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 CROSS-APPEAL REPLY BRIEF

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ARGUMENT

I. Mercury properly raised and preserved its constitutional defenses.

Mercury strongly disagrees with Shands' claim Mercury's constitutional arguments were not properly raised below. First, even if Mercury had not raised the constitutional issues in the trial court (which it did), the facial unconstitutionality of a statute may be raised for the first time on appeal. Westerheide v. State, 831 So. 2d 93, 105 (Fla. 2002); A.J. v. K.A.O., 951 So. 2d 30, 32 (Fla. 5th DCA 2007); Alexander v. State, 450 So. 2d 1212, 1215-16 (Fla. 4th DCA 1984).[1]

Second, Mercury clearly raised all of its constitutional arguments prior to the hearing on the parties' respective motions for summary judgment. (R. Vol. I, pp. 116-137). Shands had a fair opportunity to respond to these arguments at the hearing and did so with substantive legal arguments and without requesting a continuance. (8/16/07 Hearing Transcript, pp. 44-55).[2] Moreover, at the hearing, Mercury's counsel stated if the constitutional challenges were required to be asserted as affirmative defenses, then "I'd make an ore tenus motion to amend

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[1] Shands insists Mercury's constitutional challenges are facial, rather than "as applied," challenges to the Alachua County Lien Law. (Shands Cross-Appeal Answer Brief, pp. 1-4, 18-19).

[2] Shands has filed a Motion to Supplement the Record with this transcript.

[Mercury's] answer to include those - - those defenses." (8/16/07 Hearing Transcript, p. 55). Shands did not object to such motion. The trial judge heard the parties' respective legal arguments on the constitutional issues and then denied both parties' motions.[3]

Third, Mercury preserved the constitutional issues in its Pretrial Compliance (R. Vol. III, pp. 372, 374),[4] preserved the issues at trial, and moved for judgment notwithstanding the verdict based on all of the constitutional defenses. (R. Vol. III, p. 523).

Finally, Shands impliedly admits the constitutional arguments were properly raised below when it argues it was a "prevailing party" for attorneys' fee purposes in part because it prevailed at the trial court level on "the constitutionality of Chapter 88-539, Laws of Florida" and "vindicated important constitutional issues." (Shands' Cross-Appeal Answer Brief, pp. 37, 41).

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[3] Shands argues the constitutional defenses were not filed twenty (20) days prior to the summary judgment hearing. Any alleged error in this regard is entirely harmless, however, because the trial court *rejected* those defenses.

[4] Even though Mercury raised the constitutional issues in its Pretrial Compliance, Shands asserts Mercury did not specifically list them as disputed issues for the bench trial. Mercury did not do so, because the trial court had already affirmatively ruled the Alachua County Lien Law was constitutional. Nevertheless, Mercury did raise the issue as an ongoing one, by including it in the sections of the Pretrial Compliance titled "Statement of the Case" and "Memorandum of Law."

II. Mercury asserts "facial" and "as applied" constitutional challenges.

Contrary to Shands' representations, Mercury has not asserted only "facial" constitutional challenges to the Alachua County Lien Law and related ordinance. While Mercury acknowledges it has argued the lien law, on its face, violates the Florida Constitution's special law prohibitions, Mercury submits it has also consistently asserted the lien law, *as applied*, violates Mercury's substantive due process rights under the Florida and United States Constitutions.

First, in support of its Motion for Summary Judgment, Mercury stated:

> There is no reasonable or rational basis why, beyond the amount of the settlement or policy limits, that loss should be shifted from the hospital to the insurance carrier. . . . Thus, the Alachua County Lien Law, *as applied in accordance with Shands' position*, is unconstitutional *in its application.*

(R. Vol. I, p. 121)(emphasis added).

> The Lien Law, *as applied under Shands' position*, is arbitrary and capricious and fails the rational basis test because it ceases to have a rational relationship with a legitimate general welfare concern. . . . As stated above, there is no rational basis beyond those amounts to shift the financial burden from the hospital to the insurance carrier. *Such an application* and result loses any rational relationship with any legitimate general welfare concern and becomes unreasonable, arbitrary, capricious and oppressive. Thus, an interpretation of the Lien Law allowing Shands to recover amounts above Mercury's liability limits render the Lien Law unconstitutional *in its application* on due process grounds.

(R. Vol. I, pp. 321-322)(emphasis added). Likewise, Mercury contended in its Pretrial Compliance and in its posttrial Motion for Judgment Notwithstanding the Verdict that the Alachua County Lien Law, "*on its face and as applied*," violates the Florida and U.S. Constitutions. (R. Vol. III, pp. 372, 523)(emphasis added). These "as applied" arguments have been continued throughout this appeal as well.

III. The lien law violates Article III, §11(a)(12) of the Florida Constitution.

(A) The Alachua County Lien Law was enacted to grant a privilege to a few hospitals and not to benefit the public (or public hospitals).

Shands argues the Florida Constitution does not forbid the granting of special privileges to private corporations where the primary purpose of the law is to promote the public interest and not to privately benefit a corporation.[5] Such argument ignores the purpose and effect of the Alachua County Lien Law.

Mercury does not dispute that healthcare is essential to the public welfare; however, the Alachua County Lien Law was not enacted to promote healthcare. The special lien law bestows lien privileges on private nonprofit hospitals, like Shands, while providing no benefit whatsoever to other hospitals which fail to

[5] Shands cites one Florida case in support of its argument statutes designed to protect the public welfare do not violate constitutional prohibitions against the grant of special privileges. Liquor Store v. Cont'l Distilling Corp., 40 So. 2d 371 (Fla. 1949). However, that case addresses the legislature's police power and a price-fixing statute, not a special law conveying a privilege on a private corporation.

satisfy its narrow criteria. If the promotion of public welfare, in the form of healthcare, was truly the purpose of the lien law, then the law would certainly provide assistance in the form of lien rights to *all* Alachua County hospitals from which the public obtains medical care. It does not do so.

Moreover, although the general public may indirectly benefit from a hospital's *services*, the *lien law* directly benefits the *hospital alone* (at least those hospitals singled out to receive a benefit from the law) by assisting with the collection of payment for services the hospital renders. The money recovered by the private hospital pursuant to the lien law goes to the private hospital - not to the public coffers.

The hospitals actively sought the passage of the Alachua County Lien Law *for their own economic 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).

Finally, Shands' claim any privilege it receives from the lien law is merely "incidental or inconsequential" (Cross-Appeal Answer Brief, p. 22) is disingenuous given the fact it has strenuously argued, throughout this case, that the

liens are necessary for its economic well-being.

(B) Shands is a "private corporation."

Florida case law establishes Shands is a "private" corporation. See Andrew v. Shands at Lake Shore, Inc., 970 So. 2d 887 (Fla. 1st DCA 2007); Campus Communications, Inc. v. Shands Teaching Hospital and Clinics, Inc., 512 So. 2d 999, 1000 (Fla. 1st DCA 1987); DeRosa v. Shands Teaching Hospital and Clinics, Inc., 504 So. 2d 1313 (Fla. 1st DCA 1987); Shands Teaching Hospital and Clinics, Inc. v. Lee, 478 So. 2d 77 (Fla. 1st DCA 1985). Shands' own Articles of Incorporation state Shands was organized as a ***"private***, not for profit corporation." (Shands' Reply Brief Appendix, Tab 2, p. 1) (emphasis added). Shands is even identified by a Florida Statute as a "***private*** non-profit corporation." §1004.41(4)(a), Fla. Stat. (emphasis added).[6]

The Alachua County Lien Law's legislative history further indicates Shands is a "private" corporation by describing the charitable hospitals to which it applies as "***private*** entities operating on a nonprofit basis," and then by specifically identifying Shands as one of the hospitals to which the law applies. See Fla. H.R.

[6] Shands essentially asks to be treated as a "private corporation" in connection with its public welfare argument. (Cross-Appeal Answer Brief, p. 19). Shands relies on Florida Statute §154.203, relating to "health care facility[ies]," which are defined as "any *private corporation* organized not for profit and authorized by law to provide . . . hospital services in accordance with Chapter 395." §154.205(8)(a), Fla. Stat.

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. Id.

Shands' reliance on O'Malley v. Florida Insurance Guaranty Association, 257 So. 2d 9 (Fla. 1971) is misplaced. FIGA, the entity at issue in that case, was *created by a special statute* and is a "*public* corporation of *statewide authority* created for public purposes relevantly connected with *the administration of government*." Id. at 11 (emphasis added). Moreover, none of the following examples of "public corporations" identified by the Florida Supreme Court in O'Malley are analogous to nonprofit, charitable hospitals:

> [R]ural electrical cooperatives, city housing authorities, The InterAmerican Cultural and Trade Center Authority, the Soil and Water Conservation Districts, and the Jacksonville Expressway Authority.

Id. at 11.[7]

[7] Shands relies on out of state cases to support its argument it is not a "private corporation." Whether or not those cases are factually similar, Mercury submits the issue of whether a Florida hospital is a "private corporation" for purposes of the Florida Constitution should be determined by Florida law. See, e.g., 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

IV. The lien laws violate Mercury's substantive due process rights.

While the Legislature arguably had a legitimate purpose in granting hospitals a lien in the amount of their reasonable expenses and in allowing the hospital to recover those expenses from a patient's third party recovery up to the amount of that settlement or judgment, any rational basis for such a lien ceases when it is allowed to exceed the amount of the settlement or judgment paid by the insurer, particularly where such sum is in excess of the insurance carrier's liability limits. At that point, there is no rational basis to shift the financial burden from the hospital to the insurance carrier. The trial court's interpretation of the Alachua County Lien Law, which would hold Mercury liable for damages exceeding its contractual, financial responsibility under the policy it issued, renders the Alachua County Lien Law unconstitutional in its application on due process grounds, as it unfairly and unconstitutionally penalizes the insurer.[8]

The Alachua County Lien Law is also unconstitutionally vague. As applied

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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 the public was "private hospital," even though it had relations with local governments and received contributions from local governments for operating 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").

[8] The trial court limited Shands' damages to $10,000.00, not because that sum represents Mercury's policy limits, but because the insureds were uncollectible.

by the trial court and Shands, the law fails to provide adequate notice to those who enter into liability settlements of the extent of their potential liability for lien impairment. In particular, the 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.[9] 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.[10]

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[9] 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.

[10] Mercury has previously cited Florida's construction lien law as an example of how the Florida Legislature can enact a general, uniform state lien law. In response, Shands states the construction lien law supports its position, because one who violates the construction lien law (i.e., the property owner) may have to pay an amount exceeding the price of his contract with the general contractor. Mercury respectfully submits Shands misconstrues the analogy. The construction lien law essentially provides the owner does not get *credit* for improper payments to the general contractor and may have to make a payment again to the subcontractor if the owner violates the subcontractor's lien rights. Likewise, Mercury admits if the Alachua County Lien Law were to be upheld, then it should not get "credit" for its

V. Even if the $10,000.00 judgment is reinstated, Shands did not "prevail."

For the reasons set forth in Mercury's Response to Shands' Motion for Attorneys' Fees and in Mercury's Initial Brief on Cross-Appeal, even if this Court reverses the First District Court of Appeal's decision and reinstates the trial court's $10,000 judgment in favor of Shands, Shands is not the "prevailing party."[11]

Shands misrepresents its prior positions on Mercury's defenses in order to appear as if it did not "lose" on those defenses. In order to respond to the argument Mercury prevailed on its causation / collectability of tortfeasor defenses, Shands now for the first time denies it ever argued Mercury's sole defense was the reasonableness of the hospital charges and further denies it ever contested Mercury's right to argue causation or uncollectability as a defense. (Mercury's Cross-Appeal Answer Brief, p. 16, n.15). Mercury respectfully asserts the record demonstrates the contrary.

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original $10,000.00 payment to the patient; instead, it would have to make the $10,000.00 payment again to Shands.

Shands also mistakenly relies on Morgan v. Goodwin, 355 So. 2d 217 (Fla. 1st DCA 1978). In Morgan, the plaintiff was barred from filing a lien. The court merely noted where a subcontractor establishes a portion of the contract price *between the owner and general contractor* remains due and owing and unpaid, the subcontractor who has not been paid may have an equitable lien on such funds. Id. at 219.

[11] Shands claims Mercury cannot make these arguments, because the attorneys' fee hearing transcript is not part of the record on appeal. Mercury has filed a Motion to Supplement the Record with that transcript, but respectfully submits the transcript is unnecessary for the reasons set forth in that Motion.

For example, in its Statement of the Case, Shands stated its claim is "subject only to Mercury's right to question the propriety of Shands' charges." (R. Vol. II, p. 350). Likewise, at the pretrial conference on October 23, 2007, Shands' counsel argued the lien law gives Shands a lien for the full amount of the reasonable charges subject "only to the question of propriety of those charges." (10/23/07 Pretrial Conference Transcript, p. 8).[12] Similarly, Shands stated in a motion in limine that its lien was effective for the full amount "subject only to the right of Mercury to question the propriety of the charges comprising the lien." (R. Vol. II, pp. 333-334). Shands' counsel further argued Mercury should not be allowed to contest the underlying liability in the accident or raise collectability as an issue. (10/23/07 Pretrial Conference Transcript, pp. 7-12). The trial court, however, denied Shands' motions in limine to preclude evidence on those issues.

As previously stated in Mercury's Initial Brief on Cross-Appeal, Mercury, and not Shands, prevailed on the significant issues at trial.

VI. Mercury is entitled to recover its attorneys' fees.

On May 29, 2007, pursuant to Florida Rule of Civil Procedure 1.442 and Florida Statute § 768.79, Mercury served a valid and timely Proposal for

[12] Mercury has filed a Motion to Supplement the Record on Appeal in order to include the transcript of the October 23, 2007 pretrial conference.

Settlement in the amount of $17,700.00 on 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.[13]

Shands argues Mercury's Proposal for Settlement was not made in good faith, but fails to satisfy its burden to prove Mercury lacked good faith in making its proposal. Segundo v. Reid, 20 So. 3d 933, 936-937 (Fla. 3d DCA 2009); Gurney v. State Farm Mutual Automobile, 889 So. 2d 97, 100 (Fla. 5th DCA 2004). The proper focus should be on whether Mercury had a good faith basis to argue $10,000.00 was the limit of any liability it owed Shands at the time the offer was served. See Downs v. Coastal Systems International, Inc., 972 So. 2d 258, 262 (Fla. 3d DCA 2008)(holding the issue is whether or not there was a reasonable basis for making the offer and an intent to settle the case); Talbott v. American Isuzu Motors, Inc., 932 So. 2d 643, 647 (Fla. 2d DCA 2006)("The determination of whether an offer was served in good faith turns entirely on whether the offeror had

[13] Even if the $10,000.00 judgment in Shands' favor is upheld, Mercury remains entitled to recover its reasonable attorneys' fees based on its Proposal for Settlement for the reasons set forth in Mercury's Answer Brief and Initial Brief on Cross-Appeal.

a reasonable foundation upon which to make the offer"). "The issue of good faith is determined solely by the subjective motivations and beliefs of the offeror, . . ., not the reactions of the offeree." Wagner v. Brandeberry, 761 So. 2d 443, 446 (Fla. 2d DCA 2000). See also Dept. of Highway Safety and Motor Vehicles v. Weinstein, 747 So. 2d 1019, 1021 (Fla. 3d DCA 1999). Mercury respectfully submits the fact the amount it offered to settle Shands' claims equals the trial court's award strongly suggests the proposal was made in good faith.[14]

Shands also argues Mercury's Proposal for Settlement should be invalidated because Mercury's constitutional defenses had not been raised at the time its proposal was served. Nothing in Rule 1.442 or Florida Statute §768.79 requires the defendant to assert all possible defenses before serving a proposal. Instead, the defendant is only required to identify all of the claims to be settled, which Mercury undeniably did. Fla. R. Civ. P. 1.442(c)(2)(B). Shands' claims against Mercury have remained consistent and never changed after the constitutional defenses were

[14] Shands is essentially making arguments which are relevant to the *amount* of an attorneys' fee award pursuant to a proposal for settlement, rather than whether or not the proposal is valid and fees should be awarded. See Fla. R. Civ. P. 1.442(h)(2)("When determining the *reasonableness* of the amount of an award of attorneys' fees pursuant to this section, the court shall consider, along with all other relevant criteria, . . . (A) the then-apparent merit or lack of merit in the claim, . . .).

raised.[15] Moreover, given the fact Shands continues to argue Mercury's constitutional defenses lack merit and given the fact the trial court ruled in Shands' favor on the constitutional issues, Shands' implication it might have accepted Mercury's proposal at the mention of such a defense rings hollow.[16]

Contrary to Shands' claims, the inclusion of a standard satisfaction of lien condition does not invalidate the proposal. Rule 1.442 clearly allows the party serving the proposal (and in fact requires that party) to "state with particularity any relevant conditions." Fla. R. Civ. P. 1.442(c)(2)(C). See J.J.'s Mae, Inc. v. Milliken

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[15] Shands never moved to strike the proposal for settlement after Mercury raised its constitutional defenses either.

[16] Mercury disagrees with Shands' claim Central Motor Company v. Shaw, 3 So. 3d 367 (Fla. 3d DCA 2009) justifies the denial of fees in this case. In that case, there were two defendants. One defendant served a $1,000 proposal for settlement, which the plaintiff rejected. Thereafter, the second defendant offered $10,000 in exchange for a dismissal of the entire case. The plaintiff accepted. The first defendant then sought fees based on its proposal, because the entire case was dismissed. The court held the first defendant was not entitled to its fees, because there was no reason to sanction the plaintiff for rejecting the first defendant's offer in light of her later acceptance of a higher offer. The case is simply not analogous to this one.

Mercury also believes Shands' reliance on Southwinds Farm, Inc. v. Albertson, 664 So. 2d 13 (Fla. 3d DCA 1995) is misplaced. In that case, a plaintiff employee served an offer of settlement which was refused by the employer. After the presentation of the evidence at trial, the plaintiff persuaded the trial court to reopen the case and treat the claim as if it was based upon an oral contract rather than a written one. The plaintiff prevailed on this new oral contract claim only. Because the amendment added a previously nonexistent claim, and because no offer was ever submitted to settle that particular claim, the court held the offer was not enforceable.

& Company, 763 So. 2d 1106 (Fla. 4th DCA 1999)(reversing attorneys' fee award recovered pursuant to offer of judgment where offer contained various conditions requiring offeree to satisfy lien - - *but noting the rule had been subsequently amended to permit the inclusion of such conditions and thus indicating decision would have been different had offer been made under new version of Rule 1.442).*

CONCLUSION

Mercury Insurance Company of Florida 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 Mercury's substantive due process rights under the Florida and United States Constitutions, as well as Article III, §11(a)(9) of the Florida Constitution. 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 requests the remand of this case for a determination of Mercury's entitlement to attorneys' fees based on its Proposal for Settlement.[17]

[17] In the event 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; Edward J. Pozzuoli, Esquire and Stephanie Alexander, Esquire, both of Tripp Scott, P.A., Suite 216, 200 W. College Avenue, Tallahassee, FL 32301 and Philip M. Burlington, Esq., Burlington & Rockenbach, P.A., 444 West Railroad Ave., Ste. 430, West Palm Beach, FL 33401 this _____ day of June, 2010.

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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 Reply Brief on Cross-Appeal is 14 point Times New Roman.

Respectfully submitted this ____ day of June, 2010.

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