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IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,504

JERROLD YOUNG, M.D.,

Petitioner,

v.

FERN ALTENHAUS,

Respondent.

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

PETITIONER'S MAIN BRIEF ON THE MERITS

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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. 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.

The briefs in Von Stetina fully explore the constitutional issues raised in this appeal with one important distinction. In Von Stetina, the respondent argues waiver and

failure to preserve certain of the constitutional considerations. Here, there is no such impediment to a full consideration of the constitutional infirmity of Section 768.56.

ARGUMENT

FLORIDA STATUTE SECTION 768.56 IS UNCONSTITUTIONAL.

Florida Statute §768.56 permits the prevailing party in a medical malpractice action to recover his or her attorneys' fees, distinguishing medical malpractice from all other forms of noncontractual tort litigation. In Georgia Southern and Florida Railway Company v. Seven-Up Bottling Company of Southeast Georgia, Inc., 175 So.2d 39 (Fla. 1965), 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. To paraphrase this Court's decision 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 had violated the rules of fair play. This concept of fair play is preserved in the due process and equal protection clauses of the federal and Florida constitutions.

In another railroad case, Atlantic Coast Line R. Co. v. Ivey, 148 Fla. 680, 5 So.2d 244 (1942) 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 $50 attorneys' fees without proof of negligence. This Court noted that if the same animal was killed when struck by a truck on a highway in the same location, the trucking company would only be liable for the value of the animal, only upon proof of negligence, and without payment of an attorneys' fee. As this Court said, "This certainly is not equal protection of the law." Id. at 247.

This Court's treatment of special legislation targeting railroad litigation sets the precedent for the finding of unconstitutionality of Florida Statute §768.56 which establishes a substantial burden upon malpractice litigants faced by no other noncontractual tort litigant in Florida. The requirement of Florida Statute §768.56 is arbitrary, irrational, fails in its purpose, and certainly does not provide equal protection of the law.

Florida Statute §768.56 awards attorney's fees to the prevailing party only in medical malpractice cases. The equal protection clauses of the Florida and federal constitutions require that this classification bear a reasonable relation to a legitimate purpose. The principal purpose of this statute, as

stated in its preamble, is to discourage non-meritorious medical malpractice claims, thereby avoiding a dramatic increase in professional liability insurance premiums and preventing a curtailment of the availability of health care services. Yet there is no difference between medical malpractice litigation and other tort litigation with regard to non-meritorious claims. There is no evidence that the situation in the professional liability insurance market is so different than that in the liability insurance market in general as to justify discriminatory treatment. See, J.B. Spence, Closing The Courthouse Door: Florida's Spurious Claims Statute, 10 Stetson L.Rev. 397 (1981).

The avowed purpose of the statute is to inhibit non-meritorious claims. Unfortunately, it penalizes meritorious claims as well as non-meritorious claims by penalizing all losing parties. The fact that a plaintiff does not prevail in a lawsuit does not mean that his claim had no merit. A plaintiff's verdict does not mean that the defense was completely lacking in merit. Many cases involve close questions of law or fact.

Florida already has a statute, §57.105, which allows a judge to award attorney's fees to a prevailing party if there are no justiciable issues of law or fact. That statute is a sufficient deterrent to frivolous claims or defenses. Moreover, it meets its stated objective by applying only to the frivolous claim or defense. Compare, e.g., Executive Centers of America,

Inc. v. Durability Seating & Interiors, Incorporated, 402 So.2d 24 (Fla. 3d DCA 1981) with Autorico, Inc. v. Government Employees Insurance Company, 398 So.2d 485 (Fla. 3d DCA 1981).

In Lindsey v. Normet, 405 U.S. 56, 31 L.Ed.2d 36, 92 S.Ct. 862 (1972), the U.S. Supreme Court invalidated an Oregon statute which required a tenant who wished to appeal from an adverse decision in an eviction proceeding to post bond for twice the amount of rent expected to accrue pending the appellate decision and to forfeit the entire double bond if the lower court decision was affirmed. The Supreme Court stated:

> The claim that the double-bond requirement operates to screen out frivolous appeals is unpersuasive, for it not only bars nonfrivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford the bond. [405 U.S. at 78; 31 L.Ed.2d at 53].

Since the tenant was confronted by a "substantial barrier to appeal faced by no other civil litigant in Oregon," the requirement was arbitrary and irrational, thereby violating equal protection. 405 U.S. at 79, 31 L.Ed.2d at 54.

Here, since §768.56 is not reasonably tailored to discourage insubstantial claims and since it creates a substantial barrier to medical malpractice litigants, both plaintiffs and defendants, it is unconstitutional under the equal protection clauses of the state and federal constitutions.

Another indicia that §768.56 is without rational basis is one of the main assumptions on which it is based is completely

unfounded. This assumption, stated in the preamble, is that the issue of liability is the primary issue in medical malpractice litigation while the issue of damages is the primary issue in other areas of tort litigation. The preamble concludes that a requirement that the prevailing party recover attorneys' fees is effective where the primary issue is liability, but loses its effectiveness in other contexts. Those conclusions are completely unsubstantiated. Therefore, the classification drawn by the statute based on those false assumptions are irrational and arbitrary.

Section 768.56 states that attorney's fees shall not be awarded against a party who is "insolvent or poverty-stricken," although there is no standard for determining when a party is "insolvent or poverty-stricken." Equal protection of the law means equal rights for the rich as well as the poor. Hamilton v. State, 214 So.2d 26 (Fla. 4th DCA 1968). Legislation premised upon police power is restricted to those things which of necessity affect public morals, health, or safety. Promotion of the general welfare is the antithesis of legislation that subordinates the right of one group of citizens to advance the welfare of another. A statute cannot be the means leveling unequal fortunes, favoring one segment of the people at the expense of another. Liquor Store Inc. v. Continental Distilling Corporation, 40 So.2d 371, 374 (Fla. 1949).

This provision for the "insolvent or poverty-stricken" also points up the illusory nature of the purported rationale for the statute. The impecunious plaintiff is not deterred from bringing a non-meritorious claim. It is only the financially responsible plaintiff and the solvent medical practitioner who suffer from the stigma of §768.56. Compare, Lindsey v. Normet, supra.

The mere legislative establishment of a classification does not bar further inquiry into the validity of that classification. Rollins v. State, 354 So.2d 61 (Fla. 1978). See also, State v. Lee, 356 So.2d 276 (Fla. 1978) (Good drivers' incentive fund unconstitutional). The distinctions drawn must have some basis in practical experience. The courts will not sustain legislative classification upon hypothesis, but must ascertain clearly enunciated purposes to justify the continued existence of the legislation. Rollins, at 64. Although deference should be given to legislative determinations, this Court should not accept an articulated reason if it is found to be illusory.

Here, the district court failed to inquire into the validity of the legislative classification. The 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, 381 So.2d 231 (Fla. 1980). It is indeed ironic that the alternative is more insidious than the unconstitutionally burdensome mediation procedure it replaced.

The medical malpractice claimant is now entitled to full compensation plus his attorneys fees, thereby increasing litigated recoveries and settlement values. Cf. Baker v. Verela, 416 So.2d 1190 (Fla. 1st DCA 1982) ($15,000 compensatory damages, $20,000 attorneys fees, affirmed). Section 768.56 can only increase the costs of malpractice insurance coverage, to be passed on to the public through increased costs of health care. This misbegotten legislation, intended for the benefit of the medical practitioner and the general public, upon reflection benefits no one.

CONCLUSION

The final judgment on attorneys' fees should be reversed and Section 768.56 should be declared unconstitutional.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Main Brief on the Merits was mailed this 11th day of July, 1984, 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.

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