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### SUMMARY OF ARGUMENT

The issue of the constitutionality of the retroactive application of Section 768.56 to the instant case is properly before this Court, as Petitioner challenged the statute both facially and as applied at the trial court level. This Court would be entitled to review the constitutionality of the statute as applied to the facts of this case, even absent a prior challenge to the statute as applied, on the authority of TRUSHIN v. STATE, 425 So.2d 1126 (Fla. 1982), LOWER FLORIDA KEYES HOSPITAL DISTRICT v. LITTLEJOHN, 10 FLW 2663, Third District Court of Appeal case numbers 84-388 and 84-431 (opinion filed December 3, 1985), and CATO v. WEST FLORIDA HOSPITAL, INC., 471 So.2d 598 (Fla. 1st DCA 1985).

As Respondent has conceded that Petitioner is correct on the merits, this Court need not remand the instant case to the trial court for further proceedings, but need only reverse the decision of the Third District Court of Appeal, if this Court determines that the issue of the application of Section 768.56 to the instant case is properly before it.

POINT ON APPEAL

WHETHER THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN THIS CASE SHOULD BE REVERSED WHERE THE THIRD DISTRICT COURT OF APPEAL IMPROPERLY APPLIED SECTION 768.56, FLORIDA STATUTES, TO A CAUSE OF ACTION WHICH ACCRUED PRIOR TO JULY 1, 1980, AND WHERE THE THIRD DISTRICT'S DECISION AFFIRMING THE CONSTITUTIONAL VALIDITY OF SECTION 768.56 WAS IN PART BASED UPON THE THIRD DISTRICT'S PRIOR DECISION IN YOUNG v. ALTENHAUS, 448 So.2d 1039 (Fla. 3rd DCA 1983), A DECISION WHICH WAS RECENTLY QUASHED BY THIS COURT.

## ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN THIS CASE SHOULD BE REVERSED WHERE THE THIRD DISTRICT COURT OF APPEAL IMPROPERLY APPLIED SECTION 768.56, FLORIDA STATUTES, TO A CAUSE OF ACTION WHICH ACCRUED PRIOR TO JULY 1, 1980, AND WHERE THE THIRD DISTRICT'S DECISION AFFIRMING THE CONSTITUTIONAL VALIDITY OF SECTION 768.56 WAS IN PART BASED UPON THE THIRD DISTRICT'S PRIOR DECISION IN YOUNG V. ALTENHAUS, 448 So.2d 1039 (Fla. 3rd DCA 1983), A DECISION WHICH WAS RECENTLY QUASHED BY THIS COURT.

Respondent's sole argument against reversal of the decision of the Third District Court of Appeal in this case is that the issue of the constitutionality of Section 768.56 as applied in this case is not properly before this Court. Respondent argues that the constitutionality of the statute "as applied" is being raised for the first time here. (Respondent's brief, page 4). This is simply not true. The Motions to Strike and/or Motions for Orders Denying Plaintiff's Motion for Attorneys' Fees filed by both Leonard G. Kantor, M.D., and Petitioner in the trial court state "the attorneys' fees statute is unconstitutional on its face and as applied to this Defendant...." (Emphasis added) Although the trial court did not state in its order striking the claim for attorneys' fees that the statute was unconstitutional as applied, that point was properly raised by the Defendants in the trial court action.

As Appellant before the Third District Court of Appeal, Respondent did not address the constitutionality of the statute as applied; rather, she concentrated upon her contention that Section 768.56 was not violative of the equal protection or due process clauses of the state and federal constitutions, nor unconstitutionally vague. As Appellee in the lower court,

Petitioner was not obligated to raise the argument that the statute was unconstitutional as applied, where it was merely seeking to uphold the trial court's ruling to the effect that Section 768.56 was unconstitutional based upon grounds of equal protection and vagueness. Now, where Petitioner is once again in the position where he is seeking to have the statute declared unconstitutional, he has properly challenged the constitutionality of the statute as applied to this case.

The First District Court of Appeal has recently considered the issue of whether an appellant may challenge the constitutionality of a statute as applied for the first time on appeal, where the facial constitutionality of the statute had been questioned before the trial court. *CATO v. WEST FLORIDA HOSPITAL, INC.*, 471 So.2d 598 (Fla. 1st DCA 1985). In *CATO*, the First District specifically considered a challenge to the retroactive application of Section 768.56 to a cause of action accruing prior to the effective date of the statute. Unlike the instant case, the appellant in *CATO* had never challenged the constitutionality of the statute as applied while before the trial court. Nonetheless, the First District held that *Cato* could challenge retroactive application of Section 768.56 for the first time before the District Court, as the facial constitutionality of the statute had been raised before the trial court. That question was certified to this Court.

The Third District Court of Appeal has also indicated that it will allow appellants to challenge the constitutionality of Section 768.56 as applied for the first time on appeal, in the absence of a negative ruling by this Court to the question certified in *CATO*, as long as the appellant raised a facial

challenge to the constitutionality of the statute at the trial court level. LOWER FLORIDA KEYES HOSPITAL DISTRICT v. LITTLEJOHN, 10 FLW 2663, Third District Court of Appeal case number 84-388 and 84-431 (opinion filed December 3, 1985).

Respondent has quoted from this Court's decision in TRUSHIN v. STATE, 425 So.2d 1126 (Fla. 1982), in support of her contention that Petitioner has waived his constitutional challenge. The excerpt relied upon by Respondent stops short of presenting this Court's complete thoughts on the issue. The omitted portion is crucial to the determination of this case, in that this Court stated: "Once an appellate court has jurisdiction it may, if it finds it necessary to do so, consider any item that may affect the case." 425 So.2d at 1130. See also MIAMI GARDENS, INC., v. CONWAY, 102 So.2d 622 (Fla. 1958); VANCE v. BLISS PROPERTIES, INC., 109 Fla. 388, 149 So. 370 (1933).

As this Court properly has jurisdiction in the instant case pursuant to Rule 9.030(a)(2)(A)(ii), Florida Rules of Appellate Procedure, and Art. 5, Section 3(b)(iii), Florida Constitution, this Court may consider any issue that may affect the case. The constitutionality of the retroactive application of Section 768.56 is such an issue. This Court therefore may -- and in light of the facts of this case should -- consider Petitioner's contentions in this case. As Respondent has conceded, Petitioner is correct on the merits. (Respondent's brief, page 3.) The decision of the Third District Court of Appeal in this case should therefore be reversed. Respondent's concession that Petitioner is correct on the merits averts any need for this Court to remand the case to the trial court for determination of the date of accrual of Respondent's cause of action.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the issue of the constitutionality of Section 768.56, Florida Statutes (1981), is properly before this Court for review. Petitioner JOHN H. KATHE, M.D., therefore respectfully requests this Court to reverse the decision of the District Court of Appeal, Third District, in DAVIS v. NORTH SHORE HOSPITAL, 452 So.2d 937 (Fla. 3rd DCA 1983) and to enter a ruling that Section 768.56, Florida Statutes (1981) cannot constitutionally be applied to this case.

Respectfully Submitted,



ROBERT M. KLEIN  
DEBRA J. SNOW



CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 19th day of December, 1985, to the attached list of addresses.

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DAVIS v. KATHE

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