IN THE SUPREME COURT OF FLORIDA

JOHN E. MATHEWS, ET UX.,

Petitioners,

vs.

GLENN L. POHLMAN, ETC., ET AL.,

Respondents.

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

PETITIONERS' REPLY BRIEF

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STATEMENT OF THE CASE

Petitioners stand by their assertion that the Court below did not set forth the test employed for reviewing a challenge to the "access to the courts" provision of the Florida Constitution. While it is true that the Court below inappropriately applied Kluger v. White, 281 So.2d 1 (Fla. 1973), this Court's opinion in Kluger did not distinguish between the "strict scrutiny" and the "rational basis" tests; accordingly, the Court below did not address those issues when it simply followed Kluger.

STATEMENT OF THE FACTS

We cannot accept the contention by respondents (Br. 3) that the "determinative facts are those found by the legislature as set forth in the preamble to Section 768.56." As this Court stated in Moore v. Thompson, 126 So.2d 543, 549 (Fla. 1960):

> Legislative findings and declarations of policy are presumed to be correct but are not binding upon the courts under all conditions. The Courts will abide by such legislative decisions unless such are clearly erroneous, arbitrary or wholly unwarranted. [E.s.]

The Moore opinion continued by citing Seagram-Distillers Corp. v. Ben Greene, Inc., 54 So.2d 235, 236 (Fla. 1951):

> . . . The general rule is that findings of fact made by the Legislature are presumptively correct. However, it is well recognized that the findings of fact made by the Legislature must actually be findings of fact. They are not entitled to the presumption of correctness if they are nothing more than recitations amounting only to conclusions and they are always subject to judicial inquiry. [E.s.]

ARGUMENT

I

FLORIDA STATUTE 768.56 IS UNCONSTITUTIONAL IN THAT IT VIOLATES THE ACCESS TO COURT PROVISIONS OF THE FLORIDA CONSTITUTION.

We commence by reminding the Court that Article 1, Section 21 of the Constitution protects "every" person's rights from being denied by "sale" or by "denial." Contrary to the position of respondents (Br. 8) total abrogation of a cause of action is not required in order for an unconstitutional infringement to be placed upon the right of access to the Courts. We concede that Kluger held that access was indeed denied when a cause of action was totally abrogated; we reject the converse, however: that total abrogation is required in order for an impermissible infringement to be found upon one's access to the Courts. [While a confession obtained by torture will be suppressed, there is no converse rule saying that only confessions obtained by torture may be suppressed!] That violations of this constitutional right of access can be found by "chilling" action is established in Aldana v Holub, 381 So.2d 231 (Fla. 1980) and in G.B.B. Investments, Inc., v. Hinterkopf, 343 So.2d 899, 901 (Fla 3rd DCA, 1977) and Tirone v. Tirone, 327 So.2d 801 (Fla. 3rd DCA, 1976). By blindly applying the Kluger test, the Court below failed to consider these other precedents that establish that an impermissible chilling effect upon one's access to the Courts can be found in situations where there has been no total abrogation of a cause of action.

Respondents seek to rewrite the law when they first argue (Br. 9) that a "chilling effect" is meaningless where a cause of action has not been abolished and their assertion (Br. 10) that, in any event, to be unconstitutional a "chilling effect" must be an absolute precondition to filing a suit. That simply is not what the Constitution says or what the cases construing it say.

We are dealing with a statute that extracts a penalty for exercising the constitutional right of seeking redress in the courts. This is drastically different from cases that merely limit the amount of recovery to a successful litigant. The cases relied upon by respondents (Br. 8-9) thus are inapposite. Petitioners in the instant case are, in effect, "guinea pigs;" almost $400,000.00 in fees are sought from them by the physicians who prevailed in a jury trial. What is the difference between extraction of such a sum now as opposed to having required them to post a bond for $400,000.00 before they file their suit? We submit there is no legal difference - whether "before" or "after," the intimidating chill is there throughout! Respondent's weak attempt to distinguish our authorities (Br. 12) fails to hit the mark; the fact is our cited cases all deal with the zealous protection of the constitutional guarantee of access to the courts. Whether the source of the impermissible chill is from a rule, a court order or any other source is immaterial.

Nowhere does respondents' brief acknowledge that access to the courts is indeed a "fundamental right." This is the basic fallacy in the contention of respondents that "strict scrutiny" does not apply. Indeed, the passing references to the opinion

of Justice Alderman, In Re: Estate of Greenberg, 390 So.2d 40 (Fla. 1980), nowhere acknowledges the succinct analysis there recognizing that "strict scrutiny" is applicable when a statute "impinges upon a fundamental right explicitly or implicitly protected by the Constitution." 397 So.2d at p. 43.

Also totally ignored by respondents is this Court's recent reaffirmation of the sanctity of the access of the courts provision, Stokes v. Bell (S.Ct. No. 63,132; Nov. 17, 1983)[8 FLW 450].

ARGUMENT

II and III

FLORIDA STATUTE 768.56 (1981) IS UNCONSTITUTIONAL IN THAT IT VIOLATES THE EQUAL PROTECTION AND DUE PROCESS MANDATES OF THE FLORIDA AND FEDERAL CONSTITUTIONS.

We continue to assert that this statute does not reasonably relate to a legitimate object (especially with §57.105 on the books), that it arbitrarily equates "losing positions" with "meritless positions" and that it discriminates impermissibly between

a) Insolvent parties and non-insolvent parties, the the former by exemption.

b) Plaintiffs and defendants, by giving defendants a unilateral privilege of limiting exposure through the offer of judgment rule.

c) Plaintiffs or defendants, by mandating that the chill be expressly communicated to a plaintiff while making no

such demand upon the recalcitrant ("stonewall") defendant.

d) Plaintiffs and defendants, by creating an exposure to the payment of substantial sums of money that only a defendant has a reasonable opportunity to insure against.

Respondents' brief fails to address any of these points other than a half-hearted swipe (Br. 23) at the solvent - insolvent discrimination. This silence of respondents eloquently speaks volumes in support of Petitioners.

CONCLUSION

We remind the Court that the Von Stetina case does not involve access to the courts as an issue and that the Court's ruling in that case is not dispositive of all issues in this case.

We believe the statute is unconstitutional on three grounds, jointly and severally.

The decision below should be quashed and the order of the trial court reinstated, in whole or in part.

Respectfully submitted,

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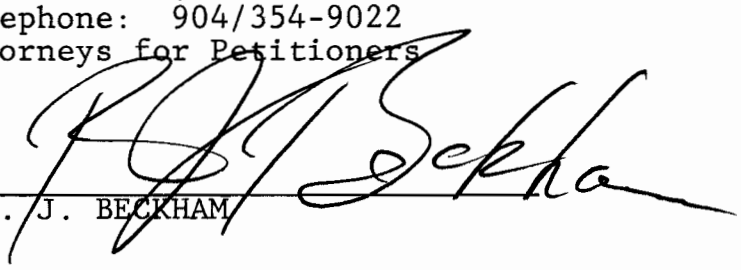
By 
R. J. BECKHAM

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing has been served by mail this 6th day of February, 1984, upon the following: John F. Corrigan, Esquire, and Lori E. Terens, Esquire, of Ulmer, Murchison, Ashby, Taylor & Corrigan, Post Office Box 479, Jacksonville, Florida 32201; Andrew G. Pattillo, Jr., Esquire, Pattillo & McKeever, P. A., Post Office Box 1450, Ocala, Florida 32678; Joe C. Willcox, Esquire, Dell, Graham, Willcox, Barber, Henderson, Monaco & Cates, P. A., Post Office Drawer J, Gainesville, Florida 32602; and L. Haldane Taylor, Esquire, 1902 Independent Square, Jacksonville, Florida, 32202.

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