FILED

IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,237

OCT 12 1983

SID J. WHITE
CLERK SUPREME COURT
By _____
Chief Deputy Clerk

FLORIDA PATIENT'S COMPENSATION FUND and FLORIDA MEDICAL CENTER, INC., d/b/a FLORIDA MEDICAL CENTER HOSPITAL,

Appellants,

vs.

SUSAN ANN VON STETINA, by and through her parents, legal guardians and next friends, MARY VON STETINA and LEO VON STETINA,

Appellees.
_____/

BRIEF OF AMICUS CURIAE

ON APPEAL FROM THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT

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INTRODUCTION

This brief is submitted by Amicus Curiae, Florida Medical Malpractice Joint Underwriting Association (FMMJUA) supporting the position of Appellants, Florida Patient's Compensation Fund (Fund), et al. Amicus here addresses the issue of the constitutionality and the reasonableness of the amount of attorney's fees awarded in this case pursuant to Florida's medical malpractice attorney's fees statute, section 768.56, Florida Statutes (1981).

The FMMJUA is a statutory association consisting of all Florida liability and malpractice insurers, and medical malpractice self-insurers. The association membership is mandatory; it provides an involuntary insurance pool for primary liability coverage of health-care providers who would be unable to obtain medical malpractice insurance in a voluntary market. It is the only medical malpractice insurance in Florida whose availability is guaranteed. The association was created in 1975 in response to a medical malpractice insurance crisis which the legislature perceived. See ch. 75-9, §14, Laws of Fla.

The FMMJUA, although established under a distinct statutory section, was created by the same general legislative enactment which created the Fund. Both associations were designed to provide accessibility in a highly restricted medical malpractice

insurance market. See generally §627.351(4), Fla. Stat. (Supp. 1982). FMMJUA's operation is complementary to that of the Fund, providing primary insurance coverage to health-care providers who would otherwise be uninsurable.

The operation of the FMMJUA is controlled by a statutory board of governors which supervises the plan of coverage, which must be based on a mandated rate structure. See §627.351(4)(d). The plan provides for one or more insurers to administer policy service. The present policy servicing company is St. Paul Insurance Company. Over 2,000 health-care providers and some 50 hospitals are presently insured through the program.

The FMMJUA has a special interest in the outcome of this case. The public purpose of the association is threatened by the district court's holding. The association cannot fix structured rates as mandated by statute because of possible payment of attorney's fees based on totally unpredictable factors. The attorney's fees awarded here were fixed by conjecture and guesswork, not based on actual time expended, producing an inherently unpredictable award. As a result, the FMMJUA must increase fees to health-care providers to account for this unforeseeable amount. The public purpose of providing accessible medical malpractice insurance is thwarted because the insurance becomes less afforable due

to enormous attorney's fees awards, as exemplified in this case.

Further, the FMMJUA is unable to evaluate the actual settlement value of a claim since widely fluctuating attorney's fees must be a part of the settlement figure, handicapping realistic efforts at settlement. An objective, adjusted hourly rate paid for attorney work based on actual effort would remedy this untenable situation.

STATEMENT OF THE CASE AND FACTS

After trial, a judgement of $12.47 million was awarded against Appellant, Florida Medical Center, arising from a claim of medical negligence. Pursuant to the medical malpractice attorney's fees statute, section 768.56, Florida Statutes (1981), appellees then sought recovery of attorney's fees.

The trial court held two hearings on attorney's fees issues. No direct evidence as to the amount of time spent by appellees' (plaintiffs') trial attorney, Sheldon Schlesinger, was presented during either hearing. Both of the appellees' experts at the hearing acknowledged they had no idea as to how much time Mr. Schlesinger spent in the trial of this matter. See Fees Hearing, July 29, 1982 at 90, 132-37. Mr. Schlesinger kept no time records and himself had no idea of his time in this case. Id. at 35,155. At his August 9, 1982 deposition, taken prior to the second fees hearing, Mr. Schlesinger conceded that he had worked on at least six other cases during the one year activity of the Von Stetina case, and that he had not really become deeply involved with this case until about five months before trial. At the second fees hearing, on August 21, 1982, the amount of total defense time involved in this case was documented as 845 hours. Also at that hearing, the appellants' experts set a reasonable attorney's fee

in the case, based on 1,000 hours of time, at between $300,000 and $500,000.

In spite of the lack of direct evidence to establish the amount of time and effort appellees' counsel had expended, and without attempting to reconstruct the time expended, the trial court awarded a fee of $4.4 million, apparently based on an approximate one-third contingency fee.

On appeal, the district court upheld the constitutionality of the malpractice fees statute. The district court, however, gleaning that such a fees awards violated Florida case law, which required an award to be based on quantum meruit and not on a percentage of the judgment, reversed the amount of the trial court's fees award. But instead of making a determination of the approximate hours expended or remanding to the trial court for a reconstruction of the time, the appellate court arbitrarily reduced the fees to $1.5 million, steadfastly refusing to recognize that a determination of the actual time spent was essential to a rational fees award.

SECTION ONE

I

THE DISTRICT COURT ERRED IN AWARDING ATTORNEY'S FEES EXCEEDING QUANTUM MERUIT, FOR SERVICES ACTUALLY PERFORMED, WHICH IS INELUCTABLY TIED TO TIME EXPENDED

The district court refused to connect the $1.5 million attorney's fees award to any approximate determination of time expended, and did not remand to the trial court for a reconstruction of the time involved in the case. Instead, the lower court merely selected an arbitrary amount for the attorney's fees, taking primarily into consideration the amount of the judgment obtained. Because the court failed to articulate an objective standard upon which it based the fees award, the amount awarded is necessarily random and constitutes an abuse of discretion under the statutory scheme of section 768.56.

An award under the medical malpractice attorney's fees statute is unquestionably measured by quantum meruit:

> A court is without power to measure an attorney's fee except on the basis of quantum meruit or a quid pro quo.

Brickell v. DiPietro, 152 Fla. 429, 431, 12 So.782, 783 (1943). In turn, quantum meruit "should pose an amount that public standards will approve for the work done, the time consumed, and the skill required." Id. (emphasis added). The principle in Brickell is that a reasonable attorney's fee must be only for "services actually performed." Insurance Co. of North

America v. Welch, 266 So.2d 164, 167 (Fla. 4th DCA 1972); see also Travlers Insurance Co. v. Davis, 411 F.2d 244, 248 (5th Cir. 1969).

The only objective measurement for service performed is the actual time expended in the case. Florida courts have proclaimed the importance of making this initial determination, noting that the time a lawyer spends on a case "must be given considerable weight because as has often been said in justifying the size of attorneys' fees, 'a lawyer's time is his stock in trade.'" Manatee County v. Harbor Ventures, Inc., 305 So.2d 299, 301 (Fla. 2d DCA 1975) (emphasis added). When a fee produces an effective hourly rate which is noticeable above the community norm, courts are quick to disallow such fees. See Dade County v. Oolite Rock Co., 348 So.2d 902 (Fla. 3d DCA 1977), cert. denied, 358 So.2d 133 (Fla. 1978). The critical determination in Oolite which led to disallowance of the attorney's fees was that the award produced a yield of $469 per hour. Notably, the only case dealing directly with section 768.56 attorney's fees justified the award primarily on the hours expended. Baker v. Varela, 416 So.2d 1190, 1193 (Fla. 1st DCA 1982); see also State, Division of Administration v. Denmark, 356 So.2d 15 (Fla. 4th DCA 1978) (starting with a reasonable hourly rate, court determined attorney's fees were excessive).

Courts of this state have warned attorneys who seek fees under a statutory scheme that keeping accurate time records is critical to support such a fees claim, emphasizing the importance of time spent:

> It should not be considered beneath the dignity of fine lawyers to keep time records if, as is the case under Chapter 440, they aim for someone other than their client to pay the fee. Because of legitimate questions not answered on this record, the fee awarded of more than $100 for every hour claimed cannot be sustained.

Brevard County School Board v. Walter, 396 So.2d 1197, 1198 (Fla. 1st DCA 1981); see also M. Serra Corp. v. Garcia, 426 So.2d 1118 (Fla. 1st DCA 1983). Federal courts have also warned attorneys of the need to keep records of time expended to justify fee allowances:

> We wish to emphasize that any attorney who hopes to obtain an allowance from the court should keep accurate and current records of work done and time spent . . . . There is no excuse for an established law firm to rely on estimates made on the eve of payment and almost entirely unsupported by daily records or for it to expect a court to do so.

In re Hudson & Manhattan Railroad, 339 So.2d 114, 115 (2d Cir. 1964). Time records form a basis for establishing the critical factor of time expended. Whenever an attorney looks to the other side for his fees, some record of time, even a reconstructed one, is justifiably required of the attorney seeking fees as an initial, objective measure for the reasonableness of the overall fee.

Basing a fees award on an initial determination of the time expended also furthers an important social goal of providing a rational justification to the public for attorney's fees awards, a concern voiced by the Florida Supreme Court:

> There is but little analogy between the elements that control the determination of a lawyer's fee and those which determine the compensation of skilled craftsmen in other fields. Lawyers are officers of the court. The court is an instrument of society for the administration of justice. Justice should be administered economically, efficiently, and expeditiously. The attorney's fee is, therefore, a very important factor in the administration of justice, and if it is not determined with proper relation to that fact it results in a species of social malpractice that undermines the confidence of the public in the bench and bar. It does more than that; it brings the court into disrepute and destroys its power to perform adequately the function of its creation.

Baruch v. Giblin, 112 Fla. 59, 164 So.2d 831, 833 (1935). "There is a limit to the amount of attorneys' fees which the public can be expected to accept as reasonable." Universal Underwriters Insurance Co. v. Georgei Enterprises, Inc., 345 So.2d 412, 414 (Fla. 2d DCA 1977). By failing to connect the $1.5 million attorney's fee awarded in this case to the objective criterion of time expended, the district court has failed to meet its obligation of social justification of the fees award. To avoid the award or appearance of "windfall fees", the awarding court must make an objective determination of time expended as a basis for a rational fees award.

The discretion which a trial judge exercises in awarding a reasonable attorney's fee is not unbridled. Cowart v. Gilson, 271 So.2d 821 (Fla. 1st DCA 1973). The fee awarded by the district court in this case is merely a subjective guess at what a reasonable fee should be, because no objective factor of time expended was included. Indeed, the district court indicated it was guessing when it considered, in assessing the fee, "the time that must have been expended." Florida Medical Center v. Von Stetina, _ So.2d _ (Fla. 4th DCA 1983) (emphasis added). Such guesswork is prohibited:

> The reasonableness of the attorney's fee is not the subject of judicial notice, neither is it to be left to local custom, conjecture or guesswork.

Lyle v. Lyle,167 So.2d 256, 257 (Fla. 2d DCA), cert. denied, 172 So.2d 601 (Fla. 1964). Depending on guesswork is particularly unsupportable in light of the policy goals of section 768.56. Guesswork only serves to create more litigation concerning the amount of attorney's fees, directly contrary to the purposes of section 768.56, which aims, in its Preamble, to decrease litigation in the medical malpractice area.

Instead of guessing, the district court in this case should have reconstructed the trial attorney's time from the history of his case involvement, which is adequately shown in his deposition. See Deposition, S. J. Schlesinger, August

9, 1982. Further, the defense testimony at the second fees hearing, showing 845 hours for total defense time, could have been used as a reasonable guideline to the hours expended by plaintiff's attorney, Mr. Schlesinger. Because Mr. Schlesinger worked on six other cases during the one year the Von Stetina case was active, and was only truly involved with the case five months prior to trial, a reasonable approximation of his time would not exceed 1,000 hours. If the district court discovered that it could not make a reasonable approximation from the record of the time expended, remand to the trial court was proper for time reconstruction.

This approach of beginning the setting of reasonable attorney's fees by assessing the time expended has been developed by federal courts. In a quartet of well-reasoned decisions, the second and third circuits moved away from the subjective "laundry-list" of DR 2-106 and towards the objective measurement of attorney's fees based on time expended. See Lindy Brothers Builders, Inc. v. American Radiators & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973) (Lindy I); Lindy II, 540 F.2d 102 (3d Cir. 1976); City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974); (Grinnell I); Grinnell II, 560 F.2d 1093 (2d Cir. 1977). Likewise, the federal fifth circuit has recently asserted that its approach to measuring

reasonable attorney's fees is similar to the objective approach of Lindy I. Cooper Liquor, Inc. v. Adolph Coors Co. 624 F.2d 575, 583 n.15 (5th Cir. 1980).

In Lindy I, the third circuit criticized the trial court's mere listing of factors it considered in setting the attorney's fee because meaningful appellate review was impossible. Moreover, utilization of a list of factors has led directly to the lack of uniformity among decisions awarding attorney's fees, a problem noted by appellees in their brief before the district court. See Brief No. 3 of Appellees, before the Fourth District Court of Appeal, at 18 n.5. This consequent lack of uniformity has also been criticized in the preeminent article on attorney's fees: Berger, Court Awarded Attorneys' Fees: What is "Reasonable"?, 126 U. Pa. L. Rev. 281, 292 (1977). This inconsistency is directly traceable to the use of a list of factors to be considered in setting a fee because one court may emphasize one factor while a second emphasizes another, producing drastically different results in similar cases. See Furtado v. Bishop, 635 F.2d 915, 920 (1st Cir. 1980).

To cope with this rampant lack of uniformity, Lindy I developed a method of assessing attorney's fees by beginning with hours expended at the attorney's hourly rate, and then

adjusting upwards to consider the risk of nonrecovery. In Lindy I, the court was adamant that the only objective standard which would lend uniformity to attorney's fees decisions was time expended:

> Before discussing the other factors to be considered in fixing fees, we stress, however, the importance of deciding, in each case, the amount to which attorneys would be entitled on the basis of an hourly rate of compensation applied to the hours worked. This figure provides the only reasonably objective basis for valuing an attorney's services.

Lindy I, 487 F.2d at 167. A similar concern motivated the court in Grinnell I to determine time expended:

> The starting point of each fee award . . . . must be a calculation of the attorney's services in terms of the time he has expended on the case. Anchoring the analysis to this concept is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts.

495 F.2d at 470. See also Berger, Attorneys' Fees, supra at 316-28.

The time expended at the normal hourly rate produces the basic "lodestar" amount, which can be adjusted for other risk factors. This adjustment typically results in a doubling of the award in contingency cases. See Lindy II.[1] The quality

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[1]The "lodestar" amount, i.e. the fee produced by an hourly rate, should not, however, be more than doubled since such an increase would be arbitrarily excessive, and only act to encourage very risky lawsuits which had less than a 50/50 chance of success. See Baughman v. Wilson Freight Forwarding Co., 583 F.2d 1208, 1217-18 (3d Cir. 1978).

of an attorney's services, the factor which the district court here explicitly relied on to avoid tying the fee to hours, is, of course, reflected in his hourly charge, and is not a separate factor to warrant increasing the overall fee. Likewise, other factors under DR 2-106 such as experience, reputation, length of employment and exclusivity of employment, are incorporated into the attorney's hourly charge. Lindy II, 540 F.2d at 102; see also Baughman, 583 F.2d at 1218.

By grounding the attorney's fee on the predictable, adjusted hourly rate, the awarding court can be fair to both parties, and justify the award to the public. This approach also helps prevent the awarding court from being "vicariously generous" with another's money. See Grinnell II, 560 F.2d at 1102. By contrast, the district court here awarded a fee of $1.5 million, which produces an hourly yield of $1,775, if one assumes plaintiff's attorney spent as much time as defendant's attorney, i.e. 845 hours. Such a fee is grossly excessive for even top-billing attorneys, and is the classic result of a guesswork system.

II

THE DISTRICT COURT FAILED TO CARRY OUT THE STATUTORY PURPOSES OF SECTION 768.56 BY AWARDING AN ATTORNEY'S FEE WITHOUT REGARD TO ACTUAL TIME EXPENDED

Perhaps the most significant reason for grounding the award of attorney's fee on time actually expended is the statutory scheme of section 768.56 itself. There are two, complementary legislative purposes in passing this law which provides attorney's fees to the prevailing party in medical malpractice litigation. See An Act Relating to Attorney's Fees in Medical Malpractice Actions, ch. 80-67, Laws of Fla. (codified at §768.56, Fla. Stat. (1981)). The avowed purposes of this bill are to replace the unconstitutional mechanism of the medical mediation panels with other means of discouraging filing of meritless claims and encouraging settlement of meritorious claims:

> "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 . . . ."

Preamble, ch. 80-67, Laws of Fla.; see also Aldana v. Holub, 381 So.2d 231 (Fla. 1980). The aims of the statute are thus twofold: (1) assisting plaintiffs with valid claims and, (2) aiding defendants with valid defenses. The ultimate goal and justification of the statute is to discourage litigation by both plaintiffs and defendants, thereby decreasing the

cost of malpractice insurance and ultimately saving the public medical costs.

The trial court must award attorney's fees to the prevailing party under section 768.56. There is no discretion; the statute is to be uniformly applied. Because the statute makes fees awards mandatory to either a prevailing plaintiff or a prevailing defendant, a standard for awarding a rational fee to both plaintiffs' attorneys and defendants' attorneys is vital to fulfill the dual statutory purposes of section 768.56, which are both to discourage meritless claims and to encourage meritorious claims.

Under this statute, to be fair to both plaintiffs and defendants, this standard must be based on actual work performed, and cannot be based on the amount of the judgment obtained, as the district court explicitly did in this case.[2] This is because defense attorneys, who are successful in defending their clients, will never produce a positive, tangible, money judgment. The most positive result a defense attorney can produce is to vindicate his client's nonliability, producing a judgment of nothing. No standard of measuring attorney's fees under this particular statute can be fair to a defendant

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[2]One of the factors directly considered by the district court in its award of attorney's fees was "the brilliant result". Florida Medical Center v. Von Stetina, _ So.2d at _.

if that standard considers the amount of judgment awarded when the plaintiff prevails. Because the statute demands fees awards to either prevailing side, under basic principles of equity as well as equal protection of the law, the amount of the award should be grounded in the time actually expended. Only by beginning with the time actually expended can the ultimate dual goals of section 768.56 be fairly realized. Importantly, this objective standard will also serve to decrease overall litigation concerning the amount of fees awarded, further accomplishing the purposes of section 768.56 to decrease litigation in the medical malpractice area.

CONCLUSION

Amicus, the FMMJUA, submits that for its statutory operation to continue, a rational and predictable means of assessing attorney's fees under section 768.56 must be implemented. Only when attorney's fees are predictable can both the Fund and FMMJUA make realistic settlement offers, incorporating a realistic attorney's fees. Only when attorney's fees under this statute are rationalized can the Fund and FMMJUA begin to set medical malpractice insurance rates which will cover this presently unknowable expense.

The fairest method of assessing attorney's fees, for both prevailing plaintiffs and defendants, is to utilize a method of ajusted hourly rates to fully and fairly compensate either side for the work actually performed, as contemplated under section 768.56.

For these reasons the decision of the district court awarding $1.5 million attorney's fees should be vacated, and a reasonable attorney's fee should be awarded based on actual time expended by Appellees' attorneys. Alternatively, the case should be remanded to the trial court, with instructions to reconstruct the hours actually spent, and to award a fee based on a normal billing rate adjusted for the risk factor.

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SECTION TWO

I

THE ATTORNEYS' FEE STATUTE, F.S.A. 768.56, UNCONSTITUTIONALLY RESTRICTS THE RIGHT OF "ACCESS TO THE COURTS" BY UNCONSTITUTIONALLY PENALIZING PARTIES FOR LITIGATING GENUINELY LITIGIOUS CASES DESPITE THE CONSTITUTIONAL GUARANTEE.

It should first be noted that the constitutional right of "Access to the Courts" applies equally to defendants and plaintiffs; many cases are genuinely litigious and a defendant has a constitutional right to litigate these without an unreasonable penalty, just as surely as a plaintiff has the right to file and litigate a suit without an undue penalty.

It is submitted that the present statute unconstitutionally restricts the rights of health care providers to defend medical malpractice lawsuits, and specifically the following:

(a) With most medical malpractice lawsuits the facts simply are not known when the plaintiff first files suit. It is during discovery that the facts become known, expert opinions are obtained and the defendants can have a court appointed examination of the defendant. By severely penalizing a lawsuit when there is no alternative to defending it violates access to the courts.

(b) Awarding attorneys' fees to the plaintiff in any lawsuit and not just in lawsuits which are frivolously or unmeritoriously defended is an unreasonable restriction on the defendant's right of access to the courts because the plaintiff can refuse valid offers to settle merely to prolong the litigation and thereby increase his attorneys' fee award. In the present case the trial court increased the award by 40% for attorneys' fees, which percentage is frequently applied, and therefor there is no reasonable relationship between the purpose of the statute and the means used.

It is respectfully submitted that in order for the statute to be constitutional it would need to only award attorneys' fees for suits frivolously brought or frivolously defended, and not for all lawsuits.

The undersigned handled the Supreme Court case of Aldana v. Holub, 381 So.2d 231 (Fla.1980), in which the Medical Mediation Statute was declared unconstitutional and the undersigned was the party which first raised the fact that the statute was being unconstitutionally applied, and had the Fourth District certify the question to the Florida Supreme Court, which resulted in the finding of unconstitutionality.

The undersigned submits that the present Statute is unconstitutional tenfold as compared with the earlier Statute.

This Statute not only is unconstitutional, but in fact, it is extraordinary the extent to which it is unconstitutional; it not only does not solve the problem it was passed to solve but instead worsens it, and it tramples on a fundamental right in the process, namely Access to the Courts.

The tests for whether a statute violates substantive due process are as follows:

> (a) Ends or Purpose. Whether the reason for the statute is a legitimate government purpose.
>
> (b) Means. Whether the means used to accomplish the legislators' purpose is reasonable and appropriate.

> (c) Effect. What is the effect on the parties involved, and particularly does it infringe on constitutional rights, and if so, to what extent.

In the present case the purpose of the Statute is to lower medical malpractice insurance premiums and thereby to lower the cost of health care. However, the means used are not reasonable and appropriate since the Statute instead will raise malpractice insurance premiums by adding Attorney's Fees on to all Judgments. In the process the effect of the Statute is to trample a constitutional right, namely Access to the Courts, since both Plaintiffs and Defendants will have to pay a heavy price for litigating legitimate claims. In other words, some cases may be frivolous to file and some may be frivolous to defend, but between these extremes the vast majority are (a) cases which could go either way, and (b) cases in which the complete facts do not become known as to liability or damages until there has been substantial discovery. This Statute does not simply penalize parties who file or defend frivolous claims but also penalizes parties who file or defend claims which legitimately need to be litigated. Therefore, it tramples on the constitutional right of Access to the Courts.

In summary, there is a valid purpose for the Statute, namely to lower medical malpractice premiums and thereby lower the cost of health care. However, the means used are not reasonable and appropriate since the Statute instead will raise medical malpractice premiums by adding Attorney's Fees on top of Judgments

and therefore, the Statute does not satisfy this Constitutional due process requirement. Additionally, the effect of the Statute is that it severely penalizes parties for litigating valid litigious cases, and therefore, it tramples on the fundamental right of Access to the Courts, and thereby it violates this test for Constitutional due process.

The Statute in question worsens the problem instead of solving it and in the process it violates the constitutional Courts, and therefore, it does not even come close to passing constitutional muster; it clearly violates Constitutional due process and there can not even be a valid argument that it does not.

(A) THE PURPOSE

The purpose of the Statute was to lower medical malpractice insurance premiums, and thereby lower the cost of health care. This purpose was stated in the Preamble to the Statute:

> Preamble (Laws 1980, c.80-67):
> "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 that 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 destablization of the professional liability insurance marketplace and a dramatic increase in professional liability insurance premuims 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," (Emphasis Added)

There can be no doubt that this is a proper governmental purpose, and in fact, the Florida Supreme Court has previously held that this is a proper governmental purpose as an exercise of the police power for the general health and welfare of the citizens of the state. Carter v. Sparkman, 335 So.2d 802 (Fla. 1976).

(B) THE MEANS

It is difficult to understand how someone could even argue that the means used to accomplish the legislation's purpose is reasonable and appropriate. The purpose was to reduce the cost of medical malpractice premiums, and in the present case the state's two largest insurers of health care providers are asking this Court to declare the Statute unconstitutional because it will substantially raise insurance premiums. (The F.M.M.J.U.A. and the Patient's Compensation Fund) The Statute does the opposite of what it is designed to do, so clearly the means used to accomplish the purpose is not reasonable and appropriate.

It takes no prophet to see that the practical effect of the Statute will be that when the doctor wins he will receive a Judgment for Attorney's Fees but will seldom be able to

collect on the Judgment against the plaintiff under the "judgment proof" system of Florida. At present, the costs in medical malpractice suits are usually several thousand dollars, and when doctor wins and receives a large cost Judgment it is almost never collected. Therefore, an Attorney's Fee Judgment will, in practically all cases, be no impediment to a Plaintiff's filing a suit since there is already the threat of a large adverse cost Judgment, and this has proven to be no impediment. On the other hand, however, when the Plaintiff wins he will be able to recover the Attorney's Fee from the doctor or hospital since they are almost always solvent.*

In summary, it is clear that the means used to accomplish the legislation's purpose are not reasonable and appropriate since the Statute will have the opposite effect and will increase malpractice premiums and thereby increase the cost of health care.

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* In "courthouse debates" the only argument which has been heard as to why the Statute should not be declared unconstitutional is that "the doctors themselves passed it". This is much less than a half truth. The doctors, hospitals and other health care providers are represented by various groups, each of which has its own representatives and its own lobbyists, etc. A partial list of groups which come immediately to mind include the F.M.M.J.U.A.; The Patient's Compensation Fund; Physicians Protective Trust; Pemco; North Broward Hospital District; The Florida Medical Association; Florida Hospital Association, etc. There certainly are many other interest groups in addition to these. One interest group through its representative proposed this Statute. The others had nothing to do with it, and specifically no party to this appeal, Amicus or otherwise proposed this Statute. The fact that one interest group proposed it is irrelevant to its constitutionality; the parties to this appeal are seriously adversely affected by it.

Numerous cases have declared statutes unconstitutional where they had a proper governmental purpose but the means used was not reasonable and appropriate. A case on point is United Gas Pipe Line Co. v. Bevis, 336 So.2d 560 (Fla. 1976). In that case the Legislature passed an act to regulate energy rates and stated that the reason was to "prevent discrimination or unreasonably high profits". The Court held that although there was a proper purpose for the law the means used were unreasonable and inappropriate, and therefore declared that it violated Constitutional due process.

Similarly, in the case of Horseman's Benevolent & Protective Assoc. v. Division of Pari-Mutual Wagering, 397 So.2d 692, 695 (Fla. 1981), the question was the constitutionality of a statute which was a tax of 1% of each purse at the horse racing tracks which was to be used to enhance the states racing and tourist industry. The Florida Supreme Court per Justice Alderman held that this was a proper governmental purpose but that the means used violated Constitutional due process:

> "...There is no reasonable relationship between the stated objective of the statute and the form of the statute chosen by the legislature to advance this purpose. . . ."
>
> (Page 695)

The tests for whether a statute violates equal protection are similar. Instead of the question of whether the means is reasonable and appropriate, the question is whether the classification is reasonable. Therefore, equal protection cases are

analagous. A recent case which is relevant and invalidated the Statute for an invalid classification is State v. Lee, 356 So.2d 276 (Fla.1978). In that case the legislature passed a "good drivers incentive fund" which provided that when drivers receive traffic violations they would be assessed additional civil penalties, and this fund would be distributed to other drivers who met the Statute's restrictive qualifications of "good drivers". The Court held that although the purpose of the Statute was a proper governmental purpose, the means used were not reasonable and appropriate to use funds for traffic violations in this manner, and therefore, declared this Statute unconstitutional.

The cases from the State of Florida as well as cases interpreting the United States Constitution are replete that even if the Statute has a proper governmental purpose, if the means used to accomplish that purpose are not reasonable and appropriate, the Statute violates Constitutional due process. In the present case, the means are not reasonable and appropriate in that they do not accomplish the result, but instead worsen the problem. Therefore, from this aspect the Statute clearly violates Constitutional due process.

(C) THE EFFECT

The clear effect of the Statute is to trample on a fundamental right, and specifically "Access to the Courts." As discussed previously, the Statute does not simply provide Attorney's Fees for frivolous lawsuits, but additionally provides them for legitimately litigious lawsuits in which the result or the

amount of damages can not be ascertained until discovery has been taken. Therefore, the doctors and Plaintiffs are penalized for litigating legitimately litigious claims, and therefore, their right of "Access to the Courts" is violated.

In this regard it is noteworthy that J.B. Spence, the State's preeminent medical malpractice Plaintiff's attorney, has authored a law review article to the effect that the Attorney's Fee Statute is unconstitutional because it violates the due process guarantee of Access to the Courts. When J.B. Spence and the medical malpractice insurers agree that a statute is unconstitutional, it must be very unconstitutional. See Spence and Roth, Closing the Courthouse Door: Florida's Spurious Claims Statute, 10 Stetson Law Review 397 (Spring 1981).

Numerous cases have held that Access to the Courts is a fundamental right and have invalidated statutes for violating this right. See generally: Griffin v. Illinois, 351 U.S. 12 (1956); Mayer v. City of Chicago, 404 U.S. 189 (1971); Boddie v. Connecticut, 401 U.S. 371 (1971); Department of Transportation v. Plunske, 267 So.2d 337 (Fla.4th DCA 1972); Overland Const. Co. v. Simons, 369 So.2d 572 (Fla.1979); Kluger v. White, 281 So.2d 1 (Fla. 1973).

THE FOURTH DISTRICT'S OPINION

The Fourth District's opinion does not analyze the constitutional criteria, but merely makes short shrift of the constitutional question by stating that many statutes authorize award of attorneys' fees. However, this certainly does not mean that any

time a statute authorizes an award of attorneys' fees that it is constitutional. The particular statute must be analyzed. In the present situation the statute has the opposite effect than its purpose, and tramples on the constitutional right of access to the courts in the process; it not only is unconstitutional but it is remarkable the extent to which it is unconstitutional. Certainly since this question of unconstitutionality has been raised, this Honorable Court which is charged with defending the Florida and United States Constitutions must sincerely consider it. It is respectfully submitted that it is clearly unconstitutional.

SUMMARY

In summary, the Attorney's Fee Statute clearly violates constitutional due process, and in fact, it is extraordinary the extent to which it violates Constitutional due process. Although the Statute has a proper governmental purpose the means used are not reasonable and appropriate to accomplish that purpose, and has the opposite effect and worsens the problem, and in addition the Statute tramples on the constitutional right of Access to the Courts. The Statute clearly violates Constitutional due process, and it is difficult to see how an argument can even be made that it does not.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Brief of Amicus Curiae was mailed to those listed on the attached Service List this 12th day of October, 1983.

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