SUPREME COURT OF FLORIDA

GALENCARE, INC.,

Petitioner,

v.

JAMES E. BLANTON, et al.,

Respondents.
_____/

Case No. 83,659

PETITIONER'S BRIEF ON THE MERITS

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Article V, sections 3(b)(3) and (4), Florida Constitution (1980) because the Second District Court of Appeal has certified its decision as being in direct conflict with Johnson v. Plantation General Hospital Limited Partnership, 621 So. 2d 551 (Fla. 4th DCA 1993), rev'd, No. 82,237 (Fla. June 16, 1994); and Johnson v. NME Hospitals, Inc., 621 So. 2d 554 (Fla. 4th DCA 1993), rev'd, No. 82,238 (Fla. June 16, 1994).[1] A. 14. This Court has jurisdiction of the entire appeal as a result of the certified conflict. Lee v. State, 501 So. 2d 591, 592 n.1 (Fla. 1987).

Although this Court reversed the Plantation and NME decisions on June 16, 1994, this Court still has jurisdiction to resolve all the issues on appeal, especially when the additional issues in this case will affect the outcome of the appeal.[2] Cantor v. Davis, 489 So. 2d 18 (Fla. 1986); Trushin v. State, 425 So. 2d 1126 (Fla. 1982); Savoie v. State, 422 So. 2d 308 (Fla. 1982); Bould v. Touchette, 349 So. 2d 1181 (Fla. 1977); Negron v. State, 306 So. 2d 104 (Fla. 1974). As this Court stated in Tyus v. Apalachicola Northern Railroad, 130 So. 2d 580, 585 (Fla. 1961):

> Since we have concluded that, on the face of the subject opinion of the District Court, it appears that there can be no doubt about the question of direct conflict . . . it becomes our **duty and responsibility** to consider the case on its merits and decide the points passed upon by

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[1] Because the Index to the Record in the Second District has not been completed by the court, references to the record will be made by referring to the Appendix filed herewith as ("A. ___").

[2] In addition, this Court's June 16, 1994 rulings in the Plantation and NME cases are subject to motions for rehearing and are not final at this time.

> the District Court which were raised by appropriate assignments of error as completely as though such case had come originally to this court on appeal. (Emphasis added.)

Further, as this Court ruled in Bould v. Touchette, 349 So. 2d 1181, 1183 (Fla. 1977):

> Having taken jurisdiction because of a conflict as to one question of law, U.S. Concrete Pipe Company says we should consider no other questions involved in the appeal before the District Court, as these questions were not raised in Bould's petition for certiorari seeking jurisdiction. This contention is without merit. If conflict appears and this court acquires jurisdiction, we then proceed to consider the entire cause on the merits.

Because this Court has jurisdiction, it is appropriate to consider the entire appeal, including whether class certification was error. Id. The order certifying a class in this case should be reviewed "as though [this] case had come originally to this court on appeal." Tyus, 130 So. 2d at 585.

Review of the class certification order will have a definite effect on the outcome of the petition. If there is no valid class, there can be no aggregation of claims, and the circuit court does not have jurisdiction of this case. As Chief Justice Grimes wrote in his concurrence to the Plantation and NME opinion, "if it is ultimately determined that the cases cannot proceed as a class action, the circuit court will lose jurisdiction and the individual claims will have to be prosecuted in county court." Johnson v. Plantation General Hospital Ltd. Partnership, Case Nos. 82,237 & 82,238. A. 8. Thus, because certification was error, this case should be decided differently from Plantation and NME.

Because the issues of subject matter jurisdiction and class certification are intertwined and the appeal presents questions of great importance to Florida courts, as well as Florida's health care providers and recipients, this Court should decide the entire appeal. A decision by this Court will also clarify the proper bounds of Lanca Homeowners, Inc. v. Lantana Cascade of Palm Beach, Ltd., 541 So. 2d 1121 (Fla. 1988), cert. denied, 493 U.S. 964 , 107 L. Ed. 2d 371, 100 S. Ct. 405 (1989), the sole decision relied on by the circuit court in certifying this class. Now that this Court has ruled that appropriate class actions may be brought in circuit court, it is necessary to lay down appropriate criteria for class certification in this case so as to prevent the further waste of judicial resources and litigation expenses on remand.[3]

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[3] Plantation, NME, Galen of Florida, Inc. v. Arscott, Case No. 82,966, and this case are four of eight purported class actions against hospitals around the State brought by the same lawyers, containing virtually identical claims.

STATEMENT OF THE CASE AND FACTS

This is a suit by two plaintiffs (respondents), individually and on behalf of a purported class, against Galencare, Inc., d/b/a Brandon Hospital ("the hospital") (petitioner). The suit alleges claims of breach of contract (Count I), money had and received (Count II), and unjust enrichment (Count III), all based on alleged "imposition." A. 73-115. The plaintiffs allege that even though they signed written agreements to pay the hospital's prevailing rates, and were charged according to the hospital's prevailing rates, the itemized charges for pharmaceuticals, medical supplies, and laboratory services were somehow the result of improper "imposition" by the hospital. A. 73-96.

James E. Blanton and Sharonlee Pimental are the current named plaintiffs. A. 73. Both Pimental and Blanton became plaintiffs in this lawsuit by answering a newspaper advertisement placed by plaintiffs' counsel asking, "Was Your Hospital Bill At Humana Brandon Hospital Unreasonably High?" A. 332. The advertisement sought people to sue Brandon Hospital.

Pimental

Sharonlee Pimental was treated as an outpatient in the emergency room of the hospital on May 28, 1992 for unspecified abdominal pain. A. 190, 381-91. Earlier that day, she went to her regular physician's office and was examined by Dr. Holly Williams. A. 190. The doctor could not determine what was wrong so she recommended that Pimental go to the Brandon Hospital emergency room. A. 190-91. Pimental took with her a sheet with Dr.

Williams's notes. Pimental claims that Dr. Williams sent her to the emergency room for limited specified testing. A. 191-92. Pimental also claims that the sheet of notes contained a list of specific tests ordered by Dr. Williams to be conducted at the hospital. A. 191-92. Pimental's main complaint about her visit is that, in her view, the tests performed by the hospital other than those allegedly ordered by Dr. Williams were unnecessary. A. 192-93. However, nothing in Pimental's records, which include a copy of Dr. Williams's notes, indicates that she was admitted for specific tests only. A. 381-91.

In connection with her treatment, Pimental signed a Condition of Admission agreement in which she guaranteed to pay the hospital's charges at the prevailing rates. A. 383. Pimental gave the hospital $50.00 as a deposit towards her bill. A. 201, 387. Pimental was treated in the emergency room as an outpatient, given a number of tests, and returned home the same evening. A. 381-91. After Pimental returned home, she received a detailed statement of charges totalling $1,857.80, primarily covering the battery of tests required to diagnose her abdominal pain. A. 381-85. Pimental discussed a payment plan with the hospital, but the hospital wanted a plan in which Pimental would pay a specific amount per month, not whatever amount Pimental decided to pay in any given month. A. 201-03. Pimental refused to agree to send the hospital any fixed amount on a monthly basis, and has paid nothing for her treatment, aside from the initial $50.00 deposit. A. 387.

Blanton

James Blanton was treated by the hospital on June 11, 1992 for a broken arm resulting from a car accident on June 6, 1992 in the State of Washington. A. 160-61; 352-80. At the time of the accident, Blanton was taken to the Fork Community Hospital in Washington but returned to Tampa to have his arm set. A. 161. Upon his return, he contacted Dr. Thomas Davison, who had previously treated his mother for a broken knee. A. 161. Earlier on the day of his admission, Blanton went through the admissions process, during which he was given a copy of the hospital's Conditions of Admission agreement for his review. A. 162. Blanton signed the agreement and agreed to pay the hospital's charges at the prevailing rates. A. 162, 354.

Blanton, who was concerned about hospital costs prior to his visit to Brandon Hospital, asked for an estimate at Fork Community Hospital in Washington. A. 164. He also knew he could get a firm estimate for the procedure at Lakeland Regional and the Watson Clinic in Lakeland, where he had been treated many times. A. 164-67. When the "poor little receiving clerk" at Brandon could not give him an estimate on the spot, he decided not to ask her to follow up or find out for him. A. 168, 173.

Blanton was aware of newspaper comparisons of hospital costs prior to his admission, including costs at Brandon Hospital and believed at the time that the rates at Brandon Hospital were the highest in the county. A. 168-70. He also knew, however, that hospitals would accept less than full payment in certain instances

because he had been mistakenly billed as a Medicare patient by Lakeland Regional and the hospital agreed to accept the lower Medicare payment amount as payment in full. A. 173-75. Blanton testified that he did not object to paying somewhat more for hospital treatment to help provide for those without insurance or those on Medicare. A. 175.

After returning home Blanton received a detailed statement of charges totaling $5,740.16. A. 357-68. He discussed the charges with his insurance company and the Florida Health Care Cost Containment Board ("HCCB"), which offered to send him complaint forms. A. 175-76. Blanton declined to follow up or make a formal complaint to the hospital about the charges. A. 176. Ultimately Blanton's insurance paid its portion of the charges and Blanton paid his co-payment. A. 178; 370-72.

The hospital has raised defenses to the plaintiffs' claims, including voluntary consent to pay the prevailing rates. A. 120-26. The hospital has also raised the defense of course of dealing as to purported class members who are repeat patients, or who have health insurance through companies who have agreed to the reasonableness of the hospital's charges. A. 120-26. The hospital has raised the defenses of voluntary payment, estoppel, waiver, and the failure to allege imposition at the time of payment.[4] A. 120-26.

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[4] In the virtually identical case of Payne v. Humana Hospital Orange Park, Case No. 92-424-CA (Fla. 4th Jud. Cir. Aug. 20, 1993), the circuit court dismissed the claims based on the failure to allege a "sufficient basis to bring an action for implied contract of reasonableness, for imposition [and] money had and received." A. 466-67.

In response to the alleged imposition argument of the plaintiffs, the hospital has demonstrated that Blanton had a variety of meaningful choices, including the choice to receive treatment at nearby Lakeland Regional, Tampa General Hospital, or University Community Hospital, yet he voluntarily chose Brandon Hospital. A. 170-173.

Plaintiffs have failed to allege that their individual claims satisfy the jurisdictional requirement of circuit court. A. 74. Instead, they allege that the overall class "claim" exceeds the requirement. Id.

On June 14, 1993, the circuit court in Hillsborough County, although finding that common questions **did not predominate** over individual questions, reluctantly certified a class in reliance on this Court's decision in Lanca Homeowners, Inc. v. Lantana Cascade of Palm Beach, Ltd., 541 So. 2d 1121 (Fla. 1988). A. 15-61. The hospital appealed. A. 145. On December 17, 1993, the Second District issued a per curiam affirmance without opinion. A. 11. On January 3, 1994, the hospital filed a Motion for Rehearing, Rehearing en banc, and/or Motion to Certify Question and Conflict on the issue of subject matter jurisdiction, given the recent action of this Court in accepting the Plantation and NME cases. On April 29, 1994, the Second District granted the hospital's motion in part and substituted an opinion for the per curiam affirmance. A. 12-14. In its opinion, the Second District stated that plaintiffs were permitted to aggregate their claims for damages to establish jurisdiction in the circuit court. Id. The Second

District, recognizing the conflict between its decision and those of the Fourth District, certified the conflict to this Court. Id. The hospital timely filed its notice to invoke this Court's jurisdiction. A. 146-154. This Court has deferred its decision on jurisdiction but has ordered briefing on the merits. A. 1.

SUMMARY OF THE ARGUMENT

Even though this Court has decided to allow aggregation in theory, the Court should reverse the Second District Court of Appeal because class certification was error. As a result, this case is simply one brought by two individuals, not a class. Accordingly, this particular case belongs in county court.

The purpose of a class action is to decide in a single proceeding all the claims that affect all class members. That purpose cannot be fulfilled when individual issues and defenses predominate over common questions. There is no benefit from a class action when each claim will have to be decided on a case by case basis. Certification of a class in this case was error because the circuit court expressly found that common questions did **not** predominate over individual questions, as required by Rule 1.220(b)(3), Florida Rules of Civil Procedure. The circuit court found that the question of "imposition" and the defenses of voluntary payment (and others) would have to be decided on a case by case basis. Unlike the issue in Lanca Homeowners, Inc. v. Lantana Cascade, 541 So. 2d 1121 (Fla. 1988), cert. denied, 493 U.S. 964, 107 L. Ed. 2d 371, 100 S. Ct. 405 (1989), this Court has

ruled that "imposition" depends on the circumstances of each case. Southern States Power Co. v. Ivey, 160 So. 46, 47 (Fla. 1935). Thus, there can be no justification for class action treatment of these claims.

Reliance by the circuit court on Lanca was misplaced because Lanca is limited to the mobile home park setting in which the unilateral act of the defendant was the only real issue in the case and the plaintiff class was a discrete residential group with a unified interest. In Lanca, their only choice was to pay the prospective rent increase or be forced to move. In contrast, this case involves a disparate group of individuals who have a wide choice of hospitals and outpatient health care options. A. 456-63. No one has been refused treatment for lack of payment. The hospital does not even send a bill until well after the individual has been discharged and returned home. At that point the individual has the choice of paying the bill or challenging the charges. Even if the hospital threatens to sue to collect a debt, that does not constitute duress or deprive an individual of his right to choose to pay the debt, question the charges, defend a lawsuit or bring a lawsuit himself.

Also, in this case, the claims of the plaintiffs focus on the allegation of "imposition" and the defenses focus on the knowledge, choice, and voluntary payment of each individual. At the certification hearing, the hospital introduced evidence of the choices patients have regarding health care and hospitals in the form of widely publicized comparisons of hospital rates done by the HCCB

and by various newspapers. A. 408-56. The hospital specifically demonstrated the different levels of knowledge and choice among the class members. For instance, some patients, such as Blanton, came to the hospital as sophisticated health care consumers with knowledge of the charges. Others, such as Pimental, were directed to the emergency room by their primary physician. Almost half of the purported class members had been patients at this hospital on prior occasions. A. 333. For a large number of class members, the hospital accepted less than payment in full and has offered a prompt pay discount. A. 278, 279, 334-37, 344-50.

This Court should correct the erroneous ruling below and prevent the extension of Lanca to cases far beyond its scope. The individual issues of knowledge and choice make this case much more like the fraud cases decided by this Court in which class certification has been substantially restricted. E.g., Lance v. Wade, 457 So. 2d 1008 (Fla. 1984).

Undisputed evidence at the class certification hearing also demonstrated that a class action in this case would be unmanageable. The evidence showed that the hospital had separate charges for over 7,000 different drugs, supply items, and lab tests. A. 309. The evidence further showed that there was no uniform mark up for each of these items, and that they were all priced differently based on factors that varied from item to item. A. 309-316. The hospital also demonstrated that the prices for each of these items changed from year to year during the relevant time frame. A. 310. Each time the price changed, the percentage of

mark up over direct cost was affected. A. 309-316. Because there was no evidence of any uniform mark up, surcharge, or fee that could have applied across the board to drugs, supplies, and lab tests, a jury would have to reprice each of the 7,000 items during the relevant time frame to determine a "reasonable" price. Such a task would be unmanageable and would not be an effective use of the judicial system.

The hospital also demonstrated through the proffered testimony of Dr. Hugh Long that there are substantial conflicts within the class since many of the proposed class members have benefitted from the hospital's current practice. A. 225-39. Because of the lack of manageability and the existence of conflicts within the class, the purpose of the class action procedure would be frustrated if certification was required in this case.

ARGUMENT

I. THESE PLAINTIFFS SHOULD NOT BE ALLOWED TO CREATE CIRCUIT COURT JURISDICTION BY AGGREGATING SEPARATE CLAIMS OF AN INVALID CLASS.

This Court has ruled that aggregation of claims of alleged absent class members is permissible "as long as the procedural and legal requirements for the class are satisfied." Johnson v. Plantation General Hospital, Nos. 82,237 & 82,238, slip op. at 5 (Fla. June 16, 1994). A. 7. The hospital respectfully disagrees with the concept of aggregation to meet circuit court jurisdiction and refers the Court to the argument submitted by undersigned counsel on behalf of the Daytona Medical Center in Galen v. Arscott, Case No. 82,966, currently pending in this Court. However, given this Court's ruling, it is still true that circuit court jurisdiction is improper in this case because "the procedural and legal requirements for the class" have not been satisfied. As Chief Justice Grimes wrote in concurring in the Court's recent decision, "if it is ultimately determined that the cases cannot proceed as a class action, the circuit court will lose jurisdiction and the individual claims will have to be prosecuted in county court." Johnson, slip op. at 6. A. 8. Because this case should not proceed as a class action, this Court should quash the Second District's decision and remand with instructions that the trial court certification order be vacated.

II. CLASS CERTIFICATION SHOULD BE REVERSED BECAUSE COMMON QUESTIONS DO NOT PREDOMINATE AND A CLASS ACTION UNDER THESE CIRCUMSTANCES WOULD SERVE NO USEFUL PURPOSE.

A. When Individual Questions Relating To Liability And Defenses Predominate Over Common Questions, A Class Should Not Be Certified.

Class action plaintiffs must carry two separate burdens in order to certify a class. **First**, plaintiffs must establish all four of the prerequisites of Rule 1.220(a): (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. **Second**, plaintiffs must establish one of the elements of Rule 1.220(b)((1)-(3). The plaintiffs in this case are proceeding under Rule 1.220(b)(3):

> (3) questions of law or fact common to the claim or defense of the representative party and the claim or defense of each member of the class **predominate over any questions of law or fact affecting only individual members of the class,** and class representation is superior to other available methods for the fair and efficient adjudication of the controversy.

(Emphasis added.) "A party seeking class action certification must demonstrate, under a **strict burden of proof**, that all of the requirements are **clearly met**." Rex v. Owens ex rel. Oklahoma, 585 F.2d 432, 435 (10th Cir. 1978) (emphasis added).[5] Plaintiffs must carry an evidentiary burden such that the trial court can make findings that the facts actually support certification. Barton-Malow Co. v. Bauer, 627 So. 2d 1233 (Fla. 2d DCA 1993).

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[5] Because Rule 1.220 was amended to conform to the federal counterpart, Florida courts follow cases interpreting Federal Rule 23. Powell v. River Ranch Property Owners, 522 So. 2d 69, 70 (Fla. 2d DCA 1988). See Plantation and NME, Case Nos. 82,237 and 82,238, slip op. at 3 (Fla. June 16, 1994) (because the Florida class action rule was modeled after the federal rule, the rules "are similarly worded and often similarly interpreted. . ."). A. 5.

Class certification is error unless the facts are clear that common questions predominate over individual ones. 7A Charles Wright et al., Federal Practice and Procedure: Civil § 1778 at 526 (2d ed. 1986) ("it is not sufficient that common questions merely exist"). The primary reason the plaintiffs cannot establish the "predominance" requirement is that each of the purported class member's claims (and the hospital's defenses thereto) depend on the individual circumstances leading up to and surrounding his or her signing of the admissions agreement and subsequent payment or nonpayment of the hospital bill.

B. The Circuit Court Made A Factual Finding That Common Questions Did Not Predominate Over Individual Questions.

Since the purpose of a class action is to resolve all liability and defense issues in one proceeding, it serves no useful purpose to certify a class when individual issues will require a case by case determination of liability. When substantial individual issues are present, a class action is not an efficient means of adjudicating the dispute, and is by no means "superior." The circuit court found that individual issues with respect to imposition, voluntary payment, estoppel, and waiver predominate over the common issues. A. 16. Based on this Court's ruling in Lanca, however, the circuit court reluctantly certified a class. Given the detailed findings of the circuit court, which were expressly incorporated into the certification order at paragraph 10, (A. 17-61), certification should be reversed.

At the conclusion of the class certification hearing, Judge Lazzara, who has since been elevated to the District Court of

Appeal, found that individual patient circumstances, including freedom of choice and voluntary payment, were critical to an evaluation of plaintiffs' claims. A. 20-36,40. The circuit court stated:

> It appears to me that there is no way in which the plaintiffs by generalized proof applied to the class as a whole can make out a case of imposition against the hospital or to defend against the defenses of voluntary payment, waiver and estoppel. It appears that such proof can only be made on an **individual-by-individual basis** as to each class member.
>
> Thus, it seems that given the fact that the resolution of these questions are **fact specific to each class member** and play such an integral part in the determination of liability, [a] class action suit appears not to be appropriate in this case.

A. 40-41 (emphasis added).

The circuit court also specifically found that the hospital's defenses of voluntary payment, waiver, and estoppel were legally appropriate and would necessitate an inquiry into individual circumstances. A. 29. The court cited Pacific Mutual Life v. McCaskill, 170 So. 579, 583 (Fla. 1936); Moore Handley, Inc. v. Major Realty Corp., 340 So. 2d 1238, 1239 (Fla. 4th DCA 1976); and Taylor v. Kenco Chemical & Mfg. Corp., 465 So. 2d 581 (Fla. 1st DCA 1985) in support of its conclusions that: (1) "the defense of voluntary payment . . . depends on the peculiar facts of each case"; (2) "estoppel focuses on the individual acts, conduct, or words of a person"; and (3) "waiver is a fact specific determination to be made on the basis of a person's individual knowledge, intent, and conduct." A. 28-31.

The court stated as follows:

> . . . it would appear that the defendant has a right to demonstrate through competent proof that, one, an individual class member based on his or her peculiar circumstances voluntarily paid the entire amount billed or part of the amount billed and thus has waived his or her right to contest the reasonableness of the charges in that bill or is estopped from contesting the reasonableness of the charges in the bill, or two an individual class member who has not paid the defendant's bill based on his or her own peculiar circumstances, in failing to protest or question the reasonableness or necessity of the charges in the bill or to request a further itemization has waved [sic] his or her right to question the reasonableness of the bill or is estopped to do so in that they have implicitly admitted the correctness of the bill.
>
> Based on the evidence presented, it appears that the range of peculiar facts and circumstances which impact on the plaintiffs' ability to prove liability based on the doctrine of imposition and the defendant's ability to mount a meaningful defense based on voluntary payment, waiver, and estoppel are many and are tied to the unique reasons why a person seeks or obtains hospital care and treatment.

A. 33-34. The court then listed seven issues, critical to imposition, voluntary payment, estoppel, and waiver, which would require individual proof:

> (1) Why did an individual class member obtain care and treatment from the defendant?
> (2) What inquiry if any did the individual class member make about the cost of his or her hospital care?
> (3) What past experiences did the individual class member have with hospital charges in general and the hospital charges of the defendant in particular?
> (4) What were the circumstances surrounding the individual class member's execution of any written agreement to pay, were any representations made by the defendant at the time of the transaction?
> (5) Were the services rendered actually necessary?
> (6) Did the individual class member after receiving the bill make an inquiry of the hospital about the charges imposed, and if so, did the

member pay under protest or was the member satisfied with the explanation and then paid?

(7) Did the individual class member pay the billing without any inquiry of the hospital?

A. 35-36. The court stated, "In the court's view all of these factors appear to relate directly to the issue of imposition and whether the defendant took unfair advantage of each class member. And they also appear to impact on the defense of voluntary payment, estoppel and waiver." A. 36.

The circuit court also stated that the testimony of the two class representatives was illustrative of the need for individualized inquiry. A. 36, 38. As Judge Lazzara noted, Blanton went to Brandon because he wanted a particular physician to set his wrist; he knew he could have gone elsewhere; it was not an emergency; he went through a pre-admission process; he even stated that he knew Brandon's rates were alleged to be high, but he chose to go there. A. 36-37. Blanton also paid in full, even after raising questions about the bill. A. 38; 370-72.

Pimental, on the other hand, went to Brandon for tests upon the advice of a physician; she was in pain and her doctor arranged for her to go to the emergency room. A. 37-38. Pimental's main complaint was that unnecessary tests may have been performed. A. 193-94. As contrasted with Blanton, Pimental paid only $50.00 and has refused to pay the balance. A. 38. The circuit court concluded:

> Thus the testimony of the two class representatives, appear to be a prelude to the myriad substantive fact patterns which this court and any jury impaneled to try this case would have to confront in determining whether

> each class member was imposed upon. And assuming imposition, whether each class member thereafter voluntarily paid his or her bill or may have otherwise waived their right to seek recovery or may be estopped to do so.

A. 38. Accordingly, the circuit court found that the plaintiffs failed to establish predominance of common issues, and that, **in fact**, common questions did **not** predominate. As the circuit court stated:

> It appears that individual issues with respect to imposition, voluntary payment, estoppel, and waiver **predominate over the common issues** and this class action would be **unmanageable** and **would not be superior**; however, the Court feels that Lanca Homeowners, Inc. v. Lantana Cascade of Palm Beach, Ltd., 541 So.2d 1122 (Fla. 1989) requires certification of the class in this case.

A. 16. The defendant hospital submits that Lanca is distinguishable from this case and is not applicable. Moreover, Lanca was not intended to govern situations in which the trial court **findings** fail to establish the predominance of common issues. Thus, certification should be reversed on the grounds that the facts failed to establish the required elements of a class action.

C. Certification Was Error Because Lanca Homeowners Does Not Apply To This Case.

In Lanca, this Court adopted a proposed rule change to the Florida Rules of Civil Procedure and affirmed the lower court, thus allowing mobile home park tenants, as a class, to sue the park owner for an unconscionable rental increase. 541 So. 2d at 1125. Because the facts in Lanca are far different from the circumstances of this case, application of Lanca to this case was erroneous.

This Court adopted Rule 1.222 of Civil Procedure because "the **unique features** of mobile home residency call for an effective

procedural format for resolving disputes between park owners and residents concerning matters of shared interest." 541 So. 2d at 1123 (emphasis added). Unlike this case, Lanca involved a unilateral rent increase imposed **after** residents had already moved into the mobile home park. Thus, there was no choice, consent, or possible knowledge prior to the increase. More importantly, any challenge to the increase would necessitate great hardship:

> Where a rent increase by a park owner is a unilateral act, imposed across the board on all tenants and imposed after the initial rental agreement has been entered into, park residents have little choice but to accept the increase. They must accept it or, in many cases, sell their homes or undertake the considerable expense and burden of uprooting and moving. The "absence of a meaningful choice" for these residents, who find the rent increased after their mobile homes have become affixed to the land, serves to meet the class action requirement of procedural unconscionability. Id.

Residents of a single trailer park represent a relatively small residential community. All of the residents have exactly the same interest vis-a-vis the landlord, and all are on an equal footing in challenging prospective future rent increases.

The present case is far different because the plaintiffs seek to challenge **prior charges**, subject to the voluntary payment defense depending on the circumstances of each individual. These plaintiffs are not challenging future increases like the trailer park residents who could not avoid increased charges without hardship. The putative class members in this case exercised choices in deciding to go to Brandon Hospital. As the circuit court noted, the two named representatives demonstrated varying

levels of choice: Blanton had a choice of going to the defendant hospital or to a number of other hospitals or clinics with which he was very familiar. A. 36-38, 170-73. Pimental, who was in pain, was directed to the hospital's emergency room by her physician. A. 36-38; 194. The hospital also introduced evidence that some purported class members were maternity patients who knew of the need for hospitalization well in advance and had numerous choices as to facilities and charges. A. 274-77. Some purported class members scheduled inpatient or outpatient surgery based on the advice of a physician and went through a pre-registration process in which they signed all agreements with the hospital several days prior to surgery. A. 270-72. In fact, unlike the mobile home park setting, the **bulk** of the purported class members in this case were outpatients. A. 334-37. In addition, nearly half the patients were "repeat customers" who were already familiar with the hospital's charge structure and voluntarily chose to return to the hospital rather than go elsewhere. A. 333. One of the previously named plaintiffs in this case, Dale Daniel, who has since been dismissed, went to the hospital on at least two occasions for the same condition and was charged the same for many of the same items each time. A. 392-407. Thus, individual circumstances will demonstrate many different ways that patients exercise meaningful choice. There is no way to lump all these different cases into one "class action."

One of the most significant differences between this case and Lanca is that plaintiffs have not alleged that the hospital "raised

the rates" midway through an outpatient procedure or after admission. The standard charges are set in advance. A. 309-10. The hospital then charges its standard, pre-existing charges for such items. Plaintiffs do not claim that there were changes in the hospital's charges after the individual made the decision to choose Brandon Hospital. The unilateral, after-the-fact, across-the-board nature of the conduct in Lanca is completely absent from this case.

Finally, individuals do not pay the hospital bill until after they return home, receive the bill in the mail, review the charges, and (if applicable) have their insurance company review and pay its portion of the charges. There is no concern, and there have been absolutely no allegation, that charges have to be paid **prior** to treatment. Moreover, individuals even have a choice of how to proceed after receipt of the charges. They can question the charges, complain to the HCCB, negotiate with the hospital, defend their rights in a collection action or institute their own action. Unlike Lanca, there is no requirement that the purported class members pay the rates or suffer hardship comparable to "sell[ing] their homes or undertak[ing] the considerable expense and burden of uprooting and moving." 541 So. 2d at 1123. All the hospital can do is bring an action to collect the money it is owed. The threat of legal proceedings to collect a debt or enforce a right does not constitute duress or lack of meaningful choice as was present in Lanca. See Stonebraker v. Reliance Life Ins. Co., 166 So. 583 (Fla. 1936). Thus, the voluntary payment defense will apply to all who have paid their bills depending on the individual circumstances

of each case. Any reliance on Lanca was misplaced and certification of a class was error.

D. Because Of The Need To Inquire Into Individual Circumstances, This Case Is Much More Like The Fraud Cases Decided By This Court, In Which A Class Action Rarely Serves A Useful Purpose.

Instead of being like Lanca, this case is much more like the fraud cases decided by this Court in which class certification has been severely limited. Tortoise Island Communities, Inc. v. Moorings Ass'n, Inc., 489 So. 2d 22 (Fla. 1986) (adopting dissent below which held that each cause of action was necessarily based on a separate factual event and that, although fraud was not alleged, the underlying rationale of the rule prohibiting class actions in cases involving fraud on separate contracts is identical); Lance v. Wade, 457 So. 2d 1008 (Fla. 1984); Avila South Condominium Ass'n v. Kappa Corp., 347 So. 2d 599 (Fla. 1977); Frankel v. City of Miami Beach, 340 So. 2d 463 (Fla. 1977); Osceola Groves, Inc. v. Wiley, 78 So. 2d 700 (Fla. 195). In Osceola Groves and Avila, this Court determined that actions involving fraud based on separate contracts were "inherently diverse as a matter of law, because 'the demands of the various defrauded parties are not only legally distinct, but each depends upon its own facts' . . ." 347 So. 2d at 609; quoting Osceola, 78 So. 2d at 702. In Lance, this Court reaffirmed the prohibition of class actions involving fraud, stating:

> In a situation such as this, involving multiple contractual sales, each of the parties has his own separate and distinct contract and must make a determination as to which terms are important to him. What one purchaser may rely upon in entering into a contract may not be material to another purchaser.

457 So. 2d at 1011.

The rationale underlying the prohibition of class actions involving fraud is particularly applicable to the present case because plaintiffs here are essentially claiming that, even though they entered into written contracts to pay the hospital's prevailing rates, they expected to be charged "reasonable" amounts and were somehow "imposed" upon. However, the expectations of the individual class members and whether there was "imposition" in any given case will vary from individual to individual, as will the reasons why each person pays his or her bill. Judge Lazzara himself recognized the similarities between fraud claims on separate contracts and the plaintiffs' claims in this case:

> [j]ust as fraud claims on separate contracts are inherently diverse as a matter of law because the demands of the various defrauded parties are not only legally distinct when each depends on its own facts, so too imposition claims on separate contracts as here also appear inherently diverse as a matter of law because the demands of the parties imposed upon appear to be not only legally distinct but also to depend upon their own unique facts.

A. 43. As a practical matter, litigating a fraud case or case such as this one with myriad issues of reliance, knowledge, and choice does not serve the purpose of a class action.

In Caro v. Proctor & Gamble Co., 22 Cal. Rptr. 2d 419, 18 Cal. App. 4th 669 (1993), a consumer brought a purported class action against an orange juice processor for an alleged misrepresentation that reconstituted juice was fresh. The trial court denied certification of a class and the appellate court affirmed. The appellate court held that class treatment provided no substantial

benefit because individual issues predominated over common questions. 22 Cal. Rptr. 2d at 433. The court stated:

> A class action cannot be maintained where each member's right to recover depends on facts peculiar to his case because the community of interest requirement is not satisfied if every member of the alleged class would be required to litigate numerous and substantial questions determining his individual right to recover following the class judgment determining issues common to the purported class. Id. (Citations omitted.)

In this case plaintiffs have stated that liability will depend on the concept of "imposition" by the hospital, or lack of meaningful choice. A. 140-42. Significantly, though, circumstances involving a claim of imposition will vary from individual to individual. "Imposition" is tantamount to duress. Jurgensmeyer v. Boone Hosp. Ctr., 727 S.W.2d 441 (Mo. Ct. App. 1987). Circumstances involving duress or meaningful choice will vary dramatically. Moreover, circumstances involving voluntary payment likewise vary dramatically and depend on knowledge, course of dealing, and other factors. 39 Fla. Jur. 2d Payment and Tender § 42 (1982); City of Miami v. Keton, 115 So. 2d 547 (Fla. 1959); Stonebraker v. Reliance Life Ins. Co., 166 So. 583 (Fla. 1936); New York Life Ins. Co. v. Lecks, 165 So. 50 (Fla. 1934). Given the need to examine individual circumstances that go to the heart of the liability issue, this case seems much closer to the fraud analogy.

In Jurgensmeyer, the Missouri Court of Appeals dismissed virtually identical allegations in a suit against a hospital alleging "overcharges." 727 S.W.2d at 443. The plaintiff alleged that when his son was hospitalized, the hospital required, as a

condition to the furnishing of hospital services, that he sign an agreement promising to pay charges for his son's hospital care. Id. at 443. Count I of the Jurgensmeyer complaint attempted to allege a cause of action for money had and received on the theory that the hospital obtained payment through **imposition**. The Missouri Court looked to this Court's decision in Southern States Power Co. v. Ivey, 160 So. 46, 47 (Fla. 1935), in which this Court gave the term **"imposition"** a meaning equivalent to "duress." Id.

The Missouri court stated that:

> Jurgensmeyer pleads absolutely nothing (conclusory or concrete) alleging that he actually had to **pay** the money before the hospital would treat [his son]. . . . The pleading concerning the signing of the agreement does not suffice to show payment under duress. It only goes to the circumstances surrounding the signing of the agreement. But to recover in assumpsit for money had and received it is necessary to allege the payment of money under circumstances which require its repayment in equity and good conscience. Id. at 443-44. (Emphasis added.)

The court went on to say:

> The failure to allege facts showing the **payment**, as contrasted with the signing of the agreement, was made under duress makes it clear that in making payment, Jurgensmeyer was acting as a volunteer. . . .

Id. at 444. Absent allegations of duress or compulsion **at the time of payment**, the Missouri court dismissed the plaintiff's claim. While the hospital cannot imagine how there could be imposition or duress after the patient goes home, receives the bill, and then pays it, such a claim would require an inquiry into the knowledge and circumstances of each individual at the time payment was made.

Assuming solely for the purposes of argument that imposition or duress could take place at the time of admission to the hospital, it would be impossible to show duress absent a review of individual circumstances. See Southern States Power Co. v. Ivey, 160 So. 46, 47 (Fla. 1935) (defining imposition as occurring "Where a person taking advantage of his position, or the **circumstances** in which another is placed, **exacts** a greater price for services rendered. . . ."") (emphasis added). Courts have consistently denied certification when an action alleges duress or coercion. Hewitt v. Joyce Beverages, 721 F.2d 625, 628 (7th Cir. 1983) (proof that one distributor was coerced would not imply that a different distributor was coerced); Ungar v. Dunkin' Donuts of Am., Inc., 531 F.2d 1211, 1226 (3d Cir.), cert. denied, 429 U.S. 823, 97 S. Ct. 74 (1976) (each franchisee was required to prove that he, individually, was coerced); McCoy v. Convenient Food Mart, Inc., 69 F.R.D. 337 (N.D. Ill. 1975); Wardell v. Certified Oil Co., 1981 WL 2173, 1982-1 Trade Cas. (CCH) ¶ 64,477 (S.D. Ohio Sept. 4, 1981) (proof of the coercive effect of the bonus plan on each individual dealer would cause individual issues to predominate over common issues); Pierucci v. Continental Casualty Co., 418 F. Supp. 704 (W.D. Pa. 1976) (result would be a myriad of mini lawsuits to determine the exact extent of coercion in each individual case); Abercrombie v. Lum's Inc., 345 F. Supp. 387 (S.D. Fla. 1972) (proof of tying must come from examination of individual franchisees' dealings which would vary from franchisee to franchisee).

Likewise, a claim for unjust enrichment depends on individual circumstances. Moore Handley, Inc. v. Major Realty Corp., 340 So. 2d 1238, 1239 (Fla. 4th DCA 1976) ("[e]verything depends on the **circumstances of the individual case** and whether or not the pleader has alleged facts which show that an injustice would occur if money were not refunded").

The defenses of voluntary payment, waiver, and estoppel must also be evaluated on an individual basis. A. 29-33; see Pacific Mutual Life v. McCaskill, 170 So. 579, 583 (Fla. 1936) (whether payment is voluntary or involuntary must depend upon **its own peculiar facts** . . . the real and ultimate fact to be determined in the context of the voluntary payment defense is whether the party really had a choice); Taylor v. Kenco Chemical & Mfg. Corp., 465 So. 2d 581 (Fla. 1st DCA 1985) (waiver and estoppel depend on individual circumstances, including acts or conduct); Lalow v. Codomo, 101 So. 2d 390 (Fla. 1958) (particular circumstances supported inference of voluntary payment). In North Shore Medical Center, Inc. v. Angrand, 527 So. 2d 246 (Fla. 3d DCA 1988), the Third District specifically held that a hospital patient who failed to object to the reasonableness of charges upon receipt of a bill was later estopped from challenging the charges in a collection action. Thus, inquiry into whether or not each individual objected to the reasonableness of charges upon receipt of the bill is necessary to any determination of liability. See also Interior Design Concepts v. Curtin, 473 So. 2d 1374 (Fla. 1st DCA 1985) (partial payment established an acceptable hourly billing rate).

Although in City of Miami v. Keton, 115 So. 2d 547 (Fla. 1959), the Court certified a class of people who had paid traffic fines for violation of city traffic ordinances, that case is distinguishable. In Keton, there was no evidence of individual circumstances affecting knowledge or liability. 115 So. 2d at 551. In the present case, the evidence demonstrates that each class member's claim turns on the circumstances surrounding his or her choice of hospital, level of knowledge, and voluntariness of payment.

When liability depends on individual circumstances, certification is error. In K. D. Lewis Enterprises Corp. v. Smith, 445 So. 2d 1032, 1034 (Fla. 5th DCA 1984), the court ruled that certification was improper in a landlord/tenant case alleging breach of implied covenants when "substantially variable facts" gave rise to individual issues determinative of liability. See Mathieson v. General Motors Corp., 529 So. 2d 761, 762 (Fla. 3d DCA 1988) (class certification was inappropriate for claims of economic loss in automobile warranty case which involved "different facts and circumstances"); Southern Bell Tel. & Tel. Co. v. Wilson, 305 So. 2d 302, 305 (Fla. 3d DCA 1975), cert. discharged, 327 So. 2d 220 (Fla. 1976) (class could not be certified in an action seeking damages for the interruption of telephone service when court would have to inquire into each putative class member's factual circumstances in order to determine whether a claim existed); Kerr v. City of West Palm Beach, 875 F.2d 1546 (11th Cir. 1989) (determinations of reasonableness must be made in light of individual

circumstances and such suits are especially unsuited to class disposition).

Courts that have dealt with actions involving medical bills or charges have recognized that the presence of individual circumstances affecting liability precludes certification. In a purported class action of patients against a hospital, a case which Judge Lazzara considered to be "factually analogous," the Court of Appeals of Georgia determined that because of varying individual circumstances a class should not be certified. A. 40-41. Winfrey v. Southwest Community Hosp. Inc., 361 S.E.2d 522, 523 (Ga. Ct. App. 1987). As the Winfrey court noted:

> [D]efendant's liability to the proposed class can be determined only by first ascertaining the status of each individual patient's account and, if an overpayment is found, by then determining the amount of overpayment and the person . . . to whom a refund is owing. "Where the resolution of individual questions plays such an integral part in the determination of liability, a class action suit is inappropriate." Id. at 523, quoting Tanner v. Brasher, 326 S.E.2d 218 (Ga. 1985).

Similarly, the court in Ralph v. American Family Mut. Ins. Co., 835 S.W.2d 522 (Mo. Ct. App. 1992), specifically recognized that reasonableness of medical charges must be individually determined. In Ralph, an insured brought an action challenging an insurance policy setoff of benefits by amounts received under uninsured motorist coverage for medical treatment. The court held that factual issues related to the amount of medical treatment, whether treatment was necessary, and the **reasonableness** of the charges, "are **specific to the individual claimant**, not common to

the class." Id. at 524 (emphasis added); see also Harrigan v. United States, 63 F.R.D. 402, 405 (E.D. Pa. 1974) (questions relating to patients' knowledge and informed consent would have to be determined on the basis of the facts in each individual case thus precluding predominance of common questions of fact or law).

For the same reasons the plaintiffs cannot meet the commonality or predominance of common questions requirements, they cannot establish that the typicality requirement under Rule 1.220 has been met. See, e.g., Love v. Turlington, 733 F.2d 1562 (11th Cir. 1984) (in an action challenging constitutionality of a basic skills test administered to students, the court held typicality was absent where findings of diploma eligibility were made on an individual basis, not merely on basis of passage of test); Merrill v. Southern Methodist Univ., 806 F.2d 600 (5th Cir. 1986) (typicality was absent in discrimination action where denial of tenure turned on unique facts regarding quality of teaching, substance of publications, and range of service to the university; court noted that the class action "would have quickly disintegrated into a plethora of individual claims"); Churchill v. International Business Machs., Inc., 759 F. Supp. 1089 (D.N.J. 1991) (holding that plaintiff could not establish typicality where employers' salary decisions were made on a highly individualized basis and there was no evidence of a common discriminatory practice).

In the present case, the individual claims of Pimental and Blanton do not each arise from the same set of circumstances nor from the same circumstances as the individual claims of other class

members. For instance, in determining if the hospital is liable to Blanton for any alleged overcharge based on "imposition," a jury would be entitled to consider the fact that Blanton knew he could get an estimate at other hospitals, thought Brandon Hospital's charges were high, chose to go there anyway, and then voluntarily paid the bill after discussing the charges with his insurance company and the HCCB. Pimental, on the other hand, went to the hospital under very different conditions with a different level of knowledge, and refused to pay the bill. These two cases demonstrate the widely varying circumstances that have a direct effect on any evaluation of liability and defenses.

How could a jury's decision in this case be binding on all class members when the jury could decide one way for Pimental and the other way for Blanton? The fact that Pimental and Blanton have such different circumstances demonstrates why this case is not a valid class action.

E. Alternatively, Because A Class Action Would Be Unmanageable, The Plaintiffs Have Failed To Establish That A Class Action Is Superior Under Rule 1.220(b)(3).

Many courts have found that, although the other requirements of the rule have been met, the class action device would not be a superior method for disposing of the claims because the individual factual determinations necessary would render the action unmanageable. See Walsh v. Ford Motor Co., 130 F.R.D. 260 (D.D.C. 1990) (class action was not superior means of obtaining fair and just adjudication of suit against automobile manufacturer for allegedly defective automatic transmissions; factual disputes over four

engine systems consisting of 23 or more component configurations employed in at least 17 different models over five or six years would overwhelm court); Jackshaw Pontiac, Inc. v. Cleveland Press Publishing Co., 102 F.R.D. 183, 189-90 (N.D. Ohio 1984) (different advertising rates, each of which depended on a range of factors, precluded certification); Windham v. American Brands, Inc., 565 F.2d 59, 66-67 (4th Cir. 1977), cert. denied, 435 U.S. 968, 98 S. Ct. 1605 (1978) (damages could not be proved by any set method of mathematical or formula calculation but would require individual proof and trial); Krehl v. Baskin-Robbins Ice Cream Co., 78 F.R.D. 108 (C.D. Cal. 1978) (proof of damage would be so individualized and complex that it rendered the case unmanageable as a class action). The Second Circuit, in Abrams v. Interco Inc., 719 F.2d 23 (2d Cir. 1983), likewise refused to certify a class in a private antitrust action against a shoe manufacturer because proof of damages rendered the action unmanageable. "Each member of the class would be entitled not to a refund of three times what he or she paid but rather three times the amount by which such payment exceeded the prices that would have prevailed in a free market. **Such determination would be complicated by the scores of different products involved, varying local market conditions, [and] fluctuations over time** . . . ." Id. at 31 (emphasis added).

The evidence here is unrefuted that there is no common mark-up formula that applied to the 7,000 items being challenged and that the great majority of the items do not bear a particular relationship to direct cost. A. 309-16; 464-65. Charges have changed

periodically over the past five years, necessitating a reconstruction of cost and price information for each item at each point in time during the past five years. A. 310; 464-65. The testimony of Dr. Hugh Long established that any determination of a "reasonable" price or mark-up could not be made based on categories of items, but would have to be done virtually item by item because of the various costs associated with delivery of that item to a patient (e.g. certain drugs require refrigeration; other drugs require greater safety precautions). A. 244-45. Thus, a jury would have to consider testimony and evidence on all of the various factors associated with pricing each drug, supply item, and lab test. Clearly, such a task would overwhelm a jury and negate any perceived judicial economy. It is this fundamental determination of **liability** for alleged overcharges with respect to every item, not the mere calculation and distribution of damages, which renders a class action in this case unmanageable by any court, whether county or circuit.

In addition, plaintiffs would have the Court believe that unless there is a class action in this case, none of the individuals would have a sufficient economic motivation to sue individually. However, these individual plaintiffs have claims which may be for hundreds or even thousands of dollars. This is not a case in which recovery, if plaintiffs prevail, would be only for a few dollars each. There should certainly be a sufficient incentive in this case to sue individually in county court. Otherwise, there would be no reason for the county court system, since it is

designed to deal with claims for hundreds or a few thousand dollars. County court is ideally suited to deal with these issues. City & County of San Francisco v. Small Claims Division, Municipal Court, 141 Cal. App. 3d 470 (1983).

III. THE EXISTENCE OF SUBSTANTIAL CONFLICTS AMONG PURPORTED CLASS MEMBERS PRECLUDES CERTIFICATION.

Conflicts within the class preclude certification. Dade County Police Benevolent Ass'n, Inc. v. Metropolitan Dade County, 452 So. 2d 6 (Fla. 3d DCA 1984). In Dade County, employees alleged that Dade County and the four insurance companies that underwrote the county's health, life, and accidental death insurance plans engaged in a scheme in which they overcharged those who participated in the life and accidental death plans. Excess premiums from these plans allegedly subsidized the group health insurance premiums. The Third District held that the class should not be certified because there was a **potential** conflict of interest among its members. Id. at 9. The court reasoned that some of the members of the class of subscribers to life and accidental death plans might very well have also participated in the health insurance plan and consequently may have **benefitted** from the transfer of premiums to the group health insurance program. Id. The different economic interests of class members created a conflict which weighed in favor of denial of certification. See also Phillips v. Klassen, 502 F.2d 362 (D.C. Cir.), cert. denied, 419 U.S. 996, 42 L. Ed. 2d 269, 95 S. Ct. 309 (1974) (because the action challenged by the plaintiffs could be construed as confer-

ring economic benefits or working economic harm depending on the circumstances, the named plaintiffs could not adequately represent the interests of the entire class).

Plaintiffs **in this case** have asserted that the hospital has "overcharged" them for ancillary items, such as drugs, supplies, and lab tests, in part to subsidize lower room rates and "daily" charges. Report of Beverly C. Moore, Jr. Regarding Class Certification, included in plaintiffs' Appendix to their Answer Brief in the Second District. The hospital, through the testimony of Dr. Hugh Long, attempted to introduce evidence that class members who received fewer drugs, supplies, and tests but who had longer stays in the hospital have benefitted from lower room rates and other daily charges. A. 225-39. However, the trial court excluded the testimony.[6] A. 235-239. Dr. Long's proffered testimony demonstrated that because certain class members have benefitted from the very practice plaintiffs are attacking, there is a substantial conflict within the proposed class, precluding certification. See Dade County, 452 So. 2d at 9. Furthermore, these same class members would be disadvantaged if the charges for room rates and other daily services had to be increased to make up

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[6] The trial court also excluded evidence, in the form of testimony from Dr. Hugh Long, of the public policy concerns of a potential class action. A. 250-62. That is, both the federal government and the State of Florida require hospitals to provide services to certain groups of patients at charges or negotiated rates less than the hospital's standard charges. The plaintiffs in this case claim that this disparity in rates is unfair. Thus, the basis for what the plaintiffs are complaining about (that class members pay more for services than other groups) is mandated by law.

for credits, refunds, or losses of revenue from drugs, supplies, and laboratory tests. A. 225-39. Thus, the circuit court excluded evidence relevant to any determination of class certification. Such evidence would have established conflicts within the class sufficient to preclude certification.

Conflicts within the class over the relative economic benefit of the challenged conduct or relief sought are sufficient to deny certification. City of Chicago v. General Motors Corp., 332 F. Supp. 285 (N.D. Ill. 1971), aff'd, 467 F.2d 1262 (7th Cir. 1972) (conflicts existed in action by city alleging defendants manufactured motor vehicles which emitted dangerous contaminants which had injured the municipality because some members of class, i.e., dealerships, repair, service and gas stations, would be adversely affected by relief sought); Cutler v. Lewiston Daily Sun, 611 F. Supp. 746, 756 (D. Me. 1985) ("[t]he potentiality of antagonistic interests between [Sunday edition subscribers and daily newspaper subscribers] is itself sufficient ground to deny certification"); Bonser v. State, 605 F. Supp. 1227, 1235-1236 (D.N.J. 1985) (**potential for antagonism** between the interests of the Fund and certain of its members is sufficient to warrant denial of certification); Gibb v. Delta Drilling Co., 104 F.R.D. 59, 80 (N.D. Tex. 1984) ("[d]iverse and potentially conflicting interests within the class are incompatible with maintenance of a class action"); Gerlach v. Allstate Ins. Co., 338 F. Supp. 642 (S.D. Fla. 1972) (class action inappropriate where the relief sought might result in loss of coverage to some members of proposed class of policy-

holders); Blankenship v. Omaha Public Power Dist., 237 N.W.2d 86, 90 (Neb. 1976) (a rate increase might be required if a refund of improper charges were ordered differentially affecting customers residing in different areas). This Court should therefore reverse and remand for consideration of the excluded testimony concerning conflicts within the class.

CONCLUSION

Even though all putative class members had the same written contract with the hospital and all were charged prices listed on the hospital's chargemaster, there the similarity ends. Some were in-patients, while most were outpatients. Some were treated by the hospital only once and may not have had prior experience with the hospital's pricing structure, while approximately one half had been to the hospital at least once before and thus obviously had knowledge as to the hospital's prices. Some asked for pre-admission estimates, while others did not. Some selected the hospital well in advance and made an appointment for treatment, while others were admitted through the emergency room. Some were sophisticated about hospital charges, while others were not. Some paid their bills after asking many questions, while others paid with substantially less understanding.

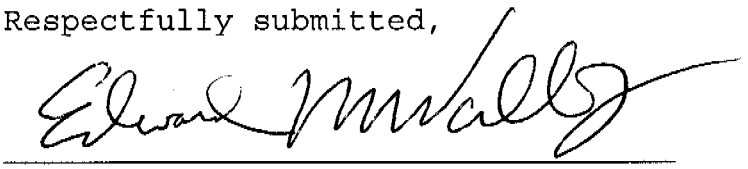
Just as the depositions of Blanton and Pimental revealed their individual circumstances relative to liability, so depositions of every individual claimant will be necessary. Further, only individual cross-examination of each putative class member at trial will reveal the facts necessary for the jury to determine liability. Only individual determinations of credibility for every single claimant will enable the jury to reach a conclusion as to each claimant's right to recovery.

Under these circumstances and given the unmanageability of trying to prove damages and given the conflicts within the

purported class, class certification in this case will not work, is not practical, and, simply put, does not make sense.

This Court should quash the opinion of the Second District because these claims may not be brought as a class action. In the event that this Court rules that evidence was erroneously excluded, this Court should reverse and remand for reconsideration.

Respectfully submitted,



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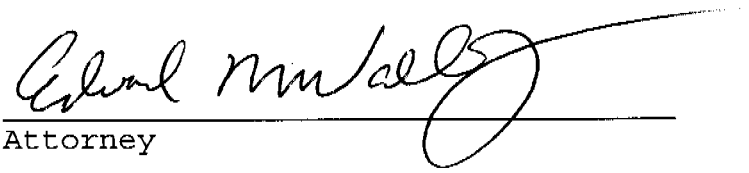
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a true and correct copy of the foregoing and appendix to be served by U.S. mail to Stephen A. Scott, Post Office Box 2218, Gainesville, FL 32602-2218 and Herbert T. Schwartz, Sullins, Johnston, Rohrbach & Magers, Suite 1200, 3701 Kirby Drive, Houston, TX 77098 this 20th day of June, 1994.



Attorney