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O.A. 4-10-91

IN THE SUPREME COURT OF FLORIDA

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CASE NUMBER 76,565

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,
Petitioners

vs.

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

**APPEAL FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA**

**REPLY BRIEF OF PETITIONERS,
JAMES F. COY, M.D., SIDNEY R. STEINBERG, M.D. AND
CLAUDE A. BOYD, M.D.**

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MAY IT PLEASE THE COURT:

ARGUMENT

I. THE APPELLEE'S ARGUMENT THAT AN ALLEGED OBSTETRICAL CRISIS JUSTIFIES THE GRANTING OF SPECIAL PRIVILEGE TO A LIMITED GROUP OF FLORIDA-LICENSED PHYSICIANS PRACTICING OBSTETRICS IS WITHOUT MERIT.

The Supreme Court of Florida and the Florida District Courts of Appeal have consistently refused to follow the highly deferential approach to judicial review of legislation which the Appellees advocate. The Florida appellate courts have thus invalidated a number of state regulations on the grounds that the provisions violated the fundamental guarantees of the Florida Constitution. See, e.g., Eslin v. Collins, Fla., 108 So.2d 889 (1959); Liquor Store v. Continental Distilling Corp., Fla., 40 So.2d 371 (1949); Wiggins v. City of Jacksonville, Fla.App., 311 So.2d 406 (1975); Department of Revenue v. Amrep Corp., Fla., 358 So.2d 1343 (1978); Fronton, Inc. v. Florida States Racing Commission, Fla., 82 So.2d 520 (1955) (en banc). This Honorable Court articulated the rationale behind Florida's refusal to follow the extremely deferential review of police regulations advocated by the Appellees. In Volusia County Kennel Club v. Haggard, Fla., 73 So.2d 884, 898 (1954) (en banc), this Honorable Court observed:

> The constitutional guarantees were not placed in our Constitution in order to protect particular groups. It would be a poor substitute, indeed, for our constitutional system of government for the courts ever to adopt a policy of upholding a law which violates constitutional guarantees merely because it may be a popular thing to do **as to a particular group** or on a given occasion. If popularity contests ever became the

> criteria for determining the validity of the law, the uncontrolled will of the mob will become the substitute for constitutional government.

(Emphasis added.)

The alleged "crisis" in obstetrics which the Appellees maintain is the justification for the class legislation at issue here is simply a smoke screen for a scheme which is intended to inure only to the benefit of a discrete group of health care providers who practice obstetrics and actually choose to reap the benefits and special protections of the statutory scheme. The fact that to date only 535 eligible physicians (obstetricians and family practitioners practicing obstetrics) have elected to "participate" in the FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PLAN belies the contention that an alleged "crisis engulfing the state" exists and illuminates the special, private nature of the statutory scheme in question. One Justice of this Honorable Court made the following observations regarding alleged crises and the guarantees contained in the Florida Constitution in a case involving Article XI, Section 3, of the Florida Constitution:

> Torn between the "good of the public" and applying the law, I voted with the majority in State v. Lee, 356 So.2d 276 (Fla. 1978), influenced by an alleged crisis in the insurance business. This was a mistake. In Chenoweth v. Kemp, 396 So.2d 1122 (Fla. 1981), we went a "wee bit" further in construing the single subject rule. I felt bound to concur because of my vote in Lee and, once more, there was an alleged crisis. Now I am again faced with an alleged crisis on one side and the one-subject constitutional provision on the other. WHERE WILL IT END? As we continue to expand our interpretation of the one-subject rule, it becomes more nebulous with each interpretation. We will become a

> court of men instead of a court of law, guided by an alleged crisis instead of the wording of the Constitution. The legislature interpreted our prior decisions as saying "Do whatever you want to do, as long as your decision is buttressed by a crisis."

Smith v. Department of Ins., Fla., 507 So.2d 1080, 1099 (1987) (Adkins, J., concurring in part and dissenting in part) (Emphasis in the original.)

In the present case, the Appellees essentially seek to allow special benefits to be showered upon a select group of Florida physicians at the expense of the Appellants herein under the guise of an alleged "crisis". The Equal Protection and Due Process clauses of the Florida Constitution prohibit such a use of the state's police power. "[T]he state's police power cannot be invoked to distribute collected funds arbitrarily and discriminatorily to a special limited class of private individuals." State v. Lee, Fla., 356 So.2d 276, 279 (1978). The statutory scheme at issue here falls squarely within the constitutional prohibition discussed in Lee, and any alleged "crisis" cannot negate the constitutional guarantees found in the Florida Constitution to which this Honorable Court has adhered consistently over time. The legislation at issue here extends the sovereign power of the state to the benefit of a mere 535 individuals to the detriment of over 40,000 Florida-licensed physicians who do not practice obstetrics and many of whom do not even practice medicine within the State of Florida. Such a scheme is, by definition, arbitrary, oppressive, and unreasonable. Liquor Store v. Continental Distilling Corp., Fla., 40 So.2d 371, 375 (1949)

The Appellees go so far as to maintain that "[a] tax may even be so high as to restrict or even possibly destroy particular occupations without violating the due process or equal protection clause". (Brief of Appellees, at 17) Such an assertion is not only absurd, but frightening. "The theory of our government, state and national, is opposed to the deposit of unlimited power anywhere." Citizens Savings & Loan Ass'n v. City of Topeka, 87 U.S. (20 Wall) 655, 22 L.Ed.2d 455, 461 (1875). The interest of a person in pursuing a legitimate, lawful profession is of great value to the professional and cannot be arbitrarily taken by the state, any more than real or personal property can be taken. Dent v. West Virginia, 129 U.S. 114, 222, 9 S.Ct. 231, 233, 32 L.Ed. 623 (1889) The position advocated by the Appellees, if recognized, would substitute "the uncontrolled will of the mob" for constitutional government. Volusia County Kennel Club, supra, at 898. This Honorable Court cannot countenance such a position.

What is even more obvious than the private nature of the legislation at issue here is the fact that Florida physicians and non-resident Florida-licensed physicians not practicing obstetrics are singled out to bear the burdens of underwriting the subsidy. In State ex rel. Watson v. Lee, Fla., 24 So.2d 798, 800 (1946), this Honorable Court upheld the constitutionality of the County Officers' and Employees' Retirement Act, but observed that had the scheme been "compulsory with no commitment as to benefits to be derived from it", the scheme would have posed serious constitutional questions. Similarly, in State v. Lee,

Fla., 356 So.2d 276 (1978), this Honorable Court held that Section 42 of the Insurance and Tort Reform Act of 1977 establishing a "Good Drivers Incentive Fund" violated the Equal Protection clauses of the United States and Florida Constitutions.

In State ex rel. Watson v. Lee, supra, if the statute in question had been compulsory but did not allow those contributing to the retirement fund to participate, the State undoubtedly would have argued that the security of a discrete group of public employees at the expense of other public employees served a public purpose by providing a "safety net" for the discrete group of public employees allowed to participate and by encouraging members of this discrete group to remain in public service. This purpose, however, would not have saved such a scheme, for the fact that the scheme would have taken property from one discrete group for the exclusive benefit of another discrete group would have rendered the scheme patently arbitrary and, thus, violative of the United States and Florida Constitutions.

In State v. Lee, Fla., 356 So.2d 276, 279 (1978), this Honorable Court explicitly rejected the state's contention that the alleged public purpose of the statute, to provide "an incentive for those persons operating motor vehicles in the state to utilize the privilege in a safe and financially responsible manner", was enough to save the statutory scheme from constitutional attack. Because the statute had "potential benefit for only a very limited class of private individuals", the statute was manifestly arbitrary and thus an impermissible use of the state's police power. Id., at 279.

State ex rel. Watson v. Lee, supra, and State v. Lee, supra, illustrate that in interpreting the relevant provisions of the Florida Constitution, this Honorable Court has not abdicated its power to say what the law is by employing the "any conceivable basis" approach which the Appellees advocate. The Florida appellate courts have not permitted the state's police power to be used for the benefit of a handful of private individuals under the guise of an alleged "public purpose". One reason for a more exacting scrutiny of legislation of this type enacted pursuant to the police power is that private groups race to the legislature to protect their own private interest in the name of the public welfare, producing legislation which cannot be realistically termed "the will of the people". Hetherington, "State Economic Regulation and Substantive Due Process of Law", 53 Nw.U.L.Rev., 226, 250 (1958). This is exactly what prompted the enactment of the statutory scheme at issue here.

Currently, the police power of the State of Florida is being used for the exclusive benefit of a mere 535 Florida-licensed obstetricians who have actually chosen to reap the benefits of the statutory scheme. There is nothing to prevent the number of "participating" physicians from decreasing, thus further aggravating the patently private nature of this legislation. The fact that Florida physicians practicing obstetrics are not required to participate in the Plan, and that therefore the accomplishment of any alleged "public purpose" is left purely to the whim and caprice of a small subspecialty of high-risk practitioners illustrates for whose benefit the legislation was

really enacted. Indeed, this feature of the statute negates the contention that the scheme is intended to benefit the public at large. The absurdity of the Appellee's contention that "[a]ll physicians holding Florida licenses are treated equally" (Brief of Appellees, at 29) is manifest. This Honorable Court has held private and special legislation unconstitutional in the past, and it should do so in the present case.

II. THE STATUTE FAILS TO SET DEFINITE LIMITS ON THE AMOUNT OF TAX ASSESSMENTS TO BE LEVIED BY THE COMMISSIONER OF INSURANCE AND PROVIDES NO SUBSTANTIVE GUIDANCE AS TO THE APPORTIONMENT OF FUTURE TAX BURDENS, IN VIOLATION OF ARTICLE VII, SECTION 1 OF THE FLORIDA CONSTITUTION.

In his discussion of the nondelegation doctrine and the role which the doctrine plays in the political system, Professor Ely observed:

> [H]ow much more comfortable it must be simply to vote in favor of a bill calling for safe cars, clean air, or nondiscrimination, and to leave to others the chore of fleshing out what such a mandate might mean. How much safer, too--and here we get to the nub. For the fact seems to be that on most hard issues our representatives quite shrewdly prefer not to have to stand up and be counted but rather to let some executive-branch bureaucrat, or perhaps some independent regulatory commission, "take the inevitable political heat."

J. Ely, Democracy and Distrust, A Theory of Judicial Review 131-32 (1980)

These observations provide an apt description of the legislative scheme at issue here as it relates to the delegation of authority to further increase the tax burdens which have been imposed upon the Petitioners.

In Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. 607, 100 S.Ct. 2844, 65 L.Ed.2d 1010 (1980), the United States Supreme Court, per Mr. Justice Stevens with three Justices joining and one Justice concurring in the judgment, held a new health standard promulgated by the Occupational Safety and Health Administration which limited occupational exposure to benzene was not supported by appropriate findings and was therefore invalid. At issue in Industrial Union was the Secretary of Labor's interpretation of §6(b)(5) of the Occupational Safety and Health Act, which required the Secretary to "set the standard" for exposure to toxic materials or harmful physical agents "which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity." The Secretary exercised his authority under the Act to lower the standard of permissible exposure to benzene significantly, but the plurality of the Court invalidated such standard. Mr. Justice Rehnquist, concurring in the judgment, would have invalidated the new standard by invalidating §6(b)(5) of the Act on nondelegation grounds. Mr. Justice Rehnquist observed:

> Finally, as indicated earlier, in some cases this Court has abided by a rule of necessity, upholding broad delegations of authority where it would be "unreasonable and impracticable to compel Congress to prescribe detailed rules" regarding a particular policy or situation. [Citations omitted.] But no need for such an evasive standard as "feasibility" is apparent in the present cases. In drafting §6(b)(5), Congress was faced with a clear, if difficult, choice between

> balancing statistical lives and industrial resources or authorizing the Secretary to elevate human life above all concerns save massive dislocation in an affected industry. That Congress recognized the difficulty of this choice is clear from the previously noted remark of Senator Saxbe, who stated that "[w]hen we come to saying that an employer must guarantee that such an employee is protected from any possible harm, I think it will be one of the most difficult areas we are going to have to ascertain." [Citation omitted.] That Congress chose, intentionally or unintentionally, to pass this difficult choice on to the Secretary is evident from the spectral quality of the standard it selected. . ..
>
> [F]or Congress to pass that decision on to the Secretary in the manner it did violates, in my mind, John Locke's caveat--reflected in the cases cited earlier in this opinion--that legislatures are to make laws, not legislators. . . .

Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S., at 681-82, 100 S.Ct., at 2885-2886 (Rehnquist, J., concurring)

In the present case, as in Industrial Union, the legislative branch has delegated an important legislative prerogative without clearly defining the limits of the exercise of the authority delegated. The statutory scheme at issue here states only that future increases in tax assessments shall be determined by "need" and "actuarial soundness". The Florida legislature has not stated **how** actuarially sound the FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PLAN is to be and thus has placed no definite upper limits on the taxing authority which it has delegated to the Commissioner of Insurance. Further, the Florida legislature has provided no guidance as to what factors are to be considered by the Commissioner of Insurance in determining "actuarial soundness". Finally, the Florida legislature has provided no guidance as to how the burdens of future increases in tax assessments are to be distributed among those forced to contribute under the Act.

Dept. of Insurance v. Southeast Volusia Hosp. Dist., Fla., 438 So.2d 815 (1983) is thus distinguishable from the case at bar. First, the statute at issue in Southeast Volusia set definite, maximum limits on the amount of sums to be maintained in the fund. Second, the statute at issue in Southeast Volusia provided detailed guidance as to what factors were to be taken into account in determining "actuarial soundness". Third, and most importantly, the statutory scheme at issue in Southeast Volusia established a voluntary system rather than a system of taxation. Certainly, in the area of taxation, the legislature should be required to specify definite limits on the delegation of the taxing power. The legislature, rather than a private association and the Commissioner of Insurance, should be required to make taxation decisions which burden the electorate. In the controversial area of taxation especially, the nondelegation doctrine must be given vigor in order to require elected representatives to "take the inevitable political heat" for increased tax burdens.

The Appellees maintain that the "procedural safeguards" of the Florida Administrative Procedure Act (APA) can somehow act to save the remarkably broad delegation of legislative power at issue in the cause sub judice. This argument is without merit for two reasons. First, this Honorable Court explicitly rejected Professor Davis' "procedural safeguards" approach to judicial review of broad delegations in Askew v. Cross Key Waterways, Fla., 372 So.2d 913 (1978). There, this Honorable Court held:

> Although the Davis view is an entirely reasonable one as demonstrated by its adoption in the federal courts and a minority of state jurisdictions, nonetheless, it clearly has not been the view in Florida. [Citation omitted.] Should this Court, then, accept the invitation of appellants to abandon the doctrine of nondelegation of legislative power which is not only firmly embedded in our law, but which has been so continuously and recently applied? [Citations omitted.] We believe stare decisis and reason dictate that we not.

Id., at 924.

Second, the "flexibility" rationale espoused by the Appellees in support of the overly broad delegation at issue here simply does not apply in the present case. The Appellees state that "[t]he Legislature meets but once a year." (Brief of Appellees, at 36). Yet, the assessments which the Commissioner of Insurance and the FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION are allowed to increase and apportion without limitation are **annual assessments.** Accountability, or a lack thereof, is the reason for the vast delegation of the taxing power at issue here, not "flexibility".

Conspicuously, the Appellees completely fail to address the issue of the delegation of the power to apportion future tax burdens among those persons and entities covered by the FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ACT. Under the statute, the Commissioner of Insurance is empowered to look to various sources for increased revenue should "actuarial soundness" require it. Section 766.314(5)(c)1, Fla.Stat., provides:

> Taking into account the assessments collected pursuant to subsection (4) and the appropriations from the

> Insurance Commissioner's Regulatory Trust Fund, if required to maintain the plan on an actuarially sound basis, the Department of Insurance shall require each entity licensed to issue casualty insurance as defined in s.624.605(1)(b), (k) and (q) to pay into the association an annual assessment in an amount determined by the department pursuant to paragraph (7)(a), in the manner required by the plan of operation.

Under the provisions of Section §766.314(4), and (5)(a), Fla.Stat., hospitals providing obstetrical care, "participating" physicians and "non-participating" physicians must also pay annual assessments to the FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION. Section 766.314(7)(b) provides:

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

Basically, then, if the initial assessments and allocations of funds are insufficient, the Commissioner of Insurance is to assess casualty insurers. However, the Commissioner of Insurance is to determine the level of such assessments. Then, if the assessment of casualty insurers is insufficient to maintain the fund on an "actuarially sound" basis, as the Commissioner interprets that term, the Commissioner of Insurance must increase the assessments on "participating" physicians, "non-participating" physicians, and hospitals providing obstetrical services.

It is crucial to note that once the Commissioner of Insurance determines that "actuarial soundness" requires increased assessments, the Commissioner must necessarily choose

among competing groups and entities to determine how the burdens of increased assessments are to be apportioned. For example, if the Commissioner determines that more revenue is necessary to achieve "actuarial soundness", the Secretary must first assess Florida casualty insurers. However, the level of this assessment will determine whether and to what extent "participating" physicians, "non-participating" physicians, and hospitals providing obstetrical services will be subject to increased assessments. Then, if the Commissioner, in his discretion, has determined to impose only a light burden on casualty insurers and is thus required to turn to "participating" physicians, "non-participating" physicians, and hospitals providing obstetrical services for more revenue, the Commissioner must then determine how to apportion the burden of increased assessments among these three competing groups. The statutory scheme at issue here provides absolutely no guidance as to how the Commissioner of Insurance is to distribute the burdens of increased assessments between and among the aforesaid competing persons and entities. The Commissioner is therefore empowered to distribute the burdens of increased assessments with favoritism and with unlimited discretion.

In High Ridge Management Corp. v. State, Fla., 354 So.2d 377, 380 (1977), this Honorable Court clearly warned that such a statutory scheme constitutes an invalid delegation of the legislative power, holding that "statutes delegating power without adequate protection against unfairness or favoritism should be invalidated and that the exercise of the police power

by the Legislature must be clearly defined and limited in scope so that nothing is left to the unbridled discretion or whim of the administrative agency responsible for enforcement of the act." One year later, this Honorable Court struck down yet another statutory scheme on nondelegation grounds, concluding that "[t]he deficiency in the legislation at issue here considered is the absence of legislative delineation of priorities among competing areas and resources which require protection in the State interest." Askew v. Cross Key Waterways, Fla., 372 So.2d 913, 919 (1978)

The Appellees can find no consolation in the Florida Administrative Procedure Act. Even assuming, arguendo, that the Florida APA even applies to the Florida Birth-Related Neurological Injury Compensation Association, a private entity, the Florida APA provides only procedural guidance and does not add the substantive standards and policy priorities that are lacking in this statutory scheme. Fundamentally, even if judicial review of increased assessments is available under the Florida APA, the lack of statutory standards to guide choices among competing interests would indirectly delegate to the judiciary the power to make the choices which the legislature refused to make. "When legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the legislature in its conduct, then, in fact, the agency becomes the lawgiver rather than the administrator of the law". Askew v. Cross Key Waterways, Fla., 372 So.2d 913, 919 (1978) Since the organic statute at

issue in the present case does not provide adequate guidelines to determine the distribution of future tax burdens, it will be virtually impossible for a reviewing court to determine whether the actions of the Commissioner of Insurance are outside of his "range of discretion", since the range of the Commissioner's discretion in allocating increased tax burdens is virtually unlimited. In such a case, there is no legal standard to apply to the Commissioner's actions since those actions are completely within the unbridled discretion of the Commissioner. The courts become powerless. This situation is precisely that which Article VII, Section 1 of the Florida Constitution was intended to prevent.

CONCLUSION

Petitioners pray that, for all the foregoing reasons, this Honorable Court should reverse the judgment of the Florida Court of Appeal, First District, and hold that §§766.314(4)(b)1, 766.314(5)(a), and 766.314(7)(b), Fla.Stat. (1988 Supp.), are violative of both the United States and Florida Constitutions. Petitioners further pray that, for all the foregoing reasons, this Honorable Court should remand this case to the trial court with instructions for it to enter an order enjoining the Respondents from enforcing §§766.314(4)(b)1, 766.314(5)(a), and 766.314(7)(b), Fla.Stat. (1988 Supp.), and award those "non participating" physicians who have paid the annual assessment the recovery of the said sums paid.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Reply Brief of Petitioners was mailed on February 28, 1991 to: William H. Adams, III, Esquire and Robert J. Winicki, Esquire, Post Office Box 4099, Jacksonville, Florida 32201; John Thrasher, Esquire, Florida Medical Association, 760 Riverside Avenue, Jacksonville, Florida 32204; Peter D. Ostreich, Esquire, Department of Insurance and Treasury, 412 Larson Building, Tallahassee, Florida 32399-0300; H. Reynolds Sampson, Esquire, Harper Field, Esquire, Florida Department of Professional Regulation, 1940 North Monroe Street, Tallahassee, Florida 32399-0750; Julie Gallagher, 204-B South Monroe Street, Tallahassee, Florida 32301; George Waas, Department of Legal Affairs, The Capitol, Suite 1501, Tallahassee, Florida 32399-1050; J. Riley

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