IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,381

Fourth District Case Nos.

82-1984
82-2085

NEIL J. KARLIN, M.D. and
FLORIDA PATIENT'S COMPENSATION FUND,

Petitioners,

vs.

DONNA DENSON and JOSEPH DENSON,

Respondents.

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

PETITIONERS' INITIAL BRIEF

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STATEMENT OF THE CASE

This appeal arose out of a medical malpractice action filed by the respondents, Donna Denson and Joseph Denson, against the petitioners, Neil J. Karlin, M.D. and the Florida Patient's Compensation Fund (Fund). The jury returned a verdict for the plaintiffs and on September 2, 1983, the trial court entered Amended Final Judgments of $100,000.00 against Dr. Karlin and $400,000.00 against the Fund. The defendants appealed these judgments, which the Fourth District Court of Appeal affirmed. Karlin v.

Denson, 8 Fla. L. W. 2212 (Fla. 4th DCA Sept. 7, 1983). Case No. 82-1984. The defendants have not sought review of that decision in this Court.

On September 8, 1982, the trial court entered its Order Taxing Attorney's Fees against both defendants of $185,000.00. See Record on Appeal (hereinafter "R.") at 1588. That order implicitly upheld the constitutionality of the statute authorizing attorney's fees, section 768.56, Florida Statutes (1981). The defendants appealed that order on the ground that the statute is unconstitutional. Case No. 82-2085.

The Fourth District Court of Appeal affirmed the trial court. 8 Fla. L. W. at 2212. The Court expressly upheld the validity of section 768.56 upon authority of a decision of a different panel of the same Court in Florida Medical Center, Inc. v. Von Stetina, 438 So.2d 1022 (Fla. 4th DCA 1983). Necessarily. then, the Fourth District's decision in Von Stetina is now before this Court for review. In upholding the statute, the Fourth District in Von Stetina held:

> As we see it, the only question before this court is whether Section 768.56 creates a

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*/ The constitutionality of this statute is also one of several issues before this Court in an appeal in that case, Florida Patient's Compensation Fund v. Von Stetina, Supreme Court Case No. 64,251, argued January 12, 1984. The question is also before this Court in Pohlman v. Mathews, 440 So.2d 681 (Fla. 1st DCA 1983).

> reasonable classification which bears a reasonable relationship to a permissible legislative objective. All of the sections so far construed bv the courts have the same preamble and it is unquestioned that all of them were enacted for precisely the same reasons as the sections already upheld in Pinillos v. Cedars of Lebanon Hospital, supra; Woods v. Holy Cross Hospital, 591 F.2d 1164 (5th Cir. 1979) and Carter v. Sparkman, 335 So.2d 802 (Fla. 1976). We acknowledge that the section applicable to the final case cited in the preceding sentence was struck down in Aldana v. Holub, 381 So.2d 231 (Fla. 1980) but not for reasons germane to the issue before us now. There are over seventy Florida Statutes awarding attorney's fees upon the outcome of litigation, see Volume 4 Florida Statutes p.402 (1981), and while two, or for that matter seventy, wrongs do not make a right, we perceive no such wrong in the section now before us.
>
> 438 So.2d at 1030.

On September 20, 19B3, the defendants moved to stay the issuance of the Fourth District's mandate pursuant to Rules 9.340 and 9.310, Florida Rules of Appellate Procedure. The Fourth District granted the motion for stay on October 3, 1983.

The petitioners timely filed their Notice to Invoke the Discretionary Jurisdiction of this Court on October 6, 1983. This Court accepted jurisdiction and dispensed with oral argument by order dated February 21, 1984.

STATEMENT OF FACTS */

History of Florida Medical Malpractice Statutes.

In 1975 and 1976 the Legislature found and declared that a public crisis existed in Florida health care. It found that medical malpractice insurers were threatening to withdraw from the Florida market and that this would force doctors to leave or curtail their practices, thereby threatening the availability of medical care at affordable rates, or perhaps altogether.

In response to this crisis, the Legislature enacted the Medical Malpractice Reform Act of 1975, Chapter 75-9, Laws of Florida, and an amendment to that act, Ch. 76-260, Laws of Florida. The Preamble to Chapter 75-9 contained the following findings:

> WHEREAS, the cost of purchasing medical professional liability insurance for doctors and other health care providers has skyrocketted in the past few months; and
>
> WHEREAS, it is not uncommon to find physicians in high-risk categories paying premiums in excess of $20,000 annually; and
>
> WHEREAS, the consumer ultimately must bear the financial burdens created by the high cost of insurance; and
>
> WHEREAS, without some legislative relief, doctors will be forced to curtail their practices, retire, or practice

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*/ This appeal presents questions of the constitutionality of section 768.56. Therefore, the principal facts relate to the content and history of the pertinent statutory provisions.

> defensive medicine at increased cost to the citizens of Florida . . . .

At this time, the Legislature created the Florida Patient's Compensation Fund.

The Patient's Compensation Fund is a non-profit association which provides its members, Florida health care providers, with excess protection against major medical malpractice claims. It provides an alternative to conventional commercial insurance excess coverage, which, as the Legislature found, was unavailable in 1975 for some health care providers and too expensive for others. The petitioner Dr. Karlin is a member of the Fund.

The purpose of the Fund is to provide protection for health care providers and a guaranteed source of recovery for malpractice victims. The Fund must be joined as a defendant in cases where the damages claimed exceed $100,000.

The 1975 law also created medical mediation panels to have claims evaluated by an expert panel prior to the filing of civil suits. The purpose of these non-binding proceedings was to reduce malpractice litigation by giving claimants and defendants some objective indication of the merits of a claim without the expense of a full civil trial. In 1980 the mediation panel mechanism was held unconstitutional by the Supreme Court of Florida as a denial of due process of law. Aldana v. Holub, 381 So.2d 231 (Fla. 1980).

Within months the 1980 Legislature reacted, expressing the belief that the Aldana decision would result in destabilization in the medical malpractice insurance marketplace. The Legislature enacted the statute now under review, the prevailing party attorney's fee statute, as an alternative method to "screen out claims lacking in merit" and to "enhance the prompt settlement of meritorious claims." The Legislature articulated its intent in the preamble to Chapter 80-67 as follows:

> WHEREAS, the effect of the invalidity of the mediation panel statute and the removal of its proven positive results will be a marked destabilization of the professional liability insurance marketplace and a dramatic increase in professional liability insurance premiums paid by health care providers in Florida, thus precipitating a present crisis in the professional liability insurance market, and
>
> WHEREAS, the impact of significant market destabilization and premium increases on the citizens of Florida will be felt through significant increases in the costs of health care services and the imminent danger of a drastic curtailment in the availability of health care services, and
>
> WHEREAS, an alternative to the mediation panels is needed which will similarly screen out claims lacking in merit and which will enhance the prompt settlement of meritorious claims, and
>
> WHEREAS, the issue of liability is a primary issue to be resolved in medical malpractice litigation while the issue of damages is generally the primary issue in other areas of tort

> litigation and, furthermore, comparative negligence is rarely an issue in malpractice actions but is a prevalent issue in other areas of the law, and
>
> WHEREAS, a requirement whereby the prevailing party in medical malpractice litigation is entitled to recover a reasonable attorney's fee is effective where liability is the primary issue and where comparative negligence is not at issue, but loses its effectiveness and fairness in other contexts, and
>
> WHEREAS, individuals required to pay attorney's fees to the prevailing party will seriously evaluate the merits of a potential medical malpractice claim, ...

The new alternative to the mediation panels provided that the prevailing party in medical malpractice cases was entitled in every case to recover a reasonable attorney's fee from the non-prevailing party. Section 768.56(1); Ch. 80-67, Laws of Florida. See Appendix (hereinafter A.) at 1-3.

ARGUMENT

THE FOURTH DISTRICT ERRED IN HOLDING SECTION 768.56 CONSTITUTIONAL

I.

SECTION 768.5S IS AN INVALID EXERCISE OF THE POLICE POWER.

An act of the Legislature is valid if there is a reasonable relationship between the stated objective of the statute and the means used by the legislature to advance that purpose. Horsemen's Benevolent and Protective Assoc. v. Division of Pari-Mutuel Wagering, 397 So.2d 692 (Fla. 1981); State v. Lee, 356 So.2d 276, 280 (Fla. 1978). Assuming that the purpose of deterring the filing of nonmeritorious claims and encouraging the prompt settlement of meritorious claims for malpractice litigants. as a separate class, is valid, see Pinillos v. Cedars of Lebanon Hospital Corp., 403 So.2d 365 (Fla. 1981), section 768.56 is nonetheless invalid because the means chosen by the Legislature are totally inconsistent with its stated premises and objectives. Horsemen's, 397 So.2d at 695. Because section 768.56 is arbitrary and irrational in light

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*/ If this Court holds that this statute fails the rational basis test, it need not reach the strict scrutiny under equal protection or the access to courts issues. Consistent with the principle that the Court will choose the narrowest possible ground on which to invalidate the statute. we analyze the rational basis test first. See Osterndorf v. Turner, 426 So.2d 539, 544 (Fla. 19B2).

of its purpose, it is an invalid exercise of the police power under the Florida Constitution, and denies those subject to its reach due process and equal protection as secured by the Florida and United States Constitutions. Patch Enterprises, Inc. v. McCall, 447 F.Supp. 1075, 1078, 1081 (M.D. Fla. 1978) (legislation based on a non-suspect classification and which does not infringe fundamental rights is subject to the rational basis test under all three doctrines).*/

A. Section 768.56 Is Unconstitutional Because It Is Irrational In Light Of Its Preamble.

When measured against the reasons articulated for its enactment, section 768.56 reveals serious and irreconcilable internal contradictions between its express goals and the underlying premise stated in the preamble. The Legislature found, and stated in the eighth "Whereas" clause, that: "[T]he issue of liability is a primary issue to be resolved in medical malpractice litigation, in

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*/ This law has been criticized as unconstitutional by nearly all commentators. For example, the foremost plaintiff's medical malpractice attorney, J.B. Spence, has written a law review article detailing the ways the statute is unconstitutional. According to Mr. Spence, section 768.56 "is not a valid exercise of the state's police power," and "[i]t denies all persons equal protection of the laws . . . ." Spence and Roth, Closing the Courthouse Door: Florida's Spurious Claims Statute, 10 Stetson L. Rev. 397 (1981).

contrast to other areas of tort litigation where damages is generally the primary issue." Building on that premise, the Legislature concluded:

> a requirement whereby the prevailing party in medical malpractice litigation is entitled to recover a reasonable attorney's fee is effective where liability is the primary issue . . . but loses its effectiveness and fairness in other contexts.
>
> Preamble to Chapter 80-67, Clause No. 9

If liability is the primary issue to be resolved in malpractice litigation, questions of liability cannot be easily or objectively determined by private parties. This is precisely the reason that the judiciary exists -- to provide an impartial assessment of such issues. Yet the Legislature has singled out this admittedly difficult issue and imposed a penalty, payment of reasonable attorney's fees, upon the nonprevailing party in every case. The sanction is uniformly applied without any requirement of a finding of vexatiousness, improper conduct, or unreasonableness of the claim or defense. The statute imposes the attorney's fee sanction upon those who are unable to predict that which the Legislature concedes cannot be predicted: the outcome of a trial on the primary liability issue. The law decries the very factual findings which underlie its own existence.

Moreover, it is obvious that the mandatory attorney's fee award does not encourage settlement. When a plaintiff has a strong liability case, the statutory fee promises to add to the "pot" the plaintiff will recover.

This increased likelihood of recovering a separate additional attorney's fee discourages settlement in such cases. even where the defendant is willing to settle. This predictable consequence -- particularly likely when a plaintiff is insolvent and immune from the sanction of section 768.58 -- is highlighted by cases where the attorney's fee exceeds the amount of the plaintiff's recovery. See, e.g., Baker v. Varela, 418 So.2d 1190 (Fla. 1st DCA 1982) (Attorney's fee of $20,000 awarded where plaintiff's damages were $15,000). The statute thus frustrates its own purpose and is an unconstitutional denial of due process to losing malpractice litigants.

This Court has applied a rational basis test to invalidate a statute requiring racehorse licensees to pay one percent of every purse to a "horseman's association." Horsemen's Benevolent and Protective Assoc. v. Division of Pari-Mutuel Wagering, 397 So.2d 692 (Fla. 1981). The Court acknowledged that the objectives of the statute, such as encouraging year-round stalling of horses in Florida, were valid. But the statute did not restrict the use of the funds; it did not require the money to be used to encourage year-round stalling or otherwise to enhance state revenues.

Therefore, the statute was held to be an invalid exercise of the police power because it was not reasonably related to the accomplishment of the legislative goals.

This Court again recently applied the rational basis test to invalidate a statute because it did not rationally advance the legislative purpose. Simmons v. Division of Pari-Mutuel Wagering, 407 So.2d 269 (Fla. 3d DCA 1981), aff'd., 412 So.2d 357 (Fla. 1982). The statute under review in Simmons prohibited dogs and horses from racing with "any substance foreign to the natural horse or dog." The district court of appeal examined the legislative preamble and concluded that the purposes of the act, "to preserve the integrity of the sport of racing from corruption, to keep the wagering public from being misled, to reduce the risk of injury, and to protect the animals from cruel and inhumane treatment," were "indisputably" valid. 407 So.2d at 271 and n.5. But the actual language of the law prohibited the use of both helpful and harmful substances. The court held that portion of the statute unconstitutional and said: "When measured against the articulated reasons for the enactment of the statute, that part of the statute banning any foreign substance cannot be said to bear a fair and substantial relationship to the objectives sought." Id. at 271-72 (court's emphasis). This Court affirmed, and adopted the district court's reasoning and conclusions. 412 So.2d at 359.

The Second District Court of Appeal recently applied the same reasoning to invalidate, under the rational basis test, a statute making it illegal to possess a controlled substance in anything other than its original container. In State v. Walker, 9 Fla. L. W. 368 (2d DCA Case No. 83-1047, Feb. 8, 1984), the court measured the legislative purpose against the actual provisions of the law:

> The legislative concern . . . is to convict persons who illegally possess controlled substances, not those who remove prescription drugs from their original containers. When weighed against the stated legislative objective we find that the application of [the statute] is an irrational means to achieve that goal.
>
> Id. at 369.

This Court must test the means chosen by the Legislature against the pronouncements of the preamble to determine whether the law bears a reasonable relationship to the legislative objective. The grounds for invalidating section 768.56, the medical malpractice prevailing party attorney's fee statute, are compelling. The law is manifestly unrelated to the accomplishment of its goals; it mocks the very factual findings which underlie its enactment. It is irrational. It is not reasonably related to the legislative findings or objectives. It is unconstitutional.

B. The Forth District Erred Because It Completely Ignored The Factors That Should Have Been Analyzed To Determine The Validity of Section 768.56.

The Fourth District in Von Stetina 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. 436 So.2d at 1030. 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." Id.

An examination of these rationale reveals that both are incorrect and insufficient to support the judgment below. First, the Court's statement that section 768.56 shares the same preamble as other sections of the Malpractice Reform Act is factually inaccurate -- it has a separate and distinct preamble. Second, the "adding machine" method of determining the validity of this attorney's fee statute ignores the substantial differences between this and other statutes authorizing the recovery of attorney's fees.

1. Section 768.56 has a separate preamble, which was overlooked by the Fourth District

The Fourth District purported to employ the rational basis test to decide the validity of Section 768.56. It perfunctorily, and mistakenly, lumped together section 768.56 with other provisions of the Medical Malpractice Reform Act which have been held valid in other contexts:

> As we see it, the only question before this court is whether Section 788.58 creates a reasonable classification which bears a reasonable relationship to a permissible legislative objective. All of the sections so far construed by the courts have the same preamble and it is unquestioned that all of them were enacted for precisely the same reasons as the sections already upheld in [Pinillos, Woods and Carter].
>
> 436 So.2d at 1030, (emphasis added)

The Fourth District was simply wrong when it stated that the attorney's fee statute shares the same preamble with the sections upheld in Pinillos, Woods and Carter. Section 768.56 was enacted in 1980, five years after the initial statutory framework upheld in those cases. It was enacted with its own separate and distinct preamble. See Preamble to ch. 80-67, Laws of Florida, quoted supra at 6-7. Surely the "minimal scrutiny" of the rational basis test does not contemplate a total absence of judicial attention.

The Fourth District broadly reasoned that because the objective of reducing malpractice insurance is legitimate and that other enactments addressing this goal have been held valid, there is no reason to distinguish section 768.56. That analysis is totally inadequate. This Court must examine the specific legislative preamble in light of the means chosen by the particular statute to accomplish the desired goals.*/ See Horsemen's Benevolent and Protective Assoc. v. Division of Pari-Mutuel Wagering, 397 So.2d 892 (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). The unique preamble which the Fourth District ignored 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. As the discussion above indicates, the statute does not rationally advance these objectives.

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*/ It is appropriate to consult "the statute itself, together with other sources such as legislative debate, law review commentary," and other judicial opinions for legislative intent. Lasky v. State Farm Ins. Co., 296 So.2d 9 (Fla. 1974).

2. Section 768.56, with its preamble, is unlike any other "attorney's fee" statute

In its failure to perform the proper constitutional analysis required by Horsemen's and Simmons, the Fourth District made a second broad, inaccurate conclusion. It stated:

> There are over seventy Florida Statutes awarding attorney's fees upon the outcome of litigation. see Volume 4 Florida Statutes p. 402 (1981) and while two, or for that matter seventy wrongs do not make a right, we perceive no such wrong in the the section now before us.
>
> 438 So.2d at 1030.

This cursory treatment hardly satisfies the constitutional test for legislation under the police power doctrine. As would be obvious were it not for the Fourth District's opinion in Von Stetina, section 768.56 must be examined on its own merits. Nevertheless, the petitioners wish to disabuse this Court of any misconceptions about the similarity of this statute to other, possibly valid attorney's fee statutes. None of the seventy-odd "attorney's fee statutes" on the books is comparable to section 768.56 in purpose or effect.

None has as its express and sole object -- as manifested in either a legislative preamble or a judicial

decision -- the deterrence of non-frivolous, good faith, litigation. Most are designed to compensate one class of litigants worthy of particular legislative protection who prevail in litigation to enforce substantive public policies enacted under the State's police power. Further, none is so wholly at odds with the legislative intent underlying its enactment.

The Index to the Florida Statutes, (1981) does list over seventy sections under the Topic "Attorney's Fees."*/ However, contrary to the Fourth District's observation, not all of those listed in the Index provide for attorney's fees "upon the outcome of litigation." Several have nothing to do with the outcome of litigation, but rather authorize the payment of fees to attorneys who perform services on behalf of persons in particular need.**/ Others define the extent

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*/ References to sections of the Florida Statutes herein will, for simplicity. omit the year of the volume of the codification. All citations (except from cases) will relate to the 1983 versions, which are identical to the 1981 versions unless otherwise indicated.

**/ For example, court-appointed counsel in competency proceedings are entitled to an award of fees under section 744.331(5); section 744.424 (guardianship services); section 742.031 (paternity proceedings); section 295.14 (veteran's guardianship proceedings); and section 744.464(2) (competency determinations of indigents). For the text of these and several other statutes providing for attorney's fees in instances other than upon the outcome of litigation, see A. 4-17.

to which parties may contract for attorney's fees;*/ others limit the availability of attorney's fees in certain circumstances.**/

Most of the statutes listed in the Index cited by the Fourth District do provide for attorney's fees upon the outcome of litigation. The overwhelming majority of these, however. are designed to advance specific substantive public policy objectives by allowing or requiring the payment of attorney's fees to persons who vindicate important public or statutorily-created private rights.***/ They are adjuncts to detailed regulatory laws governing public bodies or persons

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*/ Statutes directed to private contractual provisions are sections 520.07, .37 and .85, relating to retail installment contracts, and section 827.B41, relating to insurance premium finance agreements.

**/ Statutes limiting attorney's fee awards are: section 197.361 (the Murphy Act, prohibiting attorney's fees from being awarded against the state in actions to quiet title); section 631.70 (creating an exception to section 627.428, which provides for attorney's fees to the prevailing insured or beneficiary in insurance cases): section 403.53g, denying any legislative intent to authorize attorney's fees for participants in electric transmission line site certification proceedings; and section 768.28(8), limiting contingent fee agreements to 25 percent of the amount recovered in actions against the State.

***/ Most of the statutes found in the index authorize or require the payment of attorney's fees to a prevailing plaintiff or claimant, rather than to the prevailing party. Some of these allow that prevailing defendants can recover under certain conditions. usually where the suit was brought or maintained in bad faith or did not raise a justiciable issue of fact. See A. 54. A total of twenty-five provide for recovery of attorney's fees by the "prevailing party."

engaged in private enterprises affected with the public interest. In contrast, section 768.56 does not advance any independent public policy by compensating particular parties for litigation necessitated by a violation of a substantive standard of conduct. The following discussion demonstrates that the Fourth District's novel analysis, wherein it counted the number of topics under the heading "Attorney's Fees" in the Index to the Florida Statutes, does not establish the validity of this unique provision of law.

The Appendix to this Brief contains each relevant statute listed in the 1981 Index under the heading "Attorney's Fees." Any preambles or statements of legislative intent enacted with the general statute are included in the Appendix. None of the preambles or statements of legislative intent relate specifically to the purpose of the provision for attorney's fees. This fact alone makes section 768.56 unique.

The only other insight into legislative intent can be found in cases construing these statutes. Judicial decisions which have addressed the question all indicate that attorney's fees provisions are designed to assist in the advancement of independent public policy objectives, which would be frustrated without the provision of attorney's fees.

Two classes deemed worthy of special protection are laborer's lien and worker's compensation claimants. In Hunter v. Flowers, 43 So.2d 435 (Fla. 1949) this Court upheld a statute authorizing the recovery of an attorney's fee by a successful claimant in a summary proceeding to enforce a laborer's lien. The Court noted that the Florida Constitution indicated a strong policy in favor of protecting laborer's liens. Article 16, Section 22 of the 1885 constitution required that "the legislature shall provide for giving to mechanics and laborers an adequate lien on the subject matter of their labor." Hunter, 43 So.2d at 436. The Court emphasized the public policy furthered by ensuring that laborers recover their wages undiminished by the expense of litigation:

> The wages paid to laborers are the very foundation of the security of their firesides, as well as of the entire economy of our country. In practically all cases today, these wages are the only source of income they have to maintain their families and prevent their becoming charges upon the community.
>
> 43 So.2d at 437.

The Supreme Court thus recognized a special circumstance making justifying attorney's fee awards for successful wage claimants. It should be noted that this was a "one-way" statute, providing the fee only for the benefit

of successful claimants and not defendants. The Court held that the singling out of laborers was "based on a substantial difference between the classes bearing a reasonable and just relation to the purpose intended to be accomplished by the legislature." Id. at 438.*/

Statutes providing attorney's fees for worker's compensation claimants have also generally been upheld. The rationale for awarding a successful worker c mpensation claimant's attorney's fees is obvious. The purpose of worker compensation laws is to provide a definite and immediate flow of income to injured workers to compensate them for economic losses resulting from work-related injuries. This right to compensation frequently precludes other forms of relief the worker might otherwise seek. Theref re. it is manifestly appropriate to the efficacy of such programs to require an employer who improperly delays a payment of worker's benefits to compensate the worker for his costs in obtaining that to which he was statutorily entitled without delay. In Ohio Cas. Group v. Parrish, 350 So.2d 466, 470 (Fla. 1977), this Court held:

> Section 440.34, Florida Statutes. was enacted to enable an injured employee who has

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*/ The Fourth District cited Hunter v. Flowers, supra, together with Pinillos v. Cedars of Lebanon Hospital, supra, to uphold section 768.58. Pinillios upheld the medical malpractice classification with respect to a completely different issue -- reducing judgments for collateral source payments.

> not received an equitable compensation award to engage competent legal assistance and, in addition, to penalize a recalcitrant employer. If the services of an attorney become necessary, and the carrier is ordered to pay compensation, attorney's fees must be assessed against the carrier so that the benefits awarded the employee will constitute a net recovery. . . . Thus, in adding attorney's fees to the injured worker's compensation award, Section 440.34 discourages the carrier from unnecessarily resisting claims . . . .

In Marshall v. W & L Enterprises Corp., 360 So.2d 1147 (Fla. 1st DCA 1978), the court awarded attorney's fees to a prevailing consumer in an action on a bond arising from a judgment against a mobile home dealer for a violation of the "Little FTC Act." It held:

> The obvious purpose of the "Little FTC Act" is to make consumers whole for losses caused by fraudulent consumer practices. Similarly, the purpose of the bonding and licensing requirements in Chapter 320 is protection of consumers who deal with mobile home dealers. These aims are not served if attorney's fees are not included in the protection.
>
> Id. at 1148

In B & L Motors, Inc. v. Bignotti, 427 So.2d 1070 (Fla. 2d DCA 1983), the court similarly explained section 501.2105, which provides attorney's fees to prevailing plaintiffs in antitrust cases:

> Attorney's fees which are recoverable in antitrust actions may be generally considered

> to be for the benefit of the client by relieving the client of the obligation to pay them to his attorney.
>
> Id. at 1073.

It said that compensating the plaintiff for his attorney's fees "would be consistent with the legislative intent that the prevailing party not bear the expense of the statutory action." See also Marston v. Wood, 425 So.2d 582, 588 (Fla. 1st DCA 1982) (dissenting opinion) ("The clear intention of the legislature was to provide for recovery of attorney's fees to any individual who successfully enforces the provisions of the Sunshine Law."), rev'd. 8 Fla. L. W. 471 (Sup. Ct. Case No. 63-341, 1983).

Several attorney's fee statutes are designed to equalize the bargaining power in transactions involving important rights. In Furlong v. Chrysler Corp., 419 So.2d 385 (Fla. 3d DCA 1982), the Third District Court of Appeal upheld a statute awarding attorney's fees to prevailing motor vehicle dealers in litigation with franchisors. The court said: "The legislature . . . has taken the view that this regulation is necessary in order to equalize the conceded difference in bargaining power between the two parties and to accord some protection to the motor vehicle dealer as the weaker of the two parties." Id. at 388.

In Commodore Plaza at Century 21 Condominium Assoc. v. Cohen, 378 So.2d 307 (Fla. 3d DCA 1979), the court

applied a statute requiring it to allow reasonable attorney's fees to a successful condominium unit owner or association if the contract or lease between either of them and the developer provided for attorney's fees to the developer. The court noted: "The evident purpose of the statute is to place condominium unit owners or associations on parity with developer/lessors with respect to attorney's fees in the successful prosecution or defense of litigation." Id. at 308. Accord, Dooley v. Culver, 392 So.2d 575 (Fla. 4th DCA 1980) (Section 83.48 converts a lease which permits a residential landlord to recover his attorney's fees from a defaulting tenant into a reciprocal right for a prevailing tenant). See also section 83.756 (mobile home lot rental agreements); section 719.111 (contracts and leases between cooperative unit owners or associations and developers).

Another decision recognizing that the purpose of an attorney's fees provision is to help effectuate a specific independent public policy is Village of Palm Springs v. Retirement Builders, Inc., 396 So.2d 196 (Fla. 4th DCA) pet. denied 402 So.2d 614 (Fla. 1981). The court construed section 180.191(5), which gives the court discretion to award a prevailing party attorney's fees in litigation to enforce the law against overcharges by municipalities for

utility services. The court looked to the legislative preamble, which

> evidence[d] an intent and knowledge on the part of the legislature . . . that certain consumers were in need of protection from excess charges for utility services made by municipalities who exercise the exclusive privilege of providing the particular utility service.
>
> 396 So.2d at 198.

In Doyal v. School Board of Liberty County, 415 So.2d 791 (Fla. 1st DCA 1982), the court noted that the attorney's fee provision was necessary to make whole a plaintiff who had to incur the expense of an attorney to vindicate her statutorily recognized right to collect wages. The plaintiff had been caught in a political dispute between superiors which resulted in her wages being wrongfully withheld. She incurred $6,000 in attorney's fees to recover the $4,000 in unpaid salary and benefits to which she was entitled. The court awarded her the full $6,000 under section 448.08:

> In enacting Section 448.08, the Legislature intended to avoid the inequity which would result if an employee were required to pay her own attorney's fees in actions for unpaid wages.
>
> Id. at 793.

One final area which vividly illustrates the substantive purpose underlying a valid attorney's fee statute is the provision that successful insureds or beneficiaries recover a reasonable attorney's fee in litigation against insurers. section 627.428. In Feller v. Equitable Life Assur. Co., 57 So.2d 581 (Fla. 1952), this Court explained the purposes of the predecessor statute to section 627.428:

> It is an undue hardship upon beneficiaries of policies to be compelled to reduce the amount of their insurance by paying attorney's fees when suits are necessary in order to collect that to which they are entitled. The police power within reason may be exercised by the Legislature regulating such a business affected with a public interest.
>
> Id. at 588.*/

In sum. it is clear that the attorney's fee statutes found under Florida law are important to the enforcement of substantive public and private rights. These laws are not analogous to section 768.56, which is intended to deter the

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*/ The Court also noted the policy of discouraging "the contesting policies in Florida courts." Id. at 584. This consideration apparently arises out of the ability and duty of insurers to investigate claims for validity. See § 627.428(2); Williams v. Peninsula Life Ins. Co., 308 So.2d 144, 146 (Fla. 1st DCA 1975). See also New York Life Ins. Co. v. Shuster, 373 So.2d g18 (Fla. 197g); Equitable Life Assur. Soc. v. Nichols, 84 So.2d 500 (Fla. 1958). The policy of discouraging life insurance companies from protesting claims would not apply to medical malpractice litigants, who the legislature found were uniquely unable to assess the question of liability.

use of courts by citizens of this State.*/ The above discussion demonstrates that section 768.56 is sufficiently distinct from other "attorney's fee statutes" that the decision of the Fourth District in Von Stetina is completely unpersuasive.**/

II.

SECTION 768.56 VIOLATES THE ACCESS TO COURTS PROVISION OF THE FLORIDA CONSTITUTION.

Section 768.56 violates article 1, section 21 of the Florida Constitution, which guarantees citizens access to the courts of this State. The statute denies access to

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*/ The permissible public purposes of attorney's fee statutes apply with equal force with respect to whether the retraint on access to courts caused by section 768.56 serves a compelling governmental interest. Section II, infra.

**/ Despite the Fourth District's superficial treatment of this issue, other district courts of appeal, including the panel under review in the instant case, have followed it uncritically.

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]." In Davis v. North Shore Hospital, _____ So.2d ____, 8 Fla. L. Wk. 2488 (Fla. 3d DCA 1983), decided the same day as Young, the Third DCA upheld the statute merely citing Young and Von Stetina. In Pohlman v. Mathews, 440 So.2d 681 (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.

courts because it imposes a substantial penalty upon malpractice litigants for their resort to the courts to litigate debatable claims and defenses. A law which burdens one's right of access to courts is invalid under article I, section 21 of the Florida Constitution unless it (1) provides a reasonable alternative or (2) is supported by a compelling governmental interest and there are no less restrictive alternatives. Overland Const. Co. v. Sirmons, 369 So.2d 572 (Fla. 1979); Kluger v. White, 281 So.2d 1 (Fla. 1973).

Article I, section 21 of the Florida Constitution provides:

> Access to Courts. The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay.

If this basic right means anything, it is that persons who reasonably believe they have a colorable right to prosecute or defend against a claim in a court of law may not be denied the right to resort to a judicial forum in the absence of a compelling governmental purpose served by a precisely drawn law. The courts will not have an opportunity to "redress any injury" or "administer justice" if litigants are arbitrarily deterred by attorney's fees penalties. Although "reasonable restrictions" may be imposed on the right to enter courts, see Carter v. Sparkman, 335 So.2d 802, 805

(Fla. 1976),*/ it is unduly inhibitive to coerce a litigant to settle a reasonable claim or defense and thus deny him his day in court. See, e.g., Florida Department of Transportation v. Plunske, 267 So.2d 337, 339 (Fla. 4th DCA 1972).

Section 768.56 implicates the constitutional guaranty of access to courts because it is expressly intended to penalize the resort to courts by malpractice defendants by "encouraging" settlement of claims or defenses.**/ These are frequently issues about which reasonable people disagree and which litigants should have a right to try in a court of law. Since section 768.56 provides that the "court shall award a reasonable attorney's fee to the prevailing party" in any medical malpractice action, (emphasis added), the duty to pay attorney's fees is mandatory and must be borne by any non-prevailing party, even when there are legitimate

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*/ In Carter v. Sparkman, the Supreme Court of Florida listed typical restrictions it considered reasonable: statutes of limitations, payment of reasonable cost deposits, exhaustion of administrative remedies, where doing so is reasonable in light of the agency's expertise (zoning, worker's compensation); and newspapers' right of retraction. 335 So.2d at 805.

**/ It is intended equally to inhibit the prosecution of claims by possible victims of malpractice, which nonetheless may be subject to reasonable doubt.

issues to be tried to a jury.*/ The statute is designed to coerce a limited class of litigants with legitimate claims or defenses to abstain from their constitutional right to use the courts.**/ Those litigants previously possessed the complete freedom enjoyed by all other litigants to retain and pay an attorney to submit a dispute to a court of law for resolution. Now the Legislature has materially altered this freedom for medical malpractice litigants only. Such a prospective litigant must now take a gamble which does not confront other tort litigants: the chance that he might be liable for his opponent's attorney's fee.

In Carter v. Sparkman, this Court held that a law which merely delayed by ten months the bringing of a civil action "reached the outer limits of constitutional tolerance." 335 So.2d at 806. The present statute imposes a substantially greater burden on access to courts: it materially raises the cost to citizens of litigating debatable issues. In attempting to reduce "non-meritorious"

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*/ The statute obviously applies to apply to all claims or defenses, not just spurious ones. Otherwise, it would be completely superfluous in light of section 57.105, which requires a court to "award a reasonable attorney's fee to the prevailing party in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party."

**/ Perversely, the law denies access on the precise issue the legislature found was the most difficult to resolve outside of court -- liability for medical malpractice.

lawsuits or defenses, the law cuts, with a broad swath, the presentation of legitimate claims in the courts of this state. Surely this exceeds the "outer boundaries" defined by Carter v. Sparkman. Accord, G.B.B. Investments, Inc. v. Hinterkopf, 343 So.2d 899 (Fla. 3d DCA 1977) ("courts have generally disapproved financial pre-conditions to bringing claims of asserting defenses in courts"). Cf. Stokes v. Bell, 441 So.2d 146 (Fla. 1983)(law permitting service of process on resident of one county while temporarily in another county for unrelated litigation has chilling effect on right of access to courts).

A. Section 768.56 provides no reasonable alternative.

Section 768.56 impinges on the right of access to courts without providing any alternative. It presents prospective litigants with a Hobson's choice: settle, or roll the dice with a jury on the legitimate liability and perhaps damage issue, with the stakes increased by the possible liability for your adversary's attorney's fees. It provides no way around the dilemma of having to calculate not only the chances of prevailing on the merits but also the new risk of attendant to losing. Defendants must settle, or plaintiffs must drop claims, or face a potential penalty for submitting questions about which there is

considerable disagreement to the courts of this State. The statute provides no real alternative, much less a reasonable one as required by Florida law.

B. Section 768.56 does not serve a compelling governmental interest.

Since section 768.56 clearly is intended to and does in fact curtail the right of access to the courts without providing a reasonable alternative, it is only valid if it substantially furthers a compelling governmental interest. The foregoing analysis of cases in Section I.B.2, supra, in which other attorney's fee statutes have been upheld, indicates that section 768.56 cannot withstand this strict scrutiny. Judicial decisions indicate that non-arbitrary and non-discriminatory attorney's fee statutes are valid for the purpose of enabling citizens to vindicate important rights by compensating them for the expense of having to hire an attorney to rectify a wrong recognized by statute.*/ In contrast, section 768.56 seeks only to limit citizens' access to courts to litigate malpractice cases. It is not a sufficient public purpose to penalize one's resort to courts of justice for nothing more than the determination of one's reasonably disputable legal rights.

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*/ This proposition does not purport to undermine the validity of statutes such as section 57.105, Florida Statutes, which provides for attorney's fees to be awarded against litigants who assert spurious claims or defenses.

III.

SECTION 768.56 DENIES EQUAL PROTECTION OF THE LAW

Normally, legislation affecting social or economic interests is subject to deferential review by the judicial branch under the equal protection clauses of the Florida and United States Constitutions. In re Estate of Greenberg, 390 So.2d 40 (Fla. 1980). However, a statute is subject to more searching inquiry if it impinges on the exercise of a fundamental right. Where a law inhibits the exercise of a right explicitly protected by the constitution, a reviewing court must make a "careful examination of the governmental interest claimed to justify the classification in order to determine whether that interest is substantial and compelling and [must inquire] as to whether the means adopted to achieve the legislative goal are necessarily and precisely drawn." Greenberg, 390 So.2d at 42. Section 768.56 requires strict scrutiny because it was intended to and operates to curtail severely medical malpractice litigants' right of access to the courts as guaranteed by the Constitution of the State of Florida. See Section II, supra.

In order to withstand "strict scrutiny" and be upheld, section 768.56 must: (a) serve a compelling state

purpose and (b) be necessary to the effectuation of that purpose and admit of no less restrictive alternatives. The previous analyses with respect to access to courts and other attorney's fee statutes demonstrate that the statute fails to meet the compelling state purpose criterion. But assuming for argument's sake that the purpose of the statute is valid, the law denies equal protection because it is not necessarily and precisely drawn. The purpose of the statute, discouraging litigation, is logically inconsistent in light of that premise. Further, the means chosen, a penalty for litigating, is equally illogical with the Legislature's express premise that liability is a difficult issue to resolve. Second, notwithstanding the frail logical foundation of the legislation, it fails to effectuate even those purposes enumerated by the Legislature. Consequently, it deprives that group subject to its reach the equal protection of the law.

A. Section 768.56 Is Not Substantially Related To Its Asserted Purpose.

In at least two respects, the classifications drawn by Section 768.56 cause the statute not to achieve its asserted purpose. First, the statute is overinclusive because it does not distinguish between "unsuccessful claims or defenses" and those "lacking in merit." Second, the exemption of poverty-stricken and insolvent parties works as

a practical matter to deter good faith litigation by defendants (who will almost never be exempt), yet does not prevent insolvent plaintiffs (who are likely to be insolvent and thus exempt) from filing frivolous suits with impunity.

The purported purpose of Section 768.56 is to inhibit non-meritorious claims. However, it penalizes meritorious claims as well as non-meritorious claims by penalizing all losing parties. The fact that a party does not prevail in a lawsuit does not mean that his claim or defense had no merit. Many cases involve close questions of law or fact; indeed, that likelihood is made clear with respect to medical malpractice liability in the preamble to section 768.56. Florida already has a statute, section 57.105, which requires a judge to award attorney's fees to a prevailing party if he finds there are no justiciable issues of law or fact. That statute is a sufficient deterrent to frivolous claims or defenses.

In addition to the failure of the statute to distinguish between "nonmeritorious" and "unsuccessful" claims, section 768.56 imposes a classification on the basis of wealth which effectively eliminates the efficacy of the law. The mandatory attorney's fee is not imposed on non-prevailing parties who are insolvent or poverty stricken. Because insolvent or poverty-stricken parties will not be required to pay the prevailing party's attorneys' fees, they have no incentive to settle. The statute cannot "encourage"

them to do so. They have nothing to lose by trying claims, even if they are frivolous. Because more often than not it will be the plaintiff, and not the defendant, who is insolvent or poverty-stricken, the statute primarily operates to encourage solvent defendants to settle without any concomitant reduction in claims -- non meritorious or otherwise -- maintained by most plaintiffs.

In Lindsey v. Normet, 405 U.S. 56 (1972), the United States Supreme Court invalidated an Oregon statute which required a tenant to post bond for twice the amount of rent in order to appeal from an adverse decision in an eviction proceeding, and to forfeit the entire double bond if the lower court decision was affirmed. The Supreme Court said:

> The claim that the double-bonded requirement operates to screen out frivolous appeals is unpersuasive, for it not only bars non-frivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford bond.
>
> 405 U.S. at 78.

Since the tenant was confronted by a "substantial barrier to appeal faced by no other civil litigant in Oregon," the requirement was arbitrary and irrational, thereby violating equal protection.*/ Id. at 79.

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* The Court in Lindsey applied a rational basis test. Under the stricter test applicable here where the right of access to Florida courts is violated, section 768.56 is even more vulnerable than the statute in Lindsey.

Similarly, since section 768.56 is not reasonably tailored to discourage insubstantial claims and since it creates a substantial barrier to solvent medical malpractice litigants with good faith claims and defenses not faced by other civil litigants in Florida, it is unconstitutional under the equal protection clauses of both the State and Federal Constitutions.

Further, there is clearly a lack of mutuality in the classification drawn by section 768.56. The insolvent or poverty stricken plaintiff is simply not deterred from bringing a non-meritorious or even frivolous claim. It is only the financially responsible plaintiff and the solvent medical practitioner who stand to suffer from the penalty of section 768.56. Equal protection of the law, of course, means equal rights for all regardless of wealth. Hamilton v. State, 214 So.2d 26 (Fla. 4th DCA 1968). See also, Liquor Store, Inc. v. Continental Distilling Corp., 40 So.2d 371, 374 (Fla. 1949).

B. There Are Several Less Restrictive Alternatives Which Are More Compatible With The Legislature's Findings And Purposes.

Under strict scrutiny or any greater-than-rational-basis analysis, a statute is invalid if the Court can find "less restrictive alternatives" to the means chosen by the

Legislature. See, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969). In light of the legislative purpose, to reduce civil litigation, and its finding that "liability is a primary issue to be resolved in medical malpractice litigation," more effective and far less restrictive alternatives are available to accomplish these objectives.

1. Discretionary award based on reasonableness of claim or defense

One obvious alternative would be to make the award of attorney's fees discretionary with the trial court based upon the reasonableness of the claims or defenses maintained. Such a procedure would require an unsuccessful litigant to pay the prevailing party's attorney's fees only if his position was. based on affirmative findings of a seasoned judge, unreasonable.

Indeed, the Legislature considered and rejected a proposal which would have made the attorney's fee award discretionary depending on the trial judge's assessment of the reasonableness of the position taken by the non-prevailing party.

> Mr. Moffitt: I'm very serious on this amendment, Members of the Committee and Mr. Chairman. The Court should have the discretion -- we allow the Court the discretion in many other instances where we provide for the prevailing party to have attorney's fees . . . . I'm saying, and I

> believe, that there are instances where there may be close questions of law that ought to be litigated before the courts and where it might be a case of first impression. . . . It's a very close question of fact; it's a very close question of law. The Court ought to be able to have the discretion to decide whether or not to award attorney's fees in instances like that -- to leave the word "shall" in there and not put the word "may" ties the hands of the Court and I think it's unfair to the litigants. There may be that classification of cases filed that deserves to have the issue heard without the threat of the attorney's fees provision hanging over their head. I think it's totally reasonable to leave the discretion in the Court under these circumstances as to whether or not to allow the prevailing party attorney's fees.

See Proceedings Before the House of Representatives Insurance Committee, May 15, 1980, Florida State Archives.

Instead of this less restrictive alternative, the Committee adopted the irrational position reflected in the law as it currently stands. Notwithstanding the finding that the question of liability in medical malpractice cases is exceedingly difficult to determine, and notwithstanding that the function of the courts is to resolve seriously disputed claims, the statute eventually enacted penalizes malpractice litigants for seeking judicial resolution of difficult issues in order to encourage settlement of "meritorious" claims. If "meritorious" means "ultimately found successful by a jury" and "nonmeritorious" means "ultimately found unsuccessful by a jury," the law mocks the function of the judiciary in our society. It makes much more sense, and would be much less restrictive, to permit

the trial judge to decide whether the suit should have been brought or whether it should have been settled, and have the judge award (or not award) attorney's fees accordingly.*/

2. Admission of liability to reduce litigation on the most difficult issue

The Legislature rejected a second more effective and less restrictive alternative. That alternative would have permitted a defendant to avoid liability for attorney's fees if he admitted liability (the "primary issue") at the

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*/ In Orr v. Orr, 440 U.S. 288 (1979), the United States Supreme Court considered an equal protection challenge to a gender-based Alabama statute which provided that husbands. but not wives. could be required to pay alimony upon divorce. The Court held that the classification imposed by the statute did not substantially relate to the achievement of important governmental objectives and thus violated equal protection. The arguable rationale for the statutory scheme was to provide help for needy spouses, using sex as a proxy for need. The Court held that these considerations did not justify the statute because in Alabama, individualized hearings were held to consider the parties' relative financial circumstances. Since such hearings could determine the relative need of the spouses there was no reason to operate by generalization.

Orr, which applied a "middle-level of scrutiny" requiring the law to bear a "substantial relationship" to an "important" governmental interest, requires invalidation of section 788.86. As in Orr, the need for a sweeping, mandatory classification is obviated by the availability of individual hearings which necessarily will take place if a malpractice case goes to trial. A case-by-case determination can be made by the trial court, which is in a position to evaluate whether a claim or defense should or should not have been maintained. Significantly, this is what the Legislature found private litigants were virtually unable to do in medical malpractice cases. See Preamble to ch. 80-87, quoted supra at 6-7.

outset of the litigation, leaving only the question of damages to be litigated. The House Insurance Committee expressly deleted a provision which would have enabled "[a] party who admits liability or" makes an offer of judgment to avoid liability for his opponent's attorney's fees. That provision was in addition to the "offer of judgment" provision which, expressly incorporating the rule of civil procedure on point, was sensibly retained in order to permit a defendant to minimize his attorney's fees by making a damages offer which proves reasonable in light of the jury's ultimate finding.

The "admits liability or" provision would have met the principal stated purpose of the statute far more effectively than the final version which became law. That alternative would have enabled defendants, in effect, to settle the "primary" issue (liability) and litigate only damages. The Legislature's underlying premise, that liability is the "primary" issue, implies that liability requires the most extensive and expensive litigation. Given the law's purpose, to encourage settlement, a version of this bill which gives defendants the right to admit liability would reduce litigation on the primary issue, and would apply the sanction in only those situations where the Legislature's findings suggest it would be most appropriate:

where the defendant fails to concede nearly certain liability.*/

This additional less restrictive alternative was also rejected by the House Insurance Committee with minimal debate:

> Mr. Woodruff: Let me ask you this. If a physician, under your bill, at the beginning of the lawsuit realizes that he in fact was negligent, and in order to cut his losses and the insurance company's losses on the attorney's fees right off the bat says, we are going to admit liability, I did it, but I simply don't think that this half a million dollar lawsuit is worth half a million dollars, so I'm only going to argue about damages . . . . According to your bill, if I read it correctly, if that doctor or insurance company had been smart enough to admit liability in the very first day of the controversy, even though it might take three or four years in litigation, attorney's fees couldn't be taxed.
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> Mr. French: In that hypothetical situation you're right, Mr. Woodruff. Let me tell you, in malpractice cases it is very very rare for the issue to be the issue of damages. It is very rare for liability to be admitted. Liability is the issue in malpractice cases the vast quantity of times. In that one set of circumstances you're correct . . . . I think that given the point that you make I don't think you are going to find any overwhelming objection. [F]rom our perspective, if you wanted to strike the "admits or" and just let it ride with the offer of judgment language which is existing law, I don't think you'd find us posing any serious objection.

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* Another way to serve the legislative goals more effectively in light of the underlying premise would be to permit an admission of liability at a specified early stage of the proceedings. That would reduce even further litigation of the liability issue.

Proceedings Before the House of Representatives Insurance Committee, May 15, 1980, Florida State Archives. Section 768.56 is impermissibly overbroad because it punishes a larger class of defendants than it was intended to affect -- defendants who are willing to admit liability but who wish only to litigate damages.

This deficiency in section 768.56 was recently recognized by the Florida Medical Malpractice Insurance Advisory Council. The Council is appointed by the Florida Insurance Commissioner to review problems in the medical malpractice insurance field. Its membership broadly represents several parties and interests.

In its January, 1983 Report, the Council recommended an alternative similar to the one the Legislature rejected. It proposed a system whereby physicians would be permitted to admit liability and then negotiate, or if necessary litigate the issue of damages. The Council concluded that such a system would substantially reduce the costs of medical malpractice litigation. The Report is reprinted in pertinent part in the Appendix to this Brief, A. 78.

3. Bifurcation.

A further less restrictive alternative would be to require bifurcation of medical malpractice trials. This device is frequently and effectively used in product liability cases under Federal Rule of Civil Procedure 42 and its state equivalents. If the court conducts separate

trials on the issues of liability and damages, the optimum results would be achieved. If liability is found to exist, the defendant might be more willing to settle the question of damages rather than incur the further expense of a trial. If he doesn't settle, the attorney's fee penalty (with its offer of judgment provision) could apply, more consistently with the statute's purpose. If no liability is found, there would be no need for further trial.*/ Such a system would reduce the cost of malpractice litigation yet be consistent with the legislative finding that liability is the most difficult issue to resolve.

4. Fees for frivolous claims or defenses under section 57.105.

A final and obvious alternative is the present statute requiring the court to award attorney's fees when a non-prevailing party fails to raise a justiciable issue of law or fact. Section 57.105, Florida Statutes (1981). If section 768.56 is really intended to deter frivolous or bad faith claims or defenses, it is grossly overinclusive in

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* The Medical Malpractice Insurance Advisory Council also recommended that bifurcation of malpractice trials be available on the demand of either party in large cases. The Council's recommendation was that the system be available "in the more serious cases with questionable liability when the jury might be unduly influenced by sympathy." The proposal would permit a claimant to be present when either or both phases are tried. (A. 82).

light of the existing statutory remedy. Section 57.105 offers the major benefits to be derived from the medical-malpractice-only attorney's fee statute, without punishing litigants for submitting the very difficult issue of liability for impartial decision.

CONCLUSION

The petitioners respectfully urge this Court to reverse the decision of the Fourth District and hold that the Medical Malpractice Attorney's Fee Statute, section 768.56, Florida Statutes (1981), is unconstitutional and void.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petitioners' Brief and accompanying Appendix and Request for Oral Argument was served by mail this 12th day of March, 1984 to Joe N. Unger, Esq., 606 Concord Building, 66 West Flagler Street, Miami, Florida 33130; Milton Kelner, Esq., Kelner and Kelner, 2215 Ameri-First Building, One S.E. Third Avenue, Miami, Florida 33131; David E. Stone, Esq., 1401 West Flagler Street, Suite 201, Miami, Florida 33135; and to John S. Neely, Jr., Esq., P.O. Box 7028, Fort Lauderdale, Florida 33304.

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