

IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO.

Lower Court Case No.: 98-13485 (CACE 12)

KHURSHID KHAN, M.D., EMSA
SOUTH BROWARD, INC., and SOUTH
BROWARD HOSPITAL DISTRICT d/b/a
MEMORIAL REGIONAL HOSPITAL

Petitioners,

v.

RAYMOND PFEIFLER and CYNTHIA
PFEIFLER, his wife,

Respondents.

**PETITION FOR WRIT OF PROHIBITION
AND FOR RELIEF UNDER THE COURT'S "ALL WRITS" POWER
OF PETITIONERS KHURSHID KHAN, M.D.,
EMSA SOUTH BROWARD, INC., and SOUTH BROWARD HOSPITAL
DISTRICT d/b/a MEMORIAL REGIONAL HOSPITAL**

**An Original Proceeding from the Circuit Court of the
Seventeenth Judicial Circuit in and for Broward County, Florida**

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CERTIFICATE OF TYPE SIZE AND STYLE

Pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), Petitioners Khurshid Khan, M.D., EMSA South Broward, Inc., and South Broward Hospital District d/b/a Memorial Regional Hospital, certify that the type size and style of this brief is 14 point Times New Roman.

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PREFACE

This Petition for Writ of Prohibition is submitted on behalf of Petitioners Khurshid Khan, M.D., EMSA South Broward, Inc., and South Broward Hospital District d/b/a Memorial Regional Hospital.

Petitioners Khurshid Khan, M.D., EMSA South Broward, Inc., and South Broward Hospital District d/b/a Memorial Regional Hospital will be referred to as “SBHD.”

Respondent the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida will be referred to as the “Seventeenth Circuit.”

The Appendix will be cited as “A__.”

BASIS FOR INVOKING JURISDICTION

The Court has exclusive jurisdiction of this matter pursuant to Article 5, section 3(b)(7), Florida Constitution, and Florida Rule of Appellate Procedure 9.030(a)(3).
See Wild v. Dozier, 670 So. 2d 16, 18 (Fla. 1996).

NATURE OF RELIEF SOUGHT

SBHD seeks issuance of a writ of prohibition prohibiting the Seventeenth Circuit from assigning senior judges in Broward County, Florida to preside over “long trial” medical malpractice and other “complex litigation” cases to the exclusion of all other cases.

FACTS UPON WHICH PETITIONER RELIES

SBHD adopts the facts stated by Petitioner Physicians Healthcare Plans, Inc. (“PHP”) in its Petition for Writ of Prohibition, a copy of which is included in SBHD’s Appendix (A1), and supplements those facts as follows.

In July 2000, the Seventeenth Circuit trial judge assigned to this 1998 medical malpractice case issued an Order Setting Trial and Pretrial Procedures (A2) directing that the case be set on the Senior Judges’ Docket and requesting the Civil Division Administrative Judge to assign the trial of the case to a senior judge (A3). PHP and SBHD objected to the assignment as a violation both of this Court’s guidelines and of the Florida Constitution, and PHP thereafter filed an Amended Motion to Vacate Order Setting Trial and Pretrial Procedures on the basis of the Senior Judge assignment (“Motion”) (A4-A7).

In November 2000, after consideration, the Chief Judge denied PHP’s Motion but invited PHP and SBHD to petition this Court for relief (A8). In part, the Chief Judge’s decision was based on Administrative Order No. I-92-J-1, which in turn relies on this Court’s June 4, 1991 Memorandum regarding senior judge assignments (A9).

In February of 2001, at the Senior Judges’ Docket calendar call, the Administrative Judge explained that the Senior Judges’ Docket was reserved for complex civil cases projected to take more than two-and-one-half weeks to try,¹ that each of the 14 civil judges was required to submit cases for the docket by a certain

¹ Some take up to six months (A10-3).

cutoff date, and that the 2001 docket contained 34 cases (A3; A10-2). The Administrative Judge also explained that the Docket was called only once every nine or ten months and that the cases not reached on the prior docket roll to the top of the next docket (A10-5). An attorney can virtually insure placement on the Senior Judges' Docket by simply noticing the case for longer than a two-and-one-half week trial (A10-6-7).

This case is presently set on the Senior Judges' Docket to begin January 7, 2002. The calendar call is scheduled for October 26, 2001 (A11).

ARGUMENT

I. BROWARD COUNTY’S PRESENT USE OF RETIRED JUDGES VIOLATES PETITIONER’S RIGHT OF ACCESS TO THE COURTS.

A. The standard of review is de novo.

This Court has plenary control over the state’s court system and may issue writs of prohibition or exercise its “all writs” jurisdiction to insure that the court system is properly administered. *See Wild*, 672 So. 2d at 18.

B. Broward County’s current use of senior judges places unconstitutional restraints on litigants’ access to courts.

Several years ago, in advocating for mandatory pro bono requirements, former Florida Supreme Court Justice Gerald Kogan stated that a citizen’s fundamental right of “access to courts” means a meaningful access to the state’s legal process.” *In re Amendments to Rules Regulating The Florida Bar 1-3.1(a) and Rules of Judicial Admin. 2.065 (Legal Aid)*, 598 So. 2d 41, 58 (Fla. 1992) (Kogan, J., concurring in part, dissenting in part). According to Justice Kogan, the constitutional mandate of Article 1, section 21 of the Florida Constitution imposes an obligation on the courts to “ensure that access is genuinely meaningful in today’s world.” *Id.*

Although the right of access to the courts is firmly established under Florida law, *see e.g., In re Amendments*, 598 So. 2d at 42; *Sotto v. Wainwright*, 601 F.2d 184, 191 (5th Cir. 1979), and the Florida Constitution requires that such access be

provided without delay, few Florida cases have interpreted the right of access in the context of delay, and the parameters of the entitlement are unclear.

Despite the paucity of controlling precedent or persuasive comment, the purpose of this Petition is to show that the current use of “senior judges” by Broward County, and the resulting inordinate delay in the disposition of “long medical malpractice and other complex cases, places unconstitutional restraints on litigants’ access to courts in this County.

1. Substantive due process includes the right of access to courts.

Substantive due process is the fundamental constitutional legal theory upon which the right of access to courts is based. The doctrine of substantive due process holds that the Due Process Clause of the United States Constitution not only requires “due process,” that is, basic procedural rights, but that it also protects substantive rights. *See Dept. of Law Enforcement v. Real Property*, 588 So. 2d 957, 960 (Fla. 1991) (discussing due process under the U.S. and Florida Constitutions).

The procedural rights inherent in due process are special rights that dictate how the government can lawfully go about taking away a person’s freedom or property or life, when the law otherwise gives the government the substantive power to do so. *See State v. Glosson*, 462 So. 2d 1082, 1084-85 (Fla. 1985) (holding that a person’s liberty interest cannot be infringed by the state). The Due Process Clause of the Fourteenth Amendment says that no state shall deprive any person of life, liberty, or property without due process of law. *See U.S. Const. amend. XIV, § 1.* That is to say, the

state must use fair and just procedures whenever it is going to take away a person's life, freedom, or possessions. *State Dept. of Law Enforcement*, 588 So. 2d at 960. On the other hand, the substantive rights inherent in the analysis are those general rights that reserve to the individual the power to possess or to do certain things, despite the government's desire to the contrary. These are rights like freedom of speech and religion.

Substantive due process, therefore, has developed a broad interpretation. *See, e.g., State Dept. of Law Enforcement*, 588 So. 2d at 960; *Sotto*, 601 F.2d at 190. Substantive due process holds that the Due Process Clause of the Fifth and Fourteenth Amendments guarantees not only that fair and just procedures be used whenever the government is taking away a person's life, freedom, or possessions, but that the clauses also guarantee that a person's life, freedom, or possessions cannot be taken without appropriate government justification, regardless of the procedures used. *See generally Roe v. Wade* 410 U.S. 113, 155 (1973) (limiting 'fundamental rights' may be justified only by a compelling state interest); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake).

Substantive due process rights are not limited to those liberties specifically enumerated in the Bill of Rights. *Sotto*, 601 F.2d at 190 (citing *St. Anne v. Palisi*, 495 F.2d 423, 425 (5th Cir. 1974)). Instead, the Due Process Clause embodies a "conception of fundamental justice." *Id.* at 190 (citing *Shields v. Beto*, 370 F.2d 1003,

1004 (5th Cir. 1967)). According to that conception, the Due Process Clause protects personal immunities that are “implicit in the concept of ordered liberty,” and implicit in the concept of ordered liberty is the right of access to the courts. *Id.* (citing *NAACP v. Button*, 371 U.S. 415 (1963)).

2. Florida’s Constitution protects a litigants’ access to courts.

As with many other state constitutions,² Florida’s Constitution contains a right to free access to courts. Fla. Const. art. I, § 21. Historically, these provisions were intended as constitutional safeguards of an individual’s right to legal remedy.³ Florida’s constitutional right to free access to courts guarantees every person the right to free access on claims of redress of injuries free of unreasonable burdens and restrictions. *See G.B.B. Investments, Inc. v. Hinterkopf*, 343 So. 2d 899, 900-01 (Fla. 3d DCA 1977). This right has its “roots deep in Anglo-American legal history dating back to the Magna Charta.” *Id.* (citing *Flood v. State ex rel. Homeland, Co.*, 117 So. 385 (Fla. 1928)). In Florida, access to courts was first embraced by the 1838 Constitution and has been retained in virtually identical language throughout every revision since then. *Id.*

Although Florida’s access to court provision is not a replication of the U.S. Constitution, this Court has used federal due process and equal protection terminology

² David Shuman, *The Right To A Remedy*, 65 TEMP. L. REV. 1197, 1201 n.25 (1992).

³ *See id.* at 1201-02.

in construing the rules and tests that apply in cases challenging legislative abrogation of common law remedies. *Kluger v. White*, 281 So.2d 1 (Fla. 1973). In *Kluger*, for instance, the Court adopted a three-part test to analyze the plaintiff's challenge to a Florida statute because it eliminated the plaintiff's right to sue for minor property damage to her automobile. *Id.* at 2-4. First, if the legislatively created cause of action postdates the State's constitution, the legislature may freely alter it. *Id.* Second, if the right limited or abolished by the Legislature predates the State's constitution or was created by the common law, the Legislature must provide an alternative remedy. *Id.* Third, if the challenged statute fails to meet this alternative remedy requirement, a court must engage in a strict scrutiny analysis, requiring the Legislature to demonstrate that "an overpowering public necessity" exists for eliminating the right and that the public need cannot be met by any other means. *Id.*

3. Docket delay is a restraint on access to courts.

Courts and commentators agree that civil docket delay is a serious problem. *See Davis v. Fruit Co.*, 402 F.2d 328, 330-32 (2d Cir. 1968). Delays in civil dockets "often represent suffering and financial loss which a humane society should not tolerate." *Id.* at 330-01 (quoting former U.S. Chief Justice Earl Warren, Address at

the American Law Institute (May 21, 1968)).⁴ Former Florida Justice Raymond Ehrlich has noted:

[A]s long as our state is growing with new people, new businesses and new relationships, the teachings of history leads me to the belief that there will always be a hiatus between the manpower and material needs of the judiciary and what the legislative branch of government is willing to recognize and provide.

The Florida Bar Re: Amendment to Rules of Judicial Admin. Rule 2.050 (Time Standards), 493 So.2d 423, 426 (Fla. 1986) (Ehrlich, J., dissenting). In addressing the increasing problem of docket delay, the former justice reasoned that as people become “increasingly cognizant of and assertive of their rights under the law,” there will be continued judicial delays due to the increasing lack of judges. *Id.* at 428.

While Justice Ehrlich’s assessment is true—that the basic rights of individuals for which there are remedies, and citizens’ awareness of these rights and readiness to seek recourse in the courts have increased greatly—the pressures resulting from this burgeoning litigation create concerns over time and money. That is, the time and expense it takes to prepare for trial, try the matter, and appeal can be a disincentive to litigants—justice delayed is justice denied.

⁴ See also Edward D. Cavanagh, *The Civil Justice Reform Act of 1990 and the 1993 Amendments to the Federal Rules of Civil Procedure: Can Systemic Ills Afflicting the Federal Courts Be Remedied by Local Rules?* 67 ST. JOHN’S L. REV. 721 (1993).

Notwithstanding the Florida Constitution's mandate that the courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay, the resolution of civil disputes increasingly fails to reflect these objectives. Disposition of civil cases is not without delay and, consequently, justice is threatened. The notion that justice delayed is justice denied has repeatedly been recognized and confirmed.⁵ *Davis*, 402 F.2d at 330. Delay obstructs justice by reducing, and sometimes eliminating, the value of the outcome of a civil suit, by increasing clients' cost of litigation, and by threatening the validity of the process. Former Chief Justice Warren warned that regardless of the cause of delay, it "reduces the chance that truth will be found at the trial since the memory of witnesses invariably diminishes with time as does their availability." *Id.* This is true for defendant and plaintiff alike.

Delay may also compromise justice by eliminating the option of judicial adjudication altogether. When parties are unable to obtain timely relief, the expense of continuing to litigate may force them to accept inequitable settlements. To the extent that delay and expense produce settlements, they can do so unfairly. Some plaintiffs are "being coerced by the cost of justice into accepting far less than their due, while some defendants are yielding to opportunistic litigants who unabashedly

⁵ See e.g., Paul L. Friedman, *Speeding Up Justice at the District Court*, *Legal Times*, April 19, 1993 at 30-31 (identifying tactics that cause delay).

wield the expenses of litigation as weapons to extort undeserved settlements.”⁶ Finally, beyond the effects on actual parties, long delays have a deterrent effect on potential litigants: “High transaction costs of delay and direct expense are the enemies of justice; when these costs become high enough, people who have been injured or had their rights violated may despair of vindication, choosing instead to “lump it.”⁷ Delay thus undermines justice by effectively denying access to the judicial mechanism of dispute resolution.⁸

4. Broward County’s use of senior judges violates the Court’s guidelines, violates the Florida Constitution, and compounds docket delay for “long trial” cases to the exclusion of others.

⁶ Patrick E. Longan, *The Shot Clock Comes to Trial: Time Limits for Federal Trials*, 35 ARIZ. L. REV. 663, at 668 (quoting Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in Federal Courts*, 59 FORDHAM L. REV. 1, 3 (1990)).

⁷ *Id.* at 688 (quoting Kaufman, *Judicial Reform in the Next Century*, 29 STAN. L. REV. 1, 2 (1976)). Longan also indicates that Derek Bok made the same point almost twenty years ago. Derek Bok, *The President’s Report, 1981-82* (Harvard University 1983) (“[M]any . . . who are in the system are often compelled by the high costs and delay to settle early for less than satisfactory amounts.”).

⁸ Eric Herman, *Putting the Rocket in the Docket: Discovery Abuses Hike Litigation Costs, Burden Courts*, A.B.A. J., Oct. 1990 at 32 (quoting A.B.A. panelist Francis McGovern of the University of Alabama School of Law, who asserted that delay and expense of litigation create a social cost by reducing access to courts).

In recognition of the problems of delayed justice, over the years this Court has approved the use of senior judges and has articulated procedures that all circuit courts must follow in assigning senior judges. For the years 1999 and 2000, for instance, the procedures direct that assignment of senior judges to cases of a complex nature that may remain in the system for a lengthy period is discouraged:

The assignment of senior judges to cases, particularly those of a complex nature, which may remain in the system for a lengthy period of time and for which it is difficult to estimate the total number of hearing or trial days that may ultimately be required is discouraged.

The term “complex,” as used by the Court, is the same term applied by the Seventeenth Circuit to cases that are noticed for trials of two-and-one-half weeks or longer (A3). *See also* Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849, 855 (1998) (defining “complex” as long, including voluminous, or involving complicated legal standards); ALI, *Complex Litigation: Statutory Recommendations and Analysis with Reporter’s Study: A Model System for State-to-State Transfer and Consolidation*, 3-4 (1994) (defining complexity as multi-district and multiparty litigation). Under any definition, there is no doubt that cases such as medical malpractice litigation can be complex. The Court’s use of the word “discouraged”⁹ is clearly designed to suggest that lower courts avoid the assignment of senior judges to try complex litigation.

⁹ Webster defines it as an “attempt to repress or prevent; to dissuade; deterring or dissuading from undertaken.” *The Living Webster Encyclopedic Dictionary of the English Language* 285 (1977).

In Broward County, in contrast to the Court's direction, senior judges are routinely given complex cases (A10-2). In fact, the senior docket is considered Broward's complex litigation division. *Id.* When any circuit judge determines that an assigned meets the criteria established by this Court, the circuit judge may request that the case be transferred to the Senior Judges' Docket (A3). As a result, numerous medical malpractice cases are placed before senior judges because these cases generally involve numerous defendants and issues and therefore generally take longer than two-and-one-half weeks to try (A10-4). In April of 2001, in fact, eight of the cases on the Senior Judges' Docket were from a single plaintiff's medical malpractice law firm (A12-30). The routine nature of assigning complex medical malpractice cases to senior judges clearly violates the spirit of this Court's senior judge procedures.

Additionally, over the past several years this Court has regularly directed that senior judges are to be used on a temporary basis. *See In re Certification of the Need For Additional Judges*, 688 So.2d 321, 325 (Fla. 1997); *In re Certification of the Need For Additional Judges*, 651 So.2d 92, 94 (Fla. 1995). Yet in Broward County, circuit judges recognize that the available senior judges sit as the court's "complex litigation division" (A10-2). This practice entirely ignores the spirit of any definition of the phrase "temporary assignment."

Although the Court's Procedures for Assignment do not technically constitute a rule, they should be given the same deference. Where the language of such a direction is clear and unambiguous, as the Procedures for Assignment are here, it

should be given its plain and obvious meaning. *See, e.g., Winter v. Playa del Sol, Inc.*, 353 So. 2d 598, 599 (Fla. 4th DCA 1977) (applying the interpretation principle in the context of a statute). The Seventeenth Circuit's practice routinely violates the Court's direction.

The result of the violation is apparent in cases such as this 1998 case, which is on a January 2002 calendar after not having been reached in 2001 (A11; A13). For this case, at least, and for many others now pending in Broward County, the Seventeenth Circuit's use of senior judges results in the precise delay the Senior Judges' Docket is designed to prevent and thereby violates the Florida Constitution's access to court provision.

5. Broward County's use of senior judges violates the Court's time standards for civil litigation.

The 1986 time standards adopted by the Court for disposing of cases in trial court establish an 18-month filing-to-final disposition time frame for civil cases. *See Amendment*, 493 So.2d at 426; Fla. R. Jud. Admin. 2.085(d)(1)(B). The Opinion adopting the time standards explained that the standards represented an initial step in making the courts more efficient.¹⁰ *Id.* at 425. More specifically, rule 2.085 was a recognized step in addressing the issue of court delay. *Id.* In justifying the rule, the

¹⁰ *See* Richard W. Moore, *Time Standards, Changing The Role of Florida Judges by Judicial Fiat*, 15 FLA. ST. U.L. REV. 67, 70 (Spring 1987).

Court noted that “unwarranted delay” affects important and professional decisions of litigants. *Id.* at 423.

While the Opinions cast the time standards as goals rather than absolute requirements, complex medical malpractice cases in Broward County are placed in a procedural context designed to take much longer than is warranted under the standards. For example, during a recent status conference in Broward, the court and attorneys discussed setting a case for trial that had been on the docket for over ten years (A12-7, 59). As a result of the lengthy delay, a key defendant physician died (A12-18). This required adding the physician’s estate as a defendant (A12-18). While in that case it appears that the defendant’s death will not further delay the trial date, addition of a new defendant and new counsel only adds to the mounting litigation cost associated with the delay—delay that rule 2.085 seeks to prevent.

6. Broward County’s use of senior judges violates the intent underlying the Medical Malpractice Reform Act.

Beginning in 1975, the Florida legislature enacted the Medical Malpractice Reform Act. *See* ch. 766, Fla. Stat. (1997). Like many other states during the 1970s and 1980s, the legislation sought to address the “medical malpractice crisis”—a national rise in malpractice insurance premiums that was attributed to medical malpractice damage awards.¹¹ This crisis consists of two premises: that juries were

¹¹ § 766.201(a) states that medical malpractice liability insurance premiums have increased dramatically in recent years, resulting in increased medical costs for most

awarding excessive malpractice damages more frequently than ever before and that these awards caused a rise in medical malpractice insurance premiums. In an effort to maintain economic stability, protect the people’s right to affordable insurance coverage, improve the availability and affordability of commercial liability insurance, and decrease frivolous malpractice claims, the legislature passed the Act and thus drastically changed the procedural and substantive aspects of a medical malpractice claim. §§ 766.207, 766.209, Fla. Stat. (1997).

Previously, this Court concluded the legislature carved out medical malpractice for different treatment from other tort claims. *University of Miami v. Echarte*, 618 So.2d 189, 195 (Fla. 1993). In *Echarte*, this court decided the constitutionality of several provisions in the Medical Malpractice Act. The parents of a minor child who suffered a personal injury filed suit for medical malpractice. The University requested that the family submit their damages to a medical negligence arbitration panel pursuant to § 766.207(2), Fla. Stat. (1988). *Id.* The issue was whether sections 766.207 and .209, Florida Statutes (1988), which cap non-economic damages in medical malpractice claims when a party requests arbitration, were unconstitutional. This Court held they were not unconstitutional. *Id.* at 190. Moreover, the Court stated that the “unique facts surrounding malpractice required the legislature to tailor a different solution to solve the [medical malpractice] crisis.” *Id.* at 195.

patients and functional unavailability of malpractice insurance for some physicians.

The length of time Broward County's senior "complex litigation division" takes in getting cases to trial violates the intent behind the legislature's enactment of the Medical Malpractice Act. First, the legislative findings and intent clearly states that one of the purposes of the Act was to reduce litigation costs by reducing delays. § 766.201(1)(d), Fla. Stat. (1997). Multi-year delays, and in at least one instance, a ten-year delay, violate a principal tenet underlying the Act (A12-7, 59). Second, the delays are adding significantly to the cost of litigation. The statute makes it clear that a primary purpose of the Act is to reduce costs. § 766.201(1)(c) (d), Fla. Stat. (1997). Cases costing hundreds of thousands of dollars to litigate because of lengthy docket delay violate the underlying intent of the legislature to reduce medical malpractice cost (A12-50).

II. SENIOR JUDGES SHOULD BE ASSIGNED TO ALL AREAS OF CIVIL LITIGATION.

It is widely accepted that a judge may retire from regular active duty but retain the office and remain available for assignment to judicial duties. 28 USCA § 371(b); *see also In re Code of Judicial Conduct*, 643 So. 2d 1037, 1062 (Fla. 1997). As is true in other states, Florida relies on senior judges to assist courts with the ever-expanding backlog of cases. And this Court recognized the necessity of senior judges. But in Broward County, senior judges are used almost exclusively on complex litigation, which leads to the problems discussed above.

The inordinate delay in disposition of complex medical malpractice cases, and the subsequent increase in litigation costs places unconstitutional restraints on access to court. Therefore, Broward County should not use senior judges exclusively on complex medical malpractice litigation, but should use the judges across the board by random selection to help reduce docket delay in all civil trials.

CONCLUSION

For the foregoing reasons, Petitioners Khurshid Khan, M.D., EMSA South Broward, Inc., and South Broward Hospital District d/b/a Memorial Regional Hospital respectfully request that the Court issue a writ of prohibition to the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, prohibiting further use of senior judges in a manner that denies access to courts to PetitionerS and others similarly situated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the above and foregoing was furnished by U.S. Mail to the persons on the attached Service List, this ___ day of September, 2001.

Respectfully submitted,

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