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IN THE SUPREME COURT OF FLORIDA.

CASE NOS. 93,148 and 93, 195

DCA Nos. 98-1430 and 98-01747

Fla. Bar No. 137172

STATE OF FLORIDA, et al,

Appellants,

vs.

AMERICAN TOBACCO CO., et al,

Appellees.
_____/

BRIEF OF APPELLEE, THE LAW FIRM OF NANCE, CACCIATORE, SISSERSON, DURYEA & HAMILTON ON THE MERITS (CERTIFIED QUESTION)

GINSBERG & SCHWARTZ
410 Concord Building
66 West Flagler Street
Miami, Florida 33130
(305) 358-0427
Attorneys for Appellee NANCE

CERTIFICATE OF TYPE SIZE AND STYLE

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I.

INTRODUCTION

The appellee, the law firm of Nance, Cacciatore, Sisserson, Duryea & Hamilton ("NANCE"), along with several other private law firms, were retained by the State of Florida, under a written contract of employment, to bring a lawsuit against the tobacco industry. The state and the lawyers entered into a contingent fee contract that was specifically authorized by a Florida statute. In essence, the contract provided that if the lawyers achieved a recovery by settlement or judgment, the lawyers were to receive a 25 percent contingent fee (and reimbursement of their costs).

The parties directly involved in these consolidated proceedings are the State of Florida (to include the state, the Honorable Lawton M. Chiles, Jr., as governor of the State of Florida, and agencies of the State of Florida), several tobacco companies (which were sued by the State of Florida and with whom the state settled) and the private law firms which represented the state, interested herein as lienors by virtue of attorney charging liens filed in the instant action and directed at the recovered amounts. In this brief the parties will be referred as "THE STATE," "TOBACCO" and "THE LIENORS" and, where necessary for emphasis or clarification, by name. The symbols "A" and "SA" will refer to the appendix which

accompanied the state's initial brief filed in the Fourth District Court of Appeal [in Case No. 98-1430] and the supplemental appendix which accompanied the state's initial brief before this Court, respectively. All emphasis has been supplied by counsel unless indicated to the contrary.

II.

STATEMENT OF THE CASE AND FACTS

A.

PRELIMINARY OBSERVATIONS: THE CERTIFIED QUESTION AND THE ORDERS APPEALED.

The Fourth District Court of Appeal has certified to this Court, as a question of great public importance, the issue:

> ARE THE FUNDS DERIVED FROM THE TOBACCO SETTLEMENT SUBJECT TO DISBURSEMENT BY THE TRIAL COURT?

The Fourth District received this case on review of three orders entered by the trial court:

1. An order dated April 16, 1998, and entitled "Order Implementing Most Favored Nation Provision of Florida Settlement Agreement" (A. 1);

2. An order dated April 24, 1998, and entitled "Order on State of

Florida's Motion Requesting Stay of Court Order of April 16, 1998–Implementing Most Favored Nation Provision of Florida Settlement Agreement" (A. 2); and

3. An order dated May15, 1998, and entitled "Order Directing the Immediate Transfer of All Funds Into the Court's Registry" (SA. 1).

Comments regarding THE STATE'S characterization of the orders is reserved for the argument portion of this brief.

NANCE would comment briefly regarding the correctness vel non of the trial court's rulings. The trial court's order dated May 15, 1998, should be affirmed in all respects. The order was entered to protect the lawyers while the charging lien litigation was proceeding. The order should be approved for any one, and all, of the reasons advanced by NANCE in the argument portion of this brief.

As to the orders dated April 16, 1998, and April 24, 1998, it would appear that the trial court had no authority to enter the order over the objections of the State of Florida. NANCE is neither a signatory of, nor a party to, the written settlement agreement between the State of Florida and the tobacco industry. NANCE maintains his position that his charging lien is valid and he is entitled to recovery of his fee from the funds derived from the tobacco settlement.

The Fourth District, cognizant as it was of the many unresolved issues before it, saw the need to certify to this Court the stated issue. Given that the question certified was so phrased in the midst of on-going litigation between THE STATE, the tobacco industry and the private lawyers and at a time when the Fourth District (1) had already reinstated the attorney's fee liens and remanded the case for a hearing on, and resolution of , the very issues THE STATE suggests in its subject brief have already been determined, see: KERRIGAN, ESTES, RANKIN & McLEOD, ET AL v. STATE OF FLORIDA, ET AL, 711 So. 2d 1246 (Fla. App. 4th 1998), and (2) additionally had before it the question of whether the trial court could maintain jurisdiction over the settlement funds given the existence of Senate Bill 1270, Section 3, the question certified, although appearing to be quite broad, is in reality, quite narrow.

NANCE would suggest to this Court that it would appear that the Fourth District was impressed with the need to have this Court initially address the (sole) overriding issue, to wit: the constitutionality of Senate Bill 1270, Section 3, prior to having the underlying factual issues (to wit: contract rights, validity of lien, defenses to lien, novation, etc.) litigated. In this regard NANCE would note very little (if anything at all) has been factually determined in the trial court since this aspect of the litigation blossomed. Contrary to THE STATE'S factual assertions regarding the

apparently undisputed facts of this case, said facts remain very much in dispute and hotly contested. Indeed, such dispute provided the very foundation for the District Court's reversal of the order striking the liens in the first place:

> "We conclude that the trial court's order expressly granting the state's motion on a basis which was neither noticed nor litigated by the parties departed from the essential requirements of law because it denied petitioners (lienors) due process. An order denies due process if it adjudicates an issue that was not presented by the parties or the pleadings...Where an issue is not presented by pleading or litigated by parties during a hearing, a judgment based on that issue is voidable on appeal...(citations omitted)." 711 So. 2d at pages 1248 and 1249.

Consistent with the above NANCE herein wholeheartedly embraces the statements of the case and facts found in the briefs of NANCE'S co-appellees/co-lienors, the law firms of Kerrigan, Estes, Rankin & McLeod, Montgomery & Lamoyeaux, Sheldon J. Schlesinger, P.A., and Yerrid, Knopik & Mudano, P.A. The State of Florida's recitation of the facts deserves the detailed analysis and pointed responses made in the briefs of NANCE'S co-lienors. If anything, the responses were too kind!

B.

THE OPERATIVE AND UNDERLYING EVENTS

Consistent with his position that the certified question provides a very narrow inquiry, NANCE believes the following provides those facts necessary for this

Court to decide the subject issue:

1. NANCE (and his co-lienors) entered into a contingent fee contract with the State of Florida (A. 58).

2. The contract provided that the lawyers would receive compensation only if there were a recovery by settlement or judgment. The contract was premised upon the Medicaid Third Party Liability Act, Section 409.910(ff), Florida Statutes (1994). See also: KERRIGAN, ESTES, RANKIN & McLEOD v. STATE OF FLORIDA, 711 So. 2d at page 1246, footnote 1, supra.

3.The Medicaid Act empowered THE STATE to employ private attorneys to enforce its rights and expressly authorized contingent fee agreements in an amount up to 30 percent of the recovery. See: Section 409.910(15)(b), Florida Statutes (1994).

4. Litigation was undertaken. Approximately two years after the action was filed, THE STATE settled the monetary claims in direct negotiations with the tobacco defendants and their lawyers. See: KERRIGAN, ESTES, RANKIN &McLEOD, supra, 711 So. 2d at page 1247. The contingency occurred (A. 56, Exhibits 1 and 2). The attorneys' rights vested.

5. THE STATE refused to pay its lawyers. THE STATE contended (and still contends, the issue having not yet been resolved) that there had occurred a

"novation" and the fee contract between THE STATE and its lawyers was no longer operative (A. 53).

6. NANCE (and his co-lienors) filed his (their) lien(s) (A. 55, Exhibits 1-6).

7. The trial court quashed the attorney's fee liens (A. 46).

8. NANCE filed its motion for rehearing, clarification and reconsideration. The trial court entered its order denying same and noting that as to the grounds contained in the State of Florida's motion to quash charging liens:

> "The Court has simply not reached those arguments having decided the plaintiff's motion to quash after hearing on other grounds..."

9. NANCE and his co-lienors sought review in the Fourth District which court, after review of the record, reinstated the attorney's fee charging liens. See: KERRIGAN, ESTES, RANKIN & McLEOD, ET AL v. STATE OF FLORIDA, ET AL, supra, 711 So. 2d at page 1246.

10. Given the dispute which had arisen between the State of Florida and its private counsel over the fees, and with due regard for the charging liens, when the tobacco defendants made their initial payment pursuant to the settlement agreement, the funds were placed in escrow under the supervision of the trial court. See: (A. 52). There was no disagreement by THE STATE to the arrangement. In point of fact THE STATE agreed to the arrangement (A. 51 at page 61 of the transcript). Not

only did THE STATE agree to the arrangement but THE STATE did not appeal the order which allowed for an escrowing of the monies.

11. On February 3, 1998, the trial court entered an order designating the purposes for which the escrowed funds would be apportioned. One of the items specifically designated was an amount of money set aside for the attorney's fee liens (see: A. 35 at page 3, paragraph 3 of the order).

12. After the Florida settlement funds were placed in escrow the State of Texas also settled its litigation against the tobacco industry. Invoking the "most favored nation" provision of the Florida settlement agreement, the trial judge entered the first of the orders presently before this Court for review (A. 1). Among other things, the order gave the private attorneys an immediate payment of $50,000,000 from the escrowed proceeds and credited that amount against fees to be awarded in the future (A. 1 at pages 4 and 5). The trial court directed that any future settlement payments be paid directly into escrow and disbursed only upon court order (A. 1 at page 5).

13. Based on the anticipated passage by the Florida Legislature of an act which would prima facie appropriate all funds paid by the settling tobacco defendants (Senate Bill 1270, A. 59), THE STATE moved the trial court to stay the effect of the most favored nation order (see: A. 14). The trial court denied the stay.

This became the second order herein sought to be reviewed. The trial court stated:

> "The release of the escrow funds is solely conditioned upon further order of this court. Any terms of the escrow agreement otherwise inconsistent are hereby stricken." (A. 2)

Subsequent to the enactment of the Appropriations Act but prior to its effective date, the trial court entered what became the third order herein sought to be reviewed. In this order all remaining settlement funds were transferred from the private escrow account into the registry of the court (see: SA. 1). The trial court entered the order both to comply with an order of stay previously entered by the District Court of Appeal, Fourth District, and, as pertinent herein:

> "...To protect these funds from the application of recent legislation that may unconstitionally vacate the prior orders of this court, deny parties due process of law and impair contract..." (SA. 1)

14. The combined effect of the three orders now before this Court is that 187.5 million dollars (plus interest accrued thereon), an amount equal to the private attorneys' 25 percent contingent share of the initial $750,000,000 paid (pursuant to the settlement agreement) by the tobacco defendants, has been placed in the registry of the court for safe keeping and $50,000,000 has been ordered disbursed as a partial payment of attorney's fees. Although ordered disbursed, the money has not been paid.

15. THE STATE appealed the entry of the three orders to the Fourth District

which court, after consolidation, utilizing the provisions of Florida Rule of Appellate Procedure 9.125 and having considered motions and responses directed to the issue, certified to this Court the subject question.

NANCE reserves the right to argue the significance of the above facts and other relevant record facts in the argument portion of this brief.

III.

QUESTION PRESENTED

The District Court of Appeal, Fourth District, certified to this Court as a question of great public importance, the following:

> ARE THE FUNDS DERIVED FROM THE TOBACCO SETTLEMENT SUBJECT TO DISBURSEMENT BY THE TRIAL COURT?

IV.

SUMMARY OF ARGUMENT

The question certified to this Court by the District Court of Appeal, Fourth District, should be answered in the affirmative. The funds derived from the tobacco settlement are subject to disbursement by the trial court. NANCE reaches this conclusion upon the following analysis:

A. THE STATE, although obviously a sovereign, is, under the facts of this case, a mere litigant, with rights no greater than any other litigant who has entered

into a contract. Under present Florida law and practice where the state has entered into a contract fairly authorized by the powers granted by general law, the defense of sovereign immunity will not protect the state from action arising from the state's breach of that contract.

B. As THE STATE, under the facts of this case, possessed no sovereign immunity and was to be treated as any other litigant who has (arguably) breached its contract and failed to honor the obligations taken thereunder, THE STATE'S private counsel were entitled to assert a claim for remuneration as a consequence of THE STATE'S (alleged) breach of contract.

C. NANCE had a lawful right to sue for breach of contract. However, under well settled principles of Florida law, he also had available to him the equitable remedy of a charging lien. A charging lien is an equitable right to have costs and fees due an attorney for services in the suit secured to him in the judgment or recovery in that particular suit. Each and every element necessary for the existence of a charging lien exists herein.

D. Charging liens have been recognized in Florida for more than a century. The lien is equitable in nature. Judicially created–an attorney's charging lien is founded upon the equitable notion that an attorney ought to receive his fees and disbursements out of the recovery or judgment that he has obtained. Given its

characteristics and history, it may be concluded that a charging lien is purely a creation of the courts.

E. The Florida Constitution guarantees a "separation of powers." It specifically provides that no person belonging to one branch (of government) shall exercise any powers appertaining to either of the other branches unless otherwise expressly provided for. Given the Florida Constitution and the numerous Florida authorities construing same, it may be concluded that legislation which hampers judicial action or interferes with the discharge of judicial functions is unconstitutional.

F. Any legislative enactment purporting to "appropriate" or "claim title to funds" otherwise subject to a valid judicially created charging lien is prima facie invalid.

G. Likewise, the legislative enactment at issue herein is constitutionally infirm for the additional reason that it impairs the obligation of NANCE'S long-standing contract with the State of Florida.

H. Lastly, it should be reminded that the settlement proceeds herein involved are <u>not</u> "state funds" within the contemplation of any aspect of Florida law. This is so for two separate and distinct reasons:

1. Under well established principles of Florida jurisprudence

monies purportedly due and owing the state are not subject to legislative appropriation until they are placed into the state treasury.

2. The subject settlement funds are not "state funds" given that at all times pertinent they were funds in escrow! They were placed in escrow, under judicial control, as a consequence of the attorneys' charging liens. Given that the funds remained, at all times pertinent, in escrow, it cannot be concluded that the monies became "THE STATE'S" under the circumstances presented herein.

V.

ARGUMENT

THE FUNDS DERIVED FROM THE TOBACCO SETTLEMENT ARE SUBJECT TO DISBURSEMENT BY THE TRIAL COURT.

A.

NANCE would suggest to this Court that the question certified should be answered in the affirmative, to wit: the funds derived from the tobacco settlement are subject to disbursement by the trial court. NANCE would further suggest that an affirmative answer to the question would allow for a remand so that the underlying determinative issues such as basic contract rights, contractual defenses and alleged fee excessiveness can be initially addressed with all due process protections in

place. Issues regarding the validity of the liens are not before this Court. See: KERRIGAN, ETC., ET AL, supra.

NANCE believes as stated, supra, that the question certified, although appearing to be quite broad, is, in reality, quite narrow. THE STATE attempts to broaden the question certified by suggesting:

> "The crux of these consolidated appeals is the right, if any, of the various PTA lawyers to lien, freeze, ransom and otherwise demand state funds for payment of their claimed multi-billion dollar fee, absent legislative appropriation, and absent any determination such fee is owed. Here, the trial court has permitted PTA lawyers, acting individually, contrary to the requirements of the PTA joint venture, and often times at odds with other PTA lawyers, to dominate and control the proceedings below, materially prejudicing the state (their client), and jeopardizing the state's settlement agreement. The PTA lawyers have acted, and continue to act, contrary to their client's best interests, while unwilling to test the reasonableness of their claimed multi-billion dollar by arbitration or alleged breach of contract claim." See: brief of THE STATE, at pages 18 and 19.

NANCE would note the arguments advanced by THE STATE go far beyond what is actually necessary to answer the question certified. In point of fact THE STATE'S arguments are based upon many disputed matters of fact which, as to this point in time, have not yet been resolved. See: KERRIGAN, ETC., ET AL, supra, 711 So. 2d at page 1249.

Likewise, THE STATE'S arguments regarding what issues are before this Court only highlight THE STATE'S inability (unwillingness?) to perceive a

fundamental tenet of Florida law, to wit: the right of an attorney to pursue his client for fees earned in connection with services performed in litigation may be claimed either in an action at law (on the contract) or by equitable enforcement of a charging lien filed in the proceeding in which it arises. See: SINCLAIR, LOUIS, SIEGEL, HEATH, ETC. v. BAUCOM, 428 So. 2d 1383 (Fla. 1983).

At page 19 of its brief THE STATE asserts:

> "The PTA lawyers have acted, and continue to act, contrary to their client's best interests, while unwilling to test the reasonableness of their claimed multi-billion dollar fee by arbitration or alleged breach of contract claim."

The private counsel filed their liens in lieu of a contract action and invited a full, fair and complete hearing as to all issues which could fairly be raised as a result of the dispute over the fees. The trial court, on its own, without affording the lienors even a modicum of due process, struck their liens and sent this litigation into a tailspin. Not until the Fourth District reinstated the liens, see: KERRIGAN, ETC., ET AL, supra, could the central issue involving the fees even begin to be addressed. Although factual issues regarding the fee dispute are not before this Court, THE STATE seeks to pick up in this proceeding by asserting as fact what are merely (its) contentions. Such tactics should not be tolerated. This matter should proceed in an orderly fashion.

THE STATE'S suggestion that it is the lienors who were unwilling to test either in arbitration or in the courts the reasonableness of their claims is totally unfair and entirely misleading. The attorneys' charging liens provided a proper and lawful vehicle to test all disputed issues. The unfairness of the argument is equally matched by THE STATE'S obdurate refusal to properly view the facts of this case and in its attempt to establish that the lienors have done something wrong by seeking to enforce their liens. In truth there is simply no record evidence for most of what THE STATE contends as it relates to the lienors' actions in general and to this lienor in particular! While NANCE questions the motives of THE STATE in not paying pursuant to the contract, he will not engage THE STATE in the type of mud-slinging found in THE STATE'S statement of the case and facts. The District Court of Appeal, Fourth District posed a question. It will be addressed directly and consistent with the record as it exists.

B.

The funds derived from the tobacco settlement are subject to disbursement by the trial court. NANCE reaches this conclusion upon the following analysis:

1. THE STATE, although obviously a sovereign, is, under the facts of this case, a mere litigant, with rights no greater than any other litigant who has entered into a contract. This issue was put to rest in PAN-AM TOBACCO CORP. v.

DEPARTMENT OF CORRECTIONS, 471 So. 2d 4 (Fla. 1985), where in language dispositive herein, this Court stated:

> "Where the Legislature has, by general law, authorized entities of the state to enter into contract or to undertake those activities which, as a matter of practicality, require entering into contract, the Legislature has clearly intended that such contracts be valid and binding on both parties. As a matter of law, the state must be obligated to the private citizen or the legislative authorization for such action is void and meaningless. We, therefore, hold that where the state has entered into a contract fairly authorized by the powers granted by general law, the defense of sovereign immunity will not protect the state from action arising from the state's breach of that contract..." 471 So. 2d at page 5.

In accord: COUNTY OF BREVARD v. MIORELLI ENGINEERING, INC., 703 So. 2d 1049 (Fla. 1997).

Although at all times a sovereign, THE STATE is not immune. Section 409.910(ff), F.S. (1994) authorized THE STATE to enter into a contingent fee contract with private counsel. Attachment 1 to the employment contract specifically acknowledges:

> "This is a contract for legal services pursuant to Section 409.910, Florida Statutes, to recoup Medicaid monies from liable third parties whose tobacco products may or did cause tobacco related illnesses of Medicaid recipients and to the extent that Medicaid monies had been and will be provided for the medical care of said persons.
>
> "For reasons generally discussed below, the recovery of these monies cannot physically or economically be accomplished by attorneys working for the State of Florida and pursuant to Section

287.057(3)(f)5, the legal services contracted for herein are not subject to competitive sealed bid requirements. The contingency method of payments set forth in this contract are pursuant to Section 409.910(15), Florida Statutes." (A. 58 at attachment 1.)

The contract further provides:

"The state and the providers have agreed upon a fee of twenty-five percent of the recovery, plus out-of-pocket costs incurred by the provider to the extent the recovery meets or exceeds the total costs, with a contribution being committed by the tobacco team lawyers toward health-related charities and organizations..." (A. 58 at page 10.)

The facts and circumstances of this case fall squarely within this Court's opinion in PAN AM TOBACCO CORP., supra. THE STATE is not possessed of sovereign immunity.

2. Given that THE STATE is not, under the facts of this case, possessed of sovereign immunity and, with full recognition that the contract between THE STATE and its counsel is to be treated as any other contractual relationship, one may next ask: Were the lawyers required to institute an action for breach of contract or were they authorized to proceed in the manner selected?

NANCE had a lawful right to sue for breach of contract. However, in SINCLAIR, ETC., supra, 428 So. 2d 1383, this Court, speaking to the issue of charging liens, stated:

"The policy underlying the granting and enforcement of charging liens was clearly expressed early in their development in this state:

> "'While our courts hold the members of the Bar to strict accountability and fidelity to their clients, they should afford them protection and every facility in securing them their remuneration for their services. An attorney has a right to be remunerated out of the results of his industry, and his lien on these fruits is founded in equity and justice.'
>
> (Citation omitted). The intervening years have not diminished the attorney's duty of loyalty and confidentiality to his client. For this reason, proceedings at law between attorney and client for collection of fees have long been disfavored. The equitable enforcement of charging liens in the proceeding in which they arise best serves to protect the attorney's right to payment for services rendered while protecting the confidential nature of the attorney-client relationship (citation omitted)." 428 So. 2d at page 1385.

As there exists no sovereign immunity available to THE STATE under the circumstances of this case and further, as "proceedings at law between attorney and client for collection of fees have long been disfavored," SINCLAIR, 428 So. 2d at page 1385, there would appear to be no impediment to, in fact public policy would favor, resolution of the contract dispute in the action in which the dispute arose (even where, as here, one of the litigants is THE STATE). See: SINCLAIR, 428 So. 2d at page 1385, supra.

3. A charging lien is an equitable right to have costs and fees due an attorney for services in the suit secured to him in the judgment or recovery in that particular suit. It serves to protect the rights of the attorney. As this Court noted in

SINCLAIR, supra:

> "...Charging liens have been recognized in Florida for more than a century (citation omitted). The requirements for perfection of this lien are not statutorily imposed (citations omitted). Rather, the requirements have developed in case law which has delineated the equitable nature of the lien (citation omitted).
>
> "In order for a charging lien to be imposed, there must first be a contract between the attorney and the client (citation omitted). The contract may be express...or implied...
>
> "There must also be an understanding, express or implied, between the parties that the payment is either dependent upon recovery or that payment will come from the recovery (citations omitted)...
>
> * * *
>
> "Finally, the remedy is available where there has been an attempt to avoid the payment of fees...or a dispute as to the amount involved..." 428 So. 2d at pages 1384 and 1385.

In accord: IN RE: WARNER'S ESTATE, 35 So. 2d 196 (Fla. 1948) and LITMAN v. FINE, JACOBSON, SCHWARTZ, NASH, BLOCK & ENGLAND, P.A., 517 So. 2d 88 (Fla. App. 3d 1987).

Each one of the requirements for the creation of a charging lien prima facie exists under the facts of this case. The record before this Court establishes the existence of a written, express contract between the lienors and the State of Florida. The contract entered into between the parties specifically and undeniably acknowledges the contingent nature of the fee structure (as does the enabling statute which authorized the subject contract in the first instance), the contract

provides that payment to the attorney is dependent upon recovery and further that such payment will come from the recovery (see: SINCLAIR, supra, and MILLER v. SCOBIE, 11 So. 2d 892 (Fla. 1943). As to the last element, to wit: the remedy is available where there has been an attempt to avoid the payment of fees, NANCE does not believe any comment need be made.

4. As this Court recognized in SINCLAIR, supra, charging liens have been recognized in Florida for more than a century. A charging lien is an equitable right to have costs and fees due an attorney for services in a suit secured to him in the judgment or recovery in that particular suit. The lien is equitable in nature. The lien is protected in equity! See: NICHOLS v. KROELINGER, 46 So. 2d 722 (Fla. 1950) and LITMAN v. FINE, JACOBSON, SCHWARTZ, ETC., 517 So. 2d 88, supra.

Judicially created an attorney's charging lien is founded upon the equitable notion that an attorney ought to receive his fees and disbursements out of the judgment he has obtained. See: SINCLAIR, supra:

> "The charging lien is an equitable right to have costs and fees due an attorney for services in this suit secured to him in the judgment or recovery in that particular suit..." 428 So. 2d at page 1384.

In accord: NICHOLS v. KROELINGER, supra:

> "...When affirmative action is necessary, equity is generally considered the proper forum. If the product of the litigation is in the hands of the court, the latter may on application of the attorney, enter

an order directing payment of the fee..." 46 So. 2d at page 724.

Given its characteristics and history, it may be concluded that a charging lien is purely a creation of the courts. Its vitality, effect and enforcement are purely within the judicial branch of the government. See: SINCLAIR, supra, and cases cited therein.

5. Relevant herein is Fla. Const. Art. II, Section 3, "Branches of Government." Said section provides:

> "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided therein."

In WHITE v. JOHNSON, 59 So. 2d 532 (Fla. 1952) this court held, in language dispositive herein:

> "...It is too well established to require citation of authority that under our form of government providing for three discrete branches thereof–the executive, the legislative and the judicial–no one of them has the right to invade the sphere of operation of either of the others..." 59 So. 2d at page 534.

In accord: CHILES v. CHILDREN A, B, C, D, E AND F, 589 So. 2d 260 (Fla. 1991) and PEPPER v. PEPPER, 66 So. 2d 280 (Fla. 1953).

Given the well settled principles of law applicable to issues arising from the "doctrine of separation of powers," it may be concluded legislation which hampers

judicial action or interferes with the discharge of judicial functions is unconstitutional. In point of fact this Court so held in SIMMONS v. STATE, 36 So. 2d 207 (Fla. 1948):

> "The preservation of the inherent powers of the three branches of government–legislative, executive, and judicial–free from encroachment or infringement by one upon the other, is essential to the safekeeping of the American system of constitutional rule..." 36 So. 2d at page 208.

In accord: CHILES, 589 So. 2d 260, supra, and WALKER v. BENTLEY, 660 So. 2d 313 (Fla. App. 2d 1995), approved, WALKER v. BENTLEY, 678 So. 2d 1265 (Fla. 1996).

NANCE would respectfully suggest to this Court any legislative enactment purporting to "appropriate" or "claim title to" funds "subject to" a valid judicially created charging lien is prima facie invalid. Resolution of any issue regarding entitlement to the funds must be pursued in the courts and, especially as here, in the very lawsuit wherein the liens have been filed. For this reason alone the subject "Appropriations Act" should be held constitutionally infirm.

Consistent with, and pursuant to, the Florida Medicaid Act NANCE (and his co-lienors) contracted with the State of Florida to receive 25 percent of any amount recovered from the tobacco litigation. Long after the contingency occurred and the contract rights vested, the State of Florida attempted to legislate away vested

contract rights. Senate Bill 1270, Section 3, is constitutionally infirm in its attempts to impair the obligations of a valid contract. See: CHILES v. UNITED FACULTY OF FLORIDA, 615 So. 2d 671 (Fla. 1993):

> "The Legislature has only a very severely limited authority to change the law to eliminate a contractual obligation it has itself created..." 615 So. 2d at page 673.

To the extent that NANCE'S co-lienors challenge the subject Appropriations Act on other constitutional grounds, their arguments are adopted as if set out in full herein.

6. The funds which form the basis for this litigation, although generically referred to throughout as "state funds" [given the settlement between the State of Florida and the tobacco industry, such reference is easy to make] are not "state funds" within the contemplation of any aspect of Florida law. This is so for two separate and distinct reasons.

First, under well established principles of Florida jurisprudence, see: STATE v. ALLEN, 91 So. 104 (Fla. 1922), STATE v. LEE, 163 So. 859 (Fla. 1935), LEE v. DOWDA, 19 So. 2d 570 (Fla. 1944) and REPUBLICAN PARTY OF FLORIDA v. SMITH, 638 So. 2d 26 (Fla. 1994), monies purportedly due and owing THE STATE are not subject to legislative appropriation until they are placed <u>into</u> the state treasury:

"...An appropriation bill is one the primary and specific aim of which is to make appropriations of money from the public treasury..." 638 So. 2d at page 28.

While an exception exists to the general rule for monies expected from taxes, the Florida rule regarding appropriations may be stated as follows:

"The object of a constitutional provision requiring an appropriation made by law as the authority to withdraw money from the state treasury is to prevent the expenditure of the public funds already in the treasury...without the consent of the public given by their representatives in formal legislative acts..." 163 So. at page 168.

In STATE v. LEE, this Court noted:

"An appropriation, being merely a setting apart of money to meet an object designed to be paid for out of it, but which may never be actually paid, necessarily contemplates that the revenues accruing in the treasury to enable it to be paid may be marshaled and disbursed for the discharge of some other cognate appropriation, the object of which shall require an actual disbursement of monies to discharge it..." 163 So. at page 869.

Applying the above principles of law to the facts and circumstances of the instant cause, it may be concluded that what has been enacted is a legislative attempt at confiscation and not appropriation! The subject funds were never placed into the state treasury. The subject legislative enactment is unconstitutional.

Recently, in a case directly on point, the Maryland Court of Appeals rejected the very argument concerning "state funds" advanced herein. See: PHILIP MORRIS, INC. v. GLENDENING, 709 A. 2d 1230 (Md. 1998):

> "The gross recovery from the tobacco litigation is not 'state' or 'public' money subject to legislative appropriation until the state has fulfilled its obligation under the contract, collected the recovery, net of the contingency fee and litigation expenses, and deposited the funds into the state treasury..." 709 A. 2d at page 1241.

It may therefore be concluded, for these reasons alone, that the monies which presently pend under the jurisdiction of the trial court are not "state funds."

Second, it should also be noted that the subject monies are not "state funds" given that at all times pertinent they were funds in escrow! They were placed in escrow, under judicial control, as a consequence of the attorneys' charging liens. The entire purpose of placing monies into an escrow account is to place the funds into the hands of a third person until the occurrence of a certain event and then to deliver them out of escrow on the happening of that event, see: ZELL v. COBB, 566 So. 2d 806 (Fla. App. 3d 1990) and cases cited thereat. While NANCE understands and appreciates THE STATE'S arguments in this regard, NANCE could well argue the converse.

The Florida Medicaid Third Party Liability Act, Section 409.910(ff), Florida Statutes (1994), created a cause of action against the tobacco industry and authorized THE STATE to hire private counsel to prosecute the action. The Act approved a contingent fee of up to 30 percent of the amount actually collected to be given to the attorneys as a fee for services performed. The issue regarding

"appropriation" is a two-sided coin. Counsel's fees were "appropriated" for them long before the subject dispute arose.

In REPUBLICAN PARTY OF FLORIDA v. SMITH, supra, this Court recognized that acts of substantive law may contain an appropriation and this is so even if the appropriation is not specifically designated as such. Given THE STATE'S suggestion that the private attorneys' contingent fee had to be "appropriated," it may be noted such event occurred long prior to the subject dispute, at a time when the parties initially entered into their statutorily authorized contingent fee agreement. However, the subject issue need not be reached given that THE STATE is possessed of no sovereign immunity under the circumstances presented herein. See, generally: CITY OF CORAL GABLES v. STATE, ET AL, 176 So. 40 (Fla. 1937).

C.

As NANCE initially indicated, the District Court of Appeal, Fourth District, posed a question and it was NANCE'S intention to address it directly and consistent with the record as it presently exists. This has been done. The funds derived from the tobacco settlement are (and should be) subject to disbursement by the trial court. THE STATE is not possessed of sovereign immunity under the facts and circumstances of this case. THE STATE'S refusal to honor its contract with private

counsel justifiably warranted the filing of the charging liens. The liens, being creatures of the judiciary, cannot be impaired, affected, resolved or diminished by acts of the Florida Legislature. To the extent that the Legislature has acted, the enactment is constitutionally infirm. The certified question should be answered in the affirmative and the trial court's order dated May 15, 1998, should be affirmed in all respects.

VI.

CONCLUSION

Based upon the foregoing reasons and citations of authority, NANCE would respectfully urge this Court to answer the question certified in the affirmative, to approve the trial court's order dated May 15, 1998, and to reverse the orders dated April 16, 1998, and April 24, 1998, in that the trial court had no authority to enter the order over the objections of the State of Florida.

Respectfully submitted,

GINSBERG & SCHWARTZ
410 Concord Building
66 West Flagler Street
Miami, Florida 33130
(305) 358-0427
Attorneys for Appellee NANCE

By: _____
Arnold R. Ginsberg

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Brief of Appellee was mailed to the counsel of record on the attached Service List this 20th day of August, 1998.

_____
Arnold R. Ginsberg

SERVICE LIST

CAROL A. LICKO, ESQ.
Thomson, Muraro, Razook & Hart, P.A.
One S.E. Third Avenue #1700
Miami, Florida 33131

MURRAY R. GARNICK, ESQ.
Arnold & Porter
555 12th Street, N.W.
Washington, D.C. 20004-1202

STEPHEN J. KRIGBAUM, ESQ.
Carlton, Fields, Ward et al
P. O. Box 150
West Palm Beach, Florida 33402

WAYNE HOGAN, ESQ.
Brown, Terrell, Hogan, et al
804 Blackstone Building
233 East Bay Street
Jacksonville, Florida 32202

WILLIAM C. GENTRY, ESQ.
Gentry, Phillips, Smith & Hodak, P.A.
6 East Bay Street #400
P. O. Box 837
Jacksonville, Florida 32201

MICHAEL MAHER, ESQ.
Maher, Gibson & Guiley
90 East Livingston, #200
Orlando, Florida 32801

DAVID C. FONVIELLE, ESQ.
Fonvielle & Hinkle
3375 Capital Circle, N.E.
Building A
Tallahassee, Florida 32308

JAMES W. BEASLEY, ESQ.
Beasley, Leacock & Hauser, P.A.
505 S. Flagler Drive #1400
West Palm Beach, Florida 33401

BRUCE S. ROGOW, ESQ.
1930 Broward Financial Center
500 E. Broward Blvd.
Ft. Lauderdale, Florida 33394

GERALD J. HOULIHAN, ESQ.
2600 Douglas Road #600
Miami, Florida 33134

STUART C. MARKMAN, ESQ.
Kynes, Markman & Felman, P.A.
P. O. Box 3396
Tampa, Florida 33601-3396

SHOOK, HARDY & BACON, L.L.P.
25th Floor, New World Tower
100 N. Biscayne Blvd.
Miami, Florida 33132

ROBERT MONTGOMERY, ESQ.
1016 Clearwater Place
P. O. Drawer 3086
West Palm Beach, Florida 33402

RONALD L. MOTLEY, ESQ.
151 Meeting Street 3600
P. O. Box 1137
Charleston, S.C. 29402

MYRON H. BURNSTEIN, ESQ.
Office of the Attorney General
110 Tower, 10th Floor
110 S.E. Sixth Street
Ft. Lauderdale, Florida 33301

RICHARD F. SCRUGGS, ESQ.
734 Delmas Street
Pascagoula, MS 39568-1425

JOHN ROMANO, ESQ.
MICHAEL ERIKSEN, ESQ.
P. O. Box 21349
West Palm Beach, Florida 33416-1349

CYNTHIA M. MOORE, ESQ.
Bosies & Schiller L.L.P.
390 North Orange Ave. #1890
Orlando, Florida 32801

JAMES M. LANDIS, ESQ.
P. O. Box 3391
100 N. Tampa Street #2700
Tampa, Florida 33611

LISA K. BENNETT, ESQ.
200 East Broward Blvd. #1900
Fort Lauderdale, Florida 33301

JACK SCAROLA, ESQ.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409

JIM PETERS, ESQ.
Kimberly Tucker
Dep. General Counsel
The Capitol
Tallahassee, Florida 32399-1050

ROBERT G. KERRIGAN, ESQ.
400 E. Government Street
Pensacola, Florida 32501

SHELDON J. SCHLESINGER, ESQ.
1212 S.E. Third Avenue
Fort Lauderdale, Florida 33316