IN THE SUPREME COURT OF FLORIDA

SHANDS TEACHING HOSPITAL AND CLINICS, INC.,

Appellant/Cross-Appellee,

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

v.

MERCURY INSURANCE COMPANY OF FLORIDA,

Appellee/Cross-Appellant.
_____/

SHANDS TEACHING HOSPITAL AND CLINICS, INC.'S REPLY BRIEF AND CROSS-APPEAL ANSWER BRIEF

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PREFACE

The Appellant/Cross Appellee, Shands Teaching Hospital and Clinics, Inc. shall be referred to as "Shands".

The Appellee/Cross Appellant, Mercury Insurance Company of Florida, shall be referred to as "Mercury".

References to the Record on Appeal in this case will appear in the Appellant's brief as Record followed by the Volume number, document number and page or paragraph number, if applicable, i.e., "R. Vol. ___."

References to Shands' Initial Brief will appear as Initial Brief followed by the page number, i.e., "IB__".

Reference to Mercury's Answer Brief and Initial Brief on Cross Appeal will appear as Answer Brief and Initial Brief on Cross Appeal followed by the page number, i.e. "AB___".

References to Shand's Initial Brief Appendix will appear as Appendix followed by Tab number, i.e. "App. Tab ___".

References to Shand's Reply Brief Appendix will appear as Appendix followed by Tab number, i.e. "Reply App. Tab ___".

APPELLANT'S REPLY BRIEF - ARGUMENT

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

The Alachua County Hospital Lien Law ("ACHLL") does not violate Art. III, § 11(a)(9) of the Florida Constitution. While the ACHLL is a special law, it does not pertain to the creation of liens based on private contracts. It creates a statutory lien against the proceeds of settlements or judgments payable to persons who have received medical services resulting from accidents. Moreover, it creates 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 ACHLL serves a valid public purpose and does not run afoul of constitutional prohibitions. The First District Court of Appeal erred in holding the ACHLL unconstitutional.

A. Mercury's Claim is Strictly a Facial Challenge

Mercury claims that it is making both "facial" and "as applied" challenges to the ACHLL. (AB 8). Moreover, Mercury asserts that it has not waived its constitutional defenses. (AB 15, fn 14).[1] Mercury first raised the constitutionality of the ACHLL in its Supplemental Memorandum of Law in Support of Motion for

[1] Mercury additionally claims that the constitutional issues were tried by consent. (AB 15, fn 14). Such claim is without merit. Prior to trial, a summary judgment order was entered which declared the ACHLL to be constitutional. (R. 324-325). Therefore, the constitutional issues were not at issue during the trial and were not tried by consent. (R. Vol. V, 1-261). See Fla. R. Civ. P. 1.510(d).

Summary Judgment. (R. Vol. I, 142-163).[2] In the motion and throughout the course of proceedings in the trial court, Mercury failed to indicate whether its constitutional challenges were facial as applied, or both facial and as applied. (R. Vol. I, 142-163). Following the hearing, a summary judgment order was entered declaring the ACHLL to be constitutional and finding triable issues of fact "including but not limited to the reasonableness of the hospital charges and the amount of damages caused by the Defendant's actions." In a Motion for Judgment Notwithstanding the Verdict, Mercury stated for the first time that its constitutional challenges were both facial and as applied but without specifically identifying which claims were facial or as applied. (R. Vol. III, 522-524).

It is clear from Mercury's Supplemental Memorandum of Law that its challenge under Art. III, §11(a)(9) is a facial challenge only. Mercury does not allege that the ACHLL is unconstitutional only as applied to a particular set of circumstances. Rather, Mercury alleges that the ACHLL is unconstitutional in every sense under Art. III, § 11(a)(9).[3] As such, Mercury's challenge is strictly a facial challenge. See, Ogborn v. Zingale, 988 So.2d 56 (Fla. 1st DCA 2008); I.B. v. Dep't of Children and Families, 876 So.2d 581 (Fla. 5th DCA 2004), citing,

[2] Under Fla. R. Civ. P. 1.510, the grounds upon which a motion for summary judgment is based are to be raised at least 20 days prior to a hearing thereon. The supplemental memorandum was not served until 14 days prior to the hearing.

[3] Further evidence that Mercury's challenge is strictly a facial challenge is that Mercury submitted no evidence or documents in support of its Constitutional claims other than the legislative history on the ACHLL. (R. Vol. I, 142-163).

Westerheide v. State, 831 So.2d 93 (Fla. 2002).

To prevail on a facial challenge, Mercury must demonstrate that no set of circumstances exist under which the statute would be valid. See Fla. Dep't of Revenue v. City of Gainesville, 918 So.2d 250, 256 (Fla. 2005). A statute cannot be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt. See Lakeland Reg'l Med. Ctr., Inc. v. State Agency for Healthcare Admin., et al., 917 So.2d 1024, 1030 n. 1 (Fla. 1st DCA 2006).

> A facial challenge to a statute is more difficult than an "as applied" challenge because the challenger must establish that no set of circumstances exists under which the statute would be valid…[T]he fact that the act might operate unconstitutionally in some hypothetical circumstance is insufficient to render it unconstitutional on its face; such a challenge must fail unless no set of circumstances exists in which the statute can be constitutionally applied. A facial challenge considers only the text of the statute, not its application to a particular set of circumstances, and the challenger must demonstrate that the statute's provisions pose a present total and fatal conflict with applicable constitutional standards.

Cashatt v. State, 873 So.2d 430, 434 (Fla. 1st DCA 2004).

While Mercury may make a facial challenge to the statute, any as applied challenge is not preserved for appellate review and this Court need not look at the application of the ACHLL to the specific circumstances of this case.[4] Mercury's attempt to raise factual issues as to the relationship of the parties and the existence

[4] Even if the Court finds that Mercury somehow raised an as applied challenge, the challenge must clearly fail as Mercury introduced no evidence of any contract between Shands and Price, express or otherwise.

of an express contract or a contract implied in fact are as applied challenges that were not raised below and are not preserved for review. The Court is only required to determine whether there is any set of circumstances under which the challenged enactment might be upheld. See Fla. Dep't of Revenue, 918 So.2d at 265.

B. The ACHLL is a Statutory Lien

Art. III, § 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." 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. The imposition of a hospital lien under the ACHLL does not require an agreement between the patient and the hospital relating to a lien as to 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. v. State Farm Mut. Auto. Ins. Co., 218 So.2d 793, 798 (Fla. 3d DCA 1969). No consent or agreement by the patient is necessary or required before a

[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.

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).

Mercury's contention that Shands' interpretation renders §11(a)(9) meaningless is untrue. (AB 19). In fact, the opposite is true. Mercury's interpretation makes the words "based on private contract" superfluous. The ACHLL liens are statutory liens because they comes into existence by virtue of the special law regardless of whether an express contract has been entered into by the hospital. Statutory liens are generally involuntary. Contractual liens which are subject to the constitutional prohibition are those liens which can only exist by virtue of an express contract being entered into. They are generally voluntary. As to contractual liens, the Legislature may not by special law deal with the creation, enforcement, or impairment of lien rights. For example the Legislature could not constitutionally grant super priority status to a particular contractual lienor, create a lien in favor of a party entering into a contract where the contract does not contain a provision for the creation of lien rights, or extinguish lien rights that are expressly provided for in a particular class of contracts.

C. Constitutional History Does Not Support Mercury's Argument

While prior versions of the Florida Constitution contained a general statement that, in the circumstances enumerated in the section on special and/or local laws, the laws shall be general and of uniform operation throughout the State, this general limitation is not in the present Florida Constitution. By the time the current §11(a)(9) appeared in the Florida Constitution, this general statement was deleted from the text. Fla. Const. (1968).[6] Instead, the constitutional drafters clarified that this section of the Constitution only prohibited the Florida Legislature from enacting special laws or general laws of local application on certain enumerated topics. Fla. Const., Art. III., §11(a) (1968). This section only limits the Florida Legislature's powers, it has nothing to do with a charter county's ability to enact ordinances as suggested by Mercury.

D. The ACHLL is Based on the Lack of a Private Contract

Mercury contends that Shands is improperly attempting to shift the focus in this matter away from the "specific contract" which is the focus of this law. (AB 25). Nothing could be further from the truth. A hospital does not need a lien law to have a cause of action against its patient. Rather, a lien is required because, in

[6] Mercury claims that in Lawnwood Med. Ctr., Inc. v. Seeger, 990 So.2d 503, 513 (Fla. 2008), this Court "recognized special laws should be restricted and disfavored over uniform, statewide laws." (AB 24). While this Court in Lawnwood recognized that the constitutional prohibitions limited certain types of special laws or general laws of local application, this Court never promulgated a policy whereby all special law should be restricted or disfavored over statewide laws.

the absence of a lien, a hospital which is not in privity with the tortfeasor who caused the patient's injuries does not have a method of recovery from the proceeds of any claim of the patient against the tortfeasor, (i.e. the tortfeasor does not come to the hospital and sign an agreement to pay for the damages which he has inflicted on the patient). The ACHLL enables hospitals, like Shands, which have no contractual relationship with insurance companies to recover the reasonable value of the care and treatment rendered to patients for injury, illness, or sickness caused by their insureds from those insurers which impair hospital liens. The ACHLL is, therefore, not "based on" any private contract. It is "based on" the clear intent of the Legislature that third party insurers, with no contractual relationship with hospitals, should be required to either protect hospitals' liens or pay hospitals the reasonable value of care and treatment provided to patients for injury, illness, or sickness caused by their insureds.[7]

E. The ACHLL Is Not a True "Lien"

Mercury contends that the ACHLL creates a true "lien" within the meaning of Art. III, § 11(a)(9) merely because it attaches to something of value. (AB 26-27). When a hospital files a lien, however, the lien may never attach to any res

[7] Again, Mercury's argument assumes that an express contract always exists between a hospital and its patient. This argument is baseless. Often, especially in emergent situations, there is no written contract between a hospital and its patient. Moreover, as noted above, Mercury did not raised an as applied challenge and provided no evidence of the existence of any contract between Shands and Price.

whatsoever. Moreover, hospital lien laws do not merely create a security interest or an encumbrance. Rather, they authorize a direct cause of action in favor of a hospital against a tortfeasor and/or his insurer to recover amounts paid to the patient if the patient has not paid the hospital. Two well reasoned cases are cited in the initial brief which explains the fundamental differences between a traditional lien and the rights afforded by a hospital lien law. Bd. of Trustees of Clark Mem'l Hosp. v. Collins, 665 N.E.2d 952 (Ind.App. 1996) and Goldwater v. Mendelson, 8 N.Y.S.2d 627 (N.Y.Mun.Ct. 1938). (IB 35-38). Mercury does not address, mention or even attempt to distinguish these cases from the present matter. (AB 26-28).

F. Article III, Section 11(a)(9) Does Not Apply to "Quasi-Contracts"

As noted in the initial brief, this Court has previously held that the term "contract" as used in the Florida Constitution does not include quasi-contracts. (IB 30-35). See Fla. Sheriff's Ass'n v. Dep't of Admin., Div. of Ret., 408 So.2d 1033, 1035-36 (Fla. 1981); Anders v. Nicholson, 150 So. 639, 642 (Fla. 1933); Bd. of Comm'rs of Everglades Drainage Dist. v. Forbes Pioneer Boat Line, 86 So. 199, 201 (Fla. 1920), reversed on other grounds, Forbes Pioneer Boat Line v. Bd. of Comm'rs of Everglades Drainage Dist., 258 U.S. 338 (1922). Mercury does not address, mention or even attempt to distinguish these cases from the present matter. (AB 28-31).

Notwithstanding the fact that the term “contract” has been construed narrowly for constitutional purposes, Mercury claims that the term “contract” should be construed broadly to include both express and implied contracts. In support of its contention, Mercury cites one case, Fla. Indus. Comm’n v. Growers Equip. Co., 12 So.2d 889 (Fla. 1943). Fla. Indus. is not on point and hardly lends itself to the proposition that, for constitutional purposes, the term “contract” should be construed broadly to include quasi-contracts. In Fla. Indus., the court was called upon to interpret the term "agricultural labor" under the Social Security Act. Id. at 893. The case does not address whether "contract" as used in the Florida Constitution includes quasi-contracts. Moreover, a quasi-contract is the antithesis of a contract and, therefore, could never be considered to be a “contract” even if the broadest definition of the term is adopted for constitutional purposes. See Fla. Sheriff’s Ass’n, 408 So.2d at 1035-36; Anders, 150 So. at 642; Bd. of Comm’rs of Everglades Drainage Dist., 86 So. at 201 (Fla. 1920).

Alternatively Mercury argues that the term “contract” in the Florida Constitution should be construed broadly to encompass a contract implied in fact which, according to Mercury, arose between Shands and its patient in this case.[8]

[8] Mercury's challenge to the ACHLL under Art. III, §11(a)(9) is a facial challenge. See § I(A), infra. However, on appeal, Mercury now attempts to make an as applied argument that the relationship between Shands and its patients is a governed by a contract implied-in-fact. Mercury did not raise an as applied

(AB 29-31). A contract implied in fact is based upon a finding of an express agreement by implication from the facts. Commerce P'ship 8098 Ltd. P'ship v. Equity Contracting Co., Inc., 695 So.2d 383, 386 (Fla. 4th DCA 1997). It requires the parties' assent by words or conduct. Id. Where, as here, a hospital provided emergent care to a patient, the parties' assent by words or conduct is unlikely if not impossible. Moreover, hospitals are not treating patients necessarily based on their words or assent, but rather, are treating patients because of their duty under the Emergency Medical Treatment and Active Labor Act ("EMTALA"). 42 U.S.C. § 1395dd. Under EMTALA, hospitals are required to treat any patient who comes to the emergency department with an emergency medical condition without regard to the patient's ability to pay. Id. In fact, it is a situation involving a patient without the present ability to pay which gives rise to a hospital lien claim. Even the Court below recognized that, if no express contract existed, the contract would be implied in law or by quasi contract, not by a contract implied in fact. Mercury Ins. Co. of Fla. v. Shands Teaching Hosp. and Clinics, Inc., 21 So.3d 38, 40-41 (Fla. 1st DCA 2009).

II. THE ALACHUA COUNTY HOSPITAL LIEN ORDINANCE IS CONSTITUTIONAL

Art. III, §11(a)(9) of the Florida Constitution only acts as a prohibition

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argument below and, as a result, no evidence was presented by Mercury to establish either the existence of an express contract or a contract implied-in-fact.

against the Florida Legislature enacting special laws or general laws of local application.[9] The constitutional prohibition does not address or prohibit counties in Florida from enacting various ordinances.[10] Therefore, even if the ACHLL is unconstitutional, this Court should affirm the decision of the trial court based on the ACHLL Ordinance. See Dade County Sch. Bd. v. Radio Station WQBA, 731 So.2d 638, 644-45 (Fla. 1999).[11]

III. LEAVE TO AMEND SHOULD BE GRANTED

Mercury argues that, in the event that this Court upholds the judgment of the First District Court of Appeal, the matter should not be remanded with directions that Shands have leave to amend its complaint. Mercury's attack is two-fold. First Mercury contends that Shands leave would be untimely. Shands had no opportunity to amend its complaint in the trial court because Mercury never filed a pleading asserting that the law was unconstitutional. Moreover, in its order denying Mercury's Motion for Summary Judgment, the trial judge expressly

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[9] Mercury confuses local law with general laws of local application. While §11(a)(9) prohibits the Florida Legislature from enacting certain general laws of local application it does was not apply or restrict local laws enacted by counties.

[10] Lindsay v. City of Miami, 52 So.2d 111 (Fla. 1951), cited by Mercury for the contention that a local ordinance mirroring a special act is unconstitutional if the act is unconstitutional is not on point. In Lindsay, the special act was enabling legislation. Without the enabling legislation, the ordinance could not exist. In the present matter, the ACHLL is not enabling legislation.

[11] Mercury's contention that the ACHLL Ordinance was not at issue in the case belies the facts. Its summary judgment motion states, "SHANDS' lien rights and MERCURY's liability for lien impairment are governed by Alachua County Code Sections 262.20 et seq...." (R. Vol. I, 164-178, p. 3-4).

upheld the constitutionality of the lien law making any amendment unnecessary. Given the odd procedural background of this matter, Shands request can hardly be considered untimely. Second, Mercury cannot demonstrate futility at this stage. According to Mercury, the amendment would be futile because it cannot be deemed to have impaired a contractual lien if it was not a party to the contract creating the lien. The fact of the matter is that the lien attaches to the proceeds of the amounts payable by Mercury to settle the claim of its insured and it can be held liable for impairment. See, e.g., Wellington Reg. Med. Ctr., Inc., v. Meder, 819 So.2d 981 (Fla. 4th DCA 2002).

IV. A REDUCTION OF DAMAGES IS NOT APPROPRIATE[12]

The ACHLL and the ACHLL Ordinance on their face do not require or allow a reduction in damages based on the collectability of the tortfeasors. Ch. 88-539, Laws of Florida, § 4; Alachua County Ordinance § 262.23. In fact, the special act and ordinance expressly state that the hospital may recover from the party impairing the lien "the reasonable cost of…hospital care, treatment and maintenance." Id. No provision is made in the law for the hospital to have to prove that its patient would have been successful in litigating against the tortfeasor causing the injuries giving rise to treatment or that any judgment arising from such

[12] Pursuant to the parties stipulation and the Court's order dated April 23, 2010, this section is a reply to the argument raised in Section II(C)(5)(a)-(e) of Mercury's Initial Brief on Cross-Appeal.

litigation would be collectible.

The Florida Legislature has made a policy determination that an insurer who does not comply with the hospital lien laws may be liable for the reasonable cost of hospital care, even if this requires a payment in excess of settlement funds or policy limits. Mercury's policy arguments to the contrary cannot be substituted for the legislature's decision based upon sound policy considerations. The fact of the matter is that the only party in a position to protect the hospital's lien is the party making payment. Hospital liens are no different than construction liens whereby owners may have to pay twice for failure to make proper payments in accordance with the lien law. In the case of liens, the liability of the party who must comply with special payment requirements is based upon statute and is not based upon contract. The courts are bound to enforce statutes according to their terms which reflect the policy decision of the Legislature.

V. REPLY CONCLUSION

The judgment of the First District Court of Appeal should be reversed and the ACHLL and the ACHLL Ordinance 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, the matter should be remanded with directions that Shands should be given leave to amend its complaint.

SHANDS' ANSWER TO CROSS-APPEAL

PRELIMINARY STATEMENT

Once this Court acquires jurisdiction over the matter, its authority to consider issues other than those upon which jurisdiction is based is discretionary and should be exercised only when the other issues have been properly briefed and argued and are dispositive of the case. See Savona v. Prudential Ins. Co. of Am., 648 So.2d 705, 707 (Fla. 1995); Murray v. Regier, 872 So.2d 217 (Fla. 2002). In the present matter, while Mercury's cross-appeal regarding the constitutionality of the ACHLL was briefed below and may be dispositive of the case, Mercury's cross-appeal regarding the award of attorney's fees (AB §II(C)(4)(6) and (7)) is unrelated to the basis of jurisdiction and is not dispositive as to the constitutionality of the ACHLL. As a result, this Court should not exercise jurisdiction over these issues. In the event the Court holds the ACHLL unconstitutional, the matter should be remanded to the trial court for a determination of the entitlement to and amount of attorney's fees.[13]

STATEMENT OF THE CASE AND FACTS[14]

The procedural history set forth in the cross-initial brief is not complete or accurate as to the timing of Mercury's offer of settlement and the timing of any concessions as to damages by Mercury before trial. As a result, Shands includes a

[13] If the Court exercises jurisdiction, Shands has briefed these issues.

[14] Mercury incorporated its Statement of Facts from its answer brief. (AB 1-9).

supplement to the procedural history below.

In its answer, Mercury did not raise any affirmative defense alleging that the ACHLL was unconstitutional either as applied or on its face. (R. Vol. I, 19-21). Nor did Mercury file a counterclaim seeking declaratory relief as to the constitutionality of the ACHLL. (R. Vol. I, 19-21). In its Case Management Statement dated May 16, 2007, Mercury claimed that any liability for impairment of Shands' lien was limited to the $10,000.00 in PIP benefits which Mercury paid to settle the matter, exclusive of interest, costs and attorneys fees. (R. Vol. I, 42-45). It further listed as disputed issues for trial: (1) the amount of Mercury's liability to Shands under the claim of lien; (2) the extent to which Mercury's liability exceeds the settlement amount with Price, exclusive of interest, costs and attorneys' fees; and 3) the reasonableness of Shands' charges for medical services to Price. (R. Vol. I, 44). Mercury did not list the constitutionality of the ACHLL as a disputed issue for trial. (R. Vol. I, 44).

On May 29, 2007, Mercury served an offer of settlement. (R. Vol. I, 47, R. Vol. III, 525-526). At the time of the offer, Mercury had not raised any constitutional arguments. Shands did not accept the offer of settlement. On June 11, 2007, Mercury served a motion for summary judgment. (R. Vol. I, 52-66). The summary judgment motion did not challenge the constitutionality of the ACHLL.

(R. Vol. I, 52-66). On July 10, 2007, Shands served a motion for summary judgment. (R. Vol. I, 71-103).[15]

On August 2, 2007, Mercury served a supplemental memorandum of law in support of its motion for summary judgment challenging, for the first time, the constitutionality of the ACHLL. (R. Vol. I, 116-137). The memorandum did not state whether Mercury was making a facial or as applied challenge to the constitutionality of the ACHLL. (R. Vol. I, 116-137). The memorandum was served just 14 days prior to the hearing on the motion for summary judgment. (R. Vol. I, 116-137; Vol. VII, 262-267). With its memorandum, Mercury submitted one document, the Legislative History and Final Staff Analysis of HB 1412. (R. Vol. I, 116-137, Exhibit A).

On August 16, 2007, a hearing was held on the parties' motions for summary judgment. (R. Vol. VII, 262-267). Contrary to Mercury's contentions, Shands clearly argued that Mercury had not properly raised its constitutional issues. (Reply App. Tab 3). At the close of the hearing, the Court denied both

[15] In its brief, Mercury alleges without record reference that "Shands argued that Mercury's only defense is to challenge the reasonableness of its charges. Shands denied Mercury can raise lack of causation or the collectability of Mercury's insureds as a defense" (AB 5). While Shands argued that Mercury's liability would not be limited by the terms of a settlement agreement or insurance policy in its summary judgment, Shands never claimed that Mercury's only defense was to challenge the reasonableness of its charges or that it could not raise causation as a defense. (R. Vol. I, 71-103). Further, the issue of collectability was not addressed by Shands in its summary judgment. (R. Vol. I, 71-103).

motions for summary judgment. (R. Vol. VII, 262-267). On September 7, 2007, an order was entered by the Court memorializing the ruling. (R. Vol. II, 324-325).[16] On October 18, 2007, five days before the final pretrial conference, Mercury, for the first time, admitted that Shands' charges were reasonable. (R. Vol. II, 341-342).

On October 19, 2007, Mercury filed its pretrial compliance. (R. Vol. III, 371-377). In its filing, Mercury clearly did not concede that Shands was owed $10,000. Rather, Mercury contended that **at most** Shands was entitled to $10,000. (R. Vol. III, 371-377). On October 23, 2007, the Court held a pretrial conference in the matter. At the conference, Mercury refused to concede that it owed Shands any specific amount as damages for the lien impairment and clearly did not agree that it even owed Shands $10,000. (R. Vol. IV, 617-639, Ex. A).[17]

Thereafter, on October 25, 2007, the Court entered a pre-trial order noting that Mercury conceded that Shands' charges were reasonable and that the only issue remaining at trial is whether Mercury's actions impaired Shands' lien and, if

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[16] Mercury contends that "Judge Monaco expressly rejected Shands' position that Mercury's defenses are limited to the reasonableness of Shands' charges for its medical services." (AB 5). Again, Mercury does not cite to the record for this proposition. Moreover, a review of Judge Monaco's order contains no such rejection, express or implied. (R. Vol. II, 324-325). Further, Shands did not even argue at the hearing that Mercury's defenses were limited to the reasonableness of the hospital charges.

[17] The pretrial conference transcript clearly shows that Mercury made a conscious choice to challenge Shands' entitlement to recover even $10,000. (R. 617-639) (quoting Pretrial Tr., October 23, 2007, pp. 24-25).

so, the extent to which Shands was damaged. (R. Vol. III, 500-502). Another hearing was held on October 31, 2007, approximately one week before trial, and Mercury admitted for the first time that Shands was entitled to at least $10,000 for Mercury's violation of the ACHLL. (R. Vol. III, 506-507 and R. Vol. IV, 617-639, p. 622). On November 1, 2007, the Court entered an order confirming that Mercury now conceded this fact. (R. Vol. III, 508-509).

During a non-jury trial on November 9, 2007, Mercury, again, challenged the constitutionality of the ACHLL in a motion for directed verdict. (R. Vol. VI, 129-261, p.134-35). Mercury, again, failed to identify whether its challenge was facial or as applied. (R. Vol. VI, 129-261, p.134-35). At the conclusion of the trial, the Court entered its ruling. (R. Vol. VI, 129-261).

SUMMARY OF THE ARGUMENT

The First District Court of Appeal properly ruled that the ACHLL did not violate Art. III, §11(a)(12), Fla. Const., and did not abridge Mercury's substantive due process rights under the Florida and federal Constitutions. Mercury's claims are not supported in fact or legal theory. The ACHLL is a valid and constitutional enactment by the Florida Legislature.

ARGUMENT

I. THE ACHLL DOES NOT VIOLATE ARTICLE III, § 11(A)(12) OF THE FLORIDA CONSTITUTION

A. Mercury's Claim is Strictly a Facial Challenge

Shands adopts and incorporates its arguments made in Section I.A. of its reply brief infra. Just as Mercury's challenge to § 11(a)(9) was a facial challenge, so is Mercury's challenge to § 11(a)(12). Mercury presented no evidence as to the status of Shands or its function within the State of Florida in support of an as applied challenge. Likewise, Mercury did not claim that the ACHLL violated § 11(a)(12) only as to the set of circumstances as applied in this case. Rather, Mercury argued that the ACHLL is unconstitutional under all circumstances. As a result, this Court should uphold the constitutionality if there is any set of circumstances under which the challenged enactment might be upheld. See Fla. Dep't of Revenue v. City of Gainesville, 918 So.2d 250, 265 (Fla. 2005).

B. The ACHLL Is Reasonably Designed To Protect The Public Welfare And Is Not An Unconstitutional Grant of a Privilege

Mercury argues that the ACHLL violates Art. III, § 11(a)(12), Fla. Const., by granting privileges to a private corporation. (IB 17). Art. III, § 11(a)(12) provides that "[t]here shall be no special law or general law of local application pertaining to: … (9) …grant of privilege to a private corporation." The financial stability and continued existence of hospitals is an important public health issue in Florida. By virtue of the legislative determination in Florida Statute § 154.203, health facilities, like Shands, governed by Chapter 154 are in the public interest and no independent judicial inquiry need be made into the public nature of the facilities. Wald v. Sarasota County Health Facilities Auth., 360 So.2d 763, 770

(Fla. 1978). Hospitals provide necessary care for injured and sick persons in Florida regardless of their ability to pay. However, a hospital's ability to provide these services is tied to making enough income to stay viable. Without sources of payment, a hospital cannot exist. Without the existence of hospitals, there clearly would be a crisis in health care. As stated in its legislative history, the ACHLL was created as 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. See Fla. H.R. Comm. on Community Affairs, H.B. 1412 (1988) Final Staff Analysis.

Statutes which are reasonably designed to protect health, morals, or 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); Barnes v. City of New Haven, 98 A.2d 523 (Conn. 1953); Hanley v. State, 123 N.E. 2d 452 (Ind. 1954); Anthony v. Veatch, 220 P.2d 493 (Or. 1950); State v. Smith, 216 N.W.2d 149 (S.D. 1974). The Constitution does not forbid the grant of special privileges where the primary purpose of the grant is not the private benefit of a non-profit corporation, but rather, the promotion of the public interest. Rowe v. Housing Auth. of City of Little Rock, 249 S.W.2d 551 (Ark. 1952); Barnes v. City of New Haven, 98 A.2d 523 (Conn. 1953); Hanley v. State, 123 N.E. 2d 452

(Ind. 1954); Interstate Bond Co. v. Baran, 92 N.E. 2d 658 (Ill 1950); Barnard Motors v. City of Portland, 215 P.2d 667 (Or. 1950); Cavalier Vending Corp. v. State Bd. of Pharmacy, 79 S.E. 2d 636 (Va. 1954). An act should not be condemned because a mere incidental and inconsequential benefit may be derived by a private corporation by operation of the statute. State v. Smith, 216 N.W.2d 149 (S.D. 1974); Thomas v. Daughters of Utah Pioneers, 197 P.2d 477 (Utah 1948); Lyman v. Adorno, 52 A.2d 702 (Conn. 1947); Edwards v. Hous. Auth. of City of Muncie, 19 N.E.2d 741 (Ind. 1939); Allydonn Realty Corp. v. Holyoke Hous. Auth., 23 N.E. 2d 665 (Mass. 1939). Compare Lawnwood Med.Ctr v. Seeger, 990 So.2d 503 (Fla. 2008) (a special law enacted solely for the purpose of conveying to the Board of Directors of a for-profit hospital absolute power in running the hospital in derogation of vested rights of medical staff conveyed a direct benefit to a private corporation and, therefore, was violative of Art. III, § 11(a)(12)). Whether a statutory provision serves a public purpose rests within the sound discretion of the legislature, and courts should not override the legislature's conclusion if it can be supported on any reasonable ground. Warner v. Gabb, 93 A.2d 487 (Conn. 1952).

In the present matter, the Legislature has clearly determined that the ACHLL is a benefit to the public welfare and a necessary protection for the public health. There is no diversion of any public funds to benefit a private corporation. Rather,

the State of Florida is protecting the welfare of the public by assuring Shands a source of income to continue to provide services to accident victims regardless of their ability to pay. Any privilege accorded to Shands is incidental or inconsequential in the scheme of the Legislature's attempt to provide for the public welfare and protection of the public's health. As such, the ACHLL does not violate Art. III, §11(a)(12).

C. Section 11(a)(12) Does Not Apply to Quasi-Public Corporations

In the present matter, the ACHLL does not violate Art. III, § 11(a)(12) because certain not-for-profit hospitals, including Shands, are not "private corporations" within the meaning of the constitutional provision. Pursuant to Florida Statute §155.40, other county, district and municipal hospitals operated by a governing board can lease or contract with not-for-profit hospitals to operate hospitals. There are various structures and agreements that could exist whereby a public entity could retain even greater control over a hospital than is the case in Shands. Therefore, on a facial challenge, it cannot be said without doubt that there is no circumstance in which the ACHLL would not be constitutional.

Moreover, pursuant to Art. III, §11(a)(12), Fla. Const., "[p]rivate corporations are those which have no official duties or concern with the affairs of government, are voluntarily organized and are not bound to perform any act solely for government benefit, but the primary object of which is the personal emolument

of its stockholders." O'Malley v. Florida Ins. Guar. Assoc., 257 So.2d 9, 11 (Fla. 1971). Shands clearly does not fall within the foregoing definition of a private corporation for constitutional purposes. Instead, Shands is a quasi-public corporation which operates for the benefit of the public. Id. at 11. Shands is organized as a not-for-profit corporation under Chapter 617, Fla. Stat. (1990). By statute, Shands is a de facto arm of the University of Florida, in that: (1) the University of Florida Board of Trustees, a public entity, is required to approve Shands' articles of incorporation; (2) Shands is to be run by "a board of directors appointed and chaired by the President of the University of Florida… and Vice President for Health Affairs of the University of Florida"; (3) reimbursement to Shands is to be appropriated to the health center or the hospital each year by the Legislature; (4) the University of Florida Board of Trustees, with approval of the Legislature, can increase, remodel or renovate; (5) the University of Florida Board of Trustees is authorized to provide Shands comprehensive general liability insurance; and, (6) if the lease agreement between the University of Florida Board of Trustees and Shands terminates for any reason, the University of Florida Board of Trustees will resume management and operation of the hospital facilities. §1004.41(4)(b), Fla. Stat. (2007). (Reply App. Tab 1). Furthermore, Shands' stated purposes in its articles of incorporation are clearly public in character.

(Reply App. Tab 2, Art. II)[18]

Shands does not have stockholders and no part of any earnings made by Shands can inure to the emolument of any member, director, officer or individual. Id. Members of the Board of Directors of Shands are appointed by the President of the University of Florida, a state government official. Id., Art. III. These members must include three government officials: the president of the University of Florida, the vice president for Health Affairs of the University of Florida and the dean of the College of Medicine of the University of Florida. Id. As a result, more than half of the board members are government officials or citizens of the State of Florida. The controlling officers of Shands are, likewise, required to be government officials. Id., Art. VI. Moreover, Shands cannot amend, alter, or repeal any provision of its articles of incorporation without the approval of the University of Florida Board of Trustees, a public entity. Id., Art. VII. Based on the

[18] Mercury contends that the articles of incorporation may not properly be considered on appeal. However, a reviewing court can take judicial notice of records on file with the Secretary of State. Schriver v. Tucker, 42 So.2d 707 (Fla. 1949); § 90.202, Fla. Stat. (1978) and § 90.207, Fla. Stat. (1976) ("The failure … of a court to take judicial notice of a matter does not preclude a court from taking judicial notice of the matter in subsequent proceedings….") Moreover, the quoted portions of the articles of incorporation merely mimic the statutory language of § 1004.41, Fla. Stat., and are required by the statute. Mercury did not move to strike references to the articles of incorporation in the First District Court of Appeal. Moreover, Mercury never raised an as applied challenge in the trial court by pleading or otherwise and the constitutional challenge was ruled against Mercury in the summary judgment order. As such, Shands had no occasion to offer evidence as to its quasi-public nature in the trial court.

aforementioned facts, it is clear that Shands is not a "private corporation" under Art. III, § 11(a)(12), Fla. Const.[19] Therefore, the ACHLL does not run afoul of the prohibition in § 11(a)(12) against granting privileges to private corporations.

D. Non-Profit Hospitals are Not Private Corporations under §11(a)(12)[20]

Mercury cites to various cases in support of its contention that Shands is a private corporation under § 11(a)(12). (AB 54-55). However, these cases are not brought under or related to § 11(a)(12) or related to the meaning of "private corporation" under state constitutional provisions. Rather, these cases deal with whether an entity is a public entity for purposes of sovereign immunity or the Sunshine Law. These tests are not analogous or controlling in the present matter. The only Florida case to analyze whether an entity is a "private corporation" under the Florida Constitution is O'Malley v. Fla. Ins. Guar. Assoc., 257 So.2d 9, 11 (Fla. 1971). In O'Malley, this Court held that under Art. III, § 11(a)(12) "[p]rivate corporations are those which have no official duties or concern with the affairs of government, are voluntarily organized and are not bound to perform any act solely for government benefit, but the primary object of which is the personal emolument

[19] In fact, this Court has previously affirmed, without discussion, Delaney v. SantaFe Healthcare, Inc., 741 So.2d 595, 596 (Fla. 1st DCA 1999) a case in which the court found that Santa Fe Healthcare, part of Shands, is a quasi-public corporation.

[20] Whether Shands is a private corporation under §11(a)(12) is an as applied challenge which is not properly preserved for review.

of its stockholders." Id. Clearly, Shands does not fall within this definition of private corporation. First, it was not privately organized, it is a creature of the state. Second, it is required to act for the benefit of the public. Third, it is non-profit and there is no emolument to private enterprise. Lastly, the hospital's board and its officer are largely state actors. As such, Shands is not a "private corporation" under § 11(a)(12).

Other state supreme courts have also analyzed whether non-profit teaching hospitals affiliated with a state university are "private corporations" under their state constitutions. In Colo. Ass'n of Pub. Employees v. Bd. of Regents of the Univ. of Colo., 804 P.2d 138 (Colo. 1990), the University of Colorado Hospital was reorganized from a public hospital to a private, non-profit corporation. The Colorado Supreme Court found that the newly reorganized hospital was public or quasi-public and did not run afoul of constitutional provisions relating to "private" corporations. The Court found that despite the fact that the hospital was organized as a private, non-profit corporation, it was not "private" in constitutional terms because: (1) it was established by state officials, not private individuals and (2) the Regents of the university had a significant continuing role in the operation of the reorganized hospital. Id. at 143-44.

In Queen v. W.Va. Univ. Hosps., Inc., 365 S.E.2d 375 (W.Va. 1987), the West Virginia Supreme Court analyzed whether a university teaching hospital

which had been converted to a non-profit organization was a "private corporation" under its constitutional provisions. The court recognized that the constitutional framers, when using the term private corporation, "were exclusively concerned with stock corporations formed for profit making purposes." 365 S.E.2d at 380. The Court went on further to cite to O'Malley in finding that the hospital, as a non-profit entity, was not included in the constitutional prohibitions relating to private corporations. Id. at 381.

The Arizona Supreme Court also addressed whether a non-profit teaching hospital was included within the constitutional prohibitions relating to corporations. Kromko v. Ariz. Bd. of Regents, 718 P.2d 478 (Ariz. 1986). In Kromko, the court addressed whether a lease of a public hospital to a private non-profit corporation for a nominal fee violated the Arizona Constitution by making a donation or grant, by subsidy or otherwise, to a private corporation. Id. In determining that the lease did not violate the Constitution, the Court recognized that the non-profit university hospital served a public purpose, was not created for the benefit of private individuals, was controlled in part by state actors, and would revert to the State upon dissolution or liquidation. Id. at 480. As a result, the Court held that "the fear of private gain or exploitation of public funds envisions by our drafters is absent." Id. Therefore, the lease of the hospital to the non-profit corporation was recognized as serving a valid public purpose and did not create a

donation or subsidy to a private corporation in violation of the Arizona Constitution. Id. at 481.

II. THE ACHLL DOES NOT VIOLATE MERCURY'S SUBSTANTIVE DUE PROCESS RIGHTS

A. The ACHLL Does Not Lack a Rational Basis

The ACHLL does not violate Mercury's substantive due process rights. As Mercury correctly notes in its brief, the ACHLL does not involve a fundamental right so the rational basis test is applied. (AB 56, fn 14). Restigouche, Inc. v. Town of Jupiter, 59 F.3d 1208, 1214 n.6 (11th Cir. 1995); Haire v. Fla. Dept. of Agric. and Consumer Servs., 870 So.2d 774 (Fla. 2004). "The rational basis test is not a rigorous standard....The test is generally easily met....The task is to determine if any set of facts may be reasonably conceived to justify [the regulation]. Even if the court is convinced that the political branch has made an improvident, ill-advised or unnecessary decision, it must uphold the act if it bears a rational relation to a legitimate government purpose.'" Id. at 945-46 (quoting Cash Inn of Dade, Inc. v. Metro. Dade County, 938 F.2d 1239, 1241 (11th Cir. 1991) (internal quotation marks omitted)). Under this test, a court gives great deference to economic and social legislation. See Gary v. City of Warner Robins, Ga., 311 F.3d 1334, 1339 (11th Cir. 2002).

Mercury admits that there is an overall rational basis for the lien law. (AB 56). However, Mercury contends that the rational basis disappears when the lien

law is applied above the settlement or judgment amount paid by the insurer. (AB 56). Mercury's contention is meritless. The ACHLL, like other hospital lien laws, allows a hospital to place a lien for all reasonable charges for hospital care, treatment and maintenance of an injured person against the injured person's causes of action and upon all judgments and settlements relating to the person's injuries and to recover damages for impairment of the lien. Ch. 88-539, Laws of Florida, §§ 1, 4. There is clearly a rational relationship between affording hospitals lien rights for the full value of the services that they provide to injured parties and the Florida Legislature's purpose of lessening the burden imposed on hospitals by indigent and non-paying patients so that hospitals can maintain their viability.

Mercury contends that the Florida Legislature has shifted the financial burden from the hospital to the insurance carrier to the extent an insurance carrier is held liable for impairing the lien in an amount greater than its insurance liability limits. The fact of the matter, however, is that the liability of the insurer to the hospital for lien impairment does not arise as a result of a duty created by the contract of insurance. Rather, the liability of the insurer to the hospital is strictly statutory. The third party tortfeasor or the insurer making payment to settle or pay a claim is the only party in a position to protect a hospital's lien. Therefore, the Legislature has imposed upon the party making payment the duty to verify that the hospital's lien has been satisfied prior to making payment or accepting a release

from liability. Failure to do so can render such party liable for the reasonable cost of treatment by the hospital in order to compensate the hospital for the loss of its lien rights. The liability of the insurer is not based upon the limits of its insurance policy because that is irrelevant to the hospital's loss in the event of impairment. It is not irrational to subject an insurance carrier to liability for damages arising from the impairment of a hospital lien. As such, the ACHLL is clearly constitutional and does not offend any concepts of substantive due process.

B. The ACHLL Is Not Void for Vagueness[21]

Mercury further contends that the ACHLL is unconstitutionally vague. (AB 57). The vagueness doctrine prohibits enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." United States v. Lanier, 520 U.S. 259, 266 (1997); State v. Wershow, 343 So.2d 605 (Fla. 1977). "In a vagueness challenge, the plaintiff bears the burden of showing that the law in question is vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. Coates v. City

[21] Mercury makes the unsubstantiated claim that "Shands believes it is entitled to recover its expenses no matter how much they are, thus rendering the law a strict liability law which is punitive in nature." (AB 58). Shands has made no such claim. The ACHLL allows challenges based on causation and reasonableness of the charges.

of Cincinnati, 402 U.S. 611, 614 (1971). Such a provision simply has no core.' Smith v. Goguen, 415 U.S. 566 (1974)." Am. Dog Owners Ass'n., Inc. v. Dade County, 728 F. Supp. 1533 (S.D. Fla. 1989). The courts must entertain a strong presumption of the validity of the statute, including its penalty provisions, and must hold the statute valid as against a criticism of vagueness and uncertainty when they are reasonably sure of its meaning. United States v. Evans, 333 U.S. 483, 486-87 (1948). Moreover, the Constitution tolerates a greater degree of vagueness in enactments with civil rather than criminal penalties. High Ol' Times v. Busbee, 673 F.2d 1225, 1229 (11th Cir. 1982); Winters v. New York, 333 U.S. 507, 515 (1948).

The ACHLL is not void for vagueness. The lien law clearly gives notice of the conduct which is prohibited in Section 4. In fact, Mercury does not argue, nor could it argue, that it did not understand what the law prohibited. The law prohibited Mercury from accepting a release or satisfaction of any action, suit, claim, counterclaim, demand, judgment, settlement, or settlement agreement without Shands, as the lienholder, joining in the matter if it wanted to avoid liability for impairing Shands' lien. Ch. 88-539, Laws of Florida, § 4. The law complies with due process in providing fair notice of the prohibited conduct.

Despite receiving fair notice of the prohibited conduct as required by the Florida and United States Constitutions, Mercury complains that the penalty is

unconstitutionally vague. The penalty is not vague. The ACHLL provides, "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." Id. Mercury is clearly on notice that, in the event of an impairment, it may be liable for an amount equal to the reasonable cost of hospital care, treatment and maintenance.[22] There is no unconstitutional vagueness.[23]

III. MERCURY IS NOT ENTITLED TO ITS ATTORNEYS' FEES

Mercury claims that if it prevails on its claim that the ACHLL is unconstitutional, Mercury is entitled to recover its attorney's fees pursuant to its proposal for settlement. (AB 60). Such a contention is without merit as discussed in Section VI below.

IV. THERE IS NO INJUSTICE IN ALLOWING A HOSPITAL TO RECOVER ITS REASONABLE COST OF TREATMENT[24]

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[22] The ACHLL is no different than other lien laws whereby a party may be required to pay in excess of the contractual amount that it would otherwise be required to pay if the party does not comply with the applicable lien law. See, e.g., § 713.06, Fla. Stat.

[23] Mercury contends the vagueness is exacerbated by the fact that the ACHLL is a special law and is more likely to lead to inadvertent violations. (AB 59). Such a contention is without merit, insurers are required to regularly check county public records for other liens, such as Medicaid liens prior to paying a claim.

[24] Pursuant to the Parties' Joint Stipulation and the Court's Order dated April 23, 2010, Section II(C)(5)(a)-(e) are a part of Mercury's answer brief, and are addressed by Shands' in its Reply Section IV.

In its brief, Mercury contends that it is unjust and unfair to hold it responsible for the full value of the lien that it impairs. (AB 72-75). In fact, quite the opposite is true. It is unfair to allow Mercury, without the knowledge or consent of Shands, to extinguish Shands' lien in the amount of $38,418.20 on claims accruing to the patient as a result of the patient's hospitalization and then only require Mercury to pay $10,000.00. Under Mercury's theory, Shands should be left to suffer a $28,418.20 loss which is directly attributable to and caused by Mercury and which could simply have been avoided if Mercury had complied with the ACHLL.

Mercury argues that "[i]f an insurer violates the ACHLL by settling a patient's claim without Shands' consent, Shands should be restored to the position it would have been in had its lien not been impaired." (A.B. 74). This is exactly what the ACHLL requires – restoration of Shands to its prior position. Prior to Mercury impairing its lien, Shands possessed a lien on all claims accruing to the patient as a result of the patient's hospitalization for its reasonable costs in the amount of $38,418.20. Prior to Mercury's impairment of its lien, Shands' hospital lien was not limited to Mercury's insurance proceeds of $10,000.00. Rather, Shands' lien encompassed the full amount of any recovery by Price against the Conleys and Bryant. The judgment against the Conleys and Bryant would not be limited to just the Mercury insurance proceeds. Had Mercury complied with the

ACHLL, its liability could not have exceeded the amount of the limits of its policy of insurance. It would be unjust to penalize Shands for Mercury's wrongdoing.

The Florida Legislature has determined that hospitals are entitled to recover their reasonable costs of providing medical care provided to accident victims.[25] As a means to protect hospitals, the Florida Legislature has given hospitals lien rights and has required that insurers not impair those liens. This is not a case of requiring an insurance company rather than the hospital to pay the bills of indigents. This is a case of requiring an insurer to protect the ability of a hospital to recover the cost of care provided to a patient. The law is simple. If an insurer complies with the lien law, it protects itself and the hospital's right to payment. If an insurer ignores the lien law and impedes the ability of the hospital to potentially recover its reasonable costs, the insurer is responsible for damages.[26] This is consistent with

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[25] In support of its contention that the ACHLL should be limited to the insurer's policy limits and/or the amount of settlement, Mercury cites to allegedly "analogous lien statutes." (AB 75, fn 56). However, these statutes are clearly not analogous. The Medicaid Third Party Liability Act explicitly states that benefits are limited. § 409.910, Fla. Stat. The attorney charging lien is a common law lien which is not controlled by statutory language. Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A. v. Baucom, 428 So.2d 1383, 1384-85 (Fla. 1983).

[26] Allowing a hospital to recover payment of the reasonable value of its services in treating accident victims does not result in a windfall to the hospital. Rather, it represents a legislative determination that the hospital should be compensated for the care it provides. Allowing a provider of services to recover the full value of its service under a lien law is not unusual. For instance, under Florida's Construction Lien Law, Chapter 713, Fla. Stat., the Florida Legislature has imposed upon a property owner a duty to make sure that laborers, materialmen and subcontractors serving notice on the owner are paid for improvements to the owner's property.

public policy, is reasonable, and fair.[27]

V. SHANDS WAS ENTITLED TO PREVAILING PARTY ATTORNEY FEES

A. Mercury Has Failed to Provide Appropriate Evidence for Review

As noted by Mercury, the standard of review as to a trial court's

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Where "an owner fulfills all the duties the Mechanics' Lien Law places upon him, his liability for all mechanics' lien claims cannot exceed the contract price." Cont'l Concrete, Inc. v. Lakes at La Paz III Ltd. P'ship, 758 So.2d 1214, 1217 (Fla. 4th DCA 2000) (quoting Tamarac Village, Inc. v. Bates & Daly Co., 348 So.2d 23, 25 (Fla. 4th DCA 1977)). If, however, the owner does not comply with the requirements of the lien law, the owner's liability may exceed the contract price. See Morgan v. Goodwin, 355 So.2d 217 (Fla. 1st DCA 1978). If an owner fails to comply with the construction lien law, the requirement that the owner pay the laborers, materialmen and subcontractors, even after paying the general contractor for the same work, does not result in a windfall to the laborers, materialmen or subcontractors who are merely being paid what they are due. The recognition of a lien right by the legislature is done because, in certain situations, it is reasonable to require a party to verify that third parties have been paid prior to issuing a final payment. As in the case of construction liens, the Florida Legislature has determined that it is appropriate to require a tortfeasor or the tortfeasor's insurer to verify that all hospital liens have been paid prior to making a settlement payment and accepting a release from liability. If an insurance company complies with the hospital lien law, it only will be responsible for the limits set forth in its contract of insurance. The recovery by a hospital for lien impairment does not result in a windfall to the hospital. It merely compensates the hospital for the reasonable value of its services.

[27] The Legislature has determined that public policy supports the ACHLL. Mercury submits that this Court should override the Florida Legislature's determination. This would be improper. Courts are not free to choose an interpretation they conclude is the best public policy, but must defer to the other branches of government to make those choices. See Sebring Airport Auth. v. McIntyre, 783 So.2d 238, 244 (Fla. 2001); Shands Teaching Hosp. v. Smith, 480 So.2d 1366, 1382 (Fla. 1st DCA 1985).

determination on entitlement to attorneys' fees is abuse of discretion. (AB 76). Moreover, a trial court's findings of fact with regard to attorneys' fees enjoy presumption of correctness. Altern. Dev. Inc. v. St. Lucie Club & Apt. Homes Condo. Ass'n, 608 So.2d 822, 828 (Fla. 4th DCA 1992). A litigant who is seeking to reverse a trial court's ruling must provide the court with the hearing transcript for the attorneys' fee hearing or a proper substitute to show where the trial court erred. Joachim v. Joachim, 942 So.2d 3, 4-5 (Fla. 5th DCA 2006); Applegate v. Barnett Bank, 377 So.2d 1150 (Fla. 1979). Where a party fails to provide a transcript from the attorneys' fee hearing, a court may not be able to determine that the trial court abused its discretion in the fee award. See Joachim, 924 So.2d at 5. In the present matter, Mercury has not provided the Court with the transcript of the hearing on the parties' motions for attorneys' fees. As such, there is no showing that the Court abused its discretion in ruling that Shands was the prevailing party and is entitled to its attorneys' fees.

B. Shands Is Entitled to Its Attorneys' Fees

Shands is the prevailing party for purposes of determining entitlement to attorneys' fees. Moritz v. Hoyt Enter., Inc., 604 So.2d 807 (Fla. 1992). In Moritz, this Court adopted the standard for determining the prevailing party as set for in Hensley v. Eckerhart, 461 U.S. 424 (U.S. 1983) whereby a party is deemed "prevailing" if "the party succeeded on any significant issue in litigation which

achieves some of the benefit the parties sought in bringing suit." Moritz, 604 So.2d at 808 (quoting Hensley, 461 U.S. at 433)).

Shands clearly prevailed on significant issues in this matter. Therefore, based on the rationale of Moritz and Hensley, Shands is the prevailing party in this action. The following significant issues in the litigation were resolved in Shands' favor: (1) the amount of Mercury's liability to Shands on the lien claim; (2) the reasonableness of Shands' charges for medical services provided to Price; (3) whether Mercury's liability could exceed the settlement amount paid to Price, exclusive of interest, costs and attorneys' fees; (4) whether Mercury impaired Shands' hospital lien; (5) whether an action against the Conleys and/or Bryant would have resulted in a judgment in excess of the amount of Shands' lien; and (6) the constitutionality of Chapter 88-539, Laws of Florida. (R. Vol. IV, 617-639; 657-661). On the other hand, Mercury did not prevail on any of its affirmative defenses or its claim that the ACHLL was unconstitutional.

In its brief, Mercury does not address or challenge the trial court's finding that Shands was the prevailing party on the above-listed issues in the final judgment. (AB 76-79). Instead, Mercury argues that there was only one significant issue in this case, whether Mercury caused damages to Shands in excess of $10,000 (AB 78); a fact that Mercury contends that it conceded. (AB 91). However, Mercury fails to note that it conceded this point only a week before trial.

(R. Vol. III, 508-509). Mercury litigated Shands' entitlement to even $10,000 for over a year and then, only on the eve of trial, finally conceded that Shands was entitled to at least this sum. Shands was required to file suit and engage in expensive and protracted litigation because of the failure and refusal of Mercury to concede any liability to Shands. A party should not be able to contest an issue throughout the litigation, on the eve of trial concede the point and then claim that it should not have to pay attorneys' fees because, at trial, the party did not prevail on an amount greater than the concession. Rather, the concession simply evidences the fact that Shands prevailed on the issue on account of the results of discovery and motion practice. There is no question that Shands ultimately prevailed on significant issues in the litigation and obtained, in addition to monetary relief, multiple determinations in its favor from the court including a ruling that the ACHLL was constitutional. Shands is clearly entitled to attorneys' fees as the prevailing party.

C. The Cases Cited by Mercury Are Distinguishable

The cases of Sorrentino v. River Run Condo. Ass'n, 925 So.2d 1060 (Fla. 5th DCA 2006); Boxer Max Corp. v. Cane A. Sucre, Inc., 905 So.2d 916 (Fla. 3d DCA 2005); and Zhang v. D.B.R. Asset Mgmt., Inc., 878 So.2d 386 (Fla. 3d DCA 2004) relied upon by Mercury are distinguishable from the case at bar. In Sorrentino, the defendants prevailed on every issue in the case. It was, therefore,

reasonable to conclude that the defendants were the prevailing party. In Boxer and Zhang, the courts ultimately found that the parties had reached a settlement agreement and, therefore, there was no prevailing party.

Mercury also relies on Spring Lake Imp. Dist. v. Tyrrell, 868 So.2d 656 (Fla. 2d DCA 2004) and Lewis Oil Co., Inc. v. Milliken, 711 So.2d 636 (Fla. 1st DCA 1998). Mercury's reliance on such cases is misplaced. In Milliken, the jury awarded damages on both the complaint and the counterclaim. As a result, the court found that neither party prevailed. In Tyrrell, Spring Lake prevailed on its affirmative defenses, significantly limiting the landowners' recovery. Tyrrell did not involve a statutory lien impairment claim and, unlike the defendant in Tyrrell, Mercury did not prevail on any of its affirmative defenses.[28] The fact that the court did not award Shands the total amount of damages that it sought does not mean that Shands is not the prevailing party. Florida courts have recognized that the purpose for a statutory award of attorneys' fees is to enable an aggrieved party to bring suit to enforce its rights when, absent the right to recover attorneys' fees, it would be too costly to bring suit. See, e.g., Fonte v. AT&T Wireless Servs., Inc., 903 So.2d 1019 (Fla. 4th DCA 2005), LaFerney v. Scott Smith Oldsmobile, Inc.,

[28] Mercury asserted the following affirmative defenses: (1) Defendant, Mercury Insurance Company, has already paid $10,000.00 to Plaintiff towards the lien discussed in Plaintiff's Complaint; (2) It is unknown whether amounts, including deductible, have been paid by Mercury's insured to Plaintiff; (3) Plaintiff has not met all the conditions precedent to bring this claim and, as such, has not perfected its lien appropriately. (R. Vol. I, 19-21).

410 So.2d 534, 536 (Fla. 5th DCA 1982). A party is still considered to be the prevailing party if that party recovers some but not all of the requested monetary relief or if the party recovers non-monetary relief but is denied monetary relief altogether. See Airflo A/C & Heating, Inc. v. Pagan, 929 So.2d 739, 742 (Fla. 2d DCA 2006).

D. Shands' Prevailing Party Attorney Fee Award Should Not Be Reduced

In its brief, Mercury contends that Shands' attorney fee award should have been reduced due to Shands' limited amount of success at trial. (AB 79-80). Mercury contends that Shands' success was limited because it only recovered $10,000 in damages.[29] While an attorney fee award may be reduced where the prevailing party has limited success, such reduction is unwarranted in the present matter.

The evidence clearly established that the overall success obtained by Shands on the issues presented in the litigation precludes the reduction of the attorney fee award. In this matter, Shands prevailed on all legal theories raised in this matter. In fact, the only reason that Shands did not obtain a greater judgment was because the court happened to find the Conleys and Bryan judgment proof. As noted above and herein, the ACHLL does not require proof as to the collectability of a third

[29] Mercury, again, contends that it had "consistently conceded" that Shands was owed $10,000. (AB 79). This could not be further from the truth. As previously noted, Mercury contested Shands' entitlement to $10,000 up to one week before trial.

party tortfeasor as a condition to recovery for lien impairment. In any event, if not for the financial status of the Conleys and Bryant, Shands would not only have prevailed on all legal issues, but would also have prevailed in recovering the full damages it sought. Shands' success can hardly be considered limited. "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee…. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." Hensley v. Eckerhart, 461 U.S. 424, 435 (1983). Hence, where there is a public benefit to the successful suit and the constitutionality of a law is affirmed, attorneys' fees should not be reduced merely because of a limited damage award.

In the present matter, the trial court found that, although Shands only received a limited damage award, the overall rights vindicated and issues Shands prevailed on entitled Shands to a full recovery.[30] As the limited damage award was not due to Shands' failure to prevail on the issues in the litigation and Shands clearly vindicated important constitutional issues surrounding the ACHLL, the trial court did not abuse it discretion in failing to reduce the attorney fee awarded to

[30] "The evidence presented establishes and the Court finds that Plaintiff's counsel spent reasonable time accumulating 216.5 hours at a reasonable hourly rate of $250.00 an hour considering the factors set forth in Fla. Patient's Comp. Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) and the Rule of Professional Responsibility. This results in a reasonable attorney's fee for prosecuting this action in the amount of $54,125.00. Although the fee is more than five times the recovery, it is justified considering the importance of the outcome of this case on the parties' continuing business activities." (R. Vol. IV, 657-661).

Shands.

VI. MERCURY IS NOT ENTITLED TO RECOVER ATTORNEY'S FEES

A. The Offer Of Settlement Was Inadequate To Give Rise To An Entitlement To An Attorneys' Fee Award

Mercury contends that since Shands should not be considered a prevailing party and hence is not entitled to recover attorneys' fees that Mercury is entitled to recover attorneys' fees based upon an offer of settlement. (AB 80-81). Mercury's contention is without merit. In order for Mercury to be entitled to an award of attorneys' fees pursuant to its offer of settlement, the judgment obtained by Shands must be "at least 25 percent less than the amount of the offer." § 768.79(6)(a).

The Florida Supreme Court has spoken definitively on the issue of the items to be considered in determining the "judgment obtained". White v. Steak and Ale of Fla., Inc., 816 So.2d 546, 551 (Fla. 2002). A "judgment obtained" is the "net judgment for damages and any attorneys' fees and taxable costs that could have been included in a final judgment if such final judgment was entered on the date of the offer." Id. "Thus, in calculating the 'judgment obtained' for purposes of determining whether the party who made the offer is entitled to attorney's fees, the court must determine the total net judgment, which includes the plaintiff's taxable costs up to the date of the offer and, where applicable, the plaintiff's attorney's

fees up to the date of the offer." Id.[31] The Florida Supreme Court does not state that the "judgment obtained" only includes the pre-offer attorneys' fees that were awarded in the final judgment, but rather, the attorneys' fees that could have been included in the final judgment. This is because "[i]n determining both the amount of the offer and whether to accept the offer, the party necessarily must evaluate not only the amount of the potential jury verdict, but also any …attorney's fees… to which the party would be entitled if the trial court entered the judgment at the time of the offer or demand." Id., at 550. Hence, the offer is made without knowledge as to the final determination of entitlement to attorneys' fees and is evaluated by the potential for attorneys' fees.

The computation made by the trial court is set forth below and is in strict compliance with this Court's mandate in White. (R. Vol. IV, 657-661). In the present matter, Shands' recovery along with its pre-offer attorneys' fees, costs and prejudgment interest clearly met the required threshold and Mercury is not entitled to any award of attorneys' fees.

Mercury attempts to avoid the result mandated by the case law interpreting

[31] In the case at bar, as of May 29, 2007, the date of service of the proposal for settlement, Shands had accrued interest in the amount of $1,381.74, attorneys' fees in the amount of $7,187.50 and costs of $611.64. The sum of the foregoing amounts and the $10,000.00 principal amount awarded to Shands result in a total net judgment of $19,180.88. (R. Vol. IV, 657-661). Accordingly, Mercury would have had to have served a proposal for settlement greater than $23,976.10 (i.e., twenty-five percent greater than $19,180.88) to qualify for an award of attorneys' fees under § 768.79, Fla. Stat. Ann. and Fla. R. Civ. P. 1.442.

§768.79, Fla. Stat., by contending that "no attorneys' fees would have been included in a final judgment if such final judgment had been entered on the date that Mercury served its Proposal for Settlement." (AB 81). The argument is, again, based upon the faulty premise that Mercury did not dispute Shands' entitlement to an award of damages of at least $10,000. Besides the argument being nonsensical, the facts of this case belie Mercury's assertion.[32] It was not until October 31, 2007 that Mercury finally conceded that it had impaired Shands' lien to the extent of $10,000. (See Statement of Case and of Facts, infra).[33] Mercury's offer of settlement, however, was served on May 29, 2007. (R. Vol. I, 47; R. Vol. III, 525-526; AB 3). Therefore, at the time that Mercury served its offer of settlement, the entitlement of Shands to the principal amount of $10,000 was clearly still controverted by Mercury and, even under Mercury's analysis, a final judgment in favor of Shands' for such amount would have made Shands the prevailing party entitled to an award of attorneys' fees.

B. This Court Should Remand the Matter to the Circuit Court As To An Award Of Attorneys' Fees

Even if the Court finds the judgment obtained by Shands did not exceed the

[32] Mercury's offer of settlement included, by its terms, attorney's fees. Accordingly, Mercury's own proposal is evidence that it believed that attorney's fees were at issue at that stage of the proceedings. (R. Vol. III, 525-526).

[33] Although Mercury makes an unsupported statement that it made such a concession as early as June 11, 2007, it still would have occurred after the date that the offer of settlement was made. (AB 4).

judgment threshhold – or that the ACHLL or ordinance is invalid, Mercury is not automatically entitled to a judgment for its attorney's fees. Rather, the matter should be remanded to the Circuit Court for a proper determination of Mercury's entitlement to attorney's fees under the offer of settlement and the amount of fees to be awarded.

i. Mercury's Offer of Settlement Was Not Made in Good Faith or Should Otherwise Be Denied

At the time of Mercury's offer of settlement on May 29, 2007, Mercury had not raised any issue regarding the constitutionality of the ACHLL Ordinance or the ACHLL. (See R. Vol. III, 525-526; R. Vol. I, 142-163) Mercury's offer of settlement expired on June 28, 2007. See Fla. R. Civ. P. 1.442; §768.79, Fla. Stat. Only after the expiration of the offer of settlement did Mercury, for the first time, on August 2, 2007, challenge the constitutionality of the ACHLL. (R. Vol. I, 142-163).

Based on the foregoing, the trial court would need to determine if Mercury's offer was: (a) not made in good faith; or (b) that under the unusual circumstances of this case and based upon the factors listed in § 768.79(7)(b), Fla. Stat., the claim should be denied. Florida law is clear that a court may determine that the offer was not made in good faith. In such case, the court may disallow an award of attorney fees and costs. See § 768.79(7)(a), Fla. Stat., and Fla. R. Civ. P. 1.442(h)(1). In making any determination as to good faith, the trial court must examine the facts

and circumstances surrounding the offer to determine if the offer bears a reasonable relationship to the significant issues in the case at the time of the offer and the ultimate outcome. See Nants v. Griffin, 783 So.2d 363, 365 (Fla. 5th DCA 2001); and Fox v. McCaw Cellular Comm. of Fla., Inc., 745 So.2d 330, 333 (Fla. 4th DCA 1998). In the case at bar, it is clear that the opinion of the First District Court of Appeal is based solely upon the constitutional issues raised by Mercury after the expiration of the time for acceptance of Mercury's offer. Such issues bear no relationship to the significant issues that were pending in the case at the time of Mercury's offer. Accordingly, the First District Court of Appeal's opinion is based entirely upon a ground which, at the time of Mercury's proposal, was not an issue in the case. Based upon the foregoing, Mercury is not entitled to the recovery of attorneys' fees pursuant to § 768.79, Fla. Stat.

Florida law is clear that an award of attorney's fees pursuant to an offer of settlement under the statute or rule is intended to be a sanction against a party who refuses to accept a reasonable offer and unreasonably continues the litigation. See Attorney's Title Ins. Fund, Inc. v. Gorka, 989 So.2d 1210, 1213 (Fla. 2d DCA 2008) and Sarkis v. Allstate Ins. Co., 863 So.2d 210, 218 (Fla. 2003). Florida law is equally clear that, when determining the reasonableness of an award of attorney's fees pursuant to any offer of settlement, the court must consider the following additional factors: (1) the then apparent merit or lack of merit in the claim; (2) the

number and nature of offers made by the parties; (3) the closeness of questions of fact and law at issue; (4) whether the person making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of such offer; (5) whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties; and (6) the amount of the additional delay cost and expense that the person making the offer reasonably would be expected to incur if the litigation should be prolonged. See § 768.79(7)(b), Fla. Stat., and Fla. R. Civ. P. 1.442(h)(2). In cases where a party prevails only on an issue which was not raised at the time of the offer, Courts have refused an award of attorney's fees. Southwinds Farm, Inc. v. Albertson, 664 So.2d 13, 14 (Fla. 3d DCA 1995)(Attorney's fees denied where party prevailed on an "an eleventh hour amendment" which substantially changed the position of the parties and for which no offer of settlement was tendered.). In Segundo v. Reid, 20 So. 3d 933, 938 (Fla. 3d DCA 2009(attorney's fees were denied where an award of such fees would unfairly penalize the defendant for refusing to accept a proposal based upon damages not pled nor proven until after a proposal for settlement was rejected. The Court further found that the plaintiff should not be permitted to profit from the changing the nature of the claims after the proposal for settlement had expired.); See Cent. Motor Co. v. Shaw, 3 So.3d 367, 370 (Fla. 3d DCA 2009)(Attorney's fees denied where there was a change in circumstances subsequent to the

expiration of the offer and the court observed, "To do otherwise would counter the intent of the statute and would amount to nothing more than a ' gotcha' tactic.").

In the case at bar, any argument by Mercury that it is the prevailing party is based upon the First District Court of Appeal finding the ACHLL unconstitutional. The constitutional challenge by Mercury was raised after the expiration of the proposal for settlement. Based upon the foregoing authorities, Mercury is not entitled to an award of attorneys' fees under § 768.79, Fla. Stat., even if this Court finds the ACHLL to be unconstitutional.

ii. Mercury's Offer of Settlement Is Ambiguous

Prior to any award of attorney's fees under an offer of settlement, the trial court must consider whether the offer is in compliance with §768.79, Fla. Stat., and Fla. R. Civ. P. 1.442. See KMS Rest. Corp. v. Wendy's Int'l, Inc., 194 Fed. Appx. 591, 596 (11th Cir. 2006); McMahan v. Toto, 311 F.3d 1077, 1082 (11th Cir. 2002); JES Properties, Inc. v. USA Equestrian, Inc., 432 F. Supp. 2d 1283, 1293 (M.D. Fla. 2006); In re Auffant, 274 B.R. 554, 555 (Bankr. M.D. Fla. 2002); United Servs. Auto. Ass'n v. Behar, 752 So.2d 663 (Fla. 2d DCA 2000), review granted, 770 So.2d 163 (Fla. 2000); RLS Bus. Ventures, Inc. v. Second Chance Wholesale, Inc., 784 So.2d 1194, 1196-1197 (Fla. 2d DCA 2001). Attorneys' fee awards under § 768.79, Fla. Stat., are punitive in nature and in derogation of the common law, and therefore § 768.79, Fla. Stat. and Fla. R. Civ. P. 1.442 must be strictly

construed. Id. at 1197 (citing Schussel v. Ladd Hairdressers, Inc., 736 So.2d 776, 778 (Fla. 4th DCA 1999)); Connell v. Floyd, 866 So.2d 90, 92 (Fla. 1st DCA 2004).

In order to be enforceable, the terms of the offer must be devoid of ambiguity, patent or latent, and not require any clarification or later judicial interpretation. Dryden v. Pedemonti, 910 So.2d 854, 855-856 (Fla. 5th DCA 2005). Accordingly, in order to satisfy the offer of judgment statute and rule, an offer of settlement should be as specific as possible leaving no ambiguities so that the recipient can fully evaluate its terms and conditions. Carey - All Transp., Inc. v. Newby, 989 So.2d 1201, 1205 (Fla. 2d DCA 2008). Moreover, the term "particularity" as used in the rule governing offers of settlement means that the offer must provide specific details of any condition or non-monetary terms in the proposal. 1 Nation Tech. Corp., v. A1 Teletronics, Inc., 924 So.2d 3, 6 (Fla. 2d DCA 2005).

In the case at bar, Mercury's offer of settlement contains as a relevant condition the execution and filing of a full satisfaction of lien. (R. Vol. III., 525-526). The offer does not contain a description of the terms or a copy of the proposed satisfaction. The filing of a complete satisfaction by Shands would not only extinguish Shands' claim against Mercury, but would also extinguish Shands claims as to any other tortfeasor or tortfeasor's insurer which might be responsible

for the injuries giving rise to the treatment by Shands. For example, the filing of a complete satisfaction would have had the effect of discharging the hospital lien and any future claim for impairment arising from a potential claim involving Brian Eugene Conley, the husband of Nancy Conley and a co-owner of the vehicle who was not released. (R. Evidence Inventory, Exhibit J. 1, Tabs 14 and 17).

Where the terms of the satisfaction or release are ambiguous, the offer is unenforceable. See Carnes v. Fender, 936 So.2d 11, 15 (Fla. 4th DCA 2006)(Proposal invalid where it required execution of a general release but did not state the terms of the release with the requisite specificity); Papouras v. Bell South Telecomm., Inc., 940 So. 2d 479, 480-481 (Fla. 4th DCA 2006)(Offer invalid where it provided for the plaintiff to execute a full release without specifying which party had to draft the release or who would be released); See also, Cano v. Hyundai Motors Am., Inc., 8 So.3d 408, 410 (Fla. 4th DCA 2009); Palm Beach Polo Holdings, Inc. v. Village of Wellington, 904 So.2d 652, 653-654 (Fla. 4th DCA 2005). Because Mercury's offer does not comply with the strict requirements of the statute and rule, an award of attorney's fees is not authorized.

CONCLUSION

The judgment of the First District Court of Appeal on the issues raised in Mercury's cross-appeal should be affirmed.

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 18th day of May, 2010.

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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.

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