IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC15-1747
L.T. No.: 4D13-3497
502012GA000558XXXXSB

SEARCY, DENNEY, SCAROLA, BARNHART, ETC., ETAL.

Petitioners,

vs.

THE STATE OF FLORIDA,

Respondent,

PETITIONERS' INITIAL BRIEF ON THE MERITS

SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409

and

VAKA LAW GROUP, P.L.
777 S. Harbour Island Blvd.
Tampa, FL 33602

and

EDNA L. CARUSO, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409
Attorneys for Petitioners'

TABLE OF CONTENTS **Page**

TABLE OF AUTHORITIES

PREFACE

This case is being reviewed by the Court based upon its acceptance of jurisdiction of a question certified as one of great public importance by the Fourth District Court of Appeal.

The Petitioners before this Court were the Petitioners in the Guardianship Court and the Appellants before the Fourth District. The Attorney General of the State of Florida intervened in the matter and is the Respondent. Herein, the Petitioners will be referred to as "Aaron's attorneys" and the Attorney General will be referred to by proper name or "AG". The following symbols will be used:

(R) Record-on-Appeal

(SR) Supplemental Record-on-Appeal

(A) Petitioners' Appendix

STATEMENT OF THE CASE AND FACTS

THE UNDERLYING FACTS

On September 5, 1997, baby Aaron Edwards sustained a brain injury during birth as a result of medical malpractice at Lee Memorial Health System, located in Lee County, Florida. The Health System's mid-wife and nurse attending Aaron's mother gave her an increasing amount of Pitocin, a drug to induce labor, for five (5) hours after she should have ceased doing so. That conduct was not only against the wishes of Mr. and Mrs. Edwards, who requested a C-section, but was also contra-indicated, in violation of the Health System's express safety rules and a deviation from the standard of care. The excessive uterine contractions caused by the increasing amounts of Pitocin resulted in the unborn baby receiving less and less blood flow and oxygen, which caused his heart rate to crash. By the time an emergency C-section was finally performed, baby Aaron had already suffered a catastrophic brain injury.

THE TRIAL AND APPEAL

Petitioner, Searcy Denney Scarola Barnhart & Shipley, P.A., ("Searcy Denney") represented Aaron and his parents in a medical malpractice lawsuit filed against the Health System in 1999. Searcy Denney's attorney's fee contract was the standard contingency fee contract in a medical malpractice case, providing for an attorney's fee of 40% of any recovery if a lawsuit was filed, plus costs (R25-29).

The contract reduced the fee to the amount provided by law, (i.e.), the 25% contained in §768.28(8) Fla. Stat., if the Health System was declared a sovereign immune defendant. (R27).

The medical malpractice case was tried over a period of five to six weeks in 2007. The jury found that the Health System's employees had been negligent, and that their negligence had caused Aaron's and his parents' damages. The jury awarded $28,310,554 in damages to Aaron, $1,340,000 to his mother, and $1,000,000 to his father (R48-50). The trial court awarded Searcy Denney $167,412.48 in taxable costs. (Id.)

Post-trial, the trial court ruled that the Health System was an "independent special district" of the State, and therefore had sovereign immunity. Accordingly, judgment was entered against the Health System in the amount of $200,000 pursuant to §768.28(5) Fla. Stat. (R51-52). The Health System's negligence and the $30,817,966 damage and taxable cost awards were affirmed on appeal in a per curiam decision. The Health System did not challenge the amount of the damage awards in that appeal.

AARON'S CLAIMS BILL

A Claims Bill was filed with the Florida Legislature at the behest of Searcy Denney and a lobbyist/law firm, Grossman and Roth, P.A., on Aaron's behalf in 2011. That same year the Senate Rules Committee passed Aaron's Claims Bill for

the full amount of $30,817,966 (SR21). The House of Representative' special master found clear negligence on the part of the Health System and devastating damages (SR128). Nonetheless, the House refused to set Aaron's Claims Bill for hearing during the 2011 session (SR21-23, 128). In 2012, the Legislature finally passed Aaron's Claims Bill, which directed the Health System to pay $15,000,000 **of its own funds** "to the Guardianship of Aaron Edwards[1] to be placed in a special needs trust created for the exclusive use and benefit of Aaron Edwards, a minor" (A39). The Claims Bill provided for an initial payment of $10,000,000 by December 31, 2012, and a payment of $1,000,000 each year thereafter through 2017. (Id.) The Claims Bill also provided for a limitation of fees and costs as follows: **"The total amount paid for attorney's fees, lobbying fees, costs, and other similar expenses relating to the claim may not exceed $100,000." (Id.)**

THE GUARDIANSHIP PROCEEDINGS

On November 28, 2012, Aaron's mother filed a Petition with the Probate and Guardianship Court of Palm Beach County seeking establishment of a guardianship for Aaron, appointment of herself as guardian of Aaron's property, and appointment of a guardian ad litem (R1-2, 232-33). Aaron's father filed a "Waiver and Consent" to the appointment of Aaron's mother as the guardian of his

[1] The legislature can make an appropriation out of the State's treasury to fund a claims bill. However, it may also instruct the State subdivision or agency responsible for the negligence giving rise to the claims bill to pay the claims bill's appropriation from its own funds. (1975 Atty. Gen. Rep. 69).

property (R9). The Guardianship Judge appointed Aaron's mother as guardian of his property, directed her to file an inventory of property to be placed in his guardianship, and appointed an attorney as Aaron's guardian ad litem (R10, 494).

On March 1, 2013, Searcy Denney filed an appearance in the guardianship proceeding on behalf of itself, William S. Frates, II, P.A. (Aaron's and his parents' referring attorney), Edna L. Caruso, P.A. and Vaka Law Group, P.L. (Aaron's and his parents' appellate attorneys), and Grossman & Roth, P.A., (the lobbyist/law firm that represented Aaron and his parents, along with Searcy Denney, in the Claims Bill proceedings) (R15-52), (herein collectively referred to as "Aaron's attorneys"). Aaron's attorneys filed a Petition which requested the Guardianship Judge to approve a proposed closing statement that would authorize an amount of $2,500,000 to them, which represented the 25% in attorney's fees (including all costs and lobbying fees) allowed under their contingency fee contracts, and under §768.28(8) Fla. Stat.[2], from the initial $10,000,000 payment to Aaron under the Claims Bill (R158-175).

The Petition filed by Aaron's attorneys also sought a declaratory judgment upholding the constitutionality of Aaron's Claims Bill, but striking its $100,000 limitation in attorney's fees and costs as unconstitutional on its face, in violation of

[2] Section 768.28(8) Fla. Stat. provides that in matters involving sovereign immunity "No attorney may charge, demand, receive, or collect for services rendered, fees in excess of 25% of any judgment or settlement."

provisions of the United States and Florida Constitutions, and/or unconstitutional in its application to the facts and circumstances of this case (R53-106,158-175). Copies of the Petition were served on the State Attorney and the Attorney General, as required by §86.091 Fla. Stat. and Fla.R.Civ.P. 1.071 since it was challenging the constitutionality of a portion of Aaron's Claims Bill (R107-157). The Attorney General's Motion to Intervene was granted (R204, 206, 229-30).

The initial $10,000,000 payment by the Health System was deposited into Searcy Denney's trust account for Aaron's guardianship (R237-238). Thereafter, the Guardianship Judge approved a Special Needs Trust for Aaron, into which it ordered that $6,500,000 net proceeds be deposited, with $3,500,000 to remain in the Guardianship account to cover all claims of attorney's fees, costs, liens, etc., until those issues were finally ruled upon. (Id.)

THE GUARDIANSHIP HEARINGS AND THE JUDGE'S ORDER

The Guardianship Judge held two hearings at which he received evidence and heard argument (SR5-187). At those hearings, the parties' argued their respective positions in regard to the issues, as reflected in their pleadings and memoranda. Aaron's attorneys also filed the affidavit of attorney Michael Burman (R526-535) in which he opined that based upon the time, effort, and costs expended by Aaron's attorneys over such a lengthy period, 13 years, 25% of Aaron's recovery as attorney's fees and costs was extremely reasonable (R532). In

his opinion, if the court were determining a reasonable fee based upon a lodestar of time and hours, using a reasonable multiplier, the fee would far exceed 25% of Aaron's recovery (R532).

The Attorney General's position was that the legislature could do whatever it wanted to in granting Aaron's Claims Bill, because it was an "act of legislative grace;" and therefore no one had to explain or justify the basis or rationale for the contents of the Claims Bill, including the $100,000 limitation on attorney's fees and costs (R594; SR31, 36-37, 97, 165).

The Guardianship Judge subsequently entered an Amended Final Corrected Order which set forth the facts discussed, supra, (R591-97; A32-38), and stated:

> 1. "The facts presented were largely undisputed and demonstrated that the Petitioner performed services of the highest caliber in successfully representing the minor Aaron Edwards and his family in the underlying litigation and before the Florida legislature in the Claim Bill proceedings" (R592; A33).
>
> * * *
>
> 8. "Petitioner estimates that in excess of 7,000 attorney's hours were devoted to the litigation and appellate proceedings and the Claim Bill process in achieving the successful result for the minor, Aaron Xavier Edwards. Additionally, the Petitioner, Searcy Denney Scarola Barnhart & Shipley, P.A. , incurred costs exceeding $532,000 on behalf of the clients in the prosecution of the underlying case, the appeal therefrom, and the pursuit of the Claims Bill." (R593; A34)

The Guardianship Judge's Order noted that Aaron's parents agreed Aaron's attorneys should be awarded 25% in attorney's fees and costs from the legislature's appropriation in the Claims Bill. Additionally, to the extent the Claims Bill's

$100,000 limitation purported to deprive Aaron's attorneys from receiving 25% in attorney's fees, as provided by Searcy Denney's contingency fee contract and allowed by §768.28(8) Fla. Stat., Aaron's mother (who was also the guardian of his property), Aaron's father, and Aaron's guardian ad litem, all waived application of the Claims Bill's $100,000 limitation (R594; A35).

In regard to the argument made by Aaron's attorneys that the $100,000 limitation on their attorney's fees and costs was unconstitutional, the Guardianship Judge's Order stated (R594-95; A35-36):

> 13. "The Petitioner further asserted that the Claim Bill provisions relating to attorney's fees and costs are not impervious to constitutional challenge. It is undisputed that under the rules of the Florida Legislature, in force throughout the representation of Aaron Edwards by the Petitioner, Aaron Edwards and his family were required to exhaust all legal remedies before pursuing legislative relief to recover damages in excess of the sovereign immunity limits of $200,000. There is also no apparent standards relating to the award of fees and costs adopted by the Legislature to guide attorneys with respect to the decision to undertake the representation of individuals against sovereign immune defendants; the only standard which exists under law- and to which attorneys and their clients can look in formulating their contractual agreement- is the 25% limitation set forth in Florida Statute §768.28 (8)."
>
> 14. "The Attorney General contends that "longstanding precedent recognizes the powerful and unique nature of Claim Bills — they are acts of legislative grace for which no attorney or lobbyist can claim a constitutional right to recover (fees and costs) contrary to the Legislature's wishes." The cases upon which the Attorney General primarily relies are the Florida Supreme Court decision in *Gamble v. Wells*, 457 (sic, 450) So.2d 850 (Fla. 1984) and the decision of the Fourth District Court of Appeal in *Noel v. Schlesinger,* 984 So.2d 1265 (Fla. 4th DCA 2008)."

The Guardianship Judge's Order reluctantly concluded that based upon Gamble and Noel (R594-95; A35-36), there "appeared to be" no legal basis for invalidating the legislature's $100,000 attorney's fee/cost limitation in Aaron's Claims Bill, stating (R595-96; A36-37):

> 19. In all candor, this is an unusual case for this Court to adjudicate because herein, the lawyer and the client are on the same side, in total agreement that the lawyer should be paid for exemplary legal services and reimbursed its significant costs, out of a fund that the client would not have but for the over the top effort of her lawyers and lobbyists (Usually, the parties that appear before this Court in guardianship and other such cases fight over entitlement or amount of reasonable fees).
>
> 20. But as the Attorney General points out, there appears to be no legal basis to challenge a fee provision of a Claim Bill even when it is, without explanation, unfair on its face.*
>
> 21. It is easy therefore for this Court to conclude that the fee limitation part of this Claim Bill appears unfair and lacks an expressed rationale (sic) basis. To the extent to which one may suppose that the legislature wanted to make sure that all but for $100,000 of its financial benevolence went to the Ward; that reasoning is difficult to fathom when it is undisputed that without highly skilled lawyers devoting a great deal of time and money, here over a 10 year time span, the Ward would have received nothing from the legislature.
>
> 22. As a result, the Petitioner urges this Court to find a basis to keep Edwards Claim Bill in full force and effect except for the fee limitation sentence. However, in view of Gamble and/or Noel, the undersigned lacks the judicial authority to do so.
>
> 23. Nothing herein prevents Petitioner from securing the relief requested by it on any and all other legal or equitable theories.

24. If this order is reviewed by an appellate court, and Gamble and/or Noel is deemed distinguishable or overruled, it may then be that the consent of the guardian herein to pay her well deserving lawyers may then be accomplished.

---

* No reasonable person could dispute that limiting attorney's fees and costs to $100,000 is objectively unreasonable where the costs alone advanced by the lawyer is in excess of $500,000.

As a result of the foregoing, the Guardianship Judge denied Aaron's attorneys' Petition to Approve Closing Statement awarding them 25% of the Claim Bill, denied their Motion for Declaratory Judgment in that regard, and also denied their Notice of Constitutional Challenge to the $100,000 limitation on attorney's fee and costs in Aaron's Claims Bill (R596; A37). Aaron's attorneys appealed the Guardianship Judge's Amended Final Corrected Order to the Fourth District.

THE FOURTH DISTRICT'S AFFIRMANCE

The Fourth District's majority opinion ruled that the concept of "legislative grace" as discussed in Gamble and Noel was still controlling, even after enactment of §768.28, Fla. Stat. and Senate Rule 4.81(6). (A7-9). **Judge Ciklin wrote a 19 page dissenting opinion** which agreed with Searcy Denney's arguments; expressing the extreme importance of the issues in this case; concluding that Aaron's Claims Bill's $100,000 limitation on attorney's fees unconstitutionally impaired Plaintiffs' and their attorneys' pre-existing contracts; that subsequent changes in the law and legislative procedure rendered Gamble inapplicable; that Noel was inapplicable because its dispositive issue concerned whether a charging

lien could attach to a claims bill, an issue not involved here; that the legislature's ability to limit attorney's fees in claims bills will have a devastating effect of denying poor and low income plaintiffs access to courts; and that the unconstitutional attorney's fee limitation in Aaron's Claims Bill was severable, and thus the remainder of his Claims Bill should be enforced. (A10-29)

THE FOURTH DISTRICT'S CERTIFICATION OF AN ISSUE OF GREAT PUBLIC IMPORTANCE.

The Fourth District ultimately certified the following issue to this Court as one of great public importance (A30-31):

> AFTER THE ENACTMENT OF SECTION 768.28, FLORIDA STATUTES, AND THE ADOPTION OF FLORIDA SENATE RULE 4.81(6), IS IT CONSTITUTIONALLY PERMISSABLE FOR THE FLORIDA LEGISLATURE TO LIMIT THE AMOUNT OF ATTORNEY'S FEES PAID FROM A GUARDIANSHIP TRUST ESTABLISHED BY A LEGISLATIVE CLAIMS BILL?

SUMMARY OF ARGUMENT

The certified issue should be answered in the negative. The Fourth District erred in ruling that based upon Gamble and Noel, the $100,000 fee and cost limitation in Aaron's Claims Bill was constitutional. Neither case is applicable here. Gamble, based on a cause of action accruing in 1967-1969, held that the plaintiff was "legally remediless" to seek damages from a state agency; that she could only seek relief by way of a private relief act, which was an "act of

legislative grace," and in which the legislature could place whatever conditions or limitations it desired.

The Fourth District incorrectly ruled that Gamble was still applicable despite the fact that in 1973 the legislature enacted §768.28 (Fla. Stat.), as a complete overhaul of the area of sovereign immunity. That overhaul did not apply in Gamble, but applies here. Section 768.28(5) Fla. Stat. waived sovereign immunity to a limited degree; and further provided that beyond recovering a limited amount against a sovereign entity, a plaintiff may seek further recovery by way of a claims bill filed with the legislature to pay down the excess judgment in part or in whole. Under the statute, the legislature can refuse to pass a claims bill. However, what it cannot do, if it decides to pay down the excess judgment, is impair a pre-existing attorney's fee contract between the plaintiff and his or her attorney.

Another part of the 1973 overhaul of sovereign immunity was the enactment of §768.28(8) Fla. Stat., which permits a plaintiff's attorneys to receive 25% in attorney's fees of any claims bill recovery. Because the Gamble child's injuries occurred in 1967-1969, before the State waived sovereign immunity in 1973, the 25% attorney's fees provision was not available. Together, §768.28(5) and §768.28(8) Fla. Stat. supersede and render inapplicable the concept of "legislative grace," upon which the Fourth District relied.

Gamble is also factually distinguishable, because the Gamble attorney's contract did not provide a fee for services rendered in obtaining the private relief act; and he waived any specified fee by agreeing to accept whatever the legislature decided to give him as a fee. Senate Rule 4.81(6) also did not apply in Gamble, but is applicable here, requiring Aaron's attorneys to obtain a judgment and have it affirmed on appeal as a mandatory prerequisite to even filing a claims bill.

Noel is likewise factually distinguishable because the only issue decided in that case was that a charging lien could not be imposed on a claims bill appropriation. Moreover, the Noel attorney never claimed that the attorney's fee limitation was unconstitutional, but rather admitted that Gamble was the established law; and he never claimed that the 25% limitation on attorney's fees in §768.28(8) Fla. Stat. applied in that case.

Finally, the Fourth District erred in failing to declare the $100,000 limitation on attorney's fees and costs in Aaron's Claims Bill unconstitutional for numerous reasons: it impaired the pre-existing contract rights of Aaron's attorneys and denied them private property without just compensation; was contrary to §768.28(8) Fla. Stat.'s 25% attorney's fee provision; and violated the separation of powers doctrine. These constitutional violations, which allow the legislature to impose after-the-fact restrictive limitations on the recovery of attorney's fees and costs in claims bills, will have the effect of negatively impacting future plaintiffs and their attorneys'

access to courts. The contingency fee contract, the poor man's key to the courthouse, is already capped at 25% in sovereign immunity cases under §768.28(8) Fla. Stat. Allowing the legislature to, after-the-fact, further reduce the attorney's fees recovery to any amount it sees fit, will preclude attorneys from being able to undertake representation of poor and low income people in claims against sovereign defendants.

The Fourth District also erred in failing to sever the unconstitutional $100,000 limitation on fees and costs, but enforce the balance of Aaron's Claims Bill.

ARGUMENT

STANDARD OF REVIEW

The Fourth District's ruling on the constitutionality of the attorney's fee limitation in Aaron's Claims Bill is a pure question of law subject to a de novo standard of review. State v. Sigler, 967 So.2d 835, 841 (Fla. 2007). The Guardianship Judge's findings of fact are binding if supported by competent, substantial evidence, Rozzo v. State, 75 So.3d 409,412 (Fla. 9th DCA 2011).

POINT I

AFTER ENACTMENT OF SECTION 768.28 FLA. STAT. AND ADOPTION OF FLORIDA SENATE RULE 4.81 (6), IT WAS NOT CONSTITUTIONALLY PERMISSIBLE FOR THE FLORIDA LEGISLATURE TO LIMIT THE AMOUNT OF ATTORNEY'S FEES PAID FROM A GUARDIANSHIP TRUST ESTABLISHED BY A LEGISLATIVE CLAIMS BILL FOR ALL OF THE FOLLOWING REASONS:

(A) The Concept of "Legislative Grace," Relied Upon by the Fourth District, in an Attempt to Circumvent the Claims Bill's Unconstitutionality, is no Longer a Viable Concept in Light of the Statutory and Senate Rule Changes, and Thus Gamble and Noel are Clearly Distinguishable and Inapplicable

The Relevant Statutory and Senate Rule Changes

The Florida Legislature enacted §768.28 Fla. Stat. in 1973, which waived the State's sovereign immunity on a limited basis. In 1997, when Aaron's cause of action accrued, §768.28(5) Fla. Stat. provided that a plaintiff's recovery against the state or its agencies or subdivisions was limited to no more than $100,000 per person and $200,000 per incident. The statute also established a right for plaintiffs to claim further recovery, by way of a claims bill filed with the legislature, in order to pay down the portion of the judgment that exceeded those amounts. Section 768.28 (5) Fla. Stat. states in part:

> ...that portion of the judgment that exceeds those amounts may be reported to the legislature, but may be paid in part or in whole only by further acts of the legislature. ...

Section 768.28(8) Fla. Stat. was also enacted to provide for the attorney's fees that could be charged a plaintiff in a lawsuit involving a sovereign entity:

> (8) No attorney may charge, receive, or collect, for services rendered, fees in excess of 25% of any judgment or settlement.

Thereafter, the Senate enacted Rule 4.81(6) which provided that a claims bill could not be heard by the legislature until a settlement or final judgment had been entered against the sovereign immune defendant, and until all available administrative and judicial remedies have been exhausted. (A43)

Gamble, Noel and "Legislative Grace"

The Fourth District relied upon Gamble and Noel to conclude that a claims bill is a voluntary recognition of the legislature's moral obligation (i.e., acts of "legislative grace"), and as such is solely dependent upon legislative discretion. Those cases are clearly distinguishable, and thus, not controlling in the present case for numerous reasons.

The Gamble Case - In Gamble, a minor sustained injuries in 1967-1969 while in the custody of the State Department of Public Welfare. The child's subsequent adoptive parent signed a contingency fee contract with an attorney to represent the child for 33 1/3% of the proceeds of any recovery from the State. Because §768.28 Fla. Stat., which waived sovereign immunity on a limited basis, was first enacted in 1973 after the child's injuries occurred, **the statute was not**

applicable in Gamble, and thus the state could not be sued. The child's only recourse was to seek a private relief act from the legislature. At the hearing before the legislature's special master, her attorney agreed to reduce his contingency fee contract from 33 1/3 % to 25%. However, at the hearing before the legislature's claims sub-committee, when asked what he was willing to take as an attorney's fee, her attorney responded:

> "I am willing to take anything. The fee is of no consequence to me. I am perfectly willing to allow the committee to set anything they want to without any question. . . [B]ut again it is of no moment to me. I want you to understand that. Anything the committee wants to provide is all right."[3]

The legislature thereafter enacted a private relief act granting the Gamble child $150,000, but limiting attorney's fees to $10,000. Notwithstanding, the probate court awarded her attorney a $50,000 attorney's fee (33 1/3%), pursuant to his contract. (Id. at 178). Upon appeal, the Second District ruled that the $10,000 fee limitation amounted to an unconstitutional impairment of contract, which was severable from the remainder of the act. (436 So.2d at 180-181). It reversed the probate court's award of a $50,000 fee, concluding that the attorney had waived his contractual right to 33 1/3% by agreeing to accept 25% under his contract, and directed the probate court to award a 25% fee. (Id.)

---

[3] The attorney's response was quoted by the Second District in Gamble v. Wells, 436 So.2d, 173, 177 (Fla. 2 DCA 1983).

Upon appeal this Court ruled that the attorney's fee limitation in the **private relief act** was a constitutionally permissive exercise of legislative authority, remanding with directions to reduce the fee to $10,000, Gamble v. Wells, 450 So.2d 850 (Fla. 1984)[4]. The Court's rationale was that since the plaintiff was "legally remediless" to seek damages from a state agency, that she could only seek relief by way of a **private relief act**, which it characterized as a voluntary recognition of a moral obligation on the legislature's part, referring to it as "an act of grace" to address a wrong that was "not otherwise legally compensable". (Id. at 853). The Court further stated that since relief was sought by means of a **private relief act**, the legislature, as a matter of grace, could determine whether to allow compensation, the amount of compensation and determine the conditions, if any, to be placed on the appropriation. (Id.) Therefore, the Court concluded that the legislature had the power to place the $10,000 attorney's fee limitation in the Gamble child's **private relief act**, and that the attorney's contingent fee contract could not deprive the legislature of that power (Id.)

The Fourth District erred in relying upon Gamble, which has been superseded by §768.28 Fla. Stat. and Senate Rule 4.81(6), because the Gamble

---

[4] The $10,000 was the amount provided by the legislature based on the attorney's agreement to "take anything". Importantly, this Court's Gamble opinion (450 So.2d at 851) cited with approval the facts stated in the Second District's opinion, which had quoted the attorney's agreement to "take anything," letting the legislature set his fee "without any question."

child's injuries occurred prior to their enactment. It was only after §768.28 Fla. Stat. was enacted that a plaintiff could sue the State based upon its limited waiver of liability, and then seek recovery of damages above that limited amount from the legislature by way of a claims bill. See Cauley v. City of Jacksonville, 403 So.2d 379,381, f.n.5 (Fla. 1981). Prior thereto, a claimant had no remedy against a sovereign defendant and could only seek to have the legislature enter a private relief act which, as emphasized in Gamble, was an "act of grace," thus permitting the Legislature to control the attorney's fee amount. For that reason, Gamble did not undertake any type of constitutional impairment analysis, which must be done here, since this case involves a claims bill allowable under §768.28(5) Fla. Stat., not a private relief act as involved in Gamble.

Another reason Gamble does not apply here is because it was only after enactment of §768.28 Fla. Stat. that the 25% in attorney's fees provided in §768.28(8) Fla. Stat. was available to all plaintiffs' attorneys in sovereign immunity cases for services rendered thereafter. Since the Gamble child's injuries occurred before §768.28 Fla. Stat. was enacted, the statutory provision allowing 25% in attorney's fees did not apply. Therefore, when this Court stated in Gamble that the $10,000 fee limitation in the private relief act was constitutional and did not impair the attorney's contract rights, that statement was true because the 25%

statutory fee provision did not exist at that time. In contrast, §768.28(8) Fla. Stat. applies in this case.

That is evident in light of Ingraham v. Dade Cty. School Bd., 450 So.2d 847 (Fla. 1984), a decision rendered by this Court on the same day as the Gamble decision. Ingraham, in which §768.28 Fla. Stat. was applicable, held that the 25% attorney's fee provision contained in §768.28(8) Fla. Stat. "**applied to all situations involving waiver of sovereign immunity regardless of the source of payment**," which in that case was insurance proceeds. Application of Ingraham to the present case means that the 25% attorney's fees provision provided by §768.28(8) Fla. Stat. applied, regardless of the fact that the "source of payment" was the appropriation in Aaron's Claims Bill.

An important feature of Ingraham, which the Fourth District ignored, was that this Court referred to the fact that the Third District had ruled that §768.28 Fla. Stat. was intended by the legislature to be a **complete overhaul** of the area of sovereign immunity. (Id, at 848). This Court agreed, stating that that "§768.28 Fla. Stat. **totally revised** the area of sovereign immunity," (emphasis added), and that §768.28(8) Fla. Stat., which provided for 25% in attorney's fees, was part of "this **overall statutory scheme**, relating to sovereign immunity" (emphasis added) (Id. at 849). That necessarily means that the legislature simply could not ignore §768.28(8) Fla. Stat. by including the $100,000 limitation in Aaron's Claims Bill.

The Fourth District cited Ingraham for its ruling that §768.28(8) Fla. Stat. is constitutional and does not impair an attorney's contract or amount to a legislative usurpation of the powers of the judiciary to regulate the practice of law, as if that ruling was contrary to Searcy Denney's position. (A5) However, Searcy Denney has never contended otherwise. Searcy Denney **is relying upon** §768.28(8) Fla. Stat., upon which it bases its contractual claim to a 25% contingency fee.

Another aspect of this complete overhaul of the area of sovereign immunity, applicable here, but not in Gamble, is Senate Rule 4.81(6). Pursuant to that Rule, the Senate would not entertain Aaron's Claims Bill unless there was first a settlement or a final judgment entered against the Health System that was no longer subject to appeal (A43). The Health System made no offer to settle this case prior to judgment (SR127). Thus, obtaining a judgment and finalizing it on appeal was a prerequisite to Aaron's perfecting his right to file a claims bill. Yet, the very legislature that **required** all of the effort and expense by legal counsel in obtaining Aaron's underlying final judgment, and upholding it on appeal, then placed an after-the-fact arbitrary limitation ($100,000) on fees and costs incurred in performing those required tasks.

A further reason Gamble is inapplicable is because the attorney's contract in that case did not provide a fee for his services rendered in obtaining the private relief act; and he clearly waived any right to a specified fee when he told the

legislature that he would accept anything it wanted to give him as a fee. When this Court stated in Gamble there was no impairment of contract, it was true because **there was no contract to impair**. Notwithstanding, the attorney was awarded a fee of 6%-7% of the amount the private relief act provided the child (the traditional charge solely for lobbying fees in a present day claims bill) (R322). In other words, in Gamble, the attorney was provided an appropriate fee for the only work he performed, i.e. getting the private relief act passed by the legislature.

In contrast, in this case the referring attorney had a separate contract for his referral of the case (R30-31), Searcy Denney had a separate contract for its trial work (R25-29), the lobbyist/law firm had a separate contract for pursuing the claim bill (R38-39), the appellate law firms had separate contracts for their appellate work (R32-37), and finally, all of Aaron's attorneys executed a closing statement agreeing that the fees and costs provided for in their separate contracts would be limited to 25% of Aaron's recovery (R170-175). Yet, after all the years the attorneys spent in pursuing Aaron's cause, as **required** by Senate Rule 4.81(6), Aaron's Claims Bill provided nothing (**zero**) in attorney's fees, since its $100,000 limitation would necessarily first go towards payment of Searcy Denney's outstanding costs, which are still far from being completely paid.

Finally, Gamble is inapplicable, because even if Aaron's Claims Bill were to be considered an "act of legislative grace," as the private relief act was in Gamble,

that fact does not allow the legislature to ignore constitutional rights. Years ago, the United States Supreme Court flatly rejected the argument that constitutional rights turn on whether a matter is characterized as a "right" (upon proof of entitlement) versus an "act of grace," a "privilege," or "benefit" extended by the government where there is no entitlement. In Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, f.n.4 (1973), the U.S. Supreme Court held that "[A] probationer can no longer be denied due process, in reliance on the dictum in Escoe v. Zerbst, 295 U.S. 490, 492, 55 S.Ct. 818, 819 (1935) that probation is an 'act of grace.'" In Shapiro v. Thompson, 394 U.S. 618, 627, f.n.6, 89 S.Ct. 1322, 1327 f.n.6 (1969)[5], the Court stated: "This constitutional challenge cannot be answered by the argument that public assistance benefits are a `privilege' and not a 'right.'"

Other applicable U.S. Supreme Court cases are Graham v. Richardson, 403 U.S. 365, 374, 91 S.Ct. 1848, 1853 (1971) ("[T]his Court now has rejected the concept that constitutional rights turn upon whether a government benefit is characterized as a 'right' or as a 'privilege.'"); Sherbert v. Verner, 374 U.S. 398, 404 and f.n.6, 83 S.Ct. 1790, 1794 and f.n.6 (1963) ("[C]onstruction of the statute [cannot] be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a `privilege.' It is too late in the day to doubt that the liberties of religion and expression may be

[5] Overruled on one point not applicable here by Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1937 (1974)

infringed by the denial of or placing of conditions upon a benefit or privilege."); Speiser v. Randall, 357 U.S. 513, 518, 78 S.Ct. 1332 (1958) ("[A]ppellees are plainly mistaken in their argument that because a tax exemption is a 'privilege' or 'bounty,' its denial may not infringe speech."); Board of Regents of State Colleges v. Roth, 408 U.S. 564, 571 and f.n.9, 92 S.Ct. 2701, 2706 (1972) ("The Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges,' that once seemed to govern the applicability of procedural due process rights."); Jones v. State Bd. of Education for State of Tenn., 397 U.S. 31, 34, 90 S.Ct. 779, 781 (1970) ("It is far too late to suggest that since attendance at a state university is a 'privilege,' not a 'right,' there are no constitutional barriers to summary withdrawal of the 'privilege'").

While none of the above U.S. Supreme Court cases involved claims bills, nonetheless they stand for the proposition that the legislature cannot deny constitutional rights where an "act of grace," "privilege," or "benefit" (meaning there is no entitlement), rather than a "right," is extended to a person or group of people. It does not matter what language is used to characterize or label a particular matter, the result is the same, constitutional rights cannot be denied. Thus, even if Aaron's Claims Bill is considered an "act of grace," the legislature could not insert provisions therein that infringed upon constitutional rights, or violated §768.28(8).

For all of the above reasons, "legislative grace" and Gamble no longer apply. This Court's Gamble decision was rendered in 1984, or thirty-one (31) years ago. **Since then, this Court has never cited Gamble. Not once.**[6] The issue certified to the Court in this case gives it the opportunity to revisit the present applicability of its prior Gamble decision, in light of the statutory and rule changes that have occurred over the passage of time[7].

The Noel Case - In Noel, a minor patient and her parents recovered a judgment against the State in 1999 as a result of medical malpractice. The jury awarded $6.5 million to the minor and $2 million to her parents. The legislature passed a 2007 claims bill appropriating those exact amounts, but providing that payment of attorney's fees and costs "shall not exceed" $1,074,667. Noel v. Schlesinger, 984 So.2d 1265, 1266 (Fla. 4th DCA 2008).

The attorney then moved to reopen the 1999 case to obtain a charging lien against the parents' $2 million appropriation, seeking attorney's fees based on his contingency fee contract with them. He argued that the claims bill had limited the attorney's fees that he could obtain from the minor's appropriation, but it had

---

[6] Gamble was cited in a dissenting opinion in Florida DHRS v. SAP, 825 So.2d 1091, 1110 (Fla. 2002).

[7] This Court did something similar in Joerg v. State Farm, 2015 WL 5995754, ___So.3d ____ (Fla. October 15, 2015) when it receded from another one of its 31 year old decisions in Florida Physicians Ins. Reciprocal v. Stanley, 452 So.2d 514 (Fla. 1984). The Court concluded that Stanley could no longer be supported as a result of the passage of time, changing conditions altering public policy and changes in the law. The same applies here.

placed no limit on the amount he could recover from the parents' appropriation (See Aaron's attorney's Appendix, pages 12-13, filed with the Fourth District).

The Fourth District reversed in Noel, ruling that the **remedy of a charging lien** could not attach to a claims bill's appropriation, since the latter was the result of the legislature's "act of grace" not the fruits of the attorney's services. (Id. at 1267). The Court concluded that the claims bill was "separate and apart" from its underlying lawsuit, stating that this was demonstrated by Gamble's holding that the legislature could limit attorney's fees "in a claim bill"[8] as a matter of legislative grace, no matter what the attorney's contingency fee contract provided.

Noel is distinguishable from this case for various reasons. Noel only concerned whether a charging lien could be imposed on an appropriation provided for in a claims bill. Moreover, the attorney in Noel never claimed that the attorney's fee limitation in the claims bill was unconstitutional, or contrary to §768.28(8)'s 25% limitation on attorney's fees, or that Gamble was inapplicable. In fact, the appellate briefs filed in Noel show that both sides agreed Gamble was the established law and was applicable in that case. (See pages 8-29 of Aaron's attorney's Appendix filed with the Fourth District).

In light of the concessions agreed to in Noel, and arguments not raised and thus waived, the Fourth District's ruling in Noel was a narrow one. The Court's

[8] In fact, Gamble's ruling only pertained to a private relief act, not a claims bill as involved in Noel.

dispositive ruling was that a **charging lien** claimed under an attorney's contingency fee contract could not attach to a claims bill's proceeds.[9] In contrast to Noel, Aaron's attorneys are not seeking a charging lien, and they claimed below that Gamble did not apply to this case, that the arbitrary limitation on fees and costs in Aaron's Claims Bill was unconstitutional, and that §768.28(8) Fla. Stat. was applicable. The issues raised here were not raised in Noel, and were only discussed therein, as dicta.

Moreover, in Noel, the minor's parents objected to payment of the attorney's fees being sought by the attorney, unlike in this case (A22). Finally, when Noel stated that Gamble demonstrated that a claims bill is separate and apart from its underlying lawsuit, Noel overlooked the fact that the legislature's complete overhaul of sovereign immunity, by enacting §768.28 Fla. Stat., created a connection between the underlying judgment and the claims bill, Section 768.28(5) Fla. Stat. specifically provides that the **excess portion of the judgment may be paid** in whole or in part **by a claims bill**, clearly linking the two. Section 11.066(3), Fla. Stat., also provides that a judgment creditor against the State has to

[9] Although not relevant here since no charging lien is involved, Article III, Section 11(a) (9) of the Florida Constitution provides, in regard to the Legislature's authority, that there 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. Accordingly, Noel incorrectly held that an attorney's contingency fee contract cannot provide for a lien on claims bill appropriations. In contrast, the Legislature cannot use claims bills to impair such liens.

petition the legislature "to seek an appropriation **to pay the judgment**." As Gerard v. DOT, 472 So. 2d 1170, 1172 (Fla. 1985), explained:

> "Section 768.28(5) authorizes the rendition of a judgment in excess of the maximum the State can be required to pay. The purpose of this revision is so that the excess [judgment] can be reported to the legislature and then paid in whole or in part by further act of the legislature."

See also Jetton v. Jkvl. Elec. Auth., 399 So.2d 396, fn.5 (Fla. 1st DCA 1981).

Additionally, Senate Rule 4.81(6), which was not applicable in Gamble, clearly linked the two proceedings by mandating the exhaustion of all trial and appellate remedies before a claims bill could be sought to pay the excess judgment.

The Fourth District Incorrectly Interpreted §768.28 Fla. Stat.

Since the legislature completely overhauled the area of sovereign immunity in 1973, it is important to consider the specific language of §768.28 Fla. Stat. to determine what authority the statute actually gave the legislature. The first step in determining the meaning of a statute is to examine its plain language. JM v. Gargett, 101 So.3d 352 (Fla. 2012). When a statute is clear and unambiguous, and conveys a clear and definite meaning, the Courts will not look beyond its plain language for legislative intent or resort to rules of statutory construction to ascertain intent. Paul v. State, 129 So.3d 1058 (Fla. 2013). The plain and ordinary meaning of a statute controls. (Id). In this case §768.28(5) Fla. Stat., is clear in regard to what the Legislature can do. There is no ambiguity.

Notwithstanding, the Fourth District incorrectly interpreted §768.28 Fla. Stat., in two respects. First, under §768.28(5) Fla. Stat. the Legislature can deny a claims bill, or it can grant a claims bill to pay down an excess judgment in part or in whole. But, it cannot limit attorney's fees. Specifically, the statute provides that when a judgment is rendered in excess of the statutory limits, "that portion of the judgment that exceeds those amounts may be paid in part or in whole only by further act of the legislature." In other words, once an excess judgment is rendered and a claims bill is filed, the legislature can do only one of two things if it decides to pay down the judgment: it can pay the excess judgment in part **or** it can pay the excess judgment in whole. The statute provides the legislature with no other authority in granting a claims bill under §768.28(5) Fla. Stat. The statute does not give the legislature the right to limit attorney's fees to be paid from the amount it is appropriating to pay down the excess judgment. Therefore, the Legislature overstepped its statutory authority in limiting the attorney's fees of Aaron's attorneys to $100,000.

Section 768.28(8) Fla. Stat. supports this interpretation because it provides attorney's fees of "25% of any judgment or settlement." In other words, if the legislature decides to pay down an excess judgment "in whole or in part" the attorneys receive 25% of that payment toward the excess judgment.

Second, the Fourth District also gave an incorrect judicial interpretation to §768.28(8) Fla. Stat. The Statute provides: "**No attorney may charge**, demand, receive, or collect, for services rendered, **fees in excess of 25%** of any judgment or settlement." (Emphasis added). The Fourth District concluded that the above language does not mean that fees cannot be less than 25%, only that they cannot be in excess of 25%, stating: "The statute places a cap on the recoverable attorney's fee, not a floor, Twenty five percent is not, by its very terms, a mandatory minimum." (A8). That interpretation ignores and overlooks the plain language of §768.28(8) Fla. Stat., which expressly places the attorney in charge of determining whether his or her fee is 25% or less, not the court and certainly not the legislature. Subsection (8) does not simply provide that "attorney's fees may not exceed 25%", which language could be construed to mean that fees can be less than 25%. Rather, its language is very different. It specifically provides, in part, that "No attorney may charge ... fees in excess of 25%" which necessarily means that an attorney may charge fees up to 25%.[10] To construe the language otherwise is to limit the language's express terms.

One need only look to 28 U.S.C.A. §2678, of the Federal Tort Claims Act which contains **identical pertinent language** providing for attorney's fees in federal tort claim actions. That statute provides, in pertinent part: "**No attorney**

[10] The Fourth District previously recognized the peculiar wording of §768.28(8). No. Broward Hosp. Dist. v. Johnson, 538 So 2d. 876,877 (Fla. 4th DCA 1988).

shall charge, demand, receive, or collect for services rendered, **fees in excess of 25 percent** of any judgment...or settlement..." (Emphasis added). In Joe v. U.S., 772 F. 2d 1535, 1537 (11th Cir. 1985) the Court held that this specific language referred to contingency fee arrangements, which the attorney and client control. Jackson v. U.S., 881 F. 2d 707 (9th Cir. 1989) likewise held that the language in 28 U.S.C.A. §2678 unambiguously permits an attorney to collect on a contingency fee basis up to 25% of the recovery, and that "anything less than 25% is deemed to be a matter of private negotiations between the attorney and his client" (Id. at 713).

Finally, in Robak v. United States, 658 F. 2d 471, 479 (Fla. 7th Cir. 1981) the Seventh Circuit held that §2678's statutory language reflects that:

> Congress purposefully removed this matter from the discretion of the district court, so long as the fee fell within the section's guidelines of 25%. The contract between the Robaks and their counsel agreed upon a fee of 25% within the statutory limits. The court had no choice but to accept this pre-existing arrangement.

The Seventh Circuit also reversed the District Court's ruling that because the parents' funds were to be paid into a reversionary trust, out of which funds would be withdrawn as needed to cover the injured child's expenses, the 25% in attorney's fees were to be paid only proportionately to, and concurrent with, actual disbursement of funds from the trust (Id. at 479). The Seventh Circuit held that this ruling exceeded the District Court's authority under §2678, (Id. at 479) and noted that this method of paying attorney's fees "would have a significant chilling

effect on counsel bringing such action" (Id. at 480, fn. 28). Likewise, in this case, the Legislature's direction that the entire amount of Aaron's $15 million be placed into a Special Needs Trust, in an effort to insulate it from attorney's fees will undoubtedly have a chilling effect on attorneys' agreeing to represent plaintiffs against sovereign immune defendants. This issue is discussed more completely under Subsection (F), infra.

For the above reasons, the Fourth District incorrectly interpreted both §768.28(5) and §768.28(8), which resulted in it upholding attorney's fees of less than 25% in Aaron's Claims Bill, based upon "legislative grace." It should have enforced Aaron and his attorneys' contingency fee contract for an attorney's fee of 25%, as permitted by §768.28(8) Fla. Stat.

(B) The Claims Bill's $100,000 Limitation on Attorney's Fees and Costs Impaired the Pre-existing Contract Rights of Plaintiffs and Their Attorneys

Searcy Denney's contract provided for a reduced attorney's fee to the amount provided by law if the Health System was declared a sovereign immune defendant (R27). The amount "provided by law" was the 25% contained in §768.28(8) Fla. Stat., which became part of the contracts of Aaron's attorneys, because valid laws in effect at the time a contract is entered into become part of the contract as if expressly incorporated into the contract. Gordon v. State, 608 So.2d

800, 802 (Fla. 1992)[11]. Accordingly, Searcy Denney and other Florida attorneys should be able to rely upon that statutory 25% provision when deciding whether to undertake representation of a client against a sovereign immune defendant.

The "contract clause" of the United States Constitution, Article I, §10, prohibits any state from passing a law "impairing the obligations of contracts." The Florida Constitution, Article I, §10, contains a parallel prohibition: "No... law impairing the obligations of contracts shall be passed." The right to contract for legal services is a fundamental right that emanates from the First Amendment. Jacobson v. Southeast Personnel Leasing, Inc., 113 So.2d 1042 (Fla. 2013). It is one of the most sacrosanct rights guaranteed by our fundamental law. Chiles v. United Faculty of Florida, 615 So.2d 671 (Fla. 1993). The right to contract is substantially different from other First Amendment rights because it is a property right (Jacobson, 113 So.2d at 1050), which is one of the basic substantive rights expressly protected by Article 1, Section 2 of the Florida Constitution. Dep't. of Law Enforcement v. Real Property, 588 So.2d 957, 964 (Fla. 1991).

A statute contravenes the constitutional prohibition against impairment of contract when it has the effect of rewriting antecedent contracts, that is, of changing the substantive rights of the parties to the pre-existing contract. Manning

[11] Additionally, as stated, each attorney executed the Proposed Closing Statement agreeing that their collective recovery of attorney's fees and costs under their separate contracts would be capped at 25%, as required by §768.28(8) Fla. Stat.

v. Travelers Ins. Co., 250 So.2d 872, 874 (Fla. 1971). An impairment occurs when a contract is made worse or is diminished in quantity, value, excellence, or strength. Pomponio v. Claridge of Pompano Condo., Inc., 378 So.2d 774, 779-80 (Fla. 1979). When a right to attorney's fees is provided by contract, it cannot be constitutionally impaired by subsequent legislation which attempts to restrict, expand, or eliminate that contractual right. Xanadu of Cocoa Beach Inc. v. Levy, 504 So.2d 518, 519 (Fla. 5th DCA 1987). The polestar of any analysis of whether a statute constitutionally impairs an existing contract is the fundamental principle that virtually no degree of impairment will be tolerated no matter how laudable the underlying public policy considerations of the statute may be. (Id.)

There is a three pronged test to determine whether there has been an unconstitutional impairment of contract rights. As a threshold matter, it must be determined whether there has been impairment of a contract. See, e.g., United States Trust Co. v. New Jersey, 431 U.S. 1, 97 S.Ct. 1505 (1977). Second, it must be determined whether the impairment was substantial. Allied Structural Steel Company v. Spannaus, 438 U.S. 234, 244, 98 S.Ct. 2716, 2722-23 (1978). Third, the State, in justification, must demonstrate a significant and legitimate public purpose behind the law. Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470, 505, 107 S.Ct. 1232, 1252 (1987).

In the present case, it seems rather obvious that the first two prongs must be answered in the affirmative. First, the $100,000 attorney's fee and cost limitation substantially impaired Aaron's attorneys' pre-existing contract rights to attorney's fees and costs, which were in compliance with all laws when entered into. A statute that retroactively turns otherwise profitable contracts into losing propositions clearly constitutes impairment of contracts and is a prohibited enactment, which is facially unconstitutional. Department of Revenue v. Florida Builders Ass'n., 564 So.2d 173, 175 (Fla. 1st DCA 1990); In re: Advisory Opinion to the Governor, 509 So.2d 292, 314-15 (Fla. 1987).

Second, the $100,000 limitation was substantial. As a result of the legislature's "after-the-fact" $100,000 fee limitation in Aaron's Claims Bill, his attorneys went from being able to receive 25% of Aaron's ultimate recovery to only receiving $100,000. That amount did not even begin to pay the outstanding costs in the case, and therefore essentially provided **zero** attorney's fees for all of Aaron's attorneys. The $100,000 limitation **totally obliterated** the attorneys' fee contracts, and therefore, is facially unconstitutional.

Since the first two inquiries, i.e., whether an impairment occurred, which was substantial, have been satisfied, the next inquiry is whether the $100,000 attorney's fee limitation was required to accomplish some significant and legitimate **public** purpose. The Attorney General did not prove that any public

purpose existed. It cannot legitimately argue that the limitation was to protect the State's treasury, because the attorney's fees and costs that Aaron's attorneys would receive were to come out of Aaron's appropriation, **which itself did not come out of the State's Treasury**. Aaron's $15,000,000 appropriation was ordered by the legislature to be paid by the Health System's own funds, which had $600,000,000 in excess revenue on hand (R329, 365-69; SR135).

The Attorney General also cannot legitimately argue that the Claims Bill's $100,000 limitation was an attempt to regulate the amount of attorney's fees so that Aaron would receive a larger amount to support his needs. First, the legislature had already achieved that objective by enacting §768.28(8) Fla. Stat. to statutorily limit attorney's fees to 25% in order to protect all plaintiffs in sovereign immunity cases. Yet, the legislature ignored that very statutory provision. Second, while the Attorney General initially claimed Aaron's attorneys agreed to the $100,000 limitation during the claims bill process, the Guardianship Judge made factual findings rejecting that claim (R592). Finally, the Attorney General admitted he did not know why the legislature imposed the $100,000 limitation on fees and costs (SR166). Accordingly, the Attorney General cannot now argue that it did so out of concern for Aaron's support needs.

The bottom line is that the Fourth District concluded that under Gamble and Noel, claims bills are matters of "legislative grace." (R253-256). That means,

according to the Fourth District, the legislature can do whatever it wants in a claims bill, including ignoring and violating pre-existing contract rights. The Court ignored the fact that Gamble and "legislative grace" were superseded by the enactment of §768.28(5) Fla. Stat., §768.28(8) Fla. Stat., and Senate Rule 4.81(6).

(C) The $100,000 Limitation was Unconstitutional Because it Deprived Aaron's Attorneys of Private Property Without Just Compensation

The $100,000 limitation on attorney's fees and costs violates Article X, §6(a), of the Florida Constitution, which provides that "No private property shall be taken except for a public purpose and with full compensation therefor paid . . ." It also violated the Taking Clause of the Fifth Amendment to the United States Constitution, which likewise prohibits the government from taking private property for public use without just compensation.

The United States Supreme Court has held that valid contracts are property that cannot be taken without just compensation. Lynch v. U. S., 292 U.S. 571, 54 S.Ct. 840 (1934). As stated in Lynch, "To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation." 292 U.S. at 580, 54 S.Ct. at 844. The word "taken" within the taking clause of the Fifth Amendment includes not only substitution of ownership, but also deprivation of ownership, including **damage to, depreciation in the value of**, and destruction of **property**. U. S. v. General Motors Corporation, 323 U.S. 373, 65 S.Ct. 357 (1945) (emphasis added).

The $100,000 limitation on attorney's fees and costs constituted a "taking" of Aaron's attorneys' property. Certainly, the effect of the $100,000 limitation was to take away Aaron's attorneys' pre-existing contract right to receive payment of their fees and costs [limited to 25% by §768.28(8) Fla. Stat.], from the funds Aaron was to receive by way of the Claims Bill.

The $100,000 limitation also did not provide "just compensation." Nothing more need be said except that Aaron's Claims Bill reduced attorney's fees and costs to less than 1% of his $15 million appropriation. In effect, Aaron's attorneys **received no attorney's fees whatsoever - zero** – since the $100,000 was used to pay down the costs of Searcy Denney, which is still short about $300,000 in costs. Importantly, Aaron and his parents have continued to agree to reimburse his attorneys their fees and costs, capped at 25%, and have even agreed to waive the Claims Bill's $100,000 limitation. They have remained extremely grateful for all the time (7,000 plus hours), effort, devotion, and money expended by Aaron's attorneys over a span of thirteen (13) years toward Aaron's cause, because they know that without it, the Claims Bill would never have happened. Aaron and his parents wish for Aaron's attorneys to be paid under their fee contracts, and it is only the legislature that had a different idea.

(D) The $100,000 Limitation Was Unconstitutional Because it Was Contrary to the 25% Attorney's Fee Limitation in §768.28(8) Fla. Stat.

An appropriation bill (i.e., Aaron's Claims Bill) cannot change or amend an existing law on a subject other than a law dealing with or directed at appropriations, or alter a statutory formula, or otherwise effect a defacto amendment of existing substantive law. Florida Pharmacy Ass'n. Inc. v. Lindner, 645 So.2d 1030, 1032 (Fla. 1st DCA 1994); Chiles v. Milligin, 682 So.2d 74, 76, f.n.3 and 4 (Fla. 1996); City of North Miami v. Florida Defenders of Environment, 481 So.2d 1196 (Fla. 1985).

Several cases demonstrate this principle. In Department of Education v. Lewis, 416 So.2d 455, 460-61 (Fla. 1982), the legislature passed a 1981-82 appropriation act which provided funds to post-secondary schools, but limited or restricted their use to schools that did not advocate sexual relations between unmarried persons. This Court held that the restriction/limitation was unconstitutional, because it was contrary to existing substantive law, impacting a whole host of statutes pertaining to post-secondary institutions. (Id. at 460-461). Although the Court held the limitation unconstitutional and void, it otherwise upheld the appropriation bill.

In Murray v. Lewis, 576 So.2d 264 (Fla. 1990), Florida statutes granted an unconditional college fee waiver to welfare recipients participating in "Project Independence." Yet, an appropriation bill required the participants to first exhaust

all other funding choices before being entitled to the fee waiver. This Court reversed stating (Id. at 266):

> "... while the legislature may attach qualifications or restrictions to the use of appropriated funds ... such qualifications and restrictions may not go to the extent of changing substantive law.... Thus, the legislature may make an appropriation contingent on specified conditions, **but only if those conditions do not run contrary to pre-existing statutes. (Emphasis added.)**

The Court expunged the unconstitutional language from the appropriation bill and otherwise enforced the bill.

As in the above cases, the $100,000 attorney's fee/cost limitation in Aaron's Claims Bill was unconstitutional and void. Section 768.28(8) Fla. Stat. provides for 25% in attorney's fees in matters involving sovereign immunity. The right to an attorney's fee granted by statute is a substantive right, U.S. Security Ins. Co. v. Cahuasqui, 760 So.2d 1101, 1107 (Fla. 3rd DCA 2000), that cannot be ignored by an appropriation bill. The $100,000 limitation on attorney's fees in Aaron's Claims Bill was contrary to §768.28(8), and thus unconstitutional.

(E) The Legislature's Unconstitutional Limit on Attorney's Fees in Aaron's Claims Bill Violates the Separation of Powers Doctrine Since Courts Not Only Have a Right, But a Duty, to Refuse to Enforce Unconstitutional Laws, and Because the Fourth District Misinterpreted §768.28 Fla. Stat. to Allow Such Limitation

Florida's Constitution, Article II, §3, provides:

> "The powers of a state government shall be divided into legislative, executive and judicial branches. No person

> belonging to one branch shall exercise any powers pertaining to either of the other branches unless expressly provided herein."

The importance of the separation of powers doctrine cannot be overstated. Florida House of Representatives v. Expedia Inc., 85 So.3d 517 (Fla. 1st DCA 2012). This Court has described the "separation of powers doctrine" as the "cornerstone of American democracy" and has applied the doctrine **strictly**, with its first prohibition being that "no branch may encroach upon the powers of another." (Id.); Whitey v. Scott, 79 So.3d 702, 708-09 (Fla. 2011); Bush v. Schiavo, 885 So.2d 321, 329 (Fla. 2004) (emphasis added).

Holley v Adams, 238 So.2d 401 (Fla 1970) held that so long as acts of the legislature conform to the requirements of the Constitution, the courts will not inquire into the wisdom or policy behind them (Id. at 404); that the courts have no power to strike down a legislative act unless the provisions thereof, or some of them, violate an express or implied Constitutional inhibition or mandate (Id. at 404). However, to the extent that an act does so it is invalid, not merely because the courts so decree, but **because of the dominant force of the Constitution, an authority superior to both the Legislature and Judiciary** (Id. at 405).

In Sebring Airport Authority v. McIntyre, 783 So.2d 238 (Fla. 2001) this Court made clear that under the separation of powers doctrine, neither the judiciary nor the legislative branch can control the other in the exercise of its legitimate

functions. To the judges belongs the power of expounding the laws, and although in the discharge of that duty they may render a law [or portion thereof] inoperative by declaring it unconstitutional, it does not arise from any supremacy which the judiciary possesses over the legislature, "**BUT FROM THE SUPREMACY OF THE CONSTITUTION OVER BOTH**" (Id. at 244, fn.5). The Court further held that although courts, in accordance with the doctrine of separation of powers, will not seek to substitute their judgment for that of the legislature on a policy matter, pursuant to that same constitutional doctrine, **the courts are responsible for measuring legislative acts "with the yardstick of the Constitution"** (Id. at 245) (emphasis added).

Without question, the lawmaking power of Florida's legislature is subject to the limitations provided in both state and federal Constitutions, City of Jkvl. v. Bowden, 64 So. 769, 771-72 (Fla. 1914). A statute enacted by the Florida legislature may not restrict rights granted thereunder. Notami Hosp. of Fla., Inc. v. Bowen, 927 So.2d 139, 142 (Fla. 1st DCA 2006), aff'd 984 So.2d 478 (Fla. 2008). It is essentially the duty of the Florida courts to sustain the Constitution and to decline to enforce a state statute when its enforcement would violate organic law (Id. at 772). However, mere disagreement with a statute passed by the legislature affords no grounds for judicial interference, unless such interference is predicated on affording of judicial protection to some **personal or property right with**

which the statute unconstitutionally interferes. Shelby v. City of Pensacola, 151 So. 53, 55 (Fla. 1933).

The Fourth District rejected Searcy Denney's argument that since the $100,000 attorney's fee limitation in Aaron's Claims Bill was unconstitutional, the separation of power doctrine gave the Court the right and duty to declare it invalid. Rather, the Fourth District held that the reverse was true. It concluded that a refusal to enforce the Claims Bill's $100,000 limitation, which it ruled was allowed by its interpretation of the language of §768.28(8) Fla. Stat., would interfere with the legislature's authority under the separation of powers doctrine. The Court was wrong for two reasons. First, as the above cases indicate, the Claims Bill's attorney's fees limitation was unconstitutional, and thus it was the Court's duty to declare it as such. Second, the Court's interpretation of the language of §768.28(8) Fla. Stat. was incorrect. That statute does not allow the legislature to provide for attorney's fees of less than 25% in a claims bill. As demonstrated, supra, the statute provides for a mandatory minimum of 25% in attorney's fees, if the claimant and his or her attorney so agree.

Aaron's attorneys have not challenged the fact that part of the legislature's "separation of powers" is the authority to control the State's fiscal affairs or to adopt appropriate measures to limit governmental expenditures. With respect to attorneys' fees, the legislature has exercised that authority by enacting numerous

general statutory limitations or caps on awards of attorneys' fees, such as the cap on attorneys' fees in sovereign immunity cases set forth in §768.28(8). However, the legislature cannot now ignore that statute and instead unconstitutionally limit attorney's fees after-the-fact in this individual case through a claims bill, particularly where the attorney's fees are being paid by the Health System's **own funds**, not by the State's Treasury.

(F) Allowing the Legislature to Limit Attorney's Fees in a Claims Bill in an Amount Contrary to the Plaintiffs' and their Attorneys' Pre-Existing Contingency Fee Contract Will Dramatically and Negatively Impact Low Income and Poor People's Access to Courts to Seek Redress of Grievances Against Sovereign Immune Defendants

Article I, §5 of the Florida Constitution and Amendment I to the United States Constitution provide for the right to petition the government for redress of grievances. Article I, §21, of the Florida Constitution provides the right of access to courts. These rights will be dramatically and negatively impacted if the Legislature is allowed to ex post facto impose attorney's fee limitations in the claims bill process.

Arbitrary and unreasonable actions by the legislature in depriving attorneys of the fees provided for by their contingency fee contracts, and by §768.28(8) Fla. Stat., will have an indisputable chilling effect on the willingness of attorneys to accept and pursue cases for catastrophically injured claimants, or death cases, against sovereign immune defendants. By its action

in this case, the legislature has made it clear that it will, if allowed to, act without any reasonable standards to retroactively deny attorneys the right to a reasonable fee in cases that involve protracted, complex, and expensive litigation. This will result in the denial of access to courts and the denial of the right to petition for redress of grievances for future claimants.

This Court has recognized that an essential aspect of our common law adversarial system of justice is the role of lawyers as advocates. Equally important is the provision of legal representation to those who cannot afford it, in order to ensure meaningful access to justice for all persons. That is exactly why statutory fee provisions, such as §768.28(8) Fla. Stat. are enacted. As stated in Samuel R. Berger, Court Awarded Attorney's Fees: What is "Reasonable?", 126 U. Pa. L. Rev., 281, 312 (1977):

> "...Statutory fee provisions are not enacted for the benefit of lawyers; rather, they are enacted for the benefit of the class of persons protected by the statutes. They seek to assure that sufficient legal resources will be available to enforce fully the rights conferred and that the potential litigants' means will not affect his or her ability to vindicate those statutory rights."

It is well known that Florida's delivery of legal services to the poor is in crisis. In recent years the number of people living below the poverty line has increased, and some studies show that as much as 80% of the legal needs of the poor and disadvantaged are not being met (A25, fn. 11). Without question, an important measure to combat this societal ill is the contingency fee contract. It is

the vehicle for the poor to obtain representation by an attorney in a civil case for injuries or for wrongful death. A contingency fee contract is known as "the poor person's key to the courthouse." Unquestionably, attorneys will no longer be able to undertake and litigate cases against sovereign entities on a contingency fee basis, which requires investing enormous resources of time and costs, if the legislature can, after-the-fact, arbitrarily and unreasonably limit or eliminate the recovery of attorney's fees and costs in the claims bill process, ignoring pre-existing contracts, and the 25% attorney's fee provision in §768.28(8) Fla. Stat. That will mean that only wealthy victims of the negligence of sovereign immune defendants will have access to courts in order to petition for redress of their grievances. Poor claimants will not be able to obtain representation, and thus their right of access to courts will be profoundly and adversely affected, casting the burden of their support on society.

POINT II

THE FOURTH DISTRICT ERRED IN NOT SEVERING THE INVALID $100,000 ATTORNEY'S FEE/COSTS LIMITATION, BUT ENFORCING THE CLAIMS BILL OTHERWISE

It is the courts' imperative duty to stand by and enforce the constitution under all circumstances. Otto v. Harllee, 161 So. 402, 404 (Fla. 1935). Federal courts, including the United States Supreme Court, and state courts have long

recognized that if the legislature attaches an unconstitutional restriction or limitation to an otherwise valid appropriation bill, the courts may strike the invalid restriction while ratifying the remainder of the statute, even if that was not what the legislature intended.

In Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322 (1969)[12] the Connecticut state legislature appropriated funds to pay for a welfare program which provided benefits to needy persons in the state, but excluded otherwise eligible recipients who had lived in the state for less than one year. The United States Supreme Court affirmed judgments which had stricken the exclusion as unconstitutional and directed that the funds be made available to the needy, including those persons whom the legislature had not intended to benefit.

In United States vs. Lovett, 328 U.S. 303, 66 S.Ct. 1073 (1946), the U.S. Congress appropriated funds to pay the salary of federal employees, but expressly excluded three named employees that it concluded were guilty of subversive activity. (Id. at f.n.1). The U.S. Supreme Court concluded that the restriction in question amounted to an unconstitutional bill of attainder and that the attempted limitation on the use of appropriated funds rested upon an improper exercise of legislative authority. The Court struck down the restriction

[12] Shapiro was reversed on other grounds on one point of law, not here applicable, in Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 1350 (1974).

and held that the challenged provision "does not stand as an obstacle to payment of compensation" to all employees. (Id. at 1078-80).

In State Board of Education v. Levit, 52 Cal. 2d 441 (Cal. 1959), the California legislature appropriated funds for public school textbooks, but excluded payment for two science books specified by name. (Id. at 447, f.n.4) The California Supreme Court ruled that while the legislature could decline to appropriate funds for science textbooks altogether, it had no authority to exclude certain books because the power to select textbooks resided with the Board of Education. (Id. at 465-66). The Court concluded the restriction placed on the appropriated funds was unconstitutional and it directed the controller to disregard the restriction, and also ruled that the invalid restriction did not affect the validity of the appropriation itself. (Id. at 466).

The above decisions demonstrate that if a legislature appends an invalid restriction, exclusion, or limitation to an appropriation, the judiciary can strike that provision, and payment may be compelled without regard to the unlawful provision even though that was not what the legislature intended. Florida law dealing with severability supports that result. It favors severability of the unconstitutional parts of an otherwise valid statute. Frazier ex rel Frazier v. Winn, 535 F.3d 1279, 1283 (11th Cir. 2008) (interpreting Florida law); VFW John O'Connor Post # 4833 v. Santa Rosa, Fla., 506 F.Supp.2d 1079 (N.D. Fla.

2007); Hershey v. City of Clearwater, 834 F.2d 937, 939-40 (11th Cir. 1987) (citing Kass v. Lewin, 104 So.2d 572, 577 (Fla. 1958) and State ex rel Limpus v. Newell, 85 So.2d 124, 128 (Fla. 1956). Severability is a judicial doctrine recognizing not only the Florida judiciary's right, but its obligation to uphold the constitutionality of legislative enactments where it is possible to strike only the unconstitutional portions. Fla. Dept. of State, Div. of Elections v. Martin, 916 So.2d 763 (Fla. 2005); Lawnwood Med. Center, Inc. v. Seeger, 990 So.2d 503 (Fla. 2008). It should be noted that severability in regard to the provisions of Aaron's Claims Bill is also favored in this case, because the Claims Bill did not provide that if one provision was found invalid, the entire Bill was invalid.

Unless it is proven that the legislature would not have enacted the statutory provisions within its power, independent of those that were not, the invalid part of the statute may be dropped if what is left is fully operative as a law. Frazier ex rel Frazier v. Winn, 535 F.3d at 1283, quoting from New York v. United States, 505 U.S. 144, 112 S.Ct. 2408, 2434 (1992). In Ray v. Mortham, 742 So.2d 1276 (Fla. 1999) this Court held that a party challenging "severability", i.e., claiming that an invalid provision of a statute is not severable from the statute's valid provisions, and that the entire statute must fall, has the burden of proving that fact (Id. at 1281-1283), and that proof cannot be based "on nothing more than conjecture and speculation" (Id. at 1283).

In this case, the Attorney General did not meet its burden of proving that the legislature would not have passed the Claims Bill without the $100,000 fee limitation. **Rather the Attorney General acknowledged he did not know why the legislature limited attorney's fees and costs to $100,000** other than the fact that he argued Aaron's attorneys had agreed to the limitation, which argument the Guardianship Judge rejected (SR166). Since the Attorney General cannot now claim, except perhaps through conjecture and speculation, that the legislature would not have granted Aaron the $15,000,000 appropriation independent of the invalid $100,000 limitation on attorney's fees and costs, the invalid portion should be severed from the Claims Bill, which should be otherwise upheld.

CONCLUSION

Based upon the foregoing, this Court should answer the certified question in the negative, reverse the Fourth District's and the Guardianship Judge's Order denying Aaron's attorneys' constitutional challenge to the $100,000 limitation on attorney's fees and costs in Aaron's Claims Bill; hold the $100,000 limitation unconstitutional; strike the limitation from the Claims Bill, but otherwise uphold the Claims Bill; enter a Declaratory Judgment to that effect; and remand the case to the Guardianship Judge to award attorneys' fees and

costs to Aaron's attorneys from his appropriated funds pursuant to their 25% contingency fee agreement and §768.28(8) Fla. Stat.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 3rd day of November 2015, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on **all counsel of record or pro se parties identified on the attached Service List in** the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

Christian D. Searcy, Esquire
cds@searcylaw.com
Jack P. Hill, Esquire
jph@searcylaw.com
Primary E-Mail:
eservice@searcylaw.com
Secondary Email:
SearcyTeam@searcylaw.com
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Fl. 33409
Phone: (561) 686-6300

and

George A. Vaka, Esquire
Attorney E-Mail: gvaka@vakalaw.com
VAKA LAW GROUP, P.L.
777 So. Harbour Island Blvd., Ste. 300
Tampa, Fl. 33602
Phone: (813) 549-1799

and

Edna L. Caruso
Attorney E-Mail: elcappeals@aol.com
EDNA L. CARUSO P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, Fl. 33409
Phone:(561) 371-1431

By: Edna L. Caruso
EDNA L. CARUSO
Florida Bar No. 126509

EMAIL SERVICE LIST

Edward Downey, Esquire
attorneys@downeypa.com
Downey & Downey, P.A.
3501 PGA Boulevard, Suite 201
Palm Beach Gardens, FL 33410
Phone: (561)691-2043
Fax: (561)691-8078
Guardian Ad Litem

Allen Winsor, Esquire
allen.winsor@myfloridalegal.com
rachel.nordby@myfloridalegal.com
State of Florida
Office of the Attorney General
The Capitol, PL-01
Tallahassee, FL 32399-1050
Phone: (850)414-3681
Fax: (850)410-2672
Attorneys for Appellee

Amy Fanzlaw, Esquire
Osborne & Osborne
798 S. Federal Highway
P. O. Drawer 40
Boca Raton, FL 33429
Office: (561) 395-1000
Fax: (561) 368-6930
ajf@osbornepa. com

Attorneys for Guardianship
Neal A. Roth, Esquire
Grossman Roth, P.A.
2525 Ponce de Leon Boulevard
Suite 1150
Coral Gables, FL 33134
Office: (305)442-8666
Fax: (305)285-1668
nar@grossmanroth.com
mn@grossmanroth.com
Appellant

William S. Frates, II
William S. Frates, II, P.A.
246 Ocean Way
Vero Beach, FL 32963
Phone: (772) 231-5896
Fax: (772) 231-5124
bfrates@mac.com
Appellant

Mitzi Dee Roden
509 College Avenue
Canon City, CO 81212
Lady_mescarlo@msn.com

Mark Edwards
319 Granny She Road
Chloe, WV 25235
alderwoodretreat@yahoo.com

CERTIFICATE OF TYPE SIZE AND FONT

Petitioners hereby certify that the type size and style of the Petitioners' Brief is Time New Roman 14 point font in compliance with Florida Appellate Rule 9.210(2).

EDNA L. CARUSO
Florida Bar No. 126509