IN THE SUPREME COURT OF FLORIDA

SHANDS TEACHING HOSPITAL AND CLINICS, INC.,

Appellant,

CASE NO. SC09-2069
1st DCA Case No.: 1D08-1198

v.

MERCURY INSURANCE COMPANY OF FLORIDA,

Appellee.
_____/

INITIAL BRIEF OF APPELLANT

WALTERS LEVINE KLINGENSMITH & THOMISON, P.A.
1819 Main Street, Suite 1110
Sarasota, FL 34236
Telephone: (941) 364-8787
Facsimile: (941) 361-3023
Florida Bar No. 093282

Attorneys for Appellant
Joel W. Walters
Thomas C. Valentine
Elinor E. Baxter

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Florida Constitution

Florida Statutes

Florida Enabling Acts, Municipal Codes and Other Miscellaneous Laws

Florida Appellate Rules

Florida Bills

Federal Statutes and Laws

Other Authority

INTRODUCTION

THE RECORD ON APPEAL

The record of the circuit court proceedings consists of 7 volumes, denoted R. 1-267.

STATEMENT OF THE CASE AND FACTS

A. Nature of the Case

Shands appeals the decision of the First District Court of Appeal declaring Chapter 88-539, Laws of Florida ("Alachua County Hospital Lien Law"), and sections 262.20-262.25 of the Alachua County Code ("Alachua County Hospital Lien Ordinance") unconstitutional under Article III, section 11(a)(9) of the Florida Constitution. This Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(1)(A)(ii) and Article V, section 3(b)(1) of the Florida Constitution. See also Alachua County v. Adams, 702 So. 2d 1253 (Fla. 1997); Dep't of Bus. Regulation v. Classic Mile, Inc., 541 So. 2d 1155, 1156 (Fla. 1989); Pinellas County Dep't of Consumer Affairs v. Castle, 392 So. 2d 1292 (Fla. 1980).[1]

[1] The Florida Supreme Court has the authority to consider issues other than those upon which jurisdiction is based when they were properly briefed in the Court below and are dispositive of the case. See Warner v. City of Boca Raton, 887 So. 2d 1023 (Fla. 2004); Savoie v. State of Florida, 422 So. 2d 308 (Fla. 1982); Roberts v. State, 181 So. 2d 646 (Fla. 1966).

B. Statement of the Facts

1n 1988, the Florida Legislature enacted the Alachua County Hospital Lien Law, Chapter 88-539, Laws of Florida. The Alachua County Hospital Lien Law provides as follows:

> Section 1. Any nonprofit corporation operating a hospital that has qualified pursuant to s. 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 or the legal representative of such persons, and upon all judgments, settlements, and settlement agreements rendered or entered into by virtue thereof, on account of illness or injuries giving rise to such causes of action, suits, claims, counterclaims, demands, judgment, settlements, or settlement agreements and which necessitate or shall have necessitated such hospital care, treatment and maintenance.**
>
> Section 2. In order to perfect such a lien, the executive office or agent of the hospital, before any such person shall have been discharged from said hospital or within 10 days after such discharge, shall file in the office of the Clerk of the Circuit Court of Alachua County a verified claim in writing setting forth the name and address of such patient, as it shall appear on the records of said hospital the name and location of said hospital, and the name and address of the executive office or agent of said hospital, the dates of admission to and discharge of such patient therefrom, the amount claimed to be due for such hospital care, treatment, and maintenance, and, to the best knowledge of the person signing such claim, the names and addresses of all persons, firms, or corporations who may be claimed by such ill or injured person, or by the legal representative of such person, to be liable on account of such illness or injuries. At the same time that such claim is filed with the clerk of the circuit court, a copy thereof shall be mailed by the hospital to the ill or injured person, his attorney, if known, and to all persons, firms, or corporations named in such claim. The filing and mailing of such claim in accordance with

this section shall be notice thereof to all persons, firms, or corporations who may be liable on account of such illness or injuries, whether or not they are named in such claim of lien, and whether or not a copy of such claim shall have been received by them.

Section 3. The Clerk of the Circuit Court of Alachua County shall endorse on such claim the date and hour of filing and shall record such claim in the Official Records of Alachua County. He shall be paid by the claimant as his fee for such filing and recording of each claim the same fee as provided for filing and recording other instruments under the recording laws.

Section 4. No release or satisfaction of any action, suit, claim, counterclaim, demand, judgment, settlement, or settlement, or settlement agreement, or of any of them, shall be valid or effectual as against such lien unless such lienholder shall join therein or execute a release of such lien. 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 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 recover from the one accepting such release or satisfaction or making such settlement the reasonable cost of such hospital care, treatment, and maintenance. Satisfaction of any judgment rendered in favor of the lienholder in any such action shall operate as a satisfaction of the lien. Any action by the lienholder shall be brought in the court having jurisdiction of the amount of the lienholder's claim and may be brought and maintained in the county wherein the lienholder has his, its, or their residence or place of business. 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 attorney's fees and expenses incident to the matter.

Section 5. No person shall be entitled to recover or receive damages on account of hospital care, treatment, and maintenance, provided by the hospital, unless he shall affirmatively show that he has paid the cost thereof; however, in any action, suit, or counterclaim brought on account of illness or injury, the plaintiff or

> counterclaimant may include as an item of damages the costs of such hospital care, treatment, and maintenance, if prior to the trial of the action he shall have notified the lienholder referred to in this act of the pendency of such action or counterclaim; whereupon such lienholder shall have the right, without leave of court, to intervene in the case and prove the reasonable cost of such hospital care, treatment, and maintenance. Any verdict that may be rendered in favor of the plaintiff or counterclaimant shall set forth the amount the jury finds to be due the lienholder for such hospital care, treatment, and maintenance and the name of such lienholder. Any judgment rendered in the case in favor of the plaintiff or counterclaimant shall also be in favor of the lienholder in the amount set forth by the jury's verdict.
>
> Section 6. The provisions of this act shall not be applicable to accidents or injuries within the purview of the workers' compensation laws of this state.
>
> Section 7. This act shall take effect upon becoming a law.

Ch. 88-539, Laws of Fla. (emphasis added)(Appendix - Tab 2).

The purpose of the Alachua County Hospital Lien Law and similar lien laws in Florida is to insure that hospitals are compensated for services provided to patients by granting hospitals a lien upon any action, compromise or settlement later obtained by patients. The lien acts as a specific interest in insurance proceeds paid to the patient by a person claimed to be liable for the patient's injuries. Any insurer or other third party which settles a claim with the patient or accepts a release from liability or satisfaction of judgment without first obtaining a satisfaction of the lien has committed a prima facie impairment of the lien and can be held liable for the reasonable cost of hospital care provided to the patient. The

Alachua County Hospital Lien Law and similar lien laws in Florida advance the important public purposes of encouraging hospitals to provide care to indigent patients and reducing the amount of litigation that would otherwise be necessary to secure payment for unpaid hospital services. They also reduce the burden on the federal Medicare and Florida Medicaid programs which might otherwise be billed for the care and treatment of an indigent accident victim in the absence of a third party source of recovery.

On or about December 11, 2005, Krystal Nicole Price ("Price") was struck by a motor vehicle owned by Nancy Conley and insured by Appellee, Mercury Insurance Company ("Mercury"). From December 11, 2005 through December 14, 2005, Price received medical care and treatment at Shands for injuries sustained in this accident. Pursuant to the Alachua County Hospital Lien Law and the Alachua County Hospital Lien Ordinance, Shands properly recorded and perfected its hospital claim of lien for the reasonable cost of the hospital care, treatment and maintenance provided to Price in the amount of $38,418.20. Despite Shands' having properly recorded and perfected a claim of lien, on April 14, 2006, Mercury paid Price the sum of $10,000.00 pursuant to the bodily injury liability coverage of the policy in exchange for a full release from bodily injury liability in favor of Mercury and its insureds. The release was obtained by Mercury without joining Shands and without satisfying Shands' claim of lien.

C. Course of Proceedings and Disposition Below

Shands filed a complaint against Mercury for impairment of its hospital lien under the Alachua County Hospital Lien Law. (R. 1-7). Although never raised by the pleadings, Mercury filed a motion for summary judgment contending, for the first time, that the Alachua County Hospital Lien Law was unconstitutional.[2] (R. 116-137). Mercury failed to notify the Florida Attorney General or the state attorney of the Eighth Judicial Circuit that it was challenging the statute's constitutionality as required by Florida Statute section 86.091. Fla. Stat. § 86.091 (2009). The trial judge denied the motion for summary judgment and expressly held that the Alachua County Hospital Lien Law was constitutional. (R. 324-325). At trial, the trial judge entered a final judgment finding, in pertinent part, that Mercury impaired Shands' lien under Chapter 88-539, Laws of Florida. (R. 657-661). Since no issue was raised as to the constitutionality of the Alachua County Hospital Lien Ordinance, the trial court did not address the validity of the Alachua County Hospital Lien Ordinance. (R. 657-661).

Mercury appealed the final judgment to the First District Court of Appeal claiming that the Alachua County Hospital Lien Law and the Alachua County Hospital Lien Ordinance were unconstitutional because they violate Article III,

[2] Mercury's motion for summary judgment did not specifically challenge the constitutionality of the Alachua County Hospital Lien Ordinance. Rather, the motion merely contended that the Alachua County Lien Law was codified at Alachua County Code Section 262.20. (R. 116-137).

sections 11(a)(9) and 11(a)(12) of the Florida Constitution and substantive due process rights guaranteed under both the Florida and United States Constitutions. (Mercury's Initial Brief, First DCA). The First District Court of Appeal found no merit in Mercury's argument that the Alachua County Hospital Lien Law or the Alachua County Hospital Lien Ordinance were unconstitutional under Article III, section 11(a)(12) of the Florida Constitution or violated Mercury's substantive due process rights. However, the First District Court of Appeal held that both the Alachua County Hospital Lien Law and the Alachua County Hospital Lien Ordinance were unconstitutional under Article III, section 11(a)(9) of the Florida Constitution. The sole basis for this holding is that "chapter 88-539 is a special law which creates a lien based on a private contract between Shands and its patient, in violation of Article III, section 11(a)(9), of the Florida Constitution." Mercury Ins. Co. of Florida v. Shands Teaching Hosp. and Clinics, Inc., 2009 WL 2151903, *2 (Fla. 1st DCA July 21, 2009)(Appendix – Tab 1). Shands thereafter filed a timely appeal to this Court pursuant to Fla. R. App. P. 9.030(a)(1)(A)(ii).

D. Standard of Review

The determination of a statute's constitutionality and the interpretation of a constitutional provision are legal questions subject to *de novo* review. Fla. Dep't of Revenue v. City of Gainesville, 918 So. 2d 250, 256 (Fla. 2005). Although the standard of review is *de novo,* it is a "well-established principle that a legislative

enactment is presumed to be constitutional." Lawnwood Med. Ctr., Inc. v. Seeger, 990 So. 2d 503, 508 (Fla.2008). Whenever possible, a court should construe a challenged law to effect a constitutional outcome. Fla. Dep't of Revenue v. Howard, 916 So. 2d 640, 642 (Fla.2005) (citing Eastern Air Lines, Inc. v. Dep't of Revenue, 455 So. 2d 311, 314 (Fla.1984); Chatlos v. Overstreet, 124 So. 2d 1, 2 (Fla.1960)).

SUMMARY OF THE ARGUMENT

This case will determine the continued validity of hospital lien laws in Florida. At this time, approximately 20 counties and 116 hospitals benefit from lien laws. Hospital liens are statutory liens which exist either by special law, ordinance or both. Lien laws have been in existence in Florida since the 1950s. Prior to the opinion rendered by the First District Court of Appeal in this case, hospital lien laws have been uniformly upheld as constitutional. In fact, the holding of the First District Court of Appeal is in direct conflict with the holding of the Second District Court of Appeal which held that a hospital lien created by a special law does not violate Article III, section 11(a)(9) of the Florida Constitution. See Hosp. Bd. of Dirs. of Lee County v McCray, 456 So. 2d 936, 938-939 (Fla. 2d DCA 1984).

Hospital liens advance the important public purposes of encouraging hospitals to provide care to indigent patients and reducing the amount of litigation

that would otherwise be necessary to secure payment for unpaid hospital services. Lien laws also operate to reduce the burden on the federal Medicare and Florida Medicaid programs which might otherwise be billed for the care and treatment of an indigent patient in the absence of a third party source of recovery. A hospital lien provides a hospital with a lien against the proceeds of settlements or judgments awarded to persons who have received medical services from injuries resulting from accidents giving rise to a cause of action which is settled or adjudicated. As a result, a hospital can forego the expense of filing suit in circuit or small claims court. The hospital lien law also provides a direct cause of action against third party tortfeasors and their insurers who pay settlements or judgments or accept releases from liability without first obtaining releases of hospital liens.

The Florida Legislature has recognized that a tortfeasor, and a tortfeasor's insurer, as they are the ultimate cause for incurring the hospital bill, should be responsible for ensuring that hospitals are paid for the care that they are required to provide as a result of the tortfeasor's actions. Without hospital lien laws, tortfeasors and their insurers have no obligation to assure that hospitals are paid. They owe no contractual obligation or other legal duty to the hospital. Hospital liens ensure that the tortfeasors and their insurers make sure that hospitals have been compensated for the care that they provided before any settlement of a claim is finalized.

There is no question that a hospital's ability to efficiently collect for its services through the hospital lien mechanism enhances its ability to provide care to indigent patients. The State of Florida is also financially benefitted by hospital lien laws. As to uninsured or underinsured third party liability claims, the Florida Medicaid program is, by law, intended to be the payer of last resort. Hospitals such as Shands are required to first exhaust any entitlement to payment from available third party sources such as tortfeasors and insurers providing coverage to tortfeasors before billing Medicaid. Those hospitals that are vested with statutory lien rights utilize hospital liens to pursue payment from third party sources.

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. One of the unfortunate consequences of this holding is that, for Medicare or Medicaid compensable services, amounts that would have otherwise been recoverable by a hospital from third party sources through the imposition of a lien will not be available to reduce the payment allowed by Medicare or Medicaid to the hospital. Likewise, the payment to the hospital from Medicare or Medicaid will be substantially less than the payment that the hospital would have received through the imposition of the lien.

The Alachua County Hospital Lien Law and Alachua County Hospital Lien Ordinance are valid laws that do not run afoul of the Florida Constitution's

prohibition that "[t]here shall be no special law or general law of local application pertaining to. . . . (9) creation, enforcement, extension or impairment of liens based on private contracts, or fixing of interest rates on private contracts." Art. III, § 11(a)(9), Fla. Const. The Alachua County Hospital Lien Law is simply not based on a private contract. Rather, the Alachua County Hospital Lien Law is exactly the opposite – it is a statutory lien created because hospitals have no contracts with tortfeasors or their insurers to recover payment for the damages patients incur. Moreover, the Alachua County Hospital Lien Ordinance – which is not a special law – is not subject to the constitutional prohibition against certain types of special laws. Therefore, it is clearly not unconstitutional. The First District Court of Appeal clearly erred in holding both to be unconstitutional.

ARGUMENT

I. THE ALACHUA COUNTY HOSPITAL LIEN LAW DOES NOT VIOLATE ARTICLE III, SECTION 11(a)(9) OF THE FLORIDA CONSTITUTION

A. History of Florida Lien Laws

In 1951, the Florida Legislature passed a general law granting all hospitals in counties with populations over 325,000 the right to a hospital lien – the Hospital Lien Act of 1951 ("HLA"). Ch. 27032, Laws of Fla. (1951). At the time the HLA was passed only Dade County satisfied the population requirement. Florida Statistical Abstract 1967, p. 26 (Alvin B. Briscoe et al., eds., 1967). As other

counties grew and satisfied the population requirements, the Florida Legislature passed subsequent statutes amending the population limits used to determine where the HLA would be operative. See Chapters 61-558, 61-577 and 61-1468, General Laws of 1961. Due to the limited applicability of the HLA and its amendments, the validity of the HLA was challenged on the basis that the HLA constituted a special law enacted under the guise of a general law. See Palm Springs Gen. Hosp., Inc. of Hialeah v. State Farm Mut. Auto. Ins. Co., 218 So. 2d 793 (Fla. 3d DCA 1969); State Farm Mut. Auto. Ins. Co. v. Palm Springs Gen. Hosp., Inc. of Hialeah, 232 So. 2d 737 (Fla. 1970). The Florida Supreme Court upheld the HLA and its amendments determining that the classifications were reasonable since the problems which the HLA addressed were generally more pronounced in counties having large populations. State Farm, 232 So. 2d at 738.

As population levels changed in counties, the Florida Legislature amended the law to reflect the populations of the counties that it believed required the hospital lien law. By the early 1970s, the law was written so that the HLA only applied to counties with populations between 325,000 and 350,000, between 385,000 and 390,000 and over 425,000. See Chapters 61-558, 61-577 and 61-1468, General Laws of 1961 and Chapter 65-862, General Laws of 1965. Faced with continual population changes, a desire to limit the HLA to certain counties and/or institutions and mounting challenges that the law was not a general law of

local application, but rather, was a special law, the Florida Legislature repealed the HLA in 1971. The repeal of the HLA was intended to reduce the dependence on general laws of local application that were often subject to constitutional challenge and to expand the home rule powers of local government. Ch. 71-29, Laws of Fla. (1971).

The Florida Legislature, having dealt with the problems of the HLA, determined that hospital liens were better dealt with by special law or on the County level of government. After the repeal of the HLA, the Florida Legislature enacted special laws giving certain counties and/or institutions within certain counties the right to a hospital lien. While the legislature could have created a general law granting all hospitals lien rights[3] or even created a general law of local application similar to the HLA with appropriate classifications, it was the Florida Legislature's prerogative to choose to enact hospital lien laws relating only to certain counties by special law.

The First District Court of Appeal apparently believed that a general law was more appropriate. "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

[3] The Florida Legislature could not create a general hospital lien law which applied only to a closed set of counties. See Martin Mem'l Med. Ctr., Inc. v. Tenet Healthsystem Hosp., Inc., 875 So. 2d 797 (Fla. 1st DCA 2004)(General law which purported to apply to a closed class of hospitals located in five counties was unconstitutional under Article III, section 10 of the Florida Constitution).

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." However, the stated preference of the First District Court of Appeal of the enactment of a general law rather than special laws dealing with hospital liens misses the point. 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 courts. Where, as here, the Legislature has the authority to enact a particular law, the legislative enactment is to be upheld regardless of any belief by the court that there may have been a better way for the Legislature to have dealt with the particular issue addressed by the enactment. See Computech Int'l, Inc. v. Milam Commerce Park, Ltd., 753 So. 2d 1219, 1222 (Fla. 1999), citing, State ex rel. Second District Court of Appeal v. Lewis, 550 So. 2d 522, 526 (Fla. 1st DCA 1989) ("[C]ourts cannot willy nilly strike down legislative enactments or acts of executive officers because they do not comport with judicial notions of what is right or politic or advisable."). "[I]f any state of fact, known or to be assumed, justifies the law, the court's power of inquiry ends; questions as to the wisdom, need or appropriateness are for the legislature." Fulford v. Graham, 418 So. 2d 1204, 1205 (Fla. 1st DCA 1982). To do otherwise would create separation of powers issues. Lewis, 550 So. 2d at 526.

The creation of hospital liens by special law is appropriate. The Florida Constitution defines "special law" as "a special or local law." Art. X, § 12(g), Fla. Const. This Court has defined "special law" and "general law" as follows:

> [A] special law is one relating to, or designed to operate upon, particular persons or things, or one that purports to operate upon classified persons or things when classification is not permissible or the classification adopted is illegal; a local law is one relating to, or designed to operate only in, a specifically indicated part of the state, or one that purports to operate within classified territory when classification is not permissible or the classification adopted is illegal.
>
> A general law operates universally throughout the state, or uniformly upon subjects as they may exist throughout the state, or uniformly within permissible classifications by population of counties or otherwise, or is a law relating to a state function or instrumentality.

State ex rel. Landis v. Harris, 120 Fla. 555, 163 So. 237, 240 (Fla. 1934) (citations omitted). This Court has recognized that under the provisions of Article III, section 10 of the Florida Constitution, the Legislature is constitutionally barred from passing general laws that impact only specific parties or areas of the state. Florida Dep't of Bus. and Prof'l Regulation v. Gulfstream Park Racing Ass'n, Inc., 967 So.2d 802, 808 (Fla. 2007). In the present matter, the special laws creating hospital liens are valid special laws. They are aimed at certain counties and/or certain types of institutions within the counties; their impact is local and limited to the geographic area affected by the laws.[4] Therefore, assuming that the Florida

[4] In the case of the Alachua County Hospital Lien Law, lien rights are granted to "any non-profit corporation operating a hospital that has qualified

Legislature has otherwise complied with all other constitutional requirements, the use of special laws to grant hospital liens to certain counties and/or certain institutions within counties is wholly appropriate.

B. Necessity for Hospital Lien Laws in Florida

Unfortunately, in Florida and elsewhere, it is not uncommon for an indigent or underinsured person to be injured as the result of the negligence of a third party - often in a motor vehicle accident. When this occurs, the indigent or underinsured person, who may be unconscious or suffering life threatening conditions, is taken to the nearest emergency room. At the time of admission, such patients are typically in no condition to knowingly and voluntarily read and sign a contract, usually in the form of an admission agreement, containing, among other things: an agreement to pay for the cost of medical services; an assignment of insurance

---

pursuant to s. 501(c)(3) of the Internal Revenue Code as a charitable hospital, located in Alachua County." The effect of the Alachua County Hospital Lien Law has been to grant lien rights to the two non-profit charitable hospitals in Alachua County: Shands, and Alachua General Hospital. Alachua General Hospital is mentioned in the legislative history of the Alachua County Hospital Lien Law and has been judicially determined to be a quasi-public corporation. See Delaney v. Santa Fe Healthcare, Inc., 741 So. 2d 595, 596 (Fla. 1st DCA 1999). The history of Alachua General Hospital, its charitable purpose and its later acquisition by Shands are discussed in Delaney. Like Alachua General Hospital, Shands has provided for the healthcare of the indigent population in Alachua County. In addition, Shands is charged with the responsibility for the management, control and operation of the University of Florida Health Science Center in Alachua County. See § 1004.41(4), Fla. Stat. (2007). In the case of the Alachua County Hospital Lien Law, it was entirely reasonable for the legislature, by special law, to grant hospital liens to a particular class of hospitals operating within Alachua County.

benefits; and possibly a grant of a contractual lien or assignment as to any recovery from a third party. Such patients may only be able to knowingly and voluntarily read and sign the admission agreement after significant medical care and treatment has already been rendered. Some patients may never sign such an agreement even after significant medical care and treatment has been rendered either because they decline to do so or because they do not survive after being treated for their injuries. In fact, the hospital has no guarantee that an accident victim will ever sign an admission agreement. Therefore, although it is possible for a patient to grant to a hospital an assignment or a contractual lien as to any recovery by the patient against a third party tortfeasor, it is extremely unlikely to occur in the case of a severely injured accident victim.

The Florida Legislature has recognized that the creation of statutory hospital liens is an effective way to deal with this problem and is a means of encouraging hospitals to treat accident victims regardless of their ability to pay for such treatment:

> The logical interpretation of the legislative intent as to Ch. 27032 [The HLA] is to assure a hospital of its rights to proceeds which are held by an insurance company whose insured is liable for the injuries suffered by the hospital's patient. No lien is necessary against the injured patient as the usual channels of legal recourse are available against a solvent patient indebted to the hospital for services. The problem to which the Legislature addressed itself arises for the hospital when it is confronted with an insolvent patient whose treatment results in a mounting bill for expenses. Thus, we observe that a desirable consequence is affected by Ch. 27032 as to such an insolvent patient

> entitled to insurance proceeds; i.e., by affording the hospital a lien on the insurance proceeds, the Legislature has provided such hospital with an assurance that it will be compensated by an injured indigent, and that the hospital should have no reluctance about providing further services in view of potential anticipated costs.

Palm Springs Gen. Hosp., Inc. of Hialeah v. State Farm Mut. Auto. Ins. Co., 218 So. 2d 793 (Fla. 3d DCA 1969). As a practical matter, the lien does not extend to the patient's assets, but rather, solely to damages recoverable for injuries suffered by the patient. The recognition of a statutory hospital lien does not restrict a hospital and a patient from entering into a contract calling for: a guarantor or other person other than those liable for damages to provide guarantees or other security for payment of the claims; an assignment of insurance benefits; an agreement to be personally liable for the cost of treatment; and the grant of an assignment of claims against one or more third parties. Rather, the recognition of a statutory lien is intended to provide a hospital with an additional means to recover payment which, in the case of a severely injured indigent patient, will likely be the only means by which the hospital can receive payment in full.

In addition to providing hospitals with a viable means of collecting payment, Florida lien laws ultimately reduce the burden on the federal Medicare and Florida Medicaid programs. The Medicare program was established by Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395, *et seq*. In order to reduce costs, Congress amended 42 U.S.C. § 1395y(b)(1) to require that payments not be made "with

respect to any item or service to the extent payment has been made, or can reasonably be expected to be made … under an automobile or liability insurance policy or plan (including a self-insurance plan) or under no fault insurance." Omnibus Budget Reconciliation Act of 1980, Pub. L. No. 96-499, § 953, 94 Stat. 2599 (1980) (hereinafter the "Secondary Payor Provision."). In creating the Secondary Payer Provision, "Congress has provided the statutory means by which a health services provider, which has provided medical treatment to a Medicare beneficiary, may obtain payment from a beneficiary's liability insurance proceeds, instead of from Medicare. The effect of the "secondary payer" provision is to force a health services provider to look to a liability insurer for payment, instead of to Medicare, when payment from a liability insurer "has been made or can reasonably be expected to be made promptly." Joiner v. Med. Ctr. East, Inc., 709 So. 2d 1209 (Ala. 1998).

In general, hospitals would rather look to a third liability insurer because, unlike payments from Medicare, payments from liability insurers are not limited to predetermined fixed rates governed by the Prospective Payment System which are significantly less than the rates customarily charged by hospitals. Based on the Secondary Payer Provision, a hospital must make a choice between billing Medicare first or pursuing a liability insurer directly for payment. However, if the hospital pursues the insurer, and is unable to recover its expenses within 120 days

(the Medicare filing deadline), the hospital must either bill Medicare and accept the Medicare allowance as payment in full or continue to pursue recovery from the insurer for the full value of treatment and forego any entitlement to be paid by Medicare. A statutory hospital lien enables a hospital to forego billing Medicare altogether and seek payment from a third party liability insurance carrier.

Likewise, hospital lien laws reduce the burden on the Florida Medicaid plan. Florida's Medicaid Third Party Liability Act provides that Medicaid is to pay only after all sources of payment for medical care have been exhausted. See § 409.910, Fla. Stat. (2007). Hospitals such as Shands are required to first exhaust any entitlement to payment from available third party sources such as tortfeasors and insurers providing coverage to tortfeasors before billing Medicaid. See Fla. Admin. Code Ann. R. 59G-7.023, 59G-7.051, 59G-7.053. Statutory hospital liens enable hospitals to pursue third party sources rather than billing Medicaid.

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. One of the unfortunate consequences of this is that, for Medicaid compensable services, Shands and other hospitals will now be forced to bill Medicaid directly for amounts that otherwise would have been paid to the hospital from third party sources. This will result in a sudden and

unexpected increase in the amounts demanded by hospitals from Medicaid which will no longer function as a payer of last resort.

While Medicaid may recover some of its expenses by virtue of Section 409.910, Florida Statutes (2007), the state's ability to necessarily recover the full value of its Medicaid liens is extremely limited. Where funds are derived from a tort action, the Medicaid recovery is limited to 50% of the recovery after attorney fees and costs up to the amount of medical assistance provided by Medicaid. Moreover, Medicaid's lien for recovery against a tort settlement and award is also otherwise further limited to that amount or percentage of the award allocated to compensate the plaintiff for past medical expenses. See Arkansas Dep't of Health and Human Servs. v. Ahlborn, 547 U.S. 268 (2006); Smith v. Agency for Health Care Admin., 2009 WL 3398715, at *1-2 (Fla. 5th DCA October 23, 2009). Therefore, the State of Florida Medicaid program and the federal Medicare program will be forced to incur significant costs that cannot be recouped and that otherwise would have been paid by third party liability insurance carriers.

C. The First District Court of Appeal's Holding is in Direct Conflict with Hosp. Bd. of Dir. of Lee County v. McCray, 456 So. 2d 936 (Fla. 2d DCA 1984)

The First District Court of Appeal's holding that the Alachua County Hospital Lien Law is unconstitutional under Article III, section 11(a)(9) of the Florida Constitution is in direct conflict with the Second District Court of Appeal's

holding in Hosp. Bd. of Dir. of Lee County v. McCray, 456 So. 2d 936 (Fla. 2d DCA 1984). In McCray, the Court, in upholding the constitutionality of the Lee County hospital lien law, found that " Article III, section 11(a)(9) prohibits those special laws which create liens based on private contracts, not all special laws which create liens ... [the Lee County lien law] is a lien created by statute rather than by private contract, therefore, it does not violate the constitution." McCray, 456 So. 2d at 939. The Court further recognized that "the validity and priority of hospital liens have been firmly established." Id. The contradictory holdings of the present case and McCray have placed hospitals throughout the State of Florida in a quandary as to the validity of their lien law. As a result, it is this Court's, "constitutional responsibility to resolve this interdistrict conflict, and ensure the consistent application of the law throughout this state, see The Florida Star v. B.J.F., 530 So. 2d 286, 288 (Fla.1988), ... [and] address the very real and direct conflict created by the ... court's pronouncement of a novel statutory interpretation that directly contravenes the interpretation undergirding numerous decisions in other districts." PNR, Inc. v. Beacon Prop. Mgmt., Inc., 842 So. 2d 773 (Fla. 2003).

D. The Alachua County Hospital Lien Law, Chapter 88-539, Laws of Florida, is a Statutory Lien, Not a Special Law Creating a Lien Based on a Private Contract

Article III, section 11(a)(9) of the Florida Constitution provides that "[t]here shall be no special law or general law of local application pertaining to. . . . (9) creation, enforcement, extension or impairment of liens based on private contracts, or fixing of interest rates on private contracts." Art. III, § 11(a)(9), Fla. Const. By its terms, the Florida Constitution does not bar all laws pertaining to liens, it only bars those local laws pertaining to liens based on private contracts. Art. III, § 11(a)(9), Fla. Const.

In Florida, liens may be created by a contract between the parties or by operation of law. 34 Fla. Jur. 2d, Liens § 1 (2009); Bessemer v. Gersten, 381 So. 2d 1344 (Fla. 1980). Contractual liens are consensual whereas liens by operation of law are non-consensual. The essence of contractual liens is the existence of a contract granting the lien and the existence of existing property against which the lien may be enforced. Contractual liens include mortgages, car loans, security interests and chattel mortgages. Liens by operation of law arise by statute or operation of common law and their existence depends on the relationship of the parties. In Florida, liens by operation of law include tax liens, attorney's liens, construction liens, hospital liens and judgment liens. See Palm Springs Gen. Hosp., Inc. of Hialeah v. State Farm Mut. Auto. Ins. Co., 218 So. 2d 793, 799 (Fla.

3d DCA 1969)(comparing hospital liens with construction liens and attorney charging liens and noting that "the similarity between the interests being protected by the common law attorney's charging lien and the hospital lien is striking").

Hospital liens authorized by Chapter 88-539, Laws of Florida, and similar statutory enactments are not contractual liens. They arise by statute and are therefore statutory liens. By definition, a hospital lien is "a **statutory** lien asserted by a hospital to recover the costs of emergency and ongoing medical and other services." Black's Law Dictionary (8th ed. 2004)(emphasis added). "A statutory lien is a lien created and defined by the legislature, and the character, operation and extent of a statutory lien are ascertained solely from the terms of the statute." 53 C.J.S. Liens §13 (2009).

The imposition of a hospital lien under the Alachua County Hospital Lien Law does not require an agreement between the patient and the hospital expressly creating a lien on the potential proceeds from the patient's cause of action against a tortfeasor.[5] Rather, a statutory hospital lien attaches by operation of law from the moment a patient enters the hospital. See State Farm Mut. Ins. Co. v. Palm Springs Gen. Hosp., Inc., 232 So. 2d 737, 738 (Fla. 1970); Palm Springs Gen. Hosp., Inc. of Hialeah, 218 So. 2d at 798. Indeed, in the case of a seriously injured

[5] In the absence of a written contractual agreement, the law would not imply a lien against the recovery of the proceeds from a third party tortfeasor, it would imply an agreement that the patient would pay for the medical services provided to him/her.

accident victim, there isn't adequate time and the patient isn't physically or mentally able to review and sign a detailed contract dealing with lien rights prior to receiving emergent care. No consent or agreement by the patient is necessary or required before a statutory lien arises. Id. The lien is perfected and vests upon compliance with the statutory prerequisites. Id. After the lien attaches, a direct statutory cause of action is authorized against any third party insurer which pays or settles the claims of the patient without the knowledge or consent of the hospital. Hospital liens, therefore, are purely statutory creatures. Hosp. Bd. of Dir. of Lee County v. McCray, 456 So. 2d 936 (Fla. 2d DCA 1984)(The Lee County Hospital Lien Law is a lien created by a statute not by a private contract; therefore, it does not violate the constitution.).

The Alachua County Hospital Lien Law and similar statutory enactments clearly create non-consensual, non-possessory statutory liens. Shands' lien in this instance does not depend upon a contract between Shands and the patient, Price, granting Shands a contractual lien against all causes of action, suits, claims, counterclaims, and demands accruing to Price, and upon all judgments, settlements, and settlement agreements rendered or entered into by Price relating to the accident which necessitated her medical care at Shands. In fact, there is no record evidence whatsoever of an express contract requiring Price to pay for the medical services she received let alone granting Shands' a contractual lien. Rather,

an unexecuted admission agreement was introduced as an exhibit at trial. (R. Evidence Inventory, Exhibit J.1). Because Shands was not pursuing a cause of action against the patient based upon the admission agreement it was unnecessary to introduce into evidence a signed admission agreement in order to prove its claim against Mercury for lien impairment.[6]

The fact that the lien created by the Alachua County Hospital Lien Law is statutory rather than contractual does not mean that a patient and a hospital cannot enter into a valid contract creating lien rights. The distinction between contractual liens and statutory liens in a hospital setting is dealt with in Wellington Reg'l Med. Ctr., Inc. v. Meder, 819 So. 2d 981, 983 (Fla. 4th DCA 2002). In Meder it was recognized that statutory liens may be granted by the Legislature in favor of an enumerated hospital while contractual liens may be granted by the patient in favor of a hospital, regardless of whether such hospital has been granted a statutory lien, when the patient enters into a contract providing for such a lien "knowingly, voluntarily, and for due consideration." Id. The opinion of the panel of the First District Court of Appeal which concludes that the hospital lien at issue is based on a private contract is at odds with the holding in Meder and long standing Florida

[6] After substantial medical treatment had already been rendered, the patient in this case did sign an admission form. The signed admission form was not introduced into evidence and the trial court made no determination as to any rights or liabilities arising from the agreement. In fact, if Shands does not prevail in this matter, it should be granted leave to amend its complaint based an assignment of claim granted to Shands in the admission form.

law. See, e.g., McCray, 456 So. 2d at 939. As noted above, the statutory lien created by the Alachua County Hospital Lien Law is intended to attach the moment a patient enters the hospital regardless of whether the patient's physical condition is such that the patient could knowingly and voluntarily execute a contract creating lien rights. See Palm Springs Gen. Hosp., Inc. of Hialeah, 232 So. 2d at 238-239.

E. The Alachua County Hospital Lien Law is Based on the Lack, Not the Existence, of any Private Contract Between Hospitals Insurers for Third Party Tortfeasors

Article III, §11(a)(9) of the Florida Constitution only prohibits the creation of liens "based on" private contracts. A "base" is "a fundamental principle or groundwork; foundation; …a starting point…." The Random House Webster's Unabridged Dictionary, p. 172 (2nd ed. 2001). Thus, in order to determine what a lien is "based on," it is logical to review and analyze the legislative history of the lien law. Applying this principal of statutory construction to this case, it becomes obvious that the Alachua County Hospital Lien Law is not "based on" any private contract – it is "based on" the nonexistence of a private contract or contractual relationship between hospitals and the insurers for third party tortfeasors.

The legislative history of the Alachua County Hospital Lien Law clearly shows that the lien is not "based on" a private contract. The Alachua County Hospital Lien Law exists because the Florida Legislature realized that hospitals, like Shands, have no contractual relationship with insurance companies that would

require those insurers to reimburse hospitals for care and treatment rendered to patients for injury, illness, or sickness caused by their insureds.

> According to counsel for affected hospitals, sometimes people involved in serious accidents run up tremendous bills, eventually recover all or part of their medical expenses from insurance or legal settlements or judgments, but ultimately fail to pay their hospital bills. **Insurance companies and courts are legally obligated to the policyholder or plaintiff/defendant, not the hospital**….

Fla. H.R. Comm. on Community Affairs, H.B. 1412, Final Staff Analysis, p. 1, July 7, 1988)(emphasis added)(Appendix - Tab 3).

> The hospital lien is "a solution to the problem of payment for medical services furnished to insolvent patients [and] a manifestation of the legislature's concern for the public welfare in that the Hospital is assured of compensation and should not be reluctant to treat indigents."

Id., p. 4. The Alachua County Hospital Lien Law is, therefore, not "based on" any private contract – it is "based on" the clear intent of the Florida Legislature that third party insurers, with no contractual relationship with hospitals, would be required to pay the hospitals for care and treatment they provided to patients for injury, illness, or sickness caused by their insured.

Shands has no contractual or equitable rights against third party insurers such as Mercury. Without the lien rights created by the Alachua County Hospital Lien Law, Shands could not:

1) Require insurers of third party tortfeasors to reimburse Shands directly for medical care and treatment provided to patients injured by the negligence of their insureds;

2) Invalidate releases or satisfactions between Shands patients and insurers for the third party tortfeasors when Shands is not a party to the releases or satisfactions; or
3) Bring a direct cause of action against third party insurers to recover payment for care and treatment provided to patients where the insurers fail to satisfy Shands' lien.

Shands does not need a lien against its patients. It can already recover directly against its patient with whom it is in privity. Shands needs a lien because it does not have a contract with the third party insurer from whom the lien law requires payment. It is because Shands has no contractual rights against tortfeasors and their insurers that the Florida Legislature enacted the Alachua County Hospital Lien Law. The Florida Legislature believed that, despite the lack of any contractual privity, a third party insurer should be required to take direct responsibility for the payment of medical bills that hospitals are forced to incur as a result of its insured's negligence.

F. The Injured Party Has No Direct Cause of Action Against the Third Party Insurer

The Alachua County Hospital Lien Law does not create a lien based on a private contract between Shands and its patient because the patient has no direct cause of action against a tortfeasor's insurer. The Alachua County Hospital Lien law gives Shands a direct cause of action at law against a third party insurer which settles or pays a claim without first securing a release or satisfaction of any outstanding hospital lien. Even if an injured patient wanted to, the patient could

not grant Shands a direct cause of action against Mercury because the patient does not have a direct cause of action against Mercury. The patient's only cause of action is against the third party tortfeasor.[7] Consequently, even if a contract exists between Shands and its patient, that contract cannot grant Shands a direct cause of action against a third party insurer like Mercury. Mercury's liability has no relationship to any contractual or quasi-contractual relationship that Shands' may have with its patient. Mercury's liability to Shands is exclusively statutory.

G. Article III, Section 11(a)(9) of the Florida Constitution Relates to "Private Contracts" Not "Quasi-Contracts"

Article III, section 11(a)(9) of the Florida Constitution provides that there can be no special law creating a lien based on "private contracts." In the instant case, there was no record evidence of any private contract between Shands and its patient ("Price") for the payment of medical services or granting Shands a lien on any recovery from a third party tortfeasor. Nevertheless, it is stated in the panel opinion of the First District Court of Appeal that the Alachua County Hospital Lien Law created a lien based on a private contract between Shands and its patient. (Appendix – Tab 1, 1st DCA Opinion, p. 3). In the concurring opinion, Judge

[7] Under Florida's non-joinder statute, an injured third party may not file a direct action against a liability insurer for a cause of action covered by a liability insurance policy without first satisfying either one of two conditions precedent: (1) obtaining a settlement against the insured or (2) obtaining a verdict against the insured. § 627.4136(1), Fla. Stat. (1992).

Clark attempts to reconcile this issue by explaining that even if an express contract does not exist between a hospital and its patient, an implied contract or quasi-contract exists for the payment of medical services. (Appendix – Tab 1, 1st DCA Opinion, p. 7). She posits that this quasi-contractual relationship is a "private contract" under Article III, section 11(a)(9) of the Florida Constitution. (Appendix – Tab 1, 1st DCA Opinion, p. 8). The interpretation of "private contract" in Article III, section 11(a)(9) of the Florida Constitution to include "quasi-contracts" is contrary to existing law.

A key underlying principle of constitutional interpretation mandates that if the language of a statute is clear and unambiguous, there is nothing to interpret, and no reason to resort to rules of construction.

> [T]he aim should be to give effect to the purpose indicated by a fair interpretation of the language, the natural signification of the words used in the order, and grammatical arrangement in which they have been placed. If the words thus regarded convey a definite meaning and involve no absurdity or contradiction between the parts of the same instrument, no construction is allowable.
>
> The words and terms of a Constitution are to be interpreted in their most usual and obvious meaning, unless the text suggests that they have been used in a technical sense. The presumption is in favor of the natural and popular meaning in which the words are usually understood by the people who have adopted them.
>
> . . . .
>
> It has been said that, as statutes are hastily and unskillfully drawn, they need construction to make them sensible, but Constitutions import the utmost discrimination in the use of language, that which the words declare is the meaning of the instrument. It must be very plain, nay absolutely certain, that the people did not intend what the

> language they had employed in its natural signification imports before a court should feel at liberty to depart from the plain meaning of a constitutional provision.

City of Jacksonville v. Continental Can Co., 151 So. 488, 489-90 (Fla. 1933). See also, Florida Soc'y of Ophthalmology v. Florida Optometric Ass'n, 489 So. 2d 1118, 1119 (Fla. 1986) ("Any inquiry into the proper interpretation of a constitutional provision must begin with an examination of that provision's explicit language. If that language is clear, unambiguous, and addressed the matter in issue, then it must be enforced as written."); Dep't of Envtl. Protection v. Millender, 666 So. 2d 882, 886 (Fla. 1996)("Less latitude is permitted when construing constitutional provisions because it is presumed that they have been more carefully and deliberately framed than statutes."); Florida League of Cities v. Smith, 607 So. 2d 397, 400 (Fla. 1992)("[T]he law is settled that when constitutional language is precise, its exact letter must be enforced and extrinsic guides to construction are not allowed to defeat the plain language."); In re Advisory Opinion to the Governor Request of June 29, 1979, 374 So. 2d 959, 964 (Fla. 1979)(In construing provisions of the constitution, each provision must be given effect, according to its plain and ordinary meaning."); City of St. Petersburg v. Briley, Wild & Assoc., Inc., 239 So. 2d 817, 822 (Fla. 1970)("If the language is clear and not entirely unreasonable or illogical in its operation we have no power

to go outside the bounds of the constitutional provision in search of excuses to give a different meaning to the words used therein.").

The drafters of Article III, section 11(a)(9) of the Florida Constitution used the word "contract" not "quasi-contract." In fact, a quasi-contract is the antithesis of matters contracted for. See Cross v. Strader Constr. Corp., 768 So. 2d 465 (Fla. 2d DCA 2000). A quasi-contract is defined as:

> A class of obligations which are imposed or created by law without regard to the assent of the party bound, on the ground that they are dictated by reason and justice, and which are allowed to be enforced by an action ex contractu. They rest solely on a legal fiction and are not contract obligations at all in the true sense, for there is no agreement.

Florida Sheriff's Ass'n v. Dep't of Admin., Div. of Retirement, 408 So. 2d 1033, 1035-36 (Fla. 1981), quoting Anders v. Nicholson, 150 So. 639, 642 (Fla. 1933). By definition, a quasi-contract is not a contract at all; it is a fiction implied by law. Thus, Article III, section 11(a)(9) of the Florida Constitution does not bar the creation of liens based on quasi-contracts.

This Court has also addressed whether a "quasi-contract" is synonymous with a "contract" under the Florida Constitution in another context. Article I, section 10 of the Florida Constitution provides, "No bill of attainder, ex post facto law or law impairing the obligation of **contracts** shall be passed." (emphasis added). In Florida Sheriff's Assn., this Court held that quasi-contracts are not embraced within the constitutional guaranty against the passage of a law violating

the obligation of a contract. Florida Sheriff's Assn., 408 So. 2d at 1035. Moreover, in Anders the Court recognized that:

> It is also settled that constitutional provisions against impairing the obligation of a contract do not apply to obligations imposed by law without the assent of the party bound, even though by a legal fiction they may be enforced in an action in form ex contractu. In other words, the classes of contracts protected are voluntary – that is, based on the assent of the parties, expressly or impliedly given. That class of obligations, aptly styled, 'quasi contracts,' is not embraced within the constitutional guaranty against the passage of a law violating the obligation of a contract….

Anders v. Nicholson, 150 So. 639, 642 (Fla. 1933), quoting, Bd. of Comm'rs of Everglades Drainage Dist. v. Forbes Pioneer Boat Line, 86 So. 199, 201 (Fla. 1920)(citations omitted).

A similar result was reached in Cross where the Second District Court of Appeal concluded that "quasi-contracts" were not "obligations contracted for" for purposes of Article X, section 4(a) of the Florida Constitution. Article X provides that certain "obligations contracted for" can be a judgment lien against and the basis for a forced sale of homestead real property. However, the Second District held that "quantum meruit is the antithesis of matters contracted for" and that judgments based on quantum meruit damages are not a lien against homestead realty. Cross, 768 So. 2d at 466.

The foregoing decisions clearly establish that Article III, section 11(a)(9) of the Florida Constitution does not prohibit special laws creating liens based on

quasi-contracts. There is no record evidence of any express contract between Shands and Price (a) requiring Price to pay her own medical expenses; or (b) creating a lien on her recovery from a third party and or the insurer for the third party. Therefore, neither the majority nor concurring opinions of the panel of the First District Court of Appeal provides a valid basis for holding that the Alachua County Hospital Lien Law violates Article III, section 11(a)(9) of the Florida Constitution.

H. The Alachua County Hospital Lien Law Does Not Create a True "Lien"

The Alachua County Hospital Lien Law does not create a true "lien" – it carves out a cause of action at law against a insurance company to recover an involuntary debt, i.e. "[The hospital] shall be entitled to an action at law for damages on account of such impairment…." Ch. 88-539, Laws of Fla. (1988). The Alachua County Hospital Lien Law is not, therefore, invalidated by Article III, section 11(a)(9) of the Florida Constitution.

Other jurisdictions have similarly found that so-called hospital lien laws do not really create "liens," but rather, causes of action in favor of hospitals. In Bd. of Trustees of Clark Mem'l Hosp. v. Collins, 665 N.E.2d 952 (Ind. App. 1996), the Indiana Court of Appeals discussed the Indiana Hospital Lien Act and found that it did not create a true "lien":

> Notwithstanding the use of the term "lien," a hospital lien is not actually a "lien," but instead is an action authorized by statute based on an implied contract or quasi contract. (citation omitted). The use of the term "lien" detracts from the essentials of the cause of action authorized by such legislation.... As noted above, the interest created by Indiana's Hospital Lien Act, has been described as a lien, charge, security, incumbrance, specific interest, and direct right of the Hospital with respect to any insurance settlement later obtained by the patient (citation omitted). Therefore, we hold that the interest created by Indiana's Hospital Lien Act is merely a legal right which may appropriately be enforced against an insurance company doing business in Indiana.

Id. at 955. The court reasoned that the Indiana Hospital Lien Act plainly creates an interest in a patient's settlement or judgment from a tort lawsuit that allows hospitals to bring causes of action against insurance companies or the personal injury defendant to collect for their services.

In Goldwater v. Mendelson, 8 N.Y.S.2d 627 (N.Y.Mun.Ct. 1938), the court determined that the New York hospital lien law created a cause of action, not a "lien". The cause of action to enforce a hospital lien was an action at law to recover on an obligation to pay money imposed by statute, based on an implied or quasi-contract. The hospital's action was merely to recover an involuntary debt, which the statute created in favor of the hospital. The court pointed out that the legislature specified a plain remedy for enforcing hospital liens by fastening a naked liability upon both the tortfeasor and the insurer to pay the hospital its charges for caring for the injured person.

> No equities are involved here, nor are any equitable maxims called for. No funds are sought to be reached in the hands of third persons, nor are any trusts created by operation of law. Furthermore, the insolvency of the plaintiff's creditor is immaterial here, and no property is to be or can be impounded to apply on account of the principals' debt. The statute simply makes both defendants unconditionally liable to this plaintiff … to the extent of the moneys paid by them to the injured [person].…And finally, it provides that the plaintiff's lien is to be enforced by "a suit in law" against these defendants.

Id. at 425. It was not a matter of equity, the court stated, for although the legislature described the remedy afforded the hospital as "an enforcement of its lien," it created nothing more than an action at law to recover money based on implied contract or quasi contract:

> Although the legislature has described the remedy thus afforded the plaintiff 'an enforcement of it lien', still it has created nothing more that an action at law to recover on 'an obligation to pay money imposed by the statute.' The use of that nomenclature adds nothing to and its omission would detract less from the essentials of this action.

Id. at 425.

In the present matter, it is clear that the Alachua County Hospital Lien Law is not a true "lien" as contemplated by Article III, section 11(a)(9) of the Florida Constitution. The law creates a cause of action in favor of hospitals to insure that they are compensated for their services, thereby serving the public welfare. The law is intended to bind insurance companies if they ignore notice of the hospital's claim when settling patients' claims. Deletion of the word "lien" from the statute would not change the effect of the law which is to create a legal cause of action.

To interpret the Alachua County Hospital Lien Law as simply creating a lien rather than a direct cause of action against an insurance company would render the entire law meaningless.

II. THE ALACHUA COUNTY HOSPITAL LIEN ORDINANCE DOES NOT VIOLATE ARTICLE III, SECTION 11(a)(9) OF THE FLORIDA CONSTITUTION

A. The Alachua County Hospital Lien Ordinance is Not a Special Law Created By the Florida Legislature and is Not Subject to the Constitutional Prohibitions Found in Article III, section 11(a)(9) of the Florida Constitution

In the present matter, the First District Court of Appeal held that the Alachua County Hospital Lien Ordinance, Alachua County Code sections 262.20-262.25, was unconstitutional under Article III, section 11(a)(9) of the Florida Constitution. (Appendix – Tab 1, 1st DCA Opinion, p. 2). Although not altogether clear, it would appear that the ruling is based upon a belief that the ordinance was "enacted pursuant to" the Alachua County Hospital Lien Law. (Appendix – Tab 1, 1st DCA Opinion, p. 2). The fact of the matter, however, is that neither Shands nor Mercury ever claimed that the Alachua County Hospital Lien Ordinance was enacted pursuant to the Alachua County Hospital Lien Law and there was no record evidence whatsoever that the Alachua County Hospital Lien Ordinance was enacted pursuant to the Alachua County Hospital Lien Law.

The Alachua County Hospital Lien Ordinance was not enacted pursuant to the Alachua County Hospital Lien Law.[8] The ordinance does not state that it was enacted pursuant to the special act (i.e. Chapter 88-539, Laws of Florida) and the special act does not authorize, direct or require that an ordinance be enacted by the County. (Appendix - Tab 4). The two laws, while mirroring each other, are separate and distinct. While the Alachua County Hospital Lien Ordinance in its text lists as a reference Chapter 88-539, Laws of Florida, the reference does not in any way stand for the proposition that the ordinance was enacted pursuant to the special law or even needed a special law to be enacted. In fact, at least two counties, Bay and Brevard County, have enacted hospital lien ordinances without having a special act granting them similar lien rights. See Bay County Ordinance Ch. 11, Art. II, sections 11-26 to 11-31 and Brevard County Ordinance Ch. 54, Art. 3.

Alachua County, a Charter County pursuant to Article VIII, section 1(g), of the Florida Constitution, has all powers of local self-government not inconsistent with general law or with special law approved by vote of the electors. As a charter county, Alachua County has broad powers of self-government, including the power to enact county ordinances not inconsistent with general or special law. Phantom

[8] Even if the ordinance was enacted pursuant to the Alachua County Hospital Lien Law, the fact that the underlying statute is unconstitutional does not invalidate the ordinance.

of Brevard, Inc. v. Brevard County, 3 So. 3d 309 (Fla. 2008); Art. VIII, § 1(g), Fla. Const.

> [T]here are two ways that a county ordinance can be inconsistent with state law and therefore unconstitutional. First, a county cannot legislate in a field if the subject area has been preempted to the State. See City of Hollywood v. Mulligan, 934 So. 2d 1238, 1243 (Fla. 2006). "Preemption essentially takes a topic or a field in which local government might otherwise establish appropriate local laws and reserves that topic for regulation exclusively by the legislature." Id. (quoting Phantom of Clearwater, 894 So. 2d at 1018). Second, in a field where both the State and local government can legislate concurrently, a county cannot enact an ordinance that directly conflicts with a state statute. See Tallahassee Mem'l Reg'l Med. Ctr., Inc. v. Tallahassee Med. Ctr., Inc., 681 So. 2d 826, 831 (Fla. 1st DCA 1996). Local "ordinances are inferior to laws of the state and must not conflict with any controlling provision of a statute." Thomas v. State, 614 So. 2d 468, 470 (Fla.1993); Hillsborough County v. Fla. Rest. Ass'n, Inc., 603 So. 2d 587, 591 (Fla. 2d DCA 1992) ("If [a county] has enacted such an inconsistent ordinance, the ordinance must be declared null and void."); see also Rinzler v. Carson, 262 So. 2d 661, 668 (Fla. 1972) ("A municipality cannot forbid what the legislature has expressly licensed, authorized or required, nor may it authorize what the legislature has expressly forbidden.").

Phantom of Brevard, 3 So. 3d at 314. In the present matter, there is no evidence that the Alachua County Hospital Lien Ordinance is preempted or in conflict with any general or special law. Therefore, the Alachua County Hospital Lien Ordinance is a valid law.

Article III, section 11(a)(9) of the Florida Constitution does not apply to county ordinances. Article III, section 11(a)(9), on its face, applies only to the Florida Legislature's ability to create special laws or general laws of local

application pertaining to the creation, enforcement, extension or impairment of liens based on private contracts. Article III, section 11(a)(9) in no way limits a county's authority to validly enact a hospital lien ordinance. Accordingly, the decision of the First District Court of Appeal is a departure from Florida law in extending the reach of Article III, section 11(a)(9) of the Florida Constitution to a validly enacted county ordinance.

B. This Court Should Affirm the Trial Court Judgment Based on the Tipsy Coachmen Rule

In the trial court proceedings, Mercury admitted that its liability for lien impairment is controlled by the Alachua County Hospital Lien Ordinance, codified at Alachua County Code sections 262.20-262.25. (R. 71-103, p. 73-74). Although the trial court did not base its decision on the Alachua County Hospital Lien Ordinance and instead found the Alachua County Hospital Lien Law constitutional, this Court can affirm the judgment grounded on the Alachua County Hospital Lien Ordinance. "[I]f a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record." Dade County Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638, 644 (Fla. 1999). This doctrine is known as the "Tipsy Coachman Rule," Dade County Sch. Bd., 731 So. 2d at 644-45, and it has followed by this Court on

numerous occasions.[9] The Alachua County Hospital Lien Ordinance is identical to the special act, but it is not subject to the provisions of Article III, section 11(a)(9) applicable to special acts. Thus, the trial court's judgment based on the ordinance

[9] See, e.g. Applegate v. Barnett Bank, 377 So.2d 1150, 1152 (Fla. 1979) ("The written final judgment by the trial court could well be wrong in its reasoning, but the decision of the trial court is primarily what matters, not the reasoning used. Even when based on erroneous reasoning, a conclusion or decision of a trial court will generally be affirmed if the evidence or an alternative theory supports it."); Firestone v. Firestone, 263 So. 2d 223, 225 (Fla. 1972) ("[T]he findings of the lower court are not necessarily binding and controlling on appeal, and if these findings are grounded on an erroneous theory, the judgment may yet be affirmed where appellate review discloses other theories to support it."); Direct Oil Corp. v. Brown, 178 So. 2d 13, 15 (Fla. 1965); Cohen v. Mohawk, Inc., 137 So. 2d 222, 225 (Fla. 1962) ("[T]he judgment of the trial court reached the district court clothed with a presumption in favor of its validity. Accordingly, if upon the pleadings and evidence before the trial court, there was any theory or principle of law which would support the trial court's judgment in favor of the plaintiffs, the district court was obliged to affirm that judgment."); Chase v. Cowart, 102 So. 2d 147, 150 (Fla. 1958). Many other courts have also followed this principle. See, e.g., Green v. First American Bank & Trust, 511 So. 2d 569, 573 (Fla. 4th DCA 1987); Poller v. First Va. Mortgage & Real Estate Inv. Trust, 471 So. 2d 104, 107 (Fla. 3d DCA 1985); Wassil v. Gilmour, 465 So. 2d 566, 567 n.2 (Fla. 3d DCA 1985); McPhee v. Dade County, 362 So. 2d 74, 80 (Fla. 3d DCA 1978); Bd. of County Comm'rs v. Lowas, 348 So. 2d 13, 16 n.5 (Fla. 3d DCA 1977); First Nat'l Bank of Clearwater v. Morse, 248 So. 2d 658, 659 (Fla. 2d DCA 1971). The Fourth District Court of Appeal has referred to this principle as the "tipsy coachman" rule. See Home Depot U.S.A. Co., Inc. v. Taylor, 676 So. 2d 479, 480 (Fla. 5th DCA 1996)." Dade County Sch. Bd., 731 So. 2d at 644-45. The "tipsy coachman" rule came from Georgia to the Florida Supreme Court in Carraway v. Armour & Co., 156 So. 2d 494 (Fla. 1963). Id. at 645, fn. 8. "The pupil of impulse, it forc'd him along, His conduct still right, with his argument wrong; Still aiming at honour, yet fearing to roam, The coachman was tipsy, the chariot drove home." Carraway, 156 So. 2d at 497.

is correct and should be affirmed regardless of the constitutionality of the Alachua County Hospital Lien Law.

III. NEITHER THE ALACHUA COUNTY HOSPITAL LIEN LAW NOR THE ALACHUA COUNTY HOSPITAL LIEN ORDINANCE REQUIRE A REDUCTION IN DAMAGES FOR IMPAIRMENT OF THE LIEN BASED ON THE COLLECTABILITY OF THE TORTFEASORS[10]

In the underlying appeal, Shands claimed that the trial court improperly reduced the damages for Mercury's lien impairment. (Answer Brief, p. 60-67). The trial court reduced Shands' damages for the lien impairment based on its finding that any judgment against the tortfeasors insured by Mercury would have been uncollectible. The First District Court of Appeal, after finding that the Alachua County Hospital Lien Law and Alachua County Hospital Lien Ordinance were unconstitutional, summarily dismissed Shands' claims stating, "We find no merit to the other issues raised on … cross-appeal." (Appendix – Tab 1, 1st DCA Opinion, p. 4). Shands respectfully submits that both the trial court and First District Court of Appeal erred as to this issue.

The Alachua County Hospital Lien Law and the Alachua County Hospital Lien Ordinance do not require Shands to prove the collectability of any potential judgment against the tortfeasor who settles or pays a claim without complying the

[10] The standard of review applicable to a trial court's interpretation of a statute is a purely legal matter and therefore subject to de novo review. Operation Rescue v. Women's Health Ctr., Inc., 626 So. 2d 664, 670 (Fla. 1993), aff'd in part, rev'd in part on other grounds, 512 U.S. 753 (1994).

law. When the legislature creates a statutory cause of action, it acts as "master of the elements and boundaries of the new cause of action." Computech Int'l., Inc. v. Milam Commerce Park, Ltd., 753 So. 2d 1219, 1223 (Fla. 1999). The present action is a statutory cause of action for impairment of a hospital lien, and the legislature alone creates the elements and boundaries of this cause of action. The courts are bound to abide by the legislature's choices and cannot insert new requirements not found in the law.

The Alachua County Hospital Lien Law and Alachua County Hospital Lien Ordinance provide, in pertinent part:

> 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 or satisfaction of the lien referred to in 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 recover from the one accepting such release or satisfaction or making such settlement the reasonable cost of such hospital care, treatment and maintenance.

Ch. 88-539, Laws of Florida, § 4; Alachua County Ordinance § 262.23 (emphasis added). Recovery for impairment of a hospital lien is not limited by collectability. Rather, the law and ordinance limit recovery in two aspects: 1) to the amount of the impairment of the lien; and 2) the reasonable costs of such hospital care, treatment and maintenance. The special law and ordinance do not provide that

damages for lien impairment may be reduced if the tortfeasor is not shown by the hospital to be collectible.

Pursuant to the Alachua County Hospital Lien Law and Alachua County Hospital Lien Ordinance, Mercury's action of entering into a settlement with Price without Shands joining in and/or releasing the lien constituted a prima facie impairment of Shands' hospital lien for $38,412.20. Id. At that point, Shands was entitled to recover from Mercury the amount by which Mercury impaired the lien up to the reasonable cost of such hospital care, treatment and maintenance. Id. There is no question in the present matter that Mercury, in obtaining a complete release of itself and the tortfeasors, completely and wholly impaired the lien.[11] Furthermore, there is no issue that the reasonable costs of the hospital care, treatment and maintenance provided by Shands was $38,418.20. As a result, any reduction of damages based on the potential collectability of the third party tortfeasor was inappropriate.

The Alachua County Hospital Lien Law and Alachua County Hospital Lien Ordinance were created to assure hospitals a means to recover their expenses for treating accident patients without regard to their financial ability to pay. The lien law, by its nature, forces an insurance company to recognize the financial interest

[11] The trial court found that "the patient's underlying cause of action would, by the greater weight of evidence, have resulted in a judgment in excess of the full lien amount…" (R. 657-661, p. 2).

of the hospital. It exists to prevent insurance companies from abusive settlement practices which result in hospitals not being paid for hospital services that were provided to accident victims based upon the protection afforded to the hospitals under the hospital lien law. The Alachua County Hospital Lien Law is clear. Mercury is responsible for the amount by which it impaired Shands' lien. It simply is unfair and onerous to require the hospital, Shands, to prove that any judgment that might have been entered against a settling tortfeasor would have been collectable in order for Shands to recover pursuant to its lien. The likelihood of the hospital being able to collect the full amount of a judgment that might have been entered against a tortfeasor but for the insurer's wrongful acceptance of a general release from liability is not an element of proof called for by the Alachua County Hospital Lien Law or Alachua County Hospital Lien Ordinance should not have been required by the trial court.[12] As a result, this Court should find that Shands

[12] If this Court is inclined to find that a hospital lien claim requires proof as to whether any judgment that would have been entered against the released tortfeasor would have been collectable, it should be Mercury's burden to prove the non-collectability of the judgment for the twenty years that judgments are valid in Florida. Case law has recognized that under certain circumstances, the burden of collectability should be shifted to the party who engaged in the negligent or wrongful conduct. Fernandes v. Barrs, 641 So. 2d 1371, 1376 (Fla. 1st DCA 1994). In the context of a negligence action, the court found that the burden should be shifted where a party's negligence made proof of collectability more difficult. Id. In the present matter, the purpose of the law and the fact that the underlying tortfeasors – the Mercury insureds – are represented by the same entity which is the wrongdoer in the present action would make it appropriate for Mercury, not Shands, to bear the burden of collectability. This is a burden which Mercury failed

was entitled to damages from Mercury representing the full value of the impairment of the lien, $38,412.20, less the amount paid by Mercury - $10,000.00.

CONCLUSION

The judgment of the First District Court of Appeal should be reversed and the Alachua County Hospital Lien Law, Chapter 88-539, Laws of Florida, and the Alachua County Hospital Lien Ordinance, Alachua County Code sections 262.20-262.25, should be upheld as constitutional and the case should be remanded with directions that Shands be awarded the full value of its damages for lien impairment. In the event that this Court upholds the judgment of the First District Court of Appeal, the matter should be remanded with directions that Shands should be given leave to amend its complaint to state a cause of action against Mercury not based on either the Alachua County Hospital Lien Law or the Alachua County Hospital Lien Ordinance.

---

to meet. It is Mercury, not Shands, which is in privity of contract with the settling tortfeasor. As a matter of public policy, this Court should not rule in a manner that would ultimately put a hospital in the position of having to determine whether a third party who causes the injures for which a patient receives hospital care has the ability to pay a judgment in the next 20 years in the event that the third party's insurer does not protect the hospital's lien.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. mail to Jeffrey W. Kirsheman, Esquire, Fisher, Rushmer, P.O. Box 712, Orlando, FL 32802-0712, on 22nd day of December, 2009.

WALTERS LEVINE
KLINGENSMITH & THOMISON, P.A.
1819 Main Street, Suite 1110
Sarasota, Florida 34236
Telephone No. (941) 364-8787
Facsimile No. (941) 361-3023

Attorneys for
Shands Teaching Hospital and Clinics, Inc.

/s/ Joel W. Walters
Joel W. Walters
Florida Bar No. 604356
Thomas C. Valentine
Florida Bar No. 321389
Elinor E. Baxter
Florida Bar No. 981710

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

WALTERS LEVINE
KLINGENSMITH & THOMISON, P.A.
1819 Main Street, Suite 1110
Sarasota, FL 34236
Telephone: (941) 364-8787
Facsimile: (941) 361-3023

Attorneys for
Shands Teaching Hospital and Clinics, Inc.

By:_____
Joel W. Walters
Florida Bar No. 604356
Thomas C. Valentine
Florida Bar No. 321389
Elinor E. Baxter
Florida Bar No. 981710