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SID J. WHITE

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CLERK, SUPREME COURT

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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

LEONARD CANTOR,
Petitioner,

CASE NO. 64,663

v.

ESTINE DAVIS,
Respondent.

DCA CASE NO. 82-1392

JOHN H. KATHE, M.D.,
Petitioner,

CASE NO. 64,664

v.

ESTINE DAVIS,
Respondent.

DCA CASE NO. 82-1392

JURISDICTIONAL BRIEF OF PETITIONER
JOHN H. KATHE, M.D.

STEPHENS, LYNN, CHERNAY & KLEIN
ONE BISCAYNE TOWER
SUITE 2400
Miami, Florida 33131
(305) 358-2000

BY:

ROBERT M. KLEIN
DEBRA J. SNOW

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INTRODUCTION

Petitioner John H. Kathe, M.D. was a Defendant in the trial court and Appellee before the District Court of Appeal of Florida, Third District. Respondent Estine Davis was the Plaintiff in the trial court action, and Appellant before the District Court of Appeal. In this brief, the parties will be referred to as Petitioner/Defendant and Respondent/Plaintiff, as well as by name.

The following symbols will be used for reference purposes:

"A" for references to the Appendix which
is attached to Petitioner's brief.

All emphasis has been supplied by counsel, unless indicated to the contrary.

STATEMENT OF THE CASE AND STATEMENT OF FACT

Petitioner seeks review of the decision of the Third District Court of Appeal in DAVIS v. NORTH SHORE HOSPITAL, 452 So2d 937 (Fla. 3rd DCA 1983). The issue raised below is whether section 768.56, Fla. Statute (1981), which provides for an award of reasonable attorney's fees to the prevailing party in a medical malpractice action is constitutional. The decision of the Third District Court of Appeal in DAVIS reversed the ruling of the trial court, and found that Section 768.56, Florida Statutes, is constitutional.

Dr. Kathe initially sought review of the decision of the Third District Court of Appeal pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(ii). As this Court had agreed to review a decision from the Fourth District Court of Appeal, FLORIDA MEDICAL CENTER, etc., et al. v. VON STETINA, 436 So2d 1022 (Fla. 4th DCA 1983), which had also determined that Section 768.56 is constitutional, Petitioner sought to have this appeal consolidated with the VON STETINA appeal or, in the alternative, to stay the jurisdictional briefing schedule in this case pending a decision in VON STETINA. This Court stayed the subject case pending disposition of VON STETINA.

On May 8, 1985, Respondent moved to vacate the stay of proceedings entered by this Court and for summary denial of the review sought in this appeal. The basis for Respondent's motion was the decision of this Court in FLORIDA PATIENT'S COMPENSATION FUND v. ROWE, Supreme Court of Florida case number 64,459, opinion

decided May 2, 1985, (10 FLW 249), which Respondent maintained approved the decision of the Third District in DAVIS v. NORTH SHORE HOSPITAL , 452 So2d 937 (Fla. 3rd DCA 1983).

Dr. Kathe replied to Respondent's Motion by agreeing that the stay should be vacated; nevertheless, Petitioner asked this Court not to summarily deny review. Petitioner maintained that review would be appropriate in this case because of this Court's decisions in YOUNG v. ALTENHAUS, Supreme Court of Florida case number 64,504 and 64,589 opinion decided May 2, 1982, (10 FLW 252), and the companion consolidated case of MATHEWS v. POHLMAN.

In his response, Dr. Kathe pointed out that the YOUNG decision held that although Section 768.56, Florida Statutes, is not unconstitutional, it cannot be constitutionally applied to causes of action accruing prior to July 1, 1980. In this instance, Petitioner maintains that Respondent's cause of action accrued prior to July 1, 1980. Thus, in light of this Court's decision in YOUNG and MATHEWS, Section 768.56 cannot be constitutionally applied in this cause. Petitioner therefore suggested that this Court either enter an order directing the parties to complete jurisdictional briefs or briefs on the merits, or remand this cause to the trial court for a determination as to the date of accrual of Respondent's cause of action.

On May 31, 1985, this Court entered an order granting Respondent's motion to vacate the stay and denying Respondent's motion for summary denial of review. In compliance with the Court's order, Petitioner is filing his brief on jurisdiction.

SUMMARY OF ARGUMENT

Dr. Kathe respectfully requests this Court to exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal in DAVIS v. NORTH SHORE HOSPITAL, 452 So2d 937, (Fla. 3rd DCA 1983). This Court has jurisdiction pursuant to Rule 9.030(a)(2)(A)(ii) Fla.R.App.P. and Art. 5, Section 3(b)(3) Fla. Const., as the DAVIS decision expressly declared valid a state statute, Section 768.56, Florida Statutes. Conflict jurisdiction also exists as the DAVIS Decision conflicts with this Court's decision in YOUNG v. ALTENHAUS, Supreme Court of Florida, case number 64,459 10 FLW 252 (opinion decided May 2, 1985) and its companion consolidated case of MATHEWS V. POHLMAN.

Review is necessary in this case as Respondent's cause of action accrued prior to the effective date of Section 768.56, Florida Statutes. This Court's recent YOUNG decision held that Section 768.56 cannot be constitutionally applied to causes of action accruing prior to the effective date of that statute, July 1, 1980. If the decision of the Third District Court of Appeal in DAVIS is allowed to stand without review, Section 768.56 will be applied unconstitutionally to this case.

POINT ON APPEAL

WHETHER THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION IN THIS MATTER WHERE THE THIRD DISTRICT COURT OF APPEAL EXPRESSLY RULED UPON THE VALIDITY OF SECTION 768.56, FLORIDA STATUTES, BUT IMPROPERLY APPLIED THAT STATUTE TO A CAUSE OF ACTION WHICH ACCRUED PRIOR TO JULY 1, 1980, AND WHERE THE THIRD DISTRICT'S DECISION AFFIRMING THE CONSTITUTIONAL VALIDITY OF SECTION 768.56 WAS IN PART BASED UPON THE THIRD DISTRICT'S PRIOR DECISION IN YOUNG v. ALTENHAUS, 448 So2d 1039 (Fla. 3rd DCA 1983), A DECISION WHICH WAS RECENTLY QUASHED BY THIS COURT.

ARGUMENT

THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION IN THIS MATTER WHERE THE THIRD DISTRICT COURT OF APPEAL EXPRESSLY RULED UPON THE VALIDITY OF SECTION 768.56, FLORIDA STATUTES, BUT IMPROPERLY APPLIED THAT STATUTE TO A CAUSE OF ACTION WHICH ACCRUED PRIOR TO JULY 1, 1980, AND WHERE THE THIRD DISTRICT'S DECISION AFFIRMING THE CONSTITUTIONAL VALIDITY OF SECTION 768.56 WAS IN PART BASED UPON THE THIRD DISTRICT'S PRIOR DECISION IN YOUNG v. ALTENHAUS, 448 So2d 1039 (Fla. 3rd DCA 1983), A DECISION WHICH WAS RECENTLY QUASHED BY THIS COURT.

Petitioner respectfully requests that this Court exercise its discretionary jurisdiction and grant certiorari to review the decision of the Third District Court of Appeal in DAVIS v. NORTH SHORE HOSPITAL, 452 So2d 937 (Fla. 3rd DCA 1983). Notice to invoke discretionary jurisdiction was initially filed solely on the authority of Rule 9.030(a)(2)(A)(ii), Fla. R.App.P., and Art. 5, Section 3(b)(3) Fla. Const., as the DAVIS decision expressly declared valid a state statute, Section 768.56, Florida Statutes.

An additional basis for exercise of this Court's discretionary jurisdiction has now arisen. This Court's decisions in YOUNG v. ALTENHAUS, Supreme Court of Florida case numbers 64,504 and 64, 589, opinion decided May 2, 1982, (10 FLW 252), and its companion consolidated case, MATHEWS v. POLHMAN, have created a conflict with the decision of the Third District Court of Appeal in this matter. For this reason, this Court may now exercise

its jurisdiction to review the DAVIS decision pursuant to the added authority of Rule 9.030(a)(2)(A)(iv), Fla. R.App.P. and Art. 5, Section 3(b)(3), Fla. Const.

This Court has jurisdiction pursuant to Rule 9.030(a)(2)(A)(ii), Fla. R. App. P., as the Third District Court of Appeal in DAVIS specifically ruled upon the constitutional validity of Section 768.56, Florida Statutes, which provides for an award of reasonable attorney's fees to the prevailing party in a medical malpractice action. Rule 9.030(a)(2)(A)(ii), Fla. R. App. P., authorizes this Court to review decisions of district courts of appeal which expressly declare valid a state statute.

This Court may also exercise its jurisdiction to review the DAVIS decision pursuant to the authority of Rule 9.030(a)(2)(A)(iv), Fla. R. App. P., which authorizes the Court to review decisions of the district courts of appeal which expressly and directly conflict with the decision of another district court of appeal or this Court on the same question of law. In this instance, the Third District Court of Appeal ruled that Section 768.56 "meets constitutional muster," citing as authority FLORIDA MEDICAL CENTER INC. v. VON STETINA, 436 So2d 1022 (Fla. 4th DCA 1983) and YOUNG v. ALTENHAUS, 448 So2d 1039 (Fla. 3rd DCA 1983). A conflict has now arisen because of this Court's recent decision in YOUNG and MATHEWS. Although this Court upheld the constitutionality of Section 768.56 in YOUNG, it ruled that the statute cannot be constitutionally applied to causes of actions which accrued prior to July 1, 1980.

This Court need look no further than its opinion in YOUNG

and MATHEWS and the opinion of the Third District Court of Appeal in DAVIS to see that a conflict exists. The Third District Court of Appeal in DAVIS made a blanket ruling that Section 768.56 is constitutional, without limiting its ruling to cases where the statute is applied to causes of action accruing after July 1, 1980. Thus, the DAVIS case essentially holds that the statute is constitutional as to all causes of action, regardless of date of accrual. In contrast, this Court's decision in YOUNG and MATHEWS limited application of the statute to those causes of action accruing subsequent to July 1, 1980; it cannot be "constitutionally applied" to those causes of action accruing prior to July 1, 1980. YOUNG, supra. Conflict thus exists.

Further grounds for exercise of conflict jurisdiction exist as the relevant portion of one of the authorities which was relied upon by the Third District Court of Appeal in DAVIS, YOUNG v. ALTENHAUS, has been quashed by this Court. Where a decision of a district court of appeal cites as controlling authority another district court decision that this Court has reversed or quashed, prima facie grounds exist for an exercise of conflict jurisdiction. See JOLLIE v. STATE, 405 So2d 418 (Fla. 1981).

This Court should exercise its discretionary jurisdiction to review the DAVIS decision. The record clearly reflects that Respondent's cause of action accrued prior to July 1, 1980. Respondent's lawsuit was based upon her contention that a surgical sponge had been left in her body during surgery. It was alleged that the sponge was left in during an operation which was performed on January 2, 1980, and that a second procedure was required

on January 3, 1980 to remove the sponge. (Appendix A6). Thus, Section 768.56, Florida Statute cannot be constitutionally applied in this instance. Petitioner would therefore suggest that this Court should exercise its jurisdiction in this matter, and require the parties to submit briefs on the merits.

If this Court feels that the record is insufficient to clearly reflect the date of accrual of Respondent's cause of action, it may remand the case for a determination as to the date of accrual of the cause of action, pursuant to the authority of this Court's decision in FLORIDA PATIENT COMPENSATION FUND v. ROWE, Supreme Court of Florida case number 64,459, opinion decided May 2, 1985. Thus, if there is any remaining question on that point, this should not prevent the Court from exercising jurisdiction over this cause. While Dr. Kathe does not believe that there can be any question concerning the date of accrual of Respondent's cause of action, the option to remand is available. This Court should exercise jurisdiction over these consolidated cases.

CONCLUSION

For all of the above-captioned reasons, Petitioner John H. Kathe, M.D., would respectfully suggest that this Court should exercise jurisdiction in this cause. Accordingly, the Court should enter an order requiring the parties to submit briefs on the merits.

Respectfully submitted,

ROBERT M. KLEIN
DEBRA J. SNOW

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 13th day of June, 1985, to the attached list of addresses.

STEPHENS, LYNN, CHERNAY
& KLEIN
Attorneys for Petitioner
Kathe, M.D.
One Biscayne Tower; Suite 2400
Miami, Florida 33131
(305) 358-2000

BY: Debra J. Snow
ROBERT M. KLEIN
DEBRA J. SNOW

DAVIS v. KATHE

SERVICE LIST

JOEL R. WOLPE, ESQ.
SUITE 607, BISCAYNE BLDG.
19 WEST FLAGLER STREET
MIAMI, FLORIDA
ATTYS FOR NORTH SHORE HOSPITAL

PHILIP FREIDIN, ESQ.
SUITE 2500
44 WEST FLAGLER STREET
MIAMI, FLORIDA 33130
ATTYS FOR PLAINTIFF

PAMELA LUTTON, ESQ.
ASSISTANT ATTORNEY GENERAL
SUITE 1502, THE CAPITOL
TALLAHASSEE, FLORIDA 32301

JOEL EATON, ESQ.
SUITE 1201
25 WEST FLAGLER STREET
MIAMI, FLORIDA 33130
ATTYS FOR PLAINTIFF

JOHN G. WOOD, JR., ESQ.
P.O. BOX 1676
SARASOTA, FLORIDA 33578
ATTYS FOR FPCF

STEVEN R. BERGER, ESQ.
SUITE B-8
8525 S.W. 92nd STREET
MIAMI, FLORIDA 33156
ATTYS FOR APPELLEE CANTOR