IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,237

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

Appellants,

vs.

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

Appellee.

_____/

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

BRIEF OF APPELLEE SUSAN ANN VON STETINA

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I

STATEMENT OF THE CASE AND FACTS

We have no essential quarrel with the defendants' sketchy (and argumentative) statement of the case and facts--at least so far as it goes. Unfortunately, it omits more than it states. It also fails to comport with an appellant's settled obligation to state the facts in the light most favorable to the verdict, and it is woefully inadequate to provide this Court with the necessary background against which the legal issues must be decided--especially those issues involving the evidentiary and procedural rulings of which the defendants complain. We therefore feel constrained to restate the case and facts briefly. Our statement here will be general. Where necessary to examine the facts or the procedural backgrounds of the several issues on appeal in more detail, we will do so in the argument section of this brief.

On November 26, 1980, Susan Von Stetina, age 27, was involved in an automobile accident (R. 1498, 1607-08). She was taken to the emergency room at Florida Medical Center, where she was examined by the emergency room physician and a surgeon (R. 519-22, 542-43, 1607-18). She had a fractured femur, a fractured right wrist, and internal injuries--but no head injuries, no cardiac problems, no respiratory problems, and no neurological problems (R. 522-25, 1618). An exploratory laparotomy was performed, in which the surgeon removed a portion of her damaged liver, 80% of her pancreas, and (because the pancreas was removed) her spleen (R. 524-54). The wrist fracture was repaired as well (R. 544). According to the surgeon, the function of her liver was not impaired; she could live without her spleen; and her pancreas could function satisfactorily with the assistance of medication (R. 527-29). She tolerated the surgery "very well", "came out very nicely from the operation", and the surgeon expected a "good prognosis" (R. 530).

Because Susan required very close monitoring by specialized nurses during her expected recuperation, she was placed in the Hospital's intensive

care unit (ICU) (R. 545). Initially, she was placed on a mechanical ventilator to assist her breathing, but she was "weaned off" the ventilator the day following surgery because she was capable of breathing adequately on her own (R. 545-46). On December 1st, she began to demonstrate some respiratory distress--which is not uncommon in post-surgery patients, and which can ordinarily be controlled and managed--and she was placed back upon the ventilator as a result (R. 530-33). This time, however, the ventilator was not provided merely to assist her breathing; instead, all of Susan's body muscles were paralyzed by the continuous administration of a drug called Pavulon, in order to prevent her from interfering in any way with operation of the ventilator (R. 533-34). Because the paralytic drug prevented Susan from breathing on her own, she was totally dependent upon the ventilator to keep her alive; any malfunction of the ventilator or other interruption of her oxygen supply, if not corrected, would result first in irreversible brain damage, then heart failure, and ultimately death (R. 533-34, 539-41, 634, 866).

According to the undisputed evidence in the case, ventilator malfunctions, patient-machine disconnects, and similar interruptions of air supply are both common and predictable (R. 864, 893-96, 1019, 1065-66, 1116, 1207-14).[1/] For that reason, accepted standards of care required that Susan be given "constant" monitoring and "continuous" care by a registered nurse (RN), specially trained to be aware of the patient's total dependency on the machine, the patient's inability to communicate with anyone if the machine failed, and the nurse's need to be constantly alert and sensitive both to the machine and the patient (R. 545, 610, 635, 1059, 1079, 1101, 1112-16, 1123-25, 1229, PX.

1/ The manufacturer's recommended overhaul interval for Susan's ventilator was 10,000 hours of use; Susan's ventilator had been used approximately 13,000 hours without overhaul at the time she was connected to it (R. 1309-17). After the incident in issue, it was finally taken out of service and overhauled at 15,000 hours, when its compressor failed (R. 1312).

24).[2] To ensure that these needs are met, one aspect of the appropriate standard of care requires that every Pavulon-paralyzed patient on a ventilator be assigned one full-time RN with no other patient responsibilities (R. 912-15, 1077-79, 1088).[3] If this standard is met, the response time to an interruption of an ICU patient's air supply should be in "seconds" (R. 636, 1130).

Following her reconnection to the ventilator on December 1st, Susan's respiratory distress was controlled, and progressing satisfactorily (R. 534-35, 571-74, 1025-26, 1090-91). During the evening of December 2nd, she was cared for by Sandra Jarque, RN (R. 1140-43). Ms. Jarque constantly monitored her--and observed that she needed frequent doses of Pavulon ("two milligrams . . . approximately every 45 minutes") to ensure her continued paralysis and compatability with the ventilator, because she became "restless" and began "fighting the ventilator" each time the Pavulon wore off (R. 1144-54). Ms. Jarque gave Susan her last dosage of Pavulon at 1:30 a.m. on December 3rd, and she was relieved at that time by Mary Powers, RN (R. 1154-57). Susan, incidentally, was the only patient in the ICU paralyzed by Pavulon (R. 635). It is the quality of the care rendered to this single, paralyzed patient by Mary Powers thereafter which was the central issue in the case.

Unfortunately, Ms. Powers claimed she could remember nothing about the night of December 3rd, except that which was written in her notes (which

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2/ It was in support of these essential facts that the trial court, over the defendants' objection, admitted plaintiff's exhibit 24--a teaching document given by the Hospital to its ICU nurses, which was designed to teach them the critical need to be constantly alert and sensitive both to the machine and the patient. We will address the propriety of this ruling infra.

3/ It was the defendants' position that the standard of care only required a ratio of one RN to every two ICU patients (although the hospital's director of nursing admitted that a one-to-one ratio was sometimes required) (R. 612-13, 1634). It was also to refute this contention that PX. 24 was placed in evidence, since that document clearly implied a need for constant one-to-one nursing care for ventilator patients. As noted in fn. 3 supra, we will address the propriety of this ruling infra.

was meager at best) (R. 1699-1706, 1716, 1722). Nor could any of the other nurses remember anything of significance which occurred that night (R. 838). Susan's counsel was therefore required to reconstruct the actions of all the nurses in the ICU that night by a painstaking analysis of the records of the ICU and the records of all the ICU patients (see R. 618-823). The reconstruction was necessarily tedious, but exceptionally revealing. In addition to being assigned to care for Susan, Ms. Powers was in charge of the entire ICU that night, responsible for supervising all the nurses (R. 620-21, 628, 1691, 1698). She had no "unit secretary" to assist her in her clerical duties, as the day and evening shifts had--and she was therefore required to fill that position as well (R. 607-09, 620, 668-70, 861-62). At the beginning of the shift (midnight), the ICU was staffed with three regularly employed RNs; one "non-standard", "float" RN obtained from an outside agency; and two LPNs, who were merely there to assist the RNs (R. 604-06, 618-20, 630-32). At midnight, seven patients were in the ICU (R. 632, 644-46).

At 1:00 a.m., another patient was admitted (R. 700-01); at 2:00 a.m., a second patient was added, to which Ms. Powers assigned herself (R. 666-69, 822); and a third patient arrived at 3:00 a.m. (R. 787-88). At 3:00, therefore, the ICU had ten patients--and only four RNs to care for all of them (R. 846). According to the Hospital's night supervisor of nurses, the situation was "chaotic" (R. 1405-06). Although Ms. Powers could have, and should have, requested additional help, she did not (R. 648-50, 921-22, 1224, 1405). Instead, the ICU records indicate that nearly all of her time after 2:00 a.m. was taken up by the constant demands of the second patient who arrived after the shift began (R. 666-83). And, although Susan had needed Pavulon every 45 minutes that evening to prevent her from thrashing and "fighting the ventilator", no Pavulon was given her after Ms. Jarque's last dose at 1:30 a.m. (R. 1157). The Hospital's supervisor of nursing was able to discern

from the records that Ms. Powers was tied up with the 2:00 arrival, but she was unable to determine who, if anyone, was watching Susan (R. 822-23). From all that the Hospital records reflect, Susan not only failed to receive "intensive" care, she failed to receive any care at all (R. 694).

At 3:28 a.m., one of the RNs was walking toward the medication area to obtain medication for another patient, when she observed Susan's cardiac monitor at the nurses' station reflect a dangerously low heart rate of approximately 30 (R. 691-93, 826, 1678-79, 1683).[4/] She pulled the "code blue" alarm button, and CPR efforts were begun shortly thereafter (R. 824-30, 1264-70, 1678-80). By 3:44, Susan's heart rate was restored (R. 830). Tragically, however, Susan suffered irreversible brain damage from the incident, which has rendered her hopelessly helpless and completely dependent upon constant, 24-hour nursing care for her very survival (R. 535, 910-11). The Hospital never troubled itself to investigate the cause of Susan's brain damage, and none of the Hospital's personnel professed to have any idea of what happened to Susan between 3:00 and 3:28 a.m. on December 3rd (R. 504-05, 536-37, 622-23, 831, 838, 1356-60, 1711).

By reconstructing the events of that evening from the Hospital's records, however, six eminently qualified medical experts from some of the most prestigious hospitals and medical schools in the nation were able to determine to a certainty what caused Susan's severe brain damage. Each of them testified, in essence, that the only reasonable explanation for Susan's brain damage was that she failed to obtain oxygen for a period of at least 15 to 20 minutes, due to a malfunction of the ventilator or an interruption of her oxygen supply (such as a disconnect caused by "fighting the ventilator" as the 1:30 a.m.

4/ Although the aural alarm on Susan's cardiac monitor should have been set to sound at a heart rate no lower than 70 or 80, according to the Hospital's nurse in charge of critical care education, it had been set at 50 (R. 757, 856, 1127-28). None of the nurses could remember hearing any aural alarms (R. 838, 1682-83, 1712).

dosage of Pavulon wore off); that the condition went undetected by anyone for at least that long; and that the failure of the ICU nurses to detect the condition until Susan's heart had essentially stopped beating was a gross departure from any reasonable standard of care governing the expected conduct of ICU nurses (R. 867-1110, 1197-1236).[5/]

Following the incident which caused Susan's brain damage, the Hospital blinded her in one eye by a failure to keep the eye lubricated properly and taped shut (R. 923-24, 1237-56, 1494). It also managed to refracture Susan's partially healed leg, and could provide no explanation for it (R. 1278-87, 1492-93, 1726-36).[6/] The experts were unanimous in their opinions that these additional injuries were caused by substandard care, and the defendants did not even bother to contest the point (R. 925, 1287). The jury's ultimate finding that Susan will live an additional 40 years in her brain-damaged condition (R. 1897) is fully supported by abundant competent evidence (R. 1053, 1067, 1461-62, 1642, 1749). The length of her life is directly dependent, however, upon the nature and quality of the 24-hour nursing care which she indisputably needs to survive (R. 1053-54, 1750).

Because the defendants have directly challenged only the sufficiency of the evidence supporting the jury's award of Susan's "intangible" future damages, we need not detail the evidence of Susan's past damages or future pecuniary needs here. One somewhat callous representation of the defendants

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5/ In contrast, the Hospital presented the testimony of one local physician, who opined that Susan's brain damage arose from a "progressive deterioration" of Susan's lung function throughout the period of respiratory distress which began on December 1st (R. 1620-42). Curiously, this expert's opinion was seriously undercut by the Hospital's own chief of staff, who testified that Susan sustained no brain damage as a result of the respiratory distress which began on December 1st, and that her December 3rd blood gas studies indicated that she had not been receiving oxygen from the ventilator (R. 536-41, 571-76, 589-90).

6/ Moreover, although the refracture was "discovered" and reported at 7:00 a.m., Susan was allowed to lie with her leg bent at the fracture site in considerable pain for approximately seven hours before anyone did anything to alleviate her condition (R. 1395-1400, 1492-93, 1726-36).

concerning Susan's "intangible" damages needs to be straightened out at the outset, however. It is simply not true, as the defendants represent, that Susan's brain is completely dead and that she feels nothing. In fact, it is undisputed on the record that she feels pain, and reacts to it with facial grimaces, contortions, and by crying out; that she recognizes and reacts to people; and that she feels pleasure and responds to love and affection, to music, and to the comforting touch of a human hand (R. 1068-69, 1158, 1319-21, 1408, 1417, 1421-22, 1424-28, 1435-36, 1441-42, 1466, 1489-91).[7/] In the words of the District Court, "she is a prisoner in her own helpless body, who must experience the ultimate nightmare every waking moment of the remainder of her tragically destroyed life". 436 So.2d at 1024.

In light of these facts, we doubt that either the jury's unanimous verdict on liability or its unanimous damage awards came as a surprise to anyone in the courtroom (R. 1896-97). Judgment was entered in the plaintiff's favor thereafter for the full amount of her damages (R. 2947). The defendants' post-trial motions seeking judgment, new trial, or remittitur (R. 2951, 2955, 2958, 2960), were denied (R. 2999-3002). The defendants' motions to alter or amend the judgment to reflect the limited payout provisions of §§768.51 and 768.54, Fla. Stat. (1981) (R. 2953, 2963), were met with a challenge to the applicability and constitutionality of those statutes as applied to the facts in the case (R. 2996), and a lengthy memorandum of law was filed on those issues by the plaintiff (R. 3005). The Fund responded by conceding the unconstitutionality of the limited payout provisions on the facts in the case,

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7/ All of this is graphically demonstrated by a heart-rending videotape of Susan undergoing physical therapy, which was played to the jury. (PX. 27). A short portion of this videotape was replayed to the District Court at oral argument, and it is evident from the District Court's opinion that it was deeply moved by the tape, and that, because of the tape, it had no qualms whatsoever in rejecting the defendants' contention that Susan feels nothing. Because the tape is part of the evidence in this case, we urge the Court to view it before reaching any conclusions concerning the adequacy of the evidence to support the jury's verdict.

and argued only that a recently enacted but not yet effective version of §768.54 should govern; the Hospital responded by joining in the Fund's concession, with one exception--it resisted the plaintiff's argument that the statute unconstitutionally encroached upon the court's inherent power to enforce collection of its own judgments.[8/] After hearing oral argument on the issues (R. 2255-2367), the trial court declared §768.51 inapplicable and unconstitutional, and §768.54's payout provisions unconstitutional, and it denied the defendants' motions to alter or amend the judgment as a result (R. 3077).

The trial court next confronted the issue of the plaintiff's entitlement to attorney's fees under §768.56, Fla. Stat. (1981). After rejecting the defendants' challenge to the constitutionality of the statute (R. 3194), it heard extensive evidence on the issue of the amount to be awarded (R. 2001-2254), and entered a lengthy explanatory order awarding the plaintiff an attorney's fee of $4,400,000.00 (R. 3223). On appeal to the District Court of Appeal, Fourth District, the plaintiff's judgment for the full amount of her compensatory damages was affirmed. The judgment for attorney's fees was reversed, however, and the cause was remanded for entry of a judgment for attorney's

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8/ The Fund's concession was contained in footnote 1 of its post-trial memorandum of law:

> For the purpose of this post-trial submission only, and without waiving its right of appeal from the judgment ultimately rendered, PCF will not contest plaintiff's argument that strict application of the statute to her claim may result in constitutional objections.

The Hospital's post-trial memorandum of law simply adopted the Fund's position on the unconstitutionality of the statute. It did raise one of the grounds raised by the defendants here, however--that the language of §768.54 should be construed to limit the amount of the judgment to be entered against the Hospital to $100,000.00. (We have examined the oral arguments on the issues by counsel for both defendants, and we are satisfied that they did not raise any grounds not raised in the written memoranda; R. 2320-56).

Unfortunately, both memoranda were inadvertently omitted from the record on appeal. The defendants included both memoranda in the appendix (at pp. 477 and 510) which they filed in the District Court, however, and we accepted that as an informal supplementation of the record on appeal in the spirit of Rule 9.200(f), Fla. R. App. P.

fees in the amount of $1,500,000.00. FLORIDA MEDICAL CENTER, INC. v. VON STETINA, 436 So.2d 1022 (Fla. 4th DCA 1983). This appeal followed. The plaintiff cross-appealed.

For the convenience of the Court (and to supplement this brief for reasons which will become evident infra) we have included the following documents in the appendix to this brief:

1. The District Court's opinion (A. 1);

2. The plaintiff's post-trial memorandum of law addressing the applicability and/or constitutionality of §§768.51, 768.54 and 768.56, Fla. Stat. (1981) (R. 3005) (A. 13);

3. The trial court's order declaring §§768.54 and 768.51 unconstitutional (R. 3077) (A. 33);

4. The trial court's order declaring §768.56 constitutional (R. 3194) (A. 42);

5. The trial court's order awarding attorney's fees (R. 3223) (A. 44);

6. Portions of our appellee's briefs filed below relevant to several issues re-raised here in abbreviated form by the defendants (A. 55 et seq.).

II
ARGUMENT

A. THE DISTRICT COURT CORRECTLY HELD THAT THE TRIAL COURT COMMITTED NO REVERSIBLE ERROR REQUIRING A NEW TRIAL ON DAMAGES.

1. The trial court did not err in admitting plaintiff's exhibit 24; and if it did, the District Court did not abuse its discretion in determining that the error was harmless.

Without argument, the defendants simply postulate that plaintiff's exhibit 24 was erroneously admitted; they then argue only that the District Court was "wrong" in finding its admission to be "harmless error".[9/] We intend to

9/ The Fund seeks only a new trial on damages. In a footnote, the Hospital seeks a new trial on both liability and damages. The Hospital's additional position is advanced without argument, however, so there is no

demonstrate in response that PX. 24 was properly admitted into evidence, and that the District Court was in error in concluding otherwise. We then intend to demonstrate alternatively that even if PX. 24 was "inadmissible" for the reason expressed by the District Court, that ground for reversal was waived by a failure to raise it at trial. Finally, we will demonstrate alternatively that, even if the District Court correctly concluded that PX. 24 was erroneously admitted over a proper objection, it did not abuse its discretion in concluding that its admission was "harmless" within the meaning of §59.041, Fla. Stat. (1981). If any one of these alternative contentions is correct, this first sub-issue must be decided against the defendants.[10/]

a. Plaintiff's exhibit 24 was properly admitted.

Plaintiff's exhibit 24 was an article entitled "Just Breathing", authored by a registered nurse, which appeared in the November, 1974, issue of Nursing magazine. The article was provided to the plaintiff in discovery by the defendants themselves, from the teaching materials which the Hospital used to train its ICU nurses. It is evident from the face of the document that its use as an educational tool by the Hospital was designed to prevent

need for us to respond to it at length. In the unlikely event that this Court should determine both that the trial court erred and that the District Court abused its discretion in finding the error harmless, we think even a cursory reading of our statement of the facts will convince this Court that the evidence of the Hospital's liability was overwhelming (and much of it was not even seriously contested); that no "miscarriage of justice" was caused on the liability issues by PX. 24 in view of this overwhelming evidence; that any error in its admission was therefore "harmless" on the liability issues (see §59.041, Fla. Stat. (1981)); and that no new trial on liability is necessary. That conclusion is also fairly inferable from the Fund's decision to abandon the Hospital on this point, and the Hospital's decision not to argue it.

10/ The first and second of these three contentions assert that the District Court erred. Such an argument is proper here for the settled reason that an appellee may urge any error committed below in support of affirmance of the lower court's decision, even without a cross-appeal. See HALL v. FLORIDA BOARD OF PHARMACY, 177 So.2d 833 (Fla. 1965); CERNIGLIA v. C. & D. FARMS, INC., 203 So.2d 1 (Fla. 1967); MacNEILL v. O'NEAL, 238 So.2d 614 (Fla. 1970). Our notice of cross-appeal moots the point in any event.

precisely what happened to Susan--and it was offered in evidence to corroborate other evidence relating to the liability issues at trial. First, as we noted in our statement of the facts, it was the plaintiff's position that the appropriate standard of care required a ratio of one RN to each ventilator patient. It was the Hospital's position, however, that a ratio of one RN to two ICU patients was acceptable. PX. 24 illustrates, however, that the utter helplessness of a ventilator patient requires that the patient be constantly monitored, and it therefore undercut the Hospital's position that it was acceptable for one nurse to ignore one ventilator patient while attending to the needs of another patient across the room. Because the evidence came from the Hospital's own teaching materials, it dramatically undercut that defense--and its relevance to the plaintiff's ability to meet that defense should be obvious.

Second, and in a related vein, the evidence proved from the Hospital's own teaching curriculum what its ICU nurses were supposed to know about caring for a patient on a ventilator (R. 1123-25):

> Q. [Melinda Smith] is the head nurse of the medical intensive care unit. And she teaches a respiratory therapy course; is that right? What course does she teach?
>
> A. She teaches the respiratory part of the course. You have the objectives.
>
> Q. She teaches the respiratory part of the course. Would you do this, please, ma'am, as far as the respiratory part of the course is concerned, and what does that entail?
>
> . . . .
>
> A. Anatomy and physiology, oxygenation, acid base balance, ventilation perfusion, gas distribution, nursing care of patients on ventilators, nursing care of patients with respiratory problems.
>
> . . . .
>
> Q. And as part of that course this is given out as a handout; is that right?

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A. Yes, sir.

. . . .

Q. Why do they hand that out?

A. To give an idea to the students of how patients on ventilators feel.

Q. How they feel; is that correct?

A. Yes, sir.

. . . .

Q. It's important to know the fears, is it not, the comfort, and how a patient responds in general on a ventilator; is that correct?

A. Yes, sir.

Q. So that the nurse can have some empathy for the individual?

A. Yes, sir.

In short, PX. 24 supported the plaintiff's position (and corroborated other evidence) that the relevant standard of care required that a ventilator patient be given constant and continuous care by an RN specially trained to be aware of the patient's total dependency on the ventilator, the patient's inability to communicate with anyone if the machine failed, and the nurses' need to be constantly alert and sensitive both to the machine and the patient. And that, incidentally, is the only purpose for which the document was used at trial. That is demonstrated by examining the portion of the plaintiff's closing argument relating to the document (R. 1822-26):

> I'm going to read you something . . . . It's what the nursing director of nurses' education gives as part of the handout . . . . [I]t's given as a handout to ICU unit nurses. Now let me tell you why. Let me see if I can explain the rationale between this very brief document as an educational piece of material.
>
> It is for the purpose of developing amongst the personnel who are obliged to care for an individual that is in as artificial a circumstance as though they were underwater and hooked up to a tube, or circulating in a space capsule

> and dependent upon an artificial environment to exist. It's to develop a sensitivity among the nursing staff, to have some feeling, some responsiveness, to the problems, the difficulties and the feeling that an individual has on a respirator, on a machine which must, of necessity, breathe for them, on a machine which their life, their brain, their heart, their lungs, their organs, their existence and everything that they are as a human being depends.
>
> [The document, quoted in the defendants' brief, was then read to the jury].
>
> . . . That's an object lesson in sensitivity. That's why it's handed out, because a person on a ventilator machine is totally and completely helpless.

Before we analyze the District Court's treatment of the admissibility of PX. 24, it is important that this Court understand that the District Court appears to have overlooked, and that the defendants continue to ignore here, the fact that PX. 24 was admitted as relevant to the liability issues in the case. If we understand the defendants' argument correctly, they are complaining that the emotional impact of PX. 24 unfairly influenced the amount of damages awarded by the jury. If the evidence were admissible on the liability issues, however, the fact that it may have been excludable if offered for the sole purpose of influencing the damage issues does not make its admission erroneous. See WILLIAMS v. STATE, 110 So.2d 654 (Fla. 1959), cert. denied, 361 U.S. 847, 80 S. Ct. 102, 4 L. Ed.2d 86 (1959) (any evidence relevant to prove a fact in issue is admissible, notwithstanding that it also proves an ordinarily inadmissible fact or serves an ordinarily improper purpose).[11/] Because that proposition is well settled, we continue to insist that the admissibility of PX. 24 must be judged against the background of the liability issues, and not merely in the context of the damage issues.

The District Court rejected the primary argument made by the defendants below--that PX. 24 was inadmissible "hearsay". This conclusion was

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11/ Accord, JOHNSON v. STATE, 130 So.2d 599 (Fla. 1961); SPRINGFIELD LIFE INS. v. EDWARDS, 375 So.2d 1120 (Fla. 3rd DCA 1979).

eminently correct; it was (as the District Court's opinion notes) conceded to be correct at oral argument below; and the defendants have not challenged it here.[12/] The District Court also conceded that PX. 24 was relevant, but held nevertheless that it was inadmissible because it was "fiction":

> The plaintiff's counsel insists it is relevant because it depicts a supposed level of demanded nursing care which all nurses are made aware of as standard procedure. This argument might have merit except that this particular work of fiction was not presented by its author and there was no predicate whatever that the plaintiff, or any other patient for that matter, had actually endured such thoughts and emotions under this or similar circumstances. Courts are supposed to deal in facts not fiction, and we, therefore, believe error occurred.

436 So.2d at 1032-33.[13/] We believe this conclusion was erroneous.

In essence, the District Court concluded simply that, no matter how relevant to the issues in the case, "fiction" is never admissible for any purpose in the trial of a civil lawsuit. The general rule is, of course, that "[a]ll relevant evidence is admissible, except as provided by law". Section 90.402, Fla. Stat. (1981). This recent statutory provision is nothing more

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12/ The conclusion was correct because PX. 24 was neither offered nor admitted for the purpose of proving the truth of the matters asserted in it, and it was never used in argument for that purpose. It was offered into evidence, as we have explained above, for the purposes of establishing two aspects of the standard of care. Certainly, it would not have called for "hearsay" if plaintiff's counsel had asked the Hospital's director of critical care education what its nurses were expected to know when treating a Pavulon-paralyzed patient on a ventilator. It therefore cannot be "hearsay" to place into evidence the very training materials by which the Hospital transmits that expected knowledge to its nurses.

The trial court recognized that the document was not being offered into evidence to prove the truth of any fact contained in it, and admitted the document because it established aspects of the standard of care governing the case (R. 1120-21). That ruling was clearly correct. See §90.801(1)(c), Fla. Stat. (1981); BREEDLOVE v. STATE, 413 So.2d 1 (Fla. 1982); BROWN v. STATE, 299 So.2d 37 (Fla. 4th DCA 1974), cert. denied, 310 So.2d 740 (Fla. 1975); UNITED STATES FIDELITY & GUARANTY CO. v. PEREZ, 384 So.2d 904 (Fla. 3rd DCA), cert. denied, 312 So.2d 1381 (Fla. 1980); CITY OF MIAMI v. FLETCHER, 167 So.2d 638 (Fla. 3rd DCA 1964); PAULINE v. LEE, 147 So.2d 359 (Fla. 2nd DCA 1962), cert. denied, 156 So.2d 389 (Fla. 1963).

13/ The defendants did not object to the admission of PX. 24 on this ground. We shall have more to say about that in a moment.

than a codification of this Court's longstanding rule that all evidence "relevant to prove a fact in issue is admissible into evidence unless its admissibility is precluded by some specific rule of exclusion". WILLIAMS v. STATE, supra, 110 So.2d at 658. Because of this well-settled rule of evidence, it was incumbent upon the District Court to identify some "specific rule of exclusion" requiring the exclusion of relevant evidence merely because it is in the form of a fictional account, but the District Court cited no authority for its conclusion, nor did it offer any reference to the Evidence Code to support its conclusion. Neither have the defendants cited any authority in support of the District Court's newly-created "specific rule of exclusion".

There is no such exclusionary rule, because the law makes no distinction between fact, fiction, or opinion when the evidence is otherwise relevant to prove a fact in issue.[14/] The District Court simply forgot that it was not the recitations in the article which were sought to be proven.[15/] Because the Hospital taught its nurses with the article, the facts to be proven by the article were that the Hospital expected its nurses to know, and therefore guard against the problem illustrated by the article. Put another way, the article proved that the Hospital's nurses were or should have been on notice of the potential of the very problem which caused Susan's brain damage, and that they should have been sufficiently sensetized by this knowledge to have prevented Susan's brain damage before it occurred.

14/ That is perfectly clear from the fact that Florida courts routinely allow the use of "hypothetical" questions to elicit expert opinions. If the District Court is correct that "fiction" is never admissible, then answers to hypothetical questions are no longer admissible in Florida.

15/ Even if the accuracy of the recitations in the article were relevant to its admissibility, the fact remains that the Hospital considered PX. 24 sufficiently accurate and authoritative enough to use it as a teaching device--and it should therefore be considered by the judiciary as sufficiently accurate and authentic enough for it to be admissible to disprove a contrary factual position taken by the Hospital at trial. Cf. CONE v. BENJAMIN, 157 Fla. 800, 27 So.2d 90 (Fla. 1946) (where members of family considered book written about it to be authoritative, book was admissible to prove genealogy of family).

In short, if the Hospital's nurses had heeded the teaching of the Hospital's own teaching material, Susan would not have been ignored, and thereby brain-damaged--and we were entitled to show that to the jury, whether the article in question was fact, fiction, opinion, or something else. See, e. g., WEBB v. FULLER BRUSH CO., 378 F.2d 500 (3rd Cir. 1967) (published articles concerning dangers inherent in certain facial creams admissible to support claim that seller of creams should have known that its product might be dangerous to users); UNITED STATES v. GIESE, 597 F.2d 1170 (9th Cir.), cert. denied, 444 U.S. 979, 100 S. Ct. 480, 62 L. Ed.2d 405 (1979) (where criminal defendant placed books in evidence as representative of the type he sold, to demonstrate his peaceable character, proper for government to read portions of another book sold by him to impeach initial character evidence). Cf. HYDROLEVEL CORP. v. AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC., 635 F.2d 118 (2nd Cir. 1980), aff'd, 456 U.S. 556, 102 S. Ct. 1935, 72 L. Ed.2d 330 (1982) (newspaper article admissible to demonstrate the state of mind of those who reacted to it); EMICH MOTORS CORP. v. GENERAL MOTORS CORP., 181 F.2d 70 (7th Cir. 1950) (complaint letters received by defendant admissible to show the information upon which defendant acted against dealer complained of).

A simple example will better illustrate our point. Assume that a young boy allows a beach ball to roll into the street; he chases it into the street; and he is struck by a truck driven by an employee of a corporation. Suit is brought against the corporation, which defends by urging that, although its driver saw the ball, he never saw the child and had no reason to anticipate his presence because of the character of the neighborhood. The plaintiff offers evidence that the corporation displays a poster in the room in which its drivers are assigned trucks every morning; the poster consists of an artist's rendition of a small boy chasing a ball in front of a stylized truck, and a

caption which reads: "Rolling balls are always followed by running children". This evidence clearly disproves the corporation's defense, since it proves that its driver was well-sensitized to the very hazard involved in the suit and clearly should have anticipated the boy's presence--but the poster is clearly "fiction". If the District Court is correct, the poster is inadmissible--notwithstanding that it is the very best evidence concerning what the corporation's driver should have anticipated under the circumstances known to him.16/

When the issue in any given case is what a particular defendant or employee knew or should have known, or how that defendant or employee should have conducted himself in a particular situation, it should make no difference that that knowledge was transmitted by a fictional device designed to teach, rather than a statement of actual fact. There is no good reason in law, logic, or public policy why such evidence should be "inadmissible" as a matter of law, as the District Court held below--and we trust that this Court is not prepared to make such a rule the law of Florida. The District Court was simply in error in concluding that PX. 24 was inadmissible for any purpose, merely because its recitations were fictional, and this Court therefore need not reach the defendants' contention here that the erroneous admission of PX. 24 was "harmful".

16/ Other examples come readily to mind, because knowledge is often transmitted by hypothetical or fictional account. Industrial safety rules, for example, are often promulgated in the form of fables and cartoons. Pilots are frequently educated concerning emergency procedures and accident prevention with hypothetical "worst case" scenarios of system failures and aircraft accidents. Doctors are taught the art of diagnosis by studying the symptoms of fictional patients. Lawyers are taught the principles of property law through the device of hypotheticals involving Blackacre and Whiteacre. Paramedics are taught the art of CPR on dummies. And nurses are taught the potential problems arising in patient care, as the evidence in this case shows, by fictionalized accounts of those patient problems.

b. The District Court's ground for holding the admission of PX. 24 erroneous was not preserved for review.

There is a second reason why this Court need not consider the defendants' contention here--it was never raised in the trial court. (In fact, it was not even raised in the District Court--a point which we shall address briefly infra.) Although the defendants objected to the admission of PX. 24 on several grounds, not one of them fairly asserted that PX. 24 was inadmissible on the ground upon which the District Court held it inadmissible --that the account was fictional rather than factual.[17/] It is settled, of course, that before an appellate court can reverse a trial court for an evidentiary ruling, the record must reflect that the appellant objected below on the specific ground urged for reversal; a general objection will not suffice to preserve the issue for review, nor will an objection made on a ground other than the ground relied upon on appeal. LINEBERGER v. DOMINO CANNING CO., 68 So.2d 357 (Fla. 1953). Cf. CASTOR v. STATE, 365 So.2d 701 (Fla. 1978).[18/] Because the specific ground of objection urged here for exclusion of PX. 24 was not clearly and specifically raised in the trial court, the defendants' contention was unreviewable in the District Court, and it is therefore unreviewable here as well.

In addition, perhaps because they raised no such objection in the trial court, the defendants also did not urge in the District Court the objection

17/ The grounds asserted here: (1) that PX. 24 was "hearsay"; (2) that it was a "document written by someone else that hasn't been identified . . . other than as a handout that is given to the nurses"; (3) that "it doesn't relate to any training, experience, or any type of standard that would go into an intensive care unit in the training of the nurses"; (4) because of "the value of the damage that that is going to cause . . . when it doesn't really apply to this particular case because this nurse has just said that some other nurse gives that to the nurses by way of handout, she, herself, does not know"; and (5) that the document is "just a mismash of quotes from other people" which "doesn't say anything about any standard of care" (R. 1119-21).

18/ See, in addition, NAT HARRISON ASSOCIATES, INC. v. BYRD, 256 So.2d 50 (Fla. 4th DCA 1971); BOUTWELL v. BISHOP, 194 So.2d 3 (Fla. 1st DCA 1967); TABASKY v. DREYFUSS, 350 So.2d 520 (Fla. 3rd DCA 1977).

now relied upon here.[19/] It is a well-settled rule of appellate review that matters not raised by the parties in their briefs cannot be considered by an appellate court. See, e. g., GIFFORD v. GALAXIE HOMES OF TAMPA, INC., 204 So.2d 1 (Fla. 1967); CITY OF MIAMI v. STECKLOFF, 111 So.2d 446 (Fla. 1959).[20/] The District Court therefore could not properly hold PX. 24 inadmissible on the ground that it was fictional rather than factual, and that issue is therefore not properly before this Court for that additional reason. Put another way, it would violate all settled rules of appellate review for this Court to order a new trial on the ground that PX. 24 was inadmissible because it was fictional rather than factual, when that ground was never raised in either the trial court or the District Court. For these additional reasons, this Court need not consider the defendants' contention here.

c. If PX. 24 was erroneously admitted, the error was harmless.

We turn finally to the defendants' contention that the District Court was "wrong to find the error harmless". Our initial problem with this argument is that we do not believe the appropriate standard of review is whether the District Court was "wrong". The determination of whether any given evidentiary error is harmful or harmless is essentially a discretionary determination, reviewable only for an abuse of discretion. See BAPTIST MEMORIAL HOS-

19/ The defendants argued below only that PX. 24 was "hearsay", and alternatively, that the prejudicial value of PX. 24 outweighed its probative value (an objection also not clearly raised in the trial court). Because the defendants have been content to reargue the admissibility of PX. 24 here only on the ground upon which the District Court held it inadmissible, there is no need for us to argue that the trial court would not have abused its discretion in overruling the alternative objection. Because of the settled rule that an appellant may not raise an issue for the first time in a reply brief, we do not anticipate that the defendants will re-raise their alternative objection in this proceeding. In the event such an argument is raised, however, we refer the Court to the argument which we made on that issue in the District Court, a copy of which is included in our appendix at pp. 67-74.

20/ See, in addition, TRUXELL v. TRUXELL, 259 So.2d 766 (Fla. 1st DCA 1972); LESPERANCE v. LESPERANCE, 257 So.2d 66 (Fla. 3rd DCA 1971).

PITAL, INC. v. BELL, 384 So.2d 145 (Fla. 1980) (trial court's determination that certain improprieties at trial were harmful rather than harmless was not reviewable as a matter of law by District Court, but reviewable only for abuse of discretion); SEARS, ROEBUCK & CO. v. JACKSON, 433 So.2d 1319 (Fla. 3rd DCA 1983) (same). We therefore think that if this Court reaches this issue, the question to be decided is whether the District Court abused its discretion in determining that the error was harmless. Before such a conclusion can be reached, this Court must be convinced that no reasonable person could conclude that the error was harmless. CANAKARIS v. CANAKARIS, 382 So.2d 1197 (Fla. 1980).

Section 59.041, Fla. Stat. (1981), reads in pertinent part as follows:

> No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of . . . the improper admission . . . of evidence. . ., unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed.

The defendants' contention that an error is harmful if it might have affected the result finds no support in this statute. The plain language of the statute requires that a judgment be affirmed unless an appellate court finds, after an examination of the entire case, that the error "has resulted in a miscarriage of justice". The final sentence of the statute makes it clear that close questions are to be resolved in favor of affirmance.[21/] Given the plain language

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21/ There are, to be sure, a handful of decisions (as the defendants have noted) which appear to employ a "could have" test, or which appear to place the burden on an appellee to demonstrate "harmlessness". Because there are literally scores of decisions which state that an appellant has the burden of demonstrating that an error is prejudicial, the decisions on the subject would appear to be somewhat inconsistent. The apparent inconsistency is probably explained by the fact that the determination is essentially discretionary. In any event, whatever burden we had below was clearly shouldered--and, in this Court at least, the burden is clearly on the defendants to demonstrate prejudice of sufficient substance to overcome both the plain language of §59.041 and the District Court's unanimous conviction.

of the statute, and the District Court's perfectly reasonable explanation of its conclusion that the admission of PX. 24 did not result in a miscarriage of justice, we do not believe the defendants can shoulder their heavy burden of demonstrating an abuse of discretion here.

In the first place, the defendants' attempt to demonstrate that the evidence was a critical element in the result of the case involves an unfair bit of sleight-of-hand. The defendants quote our argument to the District Court that PX. 24 was of "importance to the plaintiff's case", and that "it is difficult to conceive of a more forceful piece of evidence . . ."--and they argue that we therefore conceded that PX. 24 had a dramatic effect on the amount of the damages awarded by the jury. We have been quoted (actually, only half-quoted) unfairly out of context, however, because our argument below related to the importance of the evidence to the liability issues in the case, not the damage issues. What we said (in its entirety) is that "it is difficult to conceive of a more forceful piece of evidence to prove the extreme sensitivity to a ventilator-patient's needs which the Hospital itself demanded of its own ICU nurses" (appellee's brief, p. 39). That is not a concession that the evidence was forceful on the damage issues. It was also not meant to be a concession that the evidence was critical on the liability issues, because our position below, as it is here, was that PX. 24 was merely corroborative and cumulative; its importance and forcefulness lay not in what it said, but simply in the fact that it came from the Hospital's own teaching curriculum.

The defendants refuse to debate us on the relevance of PX. 24 to the liability issues, however, and they make no contention that PX. 24 was harmful on those issues. Instead, they argue only that PX. 24 "would make the jury much more likely to give a huge amount of damages". We disagree. As the defendants have conceded, Susan's dependency on the respirator was not disputed. The defendants also do not deny that there is abundant evidence

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that the Hospital's negligence caused Susan's suffocation. As the District Court noted, there is also abundant expert evidence concerning "the horror of respirator malfunction". 436 So.2d at 1033. Therefore, quite apart from PX. 24, the evidence fully demonstrated Susan's dependency, her suffocation, and its undeniable horror. PX. 24 proves, at worst, only that patients who are dependent upon a ventilator fear suffocation--and it was therefore merely cumulative of something already fully proven. In short, PX. 24 was merely a drop in a sea of similar evidence, not a critical centerpiece of the plaintiff's case. It is routinely held that the erroneous admission of cumulative evidence is harmless under §59.041, and there the matter should rest.[22/] See, e. g., ATLANTIC COAST LINE R. CO. v. GARY, 57 So.2d 10 (Fla. 1952).[23/]

It is also worth noting in conclusion, as the District Court pointed out, that "all reasonable persons live in great trepidation and awareness of asphyxiation whether it be by drowning or whatever". 436 So.2d at 1033. It is therefore perfectly clear that any juror who heard the facts in this case could have written PX. 24 himself--and any error in its admission was therefore

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22/ The defendants' reliance upon STANLEY v. UNITED STATES FIDELITY & GUARANTY CO., 425 So.2d 608 (Fla. 1st DCA 1982), is misplaced. STANLEY did not involve the erroneous admission of cumulative evidence; it involved a violation of the collateral source rule--in which the decisional law has developed a "per se prejudicial" rule. In addition, STANLEY does not hold, as the defendants appear to suggest, that the mere fact that counsel relies upon erroneously admitted evidence in closing argument makes admission of the evidence harmful. In this connection, it is worth noting that the reason why PX. 24 was read to the jury during closing argument in this case is that the trial court prevented plaintiffs' counsel from orally publishing it to the jury at the time it was admitted into evidence (R. 1122-25). Presumably, if the trial court had allowed publication of the exhibit at the time of its admission, it would not have been read in its entirety during closing argument. In any event, the mere fact that counsel resorted to PX. 24 in his closing argument provides no basis for a "per se prejudicial" holding in this case.

23/ See, in addition, DELTA RENT-A-CAR, INC. v. RIHL, 218 So.2d 469 (Fla. 4th DCA), cert. denied, 225 So.2d 535 (Fla. 1969); QUINN v. MILLARD, 358 So.2d 1378 (Fla. 3rd DCA 1978); SEABOARD COAST LINE RAILROAD CO. v. HILL, 250 So.2d 311 (Fla. 4th DCA 1971), cert. discharged, 270 So.2d 359 (Fla. 1973); MYERS v. KORBLY, 103 So.2d 215 (Fla. 2nd DCA 1958).

perfectly harmless for this additional reason. The damages awarded by the jury were not large because of PX. 24; they were large because of the enormity of Susan's injuries. At the very least, reasonable persons could certainly differ upon the propriety of such a conclusion, and the District Court therefore did not abuse its discretion in reaching that conclusion below. The admission of PX. 24 simply does not require an entirely new trial on the issue of Susan's damages.

2. The jury's award of Susan's future "intangible damages" was not excessive.

The jury was instructed without objection below--in the language of Fla. Std. Jury Instn. (Civ.) 6.2a--that it should award Susan damages for her "bodily injury . . . and any resulting pain and suffering, disability, disfigurement, mental anguish, and loss of capacity for the enjoyment of life . . . to be experienced in the future" (R. 1888).[24/] On a verdict form which expressly delineated each one of those elements of Susan's future intangible damages, the jury awarded her $4,000.000.00 (R. 1897). The jury also found that this figure was intended to compensate Susan over a life expectancy of 40 years (R. 1897). In other words, Susan was awarded approximately $274.00 per day for her "ultimate injury"--and to compensate her for the fact that she must endure her "ultimate nightmare" each and every day of the next 14,600 days of her tragic life. The defendants insist that this meager sum is "excessive".[25/]

24/ Quite apart from the fact that the defendants voiced no objection to recovery of those elements of damage, there is no question here but that those elements of damage were proper. See MIAMI PAPER CO. v. JOHNSTON, 58 So.2d 869 (Fla. 1952).

25/ In actuality, the defendants have argued only that the "pain and suffering" award was excessive. The award of which they complain, however, was for pain and suffering, disability, disfigurement, mental anguish, and loss of capacity for the enjoyment of life. We assume that the defendants have merely adopted the phrase "pain and suffering" as shorthand for all of these elements of damage, since to have overlooked or ignored four out of five of them would have been unforgivable.

If we read the defendants' argument correctly, the defendants' sole contention is that the award of $4,000,000.00 to Susan is too much, because, in the words of the defendants, Susan "is unaware of her own situation" (Appellants' brief, p. 20). The defendants have the facts wrong, but we will ignore that for the moment and address the legal contention first. Apparently, it is the defendants' position that the greater a plaintiff is damaged, the less he or she is entitled to be compensated. Put another way, the defendants are apparently contending that the $4,000,000.00 awarded to Susan to compensate her for her "intangible damages" might not be excessive if she were aware of her terrible predicament, but because her brain was damaged so badly that she is semi-comatose, they need not compensate her as much.

While the argument may have some logic if confined solely to an award of damages for "mental anguish", it has no logic whatsoever when directed to an award designed to compensate a tort victim for the additional damages of physical "pain and suffering", "bodily injury", "disability" and "loss of capacity for the enjoyment of life". As long as those elements of damage are available to tort victims in this state, and they clearly are, the defendants' argument is simply wrong--and it should be rejected summarily by this Court for the same reasons it was rejected recently by the Supreme Court of West Virginia in FLANNERY v. UNITED STATES, 297 S.E.2d 433 (W. Va. 1982). Rather than belabor the point, we simply refer the Court to that decision for elaboration of our position.[26/]

The defendants also have their facts wrong. There is abundant, undisputed evidence in the record that Susan feels pain and pleasure, and that she responds to both. She grimaces and cries out when she is hurt. She

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26/ The FLANNERY decision is discussed, and other authorities on the point are collected in 26 ATLA L. Rep. 7-11. We will address the Fourth Circuit's refusal to accept the FLANNERY decision in cases arising under the Federal Tort Claims Act in a moment.

recognizes people and enjoys music. She is soothed and comforted by the touch of a caring human hand. There is a videotape in evidence which demonstrates this beyond doubt. No one knows exactly what is going on inside Susan's brain, of course, because the Hospital destroyed her ability to communicate--but it is a certainty that she is aware to some extent of her horrible tragedy. The defendants' characterization of her as mindless protoplasm is callous in the extreme; $4,000,000.00 to compensate her for the condition to which she has been reduced is, if anything, grossly inadequate.

We are tempted to close our argument on this issue at this point, but we would be remiss (as the defendants have been) if we did not briefly outline the relevant law on this question to the Court. We begin in 1972, when the Third District certified a case to this Court because it determined that there was no present formula establishing the outer limits of a jury's discretion in awarding future intangible damages. This Court held that it was unnecessary to devise a formula:

> Quite obviously some speculation enters into most personal injury actions, but the yardstick does not exist which can measure future humiliation, pain and suffering of the injured with sufficient certainty to divest a jury of exercising its sound discretion to determine the damage award based upon the evidence and merits of each case under consideration.

SEABOARD COAST LINE RAILROAD CO. v. McKELVEY, 270 So.2d 705, 706 (Fla. 1972).[27/]

The McKELVEY principle was elaborated upon in BOULD v. TOUCHETTE, 349 So.2d 1181 (Fla. 1977), in which this Court attempted to formulate an objective standard by which to judge the excessiveness of a jury verdict. The standard adopted by the Court is perhaps no more objective than the foundations upon which it is built, but it is nevertheless controlling here:

27/ In McKELVEY, an award of nearly $400,000.00 in intangible damages for the loss of an arm was upheld against the defendant's claim of "excessiveness". Surely, Susan's damages are more than 10 times the loss of an arm.

> Where recovery is sought for a personal tort, or where punitive damages are allowed, we cannot apply fixed rules to a given set of facts and say that a verdict is for more than would be allowable under a correct computation. In tort cases, damages are to be measured by the jury's discretion. The court should never declare a verdict excessive merely because it is above the amount which the court itself considers the jury should have allowed. The verdict should not be disturbed unless it is so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate.

349 So.2d at 1184-85.[28/]

The problem next confronted this Court in WACKENHUT CORP. v. CANTY, 359 So.2d 430 (Fla. 1978), in which the Court added that a verdict cannot be declared excessive by speculating upon matters which may have influenced it--but only if the record "affirmatively show[s] the impropriety of the verdict". 359 So.2d at 435. The combination of BOULD and WACKENHUT has clearly placed a great deal of discretion within the jury's domain, and severely limited the ability of a trial court or an appellate court to interfere with that discretion. The result has been that very few recent jury awards have been found excessive as a matter of law.[29/] In the instant case, it can-

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28/ This Court also noted in BOULD that a determination of the maximum limit of a reasonable range in which the jury may properly operate must include recognition of inflationary tendencies in the economy.

29/ See, e. g., GULF LIFE INSURANCE CO. v. McCABE, 363 So.2d 846 (Fla. 1st DCA 1978); CORBETT v. SEABOARD COAST LINE RAILROAD CO., 375 So.2d 34 (Fla. 3rd DCA 1979), cert. denied, 383 So.2d 1202 (Fla. 1980); LAIRD v. POTTER, 367 So.2d 642 (Fla. 3rd DCA), cert. denied, 378 So.2d 347 (Fla. 1979); DANIELS v. WEISS, 385 So.2d 661 (Fla. 3rd DCA 1980); CONNELL v. DuBOSE, 403 So.2d 436 (Fla. 2nd DCA 1981), review denied, 412 So.2d 464 (Fla. 1982).

The only decision relied upon by the defendants below was the recent decision in CITY OF TAMARAC v. GARCHAR, 398 So.2d 889 (Fla. 4th DCA 1981), in which the Court held that an award of $6,000,000.00 to a quadriplegic who remained alive and mentally competent was not excessive, but noted that the award represented a "high point" for personal injury verdicts to date. In our estimation, the unwillingness of the Court to disturb the jury's discretionary award in GARCHAR fully supports our position in this case, since the damages sustained by Susan were considerably greater than the damages sustained by Mr. Garchar.

We also note that the GARCHAR verdict is no longer the "high point" of personal injury verdicts to date. On December 23, 1982, a United States

not be said with sufficient certainty to divest the jury of its discretion that the jury's award of intangible damages is so inordinately large as obviously to exceed the maximum limit of a reasonable range within which it could properly operate. The record also reveals no impropriety affecting the verdict. The award is therefore not "excessive", and the District Court's determination that no new trial on damages was warranted was correct.

That is really all that needs to be said on this point. The defendants have argued, however, that the award for Susan's intangible damages is "barred" by LOFTIN v. WILSON, 67 So.2d 185 (Fla. 1953). We are constrained to disagree. LOFTIN lays down no rule of law which "bars" the jury award in this case; it merely holds that (in 1953, when the value of a dollar was considerably greater than it is now, 30 years later) an award of damages (for "physical pain and suffering" only) in the amount of $207,000.00 for the partial loss of a foot was excessive. The injury received by Mr. Loftin was clearly not comparable to the "ultimate injury" received by Susan, and LOFTIN did not involve any of the additional elements of intangible damages which Susan received in this case. It is also clear from what we have said previously that the law concerning the measure of "excessiveness" has changed considerably in Florida since LOFTIN. Today, before this Court can find Susan's award of intangible damages to be "excessive", it must hold as a matter of law that $4,000,000.00 is so inordinately large as obviously to exceed

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District Judge awarded a totally disabled burn victim in the neighborhood of $25,000,000.00; $10,000,000.00 of that award represented the plaintiff's intangible damages. SOSA v. M/V LAGO IZABAL, Case No. H-80-485, United States District Court for the Southern District of Texas.

See, in addition, RADLOFF v. STATE, 116 Mich. App. 745, 323 N.W.2d 541 (1982) (award of approximately $7,500,000.00 to paralysis victim not excessive). In addition, since GARCHAR, there have been a number of personal injury jury verdicts in this nation equalling and exceeding the GARCHAR award. See 26 ATLA L. Rep. 87 ($29,000,000.00); 25 ATLA L. Rep. 52 ($18,000,000.00); 25 ATLA L. Rep. 468 ($11,350,000.00); 25 ATLA L. Rep. 277 ($7,500,000.00); 25 ATLA L. Rep. 378 ($7,500,000.00); 25 ATLA L. Rep. 171 ($7,000,000.00); 25 ATLA L. Rep. 226 ($6,000,000.00); 26 ATLA L. Rep. 11 ($6,000,000.00).

the maximum limit of a reasonable range within which the jury could properly have operated. When the severity and enormity of Susan's multiple injuries are considered, no reasonable court could announce such a holding.

The defendants also argue that the Fourth Circuit's recent decision in FLANNERY v. UNITED STATES, _____ F.2d_____ (4th Cir. 1983), requires reversal here. Once again, we are constrained to disagree. FLANNERY holds (in a split decision, and over a vigorous dissent) that the element of damage known in Florida as "loss of capacity for the enjoyment of life" cannot be recovered by an unconscious plaintiff in a Federal Tort Claims Act case, because it is not "compensatory". FLANNERY announces no Florida law, of course, nor should it be adopted by this Court as the law in Florida--because it is flat wrong. The rationale offered for the Fourth Circuit's unique conclusion (which is contrary to all other authority on the question) is that "an award of [damages] for the loss of enjoyment of life cannot provide [an unconscious plaintiff] with any consolation or ease any burden resting upon him". _____ F.2d at _____. This rationale reflects a fundamental misunderstanding of the purpose of such an award, because an award of damages for "loss of capacity for the enjoyment of life" is not designed to console a plaintiff, or ease his burdens, or enable him to enjoy life; it is designed to compensate the plaintiff for the enjoyment of life of which he has been deprived. The FLANNERY court's peculiar conclusion therefore makes no sense.

In any event, even if this Court were prone to adopt FLANNERY's topsy-turvy conclusion that the greater the injury the less the damages, it cannot appropriately do so in the instant case for two very good reasons. First, unlike Mr. Flannery, Susan is not unconscious--and FLANNERY's conclusion is therefore not implicated by the facts in this case. Second, and as importantly, the defendants never even suggested to the trial court that Susan should be foreclosed as a matter of law from recovering damages for

"loss of capacity for the enjoyment of life". In fact, the jury was instructed without any objection whatsoever that it should award Susan damages for that loss. FLANNERY and its peculiar conclusion has clearly been raised for the first time on appeal, and it is fundamental that this Court therefore may not consider it. See DOBER v. WORRELL, 401 So.2d 1322 (Fla. 1981); COWART v. CITY OF WEST PALM BEACH, 255 So.2d 673 (Fla. 1971).[30] For all of the foregoing reasons, the jury's factual determination of adequate compensation for Susan's enormous losses should not be disturbed.[31]

30/ Neither can the defendants' argument be entertained under the "fundamental error" doctrine. That is settled by this Court's decision in BOULD v. TOUCHETTE, 349 So.2d 1181 (Fla. 1977), in which this Court held that the failure to object to an instruction containing an unauthorized element of damage waived the error, and that the error could not be challenged on appeal under the "fundamental error" doctrine. BOULD clearly prohibits this Court from entertaining the defendants' argument that FLANNERY requires a reversal here.

31/ It remains for us to address two entirely separate issues on appeal which the defendants have inserted into their "excessiveness" argument in the form of footnotes: (1) whether the trial court abused its discretion in refusing to declare a mistrial when the plaintiff's claim for punitive damages was withdrawn at the close of the evidence; and (2) whether the trial court abused its discretion in allowing June Banks Burke to testify for the plaintiff. It should be noted that both of these issues were raised in full-blown form in the District Court, and that the District Court thought so little of them that it disposed of both of them summarily as follows: "We either find no merit in, or see no necessity to address, any remaining points on appeal". 436 So.2d at 1033. One of the primary reasons that these issues were not addressed by the District Court was that they were formulated upon totally inaccurate versions of the record. Those inaccuracies have been repeated and exacerbated by the defendants here.

Because it was necessary for us to restate the procedural backgrounds of the two issues at length below, our responsive arguments covered 18 pages of our appellee's brief. We would be required to devote the same amount of our limited and precious space here in order to place the two issues in proper focus and argue their merits. We have determined that that would be a disservice to this Court, however, since it is highly unlikely that these issues will even be reached in view of their summary disposition below, and in view of the fact that the defendants think so little of them that they have relegated them to footnotes in an argument on a totally separate issue. We have therefore decided to resist the temptation to reargue the footnoted "issues" here. Instead, we have included in our appendix (at pp. 56-67 and 74-81) the responsive arguments we made on these issues in our brief in the District Court. Those arguments carefully unmask the inventions and omissions which lie at the heart of the defendants' footnoted issues, and they thoroughly demonstrate their error. If the Court has any concern regarding the propriety of the trial court's rulings on the two issues (or the District

B. THE DISTRICT COURT CORRECTLY HELD THAT JUDGMENT AGAINST THE HOSPITAL IN THE FULL AMOUNT OF THE VERDICT WAS PROPER.

In their second and third issues on appeal, the defendants challenge various rulings made by the trial court and the District Court concerning the construction, applicability, and constitutionality of §768.54, Fla. Stat. (1981). The second issue appears to be devoted to those rulings which resulted in a judgment against the Hospital in the full amount of Susan's damages, rather than the $100,000.00 "limitation of liability" contained in §768.54. The third issue collects and challenges the remaining rulings which resulted in a judgment against the Fund in the full amount of the verdict, rather than the $100,000.00 per year "limited payout provision" of §768.54. Several of the arguments made under the third issue relate to the Hospital's liability as well. We do not find the defendants' organization of these several arguments to be particularly logical or helpful to comprehension of the numerous issues raised, but we will respond to the various arguments in the order in which they have been presented for the convenience of the Court.

The trial court's order speaks very clearly for itself, and was adopted in large measure by the District Court. Because this Court must study that order with care, we see no need to rehash its bases at length here. We have included a copy of it in the appendix to this brief for the convenience of the Court (at pp. 33-42). We also see no need to rehash the argument which we made in the trial court, since that argument is already in the record. We have therefore included the memorandum of law which we submitted on the issues in the appendix as well (at pp. 13-33). We ask the Court to read both the memorandum and the trial court's order at this point, and consider

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Court's summary affirmance of them), we respectfully request the Court to refer to our appendix for our complete response to the defendants' footnoted issues. We believe, as the District Court found, that those arguments will demonstrate that the footnoted issues are totally without merit.

them as our primary response to the arguments which the defendants have made in their second and third issues on appeal. In what follows, we will simply reply seriatim to the several challenges which the defendants have raised to our initial position.

1. The District Court did not impermissibly "invalidate" the Hospital's contract with the Fund.

The defendants first contend that the District Court impermissibly "invalidated" the Hospital's contract with the Fund. We confess at the outset that we do not fully understand the argument, because it does not appear to us that the District Court invalidated the Hospital's contract with the Fund at all. Although the District Court held that Susan was entitled to the entry of a judgment against the Hospital in the full amount of her damages, the Fund was also held jointly liable for the same amount. It therefore clearly appears that the Hospital will only pay $100,000.00 of the judgment, in accordance with its contract with the Fund; that the Fund will pay the remainder, in accordance with its contract with the Hospital; and that the "limitation of liability" built into §768.54 for the Hospital will be fully effectuated.

Although we think this conclusion is obvious, the defendants apparently think otherwise. We think the problem is that the defendants have treated the phrase "limitation of liability" as synonymous with the word "judgment". The two concepts are not synonymous in the context presented here, however, which is made clear by §768.54 itself:

> (2)(b) A health care provider shall not be liable for an amount in excess of $100,000.00 per claim . . . for claims covered under subsection (3) if the health care provider has paid the fees required . . . and pays at least the initial $100,000.00 . . . of any . . . judgment against the health care provider for the claim in accordance with paragraph (3)(e).

(Emphasis supplied). In other words, judgment is to be entered against the health care provider, and its liability for payment upon that judgment is

limited to $100,000.00. The remainder of the judgment is to be paid by the Fund, as required by a separate provision of the statute. This "limitation of liability" is therefore a limitation upon payment, not a limitation upon judgment--and none of the District Court's rulings affect this "limitation upon payment" in any way.[32/] The only circumstance in which the Hospital could appropriately claim that its "liability" was not limited is if the Fund cannot or will not pay that portion of the judgment against the Hospital exceeding $100,000.00. That cannot happen in this case, however, because Susan's judgment is fully secured by supersedeas bonds posted by the Fund. The Hospital therefore enjoys the full benefit of §768.54's "limitation of liability" in this case, and has no cause to complain.

Even if the District Court had "invalidated" the Hospital's contract with the Fund, however, that invalidation, in and of itself, would not import its own impermissiblity; there must be some reason offered as to why the invalidation was impermissible. In our estimation, the defendants have offered none. Certainly, the plain language of the statute supplies no such "reason". Neither does this Court's recent decision in DEPARTMENT OF INSURANCE v. SOUTHEAST VOLUSIA HOSPITAL DISTRICT, _____ So.2d _____ (Fla. 1983) (1983 FLW SCO 354). The primary issue there was the constitutionality of §768.54's deficiency-assessment scheme, and this Court held simply that the statute did not unlawfully delegate legislative power to the Department of Insurance to make those assessments. Although the decision supports the indisputable proposition that the statute creates a contractual arrangement between the two defendants in the instant case, nothing in the decision even arguably purports to address, much less control, the issue presented here--

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32/ We elaborate upon this abbreviated discussion and conclusion in subsection 3 of this issue on appeal (at pp. 38-43, infra), which challenges the trial court's conclusion that the language of the statute required entry of a judgment in the full amount of Susan's damages.

whether the District Court impermissibly invalidated the Hospital's contract with the Fund. As we have demonstrated, no such thing occurred.[33/]

2. The trial court correctly held that §768.54 violated Article I, §21 of the Florida Constitution.

In its order declaring §768.54 unconstitutional on the facts in this case, the trial court held in one of several alternative rulings that the $100,000.00 "cap" upon the Hospital's liability effectively abolished Susan's cause of action against the Hospital without demonstrating an overpowering public necessity for its abolition, and without providing a reasonable alternative for the right abolished. The cornerstone for this conclusion was the undeniable fact that the "cap" abolished 99.99% of Susan's cause of action on the economic facts in this case. The District Court upheld the trial court's declaration of unconstitutionality of the statute without discussion of this alternative ground.[34/] The

33/ In a footnote, the defendants appear to offer a second "reason" for their argument, contending that "the policies of the contracts clause support the Appellants' position". This argument was made in full-blown form in the District Court, and it was summarily rejected because it reflects a fundamental misunderstanding of the very law upon which it is based. The constitutional provisions prohibiting the impairment of obligations of a contract exist to prevent the legislature from passing statutes which impair contracts entered into by citizens of the State which preexist enactment of the legislation. See POMPONIO v. CLARIDGE OF POMPANO CONDOMINIUM, INC., 378 So.2d 774 (Fla. 1979), upon which the defendants inappropriately rely.

The defendants do not argue that the legislature impaired any pre-existing contracts by enactment of §768.54, however; they argue that §768.54 created contractual relationships and that the constitution prohibited the judiciary from thereafter impairing those contracts by declaring the statute unconstitutional. No authority is cited for that peculiar proposition, however, and there is none. If the legislature enacts an unconstitutional statute, it is the constitutional duty of the judiciary to declare it unconstitutional, whether it authorizes or creates contractual relationships or not. See, e. g., LIQUOR STORE, INC. v. CONTINENTAL DISTILLING CORP., 40 So.2d 371 (Fla. 1949) (statute authorizing contractual price-fixing unconstitutional). We take it that this misguided "reason" needs no further argument.

34/ The defendants contend here that the District Court "silently rejected" this aspect of the trial court's order. We disagree. The mere fact that the District Court chose to rest its affirmance on some, rather than all, of the reasons expressed in the trial court's order does not mean that it "rejected" the trial court's alternative ground. Because that alternative ground was not addressed by the District Court, it remains viable here--and this Court must confront it (or remand the case to the District Court for an

defendants urge here that this conclusion was erroneous.

First, the defendants contend that the legislature did provide a "reasonable alternative" because it substituted the Fund in place of the Hospital to respond to all damage awards in excess of $100,000.00. The argument initially overlooks the fact that not any "reasonable alternative" will do; the alternative selected by the legislature must be the "least onerous alternative" available to it. OVERLAND CONSTRUCTION CO., INC. v. SIRMONS, 369 So.2d 572 (Fla. 1979). That the legislature did not select the "least onerous alternative" is fully revealed by the fact that it recently devised a much less onerous alternative to accomplish the same thing (in an amendment to §768.54 which the defendants insist should be applied retroactively to this case). Be that as it may, the fact remains that there is nothing "reasonable" at all about the alternative made available by the legislature, because the alternative (which is limited to a payment of $100,000.00 per year) does not provide for the payment of Susan's damages within her lifetime--or any part of them for that matter, since $100,000.00 per year is insufficient even to pay the interest accumulating on the judgment. The statute also does not even allow Susan to recover a sufficient amount of money each year to meet her annual costs of medical care.[35/]

If that were not enough to demonstrate that the limited payout provision of §768.54 is not a "reasonable alternative", the two decisions upon which the

initial ruling upon it) if it should see fit to disagree with all of the other grounds contained in the trial court's order supporting its declaration of unconstitutionality.

35/ The defendants attempt to avoid this obvious conclusion by arguing that there was evidence at trial that Susan was being cared for at the time of trial for less than $100,000.00 per year. That argument will not wash, however, because the jury rejected this evidence and found as a fact that Susan's "reasonable and necessary" medical expenses would far exceed $100,000.00 per year. Because that finding is supported by competent evidence, it cannot be challenged here--and the defendants cannot properly insist that the facts are different than the facts found by the jury.

defendants rely certainly require such a conclusion. In both LASKY v. STATE FARM INSURANCE CO., 296 So.2d 9 (Fla. 1974), and CHAPMAN v. DILLON, 415 So.2d 12 (Fla. 1982), this Court upheld the automobile "no-fault insurance" statute against an Article I, §21 attack, finding that the statute provided a "reasonable alternative" to abolition of Florida motorists' common law rights. The reasons given in both cases were that the no-fault statute did not create an arbitrary dollar limitation; that the statute only affected those with minor injuries, not those with major injuries; and that, although some elements of damage had to be insured against rather than recovered from the tortfeasor, the statute at least "assured prompt recovery of . . . major and salient economic losses". CHAPMAN, supra, 415 So.2d at 17.

In the instant case, §768.54 does precisely the opposite. It sets an arbitrary dollar limitation upon a medical malpractice plaintiff's recovery (both initially and annually thereafter), regardless of the severity of the injuries; its limited payout provision mandates delay, rather than promptness; it has no effect upon those with minor injuries, but drastically affects those with major, life-threatening injuries; and, on the facts in this case, it clearly denies Susan the recovery of her "major and salient economic losses" by limiting her annual recovery to less than the amount needed each year for her medical care. If the reasoning of LASKY and CHAPMAN is to inform the decision in this case, §768.54 cannot pass muster under Article I, §21.

The defendants' position is also not aided by this Court's decisions concerning the constitutionality of the Workers' Compensation Act. In those decisions, this Court has consistently held the Act to be a "reasonable alternative" because it provides both (1) a certain recovery irrespective of fault (thereby conferring greater benefits upon some), and (2) a prompt recovery, without the need for protracted tort litigation--thereby substituting something reasonable in place of common law remedies. See, e. g., ACTON v.

FT. LAUDERDALE HOSPITAL, _____ So.2d _____ (Fla. 1983) (1983 FLW SCO 436); MAHONEY v. SEARS, ROEBUCK & CO., _____ So.2d _____ (Fla. 1983) (1983 FLW SCO 435). Section 768.54 has none of these redeeming virtues. It requires the same-old proof of fault; it confers no benefits upon anyone that the tort system did not already confer; it requires the same-old protracted litigation for recovery; and, on top of all that, it delays ultimate recovery interminably in Susan's case. From Susan's perspective, the statute is not a substitute for anything; it is a total deprivation. All that it does is take away.

The defendants also argue that Susan's right of action was merely "reduced", and not totally abolished, since the legislature "saved" $100,000.00 of her right of action against the Hospital. There is some unfortunate language in the decisional law which suggests that Article I, §21 allows such a thing, but we must respectfully disagree that this language can be read as broadly as the defendants insist--especially on the facts in this case. Section 768.54 caps the Hospital's liability in this case at $100,000.00--which is a mere .01% of Susan's damages. Certainly, the abolition of 99.99% of a right is the abolition of that right. If that were not so, then the legislature could easily circumvent Article I, §21 by simply limiting a tort victim's recovery to $1.00 or a peppercorn, rather than abolishing it altogether. If our Constitution prohibits the latter but allows the former, it is not a Constitution--it is farce. Any reasonable construction of Article I, §21 must therefore recognize that the substantial abolition of a common law right, even if not a total abolition, is violative of Article I, §21, in the absence of a reasonable alternative remedy. That, incidentally, would appear to be the teaching of LASKY and CHAPMAN, discussed above--both of which require that the "reasonable alternative" provided by the legislature to avoid the mandate of Article I, §21 must provide for the recovery of "major and salient economic losses".

Finally, we must take issue with the defendants' hopeful reliance upon JETTON v. JACKSONVILLE ELECTRIC AUTHORITY, 399 So.2d 396 (Fla. 1st DCA), review denied, 411 So.2d 383 (Fla. 1981). The JETTON court reached the right result, but on the wrong grounds. That is proven by this Court's subsequent decision in CAULEY v. CITY OF JACKSONVILLE, 403 So.2d 379 (Fla. 1981), which reached an identical result on the identical question presented in JETTON. This Court did not adopt the JETTON court's reasoning, however. In fact, it expressly refused to consider it. Id. at 385 n. 12. Instead, it held that the apparent "cap" on damages effected by the waiver of sovereign immunity in §768.28 did not violate Article I, §21 for two reasons: (1) no right of action to recover damages against municipalities existed at common law; and (2) a separate constitutional provision--Article X, §13, providing sovereign immunity for the state and its subdivisions unless waived by the legislature--limited Article I, §21, allowing the legislature to waive immunity partially--i.e., up to specified limits.

Neither of these factors exist in the instant case. The common law has long recognized the right to recover damages caused by the negligence of individuals and private entities, and §768.54 does not waive a preexisting immunity up to $100,000.00 under a separate, limiting provision of the Constitution. Instead, it abolishes 99.99% of Susan's common law action, notwithstanding Article I, §21's mandate that "[t]he courts shall be open to every person for redress of any injury". If the statute in issue here does not violate that mandate, then that mandate is meaningless. JETTON is not the last word on the subject; it has been relegated to the position of no authority at all by CAULEY; and its illogical construction of Article I, §21 should not influence this Court to reach a ridiculous result in this case. For all of the foregoing reasons, the trial court did not err in declaring §768.54(2)(b), Fla. Stat. (1981), violative of Article I, §21 on the facts in this case.

3. The District Court correctly held §768.54 to be an unconstitutional encroachment upon the powers of the judiciary.

The defendants next contend that the District Court erred in holding that §768.54 unconstitutionally encroached on the inherent power of the judiciary to enforce collection of its judgments.[36/] The same argument is made under Issue 3, at pages 37-40 of the defendants' brief. Since the arguments are identical, we will respond to both of them here. In essence, the defendants assert that the legislature is empowered to enact substantive limitations upon liability (provided, we would add, that the enactments are otherwise constitutionally permissible); they argue that that is all that §768.54 does; and they contend as a result that the District Court erroneously concluded that the statute encroaches upon powers granted exclusively to the judiciary. Curiously lacking from the argument is any reference to the language of the statute itself. Neither of the lower courts ignored the language of the statute, however, and this Court is not free to do so either.

When the plain language of the statute is examined, it is clear that the legislature did not enact the type of "substantive limitation" described by the defendants; instead, it enacted a statute which places no limitation upon the amount of a judgment which can be entered against a health care provider or the Fund, and which merely controls the manner in which a plaintiff may collect that judgment. That conclusion is compelled by the statute itself:

36/ The constitutional limitation at issue here is not an idle, technical limitation; it is the fundamental cornerstone of our constitutional tripartite system of government:

> The preservation of the inherent powers of the three branches of government, free of encroachment or infringement by one upon the other, is essential to the effective operation of our constitutional system of government. See Fla. Const. Art. II, §3, F.S.A. This doctrine is designed to avoid excessive concentration of power in the hands of one branch.

IN RE ADVISORY OPINION TO GOVERNOR, 276 So.2d 25, 30 (Fla. 1973).

> (2)(b) A health care provider shall not be liable for an amount in excess of $100,000.00 per claim . . . for claims covered under subsection (3) if the health care provider has paid the fees required . . . and pays at least the initial $100,000.00 . . . of any . . . judgment against the health care provider for the claim in accordance with paragraph (3)(e).
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> . . . .
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> (3)(a) The fund--there is created a "Florida Patient's Compensation Fund" for the purpose of paying that portion of any claim arising out of the rendering of . . . medical care . . . arising out of the insureds' activities for those health care providers set forth [above], and which is in excess of the limits as set forth in paragraph (2)(b) . . . .
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> . . . .
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> (e). . . . The fund is authorized to negotiate with any claimants having a judgment exceeding $100,000.00 cost to the fund to reach an agreement as to the manner in which that portion of the judgment exceeding that $100,000.00 cost is to be paid. Any judgment affecting the fund may be appealed under the Florida Appellate Rules of Procedure, as with any defendant.
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> . . . .
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> (e) 3. A person who has recovered a final judgment . . . against a health care provider who is covered by the fund may file a claim with the fund to recover that portion of such judgment . . . which is in excess of $100,000.00 . . . . In the event an account for a given year incurs liability exceeding $100,000.00 to all persons under a single occurrence, the persons recovering shall be paid from the account at a rate not more than $100,000.00 per person per year until the claim has been paid in full . . . .
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> 4. . . . [J]udgments against the fund shall be paid in the order received within 90 days after the date of . . . judgment, unless appealed by the fund. If the account for a given year does not have enough money to pay all of the . . . judgments, those claims received after the funds are exhausted shall be immediately payable from the assessments of participants for that year, in the order in which they are received.

These provisions simply cannot be read to prevent the entry of a judgment against the defendants for the full amount of the jury's verdict. The very most that these provisions provide the defendants is relief from payment of

the judgment--i. e., they provide that the first $100,000.00 of the judgment shall be paid by the Hospital, and that the Fund must pay the remainder of the judgment in full, at the rate of $100,000.00 per year.[37/]

Once it is recognized that the statute imposes no substantive limitation upon the plaintiff's right to judgment in the full amount of her damages, and that it merely prevents collection of the judgment except on the terms prescribed by the statute, it is clear that the statute does nothing more than direct the judiciary how to enforce collection of the judgment. This type of legislative direction is clearly unconstitutional, for the reasons expressed in the trial court's order and the District Court's opinion. To buttress the lower courts' unanimous conclusions, we refer this Court to its recent decision in WAIT v. FLORIDA POWER & LIGHT CO., 372 So.2d 420 (Fla. 1979). At issue in that case was whether the granting of a stay pending appeal "is a step in the enforcement of a final judgment and . . . thus, procedural in nature", or whether it is "substantive in nature". 372 So.2d at 423. This Court held: "The granting of a stay, because it is a step in the enforcement of a final judgment, is concerned with 'the means and method to apply and enforce' substantive rights and falls within the definition of procedural law . . .". Id.

The substantive right granted to Susan by the common law was to recover a judgment in the full amount of her damages. Section 768.54 does not limit that right. It provides for the entry of a judgment in the full amount

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37/ Even if the statute did not contain language fully supporting that construction, that would be the only sensible construction of the statute--since nothing in the statute purports to diminish a medical malpractice victim's right to payment, in the words of the state in full. If a judgment were not entered for the full amount, it would be impossible to ascertain the amount necessary to pay the claim in full. In addition, we fail to see how a trial court could enter a final judgment disposing of this case in any form other than the traditional form, and the statute provides no guidance as to how to enter a judgment "in futuro". Our construction also makes sense, since it leaves the claimant with the ability to collect the full amount from the Hospital, if the Fund should become insolvent or defunct for any reason.

of Susan's damages, and provides that that judgment be paid "in full". The only limitation which the statute places upon Susan is her right to enforce that judgment--i. e., it controls, in the words of WAIT, "the means and method to apply and enforce" the judgment. Surely, if the stay of a judgment is a procedural matter, then the limited payout provision of §768.54 is clearly a procedural matter--because it effectively stays collection of a judgment, releasing only a $100,000.00 portion of it each year as partial payment upon it. Section 768.54's limitations therefore clearly fall "within the definition of procedural law", and if WAIT is still the law in this Court, the District Court was clearly correct in concluding that the statute impermissibly encroaches upon the inherent powers of the judiciary.[38/]

A final word is in order concerning the defendants' contention that "[t]he Third District, in MERCY HOSPITAL, INC. v. MENENDEZ, 371 So.2d 1077 (Fla. 3rd DCA 1979), cert. denied, 383 So.2d 1198 (Fla. 1980), upheld the Fund statute against similar separation of powers objections" (appellants' brief, p. 26). That contention is wrong. The plaintiff in MERCY HOSPITAL did not assert that the statute was unconstitutional because it allowed the entry of a judgment against both the health care provider and the Fund, and

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38/ It may well be that the legislature might be able to draft a statute within its substantive lawmaking powers, which would not encroach upon the judiciary's inherent powers. Compare MARKERT v. JOHNSON, 367 So.2d 1003 (Fla. 1978) (insurance company non-joinder statute which merely controls the time of joinder in a lawsuit encroaches upon the judiciary's power), with VANBIBBER v. HARTFORD ACCIDENT & INDEMNITY INSURANCE CO., ____ So.2d ____ (Fla. 1983) (1983 FLW SCO 406) (revised insurance company non-joinder statute requiring entry of a judgment against insured as a condition precedent to suit against the insurer is substantive, and does not encroach upon the judiciary's power). The legislature did not do so in the instant case, however.

As illustrated by the history of the non-joinder statute, an affirmance of the District Court on this point will not prevent the legislature from revising the statutory scheme in the future to stay within its own constitutional powers (provided, of course, that no other constitutional right is abridged in the process)--but that future ability cannot affect the issue presently before the Court, which must be determined by exclusive reference to the manner and means chosen by the legislature to implement the deprivative policy embodied in §768.54.

then merely controlled the method of payment; the plaintiff contended that he could not be required to join the Fund in the lawsuit, since such a requirement would invade this Court's rulemaking authority. That contention was rejected. We did not make such a contention in this case. In fact, we fully complied with the holding of MERCY HOSPITAL, by joining the Fund as a defendant in this case and obtaining a judgment against it.

To be sure, MERCY HOSPITAL describes §768.54 as providing for a limitation upon judgment rather than a limitation upon payment. Because the plaintiff apparently never challenged that aspect of the statute, however, the Court's treatment of the statute as providing for such a limitation would appear to be dictum of the first order. In any event, we agree with the District Court below that its decision cannot be reconciled with the decision in MERCY HOSPITAL, and that one of them is erroneous. We respectfully suggest that MERCY HOSPITAL cannot be squared with the plain language of the statute, and that its dictum should therefore be disapproved here, for the same reason that the District Court disagreed with it below. For all of the foregoing reasons, the District Court did not err in concluding that judgment against the Hospital in the full amount of Susan's damages was proper.

C. THE DISTRICT COURT CORRECTLY HELD THAT §§768.54(2)(b) AND §§768.54(3)(e)(3), FLA. STAT. (1981), APPLIED TO THIS CASE AND WERE UNCONSTITUTIONAL.

The defendants next quarrel with the District Court's conclusions (1) that §768.54, Fla. Stat. (1982 Supp.) cannot be applied retroactively to this case, and (2) that §§768.54(2)(b) and 768.54(3)(e)(3), Fla. Stat. (1981), which do apply, are unconstitutional on the facts in this case. As noted previously, we will rely primarily on our post-trial memorandum, the trial court's order, and the District Court's decision for the bulk of our responsive argument, and simply reply seriatim to the several challenges raised against our initial position here.

1. The District Court properly declined to apply §768.54, Fla. Stat. (1982 Supp.), retroactively to this case.

The judgment in this case was entered in March, 1982 (R. 2947). The legislative revision of §768.54 which the defendants seek to have applied to this case was not approved by the governor until April 28, 1982. Section 4 of the act--Ch. 82-236, Laws of Florida--expressly provided as follows: "This act shall take effect July 1, 1982". The trial court was requested to apply the Act, and it refused to do so, well before its effective date (R. 3077; order filed June 3, 1982). It is obvious that the defendants have sought retroactive application of the new version of the statute, and the only legal question presented here is whether the statute should be applied retroactively. It is clear that it should not.

It is fundamental that a statute cannot be applied retroactively unless such a legislative intent is clearly expressed in the statute itself:

> Statutes are presumed to be prospective in application unless the Legislature manifests an intention to the contrary . . . . We can restrict the debate on a legislative "intent" for retroactivity to the floor of those chambers, as well as avoid judicial intrusions into the domain of the legislative branch, if we insist that a declaration of retroactive application be made expressly in the legislation under review. By this means the forward or backward reach of proposed laws is irrevocably assigned in the forum best suited to determine that issue, and the judiciary is limited only to determining in appropriate cases whether the expressed retroactive application of the law collides with any overriding constitutional provision.
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> There being no express and unequivocal statement in this legislation that it was intended to apply to leases and management contracts which antedate its enactment, we hold the statute inapplicable to the contracts in these consolidated proceedings.

FLEEMAN v. CASE, 342 So.2d 815, 817-18 (Fla. 1976).[39/]

39/ Accord, HOMEMAKERS, INC. v. GONZALES, 400 So.2d 965 (Fla. 1981); DADE COUNTY v. FERRO, 384 So.2d 1283 (Fla. 1980); KEYSTONE WATER CO., INC. v. BEVIS, 278 So.2d 606 (Fla. 1973); TRUSTEES OF TUFTS COLLEGE v. TRIPLE R. RANCH, INC., 275 So.2d 521 (Fla. 1973).

Even in the face of the strong prohibition quoted from FLEEMAN above,

There is no expression of retroactive intent in Ch. 82-236's unambiguous provision that it does not take effect until July 1, 1982. Neither do we believe that the Fund is sincere in its insistence that Ch. 82-236 be applied retroactively, because a retroactive application of the new version of §768.54 would wreak havoc on the Fund's prior-year accounts--requiring it, for example, to disgorge immediately all "intangible damages" contained in judgments which it has not yet paid, and for which it has assessed its members on the basis that only $100,000.00/year of those damages will be paid. A retroactive application of the statute would also change the applicable claim limits against health care providers, contrary to an express provision in the revised statute for prospective, progressive changes--a provision which is antithetical on its face to the notion of "retroactivity". Retroactive application of the statute would also place a cap upon the Fund's liability to prior judgment creditors, which did not previously exist. The statute was clearly not meant to apply retroactively, and it therefore does not apply to Susan's March, 1982, judgment.[40/]

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the courts of this state have occasionally, and we emphasize the word occasionally, applied statutes retroactively, where there was no express intent for retroapplication. In one case, for example, this Court held a subsequent repeal of a pre-existing statute to be applicable retroactively, where no substantive rights were involved. WALKER & LaBERGE, INC. v. HALLIGAN, 344 So.2d 239 (Fla. 1977). Quite apart from the fact that no repeal is involved in the instant case, no judgment had been entered in the proceeding in WALKER & LaBERGE which was affected by the subsequent repeal. As we shall explain in more detail in a moment, the plaintiff had a vested right in the judgment entered in her favor prior to the effective date of the amendment to §768.54, and the law clearly does not allow the retroactive application of statutes which impair vested rights.

The only decision which we have been able to find in which this Court allowed the retroactive impairment of a judgment was TEL SERVICE CO. v. GENERAL CAPITAL CORP., 227 So.2d 671 (Fla. 1969). In that case, this Court held that a subsequently enacted statute disallowing the recovery of principal on a usurious loan voided a judgment for that amount. The ground upon which this retrospective holding was predicated was that "the usury statutes create no vested substantive right but only an enforceable penalty". 227 So.2d at 671. In the instant case, Susan's judgment contains no elements of damage in the form of a "penalty".

40/ The revised version of §768.54 is not without some relevance to the issue here, however, since it clearly illustrates that even the legislature

Before we turn to the defendants' efforts to avoid this ineluctable conclusion, it is worth noting that this issue need not even be reached--if the District Court was correct that §768.54's limited payout scheme impermissibly encroaches upon the inherent power of the judiciary to enforce its own judgments. We reach that conclusion because the amendments contained in Ch. 82-236 do not change the statute's basic requirement that judgments be entered in the full amount of a plaintiff's damages. The amendment's payout scheme, like its predecessor, simply controls the "manner and means" by which a court can enforce such judgments--and it is unconstitutional as a result, even if it does apply retroactively to this case. The defendants' arguments concerning the retroactivity of Ch. 82-236 would therefore appear to be wasted here. We will respond to the defendants' arguments nevertheless.

First, the defendants rely upon the principle of FLORIDA EAST COAST RAILWAY CO. v. ROUSE, 194 So.2d 260 (Fla. 1967). ROUSE stands for the general proposition that an appellate court will ordinarily apply the law prevailing at the time of appellate disposition, rather than the law in effect at the time the case was tried, where the law has been changed in the interim. This principle has only limited application, however. It clearly applies when a statute has expressly been given retroactive effect by the legislature (provided, of course, that no constitutional prohibition against retroactive impairment of existing rights is involved).[41/] The principle of ROUSE clearly does

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ultimately came to the conclusion that the initial version of the statute was irrational and unfair. The existence of the revised statute also tends to minimize the repercussions of the District Court's decision considerably, since a declaration of the unconstitutionality of an already changed statute can have little practical effect in the future.

41/ It also applies where the judiciary has changed the common law (unless the Court determines that the change should operate prospectively only). See HOFFMAN v. JONES, 280 So.2d 431 (1973). It also applies in cases like ROUSE, where the change in the law to be applied at the appellate level is a declaration of the invalidity of a statute governing the proceeding below. Even a declaration of invalidity will not always be applied retroactively, however. See ALDANA v. HOLUB, 381 So.2d 231 (Fla. 1980).

not apply, however, to statutes which operate prospectively only, because of the absence of an expression by the legislature that they were meant to apply retroactively. Put another way, ROUSE does not contain a license for roving, retroactive judicial application of an Act of the legislature which was not intended to be applied retroactively, merely because the statute was enacted between trial and appeal. If it did, the rule of non-retroactive application of prospective statutes expressed so emphatically in FLEEMAN would make no sense at all. We therefore take it that the District Court was correct in holding that Ch. 82-236 (which contains no expression of retroactive application) did not apply in the instant case because of the principle of ROUSE.[42/]

The defendants next argue that, notwithstanding the absence of any intent that Ch. 82-236 is to be applied retroactively, it should be applied to this case nevertheless because Susan had no "vested right" at the time of the effective date of the statute which would be affected by applying it at the present time. We are not certain that this argument makes any sense. Our understanding of the law is that prospective statutes must be applied prospectively and that the only time the question of "vested rights" comes into play is when a court is determining whether a decision or statute which is intended to be applied retroactively can be applied in that fashion constitutionally--i. e., without impairing vested rights. See, e. g., FLEEMAN v. CASE, 342 So.2d 815 (Fla. 1976); VILLAGE OF EL PORTAL v. CITY OF MIAMI SHORES, 362 So.2d 275 (Fla. 1978). In the instant case, because Ch.

42/ The District Court does not deserve the following statement made by the defendants: "The Fourth District's disregard of the Legislature's remedial amendment shows disdain, rather than respect, for the Legislature" (appellants' brief, p. 34). All that the Fourth District held (as required by FLEEMAN) was that the legislature did not express any intention to have the amendment apply retroactively, and that it therefore must have intended for the statute to apply prospectively only. In holding that the statute applied prospectively only, the District Court was clearly respecting the legislature's wishes in that regard, not expressing disdain for the legislature.

82-236 is a prospective statute, the Court need no concern itself with whether its retroactive application would impair vested rights.

In any event, if Ch. 82-236 is retroactive and does not encroach upon the judiciary's inherent power to enforce its own judgments and is substantive, as the defendants contend, the fact remains that Susan had a vested right which would be impermissibly impaired by application of Ch. 82-236 to this case. That vested right was a judgment in the full amount of her damages, entered as required by §768.54, Fla. Stat. (1981), before the effective date of Ch. 82-236. It is settled that a cause of action is merged in a judgment, and that the judgment creates a new cause of action, enforceable in its own right. See CRANE v. NUTA, 157 Fla. 613, 26 So.2d 670 (Fla. 1946); WORKINGMENS CO-OPERATIVE BANK v. WALLACE, 151 Fla. 329, 9 So.2d 731 (Fla. 1942). It is also settled that a judgment creates a vested right which cannot validly be impaired by subsequent legislative action. STATE ex rel. WARREN v. CITY OF MIAMI, 153 Fla. 644, 15 So.2d 449 (1943); VAN LOON v. VAN LOON, 132 Fla. 535, 182 So. 205 (1938).[43/] In short, Susan had a vested right against the defendants before Ch. 82-236 was even signed into law, and the law is clear that Ch. 82-236 cannot validly affect that right in the manner in which the defendants seek to have it applied here. That is true even if the legislature intended Ch. 82-236 to have that effect--which it did not.[44/]

43/ In addition, see CITY OF SANFORD v. McCLELLAND, 121 Fla. 253, 163 So. 513 (1935); BLOCKER v. FERGUSON, 47 So.2d 694 (Fla. 1950); ROSS v. GORE, 48 So.2d 412 (Fla. 1950); BEDELL v. LASSITER, 143 Fla. 43, 196 So. 699 (1940); STATE, DEPT. OF TRANSP. v. KNOWLES, 402 So.2d 1155 (Fla. 1981).

44/ The defendants contend that Susan had no vested right at the time of entry of her judgment because they obtained a stay by posting a supersedeas bond. This contention deserves no more than a brief footnote in response. The supersedeas bond did not invalidate Susan's judgment; all it did was stay collection of the judgment pending appeal. Susan's rights under the judgment clearly vested when the judgment came into being.

We must also disagree with the defendants' contention that the District Court contradicted itself when it held (1) that §768.54's payout scheme imper-

2. The revised 1982 payout provisions are unconstitutional.

Because we do not believe that §768.54, Fla. Stat. (1982 Supp.) can be retroactively applied to the pre-existing judgment in this case, we will not debate the defendants on its constitutionality at length. Suffice it to say that we disagree that the revision cured all the infirmities in the statute. At best, it partially cured only of one of them by allowing Susan to receive the damages awarded for her future medical care needs as they accrue, rather than limiting payment for those needs to $100,000.00 per year.[45/] All of the infirmities of the prior version of the statute remain. We think our limited space can best be utilized by turning to the real issue here, the constitutional infirmities of §768.54, Fla. Stat. (1981). In our discussion of that issue, we will address several of the arguments which the defendants have made concerning the constitutionality of the subsequent revision of the statute.

3. The 1981 version of the statute is unconstitutional.

Most of what we have to say on this issue has already been said in our post-trial memorandum of law, the trial court's post-trial order, and the

missibly encroached upon the inherent power of the judiciary to enforce collection of its judgments, and (2) that Ch. 82-236 could not be applied retroactively because a substantive right would be affected. These conclusions are not inconsistent. The first holding concerns §768.54, Fla. Stat. (1981), which was in effect at the time judgment was entered in Susan's favor. At that point, Susan gained a vested substantive property right which was fixed according to all the constitutional terms of that version of the statute. She also had a substantive right to collect that judgment, enforceable as a matter of procedural law by the judiciary. All that the District Court meant by its second holding, in our judgment, was that Susan's new cause of action on the judgment, which was substantive in nature, could not be retroactively impaired by the subsequently enacted version of the statute, which purported to take a portion of that substantive right away, albeit in the form of an impermissible encroachment upon the judiciary's inherent power to enforce its own judgments. In any event, because both holdings prevent the application of the revised version of the statute to the instant case, either of them prevents application of the revised version of the statute, and any inconsistency in the conclusions is therefore of no moment here.

45/ This, of course, is essentially what §768.51, Fla. Stat. (1981) allowed. The District Court declared that statute unconstitutional as well, however, and the defendants have not even challenged that ruling here.

District Court's decision, to which the Court is once again referred. We will confine our response here to clarification of that initial position in light of the several challenges which have been leveled at it here. It is worth reminding the Court at the outset, however, that the defendants conceded the unconstitutionality of those aspects of §768.54, Fla. Stat. (1981), which we challenged on the facts in this case--as we noted previously (p. 8 fn. 8, supra).[46/] We will, of course, respond to the defendants' arguments nevertheless.

The defendants first contend that the District Court was confused, and that its conclusion that one aspect of §768.54 "bears a reasonable relation to a permissible legislative objective" required it to declare the statute constitutional under the equal protection clauses of the state and federal constitutions. This argument reflects a fundamental misunderstanding of both our position below and the District Court's adoption of it. The only thing we conceded below (and the only thing the trial court held) was that the general classification of the statute bore a reasonable relation to a permissible legislative objective--i. e., that there was no constitutional infirmity in the statute's general classification singling out medical malpractice victims from other tort victims for special legislation. That concession was required by this Court's decisions in CARTER v. SPARKMAN, 335 So.2d 802 (Fla. 1976), and PINILLOS v. CEDARS OF LEBANON HOSPITAL CORP., 403 So.2d 365 (Fla. 1981).

There is more involved in §768.54, however, than this general classification alone. The statute creates a major sub-classification, and that sub-

46/ In that concession, the defendants purported to reserve the right to argue the constitutionality of the statute on appeal. We know of no rule which allows such a thing, however. We had always thought that appellate courts existed only to correct legal rulings which trial courts were called upon to make by the parties, and that issues and arguments which could have been raised in the trial court, but were not, cannot be raised for the first time on appeal. If that understanding is correct, then the constitutionality of the statute is not properly in issue here, because its unconstitutionality was conceded in the trial court.

classification must be analyzed for "reasonableness" as well. See, e. g., LASKY v. STATE FARM INSURANCE CO., 296 So.2d 9 (Fla. 1974) (reasonable to differentiate between passenger vehicle accident victims permanently injured and those similarly situated who will recover from their injuries for purposes of allowing pain and suffering awards); CHAPMAN v. DILLON, 415 So.2d 12 (Fla. 1982) (same); PURDY v. GULFBREEZE ENTERPRISES, INC., 403 So.2d 1325 (Fla. 1981) (reasonable to differentiate between accident victims whose insurers have subrogation rights and those who have received collateral source benefits not subject to subrogation in abolishing collateral source rule only as to the former).

These "reasonable" sub-classifications are to be contrasted with the sub-classification of §768.54 which the trial court and District Court found "unreasonable". In CHAPMAN and LASKY, for example, the sub-classification of permanently injured automobile accident victims and other automobile accident victims was found reasonable because the more seriously injured victims were deprived of nothing, and only the least significantly injured victims were handicapped by the statute. In contrast, §768.54 deprives less significantly injured medical malpractice victims (those with claims under $100,000.00) of nothing, and deprives those victims most deserving of and most in need of compensation (like Susan) of nearly all compensation. The sub-classification in 768.54 is therefore exactly backwards from those found reasonable in CHAPMAN and LASKY. It is also perfectly obvious that this sub-classification is "unreasonable" in the extreme on the facts in the instant case, since it deprives Susan in such a way that she cannot even recover the necessary medical expenses required to sustain her life.

As the District Court noted, it is this arbitrary sub-classification--

> . . . which is particularly offensive to the equal protection clauses of the two constitutions, since it is impossible that singling out the most seriously injured medical mal-

> practice victims (rather than imposing the same burden equally upon all medical malpractice victims) bears any reasonable relationship to the announced purpose of alleviating the "medical malpractice insurance crisis".

436 So.2d at 1027. This conclusion is fully in accord with all of the decisions which have considered this type of sub-classification to date. See AMERICAN BANK & TRUST CO. v. COMMUNITY HOSPITAL OF LOS GATOS-SARATOGA, INC., 104 Cal. App.3d 219, 163 Cal. Rptr. 513 (1980), aff'd, 33 Cal.3d 674, 190 Cal. Rptr. 371, 660 P.2d 829 (1983); CARSON v. MAURER, 424 A.2d 825 (N. H. 1980).[47/] The defendants, incidentally, have offered not even a suggestion as to how this arbitrarily drawn sub-classification can be considered "reasonably related to a permissible legislative objective"--and we dare say that this Court will have the same difficulty in finding such a relationship. Compare OSTERNDORF v. TURNER, 426 So.2d 539 (Fla. 1982).

The defendants also appear to have overlooked the fact that §768.54 was declared violative of equal protection guarantees for the additional reasons that its sub-classification was drawn arbitrarily and irrationally, and the fact that the statute was declared violative of due process guarantees because, on the facts in this case, it was discriminatory, arbitrary, oppressive, and intrinsically unfair. None of these aspects of the District Court's ruling have anything to do with the District Court's conclusion that the general classification of the statute bore a reasonable relation to a permissible legislative objective. Or perhaps the defendants have not overlooked these additional grounds, but simply have no response to them. The reason there has been no response is that the statute stands fairly accused of all of these infirmities on the facts in this case. That the accusation is fair is demonstrated simply

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47/ See, in addition, WHITE v. MONTANA, 661 P.2d 1272 (Mont. 1983); ARNESON v. OLSON, 270 N.W.2d 125 (N.D. 1978); WRIGHT v. CENTRAL DuPAGE HOSPITAL ASSN., 63 Ill.2d 313, 347 N.E.2d 736 (1976); TREECE v. SHAWNEE COMMUNITY UNIT SCHOOL DIST. No. 84, 39 Ill.2d 136, 233 N.E.2d 549 (1968).

and succinctly by the fact that the statute provides for the payment of Susan's judgment "in full", and then by its very terms prevents the payment of any of it. That is clearly irrational--and an irrational statute is, by definition, violative of equal protection and due process guarantees.

The lower courts' conclusion to that effect is fully supported by this Court's recent decision in ALDANA v. HOLUB, 381 So.2d 231 (Fla. 1980). In that case, this Court (at the request, curiously, of two health care providers) struck down Florida's Medical Mediation Act as violative of due process guarantees because only some health care providers were able to obtain its benefit, while others lost that newly-created right because of the lapse of an arbitrary time period. According to this Court, that was "intrinsically unfair". 381 So.2d at 236. The statute at issue in this case, of course, deals with far more important and long-established rights than the short-lived "right to mediate" involved in ALDANA. It also operates in the same arbitrary manner as the Medical Mediation Act: it allows some medical malpractice victims to recover the full amount of their damages (and only the least seriously injured ones at that), and it deprives those victims most in need of recompense, like Susan, of all their common law rights to recover just compensation for tortiously caused injuries. If this Court meant what it said in ALDANA, it cannot in good conscience reach any other conclusion than the one reached by the lower courts in this case: §768.54's payout scheme is "intrinsically unfair" on the facts in this case, and violative of due process guarantees as a result. For the Court to conclude otherwise in the face of ALDANA will mean that only health care providers are protected by the due process clauses of the state and federal constitutions.[48/]

48/ Two remaining miscellaneous contentions deserve a brief response. The statute cannot be saved by a conclusion that Susan's medical expenses will be less than $100,000.00 per year, merely because there is evidence in the record that the cost of her present, less-than-ideal care was less than

4. The plaintiff's future pecuniary damages were reduced to present money value.

In their final argument under this issue (and on an unrelated subject), the defendants contend that they are entitled to a new trial on damages because the jury did not reduce Susan's future pecuniary damages to present money value. This issue was raised in full-blown form below and summarily rejected.[49/] Because the issue was not preserved for review, because it is

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$100,000.00. The jury was the finder-of-fact in this case, and it found as a fact that Susan's medical expenses would be in excess of $100,000.00 per year. That finding is supported by competent evidence; Susan is entitled to the ideal care which that finding awards her (especially in light of the fact that her longevity is directly dependent upon the quality of care she receives); and this Court is not free to go behind that finding.

The statute also cannot be saved by construing it to allow the payment of principal in the amount of $100,000.00/year, and payment of interest on the principal balance annually. That would require a rewrite of the statute's plain language--since the statute limits the Fund's liability to a maximum payment of $100,000.00/year--so the defendants' suggestion is impermissible. Even if this Court were free to rewrite the statute as proposed, however, the rewrite would not cure the statute's basic infirmities. The plaintiff is entitled to interest on her judgment by virtue of a separate statute, and the interest provided by that statute does not represent any portion of her damages. Interest is paid simply as the cost of delay in the payment of damages which have been reduced to present money value, since a plaintiff is deprived of the opportunity to invest the award in order to keep pace with inflation during the period of delay.

Susan is entitled to her damages, and she cannot logically be required to accept interest on her judgment as a substitute for the damages awarded her by the jury. The question presented here is whether Susan has been unconstitutionally deprived of her damages by the statute, and all of the available interest in the world on the sums of which she has been deprived will not provide an answer to that question. Moreover, as the District Court observed, even if the statute were construed as the defendants suggest, Susan's judgment "would, under the statute, take over one hundred years to pay out". 436 So.2d 1022. We are therefore incredulous at the defendants' suggestion that the constitutional infirmities of §768.54 can be cured by such a construction of the statute.

49/ It was rejected because the jury was instructed that it must reduce Susan's future pecuniary damages to present money value; because plaintiff's counsel told the jury several times that Susan's future pecuniary damages must be reduced; because the verdict returned by the jury states on its face that each element of Susan's future pecuniary damages was reduced; and because the future pecuniary damages awarded by the jury are fully supported by the evidence of her future damages, stated in 1982 dollars (and adjusted upward for inflation, and downward by a discount to present money value). It was also rejected because it was never raised in the trial court in any manner, shape, or form.

totally without merit, and because space is at a premium, we have included our responsive argument on the issue below in our appendix here (at pp. 81-88). If the Court has any concern whatsoever about this issue, it may readily dispel that concern by reading our previous response.

The defendants have raised two arguments here which are not addressed in our previous response, and we will respond to them here briefly. First, the defendants insist that, before the issue of future damages can properly be submitted to a jury, a plaintiff has a burden to introduce expert evidence educating the jury as to how future damages are to be reduced to present money value. For this proposition, it relies upon SEABOARD COAST LINE RAILROAD CO. v. BURDI, 427 So.2d 1048 (Fla. 3rd DCA 1983). The BURDI decision nowhere adopts the defendants' proposition, however; in fact, it expressly notes what is made clear in our previous response--that the overwhelming majority of courts which have been asked to adopt the proposition have rejected it. The BURDI decision then goes on to note twice that the issue raised here was not even involved in that case. BURDI is therefore no support for the defendants' position here.[50/]

Second, the defendants suggest that the United States Supreme Court's recent decision in JONES & LAUGHLIN STEEL CORP. v. PFEIFER, _____ U.S. _____, 103 S. Ct. 2541, 76 L. Ed.2d 768 (1983), disapproves of our argument to the jury below--that future inflation will roughly offset the discount rate (an argument, incidentally, to which no objection whatsoever was lodged). We suggest that the defendants reread the Supreme Court's opinion. Even a cursory reading of that opinion will reveal that the Supreme Court did not disapprove the "total offset" method of accounting for inflation which we argued

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50/ In fact, BURDI fully supports our alternative position that, even if we did have such a burden below, the failure of the defendants to raise any mention of the issue in the trial court relieved us of that burden, and waived the issue for appellate purposes.

below without objection; in fact, it commented that "such an approach has the virtue of simplicity and may even be economically precise", 76 L. Ed.2d at 791, and it authorized its use in federal trial courts. It held, however, that it was in no position to mandate its use in the federal courts, because it was not equipped to select from the several competing economic theories currently in use in allowing juries to consider the effect of inflation on future damages --and it deferred to Congress to make the determination if it saw fit. We therefore read JONES & LAUGHLIN as an approval of our unobjected-to position below, not a rejection of it. For these, and the reasons expressed in more detail in our previous response, Susan's future pecuniary damage awards are precisely what the jury said they were--"reduced to present money value" --and this closing scattershot is without merit.[51/]

D. THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT THE TRIAL COURT "ERRED" IN DETERMINING THE AMOUNT OF A REASONABLE ATTORNEY'S FEE; AND, IF NOT, IT AT LEAST DID NOT ABUSE ITS DISCRETION IN FIXING THE AMOUNT AT $1,500,000.00.

1. The District Court erroneously concluded that the trial court "erred" in awarding an attorney's fee of $4,400,000.00.

The trial court awarded Susan's counsel a reasonable attorney's fee of $4,400,000.00. This award was based upon thoroughly settled principles of Florida law--that reasonable attorney's fees are to be determined by application of the several factors contained in DR 2-106 of the Code of Professional Responsibility; that quality, not quantity, is the decisive factor; that the award is to be informed by expert testimony; and that the award is within

51/ The defendants' footnoted contention that reference to the "annuity tables" contained in their appendix will demonstrate that the pecuniary awards were excessive should be ignored. The annuity tables were never presented at trial to the jury, and they are not in the record. More importantly, they are calculated upon a fixed yearly payout, and therefore ignore the effect of future inflation. Susan was entitled to an award, however, which would provide her with an increasing annual payout over the years in order to keep abreast of future inflation. The jury's award provides her with that payout.

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the sound discretion of the trial court. See, e. g., STATE, DEPARTMENT OF NATURAL RESOURCES v. GABLES-BY-THE-SEA, INC., 374 So.2d 582 (Fla. 3rd DCA 1979), cert. denied, 383 So.2d 1203 (Fla. 1980); SNIDER v. SNIDER, 375 So.2d 591 (Fla. 3rd DCA 1979), cert. dismissed, 385 So.2d 760 (Fla. 1980). The trial court's explanation for the award is contained in what the District Court described as a "well-reasoned order", which is included in our appendix at pp. 44-54, and which bears close reading at this point for the factual and legal background to this issue on cross-appeal.[52/]

On appeal, the standard of review which applied was whether the trial court abused its discretion. See, e. g., CITY OF RIVIERA BEACH v. CLARK, 388 So.2d 1011 (Fla. 4th DCA 1980); DIVISION OF ADMINISTRATION v. DENMARK, 354 So.2d 100 (Fla. 4th DCA 1978). There is a long line of authority in this state which holds that an appellate court cannot find an award of reasonable attorney's fees to be an abuse of discretion, if the award is supported by competent evidence and within the range of the expert opinion testimony concerning the amount of a reasonable fee.[53/] If the District Court

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52/ Summarized briefly, the rationale for the award was that no one factor of DR 2-106 required more weight than another; that it was a simple economic fact that there is no such thing as an "hourly fee" in a medical malpractice case; that the "fee customarily charged in the community" in such a case was a contingency fee; that the "contingency fee" factor of DR 2-106 was therefore entitled to considerably more weight than the factor of "time and labor required" in the instant case; that medical malpractice cases are "galaxies apart" from any other type of litigation in terms of difficulty and skill required to prosecute one successfully; that the instant case involved uniquely difficult and novel issues; that the amount involved and results obtained were extraordinary; and that plaintiff's counsel's experience, reputation and ability were unsurpassed. All of these conclusions were supported by the expert testimony of two preeminent and highly respected experts in the field of medical malpractice litigation, both of whom testified that a reasonable fee, in their opinion and considering all of the factors of DR 2-106, would be $5,000,000.00.

53/ E. g., CONNER v. CONNER, ____ So.2d ____ (Fla. 1983) (1983 FLW SCO 405); POSNER v. POSNER, 315 So.2d 175 (Fla. 1975); CITY OF RIVIERA BEACH v. CLARK, 388 So.2d 1101 (Fla. 4th DCA 1980); MELTZER v. MELTZER, 400 So.2d 32 (Fla. 3rd DCA 1981); ADAMS v. ADAMS, 376 So.2d 1204 (Fla. 3rd DCA 1979), cert. denied, 388 So.2d 1109 (Fla. 1980);

had followed this long line of authority, the trial court's award of attorney's fees should have been affirmed--because it is undisputed that the award is supported by competent evidence and expert testimony, and well within the range of expert testimony offered by both sides. After stating that it "agree[d] with much of what the trial judge said", however, the District Court held that the trial court had, in effect, simply awarded a contingent fee; that it "erred" in doing so; and that a reduction of the fee to $1,500,000.00 was required.

Quite apart from the fact that the District Court failed to apply the appropriate standard of review, we believe that this conclusion was erroneous for two reasons. First, the trial court's order emphatically stated the opposite. It stated in several places, in fact, that the award was not simply a contingent fee, but was based upon all of the factors of DR 2-106. The District Court had no authority to rewrite the trial court's order--and given the trial court's repeated disavowals of any intention to award simply a contingent fee, the trial court should have been taken at its word. Second, the District Court concluded that the award was too high on the sole ground that the factor of "time and labor expended" was required to be given considerably more weight than the "contingency fee" factor. There is no such requirement in Florida law, however, and creating such a requirement under §768.56, Fla. Stat. (1981), simply disregards economic reality. As the trial court noted, medical malpractice victims in this state simply cannot hire an attorney capable

SNIDER v. SNIDER, 375 So.2d 591 (Fla. 3rd DCA 1979), cert. dismissed, 385 So.2d 760 (Fla. 1980); AETNA CASUALTY & SURETY CO. v. FLORIDA POWER & LIGHT CO., 367 So.2d 1104 (Fla. 3rd DCA 1979); STORER v. STORER, 353 So.2d 152 (Fla. 3rd DCA 1977), cert. denied, 360 So.2d 1250 (Fla. 1978); KLARISH v. CYPEN, 343 So.2d 1288 (Fla. 3rd DCA 1977), cert. denied, 355 So.2d 515 (Fla. 1978); IN RE ESTATE OF LUNGA, 322 So.2d 560 (Fla. 3rd DCA 1975); LODDING v. DUNN, 251 So.2d 560 (Fla. 3rd DCA 1971), cert. denied, 258 So.2d 818 (Fla. 1972); JOHNSON v. KRUGLAK, 246 So.2d 617 (Fla. 3rd DCA 1971).

of prosecuting such a difficult and time-consuming lawsuit on a "time and labor expended" basis. As a result of the economic impossibility of an hourly rate retainer arrangement in medical malpractice actions, the only way a medical malpractice victim can hire an attorney in this state is under a contingent fee contract. The defendants themselves recognized that the contingent fee arrangement was reasonable by proposing to pay Mr. Schlesinger a reasonable attorney's fee of approximately 40% of each of the settlement offers made to the plaintiff.

Given this economic reality, recognized even by the defendants in this case, it seems to us that the trial court's approach to the issue was much more sensible than the District Court's. After all, one of the purposes of an attorney's fee award under §768.56 is to assist the medical malpractice victim in meeting his or her obligation for fees necessarily incurred in obtaining a recovery. Before that purpose can be adequately served, the nature of the fee arrangement must be a primary consideration, because the fee, of necessity, must be paid out of an award designed to compensate the plaintiff for other significant losses. If the purpose of the statute is to provide such assistance, only the trial court's "weighing" of the various factors in DR 2-106 makes sense. That the fee ultimately awarded seems out of the ordinary is only because Susan's injuries and the resulting litigation were extraordinary. The District Court's "weighing", on the other hand, causes Susan a considerable "shortfall".

We therefore believe that the trial court did not "err" in concluding that the "contingency fee" factor was entitled to considerable weight in this case, and that the District Court erred in concluding that economic reality must be sacrificed to the factor of the dollar worth of "time and labor expended"--a factor which is clearly fictional on the economic facts of this case, since there is no such thing as an "hourly rate" in medical malpractice cases. In the

final analysis, the District Court simply substituted its own discretion for that of the trial court. That was impermissible, when the only question before the District Court was whether reasonable persons could differ concerning the propriety of the trial court's award. We earnestly believe that reasonable persons could differ concerning the propriety of that award, given the economic reality of the circumstances and the extraordinary nature of the case; that the trial court therefore did not abuse its discretion; and that the District Court's conclusion to the contrary should be reversed, with directions to order reinstatement of the trial court's judgment for attorney's fees.

2. At the very least, the District Court did not abuse its discretion in fixing the attorney's fee award at $1,500,000.00.

Not content with their substantial victory in the District Court, the defendants complain that the present law of Florida is inadequate to the task of determining reasonable attorney's fees, and they urge this Court to adopt in its stead the "adjusted time and hourly rate", or "lodestar", approach in use in the federal courts.[54/] The federal approach is not dissimilar to the approach in present use in Florida, except to the extent that it weighs time expended much more heavily and provides for considerably less discretion at the trial court level. Since the length and the breadth of the discretion which this Court chooses to give its lower courts is largely a function of its own collective philosophy on the subject, it does not seem to us that we have much to gain by discussing the pros and cons of the subject at any great length. Our perception of this Court's philosophy on the subject, however, is that it is perfectly comfortable with granting its lower courts rather broad discretion in matters like the one in issue here. See, e. g., CANAKARIS v. CANA-

54/ They also contend that the District Court's decision articulates no adequate standards by which to determine reasonable attorney's fees. We disagree. The decision expressly articulates the standards contained in DR 2-106, which have been considered adequate by the courts of this state (and most others) for decades.

KARIS, 382 So.2d 1197 (Fla. 1980). And in light of what we have said above, there can be no question that, at the very least, a fee of $1,500,000.00 in this case does not constitute an abuse of discretion.

If we are correct that this Court is comfortable with granting its lower courts broad discretion, then it seems to us that there is no good reason for this Court to upset decades of its own decisional law (not to mention scores of district court decisions which have followed this Court's lead).[55/] See e. g., PENN-FLORIDA HOTELS CORP. v. ATLANTIC NAT. BANK OF JACKSONVILLE, 126 Fla. 344, 170 So. 877 (1936); GREENFIELD VILLAGES, INC. v. THOMPSON, 44 So.2d 679 (Fla. 1950). And make no mistake about it, literally scores of decisions spanning several decades will have to be overruled. The present system has served us well enough for decades; §768.56 was enacted at the vociferous insistence of the health care industry; if the fee awarded in this case seems out of the ordinary, that is only because this case is an extraordinary one; and there is no compelling reason why the defendants' unsettling giant step should be taken across the board by this Court, simply because of one large fee in an extraordinary case.

We also see no need for this Court to take that giant step in this case, even if it were of a mind to do so, because adoption of the federal approach would not change the result in this case. The defendants attempt to demonstrate that the maximum fee allowable under the federal approach in this case

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55/ We do perceive one good reason not to upset the well-settled applecart here. The federal approach requires, for each and every attorney's fee award, a lengthy written order containing factual findings and detailed explanations of application of all of the factors of DR 2-106. Because the federal courts only seldom award attorney's fees, they perhaps can afford that luxury. Placing such a requirement on the trial courts of this state, however, would undeniably create a considerable burden. The federal courts have long required written findings and conclusions in numerous contexts, and this Court has never seen fit to impose that burden on its already overworked trial courts in those areas. If that philosophy still prevails in this Court, the federal approach to the computation of attorney's fees, with its attendant voluminous paperwork, would seem to be disfavored here.

would be $500,000.00. To reach that result, they begin by setting Mr. Schlesinger's "hourly fee" at $250.00; they assume an expenditure of 1,000 hours; and they multiply the result by two. The defendants have apparently forgotten, however, that we are entitled to have the evidence construed in a light most favorable to us here, and they have clearly forgotten that their own expert testified below that a reasonable hourly rate for Mr. Schlesinger's services in a medical malpractice case would be double that selected by the defendants--$500.00 per hour (R. 2226). Given that as a factual minimum (and it is clearly only a minimum, since the plaintiff's experts testified to much higher figures), and accepting all the other "upward adjustments" conceded by the defendants, a reasonable fee in this case would be double the fee computed by the defendants--$1,000,000.00.

This Court need not accept the defendants' conservative "upward adjustments" in this case, however, since it is painfully obvious from the trial court's order and even a cursory review of the record that every factor of DR 2-106, on a scale of one to ten, rates a ten in this case. The District Court could therefore apply a much higher "multiplier" in adjusting the hourly fee upwards. It could, for example, accept the defendants' own evidence that a reasonable hourly fee would be $500.00 per hour; it could accept the defendants' contention that 1,000 hours were expended; and it could reasonably adopt a multiplier of three for all the other factors of DR 2-106--resulting in an award of $1,500,000.00. At the very least, reasonable persons could differ concerning the propriety of such a conclusion, and the District Court therefore did not abuse its discretion under either the federal approach or present Florida law. Because there is no need to disturb the District Court's conclusion even if the defendants are correct that the federal approach should be adopted, the defendants' contention need not even be reached, and can be saved for another case.

E. SECTION 768.56, FLA. STAT. (1981), WHICH AUTHORIZES THE IMPOSITION OF ATTORNEY'S FEES IN MEDICAL MALPRACTICE CASES, IS CONSTITUTIONAL.

Finally, the defendants contend that the District Court erred in declaring §768.56, Fla. Stat. (1981), constitutional.[56] They advance two, and only two, grounds for this contention: (1) that the means chosen by the legislature are not rationally related to the statute's announced purposes;[57] and (2) that the statute is irrational because §768.54, Fla. Stat. (1981), which creates the Patient's Compensation Fund, prevents settlements in large cases. We will respond to each of these contentions in turn.[58] Before we

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56/ To date, five panels of three District Courts have reached the same conclusion. In addition to the decision under review, see KARLIN v. DENSON, _____ So.2d _____ (Fla. 4th DCA 1983) (1983 FLW DCA 2212); DAVIS v. NORTH SHORE HOSPITAL, _____ So.2d _____ (Fla. 3rd DCA 1983) (1983 FLW DCA 2488); YOUNG v. ALTENHAUS, _____ So.2d _____ (Fla. 3rd DCA 1983) (1983 FLW DCA 2489); POHLMAN v. MATHEWS, _____ So.2d _____ (Fla. 1st DCA 1983) (case no. AR-398; opinion filed November 21, 1983).

57/ We agree with the defendants that the District Court misspoke itself when it stated that all of the statutes recently enacted to alleviate the so-called "medical malpractice insurance crisis" rest on the same preamble. Ch. 80-67, Laws of Florida, has its own preamble. That preamble states essentially the same reasons for enactment of §768.56 as those contained in the other statutes' preambles, however, so the District Court was correct in substance, if not precisely correct in form. The defendants do not quarrel with this.

58/ We will not respond to the numerous additional arguments advanced by the defendants' amici here, however, because of the settled rule that this Court cannot even consider them:

> Under the rule stated in the title Constitutional Law §76 (12 C.J. p. 760 n. 57) that the constitutionality of a statute may not be attacked by one whose rights are not affected by the operation of the statute, an amicus curiae has no right to question the constitutionality of an act, and the court will not pass on grounds of invalidity urged by an amicus curiae but not presented by the parties.

HIGBEE v. HOUSING AUTHORITY OF JACKSONVILLE, 143 Fla. 560, 192 So. 479, 485 (1940).

Although we would have liked to respond to the amici's additional arguments notwithstanding this settled rule, our space is at a premium and prohibits us from doing so. We are constrained to emphasize briefly here, however, that the broad attack mounted upon the statute in the Mathews' amicus brief, as seen from the perspective of a plaintiff, is inappropriate here--because the issue of the statute's constitutionality from that perspective

do so, however, we will briefly outline our position below.

Our position below, as it was with respect to §768.54, was that the general classification of §768.56 (which simply singles out medical malpractice victims and health care providers for special treatment not imposed upon other tort victims/tortfeasors) bore a reasonable relationship to the permissible legislative objective of alleviating the so-called "medical malpractice insurance crisis". That is the stated purpose of the statute's preamble, and that conclusion is mandated, in our judgment, by this Court's decisions in CARTER v. SPARKMAN, 335 So.2d 801 (Fla. 1976), and PINILLOS v. CEDARS OF LEBANON HOSPITAL CORP., 403 So.2d 365 (Fla. 1981). That conclusion is also mandated as a matter of federal law by WOODS v. HOLY CROSS HOSPITAL, 591 F.2d 1164 (5th Cir. 1979). Unlike §768.54, however, the attorney's fee statute contains no irrational or arbitrary sub-classifications which would render it constitutionally invalid.59/ Except for the fact that the statute

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is clearly not before the Court. That issue can be saved for another day, and it is perhaps only to ensure that this Court does save that issue for another, more appropriate case that the Mathews have appeared here at all. In any event, if the Court desires a thorough response to the miscellaneous arguments made by the amici, it can find that response in our "brief no. 2" filed in the District Court.

59/ The only sub-classification in the statute is an exemption for "insolvent or poverty-stricken" victims and tortfeasors from application of the statute. In effect, this exemption simply narrows the classifications created by the statute to "solvent malpractice victims" and "solvent health care providers". All solvent parties to medical malpractice litigation are treated alike. It is not unconstitutional for the legislature to create classifications within an otherwise homogenous class, so long as the narrowing of the class has a reasonable basis. See, e. g., LASKY v. STATE FARM INSURANCE CO., 296 So.2d 9 (Fla. 1974) (reasonable to differentiate between passenger vehicle accident victims permanently injured and those similarly situated who will recover from their injuries for purposes of allowing pain and suffering awards); CHAPMAN v. DILLON, 415 So.2d 12 (Fla. 1982) (same); PURDY v. GULF BREEZE ENTERPRISES, INC., 403 So.2d 1325 (Fla. 1981) (reasonable to differentiate between accident victims whose insurers have subrogation rights and those who have received collateral source benefits not subject to subrogation in abolishing collateral source rule only as to the former).

In the instant case, there is a perfectly reasonable basis for exempting insolvent parties from the application of §768.56, since an insolvent party could not comply with the statute in any event. The statute has the same

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operates evenhandedly (by providing for an award of attorney's fees against losing plaintiffs as well as defendants), §768.56 is no different than the more than 75 additional Florida statutes providing for attorney's fees in numerous diverse types of litigation. Constitutional challenges to those statutes have routinely been rejected by the courts of this state. See, e. g., HUNTER v. FLOWERS, 43 So.2d 435, 14 A.L.R.2d 447 (Fla. 1949).60/ The statute in issue here is reasonably designed to discourage frivolous medical malpractice claims and encourage prompt settlement of meritorious claims, with a view toward advancing a permissible legislative interest, the reduction of medical malpractice insurance premiums and health care costs--and its similarity to the various attorney's fee statutes which have withstood constitutional attack in the past renders it impervious to constitutional attack here.

The defendants nevertheless contend that the means selected by the legislature to accomplish the statute's permissible objective are not reasonably related to the objective. First, they argue that an attorney's fee statute is inconsistent with the premise that the issue of liability is a primary issue to be resolved in medical malpractice litigation, because, according to the defendants, it deters litigants from resorting to the forum best designed to resolve that issue. But that is precisely what the statute was designed in part to

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rational basis, in effect, that the federal bankruptcy laws have. In fact, if the statute did not exempt insolvent parties from its application, it would more likely than not constitute an unconstitutional bar to an insolvent malpractice victim's constitutional right of access to the courts. Since there clearly is a reasonable basis for this narrow exemption, the sub-classification contained in §768.56 does not render it violative of the due process or equal protection clauses--unlike the irrational and arbitrary sub-classification presented by §768.54. In any event, the defendants have not challenged the statute on this basis, so there is no need for the Court to reach any issue which may be presented by this sub-classification.

60/ In addition, see SARASOTA COUNTY v. BARG, 302 So.2d 737 (Fla. 1974); J. R. FURLONG, INC. v. CHRYSLER CORP., 419 So.2d 385 (Fla. 3rd DCA 1982); SHARPE v. HERMAN A. THOMAS, INC., 250 So.2d 330 (Fla. 3rd DCA), cert. denied, 257 So.2d 257 (Fla. 1971); EMPIRE STATE INSURANCE CO. v. CHAFETZ, 302 F.2d 828 (5th Cir. 1962). See generally, Annotation, Attorney's Fees to Successful Claimant, 73 A.L.R.3d 515 (1976).

do. It was designed (as are nearly all attorney's fee statutes, the only exception being the "frivolous claim" statute) to coerce defendants into compromising and settling claims in which liability is both established and fairly debatable, in order to avoid the cost of expensive litigation and the exposure to large judgments--and thereby reduce the collective cost of insurance coverage for the health care industry. The general means to effect that admitted general goal is therefore perfectly rational, even if operation of the statute might result in an occasional settlement in a case which might have been successfuly defended.

Second, the defendants contend that the statute simply adds to the plaintiff's "pot", and thus encourages lawsuits which might not otherwise have been brought. We doubt that this is true, in view of the fact that plaintiffs with less than open-and-shut cases are faced with the prospect of filling the winning defendant's "pot", but we also think the defendants are looking through the wrong end of the telescope. It is precisely the fact that the potential attorney's fee may add to the "pot" which provides the motivation for defendants to settle meritorious and fairly debatable claims rather than incur the expense of litigation and the risk of large judgments. In any event, all of the attorney's fee statutes on the books add to the plaintiff's "pot" for the purpose of encouraging defendants to settle meritorious claims, and none of those statutes have ever been declared unconstitutional. We therefore think the defendants' challenge of the means selected by the legislature to encourage the settlement of medical malpractice claims is without merit.

The defendants' primary argument is that §768.56 is not reasonably designed to accomplish its purpose in promoting settlement of meritorious medical malpractice claims, and capriciously denies the defendants due process as a result, because they are prevented from settling medical malpractice

suits by the "limited payout" provision of §768.54. This challenge to the constitutionality of §768.54 was, without question, never advanced in the trial court (which is one good reason why the District Court's opinion does not mention it). It therefore clearly cannot be considered by this Court.[61/] The point is not merely of academic interest to us. It is of enormous practical importance to us, because we do not believe the factual assertion upon which the argument depends is true. If the argument had been raised in the trial court, we would have had an opportunity to explore its basis by taking appropriate discovery, and by obtaining and presenting evidence controverting the defendants' insistence that §768.54 has prevented the settlement of meritorious medical malpractice claims.

If we had been given that opportunity, we are certain that we could have mustered abundant evidence that the Fund has settled numerous claims within the limitations provided by the statute;[62/] and we could probably have proven that, notwithstanding the statute's apparent facial limitation upon the Fund's ability to pay more than $100,000.00/year towards settling a claim, the

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61/ It is fundamental, of course, that appellate courts will not, indeed cannot, consider points, issues, grounds, or objections which are raised for the first time on appeal. See, e. g., DOBER v. WORRELL, 401 So.2d 1322 (Fla. 1981); COWART v. CITY OF WEST PALM BEACH, 255 So.2d 673 (Fla. 1971). The same rule applies to asserting grounds when challenging the constitutionality of a statute; grounds not raised in the trial court cannot be considered on appeal. See, e. g., SMITH v. ERVIN, 64 So.2d 166 (Fla. 1953); HENDERSON v. ANTONACCI, 62 So.2d 5 (Fla. 1952).

The "fundamental error" exception to the general rule is not available to the defendants either, because the issue presented here concerns the allowance of attorney's fees, and therefore does not go to the merits or the foundation of the case. That proposition is settled by SANFORD v. RUBIN, 237 So.2d 134 (Fla. 1970), in which this Court held that not all constitutional errors constitute fundamental errors, and that a constitutional issue relating to the allowance of attorney's fees could never be considered "fundamental error".

62/ Indeed, the statistics provided by the FMMJUA in its amicus brief below demonstrated that 90% of medical malpractice claims paid are less than $100,000.00, and only 1% of the claims paid exceed $583,000.00. These statistics alone demonstrate that §768.54 cannot conceivably inhibit settlement except perhaps in the rarest of cases.

Fund has actually settled a number of claims for lump sums or annuities with a present money value far in excess of that limitation. If we had been able to make such a showing, of course, the defendants would have been unable to make their primary argument here at all. That is precisely why, in the interest of fundamental fairness, appellate courts do not consider matters raised for the first time on appeal. In our estimation, it would simply be wrong for this Court to entertain the defendants' argument at a time when we are helpless to demonstrate that its factual predicate is erroneous--and we respectfully submit that the Court should decline to entertain the argument as a result.

We concede that the trial court found in its order declaring §768.54 unconstitutional that the statute's limited payout provision appeared to prevent good-faith settlements of larger claims.[63/] That conclusion was reached before any argument was held on the constitutionality of §768.56 and before any evidence was taken on the attorney's fee issue, however, and the evidence which ultimately came in on that issue (together with evidence adduced at trial) suggests two things which clearly undermine the defendants' primary argument. It suggests (1) that §768.54's limited payout provision may not necessarily prevent good-faith settlements of larger cases; and (2) that that provision did not necessarily prevent settlement of the instant case.[64/]

63/ This was only one, and perhaps the least important, of several reasons why the statute was declared unconstitutional, however. If the defendants had relied upon it or even mentioned it at the subsequent hearing held to determine the constitutionality of §768.56, the trial court could have reconsidered it and rectified it if the evidence on the issue proved otherwise. We were not given the opportunity to develop evidence on it, however, nor was the trial court given any opportunity to reconsider it--because of the defendants' failure to raise it below. In our judgment, it is unfair to use this conclusion "against" the trial court, so to speak, on an unrelated issue, without having first given it the opportunity to analyze the conclusion in light of the new contention.

64/ We emphasize that the evidence only suggests these conclusions. The limited amount of evidence available on the issue is inconclusive, because the defendants never placed the constitutionality of §768.56 in issue on this ground below, and the suggestive evidence came in on other issues.

During the hearing on the amount of attorney's fees to be awarded, two letters setting forth the Fund's settlement offers were placed into evidence without objection (R. 3128, 3130).[65/] The first letter, dated March 11, 1982, offers the plaintiff the sum of $1,000,000.00, consisting of cash "up front" of $300,000.00; attorney's fees "up front" of $400,000.00; and three annual payments of $100,000.00. The Fund's second letter, dated March 22, 1982, offers the plaintiff a package with a present money value of approximately $2,000,000.00, consisting of cash "up front" of $300,000.00; attorney's fees "up front" of $800,000.00; and a commercially purchased annuity which would pay $7,000.00/month thereafter.[66/] The plaintiff's settlement demand was established on the record inconclusively. Defendants' counsel recalled that the demand was $3,000,000.00; plaintiff's counsel recalled that the demand was $4,000,000.00 (a figure which he emphasized was "shaved . . . right to the backbone" to give Susan the immediate wherewithal to be minimally sound in an economic sense, and avoid the delay of trial and appeal and all the risks attendant thereto; he also emphasized that "[s]ettlement figures in no wise reflect what the true value of a case is.") (R. 2163-64).

It would therefore appear (at least according to defendants' counsel's recollection) that the case would have settled for a present money value of as low as $3,000,000.00. The Fund's prior settlement offers convince us that this was not an impossibility (nor would a settlement at $4,000,000.00 have

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65/ The purpose of placing these letters into evidence was to demonstrate that the Fund had offered counsel an attorney's fee of 40% of the total settlement offer; they were not placed into the record as evidence bearing on the issue under discussion here, because that issue was never raised below. The Fund has nevertheless utilized its settlement proposals as proof of the fact which it has asked this Court to assume here--that this case did not settle solely because of the limited payout provision of §768.54. The letters simply do not prove that fact, however.

66/ Curiously, neither settlement offer made available the $100,000.00 in underlying coverage which the Hospital claimed below had been tendered to the Fund.

been an impossibility).[67/] The Fund had $300,000.00 available which it was willing to pay "up front" (and perhaps another $100,000.00 available from the Hospital)--and it could have paid 40% of $3,000,000.00, or $1,200,000.00 in attorney's fees "up front". It therefore had $1,500,000.00 (or $1,600,000.00) available to pay immediately, and needed to supplement that only with an annuity with a present money value of $1,500,000.00 (or $1,400,000.00). Since it had already offered the plaintiff an annuity with a present money value of $900,000.00 in its March 22nd offer, notwithstanding the payout limitation of §768.54, there is no reason on this record to believe that the Fund could not have settled this case if it had elected to do so. Indeed, there is reason to believe that it could have settled the case: the annuity first offered paid only $84,000.00/year; that annuity could have been purchased for considerably less than the $100,000.00/year available to the Fund; and the difference was therefore clearly available to purchase a substantially larger annuity.[68/]

In the final analysis, however, the record is simply inconclusive on the issue here--but that is precisely our point. At the very least, the state of the record does not demonstrate, as the defendants have claimed, that settlement was prohibited by §768.54 as a matter of incontrovertible fact. We therefore continue to insist that the defendants are out of line here in claim-

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67/ It is worth noting in this connection that the trial court expressly found as fact "that the plaintiff's settlement demand in this case was reasonable, and that the two settlement offers made by the defendants were neither prompt nor reasonable" (R. 3223, 3227).

68/ The testimony of Maxwell Dauer (the Hospital's president, administrator, and part owner), which was placed in evidence without objection at trial, also supports our position here. In that testimony, Mr. Dauer adamantly insisted that Susan's claim was totally without merit, and admitted at the same time that he had no idea what the facts were concerning Susan's claim (R. 1378-83). At the very least, this testimony provides an inference that the instant case was never settled, not because of the limited payout provision of §768.54, but because of the Hospital's adamant and obstinate refusal to permit settlement on any terms other than those favorable to the defendants.

ing that they were prohibited from settling this case by §768.54, and that this prohibition renders §768.56 unconstitutional. There are therefore two good reasons why this Court should not entertain the defendants' primary argument here--its necessary factual foundation is not proven by the record (indeed, the record comes very close to proving the contrary), and it was never raised in the trial court. For all of the foregoing reasons, the District Court correctly rejected all of the defendants' properly preserved challenges to the constitutionality of §768.56.

III
CONCLUSION

It is respectfully submitted that the District Court correctly held that the plaintiff was entitled to judgment for the full amount of her compensatory damages, and that that aspect of the District Court's decision should be affirmed. The District Court's conclusion that Susan was entitled to recover attorney's fees under §768.56 should also be affirmed. The District Court's conclusion that the judgment for attorney's fees should be reduced to $1,500,000.00 should be reversed, however, with directions to affirm the trial court's judgment for attorney's fees; alternatively, the District Court's conclusion that the judgment for attorney's fees should be reduced to $1,500,000.00 should be affirmed.

Respectfully submitted,

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