IN THE SUPREME COURT OF FLORIDA

JOHN E. MATHEWS and
GWENDOLYN G. MATHEWS,
his wife,

Petitioners,

vs.

GLENN L. POHLMAN, M.D.; VINOD D. DESHMUKH, M.D.; JACKSONVILLE NEUROLOGICAL CLINIC, P.A.; JOSEPH J. LOWENTHAL, M.D.; LOWENTHAL & PUESTOW, P.A.; MELVIN GREER, M.D.; EDWARD VALENSTEIN, M.D.; DAVID YOCUM, M.D.; and FLORIDA PHYSICIANS' INSURANCE RECIPROCAL,

Respondents.

CASE NO. 64,589
FIRST DISTRICT
COURT OF APPEAL
NO. AR-398

RESPONDENTS' BRIEF ON ATTORNEY'S FEES

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Cases

Cases

OTHER AUTHORITIES

STATEMENT OF THE CASE

In this medical malpractice action, a final judgment was entered for the defendants based on a jury verdict. (R 30-34)

Each of the defendants moved for an award of attorney's fees pursuant to §768.56 Fla. Stat. (1981) (R 29, 35-39, 196-197). Section 768.56 provides for an award of attorney's fees to the prevailing party in medical malpractice actions.

The plaintiffs, in opposition to those motions, filed a motion to declare unconstitutional §768.56 (R 315-317) and a memorandum in support of this motion. (R 318-329).

On February 11, 1983, a hearing was held on these matters. (R 363-459 T 1-97) On February 22, 1983, the court entered its order declaring the statute unconstitutional on its face and "in violation of the equal protection, due process, and free access to court provisions of both the Florida and Federal Constitutions," and, accordingly, denying the defendants' motions for attorney's fees. (R 351).

The First District Court of Appeal reversed this order applying the rational basis test and holding that §768.56 does not violate equal protection and due process (see appendix for full text of opinion). Contrary to the assertion in petitioners' brief that the District Court

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NOTE: (R) refers to the record on appeal.

(T) refers to the transcript of proceedings which constitutes volume III of the record on appeal.

of Appeal did not set forth the test employed for reviewing the access to the courts challenge, the court applied the test set forth in Kluger v. White, 281 So.2d 1 (Fla. 1973) and held that §768.56 does not abrogate the right to sue and does not deny access to the courts. The First District Court of Appeal then certified the following question to this court:

> Does §768.56, Fla. Stat. violate constitutional guaranties of equal protection, due process, or access to the courts?

STATEMENT OF THE FACTS

The determinative facts are those found by the legislature as set forth in the preamble to §768.56:

> WHEREAS, the Legislature responded in 1975 to the dramatic rise in professional liability insurance premiums for Florida physicians and the resulting threat to the continuing availability of health care in the state by creating medical liability mediation panels, and
>
> WHEREAS, the Florida Supreme Court determined in Aldana v. Holub, No. 53,612 (Feb. 28, 1980), that the jurisdictional period provided for in the medical mediation act had proven to be arbitrary and capricious in its operation which rendered the act unconstitutional, and
>
> WHEREAS, data from the period in which the medical mediation panels were in operation indicates that they provided an efficient and effective mechanism for screening out nonmeritorious claims and for encouraging prompt settlement of those claims with merit, and
>
> WHEREAS, data from the same period reveals a significant increase in both the frequency and severity of claims despite the very positive benefits derived from the mediation panel mechanism, and such data indicated a renewed crisis in the professional liability insurance market in the near future, and
>
> WHEREAS, the effect of the invalidity of the mediation panel statute and the removal of its proven positive results will be a marked destabilization of the professional liability insurance marketplace and a dramatic increase in professional liability insurance premiums paid by health care providers in Florida, thus precipitating a present crisis in the professional liability insurance market, and
>
> WHEREAS, 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 care services, and

WHEREAS, an alternative to the mediation panels is needed which will similarly screen out claims lacking in merit and which will enhance the prompt settlement of meritorious claims, and

WHEREAS, the issue of liability is a primary issue to be resolved in medical malpractice litigation while the issue of damages is generally the primary issue in other areas of tort litigation and, furthermore, comparative negligence is rarely an issue in malpractice actions but is a prevalent issue in other areas of the law, and

WHEREAS, a requirement whereby the prevailing party in medical malpractice litigation is entitled to recover a reasonable attorney's fee is effective where liability is the primary issue and where comparative negligence is not at issue, but loses its effectiveness and fairness in other contexts, and

WHEREAS, individuals required to pay attorney's fees to the prevailing party will seriously evaluate the merits of a potential medical malpractice claim, NOW, THEREFORE,

ARGUMENT

This court has set the stage for analyzing constitutional questions relating to the medical malpractice law, Chapter 768, Florida Statutes. In Carter v. Sparkman, 335 So.2d 802 (Fla. 1976) and Aldana v. Holub, 381 So.2d 231 (Fla. 1980), this court considered constitutional attacks on the predecessor provisions to §768.56. The preamble to §768.56 sets forth its factual background in which the legislature reaffirmed many of its findings which had led to the passage of the Medical Malpractice Reform Act of 1975, the predecessor to the present statutory scheme.

In Carter v. Sparkman, supra, this court held that portions of the medical malpractice act dealing with the required mediation panels were constitutional on their face. The court considered equal protection and due process attacks, as well as access to the courts. The court emphasized that all doubts as to the validity of a statute should be resolved in favor of its constitutionality when reasonably possible and consistent with constitutional rights. Then, after discussing the constitutional arguments, this court determined that the legislature constitutionally attempted to resolve the malpractice crisis through the exercise of police power for the general health and welfare of the citizens.

Subsequently, in Aldana v. Holub, supra, this court declared that the provisions of the medical malpractice act dealing with the required mediation procedure were unconstitutional in their application because during the first four years since their enactment, the

practical operation and effect of the statute had rendered it unconstitutional. The court stated at page 237:

> It should be emphasized that today's decision is not premised on a reevaluation of the wisdom of the Carter decision. Rather, it is based on the unfortunate fact that the medical mediation statute has proven unworkable and inequitable in practical operation.

The following analysis and legal authorities will demonstrate the applicability of the constitutional principles set forth in Carter and will establish the constitutionality of §768.56.

I. SECTION 768.56 DOES NOT VIOLATE THE ACCESS TO THE COURTS CLAUSE

The imposition of attorney's fees on the losing party in a medical malpractice case does not violate Art. I, §21, the access to the courts provision of the Florida Constitution. Art. I, §21 provides that every person shall have access to the courts for the redress of any injury. Someone who claims injury as a result of alleged negligence of a health care provider has the unquestioned right to file a suit based on that claim.

The legitimate concern of the legislature in trying to insure that sufficient and quality health care will be available in the State of Florida and the requirement that before a claimant brings a suit he must carefully weigh the merits of his claim to the extent that he is put on notice that attorney's fees may be awarded in his favor if he is successful and against him if he is unsuccessful does not deny access to the courts.

Kluger v. White, supra is the leading case construing Art. I, §21. Kluger v. White held that under Art. I, §21, the legislature is without power to abolish a cause of action without providing a reasonable alternative to protect the rights of the people of the state to redress for injuries, unless an overpowering public necessity for the abolishment of such right, and no alternative method of meeting public necessity can be shown.

In Kluger v. White, this court declared unconstitutional the provisions of the no-fault statute which eliminated a suit for property

damage under the amount of $550. As the court pointed out, this limitation did not carry with it an alternate remedy, and thus, when someone was damaged in an automobile accident and suffered property damage of a value of less than $550, such a victim had no recourse. Such a statute violated Art. I, §21.

The cases following Kluger indicate that the rule set forth in that case applies only when the legislature has abolished or totally eliminated a cause of action. See, e.g. Bauld v. J.A. Jones Construction Company, 357 So.2d 401 (Fla. 1978), Alterman Transport Lines, Inc. v. State, 405 So.2d 456 (Fla. 1st DCA 1981), John v. GDG Services, Inc., 424 So.2d 114 (Fla. 1st DCA 1982), Jetton v. Jacksonville Electric Authority, 399 So.2d 396 (Fla. 1st DCA 1981). In Jetton, the court stated at page 398:

> ...In Kluger, the Supreme Court held only that the complete abolition of a prior common law right to recover for automobile accident property damages violates the right to redress provision, absent either a substitute remedy "to protect the rights of the people of the State to redress for injuries" or a legislative demonstration of "overpowering public necessity". 281 So.2d at 4.
>
> [2] Guided by case law subsequent to Kluger, we narrowly construe the instances in which constitutional violations will arise. The Constitution does not require a substitute remedy unless legislative action has abolished or totally eliminated a previously recognized cause of action.
>
> As discussed in Kluger and borne out in later decisions, no substitute remedy need be supplied by legislation which reduces but does not destroy a cause of action. The Court pointed out that legislative changes in the standard of care required, making recovery for negligence more difficult, impede but do not bar recovery,

> and so are not constitutionally suspect. Kluger, 281 So.2d at 4, discussing McMillan v. Nelson, 149 Fla. 334, 5 So.2d 867 (Fla. 1942) (automobile guest statute). Accord, Abdin v. Fischer, 374 So.2d 1379 (Fla. 1979) (limiting liability of owners of public recreational areas). Similarly, shortening the period in which a litigant may sue, as opposed to barring his cause of action entirely, does not trigger the substitute remedy requirement. [footnote omitted] Nor does elimination of one possible ground for relief require the legislature to provide some replacement. [footnote omitted].
>
> [3] In contrast to Kluger and other cases [footnote omitted] involving complete abolition of an established cause of action, appellant's cause of action has only been limited by the imposition of a dollar cap on the available recovery.

In Bauld v. Jones Construction Company, supra, this court, in upholding the constitutionality of a limitations statute against an access to the courts challenge, quoted Kluger v. White and stated at page 402:

> But the revisions in question did not abolish any right of access to the courts; they merely laid down conditions upon the exercise of such a right.

Section 768.56 does not abolish or totally eliminate a medical malpractice plaintiff's cause of action. It does not deny access to the courts. Petitioners' "chilling effect" argument is inapplicable because the Kluger rule applying Art. I, §21 deals with complete abrogation of the right to sue which is neither the intended nor practical effect of §768.56. This case is a prime example that petitioners' alleged "chilling effect" has not occurred to the extent of violating Art. I, §21 by complete elimination of the right to bring suit for medical malpractice injuries. The courts are still open to hear these claims

and the plaintiffs will only have to pay attorney's fees after the fact finder has determined that their claims have no merit. Accordingly, the Kluger v. White standards for constitutional analysis of showing an overpowering public necessity and no less restrictrive alternative are not applicable here where the cause of action has not been abolished.

In the absence of complete abolishment of a cause of action, other burdens on entering the courts are subject only to the requirement of reasonableness. Carter v. Sparkman, supra. In such cases, however, the access issue is triggered only when the restriction is an absolute precondition to filing of the lawsuit. Section 768.56 does not involve such a limitation. Carter, on the other hand, involved the requirement of going through a mediation panel prior to the filing of the lawsuit. The court stated at page 805:

> Although courts are generally opposed to any burden being placed on the rights of aggrieved persons to enter the courts because of the constitutional guaranty of access, there may be reasonable restrictions prescribed by law.

Petitioners quote the following portion of the Carter v. Sparkman, opinion referring to the then required mediation panels:

> ... the pre-litigation burden cast upon the [malpractice] claimant reaches the outer limits of constitutional tolerance... at p. 806.

Petitioners improperly assume that the attorney's fees statute, §768.56, places a greater pre-litigation burden on the litigant than

the mediation requirement. Except for the notice requirement, the attorney's fees provision does not come into play until the conclusion of the litigation after our justice system has determined the prevailing party and fees are then assessed against the losing party as determined by the factfinder. They are not assessed against all plaintiffs, only losing plaintiffs as well as defendants. The statement in Carter is inapplicable. Carter involved an absolute, mandatory prerequisite to suit which completely barred access to the courts to all litigants, at least until the mediation requirement was satisfied.

Petitioners also falsely assume that §768.56 provides for unlimited attorney's fees. The amount of attorney's fees is specifically limited in the statutory language by the reasonableness requirement.

Carter v. Sparkman, supra and Malvo v. J.C. Penney Co., Inc., 512 P.2d 575 (Alaska 1973) do not help petitioners' position. Petitioners incorrectly interpret the remarks in the Carter opinion about the economic burden involved with the mediation panels. These remarks, in fact, support the constitutionality of §768.56 in that they approve of a similar scheme of the taxing of expenses against the losing party rather than having the burden incurred regardless of who prevails on the merits.

Petitioners extract language from the Malvo case out of context. The Malvo case was not discussing the constitutionality of awarding attorney's fees to the prevailing party. That case involved a determination of what constitutes a reasonable fee under a statutory scheme awarding attorney's fees to the prevailing party and whether

the scheme required the court to award the full amount of the actual fees incurred. It offers no support for petitioners' case.

The other cases cited by petitioners dealing with access to the courts do not support their position. For example, G.B.B. Investments, Inc. v. Hinterkopf, 343 So.2d 899 (Fla. 3d DCA 1977), Lehmann v. Cloniger, 294 So.2d 344 (Fla. 1st DGA 1974) and Tirone v. Tirone, 327 So.2d 801 (Fla. 3d DCA 1976) are distinguishable. These cases did not involve the constitutionality of statutory provisions. In Hinterkopf, a mortgage forclosure suit, the trial court dismissed a counterclaim unless the mortgagor paid into the court registry the amount due plus delinquent interest and taxes. Thus, it involved a mandatory financial pre-condition to suit. The appellate court reversed this ruling because the payment had no reasonable relationship to any valid public policy purpose. Also, the Hinterkopf court could not find any authority for imposition of such a pre-condition. Tirone similarly involved payment of money as a pre-condition to access to the court. Section 768.56 does not involve such a bar to the courthouse door.

Petitioners' quotation from Hinterkopf and Cloniger, involving a liberal rule of construction, has been taken out of context. Lehmann v. Cloniger involved interpretation and construction of a rule of procedure affecting the timeliness of filing a notice of appeal. Neither case involved a question of constitutional validity of a statute. The question here, however, is one of constitutional

analysis, not statutory construction. Here, a presumption of constitutional validity applies. In Carter v. Sparkman, this court at page 805 stated the fundamental underlying constitutional principle:

> It is incumbent on this Court when reasonably possible and consistent with constitutional rights to resolve all doubts as to the validity of a statute in favor of its constitutional validity and if possible a statute should be construed in such a manner as would be consistent with the constitution, that is in such a way as to remove it farthest from constitutional infirmity.

Petitioners have confused the constitutional issues involved here. The strict scrutiny versus rational basis issue pertains to the analytical framework for challenges to statutory provisions based on the equal protection and due process clauses. The standards for determining whether or not a statute violates Art. I, §21 have been set forth in a series of Florida cases. The tests for such challenges are somewhat analogous to the strict scrutiny versus rational basis tests. Under Kluger v. White, supra, a statute violates Art. I, §21 when it abolishes a cause of action, without providing a reasonable alternative, unless an overpowering public necessity exists and no alternative method of meeting public necessity can be shown. This Kluger v. White test is similar to the strict scrutiny test for equal protection and due process. This test, however, is only invoked upon abolishment of a cause of action.

On the other hand, if a statute does not abolish a cause of action but places a burden on entering the courts, it must only

survive the reasonableness test set forth in the portion of Carter v. Sparkman quoted on page 10 of this brief. This is similar to the rational basis test for equal protection and due process. This test, however, is only invoked for restrictions which are a bar to the courthouse door. For example, the mediation panel requirement addressed in Carter v. Sparkman was an absolute pre-condition to entering the courts. Section 768.56 is not such a bar to the courthouse door and, therefore, does not concern Art. I, §21 and does not trigger application of the above-described tests. Access to the courts is not involved here.

Even if §768.56 was considered a restriction on access to the courts, since it clearly does not abolish a cause of action, it would only be subject to the reasonableness requirement as set forth in Carter v. Sparkman. Petitioners' strict scrutiny arguments are completely inapplicable to this constitutional analysis. Section 768.56 would meet this reasonableness requirement. Pinillos v. Cedars of Lebanon Hospital Corp., 403 So.2d 365 (Fla. 1981) is instructive on this point. A constitutional attack based on alleged denial of access was made in the Pinillos case which involved the collateral source statute. The Florida Supreme Court stated at page 368:

> We have also considered plaintiffs' challenges to this statute on the bases that it violates their right to access to the courts guaranteed by article I, section 21, Florida Constitution, and that it violates article II, section 3, Florida Constitution, and article V, section 2(a), in that it invades this Court's rulemaking power. We find these claims to be without merit. Accordingly, we hold that section 768.50 is constitutional, and we reverse the trial judge's ruling on this point.

If it is constitutional to require a reduction in recovery because of collateral sources, then surely the statute dealing with attorney's fees, which similarly does not come into play until the end of a case, cannot be deemed to be an impermissible limitation on access to the courts. As a matter of fact, it can be reasonably argued that it adds to the right of access by allowing a successful plaintiff to recover his costs of litigation.

The reasonableness of using an attorney's fee provision to promote a policy goal in a particular class of cases has been widely recognized. For example, §627.428, Fla. Stat. (1981), provides for the imposition of attorney's fees against an insurer and in favor of the insured upon the rendition of a judgment against an insurer under an insurance policy.

Discouraging litigation is recognized as a proper purpose of attorney's fees statutes and such statutes do not, per se, violate Art. I, §21. In Wollard v. Lloyd's and Companies of Lloyd's, ____ So.2d ____ (Fla. 1983) [8 FLW 400], which dealt with §627.428, this court quoted, with approval, the following language from Gibson v. Walter, 380 So.2d 531 (Fla. 5th DCA 1980) at page 533:

> The statutory obligation for attorney's fees cannot be avoided simply by paying the policy proceeds after suit is filed but before a judgment is actually entered because to so construe the same would do violence to its purpose, which is to discourage litigation and encourage prompt disposition of valid insurance claims without litigation.

After considering the above authorities which unequivocably establish that §768.56 does not violate Art I, §21, petitioners are left with

merely policy arguments regarding access to the courts which have no place in this constitutional analysis.

II. SECTION 768.56 DOES NOT VIOLATE THE EQUAL PROTECTION AND DUE PROCESS CLAUSES

The proper standard in evaluating petitioners' due process and equal protection challenges to §768.56 is the rational basis test rather than the strict scrutiny test because §768.56 does not involve a suspect class or fundamental right. The appellate courts which have considered equal protection and due process challenges to §768.56 have unanimously held that the rational basis test applies and that §768.56 does not deny equal protection and due process. Florida Medical Center, Inc. v. Von Stetina, 436 So.2d 1022 (Fla. 4th DCA 1983); Karlin v. Denson, ____ So.2d ____ (Fla. 4th DCA 1983) [8 FLW 2212]; Davis v. North Shore Hospital, ____ So.2d ____ (Fla. 3rd DCA 1983) [8 FLW 2488]; Young v. Altenhous, ____ So.2d ____ (Fla. 3rd DCA 1983) [8 FLW 2489].

Petitioners rely on an alleged violation of Art. I, §21 of the Florida Constitution, the access to the courts provision, as the basis for invoking the strict scrutiny test. The foregoing authority and analysis establish that §768.56 does not violate Art. I, §21 and, therefore, does not abridge any alleged fundamental right. Consequently, it is inappropriate to consider the strict scrutiny issues of whether the legitimate state purpose is substantial and compelling and whether there are less restrictive alternatives to §768.56.

Furthermore, under similar circumstances in cases such as Lasky v. State Farm Ins. Co., 296 So.2d 9 (Fla. 1974); Chapman v. Dillon, 415 So.2d 12 (Fla. 1982), Cauley v. City of Jacksonville, 403 So.2d 379 (Fla. 1981) and McMillan v. Nelson, 5 So.2d 867 (Fla. 1942), the

rational basis test was applied to equal protection and due process challenges even though these issues also involved access to the courts challenges. In each of these cases, a statute was attacked as denying access to the courts (e.g. automobile guest statute; "no-fault" statute; and statute limiting money damages recoverable in tort against a municipality) In each case, this court analyzed the Art. I. §21 issues and then applied the rational basis test to the equal protection and due process challenges. Moreover, the courts have uniformly applied the rational basis test to constitutional challenges involving access to the courts and medical malpractice statutes. Woods v. Holy Cross Hospital, 591 F.2d 1164 (5th Cir. 1979), Pinillos v. Cedars of Lebanon Hospital Corp., supra.

Section 768.56 meets this rational basis test. As the court said in the Von Stetina case at page 1030:

> To be sure, the section before us singles out medical malpractice plaintiffs and defendants for special treatment not afforded all tort victims and tortfeasors, but that in and of itself is not fatal. See Lasky v. State Farm Insurance Co., 296 So.2d 9 (Fla. 1974) and Chapman v. Dillon, 415 So.2d 12 (Fla. 1982). As we see it, the only question before this court is whether section 768.56 creates a reasonable classification which bears a reasonable relationship to a permissible legislative objective. All of the sections so far construed by the courts have the same preamble and it is unquestioned that all of them were enacted for precisely the same reasons as the sections already upheld in Pinillos v. Cedars of Lebanon Hospital, supra; Woods v. Holy Cross Hospital, 591 F.2d 1164 (5th Cir. 1979) and Carter v. Sparkman, 335 So.2d 802 (Fla. 1976). We acknowledge that the section applicable to the final case cited in the preceding sentence was struck down in Aldana v. Holub, 381 So.2d 231

> (Fla. 1980) but not for reasons germane to the issue before us now. There are over seventy Florida Statutes awarding attorney's fees upon the outcome of litigation, see Volume 4 Florida Statutes p. 402 (1981), and while two, or for that matter seventy, wrongs do not make a right, we perceive no such wrong in the section now before us.

A. Equal Protection

The classifications created by §768.56 bear a reasonable relationship to a legitimate state interest and, therefore, do not deny equal protection. A statute is not unconstitutional even if it results in some inequality or is not drawn with mathematical precision. Woods v. Holy Cross Hospital, supra. Moreover, the challenger has the burden to prove the absence of a reasonable basis. Pinillos v. Cedars of Lebanon Hospital Corp., supra. See also, Woods v. Holy Cross Hospital, supra. These principles are applicable in analyzing equal protection challenges to attorney's fees statutes, see Hunter v. Flowers, 43 So.2d 435 (Fla. 1949).

The Florida Legislature, in the preamble to §768.56, announced its legitimate state interest of protecting the availability of health care services to the people of Florida. The Florida Supreme Court has recognized that such protection is a legitimate state interest. Pinillos v. Cedars of Lebanon Hospital, supra, Carter v. Sparkman, supra.

In the preamble, the legislature also announced its findings showing the need for legislation as well as the legitimacy of this particular approach to the medical malpractice problem.

Petitioners attack the preamble to §768.56 as inconsistent. Petitioners, however, omit crucial language of the preamble which if read in its entirety is obviously consistent.

It is not inconsistent that the mediation procedure was efficient and effective in "screening out nonmeritorious claims" and "encouraging prompt settlement of those claims with merit" (3d whereas clause) but that the severity of claims increased "despite the very positive benefits derived from" (4th whereas clause) the mediation procedure. The mediation procedure was not designed to limit claims. It was designed to weed out those claims without merit so that only the ones with merit would proceed to the courts.

Furthermore, the comparative negligence provision of the statute is consistent with the preamble. This provision safeguards parties in those rare cases in which comparative negligence is an issue in order to avoid an unfair imposition of attorney's fees in such cases.

Petitioners also challenge the legislature's finding of a "crisis" and refer this court to several articles examining the validity of the crisis. The factual information in these articles was not placed in evidence in this case, is not part of the record before this court, and cannot be considered by this court as a basis to attack the legislative findings. It is undisputed that legislative findings are presumptively correct. They can only be invalidated if they are erroneous, on their face, or if the challenging party properly presents evidence to the contrary before the trial court. No such evidence is part of the record in this case. Since the factual matters relating to the existence of a medical malpractice insurance crisis are not the type of facts subject to judicial notice, the only facts before this court are the legislative findings of a crisis set forth in the preamble. The preamble to the Medical Malpractice Reform Act, of

which this section has become a part, also cites pertinent legislative findings. Section 768.56 was added to the medical malpractice act to replace, in part, the safeguards provided by the legislature in the medical mediation act.

In Pinillos v. Cedars of Lebanon Hospital Corp., supra, the court, in determining the constitutionality of another section of the medical malpractice act dealing with reduction of judgments by amounts received from collateral sources, discussed the findings of the legislature in the preamble to the Medical Malpractice Reform Act, which sets forth the rational relationship to legitimate state interests supporting its enactment and thus the enactment of §768.56. The court said at page 367:

> The primary question is whether section 768.50 violates the equal protection clauses of the Florida and federal constitutions. The plaintiffs argue that the distinction drawn between medical practitioners and other members of the public is arbitrary and unreasonable. Since no suspect class or fundamental right expressly or impliedly protected by the constitution is implicated by section 768.50, we find that the rational basis test rather than the strict scrutiny test should be employed in evaluating this statute against plaintiffs' equal protection challenge. The rational basis test requires that a statute bear a reasonable relationship to a legitimate state interest, and the burden is on the challenger to prove that a statute does not rest on any reasonable basis or that it is arbitrary. In re Estate of Greenberg, 390 So.2d 40 (Fla. 1980).
>
> The legislature, in the preamble to the Medical Malpractice Reform Act, of which section 768.50 is a part, announced in detail the legitimate state interests involved in its enactment of this provision. The legislature determined that there was a professional liability insurance crisis in Florida. It found that professional liability insurance premiums were rising at a dramatic and

> exorbitant rate, that insurance companies were withdrawing from this type of insurance market making such insurance unavailable in the private sector, that the costs of medical specialists were extremely high, and that a certain amount of premium costs is passed on to the consuming public through higher costs for health care services. This insurance crisis, the legislature concluded, threatened the public health in Florida in that physicians were becoming increasingly wary of high-risk procedures and, accordingly, were downgrading their specialties to obtain relief from oppressive insurance rates and in that the number of available physicians in Florida was being diminished. The legislature expressed the concern that the tort law liability insurance system for medical malpractice would eventually break down and that the costs would continue to rise above acceptable levels.
>
> The plaintiffs have failed to show that there is no rational basis for the distinction drawn by this statute for health care providers of professional services. We hold that the classification created by section 768.50 bears a reasonable relationship to the legitimate state interest of protecting the public health by ensuring the availability of adequate medical care for the citizens of this state. Carter v. Sparkman, 335 So.2d 802 (Fla. 1976).

The Florida Legislature has determined that non-meritorious medical malpractice claims pose a particular threat to the availability of health care and that one method for screening out non-meritorious medical malpractice claims is the imposition of an attorney's fee on the losing party. Since the goal of eliminating non-meritorious malpractice claims will help prevent the imminent danger of a drastic curtailment in the availability of health care services, this statute meets a legitimate goal and has a rational basis for its classifications.

Differentiating between medical malpractice claims versus other types of claims, medical malpractice tortfeasors versus other types of

tortfeasors, medical malpractice victims versus other types of tort victims, and medical malpractice plaintiffs versus medical malpractice defendants, has been approved by the Florida courts and the federal courts in other contexts, e.g., Pinillos v. Cedars of Lebanon Hospital Corp., supra; Woods v. Holy Cross Hospital, supra. For example, it is well recognized that it is not unconstitutional to treat plaintiffs and defendants differently. E.g., Empire State Insurance Company v. Chafetz, 302 F.2d 828 (5th Cir. 1962), see also Fair Labor Standards Act, 29 USC §201 et seq. which provides for attorney's fees only in favor of prevailing plaintiffs.

Petitioners contend that the distinction in §768.56 between solvent and insolvent losing parties violates the equal protection clause. As stated above, the equal protection clause requires only that classifications bear a reasonable relationship to a legitimate state interest. The above cited authority confirms the legitimacy of the state interest involved. Furthermore, the classification between insolvent and solvent plaintiffs is reasonably related to the purpose of discouraging meritless lawsuits and encouraging serious evaluation of the merits of potential claims. The threat of financial loss through attorney's fees may deter solvent plaintiffs from filing meritless lawsuits thereby accomplishing the purpose of the statute, but insolvent plaintiffs would not similarly be influenced because they would have nothing to lose by filing such lawsuits. Thus, it would be pointless to include them in the statute. Furthermore, this provision preserves judicial labor regarding the awarding and collecting of fees from a party unable to pay. A legislature need not

strike at all evils at the same time or in the same way; it may adopt provisions that only partially ameliorate a perceived evil and defer complete elimination of the evil to future regulations. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466, 101 S.Ct. 715, 724, 66 L.Ed.2d 659, 670 (1981). In In Re: Estate of Greenberg, 390 So.2d 40 (Fla. 1980) this court said at page 46:

> Where utilizing the rationality test, the equal protection clause is not violated merely because a classification made by the laws is not perfect. Equal protection does not require a state to choose between attacking every aspect of the problem or not attacking it at all, and a statutory discrimination will not be set aside if any statement of facts reasonably may be conceived to justify it. Dandridge v. Williams.

The equal protection clause does not require that the insolvency exemption perfectly promote the goals of the statute.

In The Florida Bar, In Re: Rules of Civil Procedure (Deletion of Rule 1.450(e)) 429 So.2d 311 (Fla. 1983), the Supreme Court indicated the propriety of distinguishing medical malpractice litigants from other tort litigants. The court reconsidered the appropriateness of the rule, applying only to civil medical malpractice actions, relating to the prohibition against any reference to insurance at the trial. The Supreme Court commented on the significance of its holding in the Aldana case in which it said that other sections of the medical malpractice act were severable from the unconstitutional mediation panel section. The court stated at pages 311 and 312:

> Aldana does not affect in any manner the public policy reasons which led to the creation of civil rule 1.450(e), governing the trial of a medical malpractice action. Our assault was on

> the pre-trial required mediation procedure. The public policy reasons, valid before, survive Aldana and remain intact.

The First District Court of Appeal, in considering the amount of an attorney's fee under this statute, has also distinguished medical malpractice litigation from other types of tort litigation. In Baker v. Varela, 416 So.2d 1190 (Fla. 1st DCA 1982) the court determined that medical malpractice litigation was "galaxies apart" from other types of litigation. The Florida Supreme Court in McCarthy v. Mensch, 412 So.2d 343 (Fla. 1982), determined that the requirement of the medical malpractice act which allowed the admission into evidence of the decision of the medical mediation panel did not violate the constitutional rights to trial by a jury, due process of law, and equal protection of the law. The court adopted the reasoning of Woods v. Holy Cross Hospital, supra.

The legislative findings embodied in this attorney's fees provision support the determination of both the legitimate state interest and a rational basis for the treatment of medical malpractice cases separate and apart from other types of cases. Whether in fact an act will serve the legitimate state interest is not the issue in equal protection cases; the Constitution only requires that the legislature could rationally have decided that a provision might promote its objective. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466, 101 S. Ct. 715, 724, 66 L.Ed.2d 659, 670 (1981).

> Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken. Id. 449 U.S. 456, 464, 66 L.Ed.2d 659, 669.

Those challenging legislative judgment must convince the court that the legislative facts on which a classification is based could not reasonably be conceived to be true by the governmental decisionmaker. Vance v. Bradley, 440 U.S. 93, 111, 99 S.Ct. 939, 59 L.Ed.2d 171, 184 (1979). The Florida legislature found that the dramatic increase in professional liability insurance premiums paid by health care providers in Florida is precipitating a crisis in the professional liability insurance market. The legislature could reasonably believe that a requirement that the prevailing party is entitled to recover a reasonable attorney's fee is effective because individuals required to pay attorney's fees to the prevailing party will seriously evaluate the merits of a potential medical malpractice claim. These findings set the framework for appropriate legislation and survive the scrutiny of the rational basis test.

The above authorities show that it is not unconstitutional to create legislative classifications as long as they have a rational basis. The Constitution does not require perfection. The above-cited cases establish that the classifications created by §768.56 are appropriate. Such categories of litigants have different characteristics and effects on the public interests justifying different treatment as recognized by this court. Pinillos v. Cedars of Lebanon, supra, Carter v. Sparkman, supra. The legislature is entitled to determine that meritless malpractice claims pose a greater public problem than other types of meritless claims. The legislature is also entitled to determine that §57.105, Florida Statutes, does not provide enough of a deterrent to meritless medical malpractice claims and enough of an incentive for

litigants to seriously evaluate the merit of their positions before taking their disputes to court. Note that petitioners' arguments regarding the existence of §57.105 are misplaced in light of the applicability of the rational basis test which does not require the legislature to select the least restrictive alternative. Petitioners' equal protection arguments consist of a multitude of policy considerations which are inappropriate for this court to consider in light of the established rational basis for the classifications created by the statute.

B. Due Process

The proper test to determine whether this section violates the due process clause is whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive. Lasky v. State Farm Ins. Co., supra. The petitioners have the burden of demonstrating that the act is invalid under this test. Thus, it is necessary for this court to examine the objectives of the legislature in enacting the medical malpractice statute, and particularly this attorney's fees statute, in order to determine whether the provisions of this section bear a reasonable relation to those objectives.

As stated in the Lasky case at pages 15 and 16:

> In doing so, we do not concern ourselves with the wisdom of the Legislature in choosing the means to be used, or even with whether the means chosen will in fact accomplish the intended goals; our only concern is with the constitutionality of the means chosen.

As the court did in the Lasky case, this court should presume the existence of the circumstances supporting the validity of the legislature's action in the absence of any evidence to the contrary. This record contains no evidence to the contrary.

The arguments of the petitioners are that the legislature did not act wisely in passing this attorney's fees statute, and that the attorney's fees statute will not, in fact, accomplish the intended goal of reducing non-meritorious medical malpractice claims. But as this court itself has said, such arguments are not determinative of the constitutionality of the statute.

The distinction between due process and equal protection is that due process emphasizes fairness between the state and the individual dealing with the state, regardless of how other individuals may be treated, whereas, equal protection emphasizes the difference in treatment by the state between similarily situated classes of individuals. Despite this distinction, the tests for determining the constitutionality of a legislative enactment remain very similar. The discussion in the earlier section of this brief on the reasonableness of the classifications of this statutory enactment applies equally to the due process attack made upon it. See, e.g., Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 470 n.12, 66 L.Ed 2d 659, 673 n.12, Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974)

The opinion in the Woods v. Holy Cross Hospital case, supra, discussed the due process argument as it relates to medical malpractice legislation. The court stated that the state need only

show that the law under attack rationally relates to a legitimate government end. A law must be a totally arbitrary deprivation of liberty to violate the substantive due process guaranty. The court in Woods then stated at page 1176:

> They were adopted to achieve an important public end, the preservation of quality health care for the residents of Florida. They were part of a reasonable legislative response to a pressing public problem, and appear to be achieving the purpose for which they were adopted. Consequently, we find that these provisions do not violate Mrs. Woods's right to substantive due process.

Petitioners try to bring this case within the holding of Aldana v. Holub, supra. Aldana, however, is distinguishable because it involved absolute pre-litigation conditions to filing suit. Fees are determined pursuant to §768.56 only after the factfinder has determined the prevailing party. Also, there is no loss of a valuable property right. Fees are incurred only after our judicial system has determined which party's position was without merit.

Moreover, §768.56 is rationally related to its purpose and is not unreasonable, discriminatory, arbitrary and oppressive. It is rational that it would deter meritless claims and encourage serious evaluation of the potential merits and, perhaps, settlement. Again, note that the due process clause does not require perfection and mathematical certainty.

The result of the Florida Medical Center, Inc. v. Von Stetina case in which the defendant was required to pay a large attorney's fee does not exacerbate the "crisis". Section 768.56 was intended to deter claims without merit, not those with merit.

The language cited by petitioners from Christianburg Garment Co. v. EEOC, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978) is inapplicable here. That language was part of a statutory interpretation of a particular federal statute and was not part of a constitutional analysis.

Petitioners engage in a policy discussion as to the advisability of a "loser pays" scheme in medical malpractice cases. Petitioners' inclusion in their appendix of an editorial from The Miami News merely highlights the political nature of petitioners' arguments and emphasizes that the appropriate forum for such is the legislature. The fact that the legislature may not have chosen the best possible means to achieve the desired end is of no consequence to the courts unless the means selected are wholly unrelated to the achievement of the legislative purpose. Fraternal Order of Police v. Department of State, 392 So.2d 1296 (Fla. 1980). The court may not substitute its judgment for that of the legislature regarding the wisdom or policy of legislation.

Section 768.56 is a reasonable incentive for serious evaluation of the merits prior to suit. Many attorney's fees statutes have been upheld against constitutional attacks. The applicability of §768.56 to losing defendants adds to the reasonableness so that a prevailing plaintiff whose position the factfinder has determined to be meritorious may recover fees. The fact that defendants pay fees in cases with merit does not inhibit the goals of the statute. The statute is aimed at reducing the undesirable costs of meritless claims, not the costs of those with merit.

Petitioners' argument regarding other attorney's fees statutes merely highlights the fact that it is constitutionally permissible for the legislature to use attorney's fees provisions to promote a particular policy objective.

In Hunter v. Flowers, supra, the Florida Supreme Court upheld the constitutionality of a statute authorizing recovery of an attorney's fee by a successful claimant in a summary proceeding to enforce a laborer's lien. The court stated at pages 436 and 437:

> The validity of statutes awarding attorneys' fees to successful litigants has been upheld in various types of cases in recent years. The rule gleaned from the decided cases seems to be that, so long as the classification is based upon some difference bearing a reasonable and just relation to the act in respect to which the classification is attempted, there is no violation of the "due process" and "equal protection" clauses of the Fourteenth Amendment of the Constitution of the United States.

CONCLUSION

Kluger v. White and its progeny establish that §768.56 does not violate Art. I, §21 because it does not totally abrogate the right to sue, it is not a bar to the courthouse door and even if if were considered as a limitation on access, it is a reasonable one. Furthermore, the overwhelming weight of authority calls for application of the rational basis test rather than the strict scrutiny test in evaluating the constitutional challenges to §768.56. Having shown a legitimate purpose, the reasonableness of the means chosen to achieve that purpose and the reasonableness of the classifications of §768.56, the holding of the District Court of Appeal, that the

attorney's fees provision satisfies constitutional requirements of due process, equal protection, and access to the courts, should be affirmed. Petitioners' sole remedy for their policy attacks on §768.56 lie with the legislature.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondents' Brief on Attorney's Fees has been furnished to R. J. Beckham, Esquire, Beckham & McAliley, P.A., 3131 Independent Square, One Independent Drive, Jacksonville, Florida 32202; Andrew G. Pattillo, Jr., Esquire, Post Ofice Box 1450, Ocala, Florida 32678; Joe C. Willcox, Esquire, Post Office Drawer J, Gainesville, Florida 32602; and L. Haldane Taylor, Esquire, 1902 Independent Square, Jacksonville, Florida 32202; by mail this 16th day of January, 1984.

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