments deprived them of their rights to due process and equal protection of the law. Any decision by this court on those issues would have no value as precedent and consequently, no necessity nor justification exists for this court to invoke its discretionary jurisdiction.

The only issue of interest would relate to the right of the Florida Department of Insurance to increase assessments if the Department determines, after an actuarial investigation, that an increase in assessments is necessary in order to maintain the Plan on an actuarially sound basis. The appellants have maintained that the delegation of this authority to the Department of Insurance is an unlawful delegation of the legislative taxing power. This result is reached in the appellants' opinion because the "actuarially sound" standard set forth in the statute is insufficient to enable the Department of Insurance and courts to determine whether the legislative intent is being implemented.

However, in Department of Insurance v. Southeast Volusia Hospital District, supra, this court specifically upheld the "actuarially sound" standard as being sufficient to satisfy constitutional requirements. Accordingly, no necessity or justification exists in this cause for the court to invoke its discretionary jurisdiction as the decision would have little or no value as precedent.

As this court is aware, the jurisdiction of this court was substantially revised by constitutional amendment in 1980. In the first case considered by the court after the amendments, this

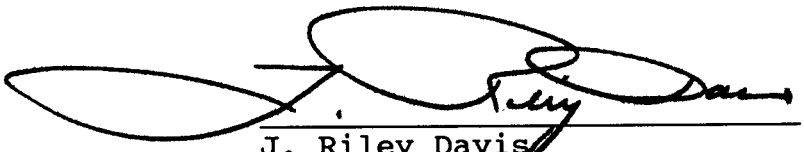
court in Jenkins v. State, 385 So.2d 1356 (S.Ct. 1980) analyzed, from a historical perspective, amendments to the jurisdiction of the court and reaffirmed and concluded that it was never intended that the District Courts of Appeal should be intermediate courts. The Supreme Court was intended as a supervisory body in the judicial system, exercising appellate power only in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice. Review by the District Courts, in most instances, would be final and absolute.

In the instant case, there has been no representation nor argument by the appellants that this case involves an area essential to the settlement of issues of great public importance and/or the preservation of uniformity of principle and practice. Instead, it is clear that appellants' primary arguments are general in nature with the one issue of interest i.e. the "actuarially sound" standard issue having already been decided by this court.

Accordingly, the appellee NICA would respectfully request this court to decline to invoke its discretionary jurisdiction.

CONCLUSION

The appellants' brief is primarily an argument on the merits of the substantive issues involved in this case and is not relevant to the threshold jurisdictional issue and, as such, the brief should not be considered by this court in its determination to invoke its discretionary jurisdiction. The appellants have not justified a decision by this court to invoke its discretionary jurisdiction since the appellants have not demonstrated that a determination by this court on the merits would result in any value as precedent, nor that the issues involved are of great public importance and/or that a decision is necessary for the preservation of uniformity of principle and practice. Accordingly, it is respectfully suggested that this court should decline to invoke its discretionary jurisdiction.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail to **KENT MASTERSON BROWN, ESQ.**, 1114 First National Building, 167 West Main Street, Lexington, Kentucky 40507; **DONNA H. STINSON, ESQ.**, of Moyle, Flanigan, Katz & Fitzgerald, 118 N. Gadsden Street, Suite 100, Tallahassee, Florida 32301; **WILLIAM H. ADAMS, III, ESQ. AND ROBERT J. WINICKI, ESQ.**, Post Office Box 4099, Jacksonville, Florida, 32201; **JOHN THRASHER, ESQ.**, Florida Medical Association, 760 Riverside Avenue, Jacksonville, Florida 32304; **GEORGE WASS, ESQ.**, Department of Legal Affairs, The Capitol, Suite 1501, Tallahassee, Florida 32399-1050; **THOMAS J. MAIDA, ESQ.**, Karl, McConnaughhay, et al., Post Office Box 229, Tallahassee, Florida 32302 and **NEIL H. BUTLER, ESQ.**, Butler & Johnson, P.A. Post Office Box 839, Tallahassee, Florida 32302 on this 28th day of September, 1990.

J. Riley Davis

JRD/ac
NICA-30176