IN THE SUPREME COURT OF FLORIDA

SHANDS TEACHING HOSPITAL
AND CLINICS, INC.,

Appellant/Cross-Appellee,

v.

CASE NO. SC09-2069
1st DCA Case No.: 1DO8-1198

MERCURY INSURANCE COMPANY
OF FLORIDA,

Appellee/Cross-Appellant.
_______________________________________/

APPELLEE/CROSS-APPELLANT MERCURY INSURANCE COMPANY OF FLORIDA'S ANSWER BRIEF AND INITIAL BRIEF ON CROSS APPEAL

JEFFREY W. KIRSHEMAN
Florida Bar No. 0059341
JAMIE BILLOTTE MOSES
Florida Bar No. 009237
Fisher, Rushmer, Werrenrath,
Dickson, Talley & Dunlap, P.A.
20 N. Orange Avenue, Suite 1500
Post Office Box 712
Orlando, FL 32802-0712
Telephone: 407-843-2111
Facsimile: 407-422-1080
Attorneys for Appellee/
Cross-Appellant

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I. MERCURY INSURANCE COMPANY OF FLORIDA'S ANSWER BRIEF

A. STATEMENT OF CASE AND FACTS [1]

(1) Nature of The Case

Appellant Shands Teaching Hospital and Clinics, Inc. ("Shands") filed this appeal from the First District Court of Appeal's decision to reverse a final judgment entered by the trial court in favor of Shands in its action for damages against Appellee Mercury Insurance Company of Florida ("Mercury") for the impairment of a hospital lien Shands recorded and perfected pursuant to Chapter 88-539, §§ 1-7, Laws of Florida (the "Alachua County Lien Law"). The First District Court of Appeal held the Alachua County Lien Law and its related ordinance (Alachua County Code §§ 262.20 - 262.25) violate Article III, § 11(a)(9) of the Florida Constitution, which prohibits special laws pertaining to the creation, enforcement, or impairment of liens based on private contracts. Mercury respectfully submits the First District Court of Appeal correctly decided this specific issue, and its ruling thereon should be affirmed.

[1] All references to the Trial Transcript will be designated as follows: (T. page number). All references to the record on appeal, as prepared by the Clerk of the Circuit Court of Alachua County, will be designated as follows: (R. page number).

(2) **Facts Underlying Shands' Claim**[2]

Mercury issued an automobile insurance policy, effective November 10, 2005 through May 10, 2006, to Nancy B. Conley (Policy #FL 05206501) (the "Policy"). (R. 79-93). The Policy provided bodily injury liability coverage in the amount of $10,000.00 and personal injury protection ("PIP") coverage in the amount of $10,000.00. (R. 79).

On December 11, 2005, Milford Bryant, a permissive user of Ms. Conley's insured vehicle, was involved in an accident with a pedestrian, Kristal Nicole Price. (R. 42-45). Ms. Price was admitted to Shands, where she received medical treatment from December 11, 2005 through December 14, 2005. (R. 42-45). Shands charged Ms. Price a total of $38,418.20 for the medical services rendered. (R. 94).

On December 21, 2005, pursuant to Chapter 88-539, § 1-3, Laws of Florida, Shands recorded and perfected a hospital claim of lien in the amount of $38,418.20 in the public records in and for Alachua County, Florida. (R. 94).[3] This claim of lien did not identify Mercury or its insureds as potentially liable parties. (R. 94).

---

[2] Mercury objects to Shands' statements on pages 4-5 of its Initial Brief regarding the "purpose" of the Alachua County Lien Law and similar hospital lien laws. Shands is improperly making legal argument and asserting its opinion in the Statement of Facts section of its brief. Moreover, no record cites or other objective support for these conclusions are provided.

[3] Shands did **not** record or perfect its hospital claim of lien pursuant to Alachua County Code § 262.20-262.25, the related ordinance.

On April 14, 2006, and in exchange for Ms. Price's release of Mercury and its insureds from all bodily injury liability, Mercury tendered its Policy's $10,000.00 bodily injury liability limits to Ms. Price. (R. 98).[4] Shands was not notified or joined as a payee on the check, and its claim of lien was not satisfied. (R. 42-45).

On May 4, 2006, Shands served a copy of its hospital claim of lien on Mercury for the first time. (R. 42-45). Roughly three weeks later, on or about May 26, 2006, Mercury paid Shands the Policy's $10,000.00 limits for PIP coverage. (R. 12).

(3) <u>Course of Proceedings - Trial Court</u>

On or about August 29, 2006, Shands commenced this lien impairment action against Mercury pursuant to Chapter 88-539, § 4, Laws of Florida. (R. 1-7).[5] Shands initially sought to recover the full amount of its $38,418.20 hospital lien from Mercury. (R. 1-7).[6]

On May 29, 2007, Mercury served a Proposal for Settlement in the amount of $17,700.00 on Shands. (R. 525-526).

---

4 In doing so, Mercury was not ignoring a lien of which it had knowledge. Mercury had no actual notice of Shands' lien until after it tendered its bodily injury policy limits to Ms. Price.

5 The Complaint does not identify the related Alachua County ordinance as a basis for Shands' claim.

6 In light of Mercury's defense of partial payment, Shands conceded Mercury's payment of $10,000.00 in PIP benefits to Shands on May 26, 2006 reduced the amount of Shands' lien to $28,418.20. (R. 22-23).

On June 11, 2007, Mercury filed a Motion for Summary Judgment, arguing Shands' damages for the alleged impairment of its lien are limited, as a matter of law, to the amount of Mercury's settlement with Ms. Price (i.e., Mercury's $10,000.00 bodily injury policy limits). (R. 52-66). Mercury admitted Shands properly recorded and perfected its hospital claim of lien (if valid) and further admitted the lien attached to Mercury's $10,000.00 settlement with Ms. Price. (R. 52-66). Mercury also challenged the constitutionality of the lien law, as set forth in its Supplemental Memorandum of Law in Support of its Motion for Summary Judgment, arguing the Alachua County Lien Law and the related Alachua County ordinance (i.e., Alachua County Code § 262.20 *et seq.*) violate the special law prohibition in Article III, §11(a)(9) of the Florida Constitution, the special law prohibition in Article III, § 11(a)(12) of the Florida Constitution, and Mercury's substantive due process rights guaranteed by the Florida Constitution and the United States Constitution. (R. 116-137).

On or about July 16, 2007, Shands filed its own Motion for Summary Judgment. (R. 71-103). Shands contended the Alachua County Lien Law allows it to recover from Mercury the reasonable costs of the hospital care, treatment, and maintenance Shands provided to Ms. Price (i.e., $28,418.20) even if such costs exceed the amount of the settlement Mercury paid Ms. Price and exceed Mercury's policy limits. (R. 71-103).

Shands further argued Mercury's only defense is to challenge the reasonableness of its charges. Shands denied Mercury can raise lack of causation or the collectibility of Mercury's insureds as defenses.

By Order dated September 7, 2007, the Honorable Trial Judge, Toby S. Monaco, denied both parties' Motions for Summary Judgment. (R. 324-325). Judge Monaco expressly rejected Shands' position Mercury's defenses are limited to the reasonableness of Shands' charges for its medical services.

On October 19, 2007, Mercury filed its Pretrial Compliance with the trial court. (R. 371-377). In this document, Mercury again admitted "Shands properly recorded and perfected a hospital claim of lien for services provided to Ms. Price," and "Shands' lien attached to the $10,000 settlement with Ms. Price." (R. 371-377). Mercury further claimed its liability to Shands "is limited as a matter of law to the amount of the settlement with Ms. Price, namely $10,000.00." (R. 371-377).

The parties attended a pretrial conference on October 23, 2007. (R. 500-502). Although Mercury's counsel misstated Shands' lien, *if valid*, may not be as much as $10,000.00, such misstatement was corrected shortly thereafter at the October 31, 2007 hearing on Shands' Motion for Clarification of Pretrial Order, at which time Mercury's counsel clearly conceded Shands was entitled to at least $10,000.00 for the impairment, assuming the lien was valid. (R. 508-509).

The bench trial of this matter was conducted on November 9, 2007 before Judge Monaco. (T. 1-239). Mercury continued to admit Shands properly recorded and perfected its claim of lien and also continued to admit Shands' charges for Ms. Price's medical care and treatment, as reflected in the lien, were "reasonable." (R. 371-377, 372, 373). Mercury further admitted it impaired Shands' lien to the extent of the $10,000.00 policy limits it paid Ms. Price to settle her bodily injury claim against Mercury's insureds. Thus, the sole issue at trial was whether Mercury caused any impairment of Shands' lien beyond the $10,000.00. (R. 373).[7]

During the trial, Mercury offered evidence supporting its position the value of Ms. Price's cause of action against Mercury's insureds did not exceed the Policy's $10,000.00 bodily injury liability limits, because the insureds, Milford Bryant and the Conleys, are judgment proof. (T. 106-108, 110).

At the trial's conclusion, Judge Monaco found Mercury impaired Shands' lien, but also concluded the damages caused by such impairment do not exceed $10,000.00. (T. 235-237). According to Judge Monaco:

> Let me just tell you, from the evidence that I've seen and heard at this point in time, <u>the greater weight of the evidence shows that had the cause of action been pursued that more likely than not a judgment in excess of the lien amount could have been obtained; but, the evidence has also shown that the potential defendants that we're talking about</u>

[7] Mercury preserved the constitutional issues at trial.

> within the context of this case, the Conleys and Bryant, are essentially judgment proof, and one of them is even knowledgeable about the bankruptcy process.
>
> That's another factor that I have to consider with respect to the value of the cause of action that was potentially or was impaired. I think there was impairment of it and now I'm trying to figure out what - - you know, what was impaired.
>
> I don't see any showing of any particular value to any future expectation of recovery from a judgment that would have been obtained against these folks in excess of the lien amount. I really haven't been shown anything from which I can conclude that that judgment would have had any significant commercial value.
>
> So that although I find that Shands' lien was impaired, when I look at the lien that was impaired, I reach the conclusion that the cause of action upon which they had a lien was significantly of no value and I have not seen any evidence that would give it any more value than an uncollectible and unrecoverable judgment.
>
> . . .
>
> . . . [T]hey probably could have gotten a judgment in excess of the lien amount, but a judgment that nonetheless would have been essentially valueless.
>
> That being the case, I think the plaintiff should recover ten thousand dollars against the defendant, that being the amount of available liability insurance proceeds that was there and that there's been a clear impairment with respect to that and I think there's been no disagreement as we approached trial with respect to that.

(T. 235-237)(emphasis added).

On November 21, 2007, Mercury filed a Motion for Judgment Notwithstanding the Verdict on the following grounds: (1) The Alachua County Lien Law is unconstitutional on its face and as applied by the trial court; and (2) Mercury's liability to Shands is necessarily limited as a matter of law to the amount of Ms. Price's third party recovery (i.e., $10,000.00). (R. 522-524).

On November 26, 2007, Shands filed a Motion for Award of Attorneys' Fees and Costs pursuant to the Alachua County Lien Law. (R. 521). Shands argued its recovery of $10,000.00 as damages for Mercury's impairment of its hospital lien made it the "prevailing party." (R. 623-627).

Also on November 26, 2007, Mercury filed a Motion to Determine Entitlement to Attorney's Fees in order to address all attorneys' fee issues simultaneously. (R. 527-543). And, on December 5, 2007, Mercury filed a Motion to Tax Attorney's Fees and Costs in its favor based on its Proposal for Settlement. (R. 544-545).

On February 6, 2008, Judge Monaco addressed the parties' post-trial motions. Judge Monaco denied Mercury's Motion for Judgment Notwithstanding the Verdict and entered a Final Judgment in favor of Shands. (R. 657-661). However, Judge Monaco ruled Mercury's impairment of Shands' lien only caused Shands to suffer damages in the amount of $10,000.00, because Ms. Price's underlying cause of action against the insured tortfeasor and vehicle owner would have been uncollectible. (R.

658). The Judge also ruled Shands was the "prevailing party" entitled to a reasonable attorneys' fee of $54,125.00 pursuant to the Alachua County Lien Law and further held Mercury did not meet the threshold necessary for obtaining attorneys' fees and costs pursuant to its Proposal for Settlement.

(4) <u>Course of Proceedings - First District Court of Appeal</u>

On or about March 5, 2008, Mercury timely served a Notice of Appeal from the Final Judgment. (R. 664-665). Mercury sought the First District Court of Appeal's review of the following issues: (1) whether the Alachua County Lien Law and related ordinance are unconstitutional; (2) whether Shands' damages must be limited, as a matter of law, to the amount of the settlement Mercury paid Ms. Price; (3) whether Shands is the "prevailing party" entitled to recover its attorneys' fees from Mercury pursuant to the Alachua County Lien Law; (4) whether Mercury is entitled to recover its reasonable attorneys' fees from Shands pursuant to its Proposal for Settlement; and (5) whether the attorneys' fee award to Shands, if upheld, should be reduced. (Mercury's Initial Brief filed with First District Court of Appeal, pp. 1-2). Shands filed a Notice of Cross Appeal.

On July 21, 2009, the First District Court of Appeal reversed the trial court's Final Judgment in favor of Shands, holding the Alachua County Lien Law (Chapter 88-539, §§ 1-7, Laws of Florida) and the related Alachua County ordinance derived

from that special law (Alachua County Code § 262.20 - § 262.25) violate Article III, §11(a)(9) of the Florida Constitution, which prohibits special laws pertaining to the creation, enforcement, or impairment of liens based on private contracts. The First District Court of Appeal found no merit to the other issues raised by the parties on appeal and cross-appeal. Id. The First District Court of Appeal remanded the case to the trial court with directions to enter judgment in favor of Mercury and to consider Mercury's claim for attorney's fees pursuant to its Proposal for Settlement. Id. [8]

On or about November 2, 2009, Shands served its Notice of Appeal from the First District Court of Appeal's decision. Mercury filed its Notice of Cross Appeal on or about November 11, 2009.

B. SUMMARY OF ARGUMENT

Mercury respectfully submits the First District Court of Appeal properly determined the Alachua County Lien Law and related Alachua County ordinance violate Article III, § 11(a)(9) of the Florida Constitution and requests this Court to affirm that decision.

Article III, § 11(a)(9) of the Florida Constitution prohibits special laws which create lien rights based on private contracts. The purpose of this constitutional prohibition, as made clear by its history, was to mandate *general, statewide, uniform*

[8] Shands' Motion for Rehearing was denied on October 5, 2009.

legislation in those areas specifically identified (i.e., the creation, enforcement, and impairment of lien rights based on private contracts). Because the Alachua County Lien Law is undeniably a "special law" which pertains to the creation, enforcement, or impairment of lien rights *based upon* the private express *or implied* contract between a patient and hospital for the payment of medical expenses incurred, such law is unconstitutional.

Shands tries to avoid this constitutional prohibition by arguing it only applies to liens "created by" a contract (e.g., mortgages, car loans, security interests, and chattel mortgages), and not to statutorily created liens. In doing so, Shands misapprehends Article III, §11(a)(9). Shands confuses a lien right "*created*" by contract, which is not the subject of this case, with a lien right created by statute (i.e., special law) but "*based upon*" a private contract, which is the subject of this case. Absent the private express or implied contract between the patient and the hospital, there would be no hospital lien, even though the lien itself was created by special law.

Shands' interpretation is also fundamentally flawed because, if accepted, it would render part of the Florida Constitution meaningless. If a lien created by a special law is exempt from Article III, §11(a)(9) because it is a statutory lien, then no lien could ever be unconstitutional thereunder because all liens governed by Article III, § 11(a)(9) are statutory.

Regardless of hospital lien law history, which Shands painstakingly outlines in its Initial Brief, and regardless of Shands' claim the Florida Legislature has the prerogative to give only some hospitals lien rights (i.e., "if the Florida Legislature does not desire to give hospital liens to all hospitals it is solely a legislative decision and not subject to second guessing by the court"),[9] Mercury respectfully submits Florida courts surely can and most certainly should "second-guess" a law if, as enacted by the Florida Legislature, it is unconstitutional. Contrary to Shands' claim, this case is not one where a court "willy nilly str[uck] down [a] legislative enactment . . . because [it does] not comport with judicial notions of what is right or politic or advisable;"[10] rather, this case is one where a legislative enactment violates the Florida Constitution.

Shands has greatly exaggerated and mischaracterized the scope of this appeal; thus, it is important to consider what this case is *not* about. Contrary to Shands' arguments, this case is not an attempt by Mercury to challenge or invalidate hospital liens generally. Rather, this appeal focuses on a fairly narrow issue: whether ***the Alachua County Lien Law*** is unconstitutional ***because*** it constitutes a special law which pertains to the creation, enforcement, extension, and/or impairment of liens based on private contracts in violation of Article III, §11(a)(9) of the Florida

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[9] See Shands' Initial Brief, p. 14.

[10] See Shands' Initial Brief, p. 14.

Constitution. Mercury does not dispute hospital liens established or created in a different manner (e.g., by contract or by general law, rather than by special law) may be valid and enforceable. As the First District Court of Appeal aptly noted:

> While there may be a noble purpose in the Florida Legislature's allowing this hospital lien, doing so by means of a special law is not legal. If the legislature wishes to grant such lien rights, it should do so by general law which is applicable to all hospitals, not just to a select few.

Mercury Insurance Company of Florida v. Shands Teaching Hospital and Clinics, Inc., 21 So. 3d 38, 39 (Fla. 1st DCA 2009) (emphasis added).[11]

Given the foregoing, Mercury respectfully submits the First District Court of Appeal properly reversed the trial court's decision and properly held the Alachua County Lien Law and related ordinance are unconstitutional because they violate Article III, §11(a)(9) of the Florida Constitution.[12] Mercury further submits it is, thus,

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[11] Shands asserts twenty (20) counties in Florida benefit from the lien laws. Because there are sixty-seven (67) counties in Florida, this means ***forty-seven (47) counties in Florida do NOT benefit from the special lien laws.*** Shands also asserts one-hundred sixteen (116) hospitals benefit from the special lien laws. However, because there are approximately two-hundred ninety-four (294) hospitals in Florida, this means ***one-hundred seventy-eight (178) hospitals in Florida do NOT benefit from the special lien laws***. Shands, as a beneficiary of the lien laws, has been accorded a special status which allows it to obtain a lien, while another hospital down the street or in another county may not so benefit.

[12] Should this Court disagree and decide the Alachua County Lien Law and related ordinance do not violate Article III, §11(a)(9) of the Florida Constitution, Mercury respectfully submits there are additional, independent grounds for finding said laws are unconstitutional. These additional constitutional grounds, which were argued by

entitled to recover its attorneys' fees pursuant to its Proposal for Settlement.[13]

C. ARGUMENT

(1) Standard Of Review

Constitutional issues are subject to *de novo* review on appeal. See Zingale v. Powell, 885 So. 2d 277, 280 (Fla. 2004); City of Miami v. McGrath, 824 So. 2d 143, 146 (Fla. 2002); State v. Glatzmayer, 789 So. 2d 297, 301 n. 7 (Fla. 2001); Fulmore v. Charlotte County, 928 So. 2d 1281, 1286 (Fla. 2d DCA 2006).

Mercury at the trial court level and before the First District Court of Appeal, are detailed in Mercury's Initial Brief on Cross-Appeal contained herein.

[13] If, despite Mercury's legal arguments, this Court finds the Alachua County Lien Law and related ordinance are constitutional, then Mercury respectfully submits Shands' damages must be limited to the $10,000.00 awarded by the trial court, rather than the total amount of Shands' lien (i.e., $28,412.20), because any judgment for Ms. Price's medical expenses beyond Mercury's $10,000.00 policy limits would have been uncollectible against Mercury's insureds. In such case, this Court should further hold the trial court erred in finding Shands is the "prevailing party" entitled to recover its attorneys' fees, because **the only issue at trial** was whether Shands suffered damages in excess of the $10,000.00 already conceded by Mercury. Because the trial court concluded Shands was only entitled to recover $10,000.00, rather than the $28,418.20 sought by Shands, Shands did not prevail on the significant issue at trial and, thus, is not entitled to recover its attorneys' fees as the "prevailing party." Moreover, in such case, Mercury is entitled to recover its attorneys' fees based on its Proposal for Settlement. At the very least, the trial court erred by failing to reduce the fee award to Shands.

(2) The Alachua County Lien Law And Related Ordinance Violate Article III, §11 (a)(9) of The Florida Constitution.[14]

The Florida Constitution unequivocally prohibits the enactment of special laws[15] which pertain to the "creation, enforcement, extension or impairment of liens based on

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[14] Mercury raised its constitutional arguments at the summary judgment stage of this litigation and again in its post-trial motions. Shands had a fair opportunity to respond to and did respond to Mercury's constitutional defenses at the hearings on these motions. Shands never objected to Mercury's constitutional defenses. By virtue of Florida Rule of Civil Procedure 1.190(b), the constitutional issues were tried by consent. Any implication they were somehow waived because they were not pled as affirmative defenses should be rejected. See generally, Dey v. Dey, 838 So. 2d 626, 627 (Fla. 1st DCA 2003); Book v. City of Winter Park, 718 So. 2d 945, 948 (Fla. 5th DCA 1998); Twenty-Four Collection, Inc. v. M. Weinbaum Construction, Inc., 427 So. 2d 1110, 1112 (Fla. 3d DCA 1983).

Shands also notes Mercury did not notify the Attorney General, pursuant to Florida Statute § 86.091, of the constitutional issues being raised by Mercury as a ***defense*** to ***Shands'*** claims. Shands raised this issue for the *first* time in its Motion for Stay and to Recall Mandate filed with this Court. Shands never raised this issue at either the trial level or before the First District Court of Appeal. Accordingly, such argument has been waived, and Shands cannot now raise the issue for the first time. See State Farm Mutual Automobile Insurance v. Warren, 805 So. 2d 1074, 1076-1077 (Fla. 5th DCA 2002)(insurer waived right to challenge insured's failure to join the Attorney General in a lawsuit challenging constitutionality of a statute, where insurer did not raise argument before trial court).

[15] The Florida Constitution defines a "special law" as a special or local law. Art. X, §12(g), Fla. Const. Case law further explains the definition as follows:

> a special law is one relating to, or designed to operate upon, particular persons or things . . .

City of Miami v. McGrath, 824 So. 2d 143, 148 (Fla. 2002).

private contracts." Art. III, § 11(a)(9), Fla. Const. As Shands concedes,[16] the Alachua County Lien Law is a "special law," because it affects only private, non-profit charitable hospitals in Alachua County, Florida. See Fla. H.R. Comm. on Community Affairs, HB 1412 (1988) (enacted as Ch. 88-539, Laws of Fla.) Final Staff Analysis (Local Legislation)("This bill creates a new *special act* . . ."). Because this special law pertains to the creation, enforcement, and impairment of liens based upon the lienholder's private contracts with its patients for medical care (i.e., the lien would not exist in the absence of such contracts), the First District Court of Appeal properly determined the Alachua County Lien Law is unconstitutional.[17]

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[16] See Shands' Initial Brief, p. 15.

[17] Even the Florida Legislature expressly acknowledged the questionable constitutionality of the Alachua County Lien Law when it enacted that special law:

> There could be problems with providing statutory liens by special act to charitable hospitals in general (as they are private entities operating on a non-profit basis), although this must first be challenged and then must be judicially determined.
>
> . . .
>
> In this respect, a question of constitutionality is raised regarding the establishment by special act of a statutory lien which benefits a private hospital.

See Fla. H.R. Comm. on Community Affairs, HB 1412 (1988 (enacted as Ch. 88-539, Laws of Fla.) Final Staff Analysis (Local Legislation) (emphasis added).

(a) **The Liens Created By The Alachua County Lien Law Are *Statutory* Liens "*Based On Private Contract*."**

The Alachua County Lien Law is within the scope of Article III, §11(a)(9), because liens created thereby are "based on a private contract" (e.g., the special statutory lien is based on the private agreement between Shands and Ms. Price for medical care and treatment). The private relationship between a hospital and its patients is contractual, whether it be express or implied. See generally, Nursing Care Services, Inc. v. Dobos, 380 So. 2d 516, 518-19 (Fla. 4th DCA 1980). See additionally, Lab v. Hall, 200 So. 2d 556 (Fla. 4th DCA 1967)(noting hospital's duty to patient is determined by degree of care, skill, and diligence used by hospitals generally in the community and required by the express *or implied* contract of the undertaking).[18] The First District Court of Appeal reasoned the Alachua County Lien Law, a special law, creates a statutory lien based and dependent upon this private contract for medical care:

> We find that the lien does not attach to the public's assets, but rather to the assets of the patient whose contract with the hospital is a private one. . . .

[18] Shands indicates an express contract between it and Ms. Price exists in this case. See Shands' Initial Brief, pp. 25-26.

Mercury Insurance Company of Florida v. Shands, 21 So. 3d 38, 39 (Fla. 1st DCA 2009)(emphasis added). In so doing, the First District correctly recognized there would be no hospital lien absent the private contract between patient and hospital, even though the lien itself was created by special law. See generally, Stephens v. Parkview Hospital, Inc., 745 N.E.2d 262, 266 (Ind. Ct. App. 2001) ("the hospital lien is an action authorized by statute *based on an implied contract*. . . ") (emphasis added).

Shands mistakenly relies on Hospital Bd. of Directors of Lee County v. McCray, 456 So. 2d 936 (Fla. 2d DCA 1984). In McCray, the Second District Court of Appeal upheld the constitutionality of the Lee County Hospital Lien Law.[19] Yet, the reasoning in McCray is fundamentally flawed. The Second District curiously held the constitutional prohibition on special laws creating liens based on private contracts was not violated, because the lien in question was created by a statute, rather than by a private contract. In doing so, the Second District confused a lien right created by contract with a lien right created by special act but based upon private contract.

[19] As pointed out in the legislative history pertaining to the Alachua County Lien Law, McCray did not address a law providing a lien to a private hospital. See Fla. H.R. Comm. on Community Affairs, HB 1412 (1988) (enacted as Ch. 88-539, Laws of Fla.) Final Staff Analysis (Local Legislation). Lee Memorial Hospital is a public hospital. See Hospital Bd. of Directors of Lee County v. McCray, 456 So. 2d at 937, n. 1. Moreover, McCray relied on State Farm Mutual Auto. Ins. Co. v. Palm Springs General Hospital, Inc. of Hialeah, 232 So. 2d 737 (Fla. 1970), which addressed a *general* lien law, and Fernandez v. South Carolina Ins. Co., 408 So. 2d 753 (Fla. 3d DCA 1982), neither of which addressed the constitutional issues raised in this case.

Moreover, if accepted, the Second District's interpretation would render Article III, §11(a)(9) of the Florida Constitution meaningless: ***If a special act is exempt from Article III, §11(a)(9) of the Florida Constitution simply because the lien it creates is a statutory lien, as the Second District Court of Appeal reasoned, then no special act could ever be unconstitutional under Article III, §11(a)(9) because all liens created by special acts are statutory liens.***

Like the Second District Court of Appeal, both Shands and the State of Florida, as amicus, confuse a lien right "created" by contract,[20] which is not the subject of this case, with a lien right created by statute (i.e., special law) but "based upon" a private contract, which is the subject of this case.

The decision in Wellington Regional Medical Center, Inc. v. Meder, 819 So. 2d 981 (Fla. 4th DCA 2002), on which Shands relies, is consistent with Mercury's position and the First District Court of Appeal's decision. In Meder, the appellate court recognized statutory liens may be granted by the Legislature in favor of a hospital, while contractual liens may be granted by the patient in favor of a hospital, regardless of whether the hospital has been granted a statutory lien, when the patient knowingly

[20] Shands apparently believes the constitutional prohibition at issue only applies to liens "created by contract" (e.g., mortgages, car loans, security interests, and chattel mortgages) and not to statutorily created liens. However, such position clearly misinterprets and does not follow the express language of Article III, §11(a)(9) of the Florida Constitution.

and voluntarily enters into a contract providing for such a lien. Mercury does not argue, and the First District Court of Appeal did not hold, the hospital lien at issue is a contractual lien. Instead, Mercury submits the hospital lien at issue is a "statutory lien" which is "*based on* a private contract for medical services," which contract may be express or implied. In other words, the relationship between the parties - patient and hospital - is at its essence a contractual relationship. Upon admission, the patient expressly or impliedly agrees to pay for hospital services. If the patient fails to pay, the hospital may avail itself of contractual type remedies. This situation is different from a noncontractual relationship, such as that between a citizen and the government. Shands misunderstands this material distinction.

(b) The Majority of Cases Cited By Shands Addresses Hospital Liens Created By *General* Law.

The majority of Florida cases cited by Shands address hospital liens created by *general* law, not by a *special* law. See, e.g., Palm Springs General Hospital, Inc. of Hialeah v. State Farm Mut. Auto. Ins. Co., 218 So. 2d 793, 799 (Fla. 3d DCA 1969) (upholding Florida's original hospital lien law provided for in General Laws of Florida, 19518, Ch. 27032, General Laws of Florida, 1951, Ch. 27032, and noting the classification by population in the statute did not render it a special act in violation of

the Florida Constitution), approved, 232 So. 2d 737 (Fla. 1970).[21] See additionally, The Public Health Trust of Dade County, Florida v. O'Neal, 348 So. 2d 377 (Fla. 3d DCA 1977); Dade County v. Pavon, 266 So. 2d 94 (Fla. 3d DCA 1972); Dade County v. Perez, 237 So. 2d 781 (Fla. 3d DCA 1970)(all addressing hospital lien laws created by Ch. 27032, Laws of Florida (1951), a *general* law). Accordingly, these cases do not support Shands' arguments in this special law case.

(c) Constitutional History Supports Mercury's Position.

Shands focuses a significant part of its brief on the history behind hospital lien laws in Florida. Mercury submits it is more important to consider the history and intent behind Article III, § 11(a)(9) of the Florida Constitution, because the lien law history is irrelevant if such laws are unconstitutional.

A general provision "prohibiting the passage of local and special laws in certain instances first appeared in the Constitution of 1868." Article III, § 21, Fla. Const. (1885), Historical Note. A provision prohibiting special and private laws in certain specific areas (the precursor to Article III, §11) was added to the 1885 Revision to the Florida Constitution (although liens were not yet mentioned). Art. III, § 20, Fla. Const. (1885). The 1885 Florida Constitution also included the following provision:

[21] The general lien law at issue in the Palm Springs General Hospital cases has since been repealed. See Ch. 71-29, Laws of Florida, 1971.

> In all cases enumerated in the preceding Section [i.e., §20, the Section prohibiting certain special laws], all laws shall be general and of uniform operation throughout the State, but in all cases not enumerated or excepted in that Section, the Legislature may pass special or local laws, except as now or hereafter otherwise provided in the Constitution.

Article III, § 21, Fla. Const. (1885) (emphasis added). **Thus, the purpose of the special law prohibitions was to mandate general and uniform legislation with respect to those areas specifically identified therein,** not to reserve those areas for local government as Shands argues without authority.[22]

Although not precedential, Mercury respectfully submits the extensive analysis of hospital lien laws in the following law review article may be of use to the Court in connection with this issue:

> . . . Whereas those liens expressly stated in a contract or which exist by virtue of general law do not present this element of unpleasant surprise, liens created by special act, which are not stated in any contract and which do not operate uniformly throughout the state, augment the hidden aspect of liens. From this perspective, the original drafters acted wisely when they included a provision prohibiting the creation of all liens by special act in the Florida Constitution. Qualifying that prohibition by preventing only those liens 'based on private contract' would be reasonable because one would want to prevent the statutory creation of liens which depend on private contracts, as such contracts often involve legally unsophisticated individuals

[22] The Florida Constitution was amended in 1968 to add the constitutional prohibition against special laws creating, enforcing, extending, or impairing liens based on private contracts. Article III, § 11(a)(9), Fla. Const. (1968).

who would be unaware of the existence of the liens crafted by special acts and their legal obligations. There need be no prohibition of liens based on public contracts, however, because they are by nature the subject of public review and scrutiny. Persons or entities seeking to obtain these contracts often have experience in the process of reviewing the statutory obligations that regulate these arrangements.

Because hospital liens created by special act involve individuals in private contractual arrangements, they would be vulnerable to the concerns raised above. All of the special acts granting hospital liens make persons participating in settlements prior to satisfaction of the hospital liens liable for payment to the hospital, regardless of settlement. Therefore, such persons must be aware of the special act and bear the burden of searching the public records before settling any suit or paying any insurance proceeds. As this liability does not arise by virtue of a general act, an unsuspecting claimant from outside the county or hospital district or an out of state insurance carrier might ignore the special act and suffer the consequences.

Most importantly, because the hospital lien preempts attorneys' fees, an injured plaintiff may not be able to find counsel to represent him or her in seeking reimbursement for medical costs. It is unthinkable that access to the courts could be dependent on the county in which a potential plaintiff is hospitalized or even perhaps on the particular hospital to which he is admitted.

> While few would argue with a public policy supporting the ability of hospitals to find a logical source of reimbursement for unpaid medical bills - in this case, from the tortfeasors accident or liability insurance coverage - - such a policy should operate uniformly throughout the state and not by special act. Indeed, article III, section 11 is intended to prohibit the legislature from doing by special act what it should do by general law. . . .
>
> The factors discussed above cast doubt on the continued constitutionality of hospital liens created by special act. Given the plain meaning of the Florida Constitution, not only are such acts doubtful, they challenge policy considerations implicit in the prohibition of certain types of special acts. . . .

Meta Calder, "Florida's Hospital Lien Laws," 21 Fla. St. U. L. Rev. 341 (Fall 1993) (emphasis added).

Significantly, as recent as August 28, 2008, this Court recognized special laws should be restricted and disfavored over uniform, statewide laws:

> One purpose of expanding the scope of prohibitions of special laws was to prevent state action benefitting local or private interests and to direct the Legislature to focus on issues of statewide importance. Indeed, article III, section 11's broad list of prohibitions reveals the drafters' concern for the restriction of local laws and the encouragement of uniformity in Florida law. . . .

Lawnwood Med. Center, Inc. v. Seeger, 990 So. 2d 503, 513 (Fla. 2008) (emphasis added).[23] Mercury submits this rationale supports its position the Alachua County

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[23] In its Lawnwood Medical Center opinion, this Court referenced certain discussions

Lien Law is unconstitutional.

(d) <u>The Alachua County Lien Law Is Not Based On The "Lack Of" A Private Contract.</u>

Article III, § 11(a)(9) of the Florida Constitution prohibits special laws which pertain to the creation, enforcement, or impairment of liens "based on" private contracts. Shands argues the Alachua County Lien Law is not "based on" a private contract but is, instead, based on the *nonexistence* of a private contract or contractual relationship between hospitals and *insurers* of third party tortfeasors. Such argument is an improper attempt to shift the focus from the hospital's relationship with its patient to the insurer of the tortfeasor and ignores the specific "contract" which is the focus of the law.

As indicated earlier, Shands' statutory lien is "based on" the private contract, be it express or implied, *between Shands and its patient*. Shands' relationship (or lack thereof) with the insurer of a third party tortfeasor is not the subject of the lien. As the

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of the 1968 Constitution Revision Commission, including the following statement from Chairman Chesterfield H. Smith:

> All of these things that they are worried about can be handled by general bill. Local bills are no panacea and if you had to pass general bills and got in the habit of it, we would have a lot more stability in the state, we would have a lot better government and people would face up to issues that they should face up to in general legislation.

First District Court of Appeal found, the lien attaches "to the assets of the patient whose contract with the hospital is a private one." Mercury Ins. Co. of Florida v. Shands Teaching Hosp. and Clinics, Inc., 21 So. 3d 38, 39 (Fla. 1st DCA 2009)(emphasis added). Absent the hospital's contractual relationship with the patient to provide medical care, there is no basis for a lien.

The hospital's rights are dependent upon those of the patient and do not exist apart from the patient's exercise of those rights. No subrogation rights are granted to the hospital. The patient has a claim against the *tortfeasor*, who may be solvent or who may not even be insured. The lien attaches to the cause of action or settlement, which belongs to the *patient*. If there is no settlement or judgment, the hospital has no right of recovery other than pursuing the patient directly. If the tortfeasor prevails, then there is nothing to which the lien attaches. Whether or not there is an insurer makes no difference. The only relationship of importance with respect to the creation of the lien is the hospital/patient relationship.

(e) The Alachua County Lien Law Creates A True Lien.

Shands erroneously argues the Alachua County Lien Law is not subject to Article III, §11(a)(9) of the Florida Constitution because, even though the Florida

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Id. at 513, n. 14.

Legislature states it is creating a "lien" and explains the procedure for perfecting said lien, and even though Shands certainly seems to claim a benefit from having a lien, the Alachua County Lien Law does not create a "true lien." Shands argues the Alachua County Lien Law and related ordinance instead merely create a "cause of action" which is, thus, not invalidated by a constitutional provision which addresses "liens." This reasoning is absurd for several reasons.

First, the Florida Legislature chose to use the word "lien" as opposed to "cause of action" or some other term. Under the rules of statutory construction, the meaning of the statute should be gleaned from its plain language, and the Florida Legislature is presumed to know the meaning of the language it chooses.

Second, the distinction between "lien" and "cause of action" is somewhat illusory. A lien is of no value without some mechanism for enforcement, which some might term a "cause of action." Black's Law Dictionary defines lien as follows: "A claim, encumbrance, or charge on property for payment of some debt, obligation, or duty. . . . Right to enforce charge upon property . . . ." BLACK'S LAW DICTIONARY 922 (6th Ed. 1990). However, one clear distinction between a lien and cause of action is the fact a lien, by its very nature, attaches to something of value. The lien laws in

question do just that. They attach to a patient's third party recovery. The fact they also provide for a means of enforcement does not render them something other than a lien.

Shands essentially wants the word "lien," as used in the Florida Constitution, to mean "lien," but wants a new definition given to the word "lien" as it is used in the Alachua County Lien Law and related ordinance. Shands improperly attributes different definitions to the same word solely in order to benefit itself.

(f) An "Express" Contract Between The Hospital And Patient Is Not Required.

Shands argues the absence of an express, written contract between the hospital and its patient somehow renders Article III, § 11(a)(9) of the Florida Constitution inapplicable. According to Shands, even if the private contract at issue is one between the hospital and the patient, such contract must be an express contract, because the Constitution merely says "private contract" and not "implied contract." Mercury submits the opposite is true.

The word "contract," by itself, encompasses both express and implied contracts. When used by itself, the word "contract" is broad - - not narrow as Shands argues. See generally, Florida Industrial Commission v. Growers Equipment Co., 12 So. 2d 889, 893-94 (Fla. 1943). Had the Florida Legislature intended to limit the term to "express" contracts alone, it certainly could have and would have done so. Thus, while Mercury

agrees with Shands' argument a statute should be enforced as written, Mercury disagrees with the conclusion Shands draws from that rule.

Shands and the State of Florida, as amicus, also mistakenly argue Article III, § (11)(a)(9) does not apply because those "private contracts" on which the lien is based cannot be "quasi-contracts." Mercury disagrees with this contention but states, even if it were true, it would not matter for purposes of this case. Even if "quasi-contracts" or "contracts implied in law" are not "real contracts," the basis for a hospital's claim for expenses from its patient is often an express, written agreement or a contract "implied in fact" - - an *implied contract* which is *not* a quasi-contract. See A.J. v. State, 677 So. 2d 935, 937 (Fla. 4th DCA 1996)("Liability for a medical expense usually arises because of a contract *implied in fact* - - services are rendered with the expectation that the patient will pay a reasonable amount in return").

The difference between a contract implied in fact and a contract implied in law was explained in Commerce Partnership 8098 Limited Partnership v. Equity Contracting Company, Inc., 695 So. 2d 383 (Fla. 4th DCA 1997):

> A contract implied in fact is one form of an enforceable contract; it is based on a tacit promise, one that is inferred in whole or in part from the parties' conduct, not solely from their words. . . . Where an agreement is arrived at by words, oral or written, the contract is said to be 'express.' 17 Am.Jur.2d 'Contracts' at § 3. A contract implied in fact is not put into promissory words with sufficient clarity, so a

> fact finder must examine and interpret the parties' conduct to give definition to their unspoken agreement.
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> . . .
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> Common examples of contracts implied in fact are where a person performs services at another's request, or 'where services are rendered by one person for another without his expressed request, but with his knowledge, and under circumstances' fairly raising the presumption that the parties understood and intended that compensation was to be paid. . . . In these circumstances, the law implies the promise to pay a reasonable amount for the services.
>
> A contract implied in law, or quasi contract, is not based upon the finding, by a process of implication from the facts, of an agreement between the parties. A contract implied in law is a legal fiction, an obligation created by the law without regard to the parties' expression of assent by their words or conduct. . . .
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> . . .
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> The blurring of the distinction between contract implied in fact and quasi contract has been exacerbated by the potential for both theories to apply to the same factual setting. For example, a common form of contract implied in fact is where one party has performed services at the request of another without discussion of compensation. These circumstances justify the inference of a promise to pay a reasonable amount for the service.

Id. at 385-86 (citations omitted)(emphasis added).

A *statutory* lien can be "based on" an express contract between a hospital and its patient or on the parties' contract implied in fact.[24] These types of contracts are often the basis of a patient's liability for medical expenses[25] and are, thus, often what the statutory lien created by the Alachua County Lien Law is properly based upon.

(g) **The Alachua County Ordinance Based On The Alachua County Lien Law Is Void If The Alachua County Lien Law Violates Article III, § 11(a)(9) Of The Florida Constitution.**[26]

Shands argues the Alachua County hospital lien *ordinance*, as opposed to the Alachua County Lien *Law*, is not subject to Article III, § 11(a)(9) of the Florida Constitution. Mercury asserts such argument should be rejected for three reasons: (1) The Alachua County ordinance merely re-published the unconstitutional special

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[24] See generally, State v. American Tobacco Co., 723 So. 2d 263, 268 (Fla. 1998)(a lawyer's charging *lien* arises out of an express *or implied* contract for legal services); McCarthy v. Estate of Krohn, 16 So. 3d 193 (Fla. 4th DCA 2009)(awards under attorneys' charging *lien* turn on express *or implied* contract between attorney and client).

[25] See A.J. v. State, 677 So. 2d 935, 937 (Fla. 4th DCA 1996)("Liability for a medical expense usually arises because of a contract *implied in fact*. . .").

[26] Shands argues Mercury failed to challenge the validity of the Alachua County ordinance (Alachua County Code §262.20-§262.25) and, instead, only challenged the Alachua County Lien Law (Chapter 88-539, Laws of Florida). Such argument constitutes a game of semantics and completely disregards the fact Mercury clearly referred to both of these laws collectively and specifically challenged the ordinance throughout the underlying litigation and before the First District Court of Appeal. (Initial Brief filed by Mercury with First District Court of Appeal, p. 1) (R. 116, 125-131, 167-172, 374, 523).

law using practically identical language; (2) The history and commentary relevant to Article III, §11 of the Florida Constitution reveal an intent to prohibit local ordinances which mirror unconstitutional special laws; and, (3) Shands' impairment of lien claim against Mercury was never based on the ordinance.

(i) The Alachua County ordinance is expressly based on and mirrors the Alachua County Lien Law and is, thus, governed by Article III, §11(a)(9) of the Florida Constitution.

Shands argues even if the Alachua County Lien Law is unconstitutional, the practically identical Alachua County ordinance (Alachua County Code §§ 262.20-262.25), which is expressly based on the special law, somehow remains constitutional and enforceable. Such argument is unsupported by the facts and law.

First, the language of the ordinance is practically identical to the language of the special law. Shands previously admitted "Alachua County codified the Alachua County Hospital Lien Law into the Alachua County Ordinance §§ 262.20-262.25 ('Alachua County Hospital Lien Ordinance')" and "the ordinance mirrors the special act." (See Shands' Answer Brief filed with First District Court of Appeal, p. 16 & n. 5).

Second, the following excerpts from the ordinance indicate it originated from and is based upon the special law:

Sec. 262.20. Entitlement to liens for charges.

> Any nonprofit corporation operating a hospital that has qualified pursuant to section 501(c)(3) of the Internal Revenue Code as a charitable hospital, located in Alachua County, shall be entitled to a lien for all reasonable charges for hospital care, treatment, and maintenance of ill or injured persons upon any and all causes of action, suits, claims, counterclaims, and demands accruing to such persons. . . . ***(Laws of Fla., ch. 88-539, §1)***
>
> Sec. 262.21. Perfecting lien.
>
> . . . ***(Laws of Fla., ch. 88-539, §2)***
>
> Sec. 262.22. Filing and recording of claim; fee.
>
> . . . ***(Laws of Fla., ch. 88-539, §3)***
>
> Sec. 262.23. Release or satisfaction of action, suit, claim, etc.; effect on lien; jurisdiction; recovery of costs.
>
> . . . ***(Laws of Fla., ch. 88-539, §4)***
>
> Sec. 262.24. Recovery of damages.
>
> . . . ***(Laws of Fla., ch. 88-539, §5)***
>
> Sec. 262.25. Application to workers' compensation laws.
>
> . . . ***(Laws of Fla., ch. 88-539, §6)***

Alachua County Code, §§ 262.20-262.25 (emphasis added).[27] Even more important,

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[27] According to the Alachua County Code, the history notes appearing in parentheses after the Code sections (i.e., "Laws of Fla., ch. 88-539"), while not having any legal effect, are "intended to indicate the source of the matter contained in the section." Alachua County Code §10.06 (emphasis added).

§§ 262.20 - 262.25 of the Alachua County Code are located in Subpart B of the Code, which is expressly entitled: "Special Laws." Thus, as is not uncommon at the county level, it appears Alachua County merely published the special act of the Florida Legislature instead of enacting a distinct ordinance.

In Lindsay v. City of Miami, 52 So. 2d 111 (Fla. 1951), the issue before the Florida Supreme Court was the constitutionality of Chapter 25536, Laws of Florida, Acts of 1949 *and Ordinance No. 3811 of the City of Miami, which was passed, according to its express language, pursuant to the Act.* The Court noted the language of the act and the ordinance coincided and held:

> In view of the recital in the ordinance, the identicalness of the language in it and in the act, and the fact that the power to enact the ordinance derives from the act, **we think the ordinance must fail if the act is found void.**

Id. at 112 (emphasis added).

(ii) History of Article III, §11 establishes Alachua County ordinance is invalid.

The history of Article III, § 11 of the Florida Constitution further establishes the Alachua County ordinance is void as unconstitutional. As indicated earlier herein, a general provision "prohibiting the passage of local and special laws in certain instances first appeared in the Constitution of 1868." Article III, § 21, Fla. Const. (1885)

Historical Note. Thereafter, the 1885 Revision to the Florida Constitution added the precursor to the current §11, a provision prohibiting special and private laws in certain specific areas (although liens were not yet mentioned). Article III, § 20, Fla. Const. (1885). With respect to this special law prohibition, the 1885 Revision specifically stated:

> In all cases enumerated in the preceding Section [i.e., §20, prohibiting certain special laws], all laws shall be general and of uniform operation throughout the State, ...

Article III, § 21, Fla. Const. (1885) (emphasis added).[28] In other words, the reason for these special law prohibitions was not to endow local government with the power to make legislative enactments in these specified areas but, to the contrary, to mandate that laws concerning those specific areas, if there is to be legislation, be general and uniform throughout the state. The piecemeal enactment of legislation concerning these areas by local government goes against the overriding purpose for the constitutional prohibition. Thus, as applied, the Alachua County ordinance violates the letter and spirit of, and is inconsistent with, the Florida Constitution, which essentially forbids local law in these areas.[29]

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[28] In 1968, the Florida Constitution was amended to add the constitutional prohibition against special laws creating, enforcing, extending, or impairing liens based on private contracts. Article III, § 11(a)(9), Fla. Const.

[29] Both the Florida Constitution and Florida Statutes state a charter county, such as Alachua County, cannot exercise any powers or enact any ordinances which are

Simply stated, the Florida Constitution cannot be unilaterally circumvented by having a local county government, rather than the Florida Legislature, enact an otherwise unconstitutional law. If Alachua County's local government was allowed to enact an ordinance which allowed such liens, it would essentially gut constitutional protections. Whether the lien was created by a special act of the Florida Legislature or by a local ordinance enacted by the Alachua County local government, it invokes the same concerns covered by Article III, §11(a)(9) of the Florida Constitution: the lien law does not operate uniformly throughout the entire state or even within each county. Thus, the First District Court of Appeal correctly decided both the special law *and* the ordinance are unconstitutional.

(iii) Shands' impairment of lien claim against Mercury was not based on the ordinance.

Even if Article III, § 11(a)(9) of the Florida Constitution does not apply to the Alachua County ordinance, which Mercury denies, such fact is immaterial for purposes of this appeal, because Shands asserted its claim of lien and impairment of lien claim based solely on the *special law*. The actual hospital claim of lien attached to the Complaint states: "This claim is filed pursuant to Chapter 88-539, Laws of Florida." Moreover, the Complaint references the special act and not the local Alachua County

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inconsistent with a general or special law. See Art. VIII, §1(g), Fla. Const.; §125.01(1), Fla. Stat.

ordinance. Even the Affidavit of Rose Parkinson filed with this Court by Shands in support of its Motion for Stay and To Recall Mandate states Shands records its liens "pursuant to Chapter 88-539, Laws of Florida." Thus, the constitutionality of the local ordinance is irrelevant to this case, because the lien at issue was asserted and pursued by Shands based solely on Chapter 88-539, Laws of Florida.

(h) Shands Greatly Overstates The Potential Effect Of The First District Court Of Appeal's Decision On Healthcare In Florida.

Shands' Initial Brief expounds at great length public policy arguments in favor of hospital lien laws. Mercury submits these arguments are more properly the domain of the Florida Legislature. However, Mercury feels compelled to point out Shands exaggerates the scope of the First District Court of Appeal's decision and greatly overstates the potential effects of that decision on healthcare in Florida. The decision does not invalidate all hospital liens nor does it generally hold hospitals are not entitled to assert statutory liens. Rather, the decision merely and singularly holds the Alachua County Lien Law is unconstitutional because it is a *special law*. The Legislature can certainly remedy this constitutional problem by enacting a statewide, uniform lien law as, for example, it has done in the context of construction and a wide variety of labor/service liens in Chapter 713, Florida Statutes. And, in the interim, those

hospitals affected by the First District's decision will continue to have the ability to obtain Medicaid reimbursement and to include lien provisions in their contracts with patients. Shands' argument the First District's decision will create a statewide healthcare crisis is significantly overstated.

The Legislature enacted several special lien laws on a patchwork basis across the state, such that a hospital's lien rights depend on the county in which it is located. Even within the same county, some hospitals may be given lien rights by special law, while others may not have lien rights. Special hospital lien laws do not benefit *all* hospitals. In fact, such laws do not even benefit the majority of Florida hospitals.

Shands asserts twenty (20) counties in Florida benefit from the lien laws. Because there are sixty-seven (67) counties in Florida, this means ***forty-seven (47) counties in Florida do NOT benefit from the special lien laws.*** Shands also asserts one-hundred sixteen (116) hospitals benefit from the special lien laws. However, because there are approximately two-hundred ninety-four (294) hospitals in Florida,[30] this means ***one-hundred seventy-eight (178) hospitals in Florida do NOT benefit from the special lien laws***. Shands, as a beneficiary of the lien laws, has been accorded a special status which allows it to obtain a lien, while another hospital down the street or in another county may not so benefit. Those hospitals which do not

[30] See http://www.fha.org/facts.html (February 10, 2010).

benefit (the majority of hospitals in Florida) would certainly benefit from a general law rather than this special one and would certainly not suffer any detriment if this Court finds the Alachua County Lien Law is unconstitutional.

Shands also argues "based upon the ruling of the First District Court of Appeal, hospitals such as Shands no longer have the right to pursue payment from a third party liability carrier through the imposition of a lien." (See Shands' Initial Brief, p. 20). Yet, in reality, the First District's decision should affect only a small number of patients. First, there must be a case of third party liability. Mercury would posit in many such cases the patient would be represented by legal counsel who has an ethical, if not legal, obligation to satisfy medical bills out of any recovery. Hospital liens have been accorded a *super* priority, superceding all other recipients of a settlement or judgment. What Shands really loses here is, perhaps, some bargaining power with the plaintiffs' bar to direct all, or at least more, of the third party recovery to itself as opposed to the patient, other medical providers, or the patient's attorney. Such loss does not, however, justify the continuance of an unconstitutional law.

Shands argues the statutory lien law reduces the burden on the Florida Medicaid plan. Even if Shands is correct to some limited extent, Mercury again points out the special lien laws in Florida do not apply to the majority of Florida hospitals (i.e.,

approximately 178 of the 294 hospitals in Florida do not benefit from the lien laws). Shands says it "and other hospitals" will now be forced to bill Medicaid directly for amounts which would have otherwise been paid by third party sources. But Shands omits the fact these "other hospitals" are not *all* hospitals: just those in the minority which have been specifically and preferentially selected to benefit from liens based on special laws. Numerous hospitals throughout the state of Florida do not benefit from such special laws.

Shands provides exhaustive arguments indicating there will be an unanticipated interruption of cash flow and an unbudgeted loss of revenue for Shands and "other hospitals." Again, the majority of hospitals in Florida will be unaffected. Moreover, Shands is essentially complaining compliance with the Florida Constitution is too expensive. These cost driven arguments are irrelevant when compared with the real issue: ***the lien law is unconstitutional.*** There is no price tag on constitutionality, and cases deciding constitutional issues often have significant financial results (e.g., Miranda rights, school busing, etc.). Unconstitutional acts should not be permitted to continue merely because it may be expensive to stop them.

The sole focus of the First District Court of Appeal was the fact the lien law on which Shands relies is unconstitutional *because it is a special law*, not because liens

are themselves somehow unconstitutional. Shands repeatedly mischaracterizes this case by arguing Mercury wants to preclude *all* hospital liens. Such argument is incorrect. Instead, Mercury narrowly argues, and the First District Court of Appeal agreed, the *particular* lien on which Shands is relying in this case was created by an *unconstitutional special law*. Concepts of fairness to all individuals and full access to legal remedies support the existence of a uniform lien law governing the entire state.

(3) Shands' Request For Leave To Amend Its Complaint Should Be Denied.

Shands argues if this Court upholds the judgment of the First District Court of Appeal, then this matter should be remanded to allow Shands to amend its complaint to assert a new cause of action against Mercury "not based on either the Alachua County Hospital Lien Law or the Alachua County Lien Ordinance." (See Shands' Initial Brief, p. 47). Although Shands does not identify the specific cause of action it now wishes to assert, Shands previously represented, for the first time on appeal, that it has a cause of action based on a contractual lien in its favor created by Ms. Price's hospital admission agreement. (See Shands' Motion for Rehearing, Rehearing En Banc and/or For Certification filed with First District Court of Appeal, p. 10, ¶19). Mercury respectfully submits Shands' request for leave to amend its complaint should be denied for several reasons.

First, the Florida Rules of Civil Procedure clearly allow a party to pursue "as many separate claims or defenses as that party has, regardless of consistency and whether based on legal or equitable grounds or both." Fla. R. Civ. P. 1.110(g). Notwithstanding this fact, Shands ***voluntarily elected*** not to pursue an alternative cause of action against Mercury based on any law or legal theory other than the Alachua County Lien Law. ***Shands admits it knew of the existence of such a potential claim, but decided not to pursue it, because Shands felt confident about its position under the Alachua County Lien Law***. (See Shands' Motion for Rehearing, Rehearing En Banc and/or For Certification filed with First District Court of Appeal, p. 10-11, ¶19-¶20). Shands essentially wants a second bite at the apple, so to speak, in order to be relieved of its own pleading election because its legal strategy failed.[31] Shands' confidence in its position on one claim should not be a basis for allowing an untimely amendment to add a second claim it could have asserted previously but intentionally omitted. Otherwise, parties will be encouraged to file only those claims on which they feel confident initially, because they will be able to seek leave to amend their complaints to add a previously existing, but unasserted, legal theory if they lose the

[31] Similarly, Shands has sought throughout this case to be relieved of its *voluntary election* to decline Medicaid reimbursement in favor of pursuing its purported lien rights.

first claim on appeal. Moreover, the prejudice Mercury would suffer in having to litigate additional lien theories at this stage of the case would be significant.

Second, *assuming* Shands intends to base its new claim on the Consent and Authorization Form which Shands gave to Ms. Price as part of her admission, that agreement provides no basis for a claim by Shands against *Mercury*. Instead, such an agreement is between Shands *and Krystal Price* (assuming she signed it), whereby Ms. Price agreed Shands could have a lien on any health insurance or liability insurance proceeds she received. Neither Ms. Price nor Shands could by contract bind Mercury, a nonparty to the agreement. Accordingly, Mercury respectfully submits any amendment by Shands to assert a legal theory against Mercury based on Shands' admissions agreement with Ms. Price would be futile and, thus, should not be allowed. See generally, Williams v. Palm Beach Community College Foundation, Inc., 862 So. 2d 917, 919 (Fla. 4th DCA 2003)(recognizing amendment of pleadings may be inappropriate where it would work prejudice to a party or be futile).

This case does not involve a situation where Shands tried to assert a claim at the trial court level but was improperly denied the right to do so. Shands never requested leave from the trial court to amend its complaint to add any other claims against Mercury. Nor is this a situation where this Court's decision may be based on a

deficiency in the pleading which could easily be cured by an amendment to the complaint. Instead, Shands merely wants to be relieved of its voluntary decision not to assert a claim when it could have done so. Given these facts, Mercury respectfully submits Shands' request for leave to amend its pleadings should be denied.

D. CONCLUSION - ANSWER BRIEF

Mercury respectfully requests this Court's affirmance of the First District Court of Appeal's decision the Alachua County Lien Law (Chapter 88-539, Laws of Florida) and related Alachua County ordinance (Alachua County Code § § 262.20 - 262.25) violate Article III, §11(a)(9) of the Florida Constitution. Mercury respectfully submits the matter should then be remanded to the trial court for a determination of Mercury's entitlement to attorney's fees pursuant to its Proposal for Settlement.

However, in the event this Court holds the Alachua County Lien Law is constitutional,[32] Mercury respectfully requests this Court to further hold as follows, based on the legal arguments Mercury has asserted in its Initial Brief on Cross-Appeal: (1) Shands' damages are limited to $10,000.00; (2) Shands is not the "prevailing party" entitled to recover its reasonable attorneys' fees or, at the very most, Shands' attorneys'

[32] Even if this Court determines the Alachua County Lien Law and related ordinance do not violate Article III, § 11(a)(9) of the Florida Constitution, Mercury respectfully submits there are independent grounds for a determination of unconstitutionality and reversal of the trial court's decision, which grounds are discussed at length in Mercury's Initial Brief on Cross Appeal.

fees should be significantly reduced based on Shands' limited success; and, (3) Mercury remains entitled to recover its attorneys' fees based on its Proposal for Settlement in accordance with this Court's rationale in White v. Steak and Ale of Florida, Inc., 816 So. 2d 546 (Fla. 2002). Mercury further submits Shands' request for leave to amend its complaint to state a cause of action, which is not based on either the Alachua County Lien Law or the related ordinance, should be denied.

II. MERCURY INSURANCE COMPANY OF FLORIDA'S INITIAL BRIEF ON CROSS APPEAL

A. STATEMENT OF CASE AND FACTS

(1) Nature Of Case

On or about November 11, 2009, Appellee/Cross-Appellant Mercury timely filed this cross-appeal from the First District Court of Appeal's decision below, based on the First District's rejection of Mercury's alternative arguments the Alachua County Lien Law and related Alachua County ordinance violate Article III, §11(a)(12) of the Florida Constitution and violate Mercury's substantive due process rights under the Florida Constitution and United States Constitution.[33] Mercury respectfully submits the First District Court of Appeal erred in determining these additional constitutional

[33] The First District Court of Appeal held the Alachua County Lien Law and related ordinance violate Article III, § 11(a)(9) of the Florida Constitution, but held there was "no merit to the other issues raised on appeal."

arguments lack merit and states such arguments provide additional and/or alternative grounds for the reversal of the trial court's final judgment in Shands' favor.

(2) **Statement Of Facts**

Mercury hereby incorporates the Statement of Case and Facts from its Answer Brief set forth earlier herein.

B. **SUMMARY OF ARGUMENT**

The First District Court of Appeal erred when it rejected Mercury's argument the Alachua County Lien Law and related Alachua County ordinance violate Article III, §11(a)(12) of the Florida Constitution and Mercury's substantive due process rights under the Florida Constitution and the United States Constitution.

First, in addition to being an unconstitutional special law which creates a lien based on a private contract, the Alachua County Lien Law and its related ordinance run afoul of the constitutional prohibition of special laws which grant a privilege to a private corporation. The Alachua County Lien Law singles out for benefit only private, non-profit charitable hospitals. Public hospitals are not benefitted by the lien privileges granted by the special act.

Second, the Alachua County Lien Law and its related ordinance violate Mercury's substantive due process rights under the United States Constitution and

Florida Constitution and fail the rational basis test as applied by the trial court. An application of the Alachua County Lien Law which results in an insurer's payment of more than the amount of its settlement with the patient or more than its policy limits is both penal and punitive in nature. As applied by Shands and by the trial court, the Alachua County Lien Law fails to adequately warn insurers and others who enter into liability settlements of the extent of their potential financial liability for lien impairment. Under Shands' interpretation, an insurer which issues a liability policy with low policy limits in exchange for a low premium rate from its insured remains potentially exposed to liability for catastrophic damages far in excess of the actual settlement and/or its liability limits. The Alachua County Lien Law provides no notice of this potential penalty and is, thus, unconstitutionally vague and violative of substantive due process.

If, despite Mercury's legal arguments, this Court finds the Alachua County Lien Law and related ordinance are constitutional, then Mercury respectfully submits Shands' damages must be limited to the $10,000.00 awarded by the trial court, rather than the total amount of Shands' lien (i.e., $28,412.20), because any judgment for Ms. Price's medical expenses beyond Mercury's $10,000.00 policy limits would have been uncollectible against Mercury's insureds. In such case, this Court should further hold

the trial court erred in finding Shands is the “prevailing party” entitled to recover its attorneys’ fees, because **the only issue at trial** was whether Shands suffered damages in excess of the $10,000.00 already conceded by Mercury. Because the trial court concluded Shands was only entitled to recover $10,000.00, rather than the $28,418.20 sought by Shands, Shands did not prevail on the significant issue at trial and, thus, is not entitled to recover its attorneys’ fees as the “prevailing party.”[34] Moreover, in such case, Mercury is entitled to recover its attorneys' fees based on its Proposal for Settlement.

C. ARGUMENT

(1) Standard Of Appellate Review

The Florida Supreme Court reviews *de novo* a lower court’s ruling on the constitutionality of a statute. Lawnwood Medical Center, Inc. v. Seeger, 990 So. 2d 503, 508 (Fla. 2008). Although a legislative enactment is presumed to be constitutional, “the power of the Legislature is limited by the Florida Constitution itself.” Id. at 509.

[34] At the very least, the trial court erred by failing to reduce the fee award to Shands.

(2) The Alachua County Lien Law Violates Article III, § 11(a)(12) of the Florida Constitution

Article III, § 11(a)(12) of the Florida Constitution prohibits the Legislature from passing any "special or general law of local application pertaining to . . . private incorporation or grant of privilege to a private corporation." Art. III, § 11(a)(12), Fla. Const. (emphasis added).[35] Despite this constitutional prohibition, the Alachua County Lien Law singles out for benefit only private, non-profit charitable hospitals located in Alachua County.[36] Accordingly, the Alachua County Lien Law violates Florida's constitutional prohibition of special laws granting privileges to private corporations.[37]

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[35] In Lawnwood Medical Center v. Seeger, 990 So. 2d 503 (Fla. 2008), this Court addressed the purpose for this specific constitutional prohibition:

> One purpose of expanding the scope of prohibitions of special laws was to prevent state action benefitting local or private interests and to direct the Legislature to focus on issues of statewide importance. Indeed, article III, section 11's broad list of prohibitions reveals the drafters' concern for the restriction of local laws ***and the encouragement of uniformity in Florida law***. Cf. Robert F. Williams, Equality Guarantees in State Constitutional Law, 63 Tex. L.Rev. 1195, 1209 (1985) ("[T]hese proscriptions on special and local laws reflect ***a concern for equal treatment under the law.***"). . .

Id. at 512-14 (emphasis added).

[36] See Ch. 88-539, § 1, Laws of Florida.

[37] This special treatment for private hospitals becomes even more problematic when juxtaposed with the shifting of financial loss from the private hospital to the private insurance carrier which will occur if Shands' position is adopted in this case.

See Lawnwood Medical Center, Inc. v. Seeger, 959 So. 2d 1222 (Fla. 1st DCA 2007) (holding a special law pertaining to hospital governance granted a privilege to a private corporation in violation of the Florida Constitution, even though the special law applied to all of the hospitals in the county, because both such hospitals were governed by the same private corporation), aff'd, 990 So. 2d 503 (Fla. 2008).

(a) The Lien Created By The Alachua County Lien Law And Related Ordinance Constitutes A "Privilege."

This Court has recently defined "privilege," as such term is used in Article III, § 11(a)(12) of the Florida Constitution, as follows:

> According to *Black's Law Dictionary* 1359 (4th ed. 1968) 'privilege' is defined in part as 'a particular and peculiar benefit or advantage enjoyed by a person, company, or class, beyond the common advantage of other citizens.' *Webster's Seventh New Collegiate Dictionary* 677 (7th ed. 1967), defines 'privilege' as 'a right or immunity granted as a peculiar benefit, advantage or favor.' The definitions provided by these dictionaries indicate that a 'privilege' encompasses more than just a financial benefit. Although this Court has not defined 'privilege' as used in article III, section 11(a)(12), it has defined 'privilege' as used in excise tax laws as 'a franchise or right granted to one by the government.' See City of Pensacola v. Lawrence, 126 Fla. 830, 171 So. 793, 795 (1937). Thus, the common theme of all of these definitions is that a privilege is a right, a special benefit, or an advantage.
>
> Florida is not alone in adopting a constitutional prohibition against granting privileges to private corporations . . . .

> . . . Because the drafters did not limit the term "privilege" by including a reference to only economic privileges, we conclude that the term 'privilege' encompasses more than a financial benefit and includes a 'right,' 'benefit,' or 'advantage,' granted to a private corporation.

Lawnwood Medical Center, Inc., 990 So. 2d at 511-12 (emphasis added). The statutory lien rights granted to private nonprofit hospitals in Alachua County by the Alachua County Lien Law clearly qualify as a "privilege" under this definition.

Shands argued below the Alachua County Lien Law did not grant a "privilege" because it is a statute designed to protect health, morals, or the public welfare. Such argument ignores the purpose and effect of the Alachua County Lien Law. The Alachua County Lien Law was enacted to protect certain private hospitals: not the general public (or even public hospitals). Although the general public may indirectly benefit from a hospital's *services*, the *lien law* directly benefits the *hospital alone* by assisting it with the collection of payment for services it renders. The money recovered by the hospital pursuant to the lien law goes to the private hospital - not to the public coffers.[38]

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[38] Moreover, it is the hospitals who actively sought the passage of the Alachua County Lien Law for their own benefit. According to the legislative history, "the charitable hospitals of Alachua County are seeking a legal mechanism which will enable them to recover their expenses . . . ." Fla. H.R. Comm. on Community Affairs, HB 1412 (1988) (enacted as Ch. 88-539, Laws of Fla.) Final Staff Analysis (emphasis added).

(b) Shands Is A "Private Corporation."

Shands is a "private" corporation for purposes of applying the constitutional prohibitions in Art. III, § 11(a)(12) of the Florida Constitution.[39]

Shands relies upon its articles of incorporation and information about its earnings and stockholders to support its argument it is not a "private corporation." Mercury submits such records should not even be considered because they were never presented to the trial court, but asserts even if such records are considered, they support Mercury's contention Shands is a private corporation. Shands' Articles of Incorporation state Shands was organized as a ***"private***, not for profit corporation" under Chapter 617 of the Florida Statutes. (See Shands Appendix filed in the First District Court of Appeal, Tab 6, p. 1).

Florida Statute §1004.41(4)(a) also refers to Shands as a "***private*** non-profit corporation:"

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[39] Shands' contention it is not a "private corporation" was never presented to the trial court when it was considering Mercury's constitutional challenges. As a result, Mercury asserts such argument was waived by Shands and cannot be addressed for the first time on appeal. See generally, Alamagan Corporation v. The Daniels Group, Inc., 809 So. 2d 22, 26 (Fla. 3d DCA 2002)("an appellate court may not decide issues that were not ruled on by a trial court in the first instance"); Palmer v. Thomas, 284 So. 2d 709, 710 (Fla. 1st DCA 1973)("The function of an appellate court is to review errors allegedly committed by trial courts and not to entertain for the first time on appeal defenses which the complaining party could and should have but did not interpose and present to the trial court for decision").

> The University of Florida Board of Trustees shall lease the hospital facilities of the health care center known as the Shands Teaching Hospital and Clinics on the campus of the University of Florida . . . to a ***private*** not for profit corporation organized solely for the purpose of operating a hospital. . . .

§1004.41(4)(a), Fla. Stat. (emphasis added).

The Alachua County Lien Law's legislative history further indicates Shands is a "private" corporation. The legislative history states the Alachua County Lien Law applies to charitable hospitals, describes such hospitals as "***private*** entities operating on a nonprofit basis," and then specifically identifies Shands as one of the hospitals to which the law applies. See Fla. H.R. Comm. on Community Affairs, HB 1412 (1988)(enacted as Ch. 88-539, Laws of Fla.) Final Staff Analysis (emphasis added). The legislative history also reveals the Legislature's concern the Alachua County Lien Law would later be found unconstitutional because of its granting of a privilege to *private* corporations (including the specifically identified Shands):

> There could be problems with providing statutory liens by special act to charitable hospitals in general (as they are ***private*** entities operating on a non-profit basis) . . .
>
> . . .
>
> In this respect, a question of constitutionality is raised regarding the establishment by special act of a statutory lien which benefits a ***private*** hospital.

Id. (emphasis added).

Florida case law also unequivocally establishes Shands is a "private" corporation. See Andrew v. Shands at Lake Shore, Inc., 970 So. 2d 887 (Fla. 1st DCA 2007)(holding Shands is a private hospital which does not enjoy statutory sovereign immunity); Campus Communications, Inc. v. Shands Teaching Hospital and Clinics, Inc., 512 So. 2d 999, 1000 (Fla. 1st DCA 1987)(holding Shands Teaching Hospital and Clinics, Inc. is not a state agency or authority for purposes of the Sunshine Law, and Shands is not a unit of government or private entity acting on behalf of any public agency for purposes of the Public Records Law); DeRosa v. Shands Teaching Hospital and Clinics, Inc., 504 So. 2d 1313 (Fla. 1st DCA 1987)(noting Shands Teaching Hospital and Clinics, Inc. is not a state agency or a corporation primarily acting as an instrumentality or agency of the state); Shands Teaching Hospital and Clinics, Inc. v. Lee, 478 So. 2d 77 (Fla. 1st DCA 1985) (holding Shands Teaching Hospital and Clinics, Inc. is not a state agency or a corporation primarily acting as an instrumentality or agency of the state). See also West Coast Hospital Ass'n v. Hoare, 64 So. 2d 293, 296 (Fla. 1953)(hospital was private where it was not owned by the government or by the public, even though it had a relationship with local governments, having received contributions from the city for both operating and expanding, payments by the county for treating indigent patients, and contributions from the United Community Fund and

from the public generally); Schwartz v. GEICO Gen. Ins. Co., 712 So. 2d 773 (Fla. 4th DCA 1998)(hospital which was not owned by the government or by the public was a "private hospital," even though it had relations with local governments and received contributions from local governments for operating and expanding and treating indigent patients); Kondos v. Underwriters Guar. Ins. Co., 1995 W.L. 1316053, *1 (Fla. Cir. Ct. Jan. 25, 1995)("A private hospital may be supported by appropriations by the state, the county or municipality without becoming a public hospital").

Because the Alachua County Lien law and related ordinance are special laws which grant a privilege to a private corporation, said laws violate Article III, § 11(a)(12) of the Florida Constitution.[40]

(3) The Alachua County Lien Law Violates Mercury's Substantive Due Process Rights And, Thus, Is Unconstitutional Under Both The Florida And United States Constitutions.

Both the United States Constitution and the Florida Constitution prohibit the deprivation of liberty and property without due process of law. U.S. CONST. art. V and XIV; Art. I, § 9, Fla. Const. In order for a statute to pass constitutional muster under the due process clauses, the Florida Legislature must have had a legitimate

[40] For the reasons set forth previously in Mercury's Answer Brief, if the Alachua County Lien Law is unconstitutional, the related Alachua County ordinance must also fail.

purpose for enacting the statute and must have provided means which are not unreasonable, arbitrary, capricious, or oppressive. Nationwide Mut. Fire Ins. Co. v. Pinnacle Medical, Inc., 753 So. 2d 55 (Fla. 2000). The Alachua County Lien Law fails this test.

The Alachua County Lien Law violates Mercury's substantive due process rights and, thus, is unconstitutional because, as applied by the trial court, it ceases to have a rational relationship with a legitimate general welfare concern.[41] The Legislature may have had a legitimate purpose in granting a hospital a lien in the amount of reasonable expenses and allowing the hospital to recover those expenses from a third party recovery by settlement or judgment up to the amount of that settlement or judgment. However, the rational basis for such a lien disappears when applied to amounts above the settlement or judgment paid by the insurer, particularly in excess of the insurance carrier's liability limits. There is no rational basis to shift the financial burden from the hospital to the insurance carrier beyond those amounts. Such an application has no rational relationship to any legitimate general welfare concern and is unreasonable,

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[41] A legislative act which does not involve a fundamental right is reviewed under a "rational basis" test. Specifically, with respect to substantive due process, a statute is valid if it bears a rational relationship to a legitimate legislative purpose in safeguarding the public health, safety, or general welfare and is not discriminatory arbitrary or oppressive. Haire v. Florida Dept. of Agriculture and Consumer Services, 870 So. 2d 774 (Fla. 2004)

arbitrary, capricious, and oppressive. Thus, the trial court's interpretation of the Alachua County Lien Law, which holds Mercury liable for damages exceeding the amount of the settlement made to protect its insured and exceeding its contractual, financial responsibility under the policy it issued, renders the Alachua County Lien Law unconstitutional in its application on due process grounds.[42]

The Alachua County Lien Law is also unconstitutionally vague. Substantive due process requires statutory language to be sufficiently explicit and definite to provide notice of prohibited conduct and penalties, such that it does not invite arbitrary and discriminatory enforcement. Southeastern Fisheries Ass'n, Inc. v. Dept. of Natural Resources, 453 So. 2d 1351 (Fla. 1984); Westerheide v. State, 767 So. 2d 637, 650 (Fla. 5th DCA 2000). According to the United States Supreme Court:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.

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[42] The trial court limited Shands' damages to $10,000.00 policy limits, not because that sum represented Mercury's policy limits, but because Mercury's insureds were uncollectible. Mercury submits the result was correct, but the failure to take into account a policy limits limitation renders the Alachua County Lien Law unconstitutional in its application on due process grounds.

Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). See also D'Alemberte v. Anderson, 349 So. 2d 164, 166 (Fla. 1977)("An assault on the constitutionality of a statute vel non must necessarily succeed if the language does not convey sufficiently definite warnings of the proscribed conduct when measured by common understanding and practice"); Westerheide v. State 767 So. 2d 637, 650, n. 8 (Fla. 5th DCA 2000) ("Due process under the United States and Florida Constitutions requires that when an individual's interest may be adversely affected by legislative action, he or she must be given adequate notice of what is prohibited by the legislation. . . . Thus, the language of the statute must be 'sufficiently definite to apprise those to whom it applies of the conduct it prohibits'").

The Alachua County Lien Law is arguably unclear and ambiguous as to whether the hospital's recoverable damages for lien impairment may potentially exceed the amount of the third party's recovery from the insurer, such that an insurer must pay more than the policy limits it contracted to pay. Shands believes it is entitled to recover its expenses no matter how much they are, thus rendering the law a strict liability law which is punitive in nature. And, as long as the insured is collectible, the trial court seemingly agrees. If such position is accepted, then the Alachua County Lien Law fails to provide adequate notice to those who enter into liability settlements, such as

insurance carriers, of the extent of their potential liability for lien impairment.[43] In particular, the Alachua County Lien Law does not put insurance carriers on notice that, if they issue an insurance policy with low liability limits at their insured's request (such as the $10,000.00 in this case), they can still potentially be liable for catastrophic damages greatly exceeding the liability limits, based solely on an administrative mishap, such as by failing to name a hospital as a payee on the settlement check. Insurance carriers in Florida, such as Mercury, would certainly want to consider such potential exposure when issuing liability policies with low policy limits at lower premium rates in order to serve those who can only afford such policies. Because the Alachua County Lien Law, as applied by Shands and the trial court, fails to put Mercury, and others similarly situated, on notice of their potential exposure greatly in excess of policy limits, such law is unconstitutionally vague.

Mercury points out the problems presented by the vague nature of the Alachua County Lien Law are exacerbated given its status as a special, rather than general, law. Because hospital lien laws are not uniform throughout Florida and do not even exist in some counties, it is more likely inadvertent violations of said laws will occur by those who do not have knowledge of all of the nuances of the various laws. Such

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[43] Shands in its Initial Brief directs disdain, if not animosity, toward insurance carriers in general. It is important to note the lien laws apply not only to insurance carriers, but also to any person or entity entering into a liability settlement.

unintentional violations are especially problematic when the special lien law at issue (like the Alachua County Lien Law) fails to put insurers on notice they can be potentially liable for catastrophic damages greatly exceeding their policy limits based solely on an administrative oversight.

(4) If The Florida Supreme Court Holds The Alachua County Lien Law And Related Ordinance Are Unconstitutional, Then Mercury Is Entitled To Recover Its Attorneys' Fees Pursuant To Its Proposal For Settlement.

On May 29, 2007, pursuant to Rule 1.442 of the Florida Rules of Civil Procedure and Florida Statute § 768.79, Mercury served a valid and timely Proposal for Settlement in the amount of $17,700.00 on Appellant Shands Teaching Hospital and Clinics, Inc. ("Shands"). Shands did not accept this proposal within thirty (30) days. Accordingly, if this Court holds the Alachua County Lien Law and related ordinance are unconstitutional, Mercury will be entitled to recover the reasonable attorney's fees it incurred during the underlying action and this appeal from Shands.

(5) If The Florida Supreme Court Reverses The First District Court Of Appeal's Decision, Shands' Damages Should Be Limited To $10,000.00.

Should this Court decide to reverse the First District Court of Appeal's decision, the parties dispute whether Shands is entitled to recover the full amount of its hospital lien from Mercury ($28,412.20) or whether the trial court correctly limited Shands'

recovery to $10,000.00, because any judgment for Ms. Price's medical expenses beyond Mercury's $10,000.00 policy limits would have been uncollectible against Mercury's insureds.[44] Mercury respectfully submits the trial court correctly limited Shands' recovery to Mercury's $10,000.00 policy limits.

(a) Standard Of Review

Statutory interpretation is a question of law to be determined by the court and is subject to *de novo* review. Therrien v. State, 914 So. 2d 942, 945 (Fla. 2005); Zingale v. Powell, 885 So. 2d 277, 280 (Fla. 2004); Bellsouth Telecommunications, Inc. v. Meeks, 863 So. 2d 287, 289 (Fla. 2003).

(b) The Alachua County Lien Law Unambiguously Requires Shands To Prove Its Damages Were *Caused By* Mercury's Impairment Of The Lien.

The Alachua County Lien Law and related ordinance clearly and unambiguously require the lienholder (i.e., Shands) to prove its damages were *caused by Mercury's impairment of the lien.* Specifically, the lienholder is given a cause of action for damages **"on account of such impairment**:"

> Any acceptance of a release or satisfaction of any such cause of action, suit, claim, counterclaim, demand, or judgment and any settlement of any of the foregoing in the absence of a release of satisfaction of the lien referred to in

[44] Mercury's "insureds," for purposes of this appeal, are Milford Bryant, Nancy Conley, and Brian Conley.

> this act shall *prima facie* constitute an impairment of such lien and the lienholder shall be entitled to an action at law for damages on account of such impairment, and in such action may[45] recover from the one accepting such release or satisfaction or making such settlement the reasonable cost of such hospital care, treatment, and maintenance.

§ 262.23, Alachua County Code (Ch. 88-539, § 4, Laws of Fla.) (emphasis added).[46]

Such language makes it clear the liability of one who impairs the lien is limited to those losses which were the proximate result of the impairment. To the extent Shands'

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[45] Further supporting this interpretation is the Legislature's use of the words "shall" and "may." The Alachua County Lien Law states the hospital **shall** be entitled to a lien, the acceptance of a release **shall** *prima facie* constitute an impairment of lien, the lienholder **shall** be entitled to an action at law for damages on account of such impairment, and the lienholder **shall** be entitled to recover costs and reasonable attorney's fees. However, when speaking directly to the lienholder's damages for impairment, the Alachua County Lien Law the state's lienholder **may** recover the reasonable cost of such hospital care and treatment. Mercury submits the Legislature's use of the word "may," when speaking to recoverable damages in a law replete with the word "shall," strongly suggests legislative intent to limit the lienholder's recovery to the amount of the settlement or judgment, even if such amount is less than the lien.

[46] The Alachua County Lien Law also contains a lien entitlement provision which states a qualifying hospital, such as Shands, "...shall be entitled to a lien for all reasonable charges for hospital care, treatment, and maintenance of ill or injured persons . . . upon all judgments, settlements, and settlement agreements ..." arising out of the injuries necessitating the hospital care and treatment. § 262.20, Alachua County Code (Ch. 88-539, § 1, Laws of Fla.) (emphasis added). In other words, the lien, as is true of liens generally and distinct from subrogated claims, attaches to something of finite value, which, in this case, is the settlement between Mercury and the patient, Ms. Price. Although Shands' lien is *potentially* for all reasonable charges, Shands' recovery from any one party is implicitly limited to the thing of value to which it attaches. It seems axiomatic and consistent with general lien law in Florida that the lienholder, in enforcing the lien, may not recover an amount greater than the subject of the lien. (See Mercury's Initial Brief filed with First District, pp. 21-26).

damages were not “on account of” Mercury’s impairment of the lien, they are not recoverable.

The loss a hospital may suffer as a result of its rendering of unpaid medical services to a patient is distinct from the loss the hospital may suffer as a result of a third party’s impairment of its lien. Shands is to be returned only to the same position it would have occupied had the lien not been impaired by Mercury. The injury proximately resulting from Mercury’s impairment of Shands’ lien was Shands’ loss of a *collectible* judgment against Mercury’s insureds. Had the lien not been impaired, Shands would have been (at best) in the position of one possessing a $28,412.20 judgment against Mercury’s judgment proof insureds, who were insured by an insurance policy with $10,000.00 limits. The value of an uncollectible, unrecoverable judgment is $0.00; thus, even if the lien had not been impaired, Shands’ recovery would have been limited to the insured tortfeasors’ insurance policy benefits (i.e., Mercury’s $10,000.00 limits). As a result, it cannot be said that, “but for” Mercury’s impairment of the lien, Shands would have recovered an amount greater than $10,000.00.[47]

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[47] Mercury would have complied with the lien law if it had merely included Shands’ name on the $10,000.00 settlement check it gave Ms. Price (had it been aware of Shands' lien). In such event, Shands would not have recovered any additional money from Mercury, because Mercury would have paid its $10,000.00 liability limits. Thus, Shands would have only recovered additional money if Ms. Price had chosen to sue

To ignore the collectibility of the potential judgment against Mercury's insureds and to award Shands the entire amount of its lien, as Shands urges, would award Shands a windfall opportunity to fare better as a result of Mercury's impairment of the lien, then it would have fared if Mercury had not impaired the lien, and to fare better than the patient herself would have fared against the tortfeasor. As a result, the trial court correctly limited Shands' damages to the $10,000.00 award.[48]

Mercury's insureds, individually, if Ms. Price prevailed on her claim against those insureds, and if Ms. Price actually collected on the judgment against those insureds. Because the evidence at trial established any judgment against the insureds would have been uncollectible, Shands would not have recovered any money over and above Mercury's $10,000.00 policy limits, *even if Mercury had not impaired the lien*.

[48] The legislative history of the Alachua County Lien Law provides further evidence the Florida Legislature intended a hospital's recovery for lien impairment to be limited to those damages the patient could *actually recover* from the tortfeasor:

> The charitable hospitals of Alachua County are seeking a legal mechanism which will enable them to recover their expenses in these cases, or at least the same proportion of these expenses as were **recovered** by the patient.

Fla. H.R. Comm. on Community Affairs, HB 1412 (1988 (enacted as Ch. 88-539, Laws of Fla.) Final Staff Analysis.(emphasis added). See also Dade County v. Perez, 237 So. 2d 781, 783 (Fla. 3d DCA 1970) (" . . . the lien provided for applies to ***whatever is recovered*** on claims against the tortfeasor arising from the injuries sustained").

(c) **Florida Courts Have Required Plaintiffs To Prove The Collectibility Of A Potential Underlying Judgment In Analogous Cases.**

Shands argued below it is not required to prove any judgment against Mercury's insureds would have been collectible, because judgments in Florida are valid for twenty years and it is impossible to predict the future financial status of a party. While Mercury recognizes a *defendant*'s collectibility is usually not an issue in a case, *it is not the defendant's collectibility nor the judgment in this case which is at issue.* Instead, the injury proximately resulting from Mercury's impairment of Shands' lien is Shands' loss of a collectible judgment against a third party tortfeasor; thus, the collectibility of a hypothetical judgment against Mercury's insureds is *an actual element of Shands' claim* in this case.

Measuring the value of a lost cause of action in terms of the collectibility of a hypothetical judgment obtained thereon is not a novel or unique ideal. Where a defendant's wrongful actions cause the plaintiff to lose the right to pursue an underlying claim against a third party, numerous courts have limited the plaintiff's damages to the amount the plaintiff can prove he or she would have *collected* on a judgment against the third party in the underlying action had it been pursued.[49]

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[49] And none of these cases hold the collectibility of the underlying judgment should be evaluated based on the possibility the judgment might have become collectible in the next twenty years.

The most common example of this type of case is a legal malpractice case where an attorney's wrongdoing resulted in the client's loss of a legal claim for damages against a third party. Such cases are often referred to as involving a "trial within a trial," because the plaintiff must prove the underlying action against the third party would have been successful *and* the plaintiff could have collected the awarded damages from the third party. Tarleton v. Arnstein & Lehr, 719 So. 2d 325, 328 (Fla. 4th DCA 1998).

For example, in Fernandes v. Barrs, 641 So. 2d 1371 (Fla. 1st DCA 1994), overruled on other grds, 668 So. 2d 180 (Fla. 1995),[50] this Court held as follows on this issue:

> We agree that the burden should ordinarily be on the plaintiff in a legal malpractice action to prove the collectibility of the judgment which would have been obtained in the underlying action but for the attorney's negligence, in order to establish the amount of damages proximately caused by the negligence. Such a rule prevents a windfall to the client by preventing him from recovering more from the attorney than he could have actually obtained from the tortfeasor in the underlying action. The plaintiff may ordinarily satisfy this burden with evidence of the

[50] Fernandes was overruled to the extent it could be read to hold a contingent fee contract which does not comply with the professional rules of conduct is enforceable by an attorney who claims fees based on a non-complying agreement. The overruled portion of Fernandes had nothing to do with the collectibility of an underlying judgment.

> original tortfeasor's financial status, insurance coverage, property ownership, and so forth if such evidence can be obtained.

Id. at 1376.[51] In reaching this conclusion, this Court noted the majority of other jurisdictions considering this issue have also imposed the burden to prove collectibility of the underlying judgment on the *plaintiff*. Id. at 1375.[52] See also Tarleton v. Arnstein

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[51] The Fernandes court held the burden should be shifted to the attorney *only when* the attorney's negligence makes it impossible to prove the collectibility of the claim. Id. at 1376. Such a situation does not exist in this case. Unlike the defendant in Fernandes, Mercury's actions did not preclude Shands from trying to establish the collectibility of its claim against Mercury's insureds. To the contrary, both Mercury and Shands presented evidence at trial concerning the insureds' financial means.

[52] See, e.g., Beeck v. Aquaslide 'N' Dive Corp., 350 N.W.2d 149, 160-61 (Iowa 1984) (*the amount of the judgment which was collectible* was the measure of damages against the negligent attorney, otherwise the client would be placed in a better position by virtue of the malpractice; Iowa law required plaintiff to introduce evidence of collectibility); Taylor Oil Co. v. Weisensee, 334 N.W.2d 27, 29, n. 2 (S.D.1983) (following rule of "many jurisdictions" that plaintiff bears burden of establishing factual evidence of *the amount of the judgment which would have been collectible*); Christy v. Saliterman, 179 N.W.2d 288, 293 (Minn. 1970)(in legal malpractice action, plaintiff had burden of proving both that the attorney negligently permitted the statute of limitations to extinguish plaintiff's claim and that plaintiff *could have recovered on that claim*); McDow v. Dixon, 226 S.E.2d 145, 147 (Ga. Ct. App. 1976) (measure of client's damages is *the amount of the judgment which would have been collectible*); Kohler v. Woollen, Brown & Hawkins, 304 N.E.2d 677, 679 (Ill. App. Ct. 1973)("In an action for legal malpractice a plaintiff has the burden of showing the validity of the demand which he lost and that *it could have been realized* if the attorneys had not been negligent"); Cook v. Superior Court of San Diego County, 97 Cal. Rptr. 189, 190 (Cal. Dist. Ct. App. 1971)("client must show the attorney was negligent in prosecuting the case and, but for such negligence, the case would have resulted in the recovery *and collection of a judgment* favorable to the client"); Gibson v. Johnson, 414 S.W.2d 235, 238-39 (Tex. Ct. App.1967)("the burden of proof is on the client to prove that his suit would have been successful but for the negligence of his attorney, and to show *what*

& Lehr, 719 So. 2d 325 (Fla. 4th DCA 1998)(agreeing plaintiff in legal malpractice case must prove he or she would have *recovere*d but for the attorneys' negligence); Sure Snap Corporation v. Baena, 705 So. 2d 46 (Fla. 3d DCA 1997)(holding the causation element of a legal malpractice claim is not satisfied "unless the plaintiff demonstrates that *there is an amount of damages which the client would have recovered* but for the attorneys' negligence"); Bolves v. Hullinger, 629 So. 2d 198, 200 (Fla. 5th DCA 1993)(in order to prevail on his claim against defendant for causing him to lose his age discrimination claim, plaintiff had to prove that but for defendant's negligence in failing to timely file the claim, the plaintiff would have *recovered* liquidated damages in the lawsuit); Hand v. Hustad, 440 So. 2d 518 (Fla. 4th DCA 1983)(relied on by Fernandes and strongly suggesting plaintiff in legal malpractice case had burden to prove *collectibility* of lien which was apparently "lost" or impaired as a result of defendant attorney's actions).[53]

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amount would have been collectible had he recovered a judgment"); Leavy v. Kramer, 226 N.Y.S.2d 349, 350 (N.Y. Sup. Ct. 1962)("It is incumbent upon the plaintiff to prove that *the original claim would or could have been collected* but for the attorney's negligence").

[53] See also Sitton v. Clements, 257 F. Supp. 63 (E.D. Tenn. 1966)(reducing $162,500 jury award against attorney to $81,250 *because defendant in underlying suit would not have been able to satisfy the larger judgment*; thus, only the loss of the reduced amount was proximately caused by attorney's negligence), aff'd, 385 F.2d 869 (6th Cir. 1967); Williams v. Briscoe, 137 S.W.3d 120 (Tex. Ct. App. 2004)(when legal malpractice claims arises from earlier litigation, plaintiff must prove *amount of damages he or she would have collected in the underlying case* if it had been properly prosecute);

The burden to prove collectibility or recoverability of an underlying judgment has also been imposed on the plaintiff in other contexts. See generally, Coopers & Lybrand v. Trustees of the Archdiocese of Miami/Diocese of St. Petersburg Health & Welfare Plan, 536 So. 2d 278 (Fla. 3d DCA 1988)(plaintiff was only entitled to recover damages which could be proven to have been caused by negligence of accountants; thus, plaintiff could not recover damages in the amount of the insurance policy which the accountant's audit failed to reveal had not been obtained - there was no evidence policy could have been obtained *and no evidence plaintiff would have successfully recovered on the policy*). See also Hammons v. Schrunk, 305 P.2d 405 (Or. 1956)(in action against Sheriff, whose failure to timely serve summons resulted in loss of cause of action due to running of statute of limitations, plaintiff had to prove validity *and collectibility of underlying claim*).

Although the instant case is not a professional malpractice case, Shands' alleged injury as a result of Mercury's wrongdoing is the same: the loss of a collectible judgment against a third party. As a result, Mercury respectfully submits the rationale

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Garretson v. Miller, 121 Cal. Rptr. 2d 317 (Cal. Ct. App. 2002)(plaintiff in legal malpractice case has the burden to prove *underlying judgment could have been collected*); McKenna v. Forsyth & Forsyth, 720 N.Y.S.2d 654, 657 (N.Y. App. Div. 4th Dept. 2001)("Limiting damages in a legal malpractice action to *the amount of a collectible judgment* is consistent with the purpose of compensatory damages, i.e., 'to make the injured client whole'" and further holding the burden of proving collectability should be on the plaintiff).

and holdings of the cases cited herein govern this case and require Shands' damages (if its lien is deemed valid) to be limited to the amount of money Shands can prove it (or Ms. Price) would have been able to collect from Mercury's insureds if Ms. Price had pursued a tort action against them.[54]

(d) An Award In Excess Of $10,000.00 Would Be Contrary To The Purpose Of Compensatory Damage Awards.

Compensatory damages exist only to compensate the plaintiff, not to punish the defendant. "The primary basis for an award of damages is *compensation*. That is, the objective is to make the injured party whole to the extent that it is possible to measure his injury in terms of money." Fisher v. City of Miami, 172 So. 2d 455, 457 (Fla. 1965). According to this Court:

> Compensatory damages are designed to make the injured party whole to the extent that it is possible to measure such injury in monetary terms. . . . A plaintiff, however, is not entitled to recover compensatory damages in excess of the

[54] It is significant the Alachua County Lien Law does not grant any subrogation rights to a hospital (i.e., the right to step into the shoes of the claimant). Shands' rights under the lien law are very limited in comparison with subrogation rights. Shands' rights are entirely dependent upon the actions of the patient with respect to a potential cause of action against the tortfeasor (thus making any claim about what was lost somewhat speculative). The lien attaches to the patient's cause of action, settlement, or judgment. If the patient chooses not to pursue a potential cause of action, there is nothing the lienholder can do to recover on its lien. The lienholder is not given the right to force the patient to pursue a lawsuit, to compel the patient to settle with the tortfeasor, or to otherwise step into the shoes of the patient.

> amount which represents the loss actually inflicted by the action of the defendant . . . .

MCI Worldcom Network Services, Inc. v. Mastec, Inc., 995 So. 2d 221, 223 (Fla. 2008)(emphasis added). Moreover, "the purpose of compensatory damages is to compensate, not to punish defendants or bestow a windfall on plaintiffs." Id.

Limiting Shands' damages to the amount of a *collectible* judgment is consistent with the purpose of compensatory damages (i.e., to make the injured party whole). The loss sustained by Shands as a result of Mercury's impairment of its lien is the amount it would have been able to collect from Mercury's insureds had the lien not been impaired: Shands simply cannot lose what it never could have had. Shands' damages, thus, must be limited to that part of the lien which would have been collectible (i.e., the judgment proof insureds' $10,000.00 insurance benefits). To hold otherwise would allow Shands to fare better as a result of the lien impairment than it would have fared if the lien had not been impaired.

(e) Shands Did Not Satisfy Its Burden To Prove A Judgment In The Underlying Case Would Have Been Collectible Against Mercury's Insureds.

Shands failed to satisfy its burden to prove a judgment against the insureds for Ms. Price's medical expenses would have been collectible. The record evidence presented at trial unequivocally supports the trial court's factual finding Mercury's

insureds have no financial means to satisfy any judgment Ms. Price could have obtained against him. The majority of their property, if not all of their property, is exempt from levy, garnishment, attachment, and execution by virtue of various Florida Statutes and the Florida Constitution. (R. 93, 96, 100, 103, 106-110, 112, 124-125, 161-166, 169-170, 172-174). These potential defendants essentially live paycheck to paycheck. They have no financial assets, own no real property, and have no other insurance available.

(f) Allowing Shands To Recover More Than The Settlement Mercury Paid Ms. Price (And More Than Mercury's Policy Limits) Would Be Unjust And Contrary To Law And Policy.

Mercury issued an automobile insurance policy with bodily injury limits of $10,000.00 to its insureds; thus, Mercury assumed a contractual obligation to pay insurance benefits up to $10,000.00 on behalf of its insureds, but no more than $10,000.00. Mercury, in fact, paid those limits to Ms. Price in order to protect its insureds.[55] In exchange for its payment of those limits, Mercury further protected its insureds by obtaining a written release from Ms. Price. As aptly stated in the Alachua County Lien Law's legislative history: "Insurance companies and courts are legally obligated to the policyholder or plaintiff/defendant, not the hospital." Fla. H.R. Comm.

[55] Mercury did not have actual knowledge of Shands' lien at the time it tendered its policy limits to Ms. Price.

on Community Affairs, HB 1412 (1988) (enacted as Ch. 88-539, Laws of Fla.) Final Staff Analysis (Local Legislation).

An insurer's liability to a claimant for its insureds' torts is generally limited to its policy limits. See State Farm Mut. Auto. Ins. Co. v. St. Godard, 936 So. 2d 5 (Fla. 4th DCA 2006). Thus, even if Mercury had protected Shands' lien, it would have only paid its$10,000.00 limits, and nothing more, to Shands. It would be unjust and unreasonable to require an insurer, such as Mercury, to be responsible for an entire hospital lien, where that lien exceeds the policy limits for which the insured paid a specific premium and which the insurer contractually agreed to pay.

In this case, the entire hospital lien at issue was four times the policy limits. In other cases, however, the hospital lien could amount to hundreds of thousands of dollars or even millions of dollars in excess of an insurer's policy limits. Thus, Shands' interpretation of the Alachua County Lien Law would essentially render the law a punitive law which unfairly penalizes insurers in favor of certain health providers. Such an interpretation would also appear to give a non-party medical provider legal rights relative to the insurer greater than the rights of the insured or claimant. The reasonable and equitable result, which was obviously contemplated by the Legislature,

is that subject hospitals be restored to the position they would have been in had their liens not been impaired: (i.e., they should be paid up to the amount of the settlement).

Although the trial court reached the same end result (i.e, Shands was only awarded $10,000.00 in damages), it did so only because Mercury's insureds were judgment proof (i.e., it viewed Shands' lien as attaching to Ms. Price's cause of action rather than to the actual settlement paid to Ms. Price). While this rationale worked in this case and limited the damages to the policy limits, it would not work in other cases where the insureds may be collectible. In such cases, using the trial court's rationale, the insurer could be held liable for millions of dollars in damages in excess of its policy limits.

An interpretation of the Alachua County Lien Law which limits damages to the policy limits or amount of the settlement/recovery is more consistent with fundamental fairness and public policy. The public policy concern is who should pay the unpaid hospital bill - the hospital or the insurance company. Fairness dictates the loss should be shifted from the hospital to the insurer up to the amount of the patient's recovery or settlement. Beyond the amount the insurer is contractually obligated to pay, however, there is no reason the loss should be entirely bourne by the insurer, especially where

the settlement is for the total liability policy limits and where satisfaction of the full lien amount would require the insurer to pay out more than its contractual obligation.[56]

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[56] Analogous lien statutes and common law rights limit recovery of damages cased by impairment to the third party's recovery. For example, pursuant to the Medicaid Third Party Liability Act ("Act"), Medicaid's right of recovery for an impairment, per statutory language and interpreting case law, is applied against third party benefits **only to the extent of those benefits**. § 409.910(1), Fla. Stat. (emphasis added). See Strafford v. Agency for Health Care Admin., 915 So. 2d 643 (Fla. 2d DCA 2005) ("lien be paid in full from the settlement proceeds;" "where a third party recovery is available;" "agency is entitled to recover the full amount of the Medicaid lien from the entire settlement amount. . . .").

Another analogous lien under Florida law is the attorney's charging lien. According to the Third District Court of Appeal, "[t]he similarity between the interest being protected by the common law attorney's charging lien and the statutory hospital lien is striking." Palm Springs Gen. Hosp., Inc. of Hialeah v. State Farm Mut. Auto. Ins. Co., 218 So. 2d 793, 799 (Fla. 3d DCA 1969), aff'd, 232 So. 2d 737 (Fla. 1970). Although analyzing a different issue, the court's analogy is nonetheless instructive in the present case:

> Another useful analogy occurs in the area of the attorney's special, or charging lien. This has been defined as the right of an attorney to have the expenses and compensation due him for his services in a suit secured to him by an equitable lien upon the judgment, decree or award for his client. . . . [T]his lien is dependent upon the equitable right of an attorney to be paid his fees and disbursements out of the recovery which he has obtained, and the attorney is allowed to actively enforce such lien against his client's recovery . . . .

Id. at 799 (emphasis added). It is axiomatic that an attorney's charging lien cannot exceed the amount of settlement or judgment.

(6) Even If Mercury Is Liable To Shands For $10,000.00 Based On Its Impairment Of The Lien, Shands Was Not The "Prevailing Party" And Is Therefore Not Entitled to Attorney's Fees and Costs.[57]

After the trial court announced its decision to award Shands $10,000.00 in damages, Shands filed a motion seeking to recover its attorneys' fees and costs from Mercury based on the following provision of the Alachua County Lien Law:

> If the lienholder shall prevail in such action, the lienholder shall be entitled to recover from the defendant, in addition to costs otherwise allowed by law, all reasonable attorneys' fees and expenses incident to the matter.

Ch. 88-539, §4, Laws of Florida (emphasis added). Accordingly, in order to be entitled to attorneys' fees, Shands must "prevail." Mercury respectfully submits Shands has not satisfied the "prevailing party" standard and the trial court, thus, abused its discretion in awarding Shands attorneys' fees.

In Moritz v. Hoyt Enterprises, Inc., 604 So. 2d 807 (Fla. 1992), the Florida Supreme Court adopted the "prevailing party" standard for attorneys' fees set forth in Hensley v. Eckerhart, 461 U.S. 424 (1983). According to this standard, the prevailing party for purposes of determining an entitlement to attorneys' fees is "the party

[57] The standard of review for prevailing party attorneys' fees is abuse of discretion. M.A. Hajianpour, M.D., P.A. v. Khosrow Maleki, P.A., 975 So. 2d 1288 (Fla. 4th DCA 2008). The trial court abused its discretion when it ruled Shands is the "prevailing party" entitled to recover attorneys' fees from Mercury.

prevailing on the significant issues in the litigation." Moritz, 604 So. 2d at 810. See also Sorrentino v. River Run Condominium Ass'n, 925 So. 2d 1060, 1065 (Fla. 5th DCA 2006); Boxer Max Corp. v. Cane A. Sucre, Inc., 905 So. 2d 916, 918 (Fla. 3d DCA 2005); Zhang v. D.B.R. Asset Management, Inc., 878 So. 2d 386, 387 (Fla. 3d DCA 2004). One measure of this test is the "result obtained" by the parties at the close of the case. Sorrentino, 925 So. at 1065; Zhang, 878 So.2d at 387.

The mere fact a party receives a monetary award "does not necessarily mean the party is a prevailing party in the litigation." Boxer Max Corp., 905 So. 2d at 918. See also Prosperi v. Code, Inc., 626 So. 2d 1360, 1363 (Fla. 1993)("the fact that the claimant obtains a net judgment is a significant factor but it need not always control the determination of who should be considered the prevailing party"); Zhang v. D.B.R. Asset Management, Inc., 878 So. 2d 386, 387 (Fla. 3d DCA 2004)("Simply because a party has obtained some economic benefit as a result of litigation, does not necessarily mean that party has succeeded on the major issue in the case"); Spring Lake Improvement District v. Tyrrell, 868 So. 2d 656, 659 (Fla. 2d DCA 2004)("the fact the [plaintiffs] recovered *something* does not require the award of costs to them" as prevailing parties).

In Spring Lake Improvement District v. Tyrrell, landowners brought a class action against a municipal improvement district seeking a refund of allegedly unlawful capital and maintenance tax assessments from 1986 to the present date. The district prevailed on its statute of limitations and laches defenses, such that the landowners' recovery was *limited* to the recovery of maintenance taxes assessed and paid after January 23, 1994. Thus, the landowners were denied a refund of *any* capital taxes and were denied a refund of all maintenance taxes assessed between 1986 and January 23, 1994. Given this result, the court held the landowners were not "prevailing parties" even though they recovered *something*. The landowners had not prevailed on the significant issue in the litigation. See also Zhang v. D.B.R. Asset Management, Inc., 878 So. 2d 386, 387 (Fla. 3d DCA 2004)(holding the party who obtained some monetary recovery (i.e., the amount the opposing party conceded was owed ($25,459.20), rather than the greater amount sought (approximately $50,000.00)), was not the "prevailing party" for purposes of attorneys' fees).

Shands is not the "prevailing party" even if it recovers a $10,000.00 damages award. The significant issue in this case, and the only real issue at trial, was whether Mercury caused Shands to suffer damages *in excess of* $10,000.00 as a result of Mercury's impairment of Shands' lien. In accordance with the evidence at trial, the

trial court concluded Mercury's impairment of Shands' lien only entitled Shands to damages in the amount of $10,000.00 (the amount already conceded by Mercury), rather than the entire amount of the lien sought by Shands ($28,418.20). As a result, Shands did not "prevail" on the significant issue at trial.[58]

At the very least, the amount of any attorneys' fee award should be reduced. See Eckhardt v. 424 Hintze Management, LLC, 969 So. 2d 1219, 1222 (Fla. 1st DCA 2007) ("a trial court **must** reduce an attorney fee award from the lodestar amount when the prevailing party achieves only limited success") (emphasis added). The trial court

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[58] Moreover, Mercury prevailed on its First Affirmative Defense, which asserted Shands' lien should be reduced by the $10,000 in PIP benefits Mercury had already paid to Shands. (R. 20). Shands later conceded the issue, reducing its lien by $10,000. (R. 22-23).

Although the trial court denied Mercury's Motion for Summary Judgment, it also denied Shands' Motion for Summary Judgment. (R. 265, 324-325). Moreover, in doing so, the trial court rejected Shands' argument Mercury could only raise one defense, the reasonableness of the hospital charges, and held Mercury was entitled to present evidence of the value of the cause of action impaired (namely, collectibility of the tortfeasor) and fault for the accident. (R. 264-265, 324-325).

The majority of the issues relied on by Shands were admitted by Mercury in advance of trial and were *never* actually litigated or seriously contested. For example, although Shands claimed it "prevailed" on the reasonableness of its charges for medical services, such charges were never seriously challenged by Mercury and the reasonableness thereof was never litigated. Shands also argued it prevailed on the issue of whether Mercury impaired the lien; however, Mercury consistently admitted Shands properly recorded and perfected a hospital claim of lien for services provided to Ms. Price and, most importantly, admitted very early in the litigation that it impaired Shands' lien to the extent of the $10,000 settlement paid to Ms. Price.

awarded Shands $54,125.00 in attorneys' fees even though there was only $28,418.20 in controversy and Shands only recovered $10,000.00 in damages. After the trial court calculated the lodestar figure, it failed to adjust that figure based on the amount in controversy or the results obtained. Because Shands' success at trial was limited in comparison to the scope of the litigation as a whole, the trial court abused its discretion when it failed to reduce the lodestar figure.

(7) Even If Mercury Is Liable To Shands For $10,000.00, Mercury Is Entitled To Recover Its Reasonable Attorneys' Fees Pursuant to Its Proposal for Settlement.

Even if the $10,000.00 judgment in Shands' favor is upheld, Mercury remains entitled to recover its reasonable attorneys' fees based on the valid and timely Proposal for Settlement it served on Shands in May 2007 for the amount of $17,700.00. Because Shands did not "prevail" (for the reasons set forth earlier herein), the attorneys' fees which Shands incurred prior to Mercury's service of the Proposal for Settlement should not be added to the $10,000.00 damages award in order to determine the "judgment obtained" under Florida Statute § 768.79. According to this Court in White v. Steak and Ale of Florida, Inc., 816 So. 2d 546 (Fla. 2002),

> [W]e conclude that the 'judgment obtained' pursuant to section 768.79 includes the net judgment for damages and any attorneys' fees and taxable costs that could have been included in a final judgment if such final judgment was entered on the date of the offer.

Id. at 551 (emphasis added). In this case, however, no attorneys' fees would have been included in a final judgment if such final judgment had been entered on the date Mercury served its Proposal for Settlement, because Shands would have no more "prevailed" by accepting $10,000.00 at that point in time, than it did when such amount was later awarded. The $10,000.00 was never in dispute. Thus, because Shands is not the "prevailing party" entitled to recover its attorneys' fees, Shands' pre-offer attorneys' fees do not have to be added to the $10,000.00 award in order to determine the "judgment obtained" pursuant to Florida Statute § 768.79. In such case, the $10,000.00 award (even including Shands' pre-offer costs and prejudgment interest) is at least twenty-five percent (25%) less than Mercury's offer, thus entitling Mercury to recover its reasonable attorneys' fees and costs from Shands.

D. CONCLUSION - INITIAL BRIEF ON CROSS-APPEAL

Based on the foregoing, Appellee/Cross Appellant Mercury Insurance Company of Florida hereby respectfully requests this Court to find the Alachua County Lien Law and related ordinance violate Article III, §11(a)(12) of the Florida Constitution and violate Mercury's substantive due process rights under the Florida and United States Constitutions. In such regard, Mercury requests this Court to affirm the First District Court of Appeal's reversal of the trial court's final judgment in favor of Shands on

these additional grounds and further requests this Court to remand the case to the trial court for a determination of Mercury's entitlement to attorneys' fees pursuant to its Proposal for Settlement.

In the event, however, this Court holds the Alachua County Lien Law and related ordinance are constitutional, Mercury respectfully requests this Court to hold as follows: (1) Shands' damages are limited to $10,000.00; (2) Shands is not the "prevailing party" entitled to recover its reasonable attorneys' fees or, at the very most, Shands' attorneys' fees should otherwise be significantly reduced based on Shands' limited success; and, (3) Mercury remains entitled to recover its attorneys' fees based on its Proposal for Settlement in accordance with this Court's rationale in White v. Steak and Ale of Florida, Inc., 816 So. 2d 546 (Fla. 2002).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy hereof has been served via U.S Mail to Thomas C. Valentine, Esquire and Joel W. Walters, Esquire, both of Walters, Levine, Klingensmith & Thomison, P.A., Sarasota City Center Suite 1110, 1819 Main Street, Sarasota, FL 34236; Bill McCollum, Attorney General, Office of the Attorney General, PL-01, The Capitol, Tallahassee, FL 32399-1050; and Edward J. Pozzuoli, Esquire and Stephanie Alexander, Esquire, both of Tripp Scott, P.A., Suite 216, 200 W. College Avenue, Tallahassee, FL 32301 this _____ day of March, 2010.

____
JEFFREY W. KIRSHEMAN
Florida Bar No. 0059341
JAMIE BILLOTTE MOSES
Florida Bar No. 009237
Fisher, Rushmer, Werrenrath,
Dickson, Talley & Dunlap, P.A.
20 N. Orange Avenue, Suite 1500
Post Office Box 712
Orlando, FL 32802-0712
Telephone: 407-843-2111
Facsimile: 407-422-1080
Attorneys for Appellee/
Cross-Appellant

CERTIFICATE OF TYPEFACE COMPLIANCE

Pursuant to Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure, counsel for Appellee/Cross-Appellant Mercury Insurance Company of Florida hereby certifies the type used in this Answer Brief and Initial Brief on Cross Appeal is 14 point Times New Roman.

Respectfully submitted this ____ day of March, 2010.

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JEFFREY W. KIRSHEMAN
Florida Bar No. 0059341
JAMIE BILLOTTE MOSES
Florida Bar No. 009237
Fisher, Rushmer, Werrenrath,
Dickson, Talley & Dunlap, P.A.
20 N. Orange Avenue, Suite 1500
Post Office Box 712
Orlando, FL 32802-0712
Telephone: 407-843-2111
Facsimile: 407-422-1080
Attorneys for Appellee/
Cross-Appellant