IN THE SUPREME COURT OF FLORIDA

Case No. 64,252

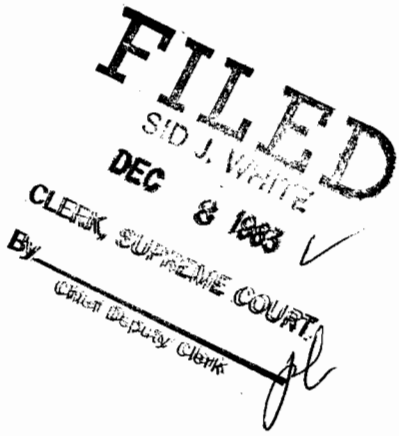
FLORIDA MEDICAL CENTER, INC., d/b/a FLORIDA MEDICAL CENTER, et al.,

Petitioners/Cross-Respondents,

vs.

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

Respondent/Cross-Petitioner,



PETITIONERS' BRIEF ON THE MERITS

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INTRODUCTION

This case is before the Court on a number of appelate grounds, each proceeding under separate case numbers.

This particular aspect of this case is based on a grant of discretionary jurisdiction pursuant to Rule 9.030 (a)(2)(A)(iv), Fla.R.App.P. This brief, concerning the construction and constitutionality of the liability limitation provisions of the Florida Medical Malpractice Reform Act, Section 768.54, Fla.Stat. (1981) (sometimes hereafter the "Statute"), is a partial but critical portion of a much broader picture which also involves the constitutionality of other provisions relating to the fundamental operation of the FLORIDA PATIENT'S COMPENSATION FUND ("Fund"). These additional constitutional issues are being brought before this Court by various parties in this and other proceedings under this Court's appellate and discretionary jurisdictions.*

The petitioner, FLORIDA MEDICAL CENTER, INC.,

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* Incorporated within the various briefs filed by the Fund and the Hospital are arguments relating to the threshold questions of liability and damages. The Fund seeks a new trial on damages and the Hospital submits that a new trial on both damages and liability is required. This Court may obviously render moot the various constitutional questions by ordering a new trial but the Hospital suggests that those issues should be addressed by the Court even if a new trial is ordered.

d/b/a FLORIDA MEDICAL CENTER HOSPITAL ("Hospital" or "Petitioner"), was the Defendant in the trial court and an appellant in the District Court of Appeal, Fourth District. Joining with this Petitioner is the Fund, also a Defendant/Appellant. The Plaintifs/Appellees/Respondents are SUSAN ANN VON STETINA, by and through her parents, legal guardians and next friends, MARY VON STETINA and LEO VON STETINA ("Plaintiff" or "Respondent").

In this brief, the symbol "A" shall stand for the Appendix accompanying ths Brief. "R" refers to the Record on Appeal. All emphasis in quotations is furnished by counsel unless otherwise noted.

STATEMENT OF CASE AND FACTS

This case began as a medical malpractice action against Petitioners. After one of the largest personal injury verdicts in the history of Florida, the case took on still broader implications by virtue of various post-trial orders entered by the Circuit Court. Those orders were subsequently affirmed by the District Court of Appeal in the decision sought to be reviewed. For purposes of this brief, all applicable facts and procedural history surrounding the case are found on the face of the decision sought to be reviewed. (A 1-19). While this brief is necessarily limited in constitutional scope, and will not therefore discuss either the merits or jurisdictional questions related to companion proceedings, it is respectfully suggested that the instant proceedings be considered in light of the totality of the case, and in view of its devastating and unsettling effect on the entire statutory scheme devised by the Legislature under the Statute.

Section 768.54(2)(b) (sometimes hereinafter, "Section (2)(b)"), Fla.Stat., as it existed at the time of the Hospital's joinder in the Fund and the rendition of the jury verdict and final judgment in the case at bar provided that:

> A health care provider shall not be liable for an amount in excess of $100,000.00 per claim. . . [upon

compliance with specified conditions].

Those conditions were met in the case sub judice, but upon post-verdict application to the trial court, the Petitioner was rebuffed, its post-trial motion to confirm the judgment to the dictates of Section (2)(b) was denied, and Section (2)(b) was declared to be unconstitutional. As a result, rather than following the dictates of Section (2)(b), final judgment was rendered against Petitioner in the full, multi-million dollar amount of the verdict. Millions of dollars in attorney's fees were also assessed against Petitioner under Section 768.56, Fla.Stat.

This constitutional decision, inter alia, was appealed to the District Court of Appeal, Fourth District, which affirmed the trial court's constitutional holding. Thus, both the trial court and the Fourth District have held that Section (2)(b) is a nullity, is constitutionally defective, and cannot be construed in the constitutional manners proffered by Petitioner and adopted by appellate precedent. See, Mercy Hospital v. Menendez, 371 So.2d 1077 (Fla. 3d DCA 1979), cert. denied, 383 So.2d 1198 (Fla. 1980).

ARGUMENT

I

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

In direct contravention of the clear terms of the Statute, the clear holding of the only precedent available, and indeed the statutory understanding of the trial court itself, the District Court misread the Statute. By focusing on specific details rather than on overall intent, the District Court has rendered a construction of the Statute completely at odds with the clear and undeniable overall legislative purpose.

A. Statutory Background

By way of background, it must be understood that the Statute sub judice operates to create what the trial court described as "a trust fund [the Fund] in the nature of liability insurance for the [participating] hospital." It is true that in operation the Fund resembles an excess liability insurer. This is clear from Section 768.54(3) which apportions and segregates the liabilities of the health care provider and the Fund, respectively, on a given claim:

> A person who has recovered a final judgment or a settlement approved by the fund against a heath care provider who is covered by the fund may file a claim with

> the fund to recover that portion of such judgment or settlement which is in excess of $100,000 or the amount of the health care provider's basic coverage, if greater, as set forth in paragraph (2)(b). *

This section establishes the basic structure of the Legislature's attempt to deal with the recognized malpractice crisis, and frames the Legislature's modification of the pre-existing common law action for medical malpractice.

The Fund's role and status, however, is not that of an insurance company. Rather, the Fund is a separate, legislatively created entity which owes a separate, enforceable legal duty to compensate successful malpractice plaintiffs. Thus, although the Fund is composed of and was created in part to benefit its health provider members, its overall statutory purpose is rather to protect and to compensate members of the public:

> It is further argued by the plaintiffs that this application of that statute [Section 768.54(2)(b)] will give it an unconstitutional effect in that the Fund is like an insurance program and that the legislative requirement that the Fund be joined in the suit is an unconstitutional invasion of the right of the Florida Supreme Court to establish rules of pro-

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* Citations throughout will be to Section 768.54, Fla.Stat. (1981), unless otherwise indicated. Petitioner recognizes that there have since been changes in the Statute, and indeed it subscribes to those arguments advanced separately by the Fund based on such changes. None of these statutory changes, however, have altered the basic framework of the Statute as relates to the restructuring and apportionment of malpractice liability between a hospital and the Fund. See discussion below at II.B. Thus, for ease of exposition, citations to the Statute throughout will generally be to those provisions in effect at the time of the orders entered below.

> cedure. [citations omitted] It is apparent from a reading of the Medical Malpractice Reform Act that the legislature did not set up an insurance fund with obligations to the health care provider. The plan is one in which the Fund has obligations primarily to the plaintiff in a medical malpractice action. As such, it is reasonable to require that the Fund be joined in any suit to enforce those obligations.
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> . . .
>
> Because the obligation of the Fund is not secondary and is not a set-off, it must be joined and have a right to defend. . . .

Mercy Hospital, Inc. v. Menendez, 371 So.2d 1077, 1079 (Fla. 3d DCA 1979), app. dismissed, 383 So.2d 1198 (Fla. 1980) ("Mercy Hospital"); Owens v. Florida Patient's Compensation Fund, 428 So.2d 708 (Fla. 1st DCA 1983), cert. denied, ___So.2d___(Fla. 1983).

The overall effect of Section 768.54 is, accordingly, to modify a malpractice plaintiff's common law cause of action against a Fund member. Under the Statute, instead of a claim solely against the member, the malpractice claimant enjoys a bifurcated right: first against the health care provider to the limits of its "basic coverage", Section 768.54(3)(e)3; and, second against the Fund for the balance of the claim. Id. These two substantative rights (the first originally of common law origin; the second newly granted by statute) together add up to compensate the claimant for that full measure of damages previously available under the common law. Stated differently,

the Statute operates to statutorily replace, modify and allocate common law malpractice liability by granting malpractice claimants a new and different right of action, unknown at common law, against the statutory Fund for the bulk of their malpractice claim.

That the Legislature intended to restructure medical malpractice liability in Florida is clear not only from the preamble to the Statute, see, Preamble to Chapter 75-9, but also from the interplay of its various sections. In addition to the creation of the Fund (and its statutory assumption of the lion's share of its members' potential liability), the Statute also preempts and modifies the traditional common law notions concerning the elements of malpractice damages. Section 768.48, Fla.Stat. (1981), for example defines and segregates those elements of damages properly recoverable under the statute: past and future medicals; past and future lost earnings; and past and future pain and suffering.

Further, Section 768.54(3)(e)3, Fla.Stat. (1982 Supp.) which provides the claims procedure to be followed in recovering against the Fund, and Section 768.51, Fla. Stat. (1981), which provides for judicial structuring of a malpractice judgment after its rendition, clearly preempt the concept of lump-sum recoveries. They establish, rather, rights to recovery which are strictly structured to ripen only over time into present entitlements to payments for certain elements of

damage. Future medical expenses, for example, must thus actually be incurred in order to be recovered. Accordingly, once the claimant dies, entitlement to future medical expenses "shall cease", Section 768.54(3)(e)3, Fla.Stat. (1982 Supp.) and Section 768.51(5), and his estate may have no claim for such now useless compensatory element of damages. Section 768.51(5). The logic and fairness of this procedure is self-evident: a defendant may not be forced to pay for expenses not actually incurred and a plaintiff will recover all reasonable and necessary expenses even beyond a mythical "lump sum" jury award.

As should be clear from examination of the statute as a whole, and from the general outline of its salient points given above, the Legislature intended to significantly modify both the liability for, and the compensation available under, a modern malpractice action. First, a mechanism, the Fund, was newly created to compensate significantly injured claimants and was intended to replace, or to be in lieu of, liability on the part of the health care provider. Second, the "lump-sum" remedy of yore has been, in certain instances, abolished in favor of a periodic-payment approach which "fine tunes" the compensatory mechanism of prior tort law to ensure both the application of compensatory damages to their proper purpose, see, e.g., Johnson v. R.H. Donnelly Co., 402 So.2d 518, 522 (Fla. 1st DCA 1981), pet. denied 415 So.2d 136 (Fla. 1982) (statutory pro-

hibition against lump-sum settlement of workmen's compensation claimant's future medical expenses upheld), and the prevention of windfalls to the malpractice victim's heirs, see, e.g., Section 768.51(5) and Loftin v. Wilson, 67 So.2d 185 (Fla. 1952).

The Legislature's approach to the medical malpractice "crisis", was thus sweeping, complex and complete. This statutory reworking of common law tort concepts carried benefits for both the health care providers who joined the Fund -- limitation of liability, pursuant to Section 764.54(2)(b) -- and for claimants -- assurance of compensatory payments even beyond the limits of judgment should that be necessary, pursuant to Section 768.51, Fla.Stat. or Section 768.54(3)(e)3, Fla.Stat. (1982 Supp.).

In reaching its decision, the Fourth District either ignored or took insufficient heed of the breadth of the Statute's sweep. Choosing instead to focus on the minutiae of at times inartful draftsmanship, the Fourth District adopted a strained argument about the Statute's meaning, and applied a talismanic and amorphous "inherent judicial power" argument in order to invalidate various portions of the Statute. Had the fourth District focused more properly on the Legislature's evident intent, rather than on the Statute's grammatical shortcomings, any one of the offered alternative constructions could have been adopted to save the Statute from constitutional infirmity. Foley v. State, 50 So.2d 179, 194 (Fla. 1951);

State v. Zimmerman, 370 So.2d 1179, 1180 (Fla. 4th DCA 1979).* The Fourth District thus erred in its unnecessary constitutional invalidation of Section 768.54.

B. The Fourth District Erred In Its Construction of Section 768.54 (2)(b).

At issue in this limited constitutional appeal is the construction and constitutional validity of Section 768.54 (2)(b), Fla.Stat. (1981). Part of the Legislature's overall modification of liability in malpractice cases, this section is one of the key elements in that modification, and serves as the major benefit and inducement for health care providers to join the Fund. At the time of trial,** Section 768.54(2)(b) provided

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* In the instant case, it is impossible to glean any attempt on the part of the District Court to afford a presumption of validity to the statute or to seek a construction of the Statute which would uphold its validity. As the Fourth District itself noted in Zimmerman, 370 So.2d at 1180:

> It is the judiciary's duty to uphold and give effect to all provisions of a legislative enactment, and to adopt any reasonable view that will do so.

It is clear that a reasonable attempt to construe the statute in such a manner could have and should have been made, and would necessarily have led to a different conclusion than that ultimately reached. See also, Industrial Fire & Casualty Insurance Co. v. Kwechin, 8 F.L.W. SC 463 (Fla. December 2, 1983) ("where two constructions of a statute are possible, one of which is questionable constitutionality, the statute must be construed so as to avoid any violation of the constitution.")

** Changes in Section 768.54(2)(b) made by Ch. 82-391 (effective June 22, 1982) since the trial serve only to support and reinforce the construction of the Statute proffered here.

> 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. . . .*

In construing this section, the Fourth District glossed over the clear meaning of the "shall not be liable" language, as did the trial court, and began its interpretation by comparing Section (2)(b) with Section 768.54(3)(e)3. The Fourth District then opined:

> While both our sister court [the Third District in Mercy Hospital] and [the Hospital] conclude that the intent of the statute [pursuant to Section (2)(b)] is to limit judgments, such a conclusion is not supported by the statute. Section 768.54 (3)(e)(3) provides:
>
> > A person who has recovered a final judgment . . . against a heath 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. . . .
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> It is clear from this section of the statute that the legislature did contemplate judgments in excess of $100,000 against health care providers and that the trial judge was

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* In the instant case, there is no question that the Hospital paid the fees required for the year in which the incident occurred, and through its underlying insurer provided an adequate defense for the Fund. (R 1777-78).

> eminently correct when he determined that the purpose of the statute was not to limit the amount of the judgment against the health care provider, but rather to prescribe the manner of collection of the judgment. We also agree that the trial court's additional conclusion that the statute is unconstitutional 'because it impermissibly encroaches upon the power granted exclusively to the judicial branch of our government.' (A 9, E.O.)

The Third District in Mercy Hospital, supra, had already construed the provision here at issue. In reversing the trial court's denial of a hospital's post-trial motion to limit the judgment in accordance with Section (2)(b), the Mercy court squarely adopted the interpretation and application of the section urged here by Petitioner; based on the section's clear and express dictates, the Third District held:

> The provision [768.54(2)(b)] is one of limitation of judgment upon the performance of conditions specified.
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> . . .
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> . . . we, therefore, conclude that the limitation is enforceable after verdict upon proper proof of compliance with the terms and conditions of the statute. 371 So.2d at 1079.

The Third District then remanded to the trial court for an evidentiary hearing on the defendant/hospital's compliance with the terms of the Statute.

Had the Fourth District construed the statute reasonably, in accordance with the Third District's decision, to be a "limitation of judgment" rather than as a limitation of

inherent judicial authority, the Fourth District could not have concluded that Section (2)(b) was unconstitutional. That the Fourth District refused to either adopt a reasonable construction of the Statute's limitation of liability, or to follow the Third District's precedent, created the judicial conflict which is the basis of this Court's jurisdiction. (A 20-22). We respectfully submit that the Fourth District erred in its construction of Section (2)(b), especially in view of the Statute's clear overall intent.*

The basis of the Fourth District's constructional error is a mistake in logic. It began with a correct legal premise, but from that premise it drew an erroneous conclusion. The Fourth District then compounded its mistake in a misguided

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* Liberal construction of Section 768.54(2)(b) for the benefit of the public in keeping with the ever present intent and purpose of the statute should have led the Fourth District to rely less on the "strict letter of the law," than on a reasonable interpretation of its language. Certainly, recognition of the limitation of liability in this manner would comport with the requirement that statutes must not be construed to render them useless, or in such a way as to lead to absurd results which are clearly at variance with other portions of the statutes, its legislative intent, and its purpose. See, e.g., Moore v. State, 343 So.2d 601 (Fla. 1977); City of Miami v. Berus, 245 So.2d 38 (Fla. 1971); State Farm Mutual Automobile Insurance Co. v. O'Kelley, 349 So.2d 717 (Fla. 1st DCA 1977); McLellan v. State Farm Mutual Automobile Insurance Co., 366 So.2d 811 (Fla. 4th DCA 1979); Good Samaritan Hospital Association, Inc. v. Simon, 370 So. 2d 1174 (Fla. 4th DCA 1979).

As stated in Ervin v. Peninsular Telephone Co., 53 So.2d 647, 654 (Fla. 1951): "The legislative intent is the polar star by which courts must be guided and such intent must be given effect, even though it may appear to contradict the strict letter of the statute. (citation omitted)."

attempt to purportedly protect the "inherent power" of the courts.

The Fourth District's faulty reasoning may be succintly stated, and derives perhaps from its too hasty adoption of the trial court's language:

> We believe the trial court, in the case now before us, properly decided that, [since] '[t]he statute [Section 768.54 (3)(e)3] imposes no substantive limitation upon plaintiff's right to judgment in the full amount of her damages,' . . . that the statute [Section 768.54 (2)(b)] [therefore] merely prevents collection of the judgments except on the terms prescribed therein.
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> . . .
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> We [thus] also agree with the trial court's additional conclusion that the statute [Section 768.54(2)(b)] is unconstitutional 'because it impermissibly encroaches upon the power granted exclusively to the judicial branch of our government.' (A 9).

The Fourth District's initial premise is correct: the Statute, as reflected in Section 768.54(3)(e)3 does not purport, a priori, to divest the malpractice claimant of recovery of the full, aggregate amount of their damage. All the elements of damage defined in Section 768.48 are indeed fully recoverable.

The premise does, however, go too far when it is also realized that certain elements of the damage are subject either to defeasance, see, e.g., Section 768.51(5), or to payment over time, id. and Section 768.54(3)(e)3. The initial premise is thus at least partially incorrect to the extent that

it contains an erroneous implication of lump-sum recovery as of right.

The logical flaw becomes more clearly apparent, however, in the next step of the Fourth District's adopted argument: since there is no limitation, the provision must "merely" and impermissibly direct the means of "collection." (A 9) This leap's logical necessity eludes Petitioner. Why is it necessarily true that, given a claimant's complete recovery, the statutory allocation of liability as among several defendants and the statutory description of the claimant's entitlement to damages as one which continues and ripens only over time are mere details of the judgment's "collection"? They are not, and it is submitted that these "details" are rather valid, substantive directions which define not only the extent of defendants' respective liabilities, but also limit the claimant's present entitlement to damages.

It is clear beyond cavil that the Legislature intended to limit health care provider's malpractice liability if they joined the Fund.* It is also clear that Section (2)(b)'s express limitation of liability was intended to be exactly that. Reading the statutory provisions in the context of the whole Statute, Petitioner would offer the language of the following

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* I.e., the "terms accepted by" the Hospital for joining the Fund. See, Department of Insurance v. Southeast Volusia Hospital District, 8 F.L.W. SC 354 (Fla. September 15, 1983).

sections as dispositive of the Legislature's intent to limit the liability of participating health care providers: Section (3)(e)3, quoted above by the Fourth District itself necessarily implies that any excess liabilities are to be paid by Fund:* Section (2)(e) of the Statute which provides:

> The limitation of liability afforded by the fund for a participating hospital or ambulatory surgical center shall apply to its officers, trustees. . . [etc.][;]

and, finally, dispositively, Section (2)(d)1 of the Statute which provides proof by negation:

> Any health care provider who does not participate in the fund or participates and does not meet the provisions of paragraph (b), shall be subject to liability under law without regard to the provisions of this section.

In the face of this overwhelming proof that the Legislature intended to limit the malpractice liability of Fund participants, the Fourth District's reading of Section (2)(b) as a "collection" matter -- in order to constitutionally prevent the efficacy

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* That this was clearly the Legislative intent is now additionally manifested in amended Section 768.54(2)(b), Fla. Stat. (Supp. 1982) which reads:

> Whenever a claim covered under subsection (3) results in a settlement or judgment against a health care provider, the fund shall be liable to the extent of the coverage if the health care provider has paid the fees required pursuant to subsection (3) for the year in which the incident occurred for which the claim is filed, provides an adequate defense for the fund, and pays the initial amount of the claim up to the applicable amount. . . .

of such limitation -- is indeed difficult to understand, much less credit. Rather than establishing collection criteria, the Legislature was clearly declaring parties' substantive liabilities on the claimant's judgment. That the Legislature has the power to define, order, allocate and establish liability relationships is well-settled. Rothwein v. Gerstein, 36 So.2d 419 (Fla. 1948) (abolishment of "heart-balm" actions upheld); McMillan, et al. v. Nelson, 5 So.2d 867 (Fla. 1942) (elevation of standard of care for gratuitous guest's recovery to "gross" negligence upheld); Seaboard Coast Line R.R. Co. v. Smith, 359 So.2d 427 (Fla. 1978) (preclusion of contribution sought against employer covered by workman's compensation upheld); Village of El Portal v. City of Miami Shores, 362 So.2d 275 (Fla. 1978) (application of contribution among tortfeasors' act upheld); Chapman v. Dillon, 415 So.2d 12 (Fla. 1982) (abolishment of pain and suffering damages for injuries failing to meet statutory threshold upheld); see also, Johnson v. R.H. Donnelly, 402 So.2d 518, 520 (Fla. 1st DCA 1981), pet. denied 415 So.2d 1360 (Fla. 1982). Indeed, the Fourth District expressly found the 1982 version of the Statute to be substantive, thereby refusing to apply it to the instant case. That Court's decision is thus internally inconsistent -- it finds the 1975 Statute to be procedural but finds the 1982 version to be substantive. Rather than seeking a construction which would uphold the statute, the Fourth District's convoluted logic implies an attempt to find a

reason to nullify the law.

By belittling the statutory effect of Section (2)(b) -- viewing it only as a collection matter -- the Fourth District not only deprived the Legislature of its clear right and ability to establish and control substantive legal relationship, but also implicitly ignored that case law which has validly construed "shall not be liable" language in other statutes so as to affect the Legislature's purpose.*

Several statutes -- the Workers' Compensation Law and the Waiver of Sovereign Immunity Statute, for example -- use terms such as "liable" or "liability" in a context clearly indicating that the legislative intent was to either preclude entry of judgment, or to provide a limitation on judgment once entered. The "exclusive remedy" provision of the Florida Workers' Compensation Law, Section 440.11(1), Fla.Stat., for example, does not speak in terms of an employee being precluded from securing a judgment against an employer but rather mandates that "the liability of an employer prescribed in Section 440.10 shall be exclusive and in place of all other liability of such

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* Where the Legislature uses the same or similar language in a number of similar or even unrelated statutes, it should be presumed that the same or similar meanings are to be consistently applied. The Legislature is presumed to know the meaning of language which it uses and, of course, statutes with a similar purpose are to be construed in pari materia. See, Miami Dolphins, Ltd. v. Metropolitan Dade County, 394 So.2d 981 (Fla. 1981); Thayer v. State, 335 So.2d 815 (Fla. 1976).

employer . . . ." The Workers' Compensation Law has been sustained as against various constitutional attacks on several occasions, e.g., Favre v. Capeletti Brothers, Inc., 381 So.2d 1356 (Fla. 1980); Seaboard Coast Line R. Co. v. Smith, 359 So.2d 427 (Fla. 1978); Carroll v. Zurich Insurance Co., 286 So.2d 21 (Fla. 1st DCA 1973); Johnson v. R.H. Donnelly, supra, and there has never been any serious question that the statutory language precluding "liability" is identical to a prohibition against recovery of or on a judgment.

Application of the Fourth District's reasoning in the instant case -- that "shall not be liable" is tantamount to impermissible encroachment on the courts' power over judgments -- would logically require a determination that Section 440.11(1) is unconstitutional. That is not the law in the Workers' Compensation context and, by clear analogy, cannot be the law in the similar context here.

The Waiver of Sovereign Immunity Statute, Section 768.28(5), Fla.Stat., similarly provides that governmental entities shall not

> be liable to pay a claim or a judgment by any one person which exceeds the sum of $100,000.00 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of $200,000.00.

Because language similar to that used in Section (2)(b) was used,

it could be said that since the legislation "contemplates" (and actually allows) entry of judgments against sovereign entities in excess of $100,000.00, the Legislature could not therefter restrict the ability of a court to enforce the judgments to the extent that they might exceed $100,000.00. Such a conclusion has never been reached by any court which has construed the Waiver Statute. See, Rombough v. City of Tampa, 403 So.2d 1139 (Fla. 2nd DCA 1981). Admittedly, the Waiver Statute has a constitutional and historical background somewhat dissimilar to a civil malpractice suit, but the clear import of the language used by the Legislature supports the Petitioner's contentions here.

It may have been a better procedure for the Legislature to have drafted Section 768.54(2)(b) to state: "no judgment shall be rendered against a health care provider in an amount exceeding $100,000.00", but the failure to be more specific is not fatal in this case. Legislative intent must control. Foley v. State, supra. Because the Legislature has frequently used the same or similar terms to reach the same or similar results sought by Petitioner, it was the duty of the Fourth District, and now becomes the duty of this Court, to apply a reasonable construction to the language used in an effort to uphold the presumptively valid limitation on liability.

Petitioner proffered two alternative constructions

below, invoking the rule requiring all reasonable attempts be made to construe a statute constitutionally. It was thus argued that Section (2)(b) could be read either to preclude entry of any judgment in an amount exceeding $100,000 against a Fund member; or, alternatively, that the post-judgment remedy sanctioned in Mercy Hospital was to be followed. Either construction would have saved the Statute from constitutional infirmity, and would have given effect to the Legislature's evident intent to limit Fund members' malpractice liability. Petitioner respectfully requests this Court adopt either of these proffered constructions, give effect to the "shall not be liable" language of Section (2)(b), and quash that portion of the Fourth District's opinion as holds Section 768.54(2)(b) to be unconstitutional.

C. Section 768.54(2)(b) Is a Substantive Enactment and Does not Encroach Upon The Powers of the Judiciary.

At the outset, it is necessary to note and distinguish between two separate and distinct provisions of the overall Statute: (1) the health care provider's limitation of liability contained in Section (2)(b) of the Statute; and (2) the "payout" limitation contained in Section (3)(e)3:

> In the event an account for a given year incurs liability exceeding $100,000 to all persons under a single occurrence, the person recovering shall be paid from the account at a rate not more than $100,000 per person per year until the

claim has been paid in full. . . .

The distinction between these two clauses, the "liability limitation" clause on the one hand and the "payout limitation" clause on the other, is an important one of which sight must not be lost. The two sections are individual and separate. While they are both obviously related to the Legislature's attempts to minimize the impact of large malpractice awards on the health care industry (and indirectly the public), they perform clearly separate functions within the statutory scheme.

The centrality of this distinction is indeed the reason that the Hospital has felt the need to separately appeal this issue. As we and the Fund have consistently maintained, the statutory and constitutional issues surrounding each of these two sections are separate, distinct, and involve different concepts within the Legislature's overall attempt to deal with the medical malpractice crisis. Unfortunately, however, neither the Respondent nor the Fourth District have adhered to this crucial distinction in order to give it effect.

Petitioner submits that this Court may uphold Secton (2)(b)'s limitation of liability provisions as a valid, substantive enactment, while at the same time constitutionally striking, as an "impermissible intrusion on the courts' power to enforce judgments," the distinct "payout limitation" of Section 768.54(3)(e)(3). While the Hospital believes that the pay-

out scheme is a substantive enactment too -- statutorily depriving a malpractice claimant of his or her former right to a lump-sum recovery, see, e.g., Johnson v. R.H. Donnelly, 402 So.2d at 520-22 -- the possible invalidity of Section (3)(e)3 does not reflect on Section (2)(b). The fate of the two sections are not linked; (2)(b) may stand with or without (3)(e)3.

That the trial court failed to distinguish the two sections is clear. (A 27-28). That the Fourth District may also have given the distinction insufficient effect is reflected in its opinion: the (3)(e)3 payout provision (reached first, by adoption of lengthy portions of the trial court's order) is given treatment in some detail; while the treatment of Section (2)(b) is more summary, with verbatim adoption of that same argument used to invalidate Section (3)(e)3. Compare Opinion at A 4-7 with Opinion at A 8-9; respectively. Without much thought the Fourth District simply found that Section (2)(b)'s limitation of liability was also an impermissible "procedural" enactment directed at the "collection" of judgments. Id., A 9.

It is submitted that this result could only have been reached by disregarding the distinction between the two sections. Under the applicable case law, "substantive" enactments are those:

> . . . which by rules and principles . . . fix and declare the primary rights of individuals as respects their person and their property.

Adams v. Wright, 403 So.2d 391, 394 (Fla. 1981) citing with approval In Re: Rules of Criminal Procedure, 272 So.2d 65, 66 (Fla. 1972) (Adkins, J. concurring) (emphasis added).

By contrast:

> Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights . . . . 'Practice and procedure' may [thus] be described as the machinery of the judicial process. . . .

Id. at 393-94; see also, Market v. Johnston, 367 So.2d 1003 (Fla 1979) (statute regulating "timing" of insurer's joinder in suit impermissibly "procedural".)

Given these definitions, it is difficult indeed to understand the Fourth District's classification of the "shall not be liable" language of Section (2)(b) as merely "procedural", and thus impermissible. Is not liability, and exposure thereto, the most "primary" of rights? If so, as must be conceded, can Section (2)(b) be anything other than a proper, substantive enactment of the Legislature? This revelation of Section (2)(b)'s substantive nature is not surprising, when the section is properly viewed through the optic of the Statute as a whole and its intent to significantly restructure medical malpractice liability. See discussion above at I.A.

Assuming arguendo the "procedurally" impermissible character of the payout provisions of Section (3)(e)3, of what

importance is this latter section's unconstitutionality on separation of powers grounds, to the clear substantive nature of Section (2)(b)? The two sections may, if necessary, be separately classified for separation of powers purposes, with constitutional results depending on the merits of each section individually. Actually, this separate constitutional treatment is to be preferred, in order to allow mininimal constitutional analysis (and potential invalidation) of the statute.*

It is respectfully submitted that if Section (2)(b) is properly viewed on its own individual merits, in keep-

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* The Hospital continues to believe that Section (3)(e)3 is "substantive" for the purposes of the separation of powers, and thus valid despite the Fourth District's erroneous conclusion. That the Legislature has the constitutional power to regulate and modify common law causes of action is clear. Estate of Roberts, 388 So.2d 216 (Fla. 1980). That the Legislature may also modify rights to and elements of damage is also clear. Accord, Chapman v. Dillon, 415 So.2d 12 (Fla. 1982). So, too, it is clear that the Legislature may properly exercise its police power to require payment of compensatory damages only over time (as they are incurred), in order to protect both the claimant and society at large. Johnson v. R.H. Donnelly, 402 So.2d 518 (Fla. 1st DCA 1981), pet. denied, 415 So.2d 1360 (Fla. 1982). Accordingly, the Legislature's requirement, under Section (3)(e)3 that future medical epxneses be paid as they are incurred rather than in lump-sum is both a substantive and a permissible modification of the common law.

However, since the Court need not reach this issue, at least within the confines of ths appeal, the merits of Section (3)(e)3's constitutinality will not be further argued.

ing with the Legislature's obvious and express intent, then Section (2)(b)'s limitation of liability can only be seen as a substantive enactment within the proper province of the Legislature. Accordingly, the Fourth District's construction of Section (2)(b) as a "procedural", unconstitutional encroachment on judicial power was error, and that portion of the Fourth District's opinion should be quashed.*

II

SECTION 768.54(2)(b)'S LIMITATION ON THE MALPRACTICE LIABILITY OF PARTICIPATING HEALTH CARE PROVIDERS DOES NOT DENY PLAINTIFFS' ACCESS TO THE COURTS IN VIOLATION OF ARTICLE I, SECTION 21 OF THE FLORIDA CONSTITUTION.

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* As a parting thought on this portion of the Brief, consideration should be given to the Fourth District's rationale on the efficacy of Fla.R.Civ.P. 1.530. The case law makes clear that Rule 1.530(1) is to be used to modify or alter judgments on "substantive" rather than the "procedural" or clerical grounds; for which Rule 1.540 is intended. See, e.g., Schrank v. State Farm Mutual Automobile Insurance Co., 438 So.2d 410, 412 (Fla. 4th DCA 1983). If this is so, and if it is further true that the Hospital's attempt to use Rule 1.530 to conform the judgment to law on "substantive" grounds is a constitutionally improper "procedural" intrusion on the court's power over judgments, then of what effect is Rule 1.530? Under the Fourth District's rationale, Rule 1.530 is either rendered surplusage -- since "substantive" change of a judgment is impermissible Rule 1.530's only remaining scope is the same as Rule 1.540's already "procedural" provinces -- or, Rule 1.530(g) is rendered a judicial mistake -- procedurally allowing unconstitutional modifications to the talismanic sanctity of judgments. Compare Adams v. Wright, 403 So.2d 391 (Fla. 1981) (allowing statutory addition and remittitur by post-verdict motion). This absurd result is further proof, if such was necessary, that the Fourth District was too hasty in its judgment.

If this Court decides that Section (2)(b) is a proper, substantive exercise of the Legislature's power to amend common law relationships, it will have to go on to reach that argument, made successfully by Respondent at trial, that the limitation of liability contained in the Statute violates Article I, Section 21 of the Florida Constitution as such section has been construed in Kluger v. White, 281 So.2d 1 (Fla. 1973) and Overland Construction Co., Inc. v. Sirmons, 369 So.2d 572 (Fla.1979).*

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* That this Court should even have to consider the Kluger "access to courts" issue is indicative of two implied propositions; neither of which support Respondent's contentions. First, the raising of the Kluger issue necessarily presumes that Section 768.54(2)(b) has somehow "abolished" the Hospital's liability to malpractice plaintiffs. This implied proposition is directly at odds with Respondent's earlier attempts to construe the Statute as not limiting the health care provider's liability at all. This inconsistency is proof positive of the spurious nature of the Fourth District's adopted statutory construction.

Second, the fact that the Kluger issue was reached at all by the trial court, proves its judicial overreaching. The court below applied the Kluger analysis only after having already determined, by statutory construction, that Section (2)(b) was not intended to limit a health care provider's malpractice liability. Having made this determination on the basis of the Statute, the court below should not, as a matter of constitutional jurisprudence, have gone on to additionally hold the Statute invalid on constitutional grounds. That courts should avoid the constitutional interpretation of statutes whenever possible requires no citation. That the trial court below nonetheless went forward and reached an unnecessary constitutional issue is equally clear.

Petitioner respectfully submits that, even though the Fourth District properly eschewed this additional and improper constitutional holding, thre is grave necessity for the resolution of Section 768.54's purported Kluger problem. Such arguments, if not here laid to rest, will surely resurface. As this Court has already recognized,

The argument Plaintiff has consistently made, and the one adopted by the trial court below, is succinctly stated as:

> The limitation of liability created by 768.54 caps the Hospital's liability in this case at $100,000--which is a mere .01 percent of Susan's damages. Certainly the abolition of 99.99% of a right is the abolition of that right. If that were not so, then the legislature could easily circumvent Article I, Section 21, by simply limiting a tort victim's recovery to $1.00 or a peppercorn, rather than abolishing it all together. If our Constitution prohibits the latter but allows the former, it is not a Constitution--it is a farce.

See, the trial court's almost verbatim adoption of this argument. (A 27-28). The argument undeniably has superficial appeal. The problem is the false premises from which it proceeds.

First, the factual premise upon which the argument is based is false: Section 768.54(2)(b) has not abolished 99.99% of the plaintiff's former common law malpractice action. In order to create this forceful mathematical facade, Respondent has resorted to viewing the liability limitation provision in a narrow, statutory "vacuum": in order to gerrymander the 99.99% figure, Respondent has expressly omitted consideration of the coverage afforded under the rest of the Fund statutory scheme, i.e., Section (3)(e)3. The Statute does indeed limit the participating health care provider's liability to that

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See, e.g., Department of Insurance, et al. v. Southeast Volusia Hospital District, et al., 8 F.L.W. SC 354 (Fla. Sept. 15, 1983) ("Southeast Volusia"), the Malpractice Reform Act is imbued with considerable public purpose and importance. It is submitted that this importance to the state and people of Florida requires that this Court constitutionally validate this Statute so as to allow its continued operation.

amount of its underlying coverage under the Fund scheme. Section 768.54(2)(b). The Legislature, however, in the same statutory breath, has created the Fund to pay the balance of a plaintiff's claim. Section 768.54(3)(e)3. When viewed in this manner, in proper conformance with the whole statutory scheme, what portion of a plaintiff's claim is it which has been abolished? Moreover, if the offending hospital has not complied with the Fund's requirements, it is then wholly liable to the claimant for all damages. Section 768.54(2)(d)1. Again, what portion of a plaintiff's former common law malpractice claim is left unprotected?

The answer. none! Rather, the Legislature by passage of the Statute has merely created a different entity, the Fund operating like an excess liability carrier, to which a plaintiff's former claim has been transferred and from which the claimant is to recover payment of any judgment rendered.*

Second, Respondent's argument also proceeds from a faulty legal premise. Kluger and its progeny apply only in a situation where a cause of action has been completely abolished,

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* Respondent's "peppercorn" hypothetical, a corrollary to its mathematical facade, is both inapplicable to the facts of this case, as argued above, and is additionally flawed in its presumption that the courts of Florida would not seek to prevent such a "peppercorn" hypothetical, should the facts present themselves in such a manner. Indeed, rather, the Florida courts have proved sufficiently sensitive to plaintiffs' access to the courts to avoid any such preposterously unjust results. See, e.g., Carter, infra, 355 So.2d at 806. Thus, Plaintiff's "peppercorn" argument may be rejected as nothing more than a feeble attempt at reductio ad absurdum.

or alternatively has been hampered to such a degree as to have been abolished as a matter of practicality. See, e.g., Carter v. Sparkman, 355 So.2d 80, 806 (Fla. 1976) ("pre-litigation burden cast upon plaintiff reaches the outer limits of constitutional tolerance"). This threshold determination of "abolishment" is necessarily precedent to the invocation of the Kluger analysis:

> Relying upon Kluger, Mrs. Roberts argues that Section 732.702(2) denies her access to the court because it abolishes a common law right of action that existed prior to the adoption of Article I, Section 21 of the 1968 Florida Constitution.
>
> . . .
>
> Mrs. Roberts' argument that she has been denied access to the court is based upon a false premise. The legislature has not abolished the wife's right to sue; as only altered one of the elements that the court may consider in determining the validity [of Mrs. Roberts' claim].

Estate of Roberts, supra, 388 So.2d at 217.

Here, as demonstrated above, the Kluger line of cases is simply inapposite since Plaintiff's cause of action has not been abolished; either literally or figuratively. Rather, it continues to exist, albeit in an altered statutory form under the structure of Section 768.54.

This conclusion, that Kluger is inapplicable here, is reinforced by the recent cases of Jetton v. Jacksonville Electric Authority, 399 So.2d 396 (Fla. 1st DCA 1981),* and Chapman

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* Respondent has, in the past, misguidedly attempted to distinguish the Jetton case by use of the later Cauley

v. Dillon, 415 So.2d 12 (Fla. 1982). The latter case was cited below to the Fourth District, surprisingly, by Plaintiff. Chapman involved the constitutionality of Florida's no-fault insurance statute which expressly abolished a plaintiff's right to sue in tort unless the claim arose from a permanent injury. See Section 627.737 (Fla. Stat. 1981). In upholding the validity of the no-fault provision which, much more clearly than the instant case, involves a Kluger problem, this Court applied the following rationale:

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* v. City of Jacksonville case, 403 So.2d 379 (Fla. 1981). Respondent's attempts to dismiss the force of the Jetton reasoning are simply overstated, since this Court in Cauley merely said,

> We note that the First District Court of Appeal has recently upheld [the sovereign immunity statute] from constitutional attack in Jetton v. Jackonville Electric Authority, 399 So.2d 396 (Fla. 1st DCA 1981). In addressing the asserted Kluger problem, the court said that because [the section] merely narrowed the right to sue municipal government rather than abolished it, no constitutional infirmity presented itself.
>
> . . .
>
> Our holding that Kluger does not apply because no right existed in common law makes it unnecessary for us to consider the First District's reasoning.

Cauley, supra, at 403 So.2d at 385 n. 12. That this Court merely refused to consider a given line of reasoning, basing its decision instead on a separate rationale, does nothing to detract from the logical force of the Jetton court's argument. While it is indeed perhaps true that the Jetton reasoning, in the context of sovereign immunity, has been relegated to an insignificant position does nothing to vitiate the force of the reasoning in those other contexts, such as here, which involved purported Kluger problems.

> Furthermore, we do not find anything in Lasky [the previous case upholding the no-fault provision] to indicate that that decision was predicated upon a motorist's being insured for the full amount of his medical expenses and lost income. Instead, the crux in Lasky was that all owners of motor vehicles were required to purchase insurance which would assure injured parties recovery of their major and salient economic losses.
>
> . . .
>
> Hence, it was the fact, that injured parties were assured prompt recovery of their major and salient economic losses, not all of their economic losses, which this Court found dispositive in Lasky. 415 So.2d at 17.

The Chapman and the Estate of Roberts cases thus stand for the propositions that the Legislature may properly amend the elements of a common law claim, as well as limit the total recovery therefor, without running afoul of Kluger and its progeny. The Kluger case itself requires no more. It, therefore, cannot avail the Plaintiff to hurl invective at the Florida Constitution, calling it a "farce," nor can it avail to offer an alternative "reasonable" construction of Article I, Section 21 which would require only "substantial" abolition of a common law claim prior to that section's invocation. Such propositions are simply not the law.

For the foregoing reasons, and under the organic law of the State of Florida as interpreted, it is clear that the liability limitation contained in Section 768.54(2)(b) is a valid exercise of the state's police power and does not unconstitutionally contravene the Plaintiff's access to the courts.

CONCLUSION

Based upon the foregoing reasons and authorities, it is respectfully submitted that the Fourth District erred in its construction of Section 768.54 and erred in determining that the dollar limitation therein is unconstitutional as either an encroachment on judicial power or as a denial of access to courts. As the Court is aware, the Fourth District's opinion is before this Court on a number of issues, each of which carriers its own request for varying degrees of appellate relief. These other appeals, if successful, may overwhelm the relief sought within the confines of the writ of certiorari which the Court has granted. Within such confines, however, Petitioner respectfully requests that at least so much of the Fourth District's decision as declares Section 768.54(2)(b) unconstitutional be quashed, that the judgment against the Hospital be reversed, and that the Court be directed to limit the judgment against the Hospital in all respects to the amount of $100,000.00. Failure to do so will also call into question the rationale of this Court's Southeast Volusia decision and will strip away the very "protection . . . accepted by" the Hospital and approved by this Court.

Respectfully submitted,

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