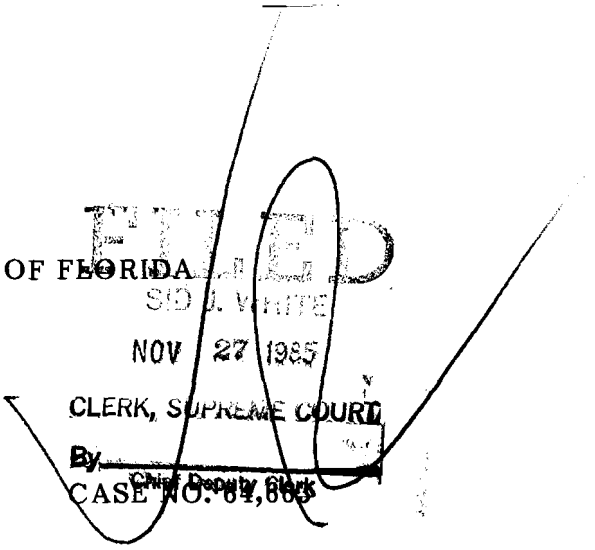

IN THE SUPREME COURT OF FLORIDA

LEONARD CANTOR,

Petitioner,

vs.

ESTINE DAVIS,

Respondent.

_____/

JOHN H. KATHE, M.D.,

Petitioner,

vs.

ESTINE DAVIS,

Respondent.

_____/

CASE NO. 64,664

CASE NO. 64,665

RESPONDENT'S BRIEF ON THE MERITS

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I.
STATEMENT OF THE CASE AND FACTS

We will restate the case and facts briefly in order to focus the Court on the only real issue here--whether the constitutional issue raised by the petitioners can properly be considered on the merits. The petitioners are two physicians who were defendants in a medical malpractice action below, in which they were charged with negligence in leaving a surgical sponge in the plaintiff's abdomen during surgery on January 2, 1980 (A. 1-5).[1/] The omission was discovered shortly thereafter, and the sponge was removed during a second surgical operation on January 3, 1980 (A. 1-5). The jury found the defendants negligent, and awarded the plaintiff $10,000.00 in compensatory damages--and a judgment was entered against the defendants in that amount (A. 6). Following trial, the plaintiff sought an award of attorney's fees under §768.56, Fla. Stat. (1981) (A. 7).

Both defendants moved to strike the motion for attorney's fees (A. 8-9, 10-11). Both motions to strike conceded that the plaintiff's action was filed after July 1, 1980, and that "Florida Statute Section 768.56 . . . is applicable to this claim"--and neither motion raised any specific challenge to the constitutionality of the statute as applied retroactively to causes of action accruing before July 1, 1980 (A. 8-9, 10-11). The trial court declared the statute facially "unconstitutional because it denies the Defendants the equal protection of the laws as guaranteed by the Florida Constitution and the Constitution of the United States, and is unconstitutionally vague" (A. 12).

The plaintiff appealed this order to the District Court of Appeal, Third District. The arguments made in the briefs were limited to the facial constitutionality of §768.56; nowhere in their briefs did the defendants challenge the constitutionality of the statute

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[1/] Because the appeal out of which this proceeding arises was taken under Rule 9.130, Fla. R. App. P. ("Proceedings to Review Non-Final Orders"), the record here consists of an appendix to the initial brief which the plaintiff filed in the District Court, rather than the original documents. References to that appendix will be identified by the symbol "A", followed by the appropriate page number of the appendix.

as applied retroactively to causes of action accruing before July 1, 1980. The District Court ultimately rejected the facial constitutional challenges raised by the defendants, held the statute to be constitutional to the extent that it had been challenged, and reversed the trial court's order. *Davis v. North Shore Hospital*, 432 So.2d 937 (Fla. 3rd DCA 1983).

The defendants then petitioned this Court for review of the District Court's decision. They did not file jurisdictional briefs, however. Instead, they moved the Court for a stay of proceedings pending this Court's resolution of *Florida Medical Center, Inc. v. Von Stetina* (Case Nos. 64,237, 64,251, and 64,252)--in which the facial constitutionality of §768.56 had been put in issue. Both defendants represented in their motions for stay that the outcome in this proceeding would be governed by this Court's decision in the *Von Stetina* case, and that they would have no basis for challenging the District Court's decision in this case if this Court upheld the facial constitutionality of the statute in that case. The motion for stay was granted.

Subsequently, this Court declared the statute facially constitutional in both *Florida Patient's Compensation Fund v. Von Stetina*, 474 So.2d 783 (Fla. 1985), and *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985). In a third case, *Young v. Altenhaus*, 472 So.2d 1152 (Fla. 1985), this Court also held that, notwithstanding its facial constitutionality, the statute could not be constitutionally applied retroactively to cases in which the plaintiff's cause of action accrued before July 1, 1980. Notwithstanding that the defendants conceded in the trial court that the statute could properly be applied to this case, and notwithstanding that the defendants did not challenge the statute in the trial court on the ground that it could not be constitutionally applied retroactively, and notwithstanding that the District Court never ruled on the issue, and notwithstanding that the defendants previously represented to this Court that the outcome of this proceeding would be governed by this Court's resolution of the facial constitu-

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tionality of the statute, the defendants now seek the benefit of *Young v. Altenhaus, supra.*

The defendants' position is clearly an afterthought of appellate counsel, prompted solely by this Court's decision in *Young v. Altenhaus*--and it is inconsistent with the defendants' previous contentions, both in the lower courts and here. The defendants concede as much, but claim entitlement to the benefit of *Young v. Altenhaus* nevertheless. For the reasons which follow, we do not believe that the issue is properly before the Court on the merits.

II.
ISSUE ON REVIEW

Because we intend to concede the merits of the defendants' legal position, and argue only that the defendants' position on the merits is not properly before the Court, we are constrained to restate the issue before the Court as follows:

WHETHER THE DEFENDANTS' CONTENTION THAT §768.56, FLA. STAT. (1981), IS UNCONSTITUTIONAL "AS APPLIED" TO CAUSES OF ACTION ACCRUING BEFORE JULY 1, 1980, IS PROPERLY BEFORE THE COURT ON THE MERITS.

III.
SUMMARY OF ARGUMENT

On the merits, of course, the defendants are correct. Section 768.56 is unconstitutional "as applied" to this case, because the plaintiff's cause of action accrued prior to July 1, 1980. Our position is simply that the issue is not properly before the Court on the merits, because it has been raised for the first time here. It is a fundamental general precept of appellate review that an appellate court sits only to review rulings actually made by the lower courts which it supervises, and that it cannot entertain a legal issue raised for the first time on appeal. That settled rule applies even where there are intervening decisions of this Court which provoke afterthoughts of appellate counsel. The general rule also embraces errors of constitutional dimension.

There is, to be sure, an exception to the general rule for "fundamental error". The exception is not available to the defendants here, however, because this Court's prior decisions say so. According to *Sanford v. Rubin*, 237 So.2d 134 (Fla. 1970), a constitutional issue relating to the allowance of attorney's fees cannot be considered "fundamental error". More recently, in *Trushin v. State*, 425 So.2d 1126 (Fla. 1982), this Court held that, although it will entertain challenges to the facial constitutionality of a statute for the first time on appeal, it cannot entertain challenges to the constitutionality of a statute "as applied" for the first time on appeal. There is nothing on the face of any of the decisions relied upon by the defendants which purports to overrule any of these settled propositions governing this Court's ability to review the decisions of the lower courts which it supervises.

If the principle of *stare decisis* is to be given anything more than mere lip service here, and if consistency is to be deemed even a modest jurisprudential virtue, the defendants' position on the merits must be rejected here as having been improperly preserved for appellate review. "Fairness" is simply not an issue here, because accepting the defendants' position at this late juncture of the proceeding will work its own brand of unfairness upon others, as we shall explain in the argument which follows.

IV.
ARGUMENT

THE DEFENDANTS' CONTENTION THAT §768.56, FLA. STAT. (1981), IS UNCONSTITUTIONAL "AS APPLIED" TO CAUSES OF ACTION ACCRUING BEFORE JULY 1, 1980, IS NOT PROPERLY BEFORE THE COURT ON THE MERITS.

We concede that the defendants are correct on the merits. Section 768.56 is unconstitutional "as applied" to this case, because the plaintiff's cause of action accrued prior to July 1, 1980. Our position is simply that the issue is not properly before the Court on the merits, because it has been raised for the first time here. For practical and policy considerations too well settled universally to require reiteration here, it is a

fundamental general precept of appellate review that an appellate court sits only to review rulings actually made by the lower courts which it supervises, and that it cannot entertain a legal issue raised for the first time on appeal. *See, e. g., Dober v. Worrell*, 401 So.2d 1322 (Fla. 1981); *Castor v. State*, 365 So.2d 701 (Fla. 1978); *Bould v. Touchette*, 349 So.2d 1181 (Fla. 1977); *Bonded Transportation, Inc. v. Lee*, 336 So.2d 1132 (Fla. 1976); *Cowart v. City of West Palm Beach*, 255 So.2d 673 (Fla. 1971); *Lipe v. City of Miami*, 141 So.2d 738 (Fla. 1962); *Mariani v. Schleman*, 94 So.2d 829 (Fla. 1957).

This general rule applies even where there has been an intervening decision of this Court which has provoked an afterthought of appellate counsel:

> The foregoing argument is not the argument raised at trial or on appeal. In both the trial and appellate courts, petitioner argued that no judgment of conviction could be entered on the jury's verdict of attempted manslaughter because there was no such crime. In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved. [Citations omitted]. It is true that the trial and appeal took place before our decision in *Taylor* was rendered. Thus it might well be argued that there was no opportunity for defense counsel to rely on the specific ground raised now, by, for example, asking that the jury be instructed on the difference between "act or procurement" and "culpable negligence." But the *Taylor* decision was no fundamental departure in this area of the law; it was based upon reasoning derived from legal precedents. . . . We therefore find that the issue petitioner presents is not properly presented, not having been raised at trial by specific objection or motion.

Tillman v. State, 471 So.2d 32, 34-35 (Fla. 1985).

With respect to the question presented in the instant case, the constitutionality of a retroactive application of §768.56 was raised by other litigants in numerous cases at the time the defendants conceded its applicability in this case. *See Young v. Altenhaus, supra.* The ground was therefore certainly available to counsel for the defendants below, at a time when it should have been put in issue and determined. In addition, the *Young* decision was not a fundamental departure in this area of the law; it was based upon

reasoning derived from legal precedents. As a result, this Court's decision in *Young v. Altenhaus*, standing by itself, does not open the door to an exception to the general rule. Neither does the fact that a constitutional challenge is involved here permit an exception, because constitutional challenges are also embraced by the general rule. *See Clark v. State*, 363 So.2d 331 (Fla. 1978); *Smith v. Ervin*, 64 So.2d 166 (Fla. 1953); *Henderson v. Antonacci*, 62 So.2d 5 (Fla. 1952).

There is an exception to the general rule, of course. An appellate court may review a "fundamental error"--an error which goes to the very heart of the merits or the foundation of the proceeding--for the first time on appeal. That exception is not available to the defendants here, however, because the issue presented here concerns the allowance of attorney's fees, and therefore does not go to the merits or the foundation of the case. That proposition would appear to be settled by *Sanford v. Rubin*, 237 So.2d 134 (Fla. 1970), in which this Court reiterated that not all constitutional errors constitute fundamental errors, and held that a constitutional issue relating to the allowance of attorney's fees could never be considered "fundamental error". If *Sanford v. Rubin* is still the law in this Court, the issue raised by the defendants here is clearly not properly before the Court on the merits.

More recently, this Court appears to have expanded the "fundamental error" exception somewhat, but not to the extent necessary to allow review of the defendants' contentions here:

> The facial validity of a statute . . . can be raised for the first time on appeal even though prudence dictates that it be presented at the trial court level to assure that it will not be considered waived. The constitutional application of a statute to a particular set of facts is another matter and must be raised at the trial level . . . .

Trushin v. State, 425 So.2d 1126, 1129-30 (Fla. 1982). If *Trushin* is still the law in this Court, the defendants' challenge to the constitutionality of §768.56, "as applied" to the facts in this case, cannot be entertained here.

The defendants argue nevertheless that the issue can be considered here because this Court considered it for the first time on review in *Young v. Altenhaus, supra,* and remanded for a determination of the date of accrual of the plaintiff's cause of action in *Florida Patient's Compensation Fund v. Rowe, supra.* We cannot deny the *possibility* that this Court considered the issue for the first time on review in *Young* and *Rowe,* but we cannot find any support for that conclusion on the face of either decision. From all that appears on the face of the two decisions, the issue was treated as if it had been raised below; and there is certainly nothing in either decision which purports to overrule *Sanford v. Rubin, supra,* or *Trushin v. State, supra,* or the fundamental precept of appellate review upon which they are bottomed. In the absence of an express holding contrary to those previously expressed in *Sanford* and *Trushin,* we are not willing to attribute to this Court the change in the settled law which the defendants seek here.

We recognize that at least one District Court has accepted the defendants' position here, although not without expressing its mystification at the apparent inconsistency between its conclusion and the conclusion required by *Sanford v. Rubin, supra. See Cato v. West Florida Hospital, Inc.,* 471 So.2d 598 (Fla. 1st DCA 1985). We are constrained to note, however, that the First District accepted the defendants' position only because it was aware from its own records that the issue had not previously been raised in the companion case disposed of by this Court in *Young* (*Mathews v. Pohlman*). We question the propriety of resorting to matters outside the face of a Supreme Court decision to determine whether the decision overrules a prior decision, when the decision makes no mention of any such intent. In our judgment, the safer course to follow is to take this Court at its word, and follow its written precedents--notwithstanding that it may have mistakenly bent the rules in a particular case to settle a pressing conflict in the decisional law, or to answer an important question, or to favor a particular litigant. Put

another way, the mistaken breach of a rule should not be taken as a repeal of the rule; a repeal must be express.

Because this Court did not overrule either *Sanford* or *Trushin* in *Young*, and because there is no language in *Young* from which it can even arguably be inferred that *Sanford* and *Trushin* were meant to be overruled *sub silentio*, we respectfully submit that, notwithstanding *Young*, the defendants' contention on the merits was waived below and that it is therefore not properly before the Court. We also believe it would be unfair for this Court to quash the District Court's decision for a ruling which the District Court never made. If the principle of *stare decisis* is to be given anything more than mere lip service here; if the wisdom of this Court's predecessors is not to be entirely ignored; and if consistency is to be deemed even a modest jurisprudential virtue, the defendants' position on the merits must be rejected here as having been improperly preserved for appellate review. The District Court's decision, which is clearly correct with respect to the issues of which it disposes, should be approved (or this proceeding should be dismissed).

The only possible motivation which this Court could have to relieve the defendants of their waiver below would be to ensure that all similarly-situated litigants are treated alike, notwithstanding their concessions and omissions in the lower courts. We do not deny the superficial appeal of such a disposition here. While such a disposition might appear at least superficially "fair", however, it would nevertheless work its own brand of unfairness upon others. We imagine that there are numerous litigants like the defendants who did not challenge the constitutionality of §768.56 "as applied"; who determined (in light of the general rule, and *Sanford*, *Trushin* and like cases) that they could not properly raise the issue on appeal; and who did not raise the issue as a result. In effect, the defendants are asking this Court to change the settled law relied upon by those similarly-situated litigants, and grant them a windfall not available to those who relied upon the settled law and paid their statutory debts without complaint. Because those litigants

cannot be relieved of their obligations at this point, good reason exists not to relieve the similarly-situated defendants in the instant case.

In addition, the plaintiff incurred a substantial expense (both in money and the time and effort of counsel) in prosecuting her appeal, based upon the record made by the defendants. It may very well be that that expense would not have been incurred if §768.56 had been challenged on the ground now raised here, since that ground would have presented a far more problematical issue. We think the plaintiff was entitled to rely upon this Court's prior decisions concerning the scope of appellate review, and that it would be unfair to her for this Court to change the settled law after-the-fact (and after her detrimental reliance upon it), simply to relieve the defendants of their concessions and omissions below. In short, notions of "fairness" do not tip the scales in this case--and if any "unfairness" is to be visited on anyone here, it should be visited on the defendants for their failure to comply with the law requiring that issues be properly preserved for appellate review.

Finally, we would note that, unless this Court intends to sidestep our position entirely and quash the District Court's decision without mention of the fact that the issue presented here was never presented below (and was not even presented to this Court until after *Young* was decided), it will be necessary for the Court to overrule *Sanford* and *Trushin*--and possibly dozens of other decisions in the process. That, of course, will simply open the floodgates to *de novo* appellate review--a temptation which this Court has resisted for decades upon decades of its jurisprudence, for sound practical and policy reasons. We respectfully submit that the reasons for that long-settled, universally-accepted general rule are still sound, and that the defendants should not be relieved of their waiver here at the expense of the general rule--because the cost to the jurisprudential principles of appellate review will be far greater than the statutorily-pre-

scribed attorney's fees which the defendants must pay, as a result of their undeniable negligence in leaving a sponge in the plaintiff's abdomen.

V.
CONCLUSION

For the foregoing reasons, it is respectfully submitted that the issue presented here is not properly before the Court on the merits. As a result, the District Court's decision should be approved. Alternatively, review having been improvidently granted, review should be denied.

VI.
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 25th day of November, 1985, to: Robert Klein, Esq., One Biscayne Tower, Suite 2400, Miami, Fla.; Joel R. Wolpe, Esq., M-110 Biscayne Bldg., 19 W. Flagler Street, Miami, Fla. 33130; and to Steven R. Berger, P. A., 8525 S.W. 92nd Street, Suite B-5, Miami, Fla. 33156.

Respectfully submitted,

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