IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,504

JERROLD YOUNG, M.D., :

Petitioner, :

vs. :

FERN ALTENHAUS, :

Respondent. :

DISCRETIONARY PROCEEDINGS TO REVIEW A DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

PETITIONER'S BRIEF ON JURISDICTION

James C. Blecke of
BLACKWELL, WALKER, GRAY,
POWERS, FLICK & HOEHL
Attorneys for Petitioner
2400 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131
(305) 358-8880

IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,504

JERROLD YOUNG, M.D., :

Petitioner, :

vs. :

FERN ALTENHAUS, :

Respondent. :

DISCRETIONARY PROCEEDINGS TO REVIEW A DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

PETITIONER'S BRIEF ON JURISDICTION

James C. Blecke of
BLACKWELL, WALKER, GRAY,
POWERS, FLICK & HOEHL
Attorneys for Petitioner
2400 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131
(305) 358-8880

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,504

JERROLD YOUNG, M.D., :

Petitioner, :

vs. :

FERN ALTENHAUS, :

Respondent. :

STATEMENT OF THE CASE

The petitioner is Jerrold Young, M.D. ("Young") a physician sued for medical negligence by respondent, Fern Altenhaus ("Altenhaus"). Altenhaus recovered a judgment against Young and, thereafter, sought and obtained an award of attorney's fees under Florida Statute §768.56. Young unsuccessfully challenged the constitutionality of the attorney's fee statute in the trial court and in the District Court of Appeal. A copy of the Third District opinion is appended ("A."). In affirming the trial court, the Third District adopted the holding of the Fourth District in Florida Medical Center, Inc. v. Von Stetina, 436 So.2d 1022 (Fla. 4th DCA 1983), a decision now under review by this Court, Case No. 64,237.

I.

JURISDICTION EXISTS WHEN A DISTRICT COURT OF APPEAL CITES AS CONTROLLING AUTHORITY A DECISION THAT IS PENDING REVIEW IN THE SUPREME COURT.

This Court has accepted jurisdiction and is reviewing Florida Medical Center, Inc. v. Von Stetina, the Fourth District opinion upon which the Third District opinion below is based. There is a prima facie jurisdictional basis for further review when a district court of appeal cites as controlling authority a decision that is pending review in the Supreme Court. Jollie v. State, 405 So.2d 418 (Fla. 1981). One of the issues that has been briefed in the Von Stetina case and will be decided by this Court is the constitutionality of the attorney's fee statute, §768.56, Fla. Stat. (1981).

II.

THE DECISION BELOW IS IN EXPRESS AND DIRECT CONFLICT WITH GEORGIA SOUTHERN AND FLORIDA RAILWAY COMPANY V. SEVEN-UP BOTTLING COMPANY OF SOUTHEAST GEORGIA, INC., 175 So.2d 39 (Fla. 1965); ATLANTIC COAST LINE R. CO. V. IVEY, 148 Fla. 680, 5 So.2d 244 (1942); STATE V. LEE, 356 So.2d 276 (1978); AND ROLLINS V. STATE 354 So.2d 61 (Fla. 1978).

The decision below is in express and direct conflict with each of the above cases because the Third District failed to apply the constitutional test recognized in each of these cases. The medical negligence attorney's fee statute is

patently discriminatory. Florida Statute §768.56 permits the prevailing party in a medical malpractice action to recover his or her attorney's fees, distinguishing it from all other forms of noncontractual tort litigation. To paraphrase this Court in Georgia Southern, the instinctive reaction of all persons - laymen and lawyers alike - to such a singling out of one class of litigants for the imposition of such a burden should be one of surprise, shock and a feeling that the Legislature has violated the rules of fair play. In Georgia Southern, this Court struck down Florida Statute §768.06 which singled out railroad companies as answerable in damages proratable with comparative negligence, when all other tort defendants enjoyed the affirmative defense of contributory negligence as a complete bar to liability.

In Atlantic Coast Line, this Court struck down legislation that imposed a penalty upon the railroad for livestock struck by a passing train. Under the statute, the owner of an animal killed by a train was entitled to recover twice its value plus attorney's fees without proof of negligence.

The decision below also conflicts with Rollins v. State and State v. Lee because the lower court failed to inquire into the validity of the legislative classification. This district court simply noted that this Court in Pinillos v. Cedars of Lebanon Corp., 403 So.2d 365 (Fla. 1981) found

a reasonable basis for the abolition of the collateral source rule in medical negligence cases. In Pinillos, however, this Court was analyzing the Medical Malpractice Reform Act, Ch. 75-9, Laws of Fla. The medical malpractice attorney's fee statute was not part of the Medical Malpractice Reform Act of 1975, but was separate legislation passed in 1980, Ch. 80-67, Laws of Fla. That one portion of 1975 Medical Malpractice Reform Act has survived constitutional scrutiny does not abrogate the lower court's duty to evaluate the legislation here under consideration in the light of its avowed purpose.

The preamble to Chapter 80-67 indicates that the legislature felt that the award of attorney's fees in medical malpractice cases was an alternative to the medical mediation panels invalidated by this Court in Aldana v. Holub, 382 So.2d 231 (Fla. 1980).

The "rational basis" for such legislative discrimination must have some basis in practical experience. Although deference should be given to legislative determinations, the courts should not accept an articulated reason if it is found to be illusory. The assumptions stated in the preamble of Chapters 80-67 are without foundation, and therefore, the classification drawn by the statute based on those false assumptions becomes irrational and arbitrary. The district court failed in the first instance to test the statute against its espoused rationale, creating jurisdictionally significant conflict with the decisions of this Court.

CONCLUSION

This Court should accept jurisdiction to review the District's Court determination of the constitutional question.

BLACKWELL, WALKER, GRAY,
POWERS, FLICK & HOEHL
Attorneys for Petitioner

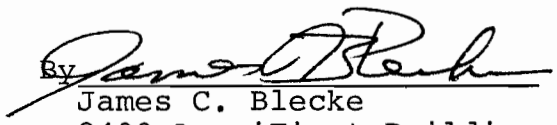
By 
James C. Blecke
2400 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131
(305) 358-8880

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on Jurisdiction was mailed this 21st day of November, 1983, to PETER S. SCHWEDOCK, Esq., Pelzner, Schwedock, Finkelstein & Klausner, P.A., Co-counsel for Altenhaus, Suite 800, Roberts Building, 28 West Flagler Street, Miami, Florida 33130; ALLAN G. COHEN, ESQ., Brumer, Cohen, Logan & Kandell, Attorneys for Altenhaus, 11th Floor, Roberts Building, 28 West Flagler Street, Miami, Florida 33130; FRANCIS A. SEVIER, ESQ., Lanza, Sevier, Womack & O'Connor, Co-counsel for Appellant, 3300 Ponce de Leon Boulevard, Coral Gables, Florida 33134; and R. FRED LEWIS, ESQ.,

Magill, Reid, Kuvin & Lewis, Attorneys for Dr. Chamuel, Suite 730, Ingraham Building, 25 Southeast Second Avenue, Miami, Florida 33131.

BLACKWELL, WALKER, GRAY,
POWERS, FLICK & HOEHL
Attorneys for Petitioner

By 
James C. Blecke
2400 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131
(305) 358-8880