097

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 PETITIONER, JUDITH SHARON ABRAMSON

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I.

INTRODUCTION

The petitioner, JUDITH SHARON ABRAMSON, was one of two appellants in the District Court of Appeal, First District, and was one of several defendants in the trial court.[1] The respondents, THE FLORIDA PSYCHOLOGICAL ASSOCIATION and PARKE FITZHUGH, Individually, were the appellees/plaintiffs. In this brief of petitioner the parties will be referred to as they appear in this Court and, alternatively, by name. The symbol "R" will refer to the record on appeal. Exhibits submitted at the February 21, 1991 (final) hearing and included in the record on appeal will be referenced directly. All emphasis has been supplied by counsel unless indicated to the contrary.

II.

STATEMENT OF THE CASE AND FACTS

The First District Court of Appeal has certified to this Court, as a question of great public importance, the issue:

> 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?

That court received this case on appeal(s) by Abramson and Seidman from trial court final order enjoining them from holding

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[1]ABRAMSON's co-appellant below was/is CAROL SEIDMAN, a co-petitioner in these proceedings. See: SEIDMAN v. FLORIDA PSYCHOLOGICAL ASSOCIATION, et al., etc., Case No. 81,248, as consolidated by order of this Court dated March 17, 1993.

themselves out as licensed psychologists until such time as they met certain statutory requirements (R. 233-239, 240, 241).

A.

This lawsuit was instituted by The Florida Psychological Association ("FPA") which is an incorporated association composed of licensed psychologists and which purportedly represents member psychologists in professional, governmental and legislative forums. Fitzhugh, a licensed psychologist and a member of FPA was subsequently joined as a party plaintiff [to insure the existence of a "controversy", "dispute", etc.?]

The order appealed, in essence, voided a settlement entered into between Abramson (one of the "private" defendants) and agencies of the State of Florida (the "public" defendants), which settlement ended, as between them, nine years of federal litigation over the constitutionality of Chapter 490, Florida Statutes (1981).

B.

The facts of this case being neither complex nor lengthy and for all pertinent purposes undisputed as to the salient events and/or happenings may, as to Abramson, be stated as follows:

1. In August of 1980 Judith Abramson graduated--with a Ph.D in psychology--from Heed University in Hollywood, Florida (R. 91, paragraph 20).

2. Heed was a school licensed by the State of Florida from November of 1973 through June of 1986 but it was never

accredited as recognized by the United States Department of Education (R. 91, paragraphs 24 and 25; Exhibit I to the initial complaint).

3. When Abramson graduated in 1980 the Florida Statute which regulated the practice of psychology had, the year before (in 1979) "sunset." Abramson lawfully held herself out as a psychologist and practiced her profession without interruption until 1981 (R. 234, paragraph 1).

4. The practice of psychology in the State of Florida was unregulated for some thirty (30) months from the time of "sunset" until the Legislature acted in 1981. In 1981 the Legislature enacted a new statute [See: Chapter 81-235, Laws of Florida], Chapter 490, Florida Statutes (1981). The 1981 statute again sought to regulate the industry and said statute provided certain "grandfather" clauses, conditions and benefits.

5. In 1981 Abramson (and others), concerned that the degrees earned from non-accredited schools would keep them from being licensed in their profession and/or from being qualified to sit for the state licensing exam (even with the inclusion of "grandfathering" provisions), filed a federal (declaratory judgment) lawsuit wherein they sought alternative relief. Named as defendants were the State of Florida, Department of Professional Regulation, the Board of Psychological Examiners (created pursuant to the then newly enacted legislation, Chapter 81-235, Laws of Florida) and individuals of each in various

capacities (R. 4, paragraph 11; Exhibits 10 and 11 in the record on appeal).

6. The thrust of the federal lawsuit was directed at the unconstitutionality of the (then) newly enacted statute and such challenge was made to the statute in both whole and in part. Specifically:

a. Chapter 490, Florida Statutes (1981), was challenged as being unconstitutional on its face;

b. Chapter 490, Florida Statutes (1981), was challenged as being unconstitutional as it was then being applied; and

c. Certain provisions of Chapter 490, Florida Statutes (1981) were being challenged for specific and particular reasons. Pertinent here is the fact that the grandfathering provision was under separate attack.

7. The lawsuit pended for some nine years through the filing of a Sixth Amended Complaint until, in April and May of 1990, a written offer (and amended offer) of settlement was made [to Abramson and selected others] which, in effect, offered that in exchange for their removal from the lawsuit and at her option (a) if Abramson could show that her qualifications were equivalent to those necessary for certification under set guidelines she would be licensed without examination OR (b) she could sit for the examination (at most twice) and if she passed she would be licensed. The specific offer provided (that if):

* * *

". . .any of the 22 plaintiffs (as described above) who can show that his or her qualifications were equivalent to those necessary for certification under the written standards of the FPA or FAPP in 1981 will be licensed by the Board of Psychological Examiners without examination. The Board of Psychological Examiners will review the standards necessary for certification. . .and determine if any of the plaintiffs. . .evidence education and experiential qualifications. . .which were equivalent to those required for certification by the two private associations. . .If the Board determines that any of the plaintiffs were equivalent, they would then be licensed as psychologists. If the Board determines that they were not equivalent, then they will be given Chapter 120.57 rights to contest such a determination and offered a hearing before The Division of Administrative Hearings to prove such a claim of equivalency as well as any and all of the appellate rights pertaining thereto. During the Board review and administrative process, the plaintiff will be permitted to practice until a final order. . .has been entered by the Board of Psychological Examiners. . .

* * *

"2. Should any of the plaintiffs determine that, in their opinion, they would not need FPA or FAPP written certification requirements, or be equivalent thereto, those who were, in fact, practicing using any of the terms regulated by Chapters 490 or 491 between July 1, 1979 and continuously up to and including January 1, 1982, will be given an opportunity to sit for the psychology or related professional examination. This opportunity will be extended to any of the plaintiffs, described above, on a one-time basis]The offer was amended to include a 'two-time basis'] and should any of the plaintiffs pass the examination, they will be licensed as either a psychologist or a related professional. If they fail the examination (which would be the present licensure examination) ANY SUCH PLAINTIFF WOULD HAVE THUS SHOWN HIS LACK OF COMPETENCE TO MEET THE STANDARDS NECESSARY FOR LICENSURE, AND THUS WOULD BE PRECLUDED FROM THE USE OF THE PROSCRIBED TERMS IN THEIR PROFESSIONAL ACTIVITIES. . ." (R. 85-146, Document F. appended to the First Amended Complaint)."

* * *

8. The settlement (as pertinent here) was offered by the Department of Professional Regulation and the Board of

Psychological Examiners and came through John J. Rimes, III, an Assistant Attorney General of the State of Florida, who made the offer within the course and scope of his authority as an attorney for the Department of Legal Affairs, Office of the Attorney General, State of Florida (R. 85-146, Document F. appended to the First Amended Complaint).

9. Abramson, through counsel, accepted the settlement (R. 90, paragraph 6, Exhibit H. appended thereto).

10. On September 14, 1990, this lawsuit was instituted by the Florida Psychological Association (R. 1-57), which lawsuit sought:

a. To enjoin Abramson (private defendant) from holding herself out as a licensed psychologist until she met certain statutory requirements; and

b. To require the public defendants to not license Abramson (and others) until the statutory requirements were met (R. 1-57; 85-146).

11. After minor intermittent skirmishing, the lower court allowed Abramson the privilege to sit for the examination but, in an order entered February 21, 1981 (the order appealed), the trial court enjoined Abramson from holding herself out as a licensed psychologist [until she met certain statutory requirements] and compelled the public defendants to require Abramson to meet the statutory requirements before being licensed. The trial court did so upon the express belief that the public defendants did not have the "lawful authority" to

agree to the terms and conditions of the settlement (as described above):

> ". . .A study of the basic underpinnings of administrative law leads to the conclusion that the public defendants are attempting to overstep their legal authority in this particular case. . ." R. 236).

The Court voided the settlement between Abramson, State of Florida, Department of Professional Regulation and the Board of Psychological Examiners, and in so doing reasoned:

* * *

> ". . .This Court is aware that important rights of an agency to settle legal disputes are pitted against its obligations to simply follow the law, whatever the law may provide. The right to settle cases saves time and money for all sides. Often settlements are in the best interests of all parties and the public; and it is not the role of this Court to review the wisdom of debatable issues. However, a study of the basic underpinnings of administrative law leads to the conclusion that the public defendants are attempting to overstep their legal authority in this particular case.
>
> "b. Understandably, the public defendants feared the grandfather clause would be held unconstitutional and that the private defendants would be licensed without examination. As a compromise between 'no grandfathering' at all and 'grandfathering without examination',the Board offered the settlement. Existing minimal educational requirements were ignored because they were not the central issue; instead, the awaited ruling on the constitutionality of the grandfather clause was the focus. Not only did private defendants dismiss themselves from the federal lawsuit which was later decided against them, but they studied and sat for examination for licensure. The private defendants have timely met their end of the settlement agreement, all at the assistance of the public defendants. The private defendants relied on the validity of the settlement. However, these facts are insufficient to support enforcement of the settlement. To allow this would ignore the plain statutory requirements for licensure, including the contested grandfather clause. . ." (R. 236).

12. Abramson appealed to the District Court, See: ABRAMSON v. THE FLORIDA PSYCHOLOGICAL ASSOCIATION, 610 So. 2d 447 (Fla.App.1st 1992). In its opinion that Court noted:

> "The first question presented is whether the trial court properly determined that DPR and the Board did not have the authority to enter into an agreement contrary to the statutory requirements of Section 490.05, Florida Statutes (1989). Although we recognize settlement is to be generally encouraged to resolve disputes, we agree with the trial court that the settlement undertaken here exceeded the authority of the agency to settle. Appellant's primary argument is that this Court should uphold the agreement because the purpose of the settlement agreement was to end litigation which threatened the validity of the entire regulatory framework of Chapter 490 and that under the Chapter 490 enabling act, the power to make such settlement has been granted. We find such contention to be unpersuasive. Agencies are generally to construe statutes which they administer on the presumption that the statute in effect is valid (Citation omitted). Further, as appellees well note, 'An agency may not increase its own jurisdiction and, as a creature of statute, has no common law jurisdiction or inherent power. (Citations omitted). It is axiomatic, therefore, that an agency <u>generally</u> may not act in a manner which exceeds the authority granted to it through statutes." 610 So. 2d at p. 449.

The Court found that neither Abramson nor Seidman met the educational requirements set forth in Section 490.005(1)(b)1., 2., Florida Statutes (1989). The Court further found:

> "The trial court's determination that the settlement is illegal because the Agency did not have the authority to make such settlement, <u>would not be erroneous</u>, absent (1) evidence that appellants met the plain statutory requirements of the above Section, or other sections as applicable and (2) any reference to portions of the enabling act of Chapter 490 (or subsequent amendment) which would clearly grant DPR and the Board the authority, in the exercise of their police power, to waive the statutorily prescribed

> educational requirements applicable to prospective licensees. Since neither of those circumstances existed, the trial court did not err." 610 So. 2d at p. 449.

Rejecting alternative arguments that "equity" should apply to allow enforcement of the settlement agreement [i.e., that is, Abramson had opted out of the federal lawsuit with reliance upon the State of Florida and had passed the examination she was required to pass in order to effectuate the settlement--in point of fact Abramson had been practicing for some ten years at the time she accepted the settlement] the court affirmed the trial court.

13. Abramson's post opinion motions were filed. The court denied rehearing but granted the request to certify the matter to this Court. This proceeding followed.

Abramson reserves the right to argue the significance of the above facts and other relevant record facts in the argument portion of this brief.

III.

QUESTION PRESENTED

The District Court certified to this Court as a question of great public importance the following:

> 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?

IV.

SUMMARY OF ARGUMENT

Abramson suggests to this Court that the certified question should be answered favorably to Abramson (and Seidman), the opinion of the District Court of Appeal, First District, should be quashed with directions to the trial court to reverse the order appealed and to direct the trial court to enter judgment for Abramson (and Seidman) and to recognize the validity and integrity of the compromise reached.

It is well settled in Florida, as elsewhere, that as to municipal corporations, counties, states, state agencies, boards and tribunals, the authority to compromise and/or settle a claim--whether it be done before or during litigation--is impliedly within its power! The power to compromise, settle and compose litigation of any kind is incident to and implied from the power of the sovereign or agency of the sovereign to sue and be sued.

It is clear from both the enabling legislation (the authorities contained in Chapter 490, Florida Statutes, and Chapter 455, Florida Statutes) and the rules promulgated thereunder, that both the Department of Professional Regulation and the Board of Psychological Examiners were fully expected to be able to sue, to be sued and to litigate. As such it is clear, and it must be so concluded, that the public defendants had the power, jurisdiction and authority to compromise any and all litigation within which they were involved.

The federal lawsuit challenged the constitutionality of the statute as a whole as well as the constitutionality of the "grandfathering" provisions. Two agencies of the State of Florida, faced with both concern and fear that the challenged statute could, in its entirety, be declared unconstitutional--with the result that the practice of psychology would again be without regulation--offered a compromise which they were impliedly authorized to do.

Where, as here, the State Legislature enacts legislation the effect of which is to create independent and autonomous agencies each capable of suing and being sued, it cannot be concluded that either was not "sovereignly empowered" to resolve or compromise claims which arose from the very legislation which created the agency at risk.

Where, as here, the Legislature specifically contemplated the existence of lawsuits when it created the agencies and mandated that the State Attorney General be counsel for each, it should be decided that the lower courts were incorrect in their conclusions. If the power, authority and jurisdiction to settle or compromise litigation arises impliedly from the administrative tribunal's ability to sue and be sued, there can be no question here that the lower courts were in error.

At no time should the trial court have attempted to delve into what was (and what was not) "a concern" of the litigation in federal court. The case should never have progressed past the trial court's recognition of the existence of the agencies'

"general power" and such recognition should have caused the court to deny injunctive (and mandamus) relief. By limiting its analysis to a discussion of "no grandfathering at all" versus "grandfathering without examination", the lower court missed the mark regarding the basic issue: NO REGULATION AT ALL VERSUS REGULATION (in whole or in part).

Because resolving concerns about the constitutionality of the statute was certainly within the power of the agency to do, and further because the Attorney General of the State of Florida is constitutionally and legislatively charged with the obligation of representation in matters of this description, it must be concluded the lower court's orders are erroneous. No authority in the orders being reviewed holds contrary to the arguments herein advanced.

It is not (now) appropriate for anyone to suggest that the federal lawsuit should have ended in one year, three years, five years, etc., nor to speculate under what terms and conditions it should have ended. Abramson's rights were vested in 1981 with the passage of Chapter 81-235, Laws of Florida. The statute was unconstitutional or constitutional on its face on that date. The pleadings in the federal lawsuit fixed the issues. It was to those issues that one had to turn in order to determine whether or not the public defendants had the authority to settle. Assistant Attorney General John Rimes negotiated a settlement which, at all times pertinent, was lawful. It was accepted. The litigants had the right, power and authority to

compromise. The public defendants, as independent agencies of the State of Florida, with the power, authority and jurisdiction to sue and to be sued, were possessed of no less rights than Abramson.

Abramson would request this Court to hold that it is 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 such board or agency and a private individual under terms or conditions that, while not expressly authorized by the board's legislative grant of power, (a) puts to rest a (disputed) issue that would, if the issue were decided against it, adversely affect the interests of the State of Florida; and (b) the Attorney General determines that settlement would not work any serious damage to the public interest in general. This holding would be fair to all.

Whether one analyzes the subject issue in terms of "authority to settle" or whether one analyzes this case under the theory of "estoppel", it becomes crystal clear that the trial court and the District Court erred in the results reached.

In the instant cause the State agencies had the authority to compromise. In this case the Board had the authority to determine, in its discretion, what would constitute "minimal educational requirements." In this case the Board determined that passage of the "present licensure examination" would demonstrate competence (on the part of Abramson) to such an

extent that there would be no detriment to the public if she were allowed to continue to practice and to make use of the "proscribed terms." If Abramson had failed the examination, she would have demonstrated "lack of competence." Her passage of the examination should be deemed to equate with "minimal educational requirements." At the very least, her passing the exam would insure that there would be no detriment to the "public interest." With no detriment to the public interest, and with the authority of the Attorney General to settle matters which bear directly on public health, safety and well-being, there can exist no justification for denying relief to Abramson. Abramson relied in good faith on the power of the State. She complied with all of her obligations and duties. She passed the required test and demonstrated the necessary competence. There exists no detriment to the public interest. The opinion herein sought to be reviewed should be quashed and the certified question answered favorably to Abramson.

V.

ARGUMENT

IT WAS LAWFUL FOR THE ATTORNEY GENERAL OF THE STATE OF FLORIDA, AS THE LEGISLATIVELY APPOINTED COUNSEL FOR A STATE BOARD OR AGENCY, TO SETTLE THE LAWSUIT BETWEEN SAID BOARD OR AGENCY, AND THE PRIVATE INDIVIDUALS, UNDER TERMS OR CONDITIONS THAT WERE NOT EXPRESSLY AUTHORIZED BY THE BOARD'S LEGISLATIVE GRANT OF POWER BUT WHICH WERE INHERENTLY IMPLIED UNDER THE UNIQUE CIRCUMSTANCES PRESENTED HEREIN.

The answer to the question as phrased by the District Court may be found in understanding what actually happened during the course of these proceedings. Given the circumstances involved--

specifically, the issues raised and litigated in the federal lawsuit--it can (and should) be concluded that the "public defendants", by and through the Attorney General of the State of Florida, had the implied authority [if not the express authority] to settle with Abramson under the terms and conditions as offered. Because they did, and for the alternative reasons which also follow, the certified question should be answered favorably to Abramson, the opinion of the District Court of Appeal, First District, should be quashed, and the trial court's injunctive order should be reversed.

A.

THE REGULATORY ACTS, AN OVERVIEW

In 1957, with the passage of Chapter 490, Florida Statutes (1957), the Florida Legislature began to regulate the practice of psychology. However, in 1961 this Court declared the statute unconstitutional. See: HUSBAND v. CASSEL, 130 So. 2d 69 (Fla. 1961).

Responding to this Court's holding, observations and discussions the Florida Legislature did, in late 1961, pass a new statute. See: Chapter 61-473, Laws of Florida. Said statute [Chapter 490, Florida Statutes (1961)] remained in effect until July 1, 1979 when it "sunset."

For some 30 months the practice of psychology was unregulated. However, effective January 1, 1982 a new Chapter 490 took effect. See: Chapter 81-235, Laws of Florida. The new statute was directly tied into Chapter 455, Florida Statutes

(1981), and created the Board of Psychological Examiners. As pertinent here, it may be noted that the Board of Psychological Examiners was created within the Department of Professional Regulation [Section 490.0041)], the Legislature mandated that all applicable provisions of Chapter 455 relating to activities of regulatory boards "shall apply" to the Board [Section 490.004(6)], and that the Board "shall" adopt rules to implement the provisions of the Chapter [(Section 490.004(5)].

B.

THE FEDERAL LAWSUIT

In 1981 Abramson (and others) sued State of Florida, Department of Professional Regulation and the Board of Psychological Examiners and, inter alia, sought to have Chapter 490, Florida Statutes (1981) declared unconstitutional (on due process and equal protection grounds) both "on its face" and "as applied."(See: Exhibits 3, 10 and 11 included in the record on appeal). The lawsuit pended for almost nine years. In the Spring (April/May) of 1990 the case was "geared up" for trial. Additionally, the court had under advisement the public defendants' motion for summary judgment as to Abramson's claims that the statute was unconstitutional "facially" and "as applied." (See: Exhibit 3, record on appeal).

From 1981 until April of 1990 agencies of the State of Florida, by and through the Florida Attorney General's Office, defended the federal lawsuit and faced the possibility that Chapter 490, Florida Statutes (1981) was unconstitutional. If

it was, the Legislature would once again have to "stopgap" the void or else proceed with the profession unregulated as it had been for the 30 months beginning in July of 1979. Additionally, the State would have to deal with any and all problems which would arise under a statute declared unconstitutional and under which persons, entities and agencies operated for some nine years. Whatever other defenses the state agencies may have had against the numerous and various party plaintiffs the salient issue remained the constitutionality of the statute!

With the above as distinct possibilities, and for strategy reasons which for now can be deemed irrelevant [See, for example, UNITED STATES v. ARMOUR & CO., 402 U.S. 673, 29 L.Ed. 2d 256, 91 S. Ct. 1752 (1971)]: "The scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it . . ."], the Florida Attorney General's Office, through Assistant Attorney General John Rimes, for and on behalf of his clients, State of Florida, Department of Professional Regulation and the Board of Psychological Examiners of the State of Florida, offered compromise to Abramson. Abramson accepted and was dismissed from the federal lawsuit which was ultimately "tried" and resolved against the claims of the remaining plaintiffs and in favor of the state agencies. (Exhibit 2 to the record on appeal).

C.

THE POWER AND AUTHORITY TO COMPROMISE

It appears to be well settled in Florida, as elsewhere, that as to municipal corporations, counties, states, state agencies, boards and tribunals, the authority to compromise and/or settle a claim--whether it be done before or during litigation--is impliedly within its power! As this Court long ago stated, See: WILLIAMS v. PUBLIC UTILITY PROTECTIVE LEAGUE OF FLORIDA, ET AL., 178 So. 286 (Fla. 1938):

> ". . .The power of the City to compromise, settle and compose litigation of any kind to which it is a party is an incident to and implied from its power to sue and be sued. . ." 178 So. at p. 287.

See also: CITY OF CORAL GABLES v. STATE, ET AL., 176 So. 40 (Fla. 1937), wherein, in a suit by one sovereign against the other, this Court determined that as the parties were capable of suing and being sued, and since the courts favor a fair compromise and settlement of disputed claims (when made in good faith between competent parties), it was fair and reasonable to assume that the power to compromise would be no different merely because sovereigns were involved. See, generally: ANNOTATION: 15 ALR 2d 1359, POWER OF CITY, TOWN, OR COUNTY, OR OTHER OFFICIALS TO COMPROMISE CLAIM. In point of fact, resolution of litigation by public bodies is generally encouraged by the judiciary. Cf. PORT OF PALM BEACH v. GOETHALS, 104 F. 2d 706 (5th Cir. 1939).

The rationale expressed by this Court in WILLIAMS, supra, is also found in the opinion in FLORIDA INDUSTRIAL COMMISSION v. NATIONAL TRUCKING COMPANY, 107 So. 2d 397 (Fla.App.1st 1958), wherein the Court noted:

> "Administrative boards, commissions and officers have no common law powers; but are limited to such powers as may be granted, either expressly or by necessary or fair implication, by the statutes creating them." 107 So. 2d at p. 401.

See also: HALL v. CAREER SERVICE COMMISSION, 478 So. 2d 1111 (Fla.App.1st 1985) ["the general rule is that an express grant of power to an agency will be deemed to include such powers as are necessary or reasonably incident to the powers expressly granted."] and FLORIDA STATE UNIVERSITY v. JENKINS, 323 So. 2d 597 (Fla.App.1st 1975) ["the powers and authority of administrative boards, commissions and officers are limited to those granted, either expressly or by necessary implication, by the statutes of their creation.]

The Legislature's passage of Chapter 81-235, Laws of Florida, created Chapter 490, Florida Statutes (1981). Section 490.004(1) created the Board of Psychological Examiners and Section 490.004(5) authorized the Board to adopt rules to implement provisions of the Chapter. Section 490.004(6) specifically provides:

> "All applicable provisions of Chapter 455 relating to activities of regulatory boards shall apply to the Board."

The Board (of Psychological Examiners) enacted certain rules and regulations which are found in the Florida Administrative Code, Chapter 21U. Specifically thereat, 21U-10 mandates that the Department of Legal Affairs shall provide legal counsel to the Board of Psychological Examiners. Same is also authorized

pursuant to Section 455.221, Florida Statutes (1981) which, as pertinent here provides:

> "(1) The Department of Legal Affairs shall provide legal services to each Board within the Department of Professional Regulation. . ."

It is clear from both the enabling legislation (the authorities contained in Chapter 490, Florida Statutes, and Chapter 455, Florida Statutes) and the rules promulgated thereunder, that both the Department of Professional Regulation and the Board of Psychological Examiners were fully expected to be able to sue, to be sued and to litigate. As such it is clear, and it must be so concluded, that the public defendants had the power, jurisdiction and authority to compromise any and all litigation within which they were involved.

D.

THE INJUNCTIVE ORDER

At page 4, paragraph b. of the order appealed, the trial court stated:

> "Understandably, the public defendants feared the grandfather clause would be held unconstitutional and that the private defendants would be licensed without examination. As a compromise between 'no grandfathering' at all, 'grandfathering without examination', the Board offered the settlement. Existing minimal educational requirements were ignored because they were not the central issue; instead, the awaited ruling on the constitutionality of the grandfather clause was the focus. . ." (R. 236).

With all due respect to the lower court, its analysis of the supposedly dispositive issue was much too limited and, because it was, the court necessarily erred.

The federal lawsuit challenged the constitutionality of the statute as a whole as well as the constitutionality of the "grandfathering" provisions. Indeed, two agencies of the State of Florida, faced with both concern and fear that the challenged statute could, in its entirety, be declared unconstitutional--with the result that the practice of psychology would again be without regulation--offered a compromise which they were impliedly authorized to do:

> "The power. . .to compromise, settle, and compose litigation of any kind to which it is a party is an incident to and implied from its power to sue and be sued." 178 So. at p. 287.

In point of fact, the type of lawsuit instituted, the issues presented therein and the concerns felt by both sides to the litigation were no more and no less unique to the particular type of litigation than any other case. In MCINERNEY v. ERVIN, 46 So. 2d 458 (Fla. 1950), this Court held that a declaratory judgment lawsuit is not the type of suit which would necessarily be barred by constitutional sovereign immunity. Citing directly to other authorities on the subject matter, this Court noted:

> "The avalanche of legislative and administrative decrees which characterize modern government has brought in its train an increasing number of commissions and officials whose powers, as they affect private activity, are a constant source of objection, doubt, debate and dispute. For the more speedy and convenient settlement of differences, administrative tribunals in growing number have been established, for under a constitutional government the jurisdiction and powers of official bodies are always a subject of judicial challenge and review. Hence, the constitutionality of statutes and ordinances, and the validity and legality of an administrative action thereunder are a constant subject of litigation.

> "It is now generally recognized that the citizen should have the most inexpensive, speedy and expeditious method possible to raise the myriad of questions that arise under the statutes and administrative acts. The Declaratory Judgments Act not only enables the citizen to do this, but it enables the Government to raise questions that beset it in its dealings with the citizen. Whether the question is raised by the citizen or the Government through its properly constituted officers, it is not a suit against the State prohibited by the State Constitution." 46 So. 2d at p. 460.

Where, as here, the State Legislature enacts legislation the effect of which is to create independent and autonomous agencies [the Department of Professional Regulation created by Chapter 445, Florida Statutes, and the Board of Psychological Examiners created by Chapter 490, Florida Statutes] each capable of suing and being sued, it cannot be concluded that either was not "sovereignly empowered" to resolve or compromise claims which arose from the very legislation which created the agency at risk.

Where, as here, the Legislature specifically contemplated the existence of lawsuits when it created the agencies, and mandated that the State Attorney General be counsel for each, it should be herein held that the lower courts were incorrect in their conclusions. If the power, authority and jurisdiction to settle or compromise litigation arises impliedly from the administrative tribunal's ability to sue and be sued, there can be no question here that the lower courts erred.

To a certain extent the trial court was not in disagreement with Abramson's observations. As stated at page 4 of the order appealed:

> "The public defendants are an administrative Board and agency; and, as such, they are creatures of statute, and their powers are dependent thereon. They have no general or common law powers, only powers as conferred by law, expressly or by implication. . . Citations omitted)." (R. 236).

The District Court, however, did not discuss the "implied" authority argument, stating simply:

> "The trial court's determination that the settlement is illegal because the agency did not have the authority to make such settlement, would not be erroneous, absent (1) evidence that appellants met the plain statutory requirements of the above section, or other sections as applicable, and (2) any reference to portions of the enabling act of Chapter 490 (or subsequent amendment) which would clearly grant DPR and the Board the authority, in the exercise of their police power, to waive the statutorily prescribed educational licensing requirements applicable to prospective licensees. Since neither of those circumstances existed, the trial court did not err." 610 So. 2d at p. 449.

Where the trial court "missed the mark", and where the District Court overly simplified the issue, was in the assertion (at page 5 of the order appealed):

> "Accordingly, it is flawed reasoning to conclude the public defendants' settlement was legally justified because of a reasonable concern for the constitutionality of the grandfather clause. The court does not accept the public defendants' premise that general authority to protect the public interest inferred a power on the agency to create application requirements which do not fall within any statutorily required application process. 'The agency may not assert the general power given it and at the same time disregard the essential conditions imposed upon its exercise.' (Citation omitted). A regulatory statute binds the officers administering such statute as well as the persons being regulated. . ." (R. 237).

The "concern" by the state agencies was over a much more broad problem, to-wit: the falling of the Statute and therefore no

regulation at all! "Application requirements", as zeroed in on by the lower court, was only one of many concerns.

In truth, the lower court should not have attempted to delve into what was (and what was not) "a concern." No less an authority than the United States Supreme Court has recognized, See: UNITED STATES v. ARMOUR COMPANY, supra, that:

> "Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the due process clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation." 402 U.S. at p. 682, 29 L.Ed. 2d at p. 263.

The public policy of the State of Florida is entirely in accord with the above. See: CITY OF CORAL GABLES v. STATE, 176 So. 40 (Fla. 1937); ROBBIE v. CITY OF MIAMI, 469 So. 2d 1384 (Fla. 1985); and UTILITIES COMMISSION OF THE CITY OF NEW SMYRNA BEACH v. FLORIDA PUBLIC SERVICE COMMISSION, 469 So. 2d 731 (Fla. 1985).

The lower court, in the order appealed, stated at page 5 therein:

> "The court does not accept the public defendants' premise that general authority to protect the public interest inferred a power on the agency to create application requirements which do not fall within any statutorily required application process. . ."

However, the court's recognition of the existence of the agencies' "general power" should have caused the court to deny injunctive relief. The "concern" was not necessarily limited to "no grandfathering at all" versus "grandfathering without examination" BUT, rather, the fear was NO REGULATION AT ALL VERSUS REGULATION (in whole or in part). Because resolving concerns about the constitutionality of the statute was certainly within the power of the agency to do [and the concerns were certainly valid, given the fact that the last time a court passed upon the constitutionality of the law regulating the practice of psychology, said law was declared unconstitutional in its entirety, See: HUSBAND v. CASSEL, supra], and further because the Attorney General of the State of Florida is constitutionally and legislatively charged with the obligation of representation in matters of this description, it must be concluded the results reached below were erroneous. No authority in either the lower court's order or the District Court's opinion holds contrary to the arguments herein advanced.

Under the lower court's analysis no agency, board, tribunal, association or municipal corporation could ever settle

any claim or litigation which was premised upon a constitutional challenge because (as the lower court stated):

> "Generally, the administrative agency must conduct its business as though the statutory provisions under which it operates are constitutional . . ."

Such a proposition is, however, inconsistent with the public policy of the State of Florida that settlements are favored and such an observation is certainly at odds with the theory of declaratory judgment lawsuits as approved by this Court in MCINERNEY v. ERVIN, supra. More importantly, it must be understood that under the Court's logic no settlement could ever occur where the statutory scheme creating administrative agencies was under constitutional challenge. Whether or not the agency was to "conduct its business as though the statutory provisions under which it operates are constitutional", the Attorney General of the State of Florida could not (and should not) be left in such a precarious position.

The trial court's reasoning (as to the following) is also flawed:

> "The grandfather clause itself was not ambiguous; and when statutory terms are unambiguous and no unconstitutionality is clearly established by law, the statute must be followed by the agency. . ." (R. 237).

With all due respect to the lower court, "20/20 hindsight" cannot be dispositive here. It should make little difference in the ultimate resolution of the subject proceeding what result did obtain in the federal litigation. It should be enough to know only what issues were fairly raised and what results could

have occurred. See: UNITED STATES v. ARMOUR & COMPANY, supra. Again, with due regard to the lower court's opinion of what it would have ruled, and its observation as to what the federal court judge did ultimately rule, such opinion should have had no effect upon the resolution of this lawsuit in the lower court. Apparently the lower court has really decided that the settlement should not have been made because the public defendants ultimately prevailed. Yet we know such analysis and considerations should not be factored into the question of whether or not there is authority (either express or implied) to settle.

Simply stated, it is not (now) appropriate for anyone to suggest that the federal lawsuit should have ended in one year, three years, five years, etc., nor to speculate under what terms and conditions it should have ended. Abramson's rights were vested in 1981 with the passage of Chapter 81-235, Laws of Florida. The statute was constitutional or unconstitutional on its face on that date. The pleadings in the federal lawsuit fixed the issues. Assistant Attorney General John Rimes negotiated a settlement which, at all times pertinent, was lawful. It was accepted. The litigants had the right, power and authority to compromise. The public defendants, as independent agencies of the State of Florida, with the power, authority and jurisdiction to sue and to be sued, were possessed of no less rights than Abramson.

E.

THE QUESTION CERTIFIED

Abramson initially noted that the answer to the question certified by the District Court would be found in an understanding of what actually happened during the course of these proceedings. As such it can now be stated that it is 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 such board or agency and a private individual under terms or conditions that, while not expressly authorized by the board's legislative grant of power, (a) puts to rest a (disputed) issue that would, if the issue were decided against it, adversely affect the interests of the State of Florida; and (b) the Attorney General determines that settlement would not work any serious damage to the public interest in general. This holding would be fair to all.

In affirming the trial court, the District Court stated:

> "The trial court's determination that the settlement is illegal because the agency did not have the authority to make such settlement, would not be erroneous, absent . . . (2) any reference to portions of the enabling act of Chapter 490 (or subsequent amendment) which would clearly grant DPR and the Board the authority, in the exercise of their police power, to waive the statutorily prescribed educational licensing requirements applicable to respective licensees. . ." 610 So. 2d at p. 449.

With all due respect to the District Court, its reasoning was flawed. The authority charged with protecting the legal interests of the State of Florida is the Florida Attorney

General. It was this office which sponsored the settlement. As the record reflects, the settlement was offered by the Department of Professional Regulation and The Board of Psychological Examiners and came through John J. Rimes, III, an Assistant Attorney General of the State of Florida, who made the offer within the course and scope of his authority as an attorney for the Department of Legal Affairs, Office of the Attorney General, State of Florida (R. 85-146, Document F. appended to the First Amended Complaint).

The Attorney General is a State and/or constitutional officer. The Legislature has expressly vested the Attorney General with the responsibility to serve as counsel for the State boards or agencies. Said counsel is authorized to exercise all such power and authority as the public interest may require from time to time. See: STATE ex rel LANDIS v. S.H. KRESS & CO., 155 So. 823 (Fla. 1934), and 48 Fla. Jur. 2d, State of Florida, Section 48.

Inherent in the definition of "public interest" is, of course, public health, safety and welfare, which concerns actually control the police power of the State:

> "Police power has its origin, purpose and scope in the general welfare of the state, or, as it is sometimes expressed, the public health, public morals and public safety. The police power of a state inheres in its sovereignty. It was born with and is a necessary concomitant of, civilized government." 10 Fla. Jur. 2d, Constitutional Law, Section 185 and cases cited thereat.

Since the authority for the respondents (and now the amicus) to intervene in the subject lawsuit is justified under

concerns for public health, public morals and public safety, and since the Attorney General was indeed satisfied that passage of the examination (by Abramson) would not be detrimental to public health, safety and welfare, the lower court's conclusion that because there existed nothing in the enabling act of Chapter 490:

> ". . .which would clearly grant DPR and the Board the authority, in the exercise of their police power, to waive the statutorily prescribed educational licensing requirements applicable to prospective licensees. . ." 610 So. 2d at p. 449

misperceives the subject issue. "Police power", in its true sense, is not found (and cannot be found) in the wording of a statute. Police power has its origin, purpose and scope in the general welfare of the State and "inheres in its sovereignty."

In this case the State Attorney General, incident to its representation of a State agency or board, believed in its judgment that settlement under the terms as agreed would not jeopardize or be detrimental to public health, public morals and/or public safety. In truth, one would never find in any statute, rule or other enabling legislation, words to the effect that "the terms of the enactment could be ignored, expanded, or bypassed, etc." The absence of these words does not mean, however, that under the "police power" of the State authority to act is lacking. This is so because "police power" includes anything which is reasonable, necessary and appropriate to secure the peace, order, protection, safety, good health, comfort, quiet, morals, welfare, prosperity, convenience, and

best interests of the public. See: 10 Fla. Jur. 2d, Constitutional Law, Section 191, and cases cited therein.

The decision (by the State) to allow licensing upon successful completion of the examination was within the power of the Agency and the Attorney General to do and certainly bore a rational relationship to protecting the public well-being. At the very least, there has never been any evidentiary basis to believe otherwise. The State was satisfied that there would be no danger to the public health, safety or well-being for Abramson to be licensed if Abramson passed the exam. It must be concluded that a valid exercise of police power was involved. It was certainly within the powers of the Attorney General of the State of Florida to so conclude. Since there never needed to be any "reference" in the enabling act which would allow for the exercise of police power, it must be concluded that the District Court erred.

Likewise, the District Court's concern that the settlement could not be enforced because it was "illegal" and that because it was "illegal" equity would not (could not) intervene, presents an exercise in flawed and circular reasoning.

The law in the State of Florida (as elsewhere) is that equitable estoppel can, and will, be invoked against the State where it is justified by the facts and circumstances. See, for example: FLORIDA LIVESTOCK BOARD v. GLADDEN, 76 So. 2d 291 (Fla. 1954) and GREENHUT CONSTRUCTION COMPANY v. KNOTT, 247 So. 2d 517 (Fla.App.1st 1971), wherein the Court noted:

> "The law of this State generally recognizes the proposition that although the sovereign may under certain circumstances be estopped, such circumstances must be exceptional and must include some positive act on the part of some officer of the state upon which the aggrieved party had a right to rely and did rely to its detriment. . ." 247 So. 2d at p. 524.

The arguments advanced by Abramson have, until now, been rejected upon the assumption that estoppel will not lie because the "State" was not possessed of the power to settle upon the terms and conditions that it did. The petitioner would suggest to this Court that the argument advanced by Abramson has been embraced in the case of GARRISON v. CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION, 149 P. 2d 711 (Cal.App.2d 1944). In that case the court allowed a citizen to rely upon the doctrine of equitable estoppel against the state's contention that it did not have the power to create a rule. The court stated:

> "It is unnecessary to pass upon the power to make the rule, because the commission is estopped to take such a position. The doctrine of equitable estoppel of governmental agencies where justice and right require it has but recently been reaffirmed and approved by our Supreme Court in FARRELL v. COUNTY OF PLACER, 145 P. 2d 570 (Cal. 1944)." 149 P.2d at p. 716.

To say that equity will not interfere because the contract between Abramson and the State was/is illegal begs the question and puts the cart before the horse. Given that the State would be estopped to deny the deal, the contract cannot be illegal. As noted by the Court in FARRELL, supra:

> ". . .Equity does not wait upon precedent which exactly squares with the facts in controversy but will assert itself in those situations where right and

justice would be defeated but for its intervention. It has always been the pride of courts of equity that they will so mold and adjust their decrees as to award substantial justice according to the requirements of their varying complications that may be presented to them for adjudication." 145 P. 2d at p. 572.

In UNITED STATES v. LAZY FC RANCH, 481 F. 2d 985 (9th Cir., 1973), it was held that equitable estoppel against the government would be allowed where basic notions of fairness required it. The Court specifically stated:

". . .Estoppel is available as a defense against the government if the government's wrongful conduct threatens to work a serious injustice and if the public's interests would not be unduly damaged by the imposition of estoppel." 481 F. 2d at p. 989.

Abramson would respectfully suggest to this Court that estoppel should be available in this case. It cannot be suggested in any way that a serious injustice would not obtain here if Abramson (and Seidman) were denied relief. The public's interests would not be damaged (much less "unduly damaged") by the imposition of estoppel. The very reason why "settlement" was offered under the terms and conditions as proffered was to insure that there could be no damage to the public interest. It must be emphasized at this juncture that when Assistant Attorney General John Rimes, for and on behalf of his clients, offered settlement to Abramson, said settlement contained the following recognition:

"If they fail the examination (which would be the present licensure examination), any such plaintiff would have thus shown his lack of competence to meet the standards necessary for licensure, and thus would be precluded from the use of the proscribed terms in their professional activity." (Page 2 of the May 3,

1990 Written Offer of Settlement, Exhibit F. to the Initial Complaint, R. 157).

In denying relief to Abramson the trial court "found" that "existing minimal educational requirements were ignored." Given the above, this cannot be deemed true. In this case the Board had the authority to compromise. In this case the Board had the authority to determine, in its discretion, what would constitute "minimal educational requirements." In this case the Board determined that passage of the "present licensure examination" would demonstrate competence to such an extent that there would be no detriment to the public if Abramson were allowed to continue to practice and to make use of the "proscribed terms." If Abramson had failed the examination, she would have demonstrated "lack of competence." Her passage of the examination should be deemed to equate with "minimal educational requirements." At the very least, her passing the exam would insure that there would be no detriment to the "public interest."

It is respectfully suggested to this Court that whether one analyzes the subject issue in terms of "authority to settle" or whether one analyzes this case under the theory of "estoppel", it becomes painfully clear that the trial court and the District Court erred in the results reached. This case cries out for a reversal. Abramson relied in good faith on the power of the State. She complied with all of her obligations and duties. She passed the required test and demonstrated the necessary competence. There exists no detriment to the public interest.

The opinion of the District Court of Appeal, First District, should be quashed with directions to the trial court to reverse the order appealed.

VI.

CONCLUSION

Based upon the foregoing reasons and citations of authority Judith Sharon Abramson respectfully requests that this Court quash the opinion of the District Court of Appeal, First District, with directions to that court to direct the trial court to enter judgment for Abramson (and Seidman) and to recognize the validity and integrity of the compromise reached.

Respectfully submitted,

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VII.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Brief of Petitioner, Judith Sharon Abramson, was served on the following counsel of record this 20th day of April, 1993.

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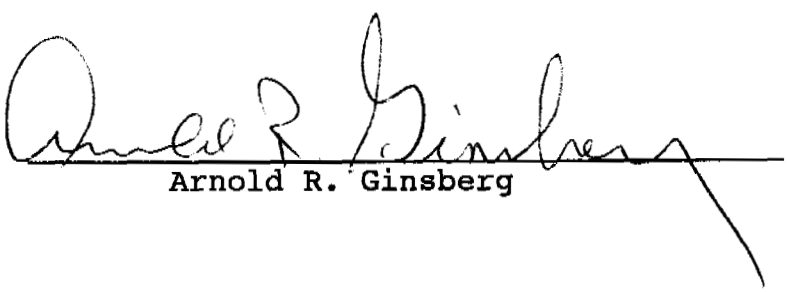

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