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IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,504

JERROLD YOUNG, M.D.,

Petitioner,

vs.

FERN ALTENHAUS,

Respondent.

Mr. Schwedock's Bar #: 112840

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE AND FACTS

Respondent, Fern Altenhaus ("Altenhaus"), was successful in obtaining a judgment for medical malpractice in the Dade County Circuit Court against petitioner, Jerrold Young, M.D. ("Young"). Thereafter, judgment for attorney's fees was awarded pursuant to Florida Statute section 768.56 (1980). This award was unsuccessfully challenged by Young in both the trial court and District Court of Appeal, Third District.

In affirming the attorney fee judgment, the District Court found section 768.56, Florida Statutes (1980), constitutional, agreeing with the Fourth District's reasoning in Florida Medical Center, Inc. vs. Von Stetina, 436 So 2d 1022 (Fla. 4 DCA 1983). That decision is pending in this Court as case no. 64,237.

POINT INVOLVED

IS FLORIDA STATUTE 768.56 CONSTITUTIONAL?

ARGUMENT

IS FLORIDA STATUTE 768.56 CONSTITUTIONAL?

Enacted by the 1980 session of the Florida Legislature as chapter 80-67, section 768.56 was seen by the plaintiff's bar as the worst law ever and by the defense bar as suitable replacement for medical mediation, found unconstitutional by the Court in Aldana v. Holub, 381 So 2d 231 (Fla. 1980).

In practice, the various interests quickly juxtopositioned, as evidenced by Young's reliance on a law review article by J. B. Spence and Jeffrey Roth, "Closing the Courthouse Door: Florida's Spurious Claims Statute," 10 Stetson L. Rev. 397 (1981).

Nowhere is such a shift more evident, than in the case at bar. Section 768.56 was enacted as a reaction to one of the annual cries by the medical profession of a "crisis" in malpractice insurance rates.

According to the preamble to this enactment, the crisis was described as occurring because of the demise of the mediation system:

> ***data indicated a renewed crisis in the professional liability insurance market in the near future, and
> ***
> the impact of significant market destabilization and premium increases on the citizens of Florida will be felt through significant increases in the costs of health care services and the imminent danger of a drastic curtailment in the availability of health services***

As a result, Section 768.56 was born, awarding the winner attorney fees assessed against the loser. The legislature's reasoning for this particular method was expressed in the closing paragraph of the preamble:

> Whereas, individuals required to pay attorney's fees to the prevailing party will seriously evaluate the merits of a potential medical malpractice claim***

It is clear that such a penalty is aimed at potential plaintiffs rather than physicians. As enacted and enforced, section 768.56, comports with the requirements of Florida's Declaration of Rights, which gives our state's citizens broad protection from discriminatory laws.

As early as 1913, this Court stated the following in David v. Florida Power Company, 64 Fla. 246, 60 So. 759 (Fla. 1913): (at 760)

> ***[that] the equal protection of the laws was designed to prevent any person, or class of persons, from being singled out as a special subject for arbitrary and unjust discrimination and hostile legislation.

Our state's Supreme Court has long recognized that laws valid when enacted, could later be invalidated because of changed conditions. See Atlantic Coat Line Railroad Co. v. Ivey, 148 Fla. 680, 5 So 2d 244 (Fla. 1942).

More recently, in Georgia Southern and Florida Railway Company v. Seven-Up Bottling Company of Southeast Georgia, Inc., 175 So 2d 39 (Fla. 1965), this Court found an act providing for comparative negligence in cases involving railroads was unconstitutional, even though the same statute was found constitutional some 25 years

earlier. c.f. Loften v. Crowley's, Inc., 150 Fla. 836, 8 So 2d 909, 142 A.L.R. 626 (Fla. 1942).

For a law to comport with the requirements of equal protection, it must be equal and uniform to all within the class it seeks to regulate. State v. Leicht, 402 So 2d 1153 (Fla. 1981).

In Leicht it was argued that the state's classification of only four substances, marijuana, cocaine, opium and morphine, as proscribed by section 893.03, Florida Statutes (1979), was impermissible, because many other drugs were as dangerous and as widely abused as those that were the statute's subject matter.

Because of this, it was alleged that no rational basis existed for this classification. While the trial court found the statute unconstitutional, this Court, disagreed, and said: (at 1155)

> ***We find that Section 893.135 is neither arbitrary nor unreasonable and that its provisions apply equally to all persons similarly situated. There may, as Appellees contend, be other drugs as hazardous as the ones included in Section 893.135. The legislature, however, has recognized the widespread use and abuse of marijuana, cocaine, morphine, opium, as an area of special concern and has acted accordingly. We acknowledge the magnitude of the trafficking in these four drugs that exists in this state, and we have no difficulty in ascertaining a rational basis for the legislature's actions in providing escalating mandatory minimum sentences regarding these substances.

Also worthy of consideration is the well-traveled axiom that a legislature's acts are presumed valid and the burden rests with the one challenging an act's validity to show it violative of equality. Gluessenkamp v. State, 391 So 2d 192 (Fla. 1980).

Arbitrariness is the basis for showing a statute violates equality. Ceasary v. Second National Bank of North Miami, 369 So 2d 917 (Fla. 1979).

Ceasary was a case in which the law allowing different rates of interest far different classifications of borrowers was challenged by a lender who was charged more than ten percent interest by the bank.

Mrs. Ceasary was an individual who paid more than that rate on her $8,800.00 loan. This Court in deciding the issue as certified from the Fifth District, held the classification reasonable because it operated uniformly throughout the state and within the regulated class.

In so deciding, the Court said: (at 921)

> The classifications of lenders created by Sections 687.031 and 656.17 (1) have a basis in real differences of conditions affecting the subject matter regulated. In establishing these classifications, the legislature considered the need for convenient, reasonable credit for as broad a group of borrowers as possible; the need to protect necessitous borrowers from over-reaching "loanshark" type lenders; the costs of different credit arrangements including

> substantial bookkeeping and computer costs; the risk of non-payment; the nature of the lender's business and the degree of existing government regulation of the business; and the nature and needs of the borrower.

Similarly, in the instant case, our legislature recognized a "crisis" in 1980, after this Court found the medical mediation statute unconstituional and passed Section 768.56. Aldora v. Hulob, 381 So 2d 231 (Fla. 1980).

The legislature rationalized its reasons for enacting this section by recognizing the "crisis" caused by the demise of medical mediation and the need for a screening mechanism for potential claims. As a result, this section germinated. Thus, it is far from arbitrary and unreasonable.

Even if as argued in the scholarly article by J. B. Spence and Jeffrey Roth, "Closing the Courthouse Door: Florida's Spurious Claims Statute,", 10 Stetson L. Rev. 397 (1981), there really was no "crisis" necessitating this statute, no such evidence was ever shown at the trial level. Therefore, no rebuttal of this statute's presumptive validity was made and the order under review should be affirmed.

Petitioner's position that Section 57.105 Florida Statutes (1978) is sufficient protection because it

accomplishes the same purpose as section 768.56 is simply beside the point. That section states:

> The court shall award a reasonable attorney's fee to the prevailing party in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party.

That language is quite different from that found in section 768.56 and cannot be deemed any kind of a substitute. Whitten v. Progressive Cas. Inc. Co., 410 So 2d 501 (Fla. 1982).

Respondent respectfully submits that the record in this cause is completely devoid of evidence showing that section 768.56 is discriminatory, and, as such, the ruling of the District Court of Appeal should be affirmed.

CONCLUSION

Respondent respectfully shows the Court that Section 768.56 is constitutional because it is not applied in an arbitrary and unreasonable manner, and, it had a rational purpose of its enactment.

Respectfully submitted,

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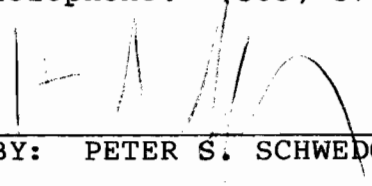

BY: PETER S. SCHWEDOCK, ESQ.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing was mailed this 23rd day of July, 1984, to: ALLAN G. COHEN, ESQ., 28 West Flagler Street, 11th Fl, Miami FL 33130; JAMES C. BLECKE, ESQ., 1 SE 3 Avenue, Suite 2400, Miami FL 33131; FRANCIS SEVIER, ESQ., 3300 Ponce de Leon Boulevard, Miami FL 33134; and R. FRED LEWIS, ESQ., 25 SE 2nd Avenue, Suite 730, Miami FL 33131.

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