IN THE SUPREME COURT OF FLORIDA

JUDITH SHARON ABRAMSON,

Petitioner,

vs. CASE NO. 81,230

THE FLORIDA PSYCHOLOGICAL ASSOCIATION and PARKE FITZHUGH,

Respondents.
_____/

CAROL SEIDMAN,

Petitioner,

vs. CASE NO. 81,248

THE FLORIDA PSYCHOLOGICAL ASSOCIATION and PARKE FITZHUGH,

Respondent.
_____/

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REPLY BRIEF OF PETITIONER, CAROL SEIDMAN

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JOSEPH R. BOYD, ESQUIRE
FLA. BAR NO. 179079
WILLIAM H. BRANCH, ESQUIRE
FLA. BAR NO. 401552
BOYD & BRANCH, P.A.
1407 Piedmont Drive East
Tallahassee, Florida 32312
(904) 386-2171

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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 PETITIONERS, UNDER THE UNIQUE CIRCUMSTANCES OF THIS CASE.

Respondents characterize the role of the Attorney General as being substantially similar to that of private legal counsel. In doing so, Respondents express a more limited role for the Attorney General in the settlement and compromise of litigation than actually exists under Florida law.

> As the attorney and legal guardian of the people of the state, and as the chief law officer of the state, the attorney general, in the absence of some express legislative or constitutional restriction to the contrary, may exercise all the power and authority as public interests, from time to time, may require, and may institute, conduct, and maintain all such suits and proceedings as are deemed necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights.

48 Fla Jur 2d State of Florida, Section 56

The office of the attorney general is vested with considerable discretion. State ex rel Landis v. S.H. Kress & Co. 115 Fla. 189, 155 So. 823 (1934). "It is generally acknowledged that he is the proper party to determine the necessity and advisability of undertaking or prosecuting actions on the party of the state." 48 Fla Jur 2d State of Florida, Section 56. It clearly follows that the Attorney General must also have the authority to negotiate the terms of a settlement agreement in

accordance with its determination of what is in the public interest. In the present case, the Attorney General exercised his discretionary authority to compromise and settle the litigation with Seidman in a manner determined to be in the best interests of the public welfare. There has never been any showing that the public welfare has been harmed by authorizing Seidman to sit for the licensing exam (which she passed on her first attempt.)

If Respondents' proposed limitations on the discretion of the Attorney General to settle and compromise claims is the law of Florida, then the cry of litigants opposite the State of Florida will be, "He who settles with the State of Florida settles at his peril." Therefore, this Court must set forth a bright line rule of law that clarifies the authority of the Attorney General to settle bona fide litigation.

The Attorney General also suggests that this Court should not make such a decision in the instant case, but should do so on another day and in another case. However, for the Petitioners in this case and future litigants and their counsel who find themselves sitting opposite the Attorney General in mediation or other settlement negotiations, the resolution of this issue is timely and should be expeditiously addressed. Otherwise, such litigants simply should not settle any lawsuit with the State.

Such may appear to be an extreme position, but in light of the result in the present case, it really is not. The Supreme

Court of Florida has announced a public policy favorable towards the mediation process. Mediators, certified by the Supreme Court, are charged with attempting to develop new and innovative ways by which litigants can resolve their differences; all the while watching over their shoulder to insure that counsel for the parties can agree that the settlement is legal. However, in the present action, if the trial court's order and the district court's decision are the present state of the law, then the law has a chilling effect on settlement of lawsuits with the Attorney General. Unless it is demonstrated that there is an express and unambiguous authority for the State to settle litigation on the facts before it, no party litigating with the State will sign off on a settlement agreement with the Attorney General without serious questions arising as to his and the State's authority to do so. Just as in this case, the litigant opposite the State could find she has given up rights with nothing to show for her settlement and compromise, if the State can walk away from an agreement and simply claim that the Attorney General had no authority to compromise and settle.

Furthermore, as occurred in the present case, even if a party settles in good faith with the State, there is the possibility that a third party collateral attack will arise against the settlement. Therefore, a party adverse to the State may be in the position of having to bring a declaratory judgment action with notice to the world, and with an attorney ad litem

appointed, to determine if the settlement entered into with the Attorney General and the State is lawful. Instead of resulting in settlement, negotiations with the Attorney General will result in further litigation.

The foregoing parade of horribles may seem absurd. However, this Court need only look at the facts in the instant case. What more could the trial counsel have done on behalf of Dr. Seidman than what he did here? The facts are undisputed, that on the threshold of a federal trial involving numerous parties, the State of Florida, Board of Psychological Examiners, through their counsel of record, the Attorney General, offered a settlement. Dr. Seidman, in consultation with her counsel, was one of the few parties who did accept such settlement. The settlement was authorized and approved by the Board of Psychological Examiners, and Dr. Seidman withdrew from the federal trial with reliance on that settlement.

In classic contract law, there was an offer, an acceptance, and conveyance of that acceptance to the offeror. Additionally, Dr. Seidman fully performed her part of the bargain. In accordance with the settlement agreement that had been proposed by the State, Dr. Seidman was on the threshold of her taking the examination in anticipation of licensure, when nonparties to the original litigation, the Florida Psychological Association and Parke Fitzhugh, moved to intervene in the litigation and enjoin the parties from carrying out the terms of their settlement

agreement. Even though Dr. Seidman acted in good faith, her agreement with the State was voided and given no effect.

> 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... 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.

United States v. Armour & Co., 402 U.S. 673, 682, 29 L.Ed. 2d 256, 263, 91 S.Ct. 1752 (1971). Unfortunately and unfairly for Dr. Seidman, she has been denied the fruits of her successful efforts to negotiate an end to her federal lawsuit against the State. However, the practical result of the trial court's and the district court's ruling is a victory for the State on the merits of the litigation that Dr. Seidman in good faith voluntarily dismissed against the State. Waiver of her right to litigate as part of her settlement agreement with the State has resulted in Dr. Seidman being left with no remedy other than the present appeal.

There has been no suggestion or evidentiary showing that the settlement or the litigation was some type of sham in order to achieve a result not otherwise allowed by law. There has been no showing that the settlement detrimentally impacted upon the public health, safety, and welfare. Dr. Seidman's action was a bona fide lawsuit of major ramifications. A compromise to the litigation was reached through a negotiated settlement with the Attorney General. Clearly, the Attorney General in making the offer and entering into the settlement agreement considered the public welfare. Making such determinations is part of the exercise of the State's police powers and exercise of the Attorney General's discretion to act on behalf of the public interest. Any reasonable counsel, either representing the State or representing a private litigant, would have signed off on the agreement, believing it to be within the normal settlement authority granted litigants, including the Attorney General.

Respondent and the Attorney General argue the certified question before this Court should not be answered. However, not only should the certified question be answered, but it should be answered so that justice may prevail in the case of Dr. Carol Seidman. The Rules of Civil Procedure and the Rules of Judicial Administration provide that they shall be "construed to secure this just, speedy, and inexpensive determination of every action." Rule 1.101, Florida Rules of Civil Procedure.

To the extent that the Chamber as amicus passionately requests this Court address the issues raised by the certified question and give the State of Florida and those private parties who litigate with the State some direction on the extent of the State's ability to compromise and settle its claims, Seidman is in agreement. However, the balance of the Chamber's argument that the settlement under review somehow involves an unwarranted federal intrusion into Florida's right to govern itself as a sovereign simply goes far beyond the narrow issues raised by this matter. Seidman contends that the issues the Chamber seeks this Court address go far afield the facts and issues before this Court in the instant case. Although this case involves dire consequences for some of the litigants, those litigants are the petitioners, not the State and not the citizenry.

Dr. Seidman has invested a substantial part of her life and great legal expense only to become a victim of a system, through no fault of her own. While the lawyers argue legal technicalities, she is not allowed to practice the profession that at one time she legally was entitled to practice. Dr. Seidman did what was in good faith negotiated, only to now find that she is still without redress. This Court should answer the certified question, and should find that when the Attorney General representing the State in bona fide litigation negotiates a settlement that is approved by the proper authority, that the State will be bound by that settlement, absent a showing of a sham or for some other reason it fails to be bona fide.

CONCLUSION

Petitioner, Carol Seidman, respectfully requests this Honorable Court quash the opinion of the First District Court of Appeal, with directions that the district court direct the trial court recognize the validity of the settlement agreement and enter judgment for the petitioners.

JOSEPH R. BOYD, ESQUIRE
WILLIAM H. BRANCH, ESQUIRE
BOYD & BRANCH, P.A.
1407 Piedmont Drive East
Tallahassee, Florida 32312
(904) 386-2171

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to:

Bruce Culpepper, Esquire
Darren Schwartz, Esquire
HABEN, CULPEPPER, DUNBAR & FRENCH, P.A.
306 N. Monroe Street
Tallahassee, Florida 32303

Louise F. Huebener, III, Esquire
Office of the Attorney General
The Capitol Building
Tallahassee, Florida 32399

Arnold R. Ginsberg, Esquire
Thomas J. Morgan, Esquire
410 Concord Building
Miami, Florida 33130

Robert P. Smith, Jr., Esquire
Post Office Box 6526
Tallahassee, Florida 32314

this 29th day of June, 1993.

JOSEPH R. BOYD, ESQUIRE
Fla. Bar No. 179079