IN THE SUPREME COURT OF FLORIDA
Case No. SC04-310

Upon Request from the Attorney General
for an Advisory Opinion as to the
Validity of an Initiative Petition

ADVISORY OPINION TO THE ATTORNEY GENERAL

RE: THE MEDICAL LIABILITY CLAIMANT'S COMPENSATION AMENDMENT

ANSWER BRIEF OF FLORIDIANS FOR PATIENT PROTECTION

IN OPPOSITION TO THE INITIATIVE

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SUMMARY OF ARGUMENT

As shown by the Sponsor's efforts to edit and rewrite its amendment in its Initial Brief, this Court confronts a "Medical Liability Claimant's Compensation Amendment" initiative whose summary and title are clearly misleading. Terms (such as "receive," "entitled" and "claimant") which should have been defined and explained in the proposal cannot be saved by subsequent interpretations in a brief.

The many violations of the single subject rule of Article XI, Section 3, Florida Constitution are similarly clear. In fact, the Sponsor's website and its initial brief explicitly describe impacts that directly and explicitly contravene the single subject rule, including:

- The Sponsor claims to have a dramatic effect on attorneys fees, thus having a direct and substantial effect on the power of the courts.
- The Sponsor claims to "guarantee" a level of "recovery" to "claimants" which would have a substantial effect on legislative and judicial authority.
- The Sponsor's rewording of its own proposal in its initial brief presages the substantial impact on a judiciary which will have to interpret the "empty vessel" of the vague proposal.

Many other likely significant impacts were simply ignored in the Sponsor's initial brief. Removing this proposal from the ballot would serve a principal purpose of the single subject rule: the potential for cataclysmic effects on multiple branches or levels of government and on multiple undisclosed sections of the constitution.

ARGUMENT

I. THE AMBIGUOUS LANGUAGE OF THE TITLE AND BALLOT SUMMARY OF THE PROPOSED AMENDMENT MISLEADS VOTERS.

The fatal ambiguities of the proposed amendment are best illustrated by the fact that the Sponsor cannot explain its amendment without changing the words. Efforts by the Sponsor in its Initial Brief to re-define the amendment emphasize the ambiguities in the proposal.[1] Attempting to save its proposal, the Sponsor rewords the language to clarify some of the vagueness and ambiguities, including the following four examples:

A. The Proposed Amendment Uses The Word "Received" But The Sponsor Uses The Word "Recovered" In Its Initial Brief.

The actual text of the proposed amendment states, ". . . [T]he claimant is entitled to **receive** no less than 70% of the first $250,000.00 in all damages **received** by the claimant, exclusive of reasonable and customary costs, whether **received** by judgment, settlement, or otherwise, and regardless of the number of

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[1] In a recent case, the Oregon Supreme Court invalidated the ballot summary and title of a proposed amendment which would have limited attorneys' fees in medical malpractice cases. *See Crew v. Myers*, 336 Or. 535, 2004 WL 692055 (Or., April 2, 2004). The Oregon court found the summary and title misleading because they used divergent terms, and because the title noted that it applied to "patients injured" by healthcare providers, without explaining that a finding of fault or liability would be required. *Id.* at *3. Similar problems with the instant initiative were addressed in Opponents' Initial Brief. *See* FPP Br. at 41, 43.

defendants." (emphasis added). Many of the problems caused by this misleading sentence were discussed in Opponent's Initial Brief. *See* Init. Br. of Opponent Floridians for Patient Protection (hereinafter "FPP Br."), at 1-3, 36-37.

In its Initial Brief, however, the Sponsor tries to change the words "received" to something else: ". . . shall receive no less than 70% of the first $250,000.00 **recovered in damages**. . ." Init. Br. of the Sponsor, Citizens for a Fair Share, Inc. ("Sponsor's Br."), at 3 (emphasis added). Similarly, the Sponsor states, "claimants . . . shall receive no less than the specified percentages of the **recovery**." *Id*. at 5. Yet the term used, "recovery," is not the same as "received."

"Recovery" of damages has long meant something in Florida. *See, e.g.*, *Florida East Coast Railway v. McRoberts*, 111 Fla. 278, 281-82, 149 So. 631, 632 (1933) (discussing laws relating to recovery of damages for wrongful death). The term "received," especially as used three times in one sentence of the proposal, has no such established and commonly-understood meaning when applied to damages.

This need to edit its own proposal is an admission by the Sponsor that the term "receive" is ambiguous and misleading. The Sponsor cannot save its amendment by replacing "receive" with "recover" in its brief. Because the voters are not advised by the summary sufficiently "to enable [them] intelligently to cast

[their] ballot," the summary is clearly defective. *Grose v. Firestone*, 422 So. 2d 303, 305 (Fla. 1982) (quoting *Hill v. Milander*, 72 So. 2d 796, 798 (Fla. 1954)).

B. The Proposed Amendment Uses The Term "Entitled" While The Sponsor Uses The Term "Guaranteed" In Its Initial Brief.

The actual text of the proposed amendment reads: ". . . [T]he claimant is **entitled to receive** no less than 70% of all damages received. . ."(emphasis added). Again, some of the problems caused by the many possible reasonable interpretations of the ambiguous phrase "entitled to receive" were discussed in FPP's Initial Brief. *See* FPP Br. at 3, 37.

The Sponsor, however, explains this sentence by changing the words to "the amendment **will guarantee** that a medical liability claimant with a contingent fee agreement will receive. . ." Sponsor's Br. at 3. Similarly, the Sponsor states "[t]he claimant **is guaranteed** no less than 70% of the first $250,000.00 in damages. . . ." *Id*. at 5. Yet "guarantee" is not the same as "entitled." FPP's Initial Brief demonstrated that the proposed amendment will not, in fact, "guarantee" any "claimant" a specific percentage of damages. *See* FPP Br. at 36.

In addition, as with "received" vs. "recovery," the Sponsor ignores the differences between "entitled to" and "guaranteed" in Florida law. Again, the

phrase "entitled to receive" has a long lineage in Florida law, but not generally in the context of damages:

> Even though the amount of the attorney's fee and the conditions on which the garnishee "shall be entitled to receive" it, are fixed by statute, this did not relieve the party "entitled to receive" it of the duty to have it taxed and entered in the judgment of the court . . . .

Florida ex rel. Sherman v. Philips, 61 Fla. 433, 436, 54 So. 814, 815 (1911). As in *Sherman*, an entitlement to receive is not the same as a "guarantee." *See, e.g.*, *Rowe v. Pinellas Sports Authority*, 461 So.2d 72, 78 (Fla. 1984) ("The city's covenant is merely to remain eligible to receive guaranteed entitlement funds."). Simply replacing "entitled" with "guaranteed" cannot save this flawed amendment.

C. The Proposed Amendment Uses the Term "Damages", While the Sponsor Uses the Phrase "Attorneys' Fees" in Its Initial Brief.

The actual text of the amendment states, ". . . [T]he claimant is entitled to receive no less than 70% of **all damages received**. . ."(emphasis added). The Sponsor attempts to limit this broad language to only affecting "attorney's fees," claiming: "The effect of the amendment is to prevent the dilution of the claimant's recovery by excessive charges **for attorney's fees**." Sponsor's Br. at 5. This cannot be the true and only effect of the proposed amendment, for two reasons:

First, as shown in FPP's Initial Brief, the text of the proposed amendment does not mention "attorneys" and likely will not affect attorney's fees at all. It

may, however, affect many other things, such as State Medicaid liens. *See* FPP Br. at 23, 36-37. This broad effect alone makes the ballot summary – which does mention "attorney's fees" and does not mention the other effects of the proposed amendment – misleading. In addition, however, the fact that the Sponsor's major predicted "effect" will not be performed by the proposed amendment is a significant indication that the ballot title and summary do not describe the major purpose and effect of the proposed amendment. *See Askew v. Firestone*, 421 So.2d 151, 156 (Fla. 1982) (where an amendment does not do what its summary promises, the summary is defective).

Second, the proposed amendment does not "prevent . . . excessive charges for attorney's fees" because excessive fees are already prevented by this Court's Rules Regulating the Florida Bar. As shown in FPP's Initial Brief, this Court limits attorney's fees to a level which is, by definition, not excessive. *See* FPP Br. at 19-20. "A Florida contingent fee contract . . . that fails to adhere to the rule governing contingent fee contracts [Rule 4-1.5(f)] is against public policy, and is unenforceable by the member of The Florida Bar who violated the rule." *Olmstead v. Emmanual*, 783 So.2d 1122, 1129 (Fla. 1st DCA 2001) (citing *Chandris, S.A. v. Yanakakis*, 668 So. 2d 180, 185-86 (Fla. 1995)).

Thus, the effect of the proposed amendment would not be, as the Sponsor suggests, to prevent "excessive" attorney's fees. Either the proposal will not affect attorney's fees at all or it will affect attorney's fees which this Court has said are not excessive. In either case, the Sponsor misleads voters by not making sure they are advised "of the true meaning, and ramifications of the amendment." *Armstrong v. Harris*, 773 So. 2d 7, 18 (Fla. 2000) (quoting *Askew*, 421 So. 2d at 156).

D. The Proposed Amendment Uses the Phrase "Reasonable and Customary Costs" While the Sponsor Uses the Phrase "Attorneys' Fees in Its Initial Brief."

The actual text of the proposal states: ". . . [T]he claimant is entitled to receive no less than 70% of the first $250,000.00 in all damages received by the claimant, **exclusive of reasonable and customary costs** . . ." (emphasis added). Again, the Sponsor erroneously contends that "[t]he effect of the amendment is to prevent the dilution of the claimant's recovery by excessive charges **for attorney's fees**." Sponsor's Br. at 5.

As discussed in FPP's Initial Brief, "reasonable and customary costs" would usually be understood to include attorney's fees, which are ordinarily deducted before a "claimant" "receives" an accounting and payment on a judgment or settlement. *See* FPP Br. at 40. Similarly, Florida law has long recognized that attorney's fees are a legitimate litigation cost. *See, e.g.*, *Bidon v. Dept. of Prof'l*

Regulation, Fla. Real Estate Comm'n, 596 So.2d 450, 453 n.7 (Fla. 1992) ("There are numerous statutes in which the legislature has expressly provided for the recovery of attorney's fees as an addition to the recovery of actual or compensatory damages."); *cf.* § 440.34, Fla. Stat. (2003) (provision of workers' compensation statutes detailing when prevailing claimants may recover attorney's fees).

Because attorney's fees are sometimes part of "reasonable and customary costs," the actual language could reasonably be interpreted to exclude attorney's fees. The ballot summary cannot be said to "tell the voter the legal effect of the amendment." *Evans v. Firestone*, 457 So. 2d 1351, 1355 (Fla. 1984). Thus, the ballot title and summary of the proposed amendment are misleading. The Sponsor can save neither its amendment nor its summary by changing its description of the amendment in its Initial Brief. For purposes of this review, the proposed amendment's ballot title and summary are fatally misleading.

II. THE SPONSOR'S INITIAL BRIEF CONFIRMS THAT THE PROPOSED AMENDMENT WOULD COMMIT MULTIPLE VIOLATIONS OF THE SINGLE SUBJECT RULE.

In addition to being misleading, as described above, the Sponsor's Initial Brief explicitly confirms that the proposed amendment will have multiple effects that will directly and explicitly contravene the single subject rule.

A. A Recent Case Shows How The Sponsor's Interpretation of the Proposed Amendment Contains Multiple Violations of the Single-Subject Rule.

The Sponsor contends that the proposed amendment's "single subject is to ensure that those claimants for medical liability involving a contingency fee shall receive no less than the specified percentages of the recovery." Sponsor's Br. at 5. A recent case decided by this court provides a dramatic and specific example of the potential impacts of this proposal on multiple branches and levels of government, and on multiple sections of the constitution. *See City of Hollywood v. Lombardi*, 770 So.2d 1196 (Fla. 2000).

Albert Lombardi, a building inspector for the City of Hollywood, slipped and fell in the course of his job, causing permanent disability. He filed a negligence action against the homeowners on whose property he was injured and settled the case for the $100,000 limit of the homeowners' property insurance. *Id*. at 1198. After deducting attorney's fees and costs, Lombardi was paid $62,671. *Id*. Because the Court considered this amount to be reasonable, it would appear that the attorneys fee in this case was not thought to be "excessive." *Id.* at 1202.[2]

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[2] The Sponsor might argue that the amendment would not apply to this fact situation because it did not involve medical malpractice. The proposed amendment, however, uses the phrase "medical liability," rather than medical malpractice; under the ambiguous terminology used in the amendment, this might indeed be a "medical liability" case by an "injured claimant." *See* FPP Br. at 2-5 (discussing ambiguous terminology of the proposal). Even if the amendment did

Assuming that this case came after passage of the proposed amendment, and further assuming that the amendment could affect this case (since Lombardi's injury and disability required medical treatment), under the proposed amendment, this non-excessive payment would have violated the new 70% entitlement. Thus, just in this one small instance, the proposed amendment would have multiple impacts constituting a single subject violation, including effects on: 1) this Court's ability to regulate the Bar; 2) discretion of courts to review and award damages; 3) contracts between attorney and client; and 4) the substantive law of damages. *See* FPP Br. at 10-21, 27.

In addition, there would be a further conflict with the proposed amendment in this case: "The court then determined that the $62,671 Lombardi received from the third-party action as his net recovery represented 25% of his total damages." 770 So.2d at 1198. In other words, Lombardi actually suffered approximately $250,000 in damages. *Id*. Apparently, Lombardi's recovery was reduced both for comparative negligence, and because the case was settled rather than tried. *Id*. Such a reduction would apparently be prohibited under the proposed amendment.

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not apply to this case, it provides a useful discussion of the damage effect that would be applicable in a case identical to *Lombardi* save for the redefinition of "medical liability" as medical malpractice.

The Sponsor says that the single subject of the proposal is to "ensure that [Lombardi] shall receive no less than [70% of his damages]." *See* Sponsor's Br. at 5. Under the proposed amendment, Lombardi would be "entitled to receive" at least 70% of damages received (approximately $175,000). The amendment does not say who must pay the additional $112,000 in damages to which Lombardi would have been "entitled" or "guaranteed," or how the amendment would "ensure" that he received the additional $112,000. As this limited example shows, the additional burden on the judiciary of interpreting and implementing this ambiguous and sweeping amendment will be enormous. *See* FPP Br. at 11-18. The proposal both creates substantive law ("guaranteeing" a recovery) and affects existing laws on comparative negligence, as well as burdening the judiciary. *Cf. Evans*, 457 So. 2d at 1354 (where an amendment "changes more than one government function, it is clearly multi-subject.").

Nor is this all the confusion which would be sown by the proposed amendment. Lombardi had received disability payments from the City of Hollywood, totaling $41,288. 770 So.2d at 1198. The City, through its servicing agent, became subrogated to Lombardi's rights against the homeowners. *Id*. After Lombardi recovered $62,671 from the homeowners, the servicing agent sought, and was granted, an equitable distribution of the funds. *Id*. The court ordered

Lombardi to pay approximately 25% of his recovery to the servicing agent, and for further disability payments to be reduced by that amount. *Id*. These repayments to the City further reduced Lombardi's receipt of funds below 70% and would, therefore, again violate the proposed amendment. Thus, the proposed amendment would affect different levels of government, change substantive laws affecting subrogation and other rights, and limit courts' discretion to implement both workers compensation and other statutory schemes to protect workers and litigants.

The facts from this one limited and relatively simple case demonstrate the multiple and substantial constitutional impacts of the proposed amendment. None of these impacts are described in the proposed amendment. The facts of this real case demonstrate the many complex and undefined impacts that will befall claimants, the judicial system, local governments, and all those affected by medical injuries if this proposal were to become part of the constitution.

B. Despite the Sponsor's Conclusory Dismissal of the Traditional Measures of Multiple Subjects, the Proposed Amendment Contains Multiple Violations of the Single Subject Rule.

The Sponsor simply concludes about the proposed amendment: "Its single subject is to ensure that those claimants for medical liability involving a contingency fee shall receive no less than the specific percentages of the recovery." Sponsor's Br. at 5. "All of the details of the amendment are succinctly stated and

relate to only one subject." *Id*. The Sponsor also claimed that the "initiative does not substantially alter or perform multiple government functions." *Id*. at 6. Yet those blithe and unsupported dismissals of complex and substantive single-subject inquiries cannot stand against the obvious flaws of the proposed amendment.

In its Initial Brief, FPP demonstrated at length a variety of single-subject violations, including:

- A significant and immediate impact on the Florida judiciary from the need to immediately interpret and implement the vague and ambiguous language of this "self-implementing" initiative. FPP Br. at 11.

- The performance of both judicial and legislative functions in one initiative, by legislating substantive law and then judicially determining that the change was self-executing. FPP Br. at 15.

- Performing judicial functions both in the regulation of the Bar and in the enactment of procedural law. FPP Br. at 18.

- Performing and substantially altering the legislative function, in both setting law and affecting the budget and appropriations processes. FPP Br. at 21.

- Performing and substantially altering the Executive Branch's function, particularly from the effect on governmental liens and statutory obligations under state and Federal law. FPP Br. at 22.

- Substantial effects on the operation of multiple levels of government, including effects on individual rights to contract, on local governments' ability to perform their functions (as illustrated by the subrogation claims in *Lombardi*), and on each of the branches of Florida's state government. FPP Br. at 25.

- Substantial and undisclosed impacts on several provisions of the Florida Constitution, including freedom of contract, access to courts, judicial power,

separation of powers, and the homestead exemption. FPP Br. at 26.

- The lack of a "logical and natural oneness of purpose," principally because of its extreme vagueness and ambiguity.

Any one of these single-subject violations is sufficient to strike the proposed amendment from the ballot. *See Advisory Op. to the Att'y Gen'l Re: Local Trustees & Statewide Governing Bd. to Manage Florida's Univ. Sys.*, 819 So. 2d 725, 729 (Fla. 2002) (*quoting Fine v. Firestone*, 448 So. 2d 984, 990 (Fla. 1984)). The combination of violations is overwhelming.

The Sponsor ignored these obvious flaws in their brief. This Court has struck proposals which altered or performed the functions of multiple branches of state government, or which substantially modified multiple parts of the Florida Constitution without identifying them. *See, e.g.*, *Advisory Op. to the Att'y Gen'l, re Amend. to Bar Govt. from Treating People Differently Based on Race in Publ. Educ.*, 778 So. 2d 888, 895 (Fla. 2000); *Advisory Op. to the Att'y Gen'l re Tax Limitation*, 644 So. 2d 489, 493-94 (Fla. 1994). Where, as here, the many possible violations of the single-subject rule are facially obvious, the Sponsor's failure to address any of these possible issues is itself a telling indication that there is, in fact, no substantive defense to the violations.

CONCLUSION

Based on the Sponsor's Initial Brief, which gives very cursory treatment to a very complex amendment, either the proposed amendment will not achieve the effect the Sponsor suggests, or the amendment will work a wholesale series of changes and have substantial impacts on multiple branches of government and the Florida constitution. In either case, the proposed amendment violates the single subject requirement of Article XI, Section 3 and the ballot summary is misleading to voters. Accordingly, this Court should invalidate the proposed "Medical Claimant's Compensation Amendment."

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the type style utilized in this brief is 14-point Times New Roman, proportionately spaced, in accordance with Rule 9.210(a)(2), FLA. R. APP. P.

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