O/a 1-12-84

IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,237

Fourth District Case Nos.

82-1332	82-1992
82-1341	82-1993
82-1597	82-2070
82-1686	82-2078

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,

Appellees.

ON APPEAL OF A DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

APPELLANTS' REPLY BRIEF AND ANSWER BRIEF TO APPELLEES' CROSS APPEAL

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EXPLANATION OF REFERENCES

The following references will be used throughout this brief:

T. _____ refers to pages in the trial transcript.

A. _____ refers to pages in Volumes I, II and III of the Consolidated Appendix filed with this Court.

Unless otherwise indicated, statutory references are to the recent (1981) compilation.

TABLE OF CITATIONS

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INTRODUCTION

This brief is filed jointly by the Florida Patient's Compensation Fund ("Fund") and the Florida Medical Center ("Hospital") as the appellants' reply brief and the answer brief on the appellees' cross-appeal.

STATEMENT OF THE CASE AND FACTS

The plaintiffs begin their defense of the $12.4 million verdict in this case with seven pages of "factual" argument, characterizing, for example, the actions of Florida Medical Center and its employees as "a gross departure from any reasonable standard of care governing the expected conduct of ICU nurses." Answer Brief at 1-7. The plaintiffs thus seek to sustain the excessive judgment below by generous use of adjectives and hyperbole. They did not seek punitive damages below, however, and it is two judicial levels too late to inject the punitive element.*/ The hospital's conduct and the cause of Susan Von Stetina's injuries have no relevance to the severity of her damages, which is the issue on appeal.**/

It is not possible in the limited space to address each of appellees' factual errors, most of which are not significant for the issues in this case. Among the very emotional facts referred to in the appellees' brief, however, are two points which need to be addressed for clarity. One relates to the defendants' objections to the admission of the admittedly fictional account, Exhibit 24, and one relates to the question of whether Susan Von Stetina is brain dead.

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*/ The plaintiffs did, however, attempt to manipulate the court and jury by first claiming punitive damages and then after adducing evidence which related to punitive damages, abandoning that claim. This point is made in footnote 16, page 10 of the appellants' initial brief.

**/ Appellant Florida Medical Center continues to maintain that the erroneous and prejudicial admission of plaintiff's Exhibit 24, see sections I. A. and B., infra, requires a new trial not only as to damages but also as to liability. While Appellant Patient's Compensation Fund has chosen not to argue the liability issue in this Court, the Exhibit 24 arguments, although couched in terms of prejudicially inflating damages, also serve to establish the potential prejudice infecting the jury's threshold determination of liability, thus requiring reversal for a new trial on all issues. See also first footnote on page 11.

The plaintiffs lay great emphasis on Ms. Von Stetina's ability to comprehend her situation. They ignore the testimony of the only expert on the subject who said that half of the cells in her brain are dead. (T. 911, A. 158, see T. 1022, 1068). The damage is irreversible. (T. 462). Although there was evidence that Susan's muscles reflexively responded to different stimuli, nothing contradicted the testimony that Ms. Von Stetina lacked any capacity for awareness of her tragedy.

It is also necessary at this juncture to identify the clear and pointed objection made at trial by defense counsel to the introduction of Exhibit 24, the fictional account of an experience on a ventilator. Counsel stated that the exhibit was not only hearsay (A. 98) but irrelevant since "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 nurses." (A. 99) He also complained that its probative value, if any, was outweighed by its prejudicial effect:

> if your honor will take a minute to read that, you can see exactly what Mr. Schlesinger wants to get it in. I mean, the value of the damage that that is going to cause for somebody reading or hearing that, your Honor, when it doesn't really apply to this particular case . . . . (A. 99).

The Fourth District agreed with the objections made in the trial court, emphasizing the last quoted statement that Exhibit 24 "doesn't apply to this particular case." Opinion at 18 (A. 641).

I.

THE DEFENDANTS ARE ENTITLED TO A NEW TRIAL

A. The Fourth District Correctly Adopted Defendants' Argument That Exhibit 24 Was Not Admissible.

The plaintiffs argue that the district court was on a frolic of its own in holding Exhibit 24 inadmissible on the ground that "there was no predicate whatsoever that the plaintiff . . . had actually endured such thoughts and emotions under this or similar circumstances." Opinion Below at 18 (A. 641). Their argument, made at 18-19 of their brief, that the defendants did not argue the inadmissibility of Exhibit 24 on this ground, is wholly incorrect. Indeed, the plaintiffs concede that defense counsel argued "the prejudicial value of PX. 24 outweighed its probative value," and that it was therefore inadmissible under section 90.403, Florida Statutes (1981). Answer Brief at 19 n. 19. See Defendants' Brief No. 1 to the Fourth District at 41-43 and Reply Brief at 22-23.

The Fourth District agreed that the document should not have been admitted, finding that the probative value of the "emotional account," which was not shown to be accurate or sponsored by its author, was negligible. In noting the absence of evidence of the document's author or the circumstances of its writing, and hence the defendants' inability to cross-examine, the Fourth District, in our view, essentially adopted our arguments that Exhibit 24 was hearsay as well.

The Fourth District was correct in its holding. The plaintiffs misread the district court's opinion on this point when they assert that the Fourth District held the article inadmissible because it was a work of fiction. The Fourth District created no per se rule for all conceivable circumstances but simply noted, as the defendants had pointed out in argument before that tribunal, that Exhibit 24 was fictional, in support of its holding that the article was irrelevant to this case. The plaintiffs seek to make hay out of defense's statement at oral argument below that Exhibit 24, as a work of fiction, fell below hearsay as competent evidence. That the article was fictional adds strength to the defense's argument that the exhibit lacks probative value. The defendants did not "almost concede" that the article is not hearsay. The document is fiction and it is hearsay. It makes no difference under the hearsay rule whether an out-of-court writing is factual or fictional. Neither is subject to cross-examination and both are excluded. A writing which is fictional is even less reliable than other evidence which purports to speak the truth and should be based on the first-hand knowledge of the declarant.

The plaintiffs' attempt to create a new exception to the hearsay rule -- the fictional exception -- has no basis. Their cavalier argument will, we hope, invite close analysis. When this work of fiction is closely examined, the Court will realize that it is written as fiction and in the first person precisely because the writer seeks to present an emotional and passionate message in a way which could not be conveyed in a third-person account. The reader -- the juror now -- is "pulled into" feeling like the reader himself is on a respirator. The explicit evocation of emotion undoubtedly sought by

the author (as well as the plaintiffs) is barred from the Florida courts, as are like techniques such as the "golden rule argument."*/

Even if the document did not have these defects, it was still inadmissible. The argument used below by plaintiffs -- that the document went to the standard of care -- fails on two grounds. Logically, Exhibit 24 could not be relevant to the standard of care unless it were true.**/ The impact of the hearsay rule cannot be escaped by simply arguing that written works are admissible because they prove the standard of care.***/ Yet, as the plaintiffs assert in their brief, they have consistently taken the position that the truth or falsity of the article was irrelevant.****/ The plaintiffs' argument therefore crashes in self-contradiction.

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*/ In Russell, Inc. v. Trento, 8 Fla.L.Wk. DCA 2839, 2040 (Fla. 3d DCA Case No. 82-1445 December 6, 1983), the court reversed a jury verdict in a wrongful death action where, in final argument, "the emotion and anguish exhibited by counsel was not spontaneous and unthinking, but was a shrewdly calculated attempt to solicit a sympathetic response from the jury." The court said "[t]hese sympathetic ploys used by counsel will not be condoned," and held that "[r]emarks made solely for the purpose of evoking sympathy for the plaintiff . . . warrant a new trial."

**/ Thus, at page 11 of their brief to this Court, plaintiffs argue that Exhibit 24 "illustrates ... that the utter helplessness of a ventilator patient requires that the patient be constantly monitored ... ." Obviously, the truth and representativeness of the portrayal of Exhibit 24, which were never proven, are assumed by this argument.

***/ Unfortunately for the plaintiffs, the Florida Evidence Code does not include a hearsay exception for learned treatises or journals. See Fla. Stat. § 90.706, Commentary 1978 Amendment (to Evidence Code), Volume 6C, p. 235; Rice v. Clement, 184 So.2d 678, 680 (Fla. 4th DCA 1966) ("Medical books cannot be read or introduced before juries as independent, substantive or affirmative proof.").

****/ Since plaintiffs concede the article is fictional, this position amounts to an arugment that "the necessary falsity of Exhibit 24 is irrelevant."

A similar argument was recently rejected by the First District Court of Appeal in Sikes v. Seaboard Coast Line R. Co., 429 So.2d 1216, (Fla. 1st DCA 1983), where the defendant in a railroad-crossing case offered the Florida Driver's License Handbook as evidence of the standard of care that the plaintiff automobile driver should have observed in approaching the crossing. The Court held that

> the handbook is nothing more than written statement of the declarant who compiled the pamphlet, which was introduced to prove the truth of what Florida Law and DOT policy require. The primary objection to the admission of hearsay evidence is, of course, that an adverse party is denied the opportunity to cross-examine the out of court declarant . . . in order to expose errors in the writing or statement . . . thus, the trustworthiness of the handbook can not be ascertained.
>
> 429 So.2d at 1220 (emphasis added)

Further, Exhibit 24 does not relate to any relevant aspect of the standard of care. It does vividly describe emotions, such as panic and terror, which one (fictionalized) respirator patient might have experienced, but it does not establish a standard of nursing care of one to one or one to two. Exhibit 24 simply does not speak to the hospital's duty in staffing an intensive care unit. It is true that Exhibit 24 might serve to sensitize nurses to the subjective helplessness which a respirator patient might feel. This point, however, was not only undisputed but irrelevant to this case.*/

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*/The decision of whether or not to place Susan Von Stetina on a respirator was made by doctors who were not joined as Defendants, and the decision was never challenged by the plaintiff.

The plaintiffs now acknowledge the strength of the defendants' position by advancing an entirely new argument. They now maintain the article was admissible to show that the Hospital was on notice that ventilator patients are helpless and in need of continuous care. If Exhibit 24 showed this, it would be irrelevant: the issue was not controverted at trial. The article, if offered for this purpose, is inadmissible under section 90.403. Whatever probative value it has to prove this point is substantially outweighed by the danger of unfair prejudice,*/ and the defendants clearly objected on this ground. (A. 99).

The plaintiffs' hypothetical poster saying "rolling balls are always followed by running children" thus misleads rather than illuminates. Exhibit 24 did not describe respirator malfunction or any negligence or lack of care by a hypothetical nurse.**/ The foundation established for Exhibit 24 (at best) was not that it showed the need for care by nurses but that it tended to show the feelings (fictitious) of respirator patients. Thus it does not show that the hospital "was well sensitized to the very hazard involved in this suit." Moreover, a poster, a rather colorless admonition, would not have the emotional and dramatic impact of Exhibit 24, which purports to express, in the first

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*/ Straight v. State, 397 So.2d 903, 907 (Fla. 1981), cert. den., 454 U.S. 1022 (1981); Carter v. Hewitt, 617 F.2d 961, 972 (3d Cir. 1980).

**/ It did, however, describe the hypothetical patient's extreme fear of potential respirator malfunction, when there was no evidence Susan Von Stetina, who was heavily sedated, was even conscious while on the respirator.

person, feelings in very emotional terms. Therefore, Exhibit 24, a hearsay document which only tended to establish an uncontrovertible fact and which did not serve to advance any proposition relevant to the proceedings, should have been excluded. Its probative value was minimal, and its prejudicial value, as we shall demonstrate, was considerable. Therefore, the district court properly held it inadmissible.

B. The Admission of Exhibit 24 Was Reversible Error.*

The plaintiffs argue that the question of the harmlessness vel non of the admission of Exhibit 24 is reviewed on an "abuse of discretion" standard. The cases which they cite, however, concern review of decisions by trial courts. Trial courts' advantages over appellate courts, in terms of familiarity with the record, with the parties, and demeanor of witnesses, are well known. There is no corresponding reason for this Court, however, to give any deference in applying legal principles in the review of the cold record by the Fourth District below. Nor has this Court ever done so.

Our point on appeal is that the Fourth District applied the wrong legal standard of review. Had the court below considered the question to be, as the law requires, whether a given evidentiary

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*/ Although for purposes of exposition, this argument is separated from the argument that Exhibit 24 was inadmissible, the defendants are aware that under section 90.403, the same points that make the admission of a document reversible error are relevant to the issue of why it is inadmissible.

error might well have caused a different result, it would have found the error reversible. The great danger of Exhibit 24, pointed out by the defendants' trial counsel, was that the jury would accept that the tragic figure described in Exhibit 24 was Susan Von Stetina, and, inflamed by sympathy, find liability even if unjustified and award high damages. That is what the jury did even though there is no evidence that Susan Von Stetina experienced the feelings described in Exhibit 24. The evidence, in fact, demonstrates that it was very unlikely that she could have had these feelings for, as the plaintiffs acknowledge, she was drugged when she was on the machine and was probably not aware of any respirator problem.

In the cases cited in our initial brief, which the plaintiffs grudgingly acknowledge are good law today, courts found reversible error when there was only a significant chance that the jury's verdict was affected by the error, or as one court has stated, where the court was "unable to find an adequate basis in the record to assure itself that there was a fair trial". Sharp v. Lewis, 367 So.2d 714, 715 (Fla. 3d DCA 1979).*/

The plaintiffs' argument that Exhibit 24 was only relevant to liability, rather than to damages, is inapposite to the issue of

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*/ The plaintiffs rather desperately place some reliance on section 59.041, the so-called "harmless error statute." This 1911 statute, as construed by plaintiffs, would attempt to tread in a very sensitive area of judicial decision-making. It has not been so construed. Cases under the harmless error statute have held that "miscarriage of justice" within the meaning of the statute occurs whenever prejudicial evidence is erroneously admitted. See Charlotte Harbor & N.R. Co. v. Truette, 81 Fla. 152, 87 So.427 (Fla. 1921); Tampa Transit Lines, Inc. v. Corbin, 62 So.2d 10, 12 (Fla. 1953); cf. Cason v. Baskin,, 159 Fla. 31, 30 So.2d 635, 640 (Fla. 1947).

inflated damages presented here.*/ The jury's inclination to identify Susan Von Stetina with the panicked and terror-stricken subject of Exhibit 24,**/ presented in what all agree is a dramatic, forceful and moving way, would lead them to award, as they did, higher damages than are fairly needed to compensate. The "foundation" which the plaintiffs claim to have proven for the article was that the article showed the emotions -- particularly panic -- of respirator patients. Even the plaintiffs concede that Exhibit 24 was inadmissible on damages. No one can consider the $4 million in damages awarded for pain and suffering to a semi-comatose patient in this case, and the medical and lost earnings awards which were virtually (if not identically) the maximum figures sought by plaintiff's counsel, and say these same results would have been reached without the powerful impact of Exhibit 24.

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*/ Answer Brief at 11. The plaintiffs' argument that Exhibit 24 goes to liability, does, however, support Florida Medical Center's argument that the exhibit's prejudicial effect on the jury's determination of liability was harmful, and its admission was reversible error. The plaintiffs cannot soundly contend that because there is allegedly "overwhelming" evidence of liability, Exhibit 24 was "harmless" error. Answer Brief at 9-10 n.9. Rather, the opposite is true. As the cumulative nature of the evidence weakens its probative value, the urgency of exclusion on the grounds of prejudice increases in inverse proportion, requiring a new trial on all issues. § 90.403, Fla. Stat. (1981). Cf. Young v. State, 234 So.2d 341, 348 (Fla. 1970); Yellow Bayou Plantation, Inc. v. Shell Chemical Inc., 491 F.2d 1239, 1242-43 (5th Cir. 1974); United States v. McRae 593 F.2d 700, 707 (5th Cir.) cert. denied 444 U.S. 862 (1979). See also argument above at 7-9.

**/ One of the most potent portions of Exhibit 24 has the young girl on the respirator thinking, "Oh HELP. What is wrong? If the machine is broken I'll DIE. I don't want to die. I'm not ready. I have too many things to say. I'M NOT FINISHED YET." (A. 96). This emotional account, written in the first person necessarily draws the reader into the place of the person who is telling the story and has the same import as the prohibited golden rule argument.

C. The "Intangible Damages" Awarded Susan Von Stetina Were Excessive.

The plaintiffs rely on the Florida case law stating that damages for pain and suffering are ordinarily left to the discretion of the jury. The defendants do not quarrel with this proposition, but argue that in the particular circumstances of this case, the award given was excessive. This ground was raised in trial court by both Florida Patient's Compensation Fund and Florida Medical Center. See Motion for Remittitur and New Trial, (A. 468-472 and 485-487). Our position is squarely supported by the opinion of the Fourth Circuit Court of Appeals in Flannery v. United States, No. 80-1563 (4th Cir. September 21, 1983) (A. 648), and this Court's decision in Loftin v. Wilson, 67 So.2d 185 (Fla. 1953). The point of these decisions is not that defendants should pay less in the way of damages when injuries are more serious. It is that where, as in this case, a plaintiff who is uncomprehending and whose every need will be satisfied by provision of her essential medical expenses and twenty-four hour care cannot be additionally compensated, extra millions will compensate her for nothing. The plaintiffs do not even assert that Susan will be aware of any part of the award. As in Loftin v. Wilson, any award will be left intact as principal to pass to Susan Von Stetina's heirs. As in Loftin v. Wilson, this Court should award a new trial on damages.

The defendants have offered, pursuant to the 1982 revision of §768.54(3)(e)(3), to pay all of Susan Von Stetina's medical expenses, including around-the-clock ideal care, at a fine institution where she can be comforted, as much as she is able, by the touch of friendly hands, by soothing music, and by other nursing care. Beyond this,

nothing can be done. It would not help Susan Von Stetina, but only inflate the health costs borne by society, to award more. Largess to the plaintiffs' counsel and relatives is not the purpose of compensatory damages in Florida.

II.

THE COURT BELOW IMPROPERLY REFUSED TO GIVE EFFECT TO THE PROVISION OF THE FLORIDA STATUTES WHICH LIMITS THE HOSPITAL'S LIABILITY TO $100,000.

A. Plaintiffs' Interpretation of the Limitation of Liability is Indefensible.

The defendants argued in their initial brief that section 768.54(2)(b) insured that the Hospital, as a member in good standing of the Florida Patient's Compensation Fund, would not have to pay more than $100,000 to Susan Von Stetina. The plaintiffs do admit that the Hospital's "liability for payment upon that judgment is limited to $100,000". At one point in their self-contradictory brief, the plaintiffs argue that, should the Fund prove unable to pay that portion of a judgment exceeding $100,000 on demand, the entire judgment must be paid by Florida Medical Center. Answer Brief at 32. The purpose and effect of the Fund statute, however, is to protect covered health care providers from payment of awards of more than $100,000 in any circumstances. The limitation of liability, as has been recognized by the Florida courts, and by all parties arguing before this Court in Department of Insurance v. Southeast Volusia Hosp. Dist., 438 So.2d 815 (Fla. 1983), limits the liability of the health care provider rather than simply insuring payment of that liability. The language of the statute, at which plaintiff would prefer to blink, states that "a health care provider shall not be liable for an amount in excess of $100,000 per claim." The use of the word "liable" must be given

effect. The statute does not say "liable so long as plaintiff does not want it otherwise."*/

There is no need for concern that the Fund will never be able to make any payments to a plaintiff. This Court, in Southeast Volusia, has insured the validity of the Fund's assessment mechanism for financing payments to plaintiffs. And it is always possible that judgments might be reopened under Florida Rule of Civil Procedure 1.540(b). The context in which the limitation of liability issue attains importance, as here, is when the Fund is temporarily cash-poor.

It is for this precise scenario that the Fund statute, section 768.54, contains explicit directions. The plaintiff is to apply to the Fund for payment, and wait for payment, in the order set by the date of judgment or settlement, until the Fund receives sufficient monies. Section 768.54(3)(e)(4) (1981).**/ The statute would not require plaintiffs to wait in line for the Fund, if the Legislature intended plaintiffs to be able to receive payment from the covered health care provider.

Moreover, the Fund statute's payout provisions -- at issue on another point in this appeal -- express the Legislature's intent that the health care provider provide no part of the compensation paid to a medical malpractice plaintiff after the original primary insurance, usually, as here, $100,000. The payout provisions plainly show the

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*/ The defendants incorporate at this point the arguments raised in the discretionary appeal of the hospital in Florida Medical Center v. Von Stetina, 436 So.2d 1022 (Fla. 4th DCA 1983), Supreme Court Case No. 64,252. Since this Court ordered no separate oral argument in that case, the defendants assume the issues will be heard together.

**/ This statute has been changed in certain irrelevant respects since the date of this statute but on this point remains the same.

Legislature's intent as to how all the liability over $100,000 should be paid. The statute defines the damages to which medical malpractice plaintiffs are entitled over $100,000 solely by reference to the Fund. The health care provider is not even mentioned. If the Legislature intended that some of this portion might under any circumstances be paid by the health care provider, the Legislature would have dealt with the possibility. Their failure to do so proves that all such damages may only be paid by the Fund.

The purposes of section 768.54 reinforce this conclusion. The preambles of Chapter 75-9, Laws of Florida, and Chapter 76-260, Laws of Florida, which first enacted section 768.54, make clear that the purpose of the statutes is to control the mounting cost of health care in Florida, and particularly, to control the instability and uncertainty of medical malpractice liability for Florida health care providers. These purposes could not be achieved if a health care provider were subject to execution on his assets simply because the Fund was not able to pay the full amount of the judgment on demand.

The contrary interpretation of section 768.54(2)(b) advanced by the plaintiffs is thus unacceptable--it ignores the language, structure, and intent of the statute.

B. There Is No Separation of Powers Problem With Sections 768.54(2)(b) or 768.54(3)(e)(3).*/

The plaintiffs, in their reply brief, do not meet the arguments made in the defendants' initial brief. They do not deny that

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*/ This section primarily addresses the limitation of liability, but we agree with the plaintiffs that the same points are applicable to the payout provisions.

the Legislature has power under the Florida Constitution to pass statutes pursuant to the police power, in the public interest, and they concede, as they must, that this Court has recognized a substantial legislative interest in health care problems including medical malpractice claims. The plaintiffs apparently agree that the limitation of liability and payout statutes were both passed for the same substantive reasons as the statutes this Court upheld in Carter v. Sparkman, 335 So.2d 802 (Fla. 1976), cert. denied, 429 U.S. 1041 (1977); Pinillos v. Cedars of Lebanon Hospital Corp., 403 So.2d 365 (Fla. 1981); and Department of Insurance v. Southeast Volusia Hosp. Dist., supra, as the statutory preambles indicate. Nor do the plaintiffs argue that the no fault statutes, the remittitur and additur statutes, the uniform contribution among joint tortfeasor statutes, the statutes directing the Fund in the payment of claims against it, or the statutes governing post judgment execution are unconstitutional as violations of separation of powers. Yet they persist in claiming both the limitation of liability and payout statutes concern matters which may only be addressed by Court rules.

As to the limitation of liability, the plaintiffs' argument relies on a selective and uninformed examination of the statute's language and a misreading of an off-point case from this Court.

Those statutory provisions cited by the plaintiffs, Answer Brief at 39, are most plausibly read as controlling the substantive liabilities of the medical malpractice plaintiff, the Fund, and covered health care providers. Even if, as the plaintiffs argue, the statute does not affect the technical "form" of the judgment, but does alter its

effect, this would still be a "substantive" enactment.*/ There would seem to be few questions of more clearly substantive significance than whether or not the hospital is liable to pay $16 million or only $100,000, or whether the plaintiff can collect $7.5 million immediately or can only collect for her medical expenses as the money is needed.**/

Even if the plaintiffs' reading is plausible, which we dispute, our view is the same as that of a unanimous Third District in Mercy Hospital, Inc. v. Menendez, 371 So.2d 1077 (Fla. 3d DCA 1979), cert. denied, 383 So.2d 1198 (Fla. 1980). This reading is certainly, at a minimum, an acceptable and reasonable one. The Fourth District in rejecting it and finding the statute invalid therefore failed to follow the recognized rule, not even cited by the court, that "if a statute can be construed to be constitutional, it should be." Van Bibber v.

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*/ Consider the proposed statutes which would modify joint and several liability, for instance, by allowing a plaintiff to recover his entire judgment from one of two joint tortfeasors only if the second were insolvent. Under the plaintiffs' reasoning, this statute would be unconstitutional under the separation of powers. However unwise such a statute would be, and whatever constitutional questions might be raised by it, all should admit that a modification of joint and several liability would modify a substantive principle of tort law. Whether a change were made by statute or common law, the change would not come by any rule of this Court.

**/ Because the Fund payout statute changes the plaintiffs' substantive entitlement to damages, the Fourth District's view that the statute is "internally contradictory" in not allowing the "full" payment of damages, opinion at 6, is erroneous. Indeed, the Fourth District's recognition that, if its interpretation were adopted the statute would be self-contradictory should have given the court a clue that its interpretation was incorrect. Woodgate Development Corp. v. Hamilton Investment Trust, 351 So.2d 14, 16 (Fla. 1977); State v. Putnam County Development Authority, 249 So.2d 6, 10 (Fla. 1974).

As we pointed out in our initial brief, it is the opinion of the Fourth District, in being "firmly convinced" that the payout provisions were "substantive," and yet concluding the Legislature had no power to enact them, that is internally contradictory. The plaintiffs' verbose attempt to correct this egregious lapse, Answer Brief at 47-48 n. 44, cannot undo the Fourth District's confusion on this point.

Hartford Accident and Indemnity Ins. Co., ___ So.2d ___, 8 Fla. L. Wk. S.Ct. 406, 407 (Fla. 1983). (McDonald, J. upholding the non-joinder statute). There are several alternative constructions even of the 1976 statute which would clear away any question of its constitutionality.*/

The Fourth District adopted, though with admitted haste and some equivocation, the plaintiffs' position, previously signed by the trial court, that "the statute does nothing more than direct this Court how to enforce collection of the judgments." (Opinion at 5, A. 628). In alleged support of this reasoning, the plaintiffs now cite Wait v. Florida Power & Light Co., 372 So.2d 420 (Fla. 1979). Wait, however, held only that the Florida appellate rules, rather than the contrary terms of a statute, governed the terms of a stay pending appeal. Wait is a very different case since it (unlike this one) involved a specifically applicable rule of this Court. See School Board of Broward County v. Surette, 281 So.2d 481, 483 (Fla. 1973). Further, Wait dealt with a matter of procedure which had no effect on the substantive results of any appeal. On the contrary, the ultimate money liabilities of the Fund and the Hospital turn on sections 768.54(2)(b) and 768.54(3)(e)(3). Substantive policies rather than procedural rules are at issue.

The argument made by the plaintiffs and adopted by the Fourth District simply misses the point of this case. The argument that statutes cannot "direct the enforcement of judgments" may invalidate Chapter

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*/ For example, the 1982 payout provisions could have been held applicable to medical expenses incurred after its effective date. That plaintiff would have received $100,000 for one month, with payment of actual expenses to begin thereafter, would not have deprived her of any significant right. Alternatively, the $100,000 payout limitation may well be construed as a limit on the repayment of principal to a successful claimant, permitting full payment of the interest on the entire principal amount at the statutory rate. Such interest at the twelve (12) percent rate of section 55.03(1), Florida Statutes (1981), would be $1.496 million per year, more than enough to satisfy plaintiff's needs.

55 (judgments and judgment liens), Chapter 76 (attachment) and Chapter 77 (garnishment), but it does not touch the statutes at issue here. The limitation of liability does not tell the Court how to collect judgments, it tells the plaintiffs who they can collect from.*/ Similarly, the Fund payout provisions do not tell the court how to collect judgments, they tell the plaintiffs what they can collect by way of damages.

The plaintiffs' hollow argument is that these matters are within the Court's "inherent power." Although there has been ample opportunity, the plaintiffs have located no court rule, court holding, or even judicial dictum bearing on either the limitation of liability or the payout provisions. We think it is inconceivable that this Court would make a rule on the subject of these statutory subsections. On the other hand, the plaintiffs do not deny both were enacted for reasons within the realm of legitimate legislative concern: i.e., control or prevention of the medical malpractice crisis, providing security and stability for health care providers, rationalizing medical malpractice compensation, and facilitating the operation of the Fund.

The narrow scope of the Florida Constitution's separation of powers provision as a limit on the legislative power to enact public policy was recently reaffirmed in Van Bibber, supra, where Justice McDonald spoke for the Court's majority:

> While this court may determine public policy in the absence of a legislative pronouncement, such a policy decision must yield to a valid, contrary legislative pronouncement. In Shingleton, we found that public policy authorized an action against an insurance company by a third-party beneficiary prior to

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*/ Compare Wait, supra. The appellate courts must have power to control the subject matter of an appeal by stay or other means as an incident to their exercise of jurisdiction. Without it, the exercise of decision making would in certain instances be futile.

> judgment. The Legislature has now determined otherwise. Our public policy reason for allowing the simultaneous joinder of liability carriers espoused in Shingleton, therefore, can no longer prevail. Finding that the statute is substantive and that it operates in an area of legitimate legislative concern precludes our finding it unconstitutional.
>
> Id. (emphasis added).

This Court cannot affirm the Fourth District without overruling the Van Bibber case, which was -- in every way -- a weaker case for the validity of the statute. The limitation of liability and payment provisions concern substantive matters of liability and damages, outside the scope of any actual or conceivable Court rule or judicially-declared policy, enacted for reasons within the police power, in an area this court has repeatedly held is one of legitimate legislative concern. Article II, Section 3 does not prevent the legislature from addressing such issues.

C. The Argument That Access to Courts Is Denied By the Limitation of Liability is Frivolous.

The plaintiffs effectively admit the weakness of their statutory interpretation and separation of powers positions in their "access to courts" argument.*/ Obviously, if a plaintiff were as able to collect the full amount of the judgment from the health care provider as before the enactment of section 768.54, there could be no harm to that plaintiff by the addition of another superfluous defendant.

The opening salvo in the plaintiffs' access to courts argument is that "the cap [on hospital liability to $100,000] abolished 99.99%

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*/ We note again the Fourth District's refusal to adopt this position, without even mentioning it.

of Susan's cause of action." Brief at 33. This argument is, as just stated, in total contradiction to their earlier argument that the statute does not in fact change the plaintiffs' substantive rights. A greater marvel is the manner in which the 99.99% figure, which apparently has attained totemic significance, was arrived at: comparing $100,000 (the yearly limitation under the 1976 statute) to $12.4 million. The crucial problem with this New Math is that the statute does not simply eliminate liability for $12.3 million. Instead, it provides that a portion of the judgment, including that portion required for future medical care, be paid as incurred. Although the jury verdict is not properly reduced to present money value, the statute allows the plintiff to be directly paid her actual damages. Plaintiffs have no legitimate complaint against such a provision, although their attorney may not be as easily able to draw off a large attorney's fee.*/

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*/ Although this particular plaintiff might be unhappy to be forced to seek payment from the Fund, others will be better off since many health care providers, particularly doctors, will be more judgment-proof than Florida Medical Center. Some plaintiffs are better off; some are worse off, and the Legislature has a good reason for acting as it did. In these circumstances there is no denial of access to courts. Action v. Fort Lauderdale Hospital, ___ So.2d ___ 8 Fla. L. Wk. S.Ct. 436 (Fla. 1983)(McDonald, J., upholding the Worker's Compensation Act provision which limited recovery for wage loss benefits and permanent impairment benefits); Mahoney v. Sears, Roebuck & Co., ___ So.2d ___, 8 Fla. L. Wk. S.Ct. 435 (Fla. 1983); Chapman v. Dillon, 415 So.2d 12 (Fla. 1982); Lasky v. State Farm Ins. Co., 296 So.2d 9 (Fla. 1974). Plaintiffs argue the Fund is imperfect. This is not uncommon in a new statutory venture, and the Legislature has continually refined the workings of the Fund, just as worker's compensation is continually being fine-tuned. This Court only last year in Southeast Volusia, supra, upheld the concept of the Fund against attack on due process grounds. The plaintiffs have said nothing to change this Court's unanimous opinion. Since the plaintiffs are fully secured for payment in this case by the Fund, they are poor candidates indeed to argue that the Fund denies malpractice plaintiffs access to courts.

We are at a loss to find the access to courts issue in this case. Even if there is such an issue, at most a plaintiff's cause of action is curtailed and not "wholly barred", as in Overland Construction Co. v. Sirmons, 369 So.2d 572 (Fla. 1979), on which plaintiffs mistakenly rely. Where a cause of action is only "curtailed", as in Bauld v. J. A. Jones Construction Company, 357 So.2d 401 (Fla. 1978) and Jetton v. Jacksonville Electric Authority, 399 So.2d 396 (Fla. 1st DCA 1981), pet. denied, 411 So.2d 383 (Fla. 1981), Article I, Section 21 is not violated.

Nor are plaintiffs correct in reading the Overland case as allowing this Court to overturn a statute if it is not, in the Court's judgment, the best alternative to the common law available. The relevant language states:

> We must first decide whether the legislature, without providing any reasonable alternative, has abolished a statutory or common law right of action protected by Article 1, Section 21 and, if so, whether that action is grounded both on an overpowering public necessity and an absence of any less onerous alternative means of meeting that need.
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> Id. at 573. (Emphasis added).

If there is any reasonable alternative provided, therefore, there is no occasion for the court to consider whether there are more desirable alternatives. In this case, the Fund plainly is a reasonable alternative to payment by the health care provider, this Court held in Southeast Volusia, and therefore, Article I, Section 21, is not implicated. Issues of legislative draftsmanship are for the Legislature, and not for the courts.

III.

THE FOURTH DISTRICT IMPROPERLY INVALIDATED THE STATUTORY PROVISIONS GOVERNING THE PAY-OUT OF CLAIMS BY THE FLORIDA PATIENT'S COMPENSATION FUND.

The plaintiffs' argument on the rather complicated issue of the payout provisions requires little by way of reply. The law of Florida is that when a statute is passed during the pendency of appeal on a particular question, which is decisive of the particular question, the courts will apply the new statute, rather than address the now moot former statute, unless vested rights have intervened. A judgment which is on appeal is not such a vested right, as was plainly held in Tel Service Co. v. General Capital Corp., 227 So.2d 667 (Fla. 1969), and the other Florida and federal cases cited in defendant's initial brief. This court's decisions in Tel Service and in Walker & LaBerge, Inc. v. Halligan, 344 So.2d 239 (Fla. 1977), establish that a statutory amendment changing the measure of damages during the pendency of an appeal will be applied by the appellate court if appellant has raised the issue addressed by the amendment in appeal papers. These principles were recently reaffirmed in Rothermel v. Florida Parole and Probation Commission, ___ So.2d ___, 8 Fla. L. Wk. DCA 2505 (Fla. 1st DCA 1983).

The plaintiffs' failure to understand the nature of the rule--that the appellate court will apply the law currently in force--is made clear by the "parade of horribles" hypothetical on page 44 of their brief. They claim that the Fund is insincere in seeking retroactive application of Chapter 82-236, Laws of Florida, and raise several examples of provisions on claim limits, assessments, and the like, which obviously were intended to apply prospectively. These very

examples show why Florida law, like federal law, distinguishes between ordinary statutory amendments, which apply prospectively (unless the amendment is procedural or remedial) and the rule that when a particular section of a statute is relevant to an appeal on that particular point amended by the statute, the court will apply the new law unless vested rights intervene. If not, the appellate court is deciding, not what the result should be in this particular case, but what it would have been under prior law (which is a question of only historical interest).

Aside from this, this Court's proper role as cooperative partner with the Legislature*/ should suffice to require application of the 1982 statute, which the plaintiffs agree is preferable and more generous to malpractice plaintiffs to the prior version of the statute, and to give effect to the Legislature's attempt to pass a remedial statute.**/

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*/ The plaintiffs are probably correct that the Fourth District did not intend disdain for the Legislature. Yet, in failing properly to give effect to the new statute in a case perfect for its application, the result was disdain and disregard of the enactment.

**/ The plaintiffs now agree with the defendants that the relevant issue in deciding whether the statute violates the due process or equal protection clause is whether the relevant classification of the statute is arguably reasonable. We do not agree that the trial court and Fourth District applied this analysis. Rather, the lower courts acknowledged both the subsections at issue were supported by a "rational basis", but then proceeded to invalidate them under the rational basis test. The plaintiffs offer no argument that the 1982 statute violates equal protection, due process, or denies access to courts, nor can this be argued with any force. See Johnson v. R.H. Donnelly Co., 402 So.2d 518 (Fla. 1st DCA 1981), pet. denied, 415 So.2d 1360 (Fla. 1982) (payment as incurred provisions upheld). Their position that the 1982 statute violates the separation of powers is as unjustifiable as its other strained constructions of the separation of powers. This Court may apply, as we argue, the provisions of current law, without doubt of the provisions' constitutionality.

Plaintiffs persist in arguing for the application of the $100,000-per-year limitation of prior law, so that this Court will declare the statute "unconstitutionally niggardly." This argument takes on a fairy land tint in view of the Fund's concession of liability and offer to pay Susan Von Stetina's expenses of ideal medical care as they are incurred as well as actual back expenses (A. 643, Initial Brief at 28). In our view this offer makes the $100,000 payout limitation thoroughly irrelevant to the litigation now presented to this Court.*/

Nonetheless, since plaintiffs somehow dispute the point, we address the validity of the $100,000 limitation of prior law.**/ The plaintiffs maintain the limitation of prior law lacks a rational basis, both on its face and as applied. They point out that the $100,000 per year payout limitation will only affect plaintiffs with claims exceeding $100,000. It is true that the selection of a particular number is, as always, somewhat arbitrary, but there is a rational basis to distinguish between large and small claims. It is only large claims which make the operation of the Fund difficult and, as this case has certainly proven, fan the flames of the perceived or threatened medical malpractice crisis.***/ Since the plaintiffs do not even contend there

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*/ The defendants maintain that should the Court not apply the payout provisions of the Fund statute, the Court must order a new trial or remittitur for reduction of the damages to present value. The plaintiffs have said nothing in their brief on this point requiring a reply.

**/ Contrary to the plaintiffs' argument, the defendants did not concede the invalidity of the 1976 payout limitation. As here, we simply sought application of the 1982 version. In any case, the party arguing the unconstitutionality of a Florida statute, duly enacted by the Legislature, has the burden of proving its invalidity, and this heavy burden would not be met even by an unequivocal and complete "concession" of unconstitutionality by an opposing party.

***/ If, for example, this $12 million judgment were to be paid in a lump sum, the Fund would have to order an immediate assessment of its hospital and doctor members.

are any fundamental rights at issue, see Carter v. Sparkman, 335 So.2d 802 (Fla. 1976), cert. denied, 429 U.S. 1041 (1977) and Pinillos v. Cedars of Lebanon Hospital Corp., 403 So.2d 365 (Fla. 1981), the statute is valid on its face.

To argue the 1976 statute is unconstitutional as applied, the plaintiffs point out the jury verdict amounted to more than $100,000 a year. This is irrelevant. The jury was not finding the minimum constitutional compensation for Susan Von Stetina, or the optimum portion of society's resources to use for her upkeep.*/ The uncontradicted evidence at trial was that she was, and presumably still is, receiving adequate care for less than $100,000 a year.**/ To paraphrase this Court's recent decision in Mahoney, an award of $100,000 a year "may appear inadequate and unfair, but it does not render the statute unconstitutional." 8 Fla. L.Wk. at 435.

The plaintiffs' argument is even more flawed when the Court looks at the actual chronology of this case. The post-judgment proceedings were completed in June of 1982 and the new, more flexible, statute became law within a month. Even if there were no appeal, the

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*/ Thus the trial court's crucial finding that $100,000 a year was "insufficient to keep [Susan] alive," adopted by the Fourth District at 6, is inconsistent with the uncontradicted record in this case. Before the Fourth District, plaintiffs sought issuance of the mandate under the argument that Susan Von Stetina might die during the pendency of appeal to this Court. After the plaintiffs' failure to present one shred of evidence to support this allegation, and in light of the defendants' offer to commence payment of ideal medical expenses to her under the current payment provisions of the Fund statute, the Fourth District denied the plaintiffs' request and stayed issuance of the mandate until this Court's final ruling. The Fourth District is apparently convinced the current $84,000-a-year care Susan receives is fully adequate for her needs.

**/ Should this prove inadequate in the future, plaintiff's remedy is to seek application of the payment provisions of current law.

trial court would have the authority from July 1, 1982 to provide for the full medical needs of Susan Von Stetina and, of course, both the trial court and the plaintiffs' counsel were aware of this amendment. It is as though the plaintiffs' counsel was straining to find a way to invalidate the payout provision, a statutory provision which actually benefits Susan Von Stetina's interests by providing for the payment of certain expenses as incurred thereby avoiding the possibility that a lump sum calculation may be inaccurate and insufficient. The 1982 payout statute is not even arguably unfair and inadequate.

Should this Court, however, reject our argument and examine the constitutionality of the 1976 version of the statute, it should hold that statute, too, to be valid.

IV.

THIS COURT SHOULD ESTABLISH A UNIFORM STANDARD FOR AWARDING "REASONABLE ATTORNEY'S FEES"

Section 768.56, Florida Statutes (1981), provides: "[T]he court shall award a reasonable attorney's fee to the prevailing party in any civil action which involves a claim for damages by reason of [medical] malpractice . . . ." The issue squarely presented to this Court is how the term "reasonable attorney's fee" is to be defined and applied by trial courts throughout the state of Florida. At a minimum, this case has profound implications for the exercise of the trial courts' judgment in awarding attorney's fees in malpractice cases. In broader terms, the ramifications of this decision can and should guide and inform the bench and bar as to all "reasonable attorney's fee" statutes or contracts.

A. This Court Should Adopt The Federal Lodestar Analysis In Place Of The Fourth District's Unprincipled Approach

The defendants urge this Court to adopt a standard for "reasonable attorney's fees" based primarily upon time spent by an attorney and then adjusted by quality and contingency factors. This is the "lodestar" analysis, which is generally accepted by the federal courts and recognized by the United States Supreme Court.

The plaintiffs' answer brief takes the astonishing position that the appropriate standard for determining a "reasonable fee" under section 768.56 is no standard at all. They urge this Court to accept, as a statewide standard of general application under this, and it follows, other "reasonable fee" statutes, that trial courts should be vested with broad and essentially unreviewable discretion over the attorney's fee to be awarded prevailing parties. The facts of this case vividly illustrate the potential disaster which inheres in the granting of such unlimited discretion to trial courts.

The plaintiffs' fundamental premise is that trial courts should be vested with broad discretion in awarding attorney's fees. Answer Brief at 60. The case cited in support of that premise, however, Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980), does not stand for the proposition that trial courts should have unlimited and unguided discretion in awarding attorney's fees under all "reasonable fee" statutes. Indeed, the type of discretion the plaintiffs advocate is forbidden by Florida law.

The plaintiffs never denied our arguments below that $250,000 would be a "reasonable" fee. They now argue that $1.5 or $4.4 million would be "reasonable" fees "within the trial Court's broad discretion." Answer Brief at 56, 61. They would thus allow $3 or even

$4 million to change hands depending on the unreviewable judgment of one circuit judge. Such a concept of wide discretion is precisely what this Court in Canakaris forbade:

> The trial court's discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner. Judges dealing with cases essentially alike should reach the same result. Different results reached from substantially the same facts comports with neither logic nor reasonableness.
>
> 382 So.2d at 1203.*/

The logic of the federal cases indicates that using hours worked as a starting point for determining a reasonable fee is the only fair and manageable method of awarding fees on a uniform basis. The plaintiffs' answer to the defendants' urging that this Court adopt the federal approach is:

> 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.
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> Answer Brief at 59.

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*/ Further, this Court in Canakaris distinguished between an abuse of discretion and a failure to apply a proper legal standard:

> [A]ppellate courts must recognize the distinction between an incorrect application of an existing rule of law and an abuse of discretion. Where a trial court fails to apply the correct legal rule . . . the action is erroneous as a matter of law. This is not an abuse of discretion. The appellate court in reviewing such a situation is correcting an erroneous application of a known rule of law.
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> 382 So.2d at 1202. (Emphasis in original).

The reason for this appeal is the very failure of the Fourth District to identify any standard in its application of Section 768.56.

As we discussed in our initial brief, Florida law does (1) consider the reasonableness of the fee on an hourly basis, at least as a check on recoveries, and (2) require meaningful appellate review of trial courts.*/ What the plaintiffs really seem to be arguing is that this Court should ignore hours worked as a measure of services rendered and vest trial courts with unlimited, unreviewable discretion.**/ It is clear that even if time expended

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*/ When an attorney keeps no time records, the Court may determine the number of hours that "would have been a reasonable time to have devoted to the work," and compute the reasonable fee using an adjusted hourly rate. In re Estate of Harrell, 8 Fla. L.W. DCA 438 (Fla. 5th DCA 1983). See also Rule 22.2, United States Court of Appeals, Fifth Circuit, adopted November 30, 1982 ("In the absence of [time] records, no time expended will be considered in the setting of the fee beyond the minimum amount necessary in the Court's judgment for any lawyer to produce the work seen in Court.") The Eleventh Circuit observes the "abuse of discretion" standard. See Fitzpatrick v. Internal Revenue Service, 665 F.2d 327, 332 (11th Cir. 1982).

**/ The plaintiffs make the tenuous argument that the detailed factual findings and explanations required in the federal system are justified because "Federal Courts only seldom award attorney's fees," and "perhaps can afford that luxury." Answer Brief at 60 n.55. This argument is specious for several reasons. First, the plaintiffs give no evidence that attorney's fees are awarded less frequently in the federal system than they are in the state system. To the contrary, the following several areas have generated a great deal of federal litigation in which such fees are routinely awarded: antitrust cases, 15 U.S.C.A. §15(a); "common fund" class action cases, Fed. R. Civ. P. 23, civil rights actions, 42 U.S.C.A. § 1988; securities laws cases, 15 U.S.C.A. §§ 77k(e) and 77i(e); suits filed and prosecuted in bad faith, 28 U.S.C.A. § 1927; and suits under the Administrative Procedure Act, 5 U.S.C.A. § 552, just to name a few.

Second, the plaintiffs' implication that the burden of requiring written findings and conclusions would be alien in state courts where they are common in federal courts is nonsensical. The truth is that such a requirement would impose no substantial additional burden beyond the proof of the issue. Certainly the plaintiffs are not suggesting that Florida courts not engage in the type of analysis necessary to support the amount awarded as a reasonable fee considering the factors of DR-106. Once such proof takes place, the additional burden of putting the findings on paper would be slight. If fairness requires adequate proof when one party wants an adversary to compensate him for a "reasonable attorney's fee," there is no reason for that principle to apply in one system and not the other.

and the degree of trial court discretion were "dissimilarities" between the federal approach and the present approach in Florida, they would be sufficient reasons for this court to adopt the federal approach. If less discretion at the trial court level means greater uniformity and more meaningful appellate review, it is a policy this Court should adopt.

1. Under the lodestar analysis, a $500,000 award is the outermost amount of a "reasonable fee."

In attempting to rebut the defendants' careful presentation of the relevant factors that would apply under the federal lodestar approach, the plaintiffs have missed the mark in several places. They argue that they are entitled to have the evidence construed in a way most favorable to themselves. This ignores the basic rule that the burden of establishing the attorney's fee is on the party seeking the award. See Service Ins. Co. v. Gulf Steel Corp., 412 So.2d 967, 969 (Fla. 2d DCA 1982). Nevertheless, the $500,000 figure described as the maximum reasonable fee in our initial brief does indeed give every benefit of the doubt to the plaintiffs.

The 1,000 hours estimated as the time devoted by Mr. Schlesinger to the case is an extremely liberal estimate considering that Mr. Schlesinger never kept time records. It is 155 hours more than the number worked by the hospital's trial attorney, which figure was undisputed. The $250 per hour figure suggested as a base fee reflects expert testimony as to the highest market rate of any private attorney in South Florida. Transcript of Aug. 12, 1982 Attorney's Fee hearing at 30, 48.*/

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*/ The plaintiffs' assertion that the defense expert testified that $500 per hour was reasonable, Answer Brief at 61, is incorrect. The testimony was that $500 would be a reasonable rate after adjustment for all the factors of DR 2-106. Transcript of Aug. 12, 1982 Attorney's Fee hearing at 48.

The multiplier of two represented upward adjustments based on the maximum multiplier factors applied to cases of at least as great difficulty and significance. The two prominent factors to be considered are the quality of the work and the contingent nature of the outcome. By standards of other cases where dramatically successful results were obtained, a multiplier of .5 for quality was the high side. See Initial Brief at 53.

For the contingency nature of success we attributed an enhancement factor of .5. This is the outermost factor which has been applied in actual cases. The Court must remember that the contingency factor has nothing to do with whether or not the plaintiffs and their attorney had a contingent fee contract. It evaluates the probability of success viewed from the time the lawsuit was filed. If a plaintiff has a 50% chance of recovering any money, the reasonable hourly rate should be doubled. A 50/50 case is a highly speculative one. See Leubsdorf, The Contingency Factor in Attorney's Fee Awards, 90 Yale L.J. 473 (1981). A multiple of .5 for this case is extremely liberal under the circumstances.

A lodestar award giving the plaintiffs every benefit of the doubt, therefore, would be $250 (per hour) x 1000 (hours) x [1 (hours x rate) + (.5 (quality) + .5 (contingency)] = $250,000 x 2 = $500,000. The Fourth District awarded the plaintiffs' counsel over $1500 per hour. This is more than three times greater than any adjusted hourly fee found in the multimillion dollar federal cases noted in the chart in our Appendix. (A. 670). We contend that $500 per hour, after adjustment, is the outermost reasonable fee that could be awarded under a "lodestar" or any sensible standard.

2. The adoption of the federal Lodestar analysis would have no effect on contingency fee arrangements between medical malpractice plaintiffs and their attorneys.

The plaintiffs devote a substantial portion of their answer brief to the proposition that setting a standard for attorney's fees using the hours worked as a touchstone for analysis would "disregard economic reality" because the contingency fee is the poor person's key to the courthouse. This argument is highly misleading and seriously mischaracterizes the purpose and effect of the attorney's fee statute. As the Fourth District correctly understood, the statute does not alter in any respect the ability of plaintiffs to retain counsel on a contingent fee basis. Opinion below at 17.

Under the typical contingency fee arrangement, the clients pay their attorney a percentage of the recovery obtained. With the malpractice attorney's fee statute, the court awards a prevailing plaintiff a sum of money in addition to his monetary judgment as a "reasonable fee." The statutory fee is a bonus; it does not reduce or otherwise infringe upon the contractual arrangement entered between attorney and client. The plaintiffs in this appeal have not even argued that a reasonable fee based upon hours worked would in fact impede plaintiffs' access to courts or attorneys' ability to take personal injury cases. They only exhort about "economic reality" to get this Court to inflate the bonus received by these plaintiffs.

The plaintiffs argue that the District Court's reduction of the award caused the plaintiff "a considerable 'short-fall.'" Answer Brief at 58. To the contrary, there was a windfall. In this case,

under the trial court's award, the plaintiffs would receive $4.4 million over and above the $12.4 million recovered as damages. The evidence indicated that Mr. Schlesinger and his clients had a 40% contingency fee contract (50% if the case was appealed). Therefore, Schlesinger received a minimum of $5 million from the plaintiffs, or 40% of the $12.4 million awarded. He took and would have taken this sum off the top regardless of how the award is computed under section 768.56. The $4.4 million attorney's fee award, which was reduced to $1.5 million by the Fourth District, is a bonus in the sense that it gives the plaintiffs money as an offset against the amount they agreed to pay their attorney to represent them in the action. The $1.5 million additionally awarded the plaintiffs for attorney's fees was, when viewed from that perspective, a windfall.*/

The plaintiffs argue disingenuously that medical malpractice victims simply cannot hire an attorney capable of prosecuting difficult cases on an hourly basis. The Fourth District correctly saw through this "economic reality argument," which completely ignores the legislative history of the statute. The Senate Staff analysis and Economic Impact Statement dated June 10, 1980, refutes this canard:

> It is questionable that this proposal would have any impact on contingent fee arrangements because they are contractual relationships between the attorney and client. An award of attorney's fees to the

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*/ In addition to 40 or 50 percent of compensatory damages, the successful plaintiff's attorney may take an equal percentage of the statutory attorney's fee award as an additional fee. Under these circumstances, it is ludicrous to argue that awarding statutory attorney's fees based upon time expended inhibits plaintiffs' ability to retain competent counsel. To the contrary, the statute makes contingent fee cases more attractive; it provides a larger recovery from which the attorney may take a cut in case of victory, but does not increase the attorney's risk since the client (if anyone) pays the defendant's attorney's fee if there is no recovery.

prevailing party would apparently be an off-set against the contingent fee owed.

(A. 604)

In other words, rather than ignore economic reality or cause plaintiffs short-falls, the amount awarded by the "reasonable attorney's fee" is an offset against the amount which plaintiffs contractually agree to pay their attorney in case of victory. It does not interfere in the slightest with the contingency fee relationship or diminish plaintiffs' recoveries.

V.

THE DISTRICT COURT CORRECTLY REVERSED THE TRIAL COURT'S FEE BECAUSE THE TRIAL COURT GAVE INSUFFICIENT WEIGHT TO THE AMOUNT OF TIME EXPENDED BY THE ATTORNEY AND AWARDED A CONTINGENT FEE.

A. The Trial Court's Award of A Contingency Fee Under a Reasonable Fee Statute is Erroneous as a Matter of Law.

(1) The trial court awarded a percentage of recovery in this case.

It is obvious, both from the enormity of the fee awarded and a reading of the trial court's opinion that the $4.4 million award was, in essence, an award of a percentage of the recovery as in a contingency fee. This was error because the meaning of a statutory "reasonable fee" requires a fair valuation of the services actually performed by the attorney.

The trial judge's preoccupation with awarding a percentage of the recovery was obvious. He admitted he was giving a fee "in line with the type of fee arrangement made between counsel and his client"

(A. 36); fallaciously stated that it would "ignore reality" to grant a fee except on a contingency fee "percentage of recovery" basis (A. 30); defended his result by saying the defendants "recognized as reasonable" this type of payment in their settlement offer (A. 30)*/; and said that "a substantial fee which bears a reasonable relationship to [the $12.473 million verdict] result" was appropriate (A. 35). The $4.4 million fee was thirty five percent (35%) of the jury verdict. Nonetheless, apparently aware of precedent condemning such overemphasis on a percentage of recovery, the judge protested (too much) that he "certainly" did not rely exclusively on this factor. (A. 30, 36)

As the Fourth District recognized, this meaningless litany is not sufficient to save the trial court's exorbitant award. The trial judge ostensibly touched on three other factors: time, quality of representation, and contingency of recovery. He cited contingency of recovery, incorrectly, to justify using Schlesinger's contract as the basis for a percentage of the recovery award. (A. 35-36) He pointed to the acknowledged quality of Mr. Schlesinger's representation as a reason for justifying the high "percentage of recovery" award. (A. 34-35) Yet, he viewed the "time and labor required," which he implicitly acknowledged would have yielded a smaller award, as "only a minor factor" and therefore no impediment against awarding a "percentage of recovery" attorney's fee. (A. 29-32) It is clear on

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*/ We point out parenthetically that a settlement offer is not admissible as an admission by the offeror. In any case, the Fund made no such admission here. The Fund's recognition of the plaintiffs' actual fee arrangement in an attempt to settle is by no means an admission of its reasonableness. Nor does it have any bearing on the meaning of the statute.

..the face of the opinion that, in fact, the trial court awarded an attorney's fee on a "percentage of recovery" basis. The $4.4 million fee awarded by the trial judge is therefore only supportable if a statutory "reasonable attorney's fee" may be computed by taking a percentage of the verdict.

(2) It is settled in Florida law that a statutory or contractual "reasonable fee" is not a percentage of the recovery.

The cases are unanimous that this approach is erroneous. A judge applying a "reasonable attorney's fee" statute, such as section 768.56, may not simply award a fee which is a percentage of the recovery, even if this is the customary means the private marketplace rewards plaintiffs' attorneys and the attorney has been unusually skillful.

As the Fourth District recognized: "A 'reasonable' fee, whether under a statute or otherwise, has seldom been likened to a contingent one. In truth the reverse has been the norm." Opinion below at 16. In United States Steel Corp. v. Green, 353 So.2d 86, 88 (Fla. 1977), this Court "condemned the practice of computing fee awards as a percentage of the ultimate benefits awarded."

Recognizing that a reasonable fee is based on services rendered or quantum meruit, the district courts have consistently reversed percentage-of-the recovery fee awards. See Baker v. Varela, 416 So.2d 1190 (Fla. 1st DCA 1982); Kaufman and Broad Home Systems, Inc. v. Sebring Airport Auth., 366 So.2d 1230, 1231 (Fla. 2d DCA 1979); Insurance Co. of North America v. Welch, 266 So.2d 164 (Fla. 4th DCA

1972)(per curiam), cert. denied, 273 So.2d 77 (Fla. 1973); Ronlee, Inc. v. P. M. Walker Co., 129 So.2d 175 (Fla. 3d DCA 1961).

One case worthy of special emphasis is Manatee County v. Harbor Ventures, Inc., 305 So.2d 299 (Fla. 2d DCA 1975), involving attorney's fees in a condemnation proceeding. The Manatee court refused to approve a percentage of the recovery, as the fee, although expert testimony supported such an amount and the attorney was concededly skillful:

> The rigid adherence to the setting of fees by using a percentage of the amount involved has the effect of ignoring most of the factors enumerated in DR 2-106(B) . . . when the amount involved is so much greater than the customary transaction, the application of percentages, even on a sliding scale, runs the risk of setting a fee which is disproportionately higher than the extra responsibility placed upon the attorney by reason of the magnitude of the matter.
>
> 305 So.2d at 301
> (emphasis added).

The uniform law of this State, as held in Green, Manatee, Kaufman, Welch and Ronlee, supports the Fourth District's reversal of the trial court's $4.4 million award.*/

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*/ To the same effect are Universal Underwriters Insurance Co. v. Gorgei Enterprises, Inc., 345 So.2d 412, 413-14 (Fla. 2d DCA 1977) (insurance); In Re Estate of Griffis, 399 So.2d 1048, 1049-50 (Fla. 4th DCA 1981)(Glickstein, J.)(domestic relations); In Re Estate of Donner, 364 So.2d 761 (Fla. 3d DCA 1978)(domestic relations). Valparaiso Bank & Trust Co. v. Sims, 343 So.2d 967, 971-72 (Fla. 1st DCA 1977) cert. denied, 353 So.2d 678 (Fla. 1977)(divorce); Chandler v. Chandler, 330 So.2d 190 (Fla. 2d DCA 1976)(divorce); Old Colony Insurance Co. v. Bunts, 250 So.2d 291, 292-93 (Fla. 3d DCA 1971) (insurance); and Travelers Insurance Co. v. Davis, 411 F.2d 244, 247-48 (5th Cir. 1969) (Fla. law) (insurance).

(Footnote continued on next page)

B. There Is Nothing About the Von Stetina Case, or Medical Malpractice Cases In General That Would Justify Use of A Percentage of Recovery Standard

(1) The trial court erred in failing to focus on the facts of the Von Stetina case.

Although the trial court purported to apply the "well-defined" and "generally-accepted" meaning of "reasonable attorney's fee," (A. 28, 31, 32-34), the court indicated that it had concluded that the very fact this was a medical malpractice action, particularly one in which

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(Footnote continued from previous page)

Federal law, which the defendants urge this Court to adopt as the standard in Florida, does not reward plaintiffs' attorneys by percentage of recovery. The contract between the attorney and client is not the measure of a reasonable fee. See Manual for Complex Litigation, §1.47 (5th ed. 1982) at 66-75. See also, Walston v. School Bd. of City of Suffolk, 466 F.2d 1201, 1204-05 (4th Cir. 1977); McDonald v. Johnson & Johnson, 546 F. Supp. 324, 336 (D. Minn. 1982), Technology Fund, Inc. v. Kansas City Southern Industries, Inc., 72 F.R.D. 433 (N.D. Ill. 1976).

In Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp. (I), 487 F.2d 161 (3d Cir. 1973), the Third Circuit Court of Appeals reversed an award of attorney's fees much like the trial court's in this case. The trial judge awarded fees on a sliding scale "percentage of the recovery basis," believing "the time spent by the attorneys was not so important here as in most cases." 487 F.2d at 166. The Third Circuit reversed, remanding for calculation of fees by computing time, valuing it at a reasonable hourly rate, and adjusting for contingency and special quality factors. 487 F.2d at 166-69. See also Chrapliwy v. Uniroyal, Inc., 509 F. Supp. 442, 450 (N.D. Ind. 1981), aff'd on this point and remanded on other grounds, 670 F.2d 760 (7th Cir. 1982). ("While [a contingent fee] may be an accepted part of our legal system in some respects, it has no place in statutorily-authorized reasonable fee cases.").

the plaintiff prevailed, entitled Schlesinger to higher attorney's fees than would otherwise be appropriate.*/

The trial judge's reasoning was based on the supposed difficulty of medical malpractice cases. The trial court's sweeping generalizations never focused on the relevant issue: how novel and difficult the specific factual and legal issues of the Von Stetina case were.

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*/ The trial court's true focus was expressed in a colloquy with the plaintiffs' leading witness at the attorney's fee hearing, J. B. Spence. Mr. Spence had testified that "for the last 12 or 15 years," the Florida Legislature "has been stampeded and almost, in my view, been bought, b-o-u-g-h-t, bought, by the medical community to pass some "horrendous statutes." (July 29, 1982, Attorney's fee hearing, T. 96). The trial court, apparently agreeing, asked Spence if the fee should not also be based upon the deterrence of the defendants for failing to settle this case. Id. at 111 (A. 581). When Spence said "no", the judge persisted,

> What I'm driving at is, if this piece of legislation was intended to replace the medical mediation panel and it was hoped by the health care providers that this particular legislation would in fact reduce the number of claims filed against health care providers, shouldn't I really place more emphasis on the deterrence of the fee awarded in this case as a message to the health care providers that the sword swings both ways?
>
> Id. (A. 581-582). (emphasis added).

The plaintiffs have adopted this theme in their cross-appeal. They assert "Section 768.56 was enacted at the vociferous insistence of the health care industry." See Answer Brief at 60. Although it is of no relevance to the issues on appeal, we must correct this gross mischaracterization. One group, the Florida Medical Association, urged the adoption of this law. The FMA is not "the health care industry" any more than Mr. Schlesinger is the "plaintiff's bar." These defendants were not responsible for the attorney's fee statute and did not urge its adoption. We have not "bought" the Legislature and strenuously object to being used as a medium to send "a message to the health care providers." For purposes of this appeal, it is only necessary to note that the trial court's preoccupation with "sending a message" obviously interfered with his ability to exercise sound discretion.

The judge said: "[T]here is no more difficult case for a plaintiff to prosecute than a medical malpractice action," (A. 32), and concluded that "representing a medical malpractice plaintiff is such a difficult undertaking that few lawyers in this State are willing to undertake the challenge." (A. 34). But neither he nor the Fourth District ever analyzed the facts of this case relevant to setting an attorney's fee. In that omission, they were in error.*/

(2) The facts of this case show the arbitrariness of application of a percentage of recovery approach under section 768.56.

This case was unusual in one way: a terribly injured plaintiff was found by the jury to require expensive and extensive care over a forty-year life expectancy. Although we contend that the damages awarded below were excessive, they will be large in any event.

All agreed from the outset that Ms. Von Stetina's condition was very serious. Both parties' counsel at voir dire displayed the belief that damages would be large, if liability were proven (T. 144-48, 177, 183, 279). But even if the full damages awarded are affirmed, Mr. Schlesinger cannot take the "credit" for the total

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*/ Under section 57.105, Florida Statutes (1981), Florida's frivolous action or defense statute, the attorney's fee is to be a "reasonable fee," computed by quantum meruit, not simply the plaintiff's contingency fee owed the attorney. Autorico, Inc. v. Government Employees Insurance Co., 398 So.2d 485, 488 (Fla. 3d DCA 1981). It certainly would be an ironic result if a malpractice defendant were subject to less liability for attorney's fees for presenting a totally frivolous defense than for presenting a serious, good faith, and well-supported but ultimately unsuccessful defense under section 768.56.

verdict. The law presumes that a jury verdict is not attributable to the skill of an attorney, but to the seriousness of the damages.*/ Should this court set a fee "in line with" the contingency fee agreed to, courts will be led into irrational and arbitrary results since attorney's fees will depend on the happenstance of damages. Cf. 8th Whereas Clause in Statutory Preamble to Chapter 80-67 (liability, not damages, is the primary issue to be resolved in malpractice litigation).

The plaintiffs additionally suggest that the expert testimony given below adequately supports the award. Answer Brief at 56. As the Fourth District recognized, the testimony referred to was merely the opinion of two eminent members of the plaintiff's bar, recommending the "percentage of recovery" approach to the trial court. That the trial court accepted their view of the law is reason enough to uphold the Fourth District's reversal.

VI.

SECTION 768.56 IS UNCONSTITUTIONAL, PARTICULARLY AS APPLIED TO THIS CASE.

Section 768.56 is unconstitutional both on its face and as applied in this case. The statute is invalid on its face because it is irrational in light of its purposes and premises. It is invalid as applied because the defendants were prevented by statute from settling yet were punished by the judge for not settling. The trial court recognized that section 768.54 statutorily prevented the settlement of large cases like this one, (A. 17), yet, inconsistently, it ignored the

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*/ Cf. Florida Code of Professional Responsibility, EC 2-10: "Advertisements should not convey the impression that the ingenuity of the lawyer rather than the justice of a cause is determinative."

practical effect of that constraint when it upheld the attorney's fee statute and entered the $4.4 million fee. The Fourth District also recognized the defendants' settlement constraints but failed to address the inconsistency.

A. Section 768.56 is Unconstitutional on Its Face Because it is Irrational in Light of Its Preamble.

The Fourth District below cursorily discussed and upheld section 768.56 on two bases. First it said that the law shares the same preamble as the other sections of the Medical Malpractice Reform Act, Chapter 75-9 which have previously been upheld. Opinion below at 13. Second, the Fourth District "reasoned" that because there are over seventy other statutes awarding attorney's fees upon the outcome of litigation, "while two, or for that matter seventy, wrongs do not make a right, we perceive no such wrong in the section now before us." Opinion below at 14. An examination of these rationale reveals that the first reason is simply wrong, and the second does not dignify the tradition of constitutional analysis which is a hallmark of the Florida courts.

1. Neither the Fourth District nor the other district courts which have passed on this question have examined the means chosen by the Legislature to accomplish the announced legislative purpose.

So cursory was the Fourth District's treatment of the constitutional issue that it erroneously assumed section 768.56 shared the preamble of the statute upheld in Pinillos and Woods v. Holy Cross Hospital, 591 F.2d 1164 (5th Cir. 1979). See Initial Brief at 57. The plaintiffs concede the Fourth District's oversight but their candor is self-servingly abbreviated. In footnote 57 at page 62, they admit that Ch. 80-67, Laws of Florida has its own preamble.

But they say: "That preamble states essentially the same reasons for the enactment of section 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." They conclude, without citation: "The defendants do not quarrel with this."

To the contrary, we vehemently object to the wholesale lumping together of these different preambles. The unique preamble to section 768.56 contains ten separate Whereas clauses dealing with the specific reasons why a prevailing party attorney's fee statute should reduce litigation and alleviate the medical malpractice insurance crisis. It is not enough that the objective of reducing malpractice insurance is legitimate and that other enactments addressing this goal are valid. This Court must examine the specific legislative preamble in light of the means chosen by the statute to accomplish the desired goals.*/

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*/ Because of the Fourth District's flip disposition of this issue, other district courts of appeal have strode, without hesitation, over the same uninformed abyss. In Young v. Altenhaus, _____ So.2d _____, 8 Fla. L. Wk. 2489 (Fla. 3d DCA 1983), the Third District Court of Appeal upheld the statute, saying only: "We agree with the fourth district's reasoning [in Von Stetina]." Davis v. North Shore Hospital, _____ So.2d _____, 8 Fla. L. Wk. (Fla. 3d DCA 1983), decided the same day as Young, upheld the statute merely citing Young and Von Stetina. In Pohlman v. Mathews, _____ So.2d _____, 8 Fla. L. Wk. 2488 (Fla. 1st DCA 1983), the First District Court of Appeal recently held that section 768.56 violated neither due process nor equal protection since the medical malpractice classification was approved in Pinillos and because attorney's fees to the prevailing party bear a reasonable relationship to "the legislative objective." The court did not even go so far as to describe that objective. The court cited Von Stetina, Davis, and Young without further analysis.

Therefore, the state of the law is in the incredible posture where three courts have adopted a hurried, uninquiring "analysis" to a statute wholly at odds with its preamble. Neither these courts nor the plaintiffs appear to comprehend the test which must be applied under the law of Florida: whether the means chosen by the legislature are rational in light of the purposes announced in the legislative preamble.

See Horsemen's Benevolent and Protective Assoc. v. Division of Pari-Mutuel Wagering, 397 So.2d 692 (Fla. 1981); Simmons v. Division of Pari-Mutuel Wagering, 407 So.2d 269 (Fla. 3d DCA 1981), aff'd 412 So.2d 357 (Fla. 1982). See also State v. Lee, 356 So.2d 276 (Fla. 1978). As demonstrated in our Initial Brief, section 768.56 fails this test because it is irrational to penalize the litigation of the issue the Legislature found was the most difficult to resolve outside of court -- liability for medical malpractice.

The plaintiffs offer two major arguments in support of this statute. First, they assert, as did the Fourth District, that since several other attorney's fees statutes have been upheld, this one must also be valid. The plaintiffs' string citation to cases upholding other attorney's fee statutes, Answer Brief at 64 and n.60, is hardly dispositive. Under the traditional constitutional analysis of Florida jurisprudence, the court must analyze the reasonableness of the means chosen to achieve the particular legislative purpose in this particular case.

The plaintiffs' second attack presents a perplexing justification of the means chosen by the Legislature. They argue that attorney's fee sanction is designed to coerce defendants to settle claims in which liability is "both established and fairly debatable." Answer Brief at 65. The plaintiffs could just as well have described an object which is "both black and white." Our point is that it is not rational for the Legislature, in attempting to minimize litigation, to recognize on the one hand that the issue of liability is almost always "fairly debatable," and, on the other hand, to select a means to achieve its goal which penalizes unsuccessful resort to the only

process by which one may "establish" that debatable question.*/ The plaintiffs' concession that section 768.56 might result in the settlement of actions that might have been defended successfully if they had been fully litigated, Answer Brief at 65, graphically illustrates our point: it is arbitrary and capricious to penalize parties for litigating issues that are acknowledged to be impossible to resolve outside of a court.

B. Section 768.56 Violates Due Process When Applied To Defendants Who Could Not Settle The Case.

The imposition of attorney's fees as a sanction for the defendants' failure to settle a case they could not legally have settled is a violation of due process. The plaintiffs, instead of addressing the merits, contend that this Court should not reach this point. But the plaintiffs cannot avoid the force of this argument so simply. Not only did the defendants attack the statute on due process grounds in the trial court, (A. 516-17, 25) but the plaintiffs themselves proved, to the trial court's satisfaction, the truth of the very factual predicate of our argument. They are now estopped to "challenge" this factual predicate at this time.

1. The-due-process-as-applied question was implicitly before the trial court.

The plaintiffs cite several inapplicable cases which merely hold that one may not raise a defense for the first time on appeal that

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*/ The attorney's fee sanction is mandatory. Trial judges must award a "reasonable fee," whether an unsuccessful litigant's claim or defense was "fairly debatable" or frivolous.

was available below.*/ Although the interaction of sections 768.54 and 768.56 was implicit in the trial court's actions, the present argument was not available to the defendants until the trial court rendered its final decision. The full impact of the court's imposition of attorney's fees was not manifest until the trial court upheld section 768.56 and actually entered the $4.4 million fee against the defendants as a penalty for "refusing" to settle, after he found that we were unable to do so.

The trial judge clearly understood that one of the purposes of section 768.56 is "to encourage the prompt and reasonable settlement of meritorious claims." (A. 30). The judge had also held, however, that

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*/ In Dober v. Worrell, 401 So.2d 1322, 1324 (Fla. 1981), the Court held that where defendants were "aware of their affirmative defense (statute of limitations) before initial pleading" they could not assert it for the first time on appeal. In Cowart v. City of West Palm Beach, 255 So.2d 673 (Fla. 1971), the Court held that a defendant could not challenge the plaintiff's standing to sue for the first time on appeal.

In Sanford v. Rubin, 237 So.2d 134 (Fla. 1970), the Court held that the constitutionality of a statutory provision for attorney's fees could not be raised for the first time in oral argument at the district court of appeal. The constitutionality of the law had not been raised at all below. In Smith v. Ervin, 64 So.2d 166 (Fla. 1953), the Court held that where a plaintiff challenged a statute on free speech and right to assemble grounds below, the court could not consider equal protection arguments for the first time on appeal. In Henderson v. Antonacci, 62 So.2d 5 (Fla. 1952), the Court held that the trial court could not declare a law unconstitutional on grounds no party raised or argued.

The plaintiffs argue that Sanford "settled" the question of whether an issue relating to attorney's fees can be considered on appeal as "fundamental error." They ignore several cases in which attorney's fee awards were treated as fundamental error. See Dooley v. Culver, 392 So.2d 575 (Fla. 4th DCA 1980); American Home Assurance Co. v. Keller Ind., 347 So.2d 767, 772 (Fla. 3d DCA 1977), cert. denied, 360 So.2d 1249 (Fla. 1978). See also Commodore Plaza at Century 21 Condominium Assoc. v. Cohen, 378 So.2d 307 (Fla. 3d DCA 1979).

section 768.54 "prevents good faith settlements and requires all medical malpractice actions in which a claim greater than $100,000 is made to be tried to judgment," because "the statute does not authorize the fund to settle claims before judgment on any terms other than those set forth in the statute." (A. 17) (court's emphasis). Nonetheless, the judge awarded an astronomical $4.4 million attorney's fee against these defendants for "refusing" to settle. (A. 30-31). See Initial Brief at 61. The Fourth District adopted the trial court's irreconcilable findings. Opinion Below at 7.

2. The plaintiffs may not challenge the courts' finding, advanced by them below, that the defendants were statutorily precluded from settling this case.

The plaintiffs devote little effort to rebutting the defendants' contention that the settlement limitations imposed by former sections 768.54(3)(e)1, 2, and 3 render the application of section 768.56 unconstitutional in this case. Initial Brief at 59-63. Their first line of attack is to "challenge" the factual basis of our argument. They say:

> [W]e 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 the basis by taking appropriate discovery, and by obtaining and presenting evidence controverting the defendants' insistence that section 768.54 has prevented the settlement of meritorious malpractice claims.
>
> Answer Brief at 66.

This is an impermissible flip-flop. The proposition the plaintiffs now seek to "challenge" was one they originally presented to the court below.

The plaintiffs concede "that the trial court found . . . the statute's limited payout provision appeared to prevent good faith settlements of larger claims." Answer Brief at 67 (emphasis added). That concession is incomplete. The trial court found the payout limitations prevented settlements in fact. (A. 17). More significantly, the plaintiffs conveniently ignore that the trial court made this finding at the specific urging of and in language identical to that proposed by the plaintiffs. See Plaintiffs' Memorandum of Law on Various Pending Post-Trial Motions (A. 497). The defendants never disputed the plaintiffs' argument on this point. The Fourth District adopted the plaintiffs' argument verbatim. (A. 17). Opinion Below at 7.

The plaintiffs are now estopped to reverse their position on appeal, having prevailed upon that argument below. Olin's, Inc. v. Avis Rental Car System, Inc., 104 So.2d 508 (Fla. 1958). The defendants' inability to settle stands as a fact found by the courts below.

The plaintiffs are not so brazen as to deny completely that the statutory limitations could prevent settlement of large cases. They cite statistics which correctly show that most cases were indeed settled because the damages claimed did not exceed the statutory settlement limitations. Answer Brief at 60, n.66. They conclude that "section 768.54 cannot conceivably inhibit settlement except perhaps in the rarest of cases." Id. It is hard to imagine a rarer case than this one, involving the largest medical malpractice verdict and attorney's fee award in the history of the State of Florida.

The plaintiffs' only attack on the merits is to suggest that if the Fund had tried harder, it could have found a way to circumvent the limits imposed upon it by statute and come up with enough money to

satisfy the plaintiffs' attorney. Their newly adopted analysis of the Fund's settlement ability, however, Answer Brief at 68-69, is wrong.

The Fund offered a package which included $350,000 ($100,000 per year since the occurrence plus $50,000 for costs); $800,000 for attorney's fees; and an annuity paying $7,000 per month or $84,000 per year, which cost $722,671.00.*/ That annuity was sufficient to pay for the nursing care the plaintiff was receiving at the time of the trial. (A. 458; T. 1473, 1495). The lump sum present value of this offer was $1,872,671.00.

The plaintiffs assert that the Fund could have purchased a "substantially larger annuity" than the one it offered paying $84,000 per year. In fact, an annuity which would have generated the maximum statutory payout, $100,000.00 per year, would have cost an additional 19% percent, or about $137,000 more than the $84,000 annuity. (The difference is verifiable in annuity tables.) Even with the larger annuity, the maximum present value the fund could have offered was $2,010,325.00, nearly a million dollars below plaintiff's "belly to backbone" settlement offer. (A. 573-74).

The plaintiffs also neglect to admit that their $3 million settlement demand was $3 million up front; it nowhere appears that the plaintiffs agreed to accept an annuity. Clearly, then, the defendants were unable, under the statutory settlement constraints, to match the plaintiffs' settlement demands in this serious malpractice case. It violates due process to punish the defendants when they were legally unable to avoid the sanction of the attorney's fee statute.

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*/ The plaintiffs do not explain the basis for their assertion that the anunity offered by the defendants had a "$900,000 present value." Answer Brief at 69.

CONCLUSION

For the foregoing reasons the defendants urge this court to reverse the decision below and order a new trial with directions to apply the current version of section 768.54. We further urge the Court to outline specific guidelines for the application of section 768.56, or, in the alternative, to declare the statute unconstitutional.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Reply Brief of Appellants Florida Patient's Compensation Fund and Florida Medical Center, Inc., d/b/a Florida Medical Center were furnished by mail, this 4th day of January 1984, to

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