Filing # 37362554 E-Filed 02/03/2016 01:51:32 PM

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,

REPLY BRIEF OF PETITIONERS

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and

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RESPONSE TO THE AG'S STATEMENT OF THE CASE AND FACTS

The AG emphasizes that Aaron's claims bill directed the $15,000,000, minus $100,000, to be paid into a "special needs trust." What it really said was that the $15,000,000 was to be paid to Aaron's Guardianship to be placed in a special needs trust, and that attorney's fees and costs could not exceed $100,000. The AG's statement acknowledges, however, that the appropriate amount of attorney's fees are to be paid before the Guardianship deposits the $15,000,000 into the trust. No one has ever objected to the funds deposit into a special needs trust, minus the 25% attorney's fees. In fact, Aaron's mother was the one who filed the motion to approve such trust as a depository of the net proceeds of Aaron's claims bill, minus attorney's fees, costs and liens (R211-214).

The AG states that the Searcy law firm "kept the entirety" of the $200,000 paid by the Health System, attempting to paint a picture of greedy lawyers pitted against an injured child. In fact, the Searcy law firm had over $500,000 in costs, which Aaron and his parents agreed should be paid down by the $200,000, as provided by their contingency fee contract. Moreover, the Guardianship Judge found Aaron's attorneys to be anything but greedy.

The AG tells the Court that Aaron's parents filed a motion seeking a pro rata (7.6%) share of Aaron's claims bill proceeds, based on judgments they obtained against the Health System that were ignored in the claims bill. It states this placed

Aaron's mother in a conflict of interest because she had been appointed guardian of his property. The AG fails to mention that Aaron's mother was the very person who filed the motion to appoint a Guardian Ad Litem for Aaron. (R234-35).

Contrary to the AG's argument, Aaron's attorneys are not seeking to rewrite Aaron's claims bill, only sever the unconstitutional $100,000 fee/cost limitation. Aaron's attorneys have a contingency fee contract with Aaron and his parents, as guardians, for 25% of his recovery, as allowed by §768.28(8). Aaron's attorneys' did not seek an award of fees and costs from the legislature, and it did not award them any fees and costs. What it did was limit recovery of attorney's fees and costs under their pre-existing contracts to $100,000. This limitation imposed a retroactive impairment of their pre-existing fee contracts which was unconstitutional.

The AG claims that §768.28 Fla. Stat. did not render Gamble v. Wells, 450 So.2d 850 (Fla. 1984) inapplicable because it only provided a judicial remedy without restricting the legislature's discretion over claims bills, which it argues is solely a legislative remedy. However, while §768.28(5) provided a judicial remedy up to a statutory limit, it also provided a statutory legislative remedy, i.e., that a judgment exceeding that limit may be paid down "in whole or in part" by the legislature. Thus, while §768.28(5) authorizes the legislature to deny a claims bill, or pay down an excess judgment in whole or in part, it provides no authorization to

limit attorney's fees.

Under rules of statutory construction, where a statute expressly describes a particular situation where something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded. Ideal Farms Drainage Dist., 19 So.2d 234, 239 (Fla 1944). A reading of §768.28(5) supports the conclusion that had the legislature intended that it have authority over attorney's fees, in addition to being able to deny, or pay down in whole or in part an excess judgment, the legislature would have included such provision. Instead, the statute provides that attorney's fees pertaining to judgments obtained under §768.28(5) are controlled by the 25% fee provision in §768.28(8).

The AG's additional arguments under this section will be addressed, infra, to avoid repetition.

1) CLAIMS BILLS FILED UNDER §768.28 ARE NOT WITHIN THE LEGISLATURE'S SO-CALLED "SOVEREIGN POWER"

The AG's argument that Art. X, §13, Fla. Const. gave the legislature authority over all claims bills, even those filed to pay down a judgment under §768.28, has no merit for two reasons. First, Art. X, §13, provides: "Provision may be made by general law for bringing suit against the State as to all liabilities." In other words, the legislature can waive sovereign immunity by enacting a general statute so providing, which is exactly what §768.28 did. Thereafter, the legislature's only

authority over claims bills that seek to pay down a judgment (as here) is specifically delineated in §768.28, which gave it no right to limit attorney's fees.

Second, after §768.28 was enacted, there were two types of bills commonly referred to as "claims bills." The first type is used to collect the difference between the statutory limits allowed, and the excess amount of a claimant's judgment against a state agency, under §768.28(5). The second type of bill presents an equitable claim filed without an underlying judgment. See Senate Rule 4.81(1), (A42), which discusses the two different types of claims bill, and Tort Suits Against Governmental Entities in Fla., 44 Fla L. Rev. 1 §V(B)(2)(a) (Jan. 1992).

This was made clear in Gerard v. Dep't. of Transp., 472 So.2d 1170 (Fla 1985). The First District had held that since §768.28(5) required a judgment as a predicate for filing a legislative claims bill, there could be no "**independent action**" seeking compensation from the legislature without a judgment. This Court disagreed in part. The Court agreed that §768.28(5) required an excess judgment in order for a claim to be filed with the legislature to pay down the judgment. Gerard, (Id. at 1173). However, it disagreed that a judgment was a prerequisite to filing a claim with the legislature otherwise, because "claimants remain free to seek legislative relief bills, as they did during days of complete sovereign immunity." (Id. at 1172). Thus, under Gerard, while the legislature has complete authority over legislative relief bills that are not based on judgments (as in Gamble), its only authority over claims bills based

on judgments is set forth in §768.28, which gives it no authority over attorney's fees and specifically provides that attorneys may charge a 25% attorney's fee.

That 25% fee limitation, provided for in §768.28(8), applies to all claims bills under §768.28(5) that pay down an excess judgment. A Legislative Staff Analysis may be considered in confirming this interpretation. GTC, Inc. v. Edgar, 1967 So.2d 781, 789 (Fla. 2007). As stated in Senate Staff Analysis, Senate Bill 18, p. 3 October 30, 1997, "§768.28 F.S., the statutory authority for tort claim bills to satisfy excess judgments against the state, limits attorney's fees to 25% of any judgment or settlement."[1] The Staff Analysis also noted that where a claims bill is not based on a tort judgment against the state, "the limitation on attorney's fees to 25% of any judgment or settlement in §768.28(8) F.S. does not apply." (Id.) This Staff Analysis refutes the AG's claim that it has control over attorney's fees under §768.28.

A) In Granting A Claim Bill Under §768.28, The Legislature Is Bound By A Pre-Existing Fee Contract Providing A 25% Fee

The AG claims that Gamble is "directly controlling," ignoring that §768.28, which applies here, did not apply in Gamble. The AG refuses to acknowledge that Gamble only concerned a "private relief act," which involves a "voluntary

[1] Although Florida appellate courts may consider a Legislative Staff Summary and Analysis in construing a statute, judicial notice is not a prerequisite to that consideration. Ellsworth v. Ins. Co. of North America, 508 So.2d 395 (Fla. 1st DCA 1987)

recognition of the [the Legislature's] moral obligation" to compensate a victim "who ha[s] suffered at the hands of the State but who [i]s legally remediless to seek damages" (Gamble, 450 So. 2d at 853).

In contrast, today Aaron, and other claimants, are not "legally remediless." They have a statutory remedy in §768.28 that provides both a legal remedy up to a maximum monetary limit, and then provides a legislative remedy by which the legislature may pay down an excess judgment in part or in whole, and allows attorneys to charge a 25% attorney's fees of any such judgment. Gamble has no application to claims bill rendered under §768.28.

The AG's brief ignores Ingraham v. Dade County School Bd., 450 So.2d 847 (Fla 1984). Ingraham cannot be ignored because it held that §768.28 "**totally revised** the area of sovereign immunity"; that Subsection (8) (providing 25% in attorney's fees) was "part of this **overall statutory scheme** relating to sovereign immunity created by §768.28"; and that its "25% limitation on attorney's fees relates to ***any* judgment** or settlement and therefore applies to all situations involving waiver of sovereign immunity **regardless of the source of the payment**" (Id. at 849). Thus, when a claims bill is sought to pay down a judgment, as here, the 25% attorney's fee limit in §768.28(8) is controlling, not Gamble.

The AG relies upon language in Gamble and Noel v. Schlesinger, 984 So.2d 1265 (Fla 4th DCA 2008) to argue that a claims bill is separate and independent from

an underlying lawsuit. That language is inapplicable for two reasons. First, §768.28 did not apply in Gamble, and the Noel attorney never argued that the claims bill was contrary to §768.28(8), or that Gamble was superseded by §768.28. He sought to uphold the claims bill by arguing that he was entitled to additional attorney's fees from the parents' recovery, by way of a charging lien.

Second, enactment of §768.28 created a clear link between an underlying lawsuit and a subsequent claims bill, by providing that the legislature may pay down an excess judgment, and allowing attorneys to charge fees up to 25% of the "judgment." §768.28(8)'s allowance of a 25% attorney's fee of "any judgment or settlement," necessarily applies to judgments or settlement paid down by claims bills under §768.28(5), as here. If the legislature had intended for a different fee to apply to judgments obtained under §768.28(5) it would have said so. Courts are obligated to adopt a construction of statutory provisions which harmonizes and reconciles them with other provisions of the same Act. Woodgate Dev. Corp. v. Hamilton Inv. Trust, 351 So. 2d 14, 16 (Fla. 1977). Here, the AG advocates an interpretation not provided for in §768.28, and which the language of the statute refutes.

The AG argues that Aaron's attorneys' attempt to distinguish Gamble based on factual differences (in Gamble's attorney's contract and waiver of his rights) fails, because this Court did not base its ruling on those facts. Obviously, the Court based

its ruling on the facts of that case, which differ greatly from the facts here,[2] and is one reason there was no impairment of contract in Gamble, but one exists here.

The AG states that the U.S. Supreme Court cases cited by Aaron's attorneys, which held that constitutional rights cannot be ignored even if the benefit granted by the legislature is characterized as a "privilege" or "act of grace," were well established when Gamble was decided. The AG implies that they were cited to the Court and rejected, but the Court's opinion does not so indicate. The AG incorrectly argues that those cases concerned whether the legislature's act was constitutional, whereas the issue here, and in Gamble, was whether a private contract can trump the legislature's exercise of its "sovereign power" over claims bills. First, constitutional issues were raised both in Gamble and are raised here. Second, in Gamble, the attorney had no attorney's fee contract for the legislative relief act he obtained. Third, the legislature has no "sovereign power" over attorney's fees in claims bills

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[2] In footnote 5, the AG states that Aaron's lawyers' brief incorrectly asserted that the Gamble attorney's $10,000 fee was solely for work he performed in getting the private relief act passed, when the Second District's Gamble opinion shows he also rendered services in several courts. The AG ignores that the same opinion shows that the attorney was not successful in those courts, and therefore would not have been entitled to attorney's fees for those services (Juvenile Ct. - motion seeking HRS to produce records was denied; Circuit Ct. - writ of mandamus granted, but reversed on appeal by the Second District; and Certiorari denied by this Court). Gamble v. Wells, 436 So.2d 173,176 (Fla. 2nd DCA 1983).

pursued under §768.28 to pay down an excess judgment. §768.28 delineates the legislative authority under that Act, and gives it no authority over attorney's fees.[3]

B) Enactment Of §768.28 Made Gamble Inapplicable

The AG reiterates that §768.28(5) did not limit the legislature's sovereign power over claims bills. Aaron's attorneys rely upon their arguments at pages 3-4, supra. The AG incorrectly contends that the crux of Aaron's attorneys' argument is

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[3] The AG's footnote 9 states that Aaron's attorneys' brief makes an erroneous statement that Aaron's Guardian Ad Litem waived application of Aaron's claims bill's $100,000 fee limitation. There are three troublesome things about that statement. First, it cites for support an October 19, 2013 "Report of Guardian Ad Litem," which **is not in the record-on-appeal.** The Report was entered a month after entry of the Order appealed. Poteat v. Guardianship of Poteat, 771 So.2d 569 (Fla. 4th DCA 2000) held "That an appellate court may not consider matters outside the record is so elemental there is no excuse for an attorney to attempt to bring such matters before the court". (Id. at 753). Poteat also held that a record-on-appeal can only be supplemented by an item that was considered by the trial court in making its decision, but omitted from the record-on-appeal. (Id.) Footnote 9 also references the content of yet another October, 2013 Order, which is not in the appellate record.

The second reason footnote 9 is troublesome is because the Guardian Ad Litem's Report dealt solely with his opposition to the parent's claims, not Aaron's attorneys' claims for fees and costs, which he supported and which had already been ruled upon. Third, the AG knows that Aaron's Guardian Ad Litem filed a November 13, 2015 Amicus Curiae brief with this Court, which stated that Aaron disagreed with the claims bill's attempt to limit payment of Petitioners' contract fees and costs.

Finally, the undersigned's statement was not erroneous. At the hearing before the Guardianship Judge, Attorney Searcy stated that Aaron, his parents, and his court appointed guardian all wanted the law firm's fees and costs paid (SR 140). The AG did not disagree or object to that statement. Accordingly when the Guardianship Judge's order referred to the "Guardian on behalf of Aaron" waiving the fee limitation (A35), the undersigned understood that to refer to the Guardian Ad Litem, in addition to Aaron's mother who was guardian of his property.

that the legislature must include a 25% attorney's fee in every claims bill that seeks recovery over the statutory caps. Not so. Aaron's attorney's argument is that the legislature has no authority over attorney's fees whatsoever under §768.28.

The AG cites Dep't. of Envtl. Prot. v. Garcia, 99 So.3d 539 (Fla. 3d DCA 2011) for the proposition that the decision whether to deny a claims bill or pay any or all of an excess judgment is entirely a legislative function completely independent of judicial invention. Aaron's attorneys agree, because that is exactly what §768.28(5) provides. However, the legislature has no discretion over attorney's fees, because §768.28(8) controls on that issue. The AG also cites Dickinson v. Bradley, 298 So.2d 352, 354 (Fla. 1974) for the proposition that "an action at law is not a legislative claims bill." However, the cause of action and damages in that case arose in the 1960's, prior to the enactment of §768.28, thus Gamble's rationale applied.

The AG argues that the language of §768.28(8) does not establish a mandatory minimum of 25% in attorney's fees, relying upon nothing more than the Fourth District's incorrect interpretation of that statutory provision. Contrary to the AG's contention, Aaron's attorneys' are not arguing that the Federal Tort Claims Act applies here. Rather their argument is that the federal courts' interpretation of identical language in that Act shows how the language in §768.28(8) should be interpreted. This is especially true since legislative history shows §768.28 was

"modeled after" the Federal Tort Claims Act. Senate Bill Analysis and Fiscal Impact Statement, Senate Bill 2060, p.3, March 23, 2010.

The cases the AG cites for the proposition that a legislature can deviate upward or downward in future claims bills from §768.28(8)'s 25% attorney's fee provision do not apply. They hold that a legislature cannot place words in a statute that precludes a future legislature from enacting a statute that repeals, changes, or creates exceptions to the prior statute. §768.28(8) contains no such words. The AG also argues that a specific statute covering a subject matter controls over a general statute covering the same subject matter, which means the $100,000 fee limitation controls over the 25% fee provision in §768.28(8). The AG misses the point. An unconstitutional provision in a statute, even if more specific, does not control.

C) Compliance with Senate Rule 4.81(6) Was Necessarily Required Since Aaron Was Seeking Relief Under §768.28

The AG claims that Senate Rule 4.81(6) did not require Aaron to obtain an underlying judgment and have it upheld on appeal. First, it argues that the Senate can waive that requirement by a two-thirds vote, but points to no case where it has done so. Nor has the AG shown that the legislature would have done so in Aaron's case. Second, the AG states that the legislature can pass a claims bill without an underlying judgment citing Gerard, supra. What Gerard held (discussed, supra, at page 4) is that even after passage of §768.28, a claimant who has no judgment, can

still seek equitable relief by filing a "legislative relief bill," as was done before §768.28 was enacted (as in Gamble). However, as Gerard held, §768.28(5) requires a claimant to first obtain a judgment in order to seek a claims bill thereunder, as Aaron did. Senate Rule 4.81(6), actually recognizes and affirms that requirement. It required Aaron to not only obtain a judgment but also have the judgment affirmed on appeal, all of which took 10 years, as a prerequisite to filing a claims bill, yet the legislature limited fees and costs to $100,000.[4]

D) The $100,000 Fee Limitation Is Unconstitutional

The AG argues that if the legislature's decision to not grant the amount of money sought by an injured claimant through a claims bill constitutes a constitutional violation, sovereign immunity will all but disappear. The AG obviously does not understand Aaron's attorneys' argument. Their contention is that under §768.28(5) the legislature can still decide whether to deny a claims bill or not, and whether to pay down an excess judgment in whole or in part, without there being a constitutional violation. What the legislature cannot do is ignore §768.28(8), which provides for a 25% attorney's fee.

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[4] In Makemson v. Martin Cty., 491 So.2d 1109 (Fla. 1986) this Court emphasized that attorneys' legal services should not be compensated "in an amount which is confiscatory of his or her time, energy and talents." The present case is a prime example of a confiscatory act by the legislature in a claims bill.

1) The Fee Limitation Impairs Contract Rights

The AG does not attempt to counter any of the cases cited in Aaron's attorneys' brief at pages 31-36, obviously because it cannot do so. Nor does it discuss the three pronged test to determine whether there was an impairment of contract. The only conclusion is that the test result was unfavorable to the AG's position.

The AG's only arguments are that the terms of Aaron's attorneys' contracts do not conflict with the $100,000 fee limitation. Its arguments are factual as to what was intended by different provisions in the attorneys' fee contracts, and were decided against the AG by the Guardianship Judge. First, the AG states that the Searcy Law Firm's fee contract was for representation of Aaron's parents, not Aaron. It fails to mention that the law firm and the clients filed affidavits that cleared up any confusion as to whether its fee contract was also for representation of Aaron (R292-317). The Judge made a factual finding that the law firm's contract "represented Aaron...through his parents as natural guardians...**and** the parents individually..." (R592; A33).

Second, the AG quotes a provision in the Searcy Law Firm's contract that if the Health System was declared a state agency, the attorney's fee would be "the amount provided by law," which meant the 25% provided by §768.28(8). The AG claims this language meant whatever fee amount was provided by Aaron's claims bill, and thus there was no impairment of contract. This is yet another factual issue

the AG raised below and lost. Aaron's attorneys filed affidavits that they never agreed to accept less than 25% in attorney's fees (R273-290). The Judge's Order, which referred to the five law firms collectively as "Petitioner" (R591; A32), found that "there was no understanding or agreement ...that Petitioner would accept or would be bound by any limitation on attorney's fees less than 25%" (R592;A33). The AG also argues that when the Searcy Law Firm's contract was signed in 1999, Gamble had been on the books for almost 15 years, ignoring the fact that in 1999 §768.28 was applicable.

The AG's argument in regard to the contract of William Frates, the referring attorney, fails for all the same reasons. The AG cites language in the appellate attorneys' contract that they would be awarded a 5% appellate fee "if approved by the legislature." That language was included because appellate counsel did not know if the 25% limitation on fees contained in §768.28(8) included appellate fees or not.

AG's arguments about language in the individual law firms' fee contracts ignore the fact that each of the five law firms signed an agreement that they would collectively be entitled to only 25% for fees and costs, as provided by §768.28(8).

Finally, the AG argues that under any contingency fee contract, an attorney runs the risk of recovering no fee or costs if the case is lost. The difference is that this case was won, and the attorneys should have been able to rely upon their fee contracts authorized by §768.28(8).

2) The $100,000 Fee Limitation Took Property Without Just Compensation

The AG's only argument is that Aaron's attorneys had no property interest in his claims bill funds based upon their fee contracts, because under Gamble claims bills are "acts of legislative grace." The AG ignores the fact that §768.28(8) superseded Gamble and gave attorneys a property interest in a judgment paid down by a claims bill. The AG also ignores cited cases holding that contracts, and the rights thereunder, are "property" that cannot be taken without just compensation.

3) The $100,000 Fee Limitation Unconstitutionally Violates §768.28(8)

The AG argues that a claims bill is a specific appropriation bill, whereas the cases cited by Aaron's attorneys' concerned general appropriations made under Art. III §12, Fla. Const. In fact, they concerned specific appropriations within general appropriation bills. The AG admits that a general appropriation bill cannot be contrary to existing law, but claims a specific appropriation bill can be, citing no authority. It ignores the fact that Aaron's attorneys' statutory right to attorney's fees under §768.28 is a substantive right, which the legislature had no authority to impair.

4) The Fourth's District's Affirmance of the Unconstitutional $100,000 Fee Limitation Violated its Duty Under the Separation of Powers Doctrine

The AG argues that the contention that the Fourth District's failure to fulfill its **duty** to declare the fee limitation invalid violated the separation of powers doctrine is not a constitutional argument, merely an argument that the Fourth District

erred in its ruling (as raised under Point I). However, if a Court has a **duty** under the separation of powers doctrine to declare a legislative act unconstitutional, and fails to do so, its failure constitutes a violation of that doctrine.

5) Allowing the Legislature to Retro-Actively Limit Fees in Claims Bills Will Negatively Impact Poor and Low Income Claimants' Rights

Aaron's attorneys have standing to raise this issue because this case meets the exceptions to the requirement for standing: 1) a substantial relationship between Aaron's attorneys and existing or potential third parties exist; 2) it is impossible for such future clients or claimants to assert their own constitutional rights, and; 3) the enforcement of the restriction on fees is likely to result indirectly in the violation of the rights of future clients or claimants. Higdon V. Metropolitan Dade Cty., 446 So. 2d 203, 207 (Fla. 3rd DCA 1984). The law firms involved in this case represent injured plaintiffs who normally cannot afford to pay for representation. If these law firms do not have standing to argue on behalf of potential claimants, their right to recovery in sovereign immunity cases will go unrepresented.

The AG argues that future claimants will not be affected because future legislatures are not bound by the $100,000 fee limitation in Aaron's claims bill, citing cases already distinguished at page 11, supra. Future claimants will be affected because if attorneys cannot rely upon the 25% attorney's fee authorized by §768.28(8) even if they win, they will be financially unable to represent poor

claimants injured by the State.

Kluger v. White, 281 So.2d 1 (Fla. 1973) is not applicable because Aaron's attorneys' argument is that allowing the legislature to limit fees in claims bills, contrary to pre-existing contingency fee contracts, will dramatically and negatively impact (not directly deny) low income and poor people's access to courts and their right to seek redress of grievances against the State.

The AG argues that no "chilling effect" will result from allowing the legislature to limit attorney's fees in sovereign immunity cases, because Gamble (decided 30 years ago) did not deter Aaron's attorneys from representing him. The AG refuses to acknowledge that §768.28(8), not Gamble, applied when Aaron's attorneys undertook representation of Aaron; and that they relied upon the 25% attorney's fee provided by their fee contracts (a fact decided by the Guardianship Judge) and authorized by §768.28(8).

Finally, the AG argues that the legislature's inability to regulate fees in claim bills pursued under §768.28 will have a greater negative effect on injured claimants, because the "chilling effect" will be on the legislature not to pass future claims bills. If that is true simply because the legislature cannot control fees under §768.28, then it is a sad day indeed. The legislature should be satisfied with doing what §768.28(5) allows it to do, i.e., deny, or pay in whole or in part, an underlying judgment, and leave the attorney's fees to §768.28(8).

II. THE FOURTH DISTRICT ERRED IN NOT SEVERING THE INVALID $100,000 ATTORNEY'S FEE LIMITATION, AND ENFORCING AARON'S CLAIMS BILL OTHERWISE

The AG has the burden of proving that the $100,000 fee limitation is not severable because the legislature would not have enacted Aaron's claim bill without it. The AG merely argues that since the fee limitation was not part of the original version of the claims bill, but was "added" during the legislative process, it was "integral" to the bill, referring to a video of both the House and Senate sessions pertaining to Aaron's claims bill. (See AG's fn. 17). While the AG did argue and refer the Guardianship Judge to the video of the Senate session (SR 259), it never argued nor mentioned the House session or a video thereof.

Accordingly, the video of the House session is new evidence not presented to the Guardianship Judge and should not be considered.[5] Since an appeal is not an evidentiary proceeding, but is a proceeding to review the judgment or order of the lower tribunal based upon the record made before the lower tribunal, the judicial notice statutes under Florida's Evidence Code do not apply to appellate proceedings.

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[5] Nor should the Court consider the Amicus Curiae Brief of the House and Senate, and its Appendix, to the extent that they rely upon claims bills of other claimants, and Special Masters Reports rendered in those other claims bills and arguments based thereon, which were not presented to the Guardianship Judge. This is new evidence. Caselaw holds that an appellate court may not take judicial notice of the record of a separate proceeding. Atlas Land Corp. v. Norman, 156 So. 885, 886 (Fla. 1984).

Hillsborough, etc. v. Pub. Emp. Rel. Com'n., 424 So.2d 132 (Fla. 1st DCA 1982). Thus, an appellate court will not consider evidence that was not presented to the lower tribunal since the function of the appellate court is to determine whether the lower tribunal committed error based on issues and evidence before it. (Id.)

The Senate video, the AG's only evidence, does not support the AG's claims. It reveals that prior to the Senate's March 7, 2012, consideration of 14 claims bills, including Aaron's, Senator Thrasher filed an amendment to each bill, which provided that attorney's fees could not exceed the following amount: "25% of the total amount awarded under this act."

However, when Aaron's claims bill was called, Senator Thrasher incorrectly told the Senate that "the attorneys and the claimants and the lobbyists" in Aaron's case had agreed to accept $100,000 as fees and costs, and for that reason he was withdrawing the above amendment as to Aaron's claims bill.[6] See video at http://thefloridachannel.org/video/3712-senate-session (the discussion of Aaron's claims bill begins at about 2:44 p.m., and Thrasher's statement at about 3:10 p.m.). The Senate thereafter passed Aaron's claims bill with a $100,000 fee limitation.

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[6] Thrasher's statement was incorrect as evidenced by the fact that Aaron's original claims bill provided that his attorneys and lobbyists agreed to a 25% limitation in fees, costs, and other expenses from the amount granted Aaron. Moreover, as previously stated, all of Aaron's attorneys and lobbyists filed affidavits with the Guardianship Judge stating that they never agreed to less than 25% in attorneys' fees (R273-290) and the Judge so ruled (R592).

The Senate video refutes the AG's claim that the fee limitation was "integral" to the passage of Aaron's claims bill. Rather, it shows that, but for Thrasher's incorrect statement, the Senate would have passed Aaron's claims bill that day with the above quoted amendment capping fees at 25%. This is clear because, after passing Aaron's claims bill with the $100,000 fee limitation, the Senate passed each of the other 13 claims bills that day with the amendment.

Add to this the fact that the AG's counsel acknowledged to the Guardianship Judge that although he was arguing that Aaron's attorneys agreed to the $100,000 fee limitation, he did not know if that was true (SR 130-132); and that he did not know why the legislature limited attorney's fees to $100,000, and **could only speculate** in that regard (SR 166). The bottom line is that the Senate video fails to prove that the legislature would not have enacted Aaron's claims bill without the $100,000 fee limitation.

Nor did the AG prove that the $100,000 fee limitation cannot be severed without defeating the manifest purpose of Aaron's claims bill. Its manifest purpose was to comply with §768.28(5), by deciding what amount, if any, the Health System should compensate Aaron for his injuries in order to pay down the excess portion of his judgment. The claims bill's purpose under §768.28 was not to determine attorney's fees, which was controlled by §768.28(8).

The AG's second argument is that the $100,000 fee limitation in Aaron's claims bill served a dual purpose, limiting the amount of attorney's fees and authorizing their payment from the $15,000,000. It claims, if the fee limitation is severed, there is no "authorizing provision" which means Aaron's attorneys get zero attorney's fees. Aaron's attorneys need no "authorizing provision" in his claims bill, because they get paid by the Guardianship from Aaron's recovery, pursuant to their 25% fee contract authorized by §768.28(8), and not by the legislature via Aaron's claims bill.

Finally, Florida case law supports severance of an invalid attorneys' fee provision. Fonte v. AT&T Wireless Svcs., Inc., 903 S0.2d 1019 (Fla. 4th DCA 2005) held that a provision in a contract prohibiting an award of attorney's fees, which violated Florida Statutes, could be severed from the remainder of the contract, which was enforced. The Court determined that the attorney's fee provision did not go to the essence of the contract. The same rationale applies here.

CONCLUSION

The Court should answer the certified question in the negative, sever the $100,000 fee/cost limitation from Aaron's claims bill and uphold the claims bill otherwise.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was furnished by electronic service through the Florida Courts E-Filing Portal on February 3, 2016.

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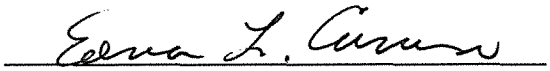

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