IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,252

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

Petitioners,

vs.

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

Respondent.

_____/

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

RESPONDENT'S BRIEF ON THE MERITS

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INDEX PAGE

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TABLE OF CASES

AUTHORITIES

I
STATEMENT OF THE CASE AND FACTS

We disagree with the petitioners' statement of the case and facts, primarily because it is highly argumentative and not very helpful as background.[1/] We see no need to restate it, however, because the background to this proceeding has been thoroughly explored in the briefs filed by the petitioners and the respondent in the companion plenary appeal--case no. 64,237--and it is set out adequately as well in the decision sought to be reviewed: FLORIDA MEDICAL CENTER, INC. v. VON STETINA, 436 So.2d 1022 (Fla. 4th DCA 1983). We therefore simply refer the Court to the decision sought to be reviewed and the parties' briefs in the companion appeal for the necessary background here.

The petitioners have argued two issues in their brief in this proceeding. Both of the issues have already been thoroughly argued in the parties' briefs in the companion appeal, so the petitioners' brief is largely repetitive and merely cumulative. Rather than repeat the responsive arguments we have already made in the companion appeal, we simply adopt those arguments here by reference. We will respond to the petitioners' reargument of the issues nevertheless (primarily out of concern that our silence might be construed as acquiescence in the petitioners' position), but because the issues have already been briefed, our response here will be exceedingly brief.

II
ISSUES PRESENTED FOR REVIEW

The issues, as framed by the petitioners (and slightly restated), are as follows:

1/ The initial brief is denominated as a "petitioners' brief". However, counsel for only one of the petitioners, Florida Medical Center, appear on the brief. From this fact, and from the nature of the issues selected for argument, we think the brief was filed on behalf of the Florida Medical Center alone. We will nevertheless honor counsels' placement of the apostrophe and treat the brief as a "petitioners' brief".

A. WHETHER THE DISTRICT COURT ERRED IN ITS OVERALL CONSTRUCTION OF §768.54, FLA. STAT. AND IN DECLARING §768.54(2)(b), FLA. STAT. UNCONSTITUTIONAL INSOFAR AS IT LIMITS THE LIABILITY OF HEALTH CARE PROVIDERS.

B. WHETHER THE TRIAL COURT ERRED IN DECLARING §768.54(2)(b)'s LIMITATION OF LIABILITY FOR PARTICIPATING HEALTH CARE PROVIDERS VIOLATIVE OF ARTICLE I, §21 OF THE FLORIDA CONSTITUTION ON THE FACTS IN THIS CASE.

III
ARGUMENT

A. THE DISTRICT COURT DID NOT ERR IN ITS OVERALL CONSTRUCTION OF §768.54, FLA. STAT. AND IN DECLARING §768.54(2)(b), FLA. STAT. UNCONSTITUTIONAL INSOFAR AS IT LIMITS THE LIABILITY OF HEALTH CARE PROVIDERS.

The petitioners have devoted 22 pages of argument to this issue. Reduced to its essentials, the argument can be stated in a single sentence: when read in the context of §768.54, Fla. Stat. (1981) in its entirety, the words "shall not be liable" contained in subsection (2)(b) create a substantive limitation upon the amount of a judgment which can be entered against a participating health care provider, not a limitation upon payment of a judgment--and the District Court therefore erred in holding that the statute impermissibly encroaches upon the judiciary's inherent power to enforce collection of its own judgments. In the course of their 22-page argument in support of this proposition, the petitioners accuse the District Court of focusing on "minutiae" in the statute, at the expense of the overall intent of the legislature. In our judgment, it is the petitioners who are guilty of the accusation, not the District Court. We reach that conclusion because the petitioners have undeniably built their entire argument upon the minutiae of four small words--"shall not be liable"--at the considerable expense of all the remaining language of the statute.

In truth, the four small words upon which the petitioners have focused simply provide no answer to the principal question resolved by the District Court--whether the "limitation of liability" they create is a limitation upon judgment or a limitation upon payment. The four small words upon which the petitioners focus can be read a thousand times, and they will never answer that question. Both the intent of the legislature, and therefore the answer to the question, simply must be found elsewhere in the statute. Although the petitioners insist over and over again that the District Court ignored the remainder of the statute, and that the remainder of the statute provides convincing evidence that the four small words mean "limitation upon judgment", rather than "limitation upon payment", they quote only two brief snippets from the rest of the statute (at page 17 of their brief)--neither of which sheds any light on the issue at all.[2/] We find this almost total avoidance of the remainder of the statute to be most curious--but easily explainable. The reason no further references to the language of the statute appear in the petitioners' brief is that the remaining language of the statute makes it perfectly clear that the four small words upon which the petitioners have placed all their reliance mean "limitation upon payment", not "limitation upon judgment".

In fact, the answer to the question presented here can be found in the very sentence from which the petitioners have extracted the words "shall not be liable"--and the petitioners know it because they have deleted that answer from their quotation of the sentence and replaced it with an ellipsis in their brief. We quote the petitioners' brief:

2/ Neither of the snippets quoted by the petitioners contain the words "payment" or the word "judgment" (or any derivative form of those words)--and both of them can be read consistently with either construction of the "limitation of liability" which they mention.

At the time of trial, Section 768.54(2)(b) provided

> A health care provider shall not be liable for an amount in excess of $100,000 per claim or $500,000 per occurrence for claims covered under [Section 768.54(3)(e)] if the health care provider has paid the fees required pursuant to [Section 768.54(3)(c)] for the year in which the incident occurred for which the claim is filed and an adequate defense for the fund is provided . . . .

(Petitioners' brief, pp. 11-12; footnotes omitted). The portion of the sentence which the petitioners have replaced with the ellipsis reads as follows: "and pays at least the initial $100,000 . . . of any settlement or judgment against the health care provider for the claim in accordance with paragraph (3)(e)." (Emphasis supplied).[3/] In other words, the plain language of the statute says simply that a participating health care provider shall not be liable for an amount in excess of $100,000.00 per claim if it pays at least $100,000.00 of any judgment entered against it. We fail to understand how that plain language can possibly provide anything other than a "limitation upon payment" --and it most certainly cannot be "construed" to mean "no judgment shall be rendered against a health care provider in an amount exceeding $100,000"--as the petitioners unabashedly ask this Court to do at page 21 of their brief.

If the very sentence upon which the petitioners rely (half of which they disavow) did not provide its own clear answer to the question presented here, there are several other portions of the statute which make it perfectly clear that the statute contemplates the entry of a judgment in the full amount of a plaintiff's claim, and then merely limits a participating health care provider's maximum payment upon that judgment. For example: subsection 3(a) of the statute creates the Fund "for the purpose of paying that portion of

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3/ The very next sentence of the statute begins: "A health care provider may have the necessary funds available for payment when due, or an adequate defense for the fund may be provided by the use of: . . .". (Emphasis supplied).

any claim . . . in excess of the limits as set forth in paragraph (2)(b)". This subsection also makes the Fund "liable only for payment of claims" against participating health care providers. Subsection 3(e)(1) authorizes the fund "to negotiate with any claimants having a judgment exceeding $100,000 cost to the fund to reach an agreement as to the manner in which that portion of the judgment exceeding that $100,000 cost is to be paid". Subsection 3(e)(3) provides that a person who has recovered "a final judgment . . . against a health care provider who is covered by the fund may file a claim with the fund to recover that portion of such judgment . . . which is in excess of $100,000 or the amount of the health care provider's basic coverage . . .". Subsection 3(e)(4) specifically contemplates the entry of judgments against the fund and provides for their payment. Finally, subsection 3(e)(6) provides that a health care provider who has underlying insurance in excess of $100,000.00 shall be liable for losses up to the amount of its coverage, not merely $100,000.00. All of these provisions are consistent with subsection (2)(b)'s limitation upon payment; none of them are even arguably consistent with the petitioners' notion that subsection (2)(b) provides a limitation upon judgment.

In the final analysis, the petitioners are not asking this Court to "construe" the statute at all; they are asking this Court to rewrite it in a manner which will be inconsistent with (indeed, exactly contrary to) its plain language. Whether this Court agrees with the wisdom of the statute or not, it is bound by its plain language to read it the way it was written. See LEVINE v. DADE COUNTY SCHOOL BOARD, _____ So.2d _____ (Fla. 1983) (1983 FLW SCO 476).[4/] Given the plain language of the statute, the District Court did

4/ At the very least, even if §768.54(2)(b) were ambiguous, it must be "construed" in conformity with the remainder of the statute, not contrary to its remaining terms. See DISTRICT SCHOOL BOARD OF LAKE COUNTY v. TALMADGE, 381 So.2d 698 (Fla. 1980).

not err in concluding that §768.54's "limitation of liability" is a limitation upon payment, not a limitation upon judgment. The petitioners' protestations to the contrary notwithstanding, such a reading of the statute does no violence to the legislature's intent to limit the liability of health care providers to $100,000.00--because such a reading does not upset the Fund's statutory obligation to the health care provider in any way. Even under the District Court's reading of the statute, the petitioner-Hospital will pay only $100,000.00 of Susan's judgment; the Fund will pay the rest; and the judgment entered against the Hospital will be discharged in full as the statute contemplates. Because the petitioner-Hospital will ultimately pay only $100,000.00 of Susan's judgment, we are frankly uncertain why the Hospital is even complaining of this aspect of the District Court's decision.

Once it is recognized that §768.54 merely limits a health care provider's liability for payment upon a judgment entered against it, it is clear that it encroaches upon the judiciary's inherent power to enforce collection of its own judgments. We have already argued that point at length in our brief in the plenary appeal, so we will not belabor it here. In that brief, we also addressed the propriety of the Third District's gratuitous dictum in MERCY HOSPITAL, INC. v. MENENDEZ, 371 So.2d 1077 (Fla. 3rd DCA 1979), cert. denied, 383 So.2d 1198 (Fla. 1980)--so there is no need for us to reargue that point here either. However, we will briefly address the petitioners' contentions that their position is buttressed by the "exclusive remedy" provision of the Workers' Compensation Act and the waiver of sovereign immunity contained in §768.28, Fla. Stat.--because those contentions have been raised for the first time here.

In our judgment, §440.11, Fla. Stat. (1981), provides no aid to the petitioners. Unlike §768.54, nothing in its terms contemplates the entry of a judgment in a common law action, and then limits payment upon that judgment

to specific amounts. It provides instead that "the liability of an employer [to secure workers' compensation payments] shall be exclusive and in place of all other liability . . . to the employee". That language plainly and clearly abolishes common law remedies and substitutes entitlement to workers' compensation benefits as the employee's "exclusive remedy". Perhaps the legislature could have drafted §768.54 in a similar fashion, but it clearly did not. Section 440.11 is simply irrelevant to the issue presented here.

Unlike §440.11, and like the statute at issue in this case, §768.28, Fla. Stat. (1981), provides that tort judgments shall be entered against the State and its political subdivisions in the full amount of a plaintiff's damages, and it then limits payment upon those judgments to $100,000.00 per claim (pending further Act of the legislature). That statute clearly does not help the petitioners here, however, because it is consistent with the District Court's reading of the similarly worded statute at issue here in every respect.[5/] Neither does it help the petitioners that no court has ever declared §768.28 to be an encroachment upon the judiciary's inherent power to enforce collection of its own judgments, because the fact of the matter is that §768.28 has never been challenged on that ground in any reported decision which we have been able to find. The constitutional question presented here is therefore an open question so far as §768.28 is concerned.

It is highly doubtful that §768.28 would ever fall prey to such a challenge, however, because there is a separate provision in the Florida Constitution--Article X, §13--which places all authority for waiving the state's sovereign immunity exclusively within the legislative branch. This constitutional provision clearly allows the legislature to waive the state's sovereign immunity

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5/ Compare DISTRICT SCHOOL BOARD OF LAKE CITY v. TALMADGE, 381 So.2d 698 (Fla. 1980) (construing §768.28(9), Fla. Stat. (1975), as providing for indemnification of government employee rather than a limitation upon judgment).

on any terms and in any fashion it wishes, and it is therefore clearly a constitutional exception to the constitution's more general division of the State's government into three separate branches. We therefore do not believe that §768.28 provides any assistance to the petitioners here--and for all of the foregoing reasons, it is respectfully submitted that the District Court did not err in concluding that §768.54(2)(b) provides a limitation upon payment, rather than judgment, and that it impermissibly encroaches upon the inherent powers of the judiciary as a result.

B. THE TRIAL COURT DID NOT ERR IN DECLARING §768.54(2)(b)'s LIMITATION OF LIABILITY FOR PARTICIPATING HEALTH CARE PROVIDERS VIOLATIVE OF ARTICLE I, §21 OF THE FLORIDA CONSTITUTION ON THE FACTS IN THIS CASE.

Next, the petitioners complain of the trial court's alternative conclusion that §768.54(2)(b)'s limitation of the Hospital's liability to $100,000.00 (which effectively abolished 99.99% of Susan's right to recovery from the Hospital) violated Article I, §21 on the facts in this case.[6/] This issue, like the preceding issue, has already been thoroughly briefed in the plenary appeal, and we will rely on our response there as our primary response here. We will supplement that response briefly here, however, to dispose of two new contentions raised here.

6/ In a footnote, the petitioners chide the trial court for articulating this alternative conclusion, contending that "as a matter of constitutional jurisprudence", the trial court should not have reached the issue in view of its declaration of unconstitutionality on other grounds. The petitioners misunderstand the principle upon which they rely. That principle holds that a court should avoid deciding constitutional issues in a case if the case can be decided on non-constitutional grounds. The principle does not preclude a court from resolving all the constitutional issues presented in a case once those issues must be reached because the case cannot be decided solely on non-constitutional grounds. The trial court in this case simply does not deserve the petitioners' inappropriate reprobation. That the reprobation was clearly undeserved is proven by the fact that, in the same breath, the petitioners implore this Court to decide the Article I, §21 issue, notwithstanding that it is merely an alternative ground, because of the importance of the question. The trial court can hardly be faulted for doing exactly what the petitioners implore this Court to do.

First, the petitioners contend that "Section 768.54(2)(b) has not abolished 99.99% of the plaintiff's former common law malpractice action"--because, according to the petitioners, the legislature provided a substitute for the 99.99% lost in the form of an action against the Patient's Compensation Fund. The petitioners are simply confused. KLUGER v. WHITE, 281 So.2d 1 (Fla. 1973), and its progeny involve a two-step analysis under Article I, §21. The first step asks the question whether a common law right has been abolished. As to Susan's common law right against the Hospital, §768.54(2)(b) clearly abolishes 99.99% of it. Whether this abolition is constitutionally permissible depends upon the second step of the analysis--whether the legislature provided both a reasonable and the least onerous alternative available for the right abolished.[7/] In this case, the alternative provided Susan was the Patient's Compensation Fund (and its limitation of liability, which deprived Susan of a sufficient amount of funds to keep her alive from year to year).

The existence of that alternative and its reasonableness is a separate question altogether from the initial question of whether a common law right has been abolished--and it is wrong for the petitioners to combine those two questions into a single question, and argue that no right has been abolished simply because an alternative has been provided. On the facts in this case, §768.54(2)(b) clearly abolishes 99.99% of Susan's common law right against the Hospital, and the only valid question here is whether the alternative provided by the legislature was both reasonable and the least onerous alternative available. It was not--because, as we explained in our brief in the plenary

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7/ According to KLUGER, a reasonable alternative must be provided unless the legislature can show an overpowering public necessity for abolition of the right, and no alternative method of meeting such public necessity can be shown. The petitioners have not contended, either here or in the companion plenary appeal, that §768.54 can be justified on these grounds, so we take it that only KLUGER's initial two-step analysis is required in this case.

appeal, it does not provide for the recovery of Susan's major and salient economic losses on the facts in this case.

Next, the petitioners argue that KLUGER and its progeny apply only where a common law right has been totally abolished, or, in the words of the petitioners, where a common law right has "been hampered to such a degree as to have been abolished as a matter of practicality". We fail to see how this argument gains the petitioners a thing, because the abolition of 99.99% of Susan's common law right at the very least abolishes that right "as a matter of practicality". In our estimation, the petitioners have therefore conceded the propriety of the trial court's conclusion that §768.54(2)(b) effectively abolished Susan's common law right against the Hospital on the facts in this case.

The remainder of the petitioners' reargument under this issue has been addressed in the plenary appeal, and we will not belabor our position further. Suffice it to say that there is far more to the trial court's eminently reasonable conclusion than the mere "undeniably . . . superficial appeal" which the petitioners concede it has. The conclusion is solid throughout. Certainly the abolition of 99.99% of a right is the abolition of that right. If Article I, §21 allows such a thing without provision for a reasonable alternative remedy which allows for the prompt recovery of major and salient economic losses, then KLUGER and its progeny must be disavowed here altogether. For all of these reasons, as well as the reasons expressed in our brief in the plenary appeal, the trial court did not err in declaring §768.54(2)(b) violative of Article I, §21 on the facts in this case.

IV
CONCLUSION

It is respectfully submitted that neither the trial court nor the District Court erred in declaring §768.54(2)(b) unconstitutional on the facts in this

case, and the District Court's decision should therefore be approved with respect to the two grounds upon which it has been challenged here.[8/]

V
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 19th day of December, 1983, to all counsel listed on the attached service list.

Respectfully submitted,

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8/ We remind the Court that §768.54(2)(b) was also declared violative of both the due process and equal protection clauses of the Florida and United States Constitutions. Therefore, even if the petitioners' limited challenges here are accepted by the Court, the propriety of Susan's final judgment must ultimately stand or fall on the result in the companion plenary appeal.

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