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SID J. WHITE
MAY 26 1993
CLERK, SUPREME COURT
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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

JUDITH SHARON ABRAMSON,

Petitioner,

vs. CASE NO. 81,230

THE FLORIDA PSYCHOLOGICAL ASSOCIATION, et al., etc.,

Respondents.
_____/

CAROL SEIDMAN,

Petitioner,

vs. CASE NO. 81,248

THE FLORIDA PSYCHOLOGICAL ASSOCIATION, et al., etc.,

Respondents.
_____/

BRIEF OF ROBERT A. BUTTERWORTH, ATTORNEY GENERAL, AS AMICUS CURIAE

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STATEMENT OF THE CASE AND FACTS

A. Regulatory Background

The State first began regulation of the practice of psychology in 1957 with the enactment of Chapter 490, Fla.Stat. In 1961, the law was declared unconstitutional as an overbroad delegation of legislative authority to the statutorily created state board of examiners of psychology. Husband v. Cassel, 130 So.2d 69 (Fla. 1961). Following the Husband decision, Chapter 490 was revised in 1961.

Chapter 490 remained in effect until its "sunset" in 1977. Throughout this period Chapter 490 prohibited the practice of psychology by any individual not certified under its provisions. The 1961 act provided in pertinent part:

* * * *

> (2) No individual or organization, other than those certified and registered under this chapter, shall render or offer to render psychological services as defined in § 490.011.

* * * *

Section 490.021(2), Fla.Stat. (1961).

Although revised in 1970, Chapter 490 still provided that:

> It shall be unlawful for anyone to practice psychology in the state without first procuring a license and license certificate in accordance with the provisions of this chapter.

Section 490.17, Fla.Stat. (1970). This section remained a part of Chapter 490 until the sunset of the law on July 1, 1979, after which the practice of psychology continued unregulated by the state for a period of thirty months.

A new Chapter 490, Fla.Stat., was enacted in 1981 and became effective on January 1, 1982. See Chapter 81-235, Laws of Florida. This chapter, which provided for licensing of psychologists, clinical social workers, marriage and family therapists, mental health counselors, and school psychologists, required a license of any person "hold[ing] himself out by any title or description incorporating the words, or permutations of them, 'psychologist,' 'psychology,' 'psychological,' 'school psychologist,' 'psychotherapy'...." Section 490.012(1), Fla.Stat. (1981). As later interpreted in Abramson v. Gonzalez, 949 F.2d 1567 (11th Cir. 1992), the reenacted Chapter 490 did not prohibit the practice of psychology by unlicensed individuals. Under its provisions, unlicensed practitioners could practice psychology and therefore had a First Amendment right to represent themselves as "psychologists." They could not, however, hold themselves out as "licensed psychologists." Id.

A 1990 amendment to section 490.012 provides that:

> (5) Beginning October 1, 1995, no person shall practice psychology in this state, as such practice is defined in s. 490.003(4), for compensation, unless such person holds an active valid

license to practice psychology issued pursuant to this chapter. ****

Chapter 90-263, section 3, Laws of Florida.

B. The Federal Court Lawsuit

In 1981 petitioners Abramson and Seidman and others brought suit in federal court challenging the constitutionality of Chapter 490 both facially and as applied. They also challenged the constitutionality of the grandfather clause, which operated to exclude them because they had not obtained their doctorate degrees from an accredited university. See Abramson v. Gonzalez, 949 F.2d 1567, 1579-1580 (11th Cir. 1992).[1] The Eleventh Circuit rejected the challenge to the grandfathering provisions. Id.

In May 1990, prior to trial of the federal court suit, the Board of Psychological Examiners made an offer of settlement to 22 of the plaintiffs. Contrary to numerous representations in the brief of petitioners Abramson and Seidman, the Attorney General did not "sponsor" this offer

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[1] The grandfather provisions pertaining to psychologists were not codified in the Florida Statutes. They are contained in Chapter 81-235, Laws of Florida, specifically section 490.013(2) thereof, which required an application to be filed with DPR by December 31, 1981. This section required a doctoral degree from an accredited university or certification by the Florida Psychological Association or the Florida Association of Practicing Psychologists. These two associations, as the decision in Abramson v. Gonzalez points out, certified only those persons who had attended APA accredited or comparable institutions. 949 F.2d at 1579-1580.

of settlement. The Board authorized the offer and it was communicated by the Board's counsel, an assistant attorney general. The written offer stated:

> On behalf of my clients, the Department of Professional Regulation, Board of Psychological Examiners and the Board of Clinical Social Work, Marriage and Family Therapy, and Mental Health Counsel, I have been authorized to make an offer of settlement....

(First Amended Complaint, Ex. F, R131)

There is no evidence in the record of this case that the offer of settlement came from the Attorney General or was made at the instigation of the Attorney General. As the letter stated, the Board authorized the settlement.

The proposed settlement offered two alternatives for licensure. The first enabled any plaintiff to demonstrate that his or her qualifications were "equivalent to" those necessary for certification by the FPA or FAPP in 1981. This would have required showing educational qualifications equivalent to those of an individual holding a doctorate degree from an accredited institution.

The second alternative for those who could not make the above showing and who had practiced between July 1, 1979, and January 1, 1982, was to pass the Board's examination. Those accepting would not have to demonstrate compliance with statutory educational requirements. By an amended offer, those choosing this alternative would have two opportunities to pass the Board's examination. (R135)

Petitioners Abramson and Seidman accepted the settlement offered in May 1990. Rather than attempt to demonstrate their educational qualifications, each elected to take the examination.

Except for the ruling that unlicensed psychologists could call themselves "psychologists," the constitutional challenges to Chapter 490 raised in the federal suit, including the challenge to the grandfather provision, were ultimately rejected. Abramson v. Gonzalez, 949 F.2d 1567.

C. Proceedings in the Lower Courts

In September 1990, The Florida Psychological Association ("FPA") and Parke Fitzhugh a member of the FPA, plaintiffs below, sued the Department of Professional Regulation; Larry Gonzalez, Secretary of the Department; the Board of Psychological Examiners; Abramson, Seidman and others. (R1 et seq.) (First Amended Complaint R85 et seq.) The plaintiffs sought to enjoin the Department from allowing Abramson and Seidman to take the examination until such time as they met the educational requirements set forth in Chapter 490 and Rule 21U-11.006, Florida Administrative Code. (R85 et seq.)

The trial court permitted Abramson and Seidman to take the licensure examination in October 1990. Each passed. In its final judgment the trial court found the

Board lacked the authority to enter a settlement agreement contrary to the statutory requirements of section 490.005(1)(b), Fla.Stat. (1989). The judgment enjoined the Board from licensing Abramson and Seidman until they met the statutory requirements.

The petitioners pursued an appeal to the First District Court of Appeal. The Board also filed a notice of appeal, but following the decision in the Eleventh Circuit the Board dismissed its appeal. The Board filed no brief before the dismissal.

On appeal to the First District Court of Appeal, Abramson's initial brief stated the single issue to be:

> WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND/OR GROSSLY ABUSED ITS DISCRETION IN ENTERING THE ORDER APPEALED.

(Initial Brief of Appellant Abramson, p. 7)

Seidman's brief stated the issue to be:

> [WHETHER] THE COURT ERRED BY FAILING TO ENFORCE THE SETTLEMENT AGREEMENT OFFERED BY DPR AND THE BOARD AND ACCEPTED BY SEIDMAN.

None of the briefs filed contended that the Attorney General "sponsored" the settlement agreement.[2] This suggestion was made for the first time in the course of this litigation in petitioner Abramson's motion for

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[2] The decision of the First District specifically states that "[I]n April and May of 1990, DPR and the Board offered a settlement to Abramson (and certain others, including Seidman)...." Slip Opinion, p.3.

rehearing and request for certified question. The motion suggested that it was the Attorney General's Office "which sponsored the settlement in this case" (Motion, p. 3 para. F), and further that "The State Attorney General . . . believed in its judgment that settlement under the terms as agreed would not jeopardize or be detrimental to public health, public records and/or public safety." (Motion, p. 3 para. J)

The record does not support the representation that the Attorney General sponsored the settlement or that he, independently of the Board, made any determination that the settlement would not be detrimental to public health, safety and welfare.

Furthermore, neither the Board nor the Attorney General was participating in the appeal at this point, and, as the certificates of service on the motions reflect, neither was served with Abramson's or Seidman's motion. Nevertheless, each motion suggested certification of the following question to the Florida Supreme Court:

> WHERE THE ATTORNEY GENERAL OF THE STATE OF FLORIDA, AS THE LEGISLATIVELY APPOINTED COUNSEL FOR A STATE BOARD OF AGENCY, SETTLES A LAWSUIT BETWEEN SAID BOARD OR AGENCY AND A PRIVATE INDIVIDUAL UNDER TERMS OR CONDITIONS THAT ARE NOT EXPRESSLY AUTHORIZED BY THE BOARD'S LEGISLATIVE GRANT OF POWER, BUT MAY BE IMPLIED UNDER THE GENERAL POLICE POWER OF THE STATE, IS THE SETTLEMENT LAWFUL?

The First District Court of Appeal certified to this Court the following question:

> WHEN IS IT LAWFUL FOR THE ATTORNEY GENERAL OF THE STATE OF FLORIDA, AS THE LEGISLATIVELY APPOINTED COUNSEL FOR A STATE BOARD OR AGENCY, TO SETTLE A LAWSUIT BETWEEN SAID BOARD OR AGENCY AND A PRIVATE INDIVIDUAL UNDER TERMS OR CONDITIONS THAT ARE NOT EXPRESSLY AUTHORIZED BY THE BOARD'S LEGISLATIVE GRANT OF POWER?

Judge Ervin dissented from the certification of this question.

The certified question was not the issue the parties briefed and argued, nor was it the issue the First District decided. It has no record foundation.

SUMMARY OF ARGUMENT

The First District Court of Appeal has certified a question that its own decision did not rule on or even address. Moreover, its factual premise -- that the Attorney General settled the lawsuit -- is erroneous, as is petitioners' contention that the Attorney General "sponsored" the settlement and determined it to be consistent with the public health, safety and welfare. The record shows, and the district court of appeal found, that DPR and the Board of Psychological Examiners authorized the settlement.

Although the Department of Legal Affairs represents the 39 professional and occupational boards

housed in DPR, that does not mean that the Attorney General must approve of every action taken by one of those boards or determine its consistency with a larger public interest.

The issue this Court should decide is the same issue decided by the district court of appeal: whether the settlement agreement in the federal action was within the express or implied authority of the Board, notwithstanding petitioners' failure to meet statutory educational requirements.

ARGUMENT

I. THE ISSUE PROPERLY BEFORE THIS COURT IS THE ISSUE THAT WAS DECIDED BY THE FIRST DISTRICT COURT OF APPEAL -- WHETHER THE BOARD OF PSYCHOLOGICAL EXAMINERS HAD THE AUTHORITY, EXPRESS OR IMPLIED, TO SETTLE THE FEDERAL COURT ACTION ON THE TERMS AND CONDITIONS OFFERED PETITIONERS ABRAMSON AND SEIDMAN.

The question the petitioners suggested for certification and the brief they have filed in this Court seek to significantly -- and impermissibly -- shift the focus of the issue in this case. In the trial court and in the briefs filed in the First District Court of Appeal, the issue petitioners argued was whether the Board of Psychological Examiners had the legal authority, express or implied, to settle the federal court lawsuit on the terms agreed to with the petitioners. The trial court, affirmed by the district court of appeal, answered this question in the negative.

Petitioners now argue a new issue in this Court. They contend that the Attorney General not only sponsored the settlement but found it not contrary to the public health, safety, and welfare. This argument is unacceptable for two reasons. First, there is no indication in the record that that Attorney General acted in such a manner. Second, petitioners have not argued this point previously and cannot raise it for the first time on appeal. Dober v. Worrell, 401 So.2d 1322 (Fla. 1981). The appropriate issue for this Court to review, assuming review was providently granted, is the issue decided by the trial court and the district court of appeal.

Petitioners' argument assumes that because section 455.221, Fla.Stat., requires the Department of Legal Affairs to provide legal services to each board within the Department of Professional Regulation, every action a board may take on which it has been advised or represented by the Department of Legal Affairs has been approved by the Attorney General and determined to be consistent with a larger public interest. Even if the petitioners had preserved this point for review, it is submitted that the argument assumes far too much.

Under section 455.221(1), Fla.Stat., the Department of Legal Affairs represents not only the various professional and occupational boards but also "the interests of the citizens of the state." It is to effectuate the

latter interest "by vigorously counseling the boards with respect to their obligations under the laws of the state." Section 455.221(1), Fla.Stat. It is also true that the Attorney General, as the chief legal officer of the State, retains extensive common law powers and the right and duty to assert those powers in the public interest. See State ex rel. Landis v. S.H. Kress & Co., 115 Fla. 189, 155 So. 823 (1934); State ex rel. Shevin v. Yarborough, 257 So.2d 891, 894 (Fla. 1972) (Ervin, J., concurring).

The existence of these powers does not mean, however, that every action taken by an agency client bears the imprimatur of the Attorney General and his personal finding that the action is consistent with, or at least not contrary to, some larger public interest. Virtually every decision of an administrative board affects the interests of the public to some degree. It would be an unrealistic and burdensome interpretation indeed to read section 455.221(1) as requiring the Attorney General to independently assure himself, as legal counsel, that every decision made by each of the 39 boards under DPR is in the larger public interest or not harmful to it. Such decisions are often highly technical in nature and many times the true interests of the public are elusive. In any event, if and when the Attorney General exercises his right and power to act in the public interest, as opposed to advising a board involved in a lawsuit, he should do so by clearly stating his overriding

authority at an appropriate time. Fairness to an agency client and fidelity to his office and the public interest demand no less.

Because petitioners have taken no pains to make any sort of record on this issue, their assertion that the Attorney General independently determined the public interest and was acting in that interest in "sponsoring" the settlement agreement should not be given credence.

The lower courts ruled in this case that the settlement agreement was not within the scope of the Board's statutory or implied authority because petitioners did not meet the statutory educational requirements. Inherent in petitioners' argument therefore is the assumption that the Attorney General may settle a claim against the state or one of its agencies contrary to statutory law if he merely determines that the settlement is consistent with the public interest. If the settlement agreement in question were consistent with statutory law such a consideration would be irrelevant.

The legislature and courts have never undertaken to delineate the outer limits of the Attorney General's litigation powers and his role as the state's chief legal officer. State ex rel. Shevin v. Yarborough, 257 So.2d at 896 (Ervin, J., concurring). The need to deal with new problems and emergencies affecting the public interest counsels against any attempt to circumscribe his powers.

Id. So too the issue of whether the Attorney General or an agency of the state may settle a case in a manner that is not consistent with statutory requirements is not susceptible to concise delineation or bright line rules. The question certified to this Court is much too broad and cannot be resolved by a single rule that takes into account all variables. There are simply too many.

When a statute is clearly unconstitutional, facially or as applied, the Attorney General submits that a settlement agreement contrary to statutory requirements may be acceptable, if in the public interest. Defending constitutional challenges can be extremely costly to the State, particularly if the challenge is brought under 42 U.S.C. §§ 1983 and 1988, where the prevailing party is entitled to attorney's fees. And if the application of a statute is unclear, or proof necessary to support a claim in doubt, the Attorney General or the agency should retain considerable latitude to determine the course of litigation, including its resolution. But the Attorney General does not assert, on behalf of himself or the agencies of the state, the broad authority to settle cases contrary to clear statutory requirements without compelling reasons or merely because he may be able to say the settlement is not contrary to the public interest.

Petitioners contend here that the Board was justified in settling the federal action not only because it

feared losing the "grandfathering" issue but also its right to regulate the profession and practice of psychology. Petitioners greatly overstate their case, however. Florida began to regulate the practice of psychology in 1957. Virtually every other state also regulates the practice of psychology. It is not a serious argument to suggest the Board had any reason to fear that a federal court would rule it could not regulate the practice of psychology.

As the foregoing considerations indicate, every case must be viewed in light of its own facts. In this case, it is not possible to say that Chapter 490, Fla.Stat., was clearly unconstitutional. Nor were the educational requirements of uncertain application. Furthermore, the petitioners did not attempt to prove in this action that the settlement agreement was in the public interest or that the Attorney General determined it to be so. The arguments in the lower courts were strictly legal, petitioners contending that the settlement agreement was within the Board's implied legal authority even if not consistent with statutory requirements. This case thus does not now present any basis for determining the extent of the Attorney General's settlement powers as the State's chief legal officer. Dober v. Worrell, supra.

The question that remains for review, therefore, is whether the federal court settlement agreement was consistent with the controlling provisions of Chapter 490.

It is that question the parties and the Court should address. The Attorney General respectfully suggests that that argument should be based on the record, not on unwarranted assumptions.

CONCLUSION

Petitioners should not be permitted in this appeal to raise a new issue that was not argued below and that lacks a proper foundation in the record. The issues for consideration here are those that were briefed and argued before the district court of appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing **BRIEF OF ROBERT A. BUTTERWORTH, ATTORNEY GENERAL, AS AMICUS CURIAE** has been furnished by U.S. Mail to **ARNOLD R. GINSBERG, Esquire** and **THOMAS MORGAN, Esquire**, 410 Concord Building, 66 West Flagler Street, Miami, Florida 33130, **BRUCE CULPEPPER, Esquire** and **DARREN A. SCHWARTZ, Esquire**, Haben, Culpepper, Dunbar & French, P.A., 306 North Monroe Street, Tallahassee, Florida 32301, **JOSEPH BOYD, Esquire** and **WILLIAM H. BRANCH, Esquire**, Boyd & Branch, P.A., 1407 Piedmont Drive East, Tallahassee, Florida 32312 and **ROBERT P. SMITH, JR., Esquire**, Post Office box 6526, Tallahassee, Florida 32314 this 26th day of May, 1993.

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Assistant Attorney General

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